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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CITY OF HOBOKEN,

Plaintiff,

-against-

EXXON MOBIL CORP., EXXONMOBIL OIL CORP., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, BP P.L.C., BP AMERICA INC., CHEVRON CORP., CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, AMERICAN PETROLEUM INSTITUTE,

Defendants.

Civil Action No. 2:20-cv-14243

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO STAY EXECUTION OF REMAND ORDER PENDING APPEAL

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PRELIMINARY STATEMENT

Defendants fall woefully short of meeting their heavy burden to justify the rare and extraordinary remedy of a stay of the Remand Order pending appeal.

Defendants "merely recite the same arguments outlined in their Notice of Removal and opposition to the City's Remand motion" in their motion to stay, *Mayor & City Council of Baltimore v. BP P.L.C.*, No. 18 Civ. 2537, 2019 WL 3464667, at *4 (D. Md. July 31, 2019) ("*Baltimore Stay Denial*"), arguments they have now lost in *ten different cases*. They have not prevailed once. A total of *fourteen* appellate and district court decisions have rejected Defendants' removal arguments. In these cases, Defendants have lost attempts at removal on federal common law, *Grable*, federal officer, Outer Continental Shelf Lands Act ("OCSLA"), and federal enclave grounds at least *eight times each*.

Defendants' motion to stay points to no caselaw raising any possibility that the Third Circuit will reach a different result. In fact, *Arlington* and *City of New York*, two of the cases Defendants rely on most heavily in their motion, *cite approvingly* to the ten cases uniformly granting plaintiffs' motions to remand. Defendants' stay motion is just an attempt to rehash the same arguments rejected by all ten courts to consider them. That does not cut it. The harmonious chorus of well-reasoned decisions rejecting the identical arguments Defendants raise here, together with the absence of any authority supporting a contrary result, foreclose a

finding that Defendants have a *strong* likelihood of success on the merits, one of two elements Defendants *must* establish to obtain a stay pending appeal.

Defendants get no closer to establishing that they will suffer irreparable injury absent a stay. The entirely speculative injuries they raise boil down to the inconvenience of litigating in state court while pursuing their appeal to the Third Circuit. Inconvenience is not irreparable harm. Defendants identify no actual or imminent injury that is more likely than not to occur, nor any outcome which could not be remedied in the absence of a stay. That is what the Third Circuit requires to establish irreparable harm, and Defendants fall well short. They thus fail to establish both critical elements they need to obtain a stay pending appeal.

Defendants' invocations of "prudence" and "judicial economy," Defs' Br., Dkt. 130-1, at 2, 7, 30, give up the game. Neither prudence nor judicial economy are factors in the analysis of a motion for a stay pending appeal. But even if they were, it is Defendants who are throwing them to the wind. Unperturbed by their 0 for 10 record on identical motions to remand and bolstered by an unlimited litigation budget, they march onward in an effort to delay and drive up Plaintiff's costs. Litigation of the remand motion has already delayed proceedings in state court by a year. But *time is of the essence* for the City of Hoboken. This summer, Tropical Storms Ida and Henri, two record-shattering rainfall events exacerbated by climate change, pummeled the City with over 13 inches of rain in the span of

less than two weeks. The Court should not countenance Defendants' further delay tactics when the climate crisis has already arrived in Hoboken. The public interest—the final factor the Court must weigh in the stay analysis—plainly favors Plaintiff.

PROCEDURAL BACKGROUND

Defendants' 0 for 10 record in removing analogous climate change cases to federal court on the identical grounds they assert here is summarized in the table below:

Decision	Removal Ground(s) Rejected
Rhode Island v. Shell Oil Prod. Co., 979 F.3d 50 (1st Cir. 2020) ("*Rhode Island II*"), *cert. granted and vacated and remanded on other grounds*, 2021 WL 2044535 (Mem) (U.S. May 24, 2021)[1]	Federal officer
Bd. of Cnty. Comm'rs of Boulder Cnty. Suncor Energy (U.S.A.) Inc., 965 F.3d 792 (10th Cir. 2020) ("*Boulder Cnty. II*"), *cert. granted and vacated and remanded on other grounds*, 2021 WL 2021 WL 2044533 (Mem) (U.S. May 24, 2021)	Federal officer
Cnty. of San Mateo v. Chevron Corp., 960 F.3d 586 (9th Cir. 2020) ("*San Mateo II*"), *cert. granted and vacated and remanded on other grounds*, 2021 WL 2044535 (Mem) (U.S. May 24, 2021)	Federal officer
Mayor & City Council of Baltimore v. BP P.L.C., 952 F.3d 452 (4th Cir. 2020) ("*Baltimore II*"), *vacated and remand on other grounds*, 141 S. Ct. 1532 (2021)	Federal officer
City of Oakland v. BP PLC, 969 F.3d 895, 906-08 (9th Cir. 2020)	Federal common law; *Grable*

[1] Following *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021) ("*Baltimore III*"), holding that all of Defendants' asserted removal grounds are reviewable on appeal, the Supreme Court vacated and remanded the Circuit and District Court decisions in the *Rhode Island*, *Boulder*, *San Mateo*, and *Baltimore* cases for the appeals courts to review Defendants' non-federal officer removal grounds for removal. *See, e.g.*, *Shell Oil Prods. Co. v. Rhode Island*, No. 20-900, 2021 WL 2044535 (U.S. May 24, 2021). Neither *Baltimore III* nor this vacatur, both purely procedural, alter the appellate courts' uniform rejection of federal officer removal or the district courts' uniform rejection of all of Defendants' removal grounds.

