IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

STATE OF VERMONT, *Plaintiff*, *v.* EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, SHELL OIL PRODUCTS COMPANY LLC, MOTIVA ENTERPRISES LLC, SUNOCO LP, SUNOCO, LLC, ETC SUNOCO HOLDINGS LLC, ENERGY TRANSFER (R&M), LLC, ENERGY TRANSFER LP, and CITGO PETROLEUM CORPORATION, *Defendants*.	Civil Action No. 2:21-cv-260-wks

DEFENDANTS' MOTION TO STAY PROCEEDINGS

This Court should stay these proceedings, including any briefing on Plaintiff's forthcoming motion to remand, while the Second Circuit is considering whether actions like this one belong in federal court.[1] Specifically, in *Connecticut v. Exxon Mobil Corp.*, No. 21-1446 (2d Cir. June 10, 2021), the Second Circuit will decide whether a substantially similar action—asserted by an Attorney General against one of the Defendants here—was properly removed to federal court on grounds overlapping with those asserted here. The defendant in *Connecticut* removed the action to federal court, and the district court granted a motion to remand. Because that case (like this one) was removed in part under 28 U.S.C. § 1442(a), the defendant was authorized to appeal, and given the Supreme Court's recent decision in *BP P.L.C. v. Mayor &*

[1] This motion is submitted subject to and without waiver of any defense, affirmative defense, or objection, including personal jurisdiction, insufficient process, or insufficient service of process.

City Council of Baltimore, 141 S. Ct. 1532 (2021), the Second Circuit is to review *every* ground for removal the defendant asserted in that case. The Second Circuit currently is reviewing the *Connecticut* remand order, and the Court's decision there will control, or at least inform, the result here. If the Second Circuit determines that federal jurisdiction exists in that case, there likely will be no need for the parties to brief (and this Court to decide) that issue here. And even if *Connecticut* does not completely resolve the question of federal jurisdiction here, it likely will narrow and focus the issues before this Court—by defining the legal standard applicable to at least one and as many as six of the grounds for removal raised here. A stay is thus warranted to promote judicial efficiency and avoid wasting the parties' time and resources in briefing a remand motion without the benefit of the Second Circuit's guidance.

A stay will not prejudice Plaintiff because the Second Circuit appears set to rule quickly in *Connecticut*. The Second Circuit recently issued an order expediting the case, and briefing is scheduled to be complete by November 15, 2021. There is thus a strong likelihood that the Second Circuit will rule before briefing and decision on Plaintiff's anticipated remand motion in this case is even complete, which would require a new round of briefing on the effect of the Second Circuit's decision. To avoid that waste of judicial and party resources, this Court should stay proceedings and order that briefing on any remand motion not commence until after the Second Circuit issues its mandate in *Connecticut*.

I. BACKGROUND

Plaintiff, the Vermont Attorney General, filed this action against a select group of out-of-state energy companies in Vermont Superior Court seeking to use state law to impose liability for harms allegedly attributable to global climate change. According to Plaintiff, "the use of [Defendants'] fossil fuel products . . . is and remains a leading cause of global

warming and, unless abated, will bring about grave consequences." Compl. ¶ 98, Ex. 68, Notice of Removal, Dkt. 1 (*originally filed* Sept. 14, 2021) ("Complaint"). The Complaint alleges that Defendants have "known for decades" that fossil fuels are "the primary source" of climate change, *id.* ¶ 2, but that Defendants "continued to ramp up fossil fuel production," *id.* ¶ 126, and "market their fossil fuel products," *id.* ¶ 2. Plaintiff challenges Defendants' promotion of fossil fuels because they allegedly "will cause catastrophic effects on the environment if unabated." *Id.* ¶ 118. And Plaintiff alleges that, absent certain alleged misrepresentations, Vermont consumers would have made "other energy-related choices" that would have lowered greenhouse gas emissions. *Id.* ¶ 4. Plaintiff thus functionally seeks to shift consumer demand from fossil fuels to alternative sources of energy in order to abate emissions and climate change. Although the Attorney General asserts two purported causes of action under the Vermont Consumer Protection Act, 9 V.S.A. § 2453, this action is a thinly veiled attempt to seek relief for harms associated with global climate change.

