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

CITY OF HOBOKEN Plaintiff, v. 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.	Case No. 2:20-cv-14243 JMV-MF **REPLY BRIEF IN SUPPORT OF DEFENDANTS' JOINT MOTION TO STAY EXECUTION OF REMAND ORDER PENDING APPEAL** **ORAL ARGUMENT REQUESTED**

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

ARGUMENT 5

I. Defendants Are Likely To Succeed On Appeal. 5

II. Defendants Are Likely To Face Irreparable Harm Absent A Stay. 13

III. The Public Interest Favors A Stay. 14

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Battle v. Seibels Bruce Ins. Co.,
288 F.3d 596 (4th Cir. 2002) 8

City & County of Honolulu v. Sunoco LP,
2021 WL 531237 (D. Haw. Feb. 12, 2021)..9

City of Annapolis, Maryland v. BP P.L.C.,
2021 WL 2000469 (D. Md. May 19, 2021)..2, 6

City of New York v. Chevron Corp.,
993 F.3d 81 (2d Cir. 2021) 6

Cnty. Bd. of Arlington Cnty., Virginia v. Express Scripts Pharmacy, Inc.,
996 F.3d 243 (4th Cir. 2021) 8

In re Color Spot Holdings, Inc.,
2018 WL 3996938 (D. Del. Aug. 21, 2018)..11

North Carolina ex rel. Cooper v. Tenn. Valley Auth.,
615 F.3d 291 (4th Cir. 2010) 8

Corley v. Long-Lewis, Inc.,
688 F. Supp. 2d 1315 (N.D. Ala. 2010)..11

County of San Mateo v. Chevron Corp.,
960 F.3d 586 (9th Cir. 2020) 9

Ford Motor Co. v. Montana Eighth Judicial District Court,
141 S. Ct. 1017 (2021)..10

Forty Six Hundred LLC v. Cadence Education, LLC,
__ F.4th __, 2021 WL 4472684 (1st Cir. Sept. 30, 2021)..............................3, 4

In re Grossman's, Inc.,
607 F.3d 114 (3d Cir. 2010) 2

Hicks v. Swanhart,
2012 WL 6152901 (D.N.J. Dec. 10, 2012)..14

Jock v. Sterling Jewelers, Inc.,
738 F. Supp. 2d 445 (S.D.N.Y. Sept. 18, 2010) 5

Estate of Joseph Maglioli v. Andover Subacute Rehab. Ctr.,
2021 WL 2525714 (D.N.J. June 18, 2021)..13

Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.,
772 F.3d 158 (3d Cir. 2014) 11, 12

Minnesota v. American Petroleum Institute,
2021 WL 3711072 (D. Minn. Aug. 20, 2021)..................... 1, 2, 3, 4, 5, 7, 14, 15

Moutevelis v. United States,
564 F. Supp. 1554 (M.D. Pa. 1983)..5

New SD, Inc. v. Rockwell Intern. Corp.,
79 F.3d 953 (9th Cir. 1996) 8

Newton v. Capital Assurance Co.,
245 F.3d 1306 (11th Cir. 2001) 8

In re Otter Tail Power Co.,
116 F.3d 1207 (8th Cir. 1997) 8

Pet Quarters, Inc. v. Depository Trust & Clearing Corp.,
559 F.3d 772 (8th Cir. 2009) 11

Republic of Philippines v. Marcos,
806 F.2d 344 (2d Cir. 1986) 8

In re Revel AC, Inc.,
802 F.3d 558 (3d Cir. 2015) 5

Sam L. Majors Jewelers v. ABX, Inc.,
117 F.3d 922 (5th Cir. 1997) 8

St. Claire v. Cuyler,
482 F. Supp. 257 (E.D. Pa. Dec. 28, 1979) 1, 5

Telebrands Corp. v. Grace Mfg.,
2010 WL 4929312 (D.N.J. Nov. 30, 2010) 3

Torres v. S. Peru Copper Corp.,
113 F.3d 540 (5th Cir. 1997) 8

Yee v. City of Escondido,
503 U.S. 519 (1992)..12

Statutes

28 U.S.C. § 1450 13

PRELIMINARY STATEMENT

This Court's remand order presents several issues of first impression in the Third Circuit regarding federal courts' jurisdiction to resolve disputes involving the *worldwide* phenomenon of global climate change. Indeed, this Court has expressly acknowledged that "the Third Circuit will be presented with matters of first impression that could potentially impact this Court's remand Order." Dkt. 127 at 2. Where, as here, a district court's holding is novel or resolves a question of first impression, a stay pending appeal is proper. *See, e.g.*, *St. Claire v. Cuyler*, 482 F. Supp. 257, 258 (E.D. Pa. Dec. 28, 1979); *see also* Mot. (D.E. 130-1) at 10–11.