City of Hoboken v. Exxon Mobil Corp., No. 20 Civ. 14243, 2021 WL 4077541 (D.N.J. Sept. 8, 2021), *appeal filed* No. 21-2728 (3d Cir. Sept. 14, 2021)	Federal common law; *Grable*; federal officer; OCSLA; federal enclave; CAFA
Connecticut v. Exxon Mobil Corp., No. 20 Civ. 1555, 2021 WL 2389739 (D. Conn. June 2, 2021), *appeal filed* No. 21-1446 (2d Cir. Sept. 22, 2021)	Federal common law; *Grable*; federal officer; OCSLA; federal enclave
Minnesota v. Am. Petroleum Institute, No. 20 Civ. 1636, 2021 WL 1215656 (D. Minn. March 31, 2021), *appeal filed* No. 21-1752 (8th Cir. Apr. 5, 2021)	Federal common law; *Grable*; federal officer; OCSLA; federal enclave; CAFA
Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31 (D. Mass. 2020) ("*Massachusetts*")	Federal common law; *Grable*; federal officer; CAFA
City and Cty. Of Honolulu v. Sunoco LP, et al., No. 20 Civ. 163, 2021 WL 531237 (D. Haw. Feb. 12, 2021) ("*Honolulu*"), *appeal filed* No. 21-15318 (9th Cir. Feb. 23, 2021)	federal officer; OCSLA; federal enclave
Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142 (D.R.I. 2019) ("*Rhode Island I*"), *cert. granted and vacated and remanded on other grounds*, 2021 WL 2044535 (Mem) (U.S. May 24, 2021)	Federal common law; *Grable*; federal officer; OCSLA; federal enclave
Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947 (D. Colo. 2019) ("*Boulder Cnty. I*"), *cert. granted and vacated and remanded on other grounds*, 2021 WL 2044535 (Mem) (U.S. May 24, 2021)	Federal common law; *Grable*; federal officer; OCSLA; federal enclave
Mayor & City Council of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019), *as amended* (June 20, 2019) ("*Baltimore I*"), *cert. granted and vacated and remanded on other grounds*, 2021 WL 2044535 (Mem) (U.S. May 24, 2021)	Federal common law; *Grable*; federal officer; OCSLA; federal enclave
Cnty. of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934 (N.D. Cal. 2018) ("*San Mateo I*"), *cert. granted and vacated and remanded on other grounds*, 2021 WL 2044535 (Mem) (U.S. May 24, 2021)	Federal common law; *Grable*; federal officer; OCSLA; federal enclave

On September 2, 2020, Plaintiff filed this action for public and private nuisance, trespass, negligence, and violation of the New Jersey Consumer Fraud Act in the New Jersey Superior Court, Hudson County. *See* Compl., Dkt. 1-2. On October 9, 2020, Defendants removed this action to federal court in a 163-page Notice of Removal. *See* Dkt. 1. Plaintiff filed a motion to remand December 11, 2020, Dkt. 94, which was fully briefed on February 26, 2021, Dkt. 101. This Court granted Plaintiff's motion to remand on September 8, 2021, rejecting Defendants' federal common law, *Grable*, federal officer, OCSLA, federal enclave, and Class Action Fairness Act removal arguments. *See* Remand Order, Dkt. 121. On

September 9, 2021, the Court granted Defendants' motion for a temporary stay of execution of the Remand Order pending resolution of Defendants' motion to stay the Remand Order pending appeal to the Third Circuit, Dkt. 127, which Defendants filed on September 22, 2021, Dkt. 130.

ARGUMENT

I. LEGAL STANDARD

"A stay pending appeal is an 'extraordinary remedy' that is rarely granted." *Garcia v. TEMPOE, LLC*, No. 17 Civ. 2106, 2018 WL 443456, at *1 (D.N.J. Jan. 16, 2018) (cleaned up) (quoting *Alpha Painting & Constr. Co. v. Del. River Port Auth. of Pa. & N.J.*, No. 16 Civ. 5141, 2016 WL 9281362, at *1-2 (D.N.J. Nov. 2, 2016)). Courts assess four factors—the same for a motion for a preliminary injunction—when deciding whether to grant this extraordinary remedy:

> (1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v Holder, 556 U.S. 418, 426 (2009) (cleaned up). Defendants bear the "heavy burden . . . of establishing the required factors," one that is " not easily met." *Nat'l Labor Rels. Bd. v. 710 Long Ridge Rd. Op. Co. II, LLC*, No. 14 Civ. 1542, 2014 WL 1155539, at *1 (D.N.J. March 21, 2014) (cleaned up).

The first two factors are "the most critical." *Nken*, 556 U.S. at 434. "[B]oth are necessary" for Defendants to prevail. *In re Revel AC, Inc.*, 802 F.3d 558, 568, 571 (3d Cir. 2015). "[I]f the movant does not make the requisite showing on either of these first two factors, the inquiry into the balance of the harms and the public interest is unnecessary, and the stay should be denied without further analysis." *Id.* at 571 (cleaned up). Only if both of the first two factors are satisfied, the Third Circuit turns to a "sliding scale" approach under which "the necessary level or degree of possibility of success will vary according to the court's assessment of the other stay factors." *Id.* at 569 (cleaned up). That is, a weaker showing on one factor will demand a stronger showing on the others. *Id.*

II. DEFENDANTS ARE UNLIKELY TO SUCCEED ON APPEAL

Defendants must make a "strong" showing that their appeal is likely to succeed on the merits. *Nken*, 556 U.S. at 434. "[I]t is not enough that the chance of success be 'better than negligible.'" *Id.* Rather, a "strong showing" exists where the moving party demonstrates "a reasonable chance, or probability, of winning." *Revel*, 802 F.3d at 568.