Defendants timely removed the case to this Court on six independent grounds. *See* Notice of Removal, Dkt. 1 (Oct. 22, 2021). *First*, the claims arise under federal law because federal common law governs disputes involving interstate air emissions and claims implicating important foreign affairs issues, as this case assuredly does; *second*, the case is removable under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 312 (2005), because Plaintiff's claims turn on several disputed and substantial questions of federal law; *third*, removal is proper under the federal officer removal statute, 28 U.S.C. § 1442, because the claims are connected or associated with fossil fuel production activities that Defendants have undertaken at federal direction for decades; *fourth*, the case arises out of, or in connection, with operations Defendants

conducted on the Outer Continental Shelf and thus removal is proper under the Outer Continental Shelf Lands Act ("OCSLA"); *fifth*, the claims arise out of Defendants' substantial fossil fuel production activities on federal enclaves; and *sixth*, the case is removable based on diversity jurisdiction because Vermont consumers are the real parties in interest and no Defendant is a citizen of Vermont.

Shortly after Defendants filed the Notice of Removal, the parties stipulated to defer briefing on motions to dismiss until after this Court has resolved Plaintiff's anticipated motion to remand, and the Court entered that stipulation. *See* Stip. & Order, Dkt. 17. Defendants approached Plaintiff about further stipulating to stay proceedings until the Second Circuit has issued a decision in *Connecticut v. Exxon Mobil Corp.*, No. 21-1446 (2d Cir. June 10, 2021), a parallel climate change-related action filed by another state Attorney General involving similar legal theories and removal grounds.

The *Connecticut* action is like this one in many respects, and the Second Circuit is poised to decide whether federal jurisdiction lies over claims alleging harms from global climate change, like those asserted here. In both cases, the Attorneys General for the respective States have sued energy companies, including Exxon Mobil Corporation ("ExxonMobil"), purportedly seeking to enforce state consumer protection statutes. The complaints in both actions allege that defendants' fossil fuel products have contributed to greenhouse gas emissions and thus global climate change and attendant physical harms. *See* Compl. ¶ 179 ("[T]he use of Defendants' fossil fuel products will contribute to global warming, sea level rise, disruptions to the hydrologic cycle, increased extreme precipitation, heatwaves, drought, and other consequences of the climate crisis."); *cf. Connecticut v. Exxon Mobil Corp.*, No. 3:20-cv-01555-JCH (D. Conn. Oct. 14, 2020), Compl. ¶ 17, Ex. 12,

Notice of Removal, Dkt. 1-2 (*originally filed* Sept. 14, 2020) ("*Connecticut* Compl.") ("ExxonMobil's campaign of deception has contributed to myriad negative consequences in Connecticut, including but not limited to sea level rise, flooding, drought, increases in extreme temperatures and severe storms, decreases in air quality, contamination of drinking water, increases in the spread of diseases, and severe economic consequences.").

Both complaints challenge the promotion and sale of fossil fuels precisely because their continued use allegedly will cause "catastrophic" effects on the environment. *See* Compl. ¶ 118 ("Defendants fail to disclose . . . that the development, production, refining, and use of their fossil fuel products . . . *increases* greenhouse gas emissions and is the leading cause of global warming; and that *the continued use of these products will cause catastrophic effects on the environment if unabated*.") (second emphasis added); *cf. Connecticut* Compl. ¶ 19 ("The success of ExxonMobil's campaign of deception has helped to ensure that the people of the State of Connecticut *will continue to experience the catastrophic consequences of climate change for the foreseeable future*.") (emphasis added). The complaints seek disgorgement, civil penalties, and declaratory and injunctive relief.