Plaintiff does not dispute any of this. Instead, Plaintiff argues that the Court should deny a stay because a number of courts in other jurisdictions have rejected Defendants' removal arguments. Yet many of those same courts granted the relief Defendants seek here and stayed their remand orders pending appeal. As the District of Minnesota explained, "it makes sense for all parties to allow the [court of appeals] to address these weighty jurisdictional issues prior to commencing litigation in state court." *Minnesota v. American Petroleum Institute*, 2021 WL 3711072, at *4 (D. Minn. Aug. 20, 2021). And, just last week, in the climate action brought by Connecticut—a case that Plaintiff cites throughout its Opposition—the Second Circuit reversed the district court and granted a motion to stay the remand order pending appeal, finding that the defendant "ha[d] made a sufficient showing that it

is entitled to a stay" under the Supreme Court's standard in *Nken v. Holder*, 556 U.S. 418, 434–35 (2009)—the same standard that applies here.[1]

Plaintiff's contention that a stay is unwarranted because other courts have rejected Defendants' removal arguments after merits briefing is especially unpersuasive given that, prior to *Baltimore*, appellate review had generally been limited to only one ground—federal officer removal.[2] Post-*Baltimore*, multiple appellate courts, including the First, Second, Fourth, Eighth, Ninth, and Tenth Circuits, are considering many of Defendants' removal grounds for the *very first time*. The Third Circuit will soon address, for the first time, all of Defendants' grounds for federal jurisdiction over a climate change-related case. There can be no doubt that because "the legal landscape is shifting," issuing a final remand order before the Third Circuit can weigh in on these issues "would result in a decision by this Court with the proverbial half a deck." *City of Annapolis, Maryland v. BP P.L.C.*, 2021 WL 2000469, at *4 (D. Md. May 19, 2021) (granting motion to stay); *see also Minnesota*, 2021 WL 3711072, at *2 ("[T]his action raises weighty and significant questions that intersect with rapidly evolving areas of legal thought.").

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1 *Connecticut v. Exxon Mobil Corp.*, No. 21-1446, Dkt. 80 (2d Cir. Oct. 5, 2021), attached to the Declaration of Herbert J. Stern, filed concurrently, as Exhibit A.

2 Plaintiffs' court-counting approach is also unsound as a matter of law, and has been expressly repudiated by the Third Circuit. *See, e.g.*, *In re Grossman's, Inc.*, 607 F.3d 114, 121 (3d Cir. 2010) ("Notwithstanding what appears to be universal disapproval, we decide cases before us based on our own examination of the issue, not on the views of other jurisdictions.").

A failure to stay the remand order also poses the threat of irreparable injury to Defendants, who would be forced to simultaneously litigate in two different forums, subject to two different sets of procedural rules. If Defendants prevail in their appeal, there may be no way to undo the state-court proceedings. Indeed, "dispositive resolution of the claims pending full appellate review would constitute a concrete and irreparable injury, particularly 'where a failure to enter a stay will result in a meaningless victory in the event of appellate success.'" *Minnesota*, 2021 WL 3711072, at *3. As the First Circuit recently explained in reversing a remand order, "prematurely returning [a] case to the state court would defeat the very purpose of permitting an appeal and leave a defendant who prevails on appeal holding an empty bag. Neither Supreme Court precedent nor our own case law demands so illogical a result." *Forty Six Hundred LLC v. Cadence Education, LLC*, __ F.4th __, 2021 WL 4472684, at *7 (1st Cir. Sept. 30, 2021).

On the other side of the ledger, Plaintiff faces no meaningful harm from a short stay. Plaintiff seeks only monetary damages to defray the cost of responding to the alleged physical impacts of climate change, but it is black-letter law that the delayed recovery of monetary damages is not a meaningful harm. *See Telebrands Corp. v. Grace Mfg.*, 2010 WL 4929312, at *4 (D.N.J. Nov. 30, 2010) ("It is well settled that a purely economic injury is compensable in money damages and therefore can never constitute irreparable harm."). In fact, as the District of

Minnesota explained, the "public also has an interest in conserving resources by avoiding unnecessary or duplicative litigation, particularly where, as here, the [court of appeals] will be addressing for the first time whether the state court has jurisdiction to resolve the claims and redress the injuries alleged at all." *Minnesota*, 2021 WL 3711072, at *4.