Defendants have litigated and lost the same removal grounds they raise here in *ten different cases*. They have not prevailed once, giving them a "batting average of .000" in opposing remand of materially identical lawsuits. *City & Cnty.*

of Honolulu v. Sunoco LP, No. 20 Civ. 163, 2021 WL 839439, at *2 n.3 (D. Haw. Mar. 5, 2021) ("*Honolulu Stay Denial I*"). It is well-established that a party makes a *very weak* showing of likelihood of success where it has argued and lost the same issue several times in other forums—whether or not that issue has been reviewed by the appeals court. *See* *Coppedge v. Charlton*, No. 19 Civ. 1640, 2019 WL 4857469, at *5 (D. Del. Oct. 2, 2019) (motions that "merely reargue points that have been rejected multiple times in other courts . . . fail[] to demonstrate any likelihood of success"); *Beard v. United States*, 101 Fed. Cl. 100, 104 (Fed. Cl. 2011) ("The court acknowledges that no appellate court has yet examined Section 6331(i) in any detail. The trial courts that have encountered Section 6331(i), however, have uniformly rejected the government's position. Because the government's current motion adds little to arguments invariably found to be unpersuasive by this court and other courts, the government has a *very weak* position, not a strong likelihood of success on appeal." (emphasis added) (cleaned up)); *In re Whitfield*, Misc. No. C-08-21, 2008 WL 694713, at *2 n.6 (S.D. Tex. Mar. 13, 2008) ("Movant has [shown] a *very low* likelihood of success on the merits [where] Movant has raised the same arguments in the numerous actions he

has brought before this and other courts, and Movant's arguments have been consistently rejected . . . ." (emphasis added)).[2]

Defendants cannot hide behind the specter of "questions of first impression" being raised at the Third Circuit to justify their application for a stay, Defs' Br. at 10, when the reason those are questions of first impression is because there is quite literally no support in caselaw for Defendants' theory of removal. Defendants' motion raises "the same arguments considered and rejected by [other courts] based on the same evidence. . . . Merely repeating these rejected arguments does not meet the 'substantial' burden Appellants have to show a likelihood of success on the merits of their appeal." *In re Color Spot Holdings, Inc.*, No. 18 Civ. 1246, 2018 WL 3996938, at *3 (D. Del. Aug. 21, 2018); *accord LeJon-Twin El v. Marino*, No. 16 Civ. 2292, 2017 WL 3400001, at *2 (D.N.J. Aug. 7, 2017) ("Plaintiff's motion does not make any persuasive showing of likelihood of success

[2] *See also, e.g.*, *Manlagit v. Nat'l City Mortgage*, No. 10 Civ. 1225, 2010 WL 2044687, at *3 (E.D. Cal. May 20, 2010) (party failed to show likelihood of success on the merits where its argument "has [] been rejected by many district courts"); *Arthur v. King*, No. 07 Civ. 319, 2007 WL 2381992, at *5 (M.D. Ala. Aug. 17, 2007) ("[Plaintiff] cannot demonstrate a substantial likelihood of success on the merits in his DNA and other testing claim. He has not demonstrated that he has a constitutional right to such testing in the circumstances presented here, and his claim to such testing has been previously considered by the other courts and rejected.").

on the merits; at best it rehashes the arguments already rejected by the Court, for the reasons expressed in prior opinions.").

A. Federal Common Law Removal

Defendants are 0 for 9 on federal common law removal.[3] They continue to argue from the two *Milwaukee* decisions for the proposition that "removal [is] proper because Plaintiff's claims necessarily 'arise under' federal common law." Defs' Br. at 12. But those cases "did not implicate the well-pleaded complaint rule, nor did the Supreme Court address any principals of preemption or jurisdiction," Remand Order, Dkt. 122, at 10. The Third Circuit has also squarely "rejected the very argument Defendants make here" in *Goepel v. Nat'l Postal Mail Handlers Union, a Div. of Liuna*, 36 F.3d 306, 310 (3d Cir. 1994). Remand Order, Dkt. 122, at 12 n.7; *see also Smith v. Northland Grp., Inc.*, No. 13 Civ. 249, 2013 WL 1766775, at *2 (M.D. Pa. Apr. 24, 2013) (confirming that *U.S. Express Lines Ltd. v. Higgins*, 281 F.3d 383, 389 (3d Cir. 2002) only applies to complete preemption and *Grable* removal). Defendants' argument on appeal will thus be

[3] *City of Oakland v. BP PLC*, 969 F.3d 895, 906-08 (9th Cir. 2020); *Hoboken*, 2021 WL 4077541, at *5-6; *Connecticut*, 2021 WL 2389739, at *4-7; *Minnesota*, 2021 WL 1215656 at *4-6; *Massachusetts*, 462 F. Supp. 3d at 41-44; *Rhode Island I*, 393 F. Supp. 3d at 148-50; *Boulder I*, 405 F. Supp. 3d at 956-64; *Baltimore I*, 388 F. Supp. 3d at 551-58; *San Mateo I*, 294 F. Supp. 3d at 937-938.

that *Goepel* and every other appellate court decision on "common law removal" were wrongly decided. Defendants are unlikely to succeed on appeal.

City of New York has no relevance to the motion to remand and does not make Defendants more likely to succeed on the merits. The Second Circuit considered only *ordinary* preemption and did not consider it "under the heightened standard unique to the removability inquiry." *City of New York v. Chevron Corporation* (*New York*), 993 F.3d 81, 94 (2d Cir. 2021). "[T]he Second Circuit expressly noted that because of this procedural difference, its conclusion did not conflict with 'the parade of recent opinions holding that state-law claims for public nuisance brought against fossil fuel producers do not arise under federal law.'" Remand Order at 13 (quoting *City of New York*, 993 F.3d at 94).[4]

The stay granted in *Minnesota v. Am. Petroleum Inst.*, No. 20 Civ. 1636, 2021 WL 3711072 (D. Minn. Aug. 20, 2021) ("*Minnesota Stay Opinion*") does little to help Defendants' argument. The Minnesota district court granted remand on March 31, a day before the Second Circuit decided *City of New York*. Four

[4] Defendants now cite *Jarbough v. Attorney General*, 483 F.3d 184 (3d Cir. 2007), which is even further afield. The Third Circuit there considered a petition for review of a deportation order from the Board of Immigration Appeals and declined jurisdiction because, "[a]side from the constitutional label," the petitioner made "no attempt to tie his claim of factual errors" in his deportation decision to any constitutional rights. *Id.* at 189-90. That case was not even in federal district court, let alone state court, and obviously did not involve any state law causes of action, federal common law, or removal jurisdiction.