ExxonMobil removed the *Connecticut* action to the District of Connecticut on the same six grounds as Defendants assert here, including that federal law necessarily governs claims that functionally seek to abate emissions. The district court granted the plaintiff's motion to remand the *Connecticut* action, and ExxonMobil appealed. The district court denied ExxonMobil's motion for a stay of the remand order, but granted a temporary stay to allow it to seek a stay from the Second Circuit. On October 5, 2021, the Second Circuit granted a motion to stay the *Connecticut* remand order. *See* Mot. Order, *Connecticut v. Exxon Mobil Corp.*, No. 21-1446 (2d Cir. Oct. 5, 2021), Dkt. 81. The Second Circuit also

ordered the appeal to be heard on an expedited basis.

The very next day, the Southern District of New York, in yet another case similar to the instant action, and where a remand motion is pending, ordered the plaintiff to show cause why that case should not be stayed pending the Second Circuit's decision in *Connecticut*. *See* Order, *City of New York v. Exxon Mobil Corp.*, No. 1:21-CV-4807 (S.D.N.Y. Oct. 6, 2021), Dkt. 55. In response, the City of New York conceded that the Second Circuit "is poised to decide many of the grounds for removal presented by ExxonMobil in [the *Connecticut*] case and by Defendants in [the *City of New York*] case." Letter, *City of New York v. Exxon Mobil Corp.*, No. 1:21-cv-4807 (S.D.N.Y. Oct. 19, 2021), Dkt. 56. The plaintiff acknowledged that "the Court may prefer to wait for further guidance in *Connecticut* before proceeding with the City's pending motion to remand." *Id.* (citing *LaSala v. Needham & Co.*, 399 F. Supp. 2d 421, 427 & n.39 (S.D.N.Y. 2005)).

Despite the obvious relevance of the *Connecticut* appeal to the issues in this case, Plaintiff declined to stipulate to a stay and proposed instead that the briefing on its remand motion proceed simultaneously with proceedings in the Second Circuit. Because that course of action would waste the parties' and this Court's resources, Defendants now seek a stay.

II. LEGAL STANDARD

District courts have the inherent authority to stay proceedings before them. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). "It follows that the decision whether to issue a stay is 'firmly within a district court's discretion.'" *LaSala v. Needham & Co.*, 399 F. Supp. 2d 421, 427 (S.D.N.Y. 2005) (citation omitted). A court may, "in the interest of judicial economy, enter a stay pending the outcome of proceedings which bear upon the case, even if such proceedings are not necessarily controlling of the action that is to be

stayed." *Id.* Courts consider five factors when deciding whether to grant this type of stay:

> (1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest.

Clift v. City of Burlington, Vt., 2013 WL 12347196, at *1 (D. Vt. Apr. 8, 2013). Courts applying these factors will "stay a federal action in light of a concurrently pending federal action" where "the pending action would resolve a controlling point of law." *LaSala*, 399 F. Supp. 2d at 427.[2]

III. ARGUMENT

A. A Brief Stay Will Promote Judicial Economy And Serve The Public Interest.

A stay is warranted here because "the precise question at issue in [*Connecticut*]"—whether federal removal jurisdiction lies over claims alleging harms from global climate change—"bears directly on this litigation." *Goldstein*, 3 F. Supp. 2d at 438. Whether the Second Circuit affirms or reverses the *Connecticut* remand order, "resolution of that appeal should guide this Court in ruling on one of the key issues in this litigation." *Id.* at 439. Because the Second Circuit's resolution of *Connecticut* will be highly probative for determining the question of federal jurisdiction here, this Court "should stay further proceedings pending the resolution of" *Connecticut* by the Second Circuit. *Marshel*, 552 F.2d at 472.

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[2] *See also Friarton Estates Corp. v. City of New York*, 681 F.2d 150, 160 (2d Cir. 1982) (Friendly, J.) (discussing rationales); *Marshel v. AFW Fabric Corp.*, 552 F.2d 471, 472 (2d Cir. 1977); *Goldstein v. Time Warner New York City Cable Grp.*, 3 F. Supp. 2d 423, 438-39 (S.D.N.Y. 1998) (quoting *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863-864 (9th Cir. 1979)); *Credit Suisse Secs. (USA) LLC v. Laver*, 2019 WL 2325609, at *3 (S.D.N.Y. May 29, 2019); *Hoover v. HSBC Mortg. Corp. (USA)*, 2014 WL 12781322, at *2 (N.D.N.Y. July 9, 2014) ("This Court has authority to stay proceedings pending disposition of another case that could affect the outcome.").