The reason for a stay here is simple: In short order, the Third Circuit will issue a decision on matters of first impression in this Circuit that will have a significant, if not dispositive, impact on the threshold issue of federal jurisdiction. Plaintiff has not provided a single reason why it would be inappropriate to take a short pause while the correct forum for this litigation is sorted out. On the contrary, the sensible path points to a stay. The First Circuit recently encouraged district courts "to help prevent a removed case from becoming a shuttlecock, batted back and forth between a state court and a federal court" by "avoid[ing] immediately certifying the remand order and returning the case file to the state court until it believes the specter of shuttling has abated." *Forty Six Hundred LLC*, 2021 WL 4472684, at *8. The Court should do that here and grant a stay of its remand order pending appeal. At a minimum, the Court should grant a temporary stay to preserve Defendants' right to seek a stay from the Third Circuit. *See id.*[3]

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[3] This Reply is submitted subject to and without waiver of any defense, affirmative defense, or objection, including personal jurisdiction.

ARGUMENT

I. Defendants Are Likely To Succeed On Appeal.

Plaintiff acknowledges that, to show a likelihood of success on appeal, Defendants need only "demonstrate[] 'a reasonable chance, or probability, of winning." Opp. (D.E. 131) at 6 (quoting *In re Revel AC, Inc.*, 802 F.3d 558, 568 (3d Cir. 2015)). This standard is satisfied where an appeal presents an issue of first impression. *See St. Claire*, 482 F. Supp. at 258; *Moutevelis v. United States*, 564 F. Supp. 1554, 1556 (M.D. Pa. 1983) (granting a stay where appeal "may well involve issues of first impression in this Circuit"); *Jock v. Sterling Jewelers, Inc.*, 738 F. Supp. 2d 445, 447 (S.D.N.Y. Sept. 18, 2010) (staying order pending appeal where "there is no doubt that the plaintiffs' appeal presents an issue of first impression," even though "the Court remain[ed] confident in the soundness of the reasons" for its decision).

Each of Defendants' grounds for removal presents a question of first impression because the Third Circuit has not addressed those issues in a climate change-related case. And in light of the Supreme Court's decision in *Baltimore*, the Third Circuit will have the opportunity to consider all of those grounds in this case. Multiple courts since *Baltimore*—including the Second Circuit just last week, *see Connecticut*, No. 21-1446, Dkt. 80—have recognized that it is appropriate to stay execution of a remand order until the courts of appeals have had the opportunity to consider these important and novel questions, *see, e.g.*, *Minnesota*, 2021 WL

3711072, at *2; *City of Annapolis*, 2021 WL 2000469.[4]

Plaintiff does not dispute this. Instead, it cites other cases, in other postures, that considered whether removal was proper as an initial matter—many of which are currently on appeal. *See, e.g.*, *Mayor & City Council of Baltimore v. BP P.L.C.*, No. 19-1644 (4th Cir.); *County of San Mateo v. Chevron Corp.*, No. 18-5449 (9th Cir.); *City and County of Honolulu v. Sunoco LP*, No. 20-163 (9th Cir.); *State of Rhode Island v. Shell Oil Prods. Co*, No. 19-1818 (1st Cir.). But the question for purposes of a stay is not whether removal was proper as an initial matter, but only whether there is a reasonable possibility that the Third Circuit might accept one or more of Defendants' arguments. The answer to that question is indisputably "yes."

First, there is a reasonable chance that the Third Circuit will hold that removal is proper under the Court's federal-question jurisdiction because, as the Second Circuit recently held, Plaintiff's "claims must be brought under federal common law." *City of New York v. Chevron Corp.*, 993 F.3d 81, 95 (2d Cir. 2021). Plaintiff argues that "*City of New York* has no relevance" here because "[t]he Second Circuit considered only *ordinary* preemption and did not consider it 'under the heightened standard unique to the removability inquiry.'" Opp. at 10. But *City of New York*

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[4] The day after the Second Circuit issued its stay order in *Connecticut*, the district court in a materially similar climate action, ordered Plaintiff to show cause why the court should not also issue a stay, rather than rule on plaintiff's motion to remand, pending the Second Circuit's decision in *Connecticut*. *See City of New York v. Exxon Mobil Corp.*, No. 21-cv-04807, Dkt. 55 (S.D.N.Y. Oct. 6, 2021).

explicitly rejected Plaintiff's primary argument against federal-question jurisdiction—that its claims are governed entirely by *state* law.