months after those decisions, the court in *Minnesota v. Am. Petroleum Inst.* opined that the Second Circuit's opinion—which it had not reviewed in granting remand—"at least slightly increases the likelihood that Defendants will prevail." *Id.* at *2. That, respectfully, is not enough. Defendants must make a "strong" showing that their appeal is likely to succeed on the merits, not just a "chance of success [that is] 'better than negligible,'" *Nken*, 556 U.S. at 434, and *City of New York* does not carry them even over that line.[5]

In any event, unlike the court in *Minnesota v. Am. Petroleum Inst.*, this Court *did* address the import of the Second Circuit's opinion in remanding the case and found it inapposite. Indeed, a court in the District of Connecticut, which is bound by the rulings of the Second Circuit, granted remand in June 2021, finding again that *City of New York* is not relevant to removal jurisdiction. *Connecticut v.*

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[5] The court in *Minnesota v. Am. Petroleum Inst.* also cited the Supreme Court's order in *Baltimore III*, but merely to note that the Eighth Circuit "may consider all [of Defendants'] asserted grounds for removal." *Minnesota Stay Opinion*, 2021 WL 3711072, at *3. The mere assertion of many removal grounds on appeal cannot satisfy Defendants' "heavy burden" to establish a likelihood of success. *710 Long Ridge Rd. Op. Co.*, 2014 WL 1155539, at *1. Indeed, as this Court found, "[b]ecause the Supreme Court only addressed this limited procedural issue, *Baltimore III* does not guide the Court's analysis here." Remand Order at 7. More broadly, Defendants' argument from *Baltimore III* implies that the Courts of Appeals have never reviewed their federal question removal argument, and thus have not spoken to its validity. Not true. The Ninth Circuit in *Oakland* considered and rejected this very argument. *Oakland*, 969 F.3d 895. Defendants moved for certiorari and were unsuccessful. *Chevron Corp. v. City of Oakland, California*, No. 20-1089, 2021 WL 2405350 (U.S. June 14, 2021).

Exxon Mobil Corp., No. 20 Civ. 1555, 2021 WL 2389739, at *7 n.7 (D. Conn. June 2, 2021). The same court subsequently denied defendants' stay motion in part, explaining that it did "not view the defendants[']argument in support [of a stay, based on *City of New York*,] as showing a strong likelihood of success on the merits, or even a likelihood of success with the balance of the equities in the defendants['] favor." *Connecticut v. Exxon Mobil Corp.*, No. 20 Civ. 1555, Dkt. No. 56 (D. Conn. June 11, 2021) ("*Connecticut Stay Denial*").[6]

B. Federal Officer Removal

Defendants are 0 for 9 on federal officer removal.[7] This shutout includes decisions from *four* Federal Circuit Courts of Appeals that rejected the same bases

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[6] The District of Colorado noted that a stay on the grounds that federal common law removal might raise a "serious" issue "deserving of more deliberate investigation"—though still short of a likelihood of success—but did so based on a split of authority that no longer exists since the Ninth Circuit in *Oakland* reversed and remanded the district court in *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018) and its companion case. *See Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc.*, 423 F. Supp. 3d 1066, 1073 (D. Colo. 2019) ("*Boulder Stay Denial*"). Similarly, the one-paragraph stay order in the *San Mateo* case cited by Defendants, Defs' Br. at 8, was issued on April 9, 2018, before any other court had examined Defendants' removal arguments. *See* Order Granting Motions to Stay, *County of San Mateo v. Chevron Corp.*, No. 17 Civ. 4929, Dkt. 240 (Apr. 9, 2018). Its conclusion that there is a "substantial ground for difference of opinion," *id.* at 1, has been conclusively refuted by the ten cases subsequently and uniformly rejecting Defendants' removal arguments.

[7] *Rhode Island II*, 979 F.3d at 59-60; *Boulder II*, 965 F.3d at 819-27; *San Mateo II*, 960 F.3d at 598-603; *Baltimore II*, 952 F.3d at 461-71; *Hoboken*, 2021 WL 4077541, at *9-10; *Connecticut*, 2021 WL 2389739, at *11-12; *Minnesota*, 2021

for federal officer jurisdiction Defendants assert here. Defendants "ignore[] the unbroken line of cases from other courts of appeals that have rejected [their] position," a knockout blow to their likelihood of success on the merits. *Metro Found. Contractors, Inc. v. Arch Ins. Co.*, No. 09 Civ. 6796, 2011 WL 2947003, at *1 (S.D.N.Y. July 18, 2011).

This Court, like every other court to review Defendants' federal officer removal argument, found that Defendants' smattering of contracts with the federal government lacked the necessary "connection or association" to Plaintiff's Complaint because "Plaintiff's claims focus on Defendants' alleged misinformation campaign, not their production of oil and gas." Remand Order at 22. Plaintiff's Complaint bears out the First Circuit's conclusion that Defendants' asserted bases for federal officer removal are just a "mirage" that "only lasts until one remembers what [Plaintiff] is alleging in this lawsuit." *Rhode Island II*, 979 F.3d at 59-60; *see* Compl. ¶¶ 75-193, 209-221, 291, 296, 299-300-302 (chronicling Defendants' half-century of climate deceptions which form the basis of all five of Plaintiff's state law claims).

Defendants provide no authority to distinguish this well-developed body of law. They rely primarily on *County Board of Arlington County, Virginia v.*

WL 1215656, at *8; *Honolulu*, 2021 WL 531237, at *4-7; *Massachusetts*, 462 F. Supp. 3d at 41-44.

Express Scripts Pharmacy, Inc., 996 F.3d 243 (4th Cir. 2021) ("*Arlington*"), a single out-of-Circuit case with wholly different facts. What is most remarkable about Defendants' reliance on *Arlington* is that *Arlington*, decided in the same Circuit as *Baltimore*, not only leaves *Baltimore*'s federal officer removal decision fully intact—it *cites extensively* to *Baltimore*'s analysis as good law. *See id.* at 250-51, 253, 256 (e.g., affirming *Baltimore*'s holding that "selling 'standardized consumer product[s]' to the federal government does not implicate the federal officer removal statute . . . , [e]ven when a contract specifies the details of the sales and authorizes the government to supervise the sale and delivery." (quoting *Baltimore II*, 952 F.3d at 464)).