The District of Minnesota recently confirmed that *City of New York* favors entering a stay pending appeal, finding that the decision "provides a legal justification for addressing climate change injuries through the framework of federal common law and thus at least slightly increases the likelihood that Defendants will prevail on their efforts to keep this, and similar actions, in federal court." *Minnesota*, 2021 WL 3711072, at *2. Although Plaintiff insists that *Minnesota* is wrong and that its reasons for granting a stay are "not enough," Opp. at 11, Plaintiff provides no contrary authority. The closest it comes is *Connecticut v. Exxon Mobil Corp.*, where the district court "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 defendants['] favor.'" *Id.* at 12 (citing *Connecticut v. Exxon Mobil Corp.*, No. 20-civ-1555, Dkt. 56 (D. Conn. June 11, 2021) (alterations in original)). But just days ago, the Second Circuit intervened and stayed the remand order, finding that "Appellant *has* made a sufficient showing that it is entitled to a stay." *Connecticut*, No. 21-1446, Dkt. 80 (emphasis added).

Plaintiff is demonstrably wrong in contending that "every other appellate court decision" has rejected federal-question jurisdiction where the complaint did

not expressly plead a federal cause of action. Opp. at 10. In fact, numerous courts of appeals cases have upheld removal on precisely that ground.[5] And other courts now considering the same question have ordered supplemental briefing regarding the impact of *City of New York*. *See, e.g.*, Order Granting Supplemental Briefing, *State of Rhode Island v. Shell Oil Prods. Co.*, No. 19-1818 (1st Cir. June 28, 2021); *Mayor & City Council of Baltimore v. BP P.L.C.*, No. 19-1644, Dkt. 179 (4th Cir.). The Fourth Circuit recently calendared oral argument for December. *Id.* at Dkt. 225.

Second, there is a reasonable chance that the Third Circuit will hold that this action was properly removed under the federal officer removal statute. As the Fourth Circuit has explained, defendants "act[] under" federal direction or control when they contract with the government to provide a product or service subject to contracts that are "extensively governed by various federal statutes and regulations," *Cnty. Bd. of Arlington Cnty., Virginia v. Express Scripts Pharmacy, Inc.*, 996 F.3d 243, 249 (4th Cir. 2021)—which Defendants clearly did by, among other things, providing billions of dollars in highly specialized jet fuel to the Department of Defense over

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[5] *See, e.g.*, *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 301 (4th Cir. 2010); *Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 598, 607 & n.17 (4th Cir. 2002); *Newton v. Capital Assurance Co.*, 245 F.3d 1306, 1309 (11th Cir. 2001); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 923-26 (5th Cir. 1997); *In re Otter Tail Power Co.*, 116 F.3d 1207, 1213-15 (8th Cir. 1997); *Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 542-43 (5th Cir. 1997); *New SD, Inc. v. Rockwell Intern. Corp.*, 79 F.3d 953 (9th Cir. 1996); *Republic of Philippines v. Marcos*, 806 F.2d 344, 352-54 (2d Cir. 1986).

the course of decades. And Plaintiff's claims are "for or relating to" that conduct because the production, sale, and combustion of such fossil fuels is, according to Plaintiff, the entire reason it is suffering climate change-related harms.

Plaintiff urges the Court to disregard the law and facts in this case and simply defer to other courts that have purportedly "rejected the same bases for federal officer jurisdiction that Defendants assert here." Opp. at 12–13. But even were those merits rulings relevant to the stay inquiry (they are not), Plaintiff ignores the substantially more robust record in this case than in those other cases. Only the District of Hawaii has considered the propriety of federal officer removal on a factual record analogous to this one, and in declining to exercise jurisdiction, it noted the "tinged canvas" upon which it wrote, *City & County of Honolulu v. Sunoco LP*, 2021 WL 531237, at *4 (D. Haw. Feb. 12, 2021), less than a year after the Ninth Circuit rejected federal officer removal in a case with a far sparser record, *see County of San Mateo v. Chevron Corp.*, 960 F.3d 586, 598–603 (9th Cir. 2020).