Defendants are wrong in claiming *Arlington* is instructive on the "for or relating to" prong. *First*, *Arlington*'s recitation of the Removal Clarification Act's familiar standard of "a connection or association between the act in question and the federal office," as opposed to a "causal nexus," *see* Defs' Br. at 17-18, is the exact same standard applied in *all nine cases* that have rejected Defendants' federal officer removal arguments. *Second*, Defendants' argument that *Arlington* is analogous to this case because the *Arlington* complaint was based on the "over-production and over-use of opioids," Defs' Br. at 18, overlooks that, *unlike* this case, misrepresentations and deceptions about opioids played no role in the *Arlington* plaintiffs' claims. *See Arlington*, 996 F.3d at 248 ("Arlington seeks to

impose liability on the [] Defendants because they were keenly aware of the oversupply of prescription opioids . . . but failed to take any meaningful action to stem the flow of opioids into communities." (cleaned up)). Defendants' deceptions about climate change are a fundamental component of Plaintiff's Complaint here.[8]

Defendants' claim that *Arlington* supports federal officer removal based on Defendants' sale of specialized military fuels falls equally flat. "This specialized fuel does not appear to be the same as fuel that consumers purchased because of Defendants' alleged marketing and disinformation campaigns." Remand Order at 21-22. That is a basic fact about Plaintiff's claims, not a complex or novel legal issue for the Third Circuit. Regardless, those sales largely predate the allegations in the Complaint, taking them out of the federal officer removal analysis. *See In re Methyl Teriary Butyl Ether Prods. Liab. Litig.*, 488 F.3d 112, 124-125 (2d Cir. 2007) ("Critical under the [federal officer] statute is to what extent defendants acted under federal direction *at the time they were engaged in the conduct now being sued upon*." (emphasis added) (cleaned up)).

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[8] Defendants' citation to *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Philadelphia*, 790 F.3d 457 (3d Cir. 2015) for the proposition that defendants are not "required to allege that the complained-of conduct *itself* was at the behest of a federal agency," *id.* at 470 (emphasis in original), also does not move the needle. What matters is whether the "allegations are directed at the relationship between the [defendant] and [the federal government]." *Id.* Defendants' climate change deceptions have absolutely nothing to do with that relationship.

Finally, Defendants' contention that the Court must "credit Defendants' theory" of the case, Defs' Br. at 18-19, does not permit them to transform the Complaint into something it is not, *see Honolulu*, 2021 WL 531237, at *7 ("[I]f Defendants had it their way, they could assert *any* theory of the case, however untethered to the claims of Plaintiffs, because this Court must 'credit' that theory."). It is axiomatic that Defendants must show that their conduct acting under federal officers relates to the "acts complained of" in the Complaint. *Defender Ass'n*, 790 F.3d at 472. As every Court to address this issue has concluded, Defendants' deceptions are the "acts complained of" here, and they do not relate to any conduct taken under the direction of federal officers. Moreover, the cases Defendants cite that credited the defendants' "theory of the case" did so with respect to disputed *legal* issues because resolution of those issues would decide the merits of the case.[9] That concern is not present here. The Third Circuit cannot ignore the *unlawful conduct* alleged in the Complaint in determining

[9] *See Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 432 (1999) ("To choose between those readings of the Ordinance is to decide the merits of the case . . . , [which] would defeat the purpose of the federal officer removal statute."); *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 947 (7th Cir. 2020) (citing *Acker* for the proposition that "we are concerned with who makes the ultimate determination, not what that determination will be" (cleaned up)); *K&D LLC v. Trump Old Post Office LLC*, 951 F.3d 503, 506 (D.C. Cir. 2020) (quoting *Acker* for the same proposition); *Cessna v. Rea Energy Cooperative, Inc.*, 753 F. App'x 124, 128 (3d Cir. 2018) (same).

whether there is a connection or association between *that conduct* and actions taken under the direction and control of federal officers.

C. Outer Continental Shelf Lands Act

Defendants are 0 for 8 on Outer Continental Shelf Lands Act ("OCSLA") removal.[10] This Court and every other court to consider this issue analyzed the same statutory language the Third Circuit will on appeal—whether Plaintiff's claims "aris[e] out of, or in connection with" an "operation on the Outer Continental Shelf," 43 U.S.C. § 1349—and found that they do not. *See, e.g.*, Remand Order at 18 (concluding that Defendants' "chain of causation is too attenuated" and citing *Baltimore I* and *San Mateo I*). The First and Fourth Circuits also found, in the context of federal officer removal, that Defendants' Outer Continental Shelf ("OCS") operations lack the requisite "connection" to Plaintiff's claims to establish jurisdiction. *Rhode Island II*, 979 F.3d at 59-60; *Baltimore II*, 952 F.3d at 466-68. Again, Plaintiff's claims arise out of Defendants' climate change deceptions, which have no connection to operations on the OCS.

The Supreme Court's recent decision in *Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017 (2021), a decision regarding constitutional

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[10] *See Hoboken*, 2021 WL 4077541, at *8-9; *Connecticut*, 2021 WL 2389739, at *12; *Minnesota*, 2021 WL 1215656 at *10; *Honolulu*, 2021 WL 531237, at *3; *Rhode Island I*, 393 F. Supp. 3d at 151-52 *Boulder I*, 405 F. Supp. 3d at 973-75; *Baltimore I*, 388 F. Supp. 3d at 566-67; *San Mateo I*, 294 F. Supp. 3d at 938-39.

requirements for personal jurisdiction that has nothing to do with OCSLA jurisdiction or Plaintiff's claims in this case, does not establish any reasonable possibility of success on the merits. *Ford*'s holding that the word "connection" does not mean a "strict causal relationship," Defs' Br. at 21 (quoting *Ford*, 141 S. Ct. at 1026), is uncontroversial. It does not alter the well-established "but for" test for OCSLA jurisdiction, an issue *Ford* does not touch, or the clear absence of a connection between Defendants' OCS operations and Plaintiff's claims. *See* Remand Order at 17-18.

D. Federal Enclave Removal

Defendants are 0 for 8 on federal enclave removal.[11] They offer nothing to suggest the Third Circuit will reach a different result. The "locus" of Plaintiff's injuries (Hoboken) is not a federal enclave—as federal enclave removal requires. *See e.g.*, *Bordetsky v. Akima Logistics Servs., LLC*, No. 14 Civ. 1786, 2016 WL 614408, at *1 (D.N.J. Feb. 16, 2016); *In re High–Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1125 (N.D. Cal. 2012). Defendants' motion to stay cursorily "rehashes the same arguments considered and rejected by the [court] based on the same evidence." *In re Color Spot Holdings, Inc.*, 2018 WL 3996938, at *3.

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[11] *See Hoboken*, 2021 WL 4077541, at *11; *Connecticut*, 2021 WL 2389739, at *13; *Minnesota*, 2021 WL 1215656 at *10-11; *Honolulu*, 2021 WL 531237, at *8; *Rhode Island I*, 393 F. Supp. 3d at 152 *Boulder I*, 405 F. Supp. 3d at 978-79; *Baltimore I*, 388 F. Supp. 3d at 563-66; *San Mateo I*, 294 F. Supp. 3d at 939.

"Merely repeating these rejected arguments does not meet the 'substantial' burden Appellants have to show a likelihood of success on the merits of their appeal." *Id.*[12]

E. Grable

Defendants are 0 for 9 on *Grable* removal.[13] No court has accepted Defendants' argument that "[a]djudicating Plaintiff's claims will necessarily require the court to balance the competing interests of environmental protection and economic growth—a balance that federal law entrusts to the EPA." Defs' Br. at 22. The only *Grable* case cited by Defendants in this motion is *Pet Quarters, Inc. v. Depository Trust & Clearing Corp.*, 559 F.3d 772 (8th Cir. 2009), a case Plaintiff noted had been limited by *Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 772 F.3d 158, 165 n.4 (3d Cir. 2014), Dkt. 94 at 32, and which was abandoned by Defendants in their opposition to the motion to remand, Dkt. 100. They do not explain how an out-of-Circuit case they abandoned when opposing

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[12] Defendants thought so little of their chances of success on federal enclave removal that they relegated their argument for it to a footnote in their opposition to Plaintiff's motion to remand. *See* Dkt. 100 at 53 n.8.

[13] *Oakland*, 969 F.3d at 904-05; *Hoboken*, 2021 WL 4077541, at *7-8; *Connecticut*, 2021 WL 2389739, at *7-10; *Minnesota*, 2021 WL 1215656 at *6-8; *Massachusetts*, 462 F. Supp. 3d at 44-45; *Rhode Island I*, 393 F. Supp. 3d at 150-51; *Boulder I*, 405 F. Supp. 3d at 964-68; *Baltimore I*, 388 F. Supp. 3d at 558-61; *San Mateo I*, 294 F. Supp. 3d at 938.

Plaintiff's remand motion, and which has expressly been limited by the Third Circuit, shows their strong likelihood of success on appeal.

F. Class Action Fairness Act

Defendants are "just" 0 for 3 on Class Action Fairness Act ("CAFA") removal,[14] a more recent invention of theirs. Defendants' argument is preposterous. They effectively abandoned it on the motion to remand, Dkt. at 29-30, ignored Plaintiff's caselaw, Dkt. 94 at 56-59, never identified a "State statute or rule of judicial procedure" similar to Rule 23 in Plaintiff's claim, 28 U.S.C. § 1332(d)(l)(B), and never addressed Plaintiff's 28 U.S.C.A. § 1332(d)(4)(A) and (B) arguments, Dkt. 101 at 29 n.17 and ECF No. Dkt. 59 n. 19. "This argument can be dealt with in short order." Remand Order at 24.

Defendants have lost each of their removal arguments numerous times and fail to identify any caselaw that supports their position. This does not establish any serious questions going to the merits, much less Defendants' heavy burden to establish a strong likelihood of success on appeal. That alone defeats their stay motion.

[14] *Hoboken*, 2021 WL 4077541, at *11; *Minnesota*, 2021 WL 1215656 at *11-12; *Massachusetts*, 462 F. Supp. 3d at 45-47.

III. DEFENDANTS WILL NOT SUFFER IRREPARABLE HARM ABSENT A STAY

Defendants also fail to establish the second vital requirement for a stay pending appeal: irreparable harm. To establish irreparable harm, a stay movant "must demonstrate an injury that is neither remote nor speculative, but actual and imminent." *Revel*, 802 F.3d at 571 (quoting *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989)). Irreparable injury is harm "the movant will suffer during the pendency of the litigation that cannot be prevented or fully rectified by the tribunal's final decision." *Id.* (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). A stay applicant "must 'demonstrate that such irreparable injury is *likely*[,] not merely possible[,] in the absence of a stay.'" *Id.* at 569 (emphasis in original) (alterations omitted) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). "'[L]ikely' [] mean[s] more apt to occur than not." *Id.* Defendants point to only speculative and remote harms, none of which are more likely than not occur.