Plaintiff's remaining arguments can all be reduced to the assertion that Plaintiff's claims are based on deceptive marketing, rather than the production and sale of fossil fuels. *See, e.g.*, Opp. at 13; *id.* at 14; *id.* at 15; *id.* at 16. While Plaintiff accuses Defendants of trying to "transform the Complaint into something it is not," *id.* at 16, the Complaint expressly asserts "that the fossil fuels [Defendants] *extract*, *produce*, *market*, *and sell* on a massive scale are causing accelerating climate

change" that lies at the center of this case. Dkt. 1-2 ¶ 2 (emphasis added). There is, therefore, at least a serious question whether Plaintiff's claims are sufficiently related to Defendants' conduct under federal officers to support removal.

Third, Defendants are reasonably likely to succeed on the merits of their appeal because the Third Circuit has never considered whether OCSLA confers federal jurisdiction over climate change-related cases, and both the plain statutory text and the Supreme Court's recent decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), indicate that but-for causation is not necessary to establish OCSLA jurisdiction. Plaintiff contends that *Ford* "has nothing to do with OCSLA jurisdiction or Plaintiff's claims in this case" and therefore "does not alter the well-established 'but for' test for OCSLA jurisdiction," Opp. at 18, but it is the *reasoning* in *Ford* that is critical. *Ford*'s holding that the "requirement of a 'connection' between a plaintiff's suit and a defendant's activities" does not necessarily require but-for causation in the personal jurisdiction context raises at least a reasonable probability that the Third Circuit will draw a similar conclusion regarding the "connection" required between Plaintiff's claims and Defendants' conduct on the OCS in the OCSLA jurisdiction context.

Fourth, there is a reasonable possibility that the Third Circuit will find federal enclave jurisdiction—another question of first impression. As Defendants explained in their motion, "even if Plaintiff's claims are based in part on alleged injuries that

did not occur on federal enclaves, that does not defeat federal jurisdiction so long as '*some of the events* alleged . . . occurred on a federal enclave.'" Mot. at 22 (quoting *Corley v. Long-Lewis, Inc.*, 688 F. Supp. 2d 1315, 1336 (N.D. Ala. 2010)). Plaintiff provides no response to this point. Instead, Plaintiff accuses Defendants of "cursorily 'rehash[ing] the same arguments considered and rejected by the [court] based on the same evidence.'" Opp. at 18 (quoting *In re Color Spot Holdings, Inc.*, 2018 WL 3996938, at *3 (D. Del. Aug. 21, 2018)). But unlike in *In re Color Spot Holdings*, it is not the case here that Defendants "make no effort to identify any specific errors that exist in the" remand order and "offer no further analysis, no suggestion that the [court] misapprehended the evidence proffered, and no critique or suggestion that the [court] employed an improper legal standard in evaluating and analyzing the facts." 2018 WL 3996938, at *3. On the contrary, Defendants have carefully detailed their specific objections to the remand order in their Motion.

Fifth, Defendants' appeal presents a serious question of first impression under *Grable*. Curiously, Plaintiff takes issue only with the relevance of *Pet Quarters, Inc. v. Depository Trust & Clearing Corp.*, 559 F.3d 772 (8th Cir. 2009), which "held that the *Grable* test was satisfied [where] the complaint 'presents a substantial federal question because it directly implicates actions taken by the [Securities and Exchange] Commission,'" *Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 772 F.3d 158, 165 n.4 (3d Cir. 2014). Plaintiff asserts that Defendants cannot rely

on this case because they "abandoned" it by not citing it in their remand opposition, Opp. at 19–20, but a party can waive only *arguments*—not *cases*, *cf. Yee v. City of Escondido*, 503 U.S. 519, 534–35 (1992)—and there is no disputing that Defendants have vigorously litigated the propriety of removal under *Grable*, *see* Dkt. 100 at 19–26. Plaintiff's argument that *Pet Quarters* has "expressly been limited by the Third Circuit," Opp. at 20, fares no better. While *Manning* held that the holding in *Pet Quarters* could not be expanded "to all private defendants anytime a plaintiff's claim was uncomfortably juxtaposed with federal regulation," 772 F.3d at 165 n.4, this is not a case of mere uncomfortable juxtaposition; rather, resolving Plaintiff's claims will necessarily require construing and balancing federal regulatory schemes.

Sixth, Defendants' appeal raises serious legal questions regarding whether a municipality's civil action to recover damages for resident consumers constitutes a class action removable under the Class Action Fairness Act. Plaintiff's response—simply pointing to the rejection of this ground in this Court's remand order—flouts the distinct legal standard that governs the instant motion. *See* Opp. at 20.