Defendants do not want to litigate in state court after losing their motion to remand. But, as the *Honolulu* court held in denying Defendants' stay application, "the purported *injury* of litigati[on] in State court is simply a natural consequence of Defendants failing to demonstrate that these cases were properly removed, . . . [s]omething which hardly seems like a reason to find an irreparable injury, let alone a probable one." *Honolulu Stay Denial I*, 2021 WL 839439, at *2 (emphasis

in original) (citation omitted); *see also City & Cnty. of Honolulu v. Sunoco LP*, Nos. 21-15313, 21-15318, 2021 WL 1017392, at *1 (9th Cir. Mar. 13, 2021) ("[T]he theoretical possibility that the state court could irrevocably adjudicate the parties' claims and defenses while these appeals are pending [] falls short of meeting the demanding irreparable harm standard."); *Boulder Stay Denial*, 423 F. Supp. 3d at 1074 ("Defendants' argument that discovery could be unduly burdensome in state court is speculative."); *Baltimore Stay Denial*, 2019 WL 3464667, at *5 ("[D]efendants' appeal would only be rendered moot in the unlikely event that a final judgment is reached in state court before resolution of their appeal," which is a "speculative harm [that] does not constitute an irreparable injury"); 15A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3914.11 (2d ed. 2021) ("[A]s important as it is to make correct decisions about matters of federal jurisdiction and even removal procedure, trial in state court is not a horrible fate.").[15]

Defendants' arguments regarding mootness, conflicting judgments, or cost do not change this analysis. *First*, the *Baltimore* and *Boulder* courts both rejected

[15] To the extent the *Minnesota* court found that potential "dispositive resolution of the claims pending full appellate review" can properly be considered a basis of "irreparable harm," *Minnesota Stay Opinion,* 2021 WL 3711072 at *3, it is simply against the weight of the authority. Moreover, Defendants have not and cannot show that this outcome "is more apt to occur than not," as the Third Circuit requires to demonstrate irreparable harm. *Revel*, 802 F.3d at 569.

Defendants' claim that a final judgment in state court before an appellate decision on remand would render their appeal moot, Defs' Br. at 24-25, because this is an "unlikely event" that raises the possibility of only "speculative harm," *Baltimore Stay Denial,* 2019 WL 3464667, at *5; *Boulder Stay Denial*, 423 F. Supp. 3d at 1072 ("*Boulder Stay Denial*") (same). At present, a final judgment against Defendants—the only type of final judgment that would materially harm them—would require (1) litigation of a motion to dismiss and all appeals; (2) completion of all discovery; (3) litigation of summary judgment and all appeals; and (4) a possible trial. The chance of all of this occurring before the Third Circuit's review of the Remand Order is essentially nil, not "more apt to occur than not." *Revel*, 802 F.3d at 569. Nor would any other, entirely speculative final judgment moot the appeal at all—in the unlikely event that Defendants prevail at the Third Circuit, the district court has authority under 28 U.S.C. § 1450 to dissolve or modify any of the state court's orders. *See Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cnty.*, 415 U.S. 423, 437 (1974) ("Section 1450 . . . recogniz[es] the district court's authority to dissolve or modify injunctions, orders, and all other proceedings had in state court prior to removal.").[16]

[16] The cases Defendants cite to support this argument are inapposite because they either involve circumstances where irreversible and immediate harm was likely to befall defendants absent a stay, *see Providence Journal Co. v. Fed. Bureau of*

Second, Defendants' alarm about "conflicting court decisions" and comity issues, Defs' Br. at 25-27, ignores that "[i]t is not unusual for cases to be removed after substantial state court litigation. 28 U.S.C. § 1450 recognizes this, and provides that '[a]ll injunctions, orders and other proceedings' in state court prior to removal remain in force unless 'dissolved or modified' by the district court." *Boulder Stay Denial*, 423 F. Supp. 3d at 1074-75 (quoting 28 U.S.C. § 1450). That is, any conflicting state court decisions would be *reparable* upon removal back to federal court. This simply is not the type of harm that "cannot be prevented or fully rectified by the tribunal's final decision"—the definition of "irreparable." *Revel*, 802 F.3d at 571 (cleaned up). "[I]nterim proceedings in state court may well advance the resolution of the case in federal court" because "the parties will have to proceed with the filing of responsive pleadings or preliminary motions, regardless of the forum." *Baltimore Stay Denial*, 2019 WL 3464667, at *6.

Investigation, 595 F.2d 889, 890 (1st Cir. 1979) ("Once the documents are surrendered pursuant to the lower court's order, confidentiality will be lost for all time. The status quo could never be restored."); *Wadhwa v. Dep't of Veterans Affairs*, No. 06 Civ. 4362, 2011 WL 13287074, at *1 (D.N.J. Feb. 1, 2011) ("In FOIA cases where disclosure is ordered, the threat of irreparable harm is great because absent a stay, documents must be disclosed . . . ."), or arise in a wholly different procedural context, *see Hicks v. Swanhart*, No. 12 Civ. 1633, 2012 WL 6152901, at *3 (D.N.J. Dec. 10, 2012) (granting stay of civil proceeding pending criminal appeal based on analysis of whether stay would "simplify issues and promote judicial economy for both the Court and the parties," which is not a factor in the analysis of a motion to stay a remand order pending appeal).

Moreover, the possibility that a state court could decide an issue differently than a federal court exists *every* time a case is remanded while an appeal of the remand order is pending. But staying every remand order that gets appealed for this reason is irreconcilable with a stay being a "rare[]" and "extraordinary remedy." *Garcia*, 2018 WL 443456, at *1 (cleaned up). In any event, Defendants merely raise the speculative possibility of such conflicting decisions; they do not show that this possibility is "actual and imminent." *Revel*, 802 F.3d at 571.

Third, it is firmly established that Defendants' complaints regarding the "burden and expense incurred" from litigating in state and federal court at the same time, Defs' Br. at 26, do not rise to the level of irreparable injury. "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *see also, e.g.*, *Bordeaux v. LTD Fin. Servs., L.P.*, No. 16 Civ. 243, 2018 WL 1251633, at *2 (D.N.J. Mar. 9, 2018) ("Litigation costs will generally not rise to the level of irreparable harm."); *Heinzl v. Cracker Barrel Old Country Store, Inc.*, No. 14 Civ. 1455, 2016 WL 5107173, at *2 (W.D. Pa. June 8, 2016) ("[A] party may have to expend money on discovery that could be deemed unnecessary if the case is reversed on appeal, but that fact does not transform such expenses into irreparable harm."). This is especially true here, where Defendants are some of the world's most profitable companies and they exposed themselves to this potential extra

expense by removing the case to federal court rather than proceeding in state court in the first instance.

IV. THE PUBLIC INTEREST FAVORS PLAINTIFF

The public interest—the only remaining *Nken* factor when the party opposing the stay is a government actor, *Nken*, 556 U.S. at 435—further supports a denial of this motion. The danger to Hoboken, and the need for the relief it seeks, is imminent. Hoboken filed this lawsuit in the midst of a series of extreme rainfall events. *See* Compl. ¶¶ 264-68. One year on from those storms, and as this Court granted remand, Tropical Storm Henri dumped 6.5 inches of rain on Hoboken, nearly double its average total rainfall for the entire month of August, causing sewage and floodwaters to spill into Hoboken's streets. Less than two weeks later, Tropical Storm Ida followed with *another* 6.5 inches of rain, causing devastating and widespread flooding across the City. Hoboken needs help *now*.

It is grotesque for Defendants to, on the one hand, speak in the language of "greenwashing," *id.* ¶¶ 172-93, trumpeting their recognition of the effects of climate change, *id.* ¶¶ 194-207, while on the other hand saying "there can be no legitimate dispute that Plaintiff will *not* be harmed if the Court grants Defendants' Motion because Plaintiff principally seeks monetary damages," Defs' Br. at 28 (emphasis in original). The City seeks damages from the tortfeasers so that it can remediate its physical and human infrastructure to deal with this harm, *id.* ¶¶ 269-

86, and time is running out, *see, e.g.*, *Baltimore Stay Denial*, 2019 WL 3464667, at *6 (third and fourth factors weighed in favor of denying stay given "the seriousness of the City's allegations and the amount of damages at stake"); *Boulder Stay Denial*, 423 F. Supp. 3d at 1075 (same); *Honolulu* Stay Denial I, 2021 WL 839439, at *3 ("Staying these cases will only add, potentially significantly, to this delay," which is not in the public interest).

Defendants' argument is also wrong on the law: Plaintiff does not need to show "irreparable harm" to defeat this motion, as Defendants deceptively imply by citing caselaw regarding the *petitioner's* burden in seeking a preliminary injunction. *See* Defs' Br. at 18 (citing *Longo v. Env't Prot. & Improvement Co., Inc.*, No. 16 Civ. 9114, 2017 WL 2426864 (D.N.J. June 5, 2017) (rejecting preliminary injunction) and *Telebrands Corp. v. Grace Mfg., Inc.*, No. 10 Civ. 2693, 2010 WL 4929312 (D.N.J. Nov. 30, 2010) (same)). Defendants, as the party moving for a stay, must show irreparable harm and they have not, *supra* § III, dooming their motion. *Cf. City of Annapolis, Maryland v. BP P.L.C.*, No. CV ELH-21-772, 2021 WL 2000469, at *4 (D. Md. May 19, 2021) (granting a stay of proceedings, not under the *Nken* standard, where the remand motion had yet to be briefed); *Trusted Transp. Sols., LLC v. Guarantee Ins. Co.*, No. 16 Civ. 7094, 2018 WL 2187379, at *4 (D.N.J. May 11, 2018) (summarizing looser "judicial economy" standard for stay of proceedings, not order, pending parallel bankruptcy

case).[17] It is sufficient for Plaintiff to show, as it has, that delaying this litigation further would delay much-needed relief after Defendants' actions have already wasted one year. *Honolulu Stay Denial I*, 2021 WL 839439, at *3 ("Staying these cases will only add, potentially significantly, to this delay. No matter what may happen with these cases on the merits in the future, the Court cannot discern any public interest in such delay."); *Hawaii ex rel. Louie v. Bristol-Myers Squibb Co.*, No. CIV. 14-00180 HG-RLP, 2014 WL 3865213, at *4 (D. Haw. Aug. 5, 2014) ("Public interest does not support continued interference with state court proceedings."); *cf. Raskas v. Johnson & Johnson*, No. 12 Civ. 2174, 2013 WL 1818133, at *2 (E.D. Mo. Apr. 29, 2013) (granting stay because the "expedited appellate review process" for CAFA appeals would limit prejudice to plaintiff);

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[17] In fact, *Annapolis* specifically distinguished the "multiple courts [that] denied motions to stay remand orders pending appeal in other climate change cases" because "the standard for granting a stay pending appeal differs from the standard for a discretionary stay" in that it does not involve "a movant's likelihood of success on the merits of his appeal" or "the threat of irreparable harm to the movant in the absence of a stay." 2021 WL 2000469, at *4. Those are the two "most critical" factors on Defendants' motion here. *Nken*, 556 U.S. at 434. The stay orders in the *City of Charleston, Anne Arundel County*, and *Pacific Coast Federation of Fishermen's* cases were all so ordered on stipulations by the parties and came about in the same procedural posture as *Annapolis*—the identical issues posed by the not-yet-briefed motions to remand in the district court were already teed up for decision in other cases the applicable Circuit. *See Anne Arundel County v. BP P.L.C.*, No. 21-cv-1323, Dkt. 19 (D. Md. June 1, 2021); *City of Charleston v. Brabham Oil Co.*, No. 20-cv-3579, Dkts. 120-21 (D.S.C. May 27, 2021); *Pac. Coast Fed'n of Fishermen's Assocs., Inc. v. Chevron Corp.*, No. 18 Civ. 07477, Dkt. 91 (N.D. Cal. Jan. 2, 2019). They too have no bearing here.

Citibank, N.A. v. Jackson, No. 3:16-CV-712-GCM, 2017 WL 4511348, at *3 (W.D.N.C. Oct. 10, 2017) (same).

Defendants have filed thousands of pages in this Court on a preliminary procedural point, one they have lost in ten courts already, all in an effort to delay and drive up costs for Plaintiff. Defendants could have conserved everyone's resources by litigating this case in state court. Instead, they leveraged their unlimited litigation budget for this jaunt through the federal courts. They cannot now seriously argue that Plaintiff would "benefit from a stay" because such a stay "would conserve Plaintiff's resources—financial and otherwise." Defs' Br. at 29.

CONCLUSION

For the reasons stated above, Defendants' motion to stay the Remand Order pending appeal must be denied.

Dated: October 4, 2021
New York, New York

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