Standing alone, each of the foregoing grounds for removal presents serious legal questions of first impression in this Circuit that establish a reasonable chance of success on the merits and justify a stay pending appeal. The collective force of these grounds is demonstrated by the multiple courts that have stayed remand of sister climate change cases pending appeal, including other district courts that stayed

their own remand orders. This Court having already done so on a temporary basis, Defendants urge the Court to stay its remand of this case pending appeal.

II. Defendants Are Likely To Face Irreparable Harm Absent A Stay.

Plaintiff argues that a stay is also improper because, it claims, "Defendants point to only speculative and remote harms, none of which are more likely than not to occur" in the absence of a stay. Opp. at 21. But Plaintiff misconstrues the irreparable harms Defendants face. For example, Plaintiff brushes aside concerns "about 'conflicting court decisions' and comity issues" because 28 U.S.C. § 1450 "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.'" *Id.* at 24 (emphasis added). But some orders, such as compelled discovery of sensitive materials, cannot be so easily erased. *See* Mot. at 26–27. Similarly, Plaintiff asserts that "the possibility that a state court could decide an issue differently than a federal court" cannot support a stay because it "exists *every* time a case is remanded while an appeal of the remand order is pending," Opp. at 25, but Plaintiff cites *no* case for that assertion, *see, contra.*, *Estate of Joseph Maglioli v. Andover Subacute Rehab. Ctr.*, 2021 WL 2525714, at *7 n.3 (D.N.J. June 18, 2021) ("[T]he burden of simultaneous litigation and the potential for inconsistent outcomes constitutes irreparable harm.").

Plaintiff's assertion that the chance of a final judgment mooting Defendants'

appeal "is essentially nil," Opp. at 23, contrasts with *Minnesota*'s conclusion that, "[b]ecause *Baltimore* has significantly expanded the scope" of appellate review, "[t]here is . . . a heightened likelihood that the state court would decide the merits of the claims or address dispositive motions before Defendants' appeal is fully exhausted." 2021 WL 3711072, at *3. And because a final "state court judgment or order could render the appeal meaningless," Defendants face "severe and irreparable harm if no stay is issued." *Northrop Grumman*, 2016 WL 3346349, at *4; *see also Hicks v. Swanhart*, 2012 WL 6152901, at *3 (D.N.J. Dec. 10, 2012) ("The possibility of mootness, however, is a consideration which weighs in favor of a stay of the proceedings.").

In short, if credited, Plaintiff's arguments would all but preclude a finding of irreparable harm in *any* case remanded to state court. But courts *routinely* grant motions to stay remand orders pending appeal based on the likelihood that the defendant would otherwise suffer irreparable harm and, as detailed above, have done just that in similar climate change cases, especially in the wake of *Baltimore*. Indeed, in reversing the district court, the Second Circuit recently found a "sufficient showing" of irreparable harm based on arguments asserted by the defendant there that are nearly identical to those asserted by Defendants here.

III. The Public Interest Favors A Stay.

Plaintiff contends that the public interest weighs against a stay because "in the

midst of a series of extreme rainfall events . . . [t]he danger to Hoboken, and the need for the relief it seeks, is imminent." Opp. at 26. But Plaintiff concedes that any delay pending appeal pales in comparison to the long road ahead on the merits. *Id.* at 23. And it offers no reason to believe that the *marginal* delay occasioned by the requested stay would cause it any inconvenience beyond that attendant to the ordinary course of litigation.

Plaintiff's attempt to dismiss the benefits to *all* parties from a stay, including the conservation of both party and judicial resources, is absurd on its face—particularly given that Plaintiff is the government, and the wasted resources belong to the public. "Should the [Third] Circuit ultimately disagree with the Court's reasoning and find that remand was unwarranted, the public would be better served by concentrating resources and litigating these claims in the most appropriate forum." *Minnesota*, 2021 WL 3711072, at *4. Because Plaintiff's interests will not be prejudiced by a short pause in the proceedings, and because Plaintiff's preference to avoid "delay" cannot overcome the obvious efficiencies of awaiting the Third Circuit's ruling, the public interest weighs in favor of a stay.

CONCLUSION

The Court should grant the motion and stay execution of the remand order pending appeal or, in the alternative, grant a temporary stay to preserve Defendants' right to seek a stay from the Third Circuit.

Respectfully submitted,

Dated: October 12, 2021
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