The Complaint in *Connecticut* is similar in many respects to the one here, and the grounds for removal are nearly identical (although Defendants have provided additional legal arguments and factual support for removal in this case that are not presented in *Connecticut*). *Compare* Notice of Removal, Dkt. 1, *with Connecticut v. Exxon Mobil Corp.*, No. 3:20-cv-01555-JCH (D. Conn. Oct. 14, 2020), Notice of Removal, Dkt. 1. Accordingly, the Second Circuit's decision in *Connecticut* could prove dispositive—for example, a ruling by the Second Circuit that Connecticut's claims necessarily arise under federal law would obviate the need for the parties to brief remand and removal here, because such a decision would establish this Court's jurisdiction over Plaintiff's claims.[3] "In the meantime, it would be an inefficient use of time and resources of the Court and the parties to proceed in light of a pending Second Circuit decision that will significantly impact this litigation. As such, the third, fourth, and fifth factors weigh in favor of granting a stay." *Hoover*, 2014 WL 12781322, at *2; *see Friarton*, 681 F.2d at 160 ("stay was reasonable" where "the expense to the parties and the burden on the courts . . . would have been wasted" pending appellate decision).

Even if *Connecticut* does not fully resolve this Court's jurisdiction, the substantial overlap in legal issues provides sufficient grounds for a stay. Indeed, a court may, "in the

[3] Indeed, in yet another related case, the Second Circuit recently held that federal common law governs claims seeking redress for global climate change, regardless of the plaintiff's chosen claims, because climate change is a "uniquely international problem" that is "not well-suited to the application of state law." *City of New York v. Chevron Corp.*, 993 F.3d 81, 85-86 (2d Cir. 2021). Although the City of New York argued that its case concerned only the "production, promotion, and sale of fossil fuels," the Second Circuit explained that "artful pleading" could not "transform" the complaint into "anything other than a suit over global greenhouse gas emissions" governed by federal law. *Id.* at 91. *City of New York* did not directly address removal, but the Second Circuit's rationale in disposing of the case on the merits supports federal jurisdiction here. As in *Connecticut*, the Attorney General's climate-related claims, if at all, "must be brought under federal common law," and "those federal claims," *id.* at 95, therefore are removable, *see National Farmers Union Insurance Cos. v. Crow Tribe Indians*, 471 U.S. 845, 850 (1985).

interest of judicial economy, enter a stay pending the outcome of proceedings which bear upon the case, even if such proceedings are not necessarily controlling of the action that is to be stayed." *LaSala*, 399 F. Supp. 2d at 427; *see Goldstein*, 3 F. Supp. 2d at 437-38; *Credit Suisse*, 2019 WL 2325609, at *3 ("Where it is efficient for a trial court's docket and the fairest course for the parties, a stay may be proper even when the issues in the independent proceeding are not necessarily controlling of the action before the court.").

Given the obvious efficiencies of waiting for guidance from the Second Circuit, the public interest weighs in favor of a stay. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. E.P.A.*, 630 F. Supp. 2d 295, 306 (S.D.N.Y. 2009) ("By conserving judicial resources, a stay will serve not only the interest of the courts, but also the interests of the Parties, the nonparties, and the public in 'an orderly and efficient use of judicial resources.' "). This is particularly the case here, because the Plaintiff is the government and the public has an interest in conserving governmental resources. *See Minnesota v. Am. Petroleum Inst.*, 2021 WL 3711072, at *4 (D. Minn. Aug. 20, 2021) ("Should the Eighth 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."); *see also Nken v. Holder*, 556 U.S. 418, 435 (2009) (observing that the harm to the opposing party and public interest factors merge "when the Government is the opposing party").

B. Plaintiff Will Not Be Prejudiced By A Short Stay.

Because the appeal of the Connecticut remand order has been expedited, any stay here will be of limited duration. "This is not an open-ended stay. Rather it is expressly contingent upon the Second Circuit's resolution of the appeal in [*Connecticut*]," which will be fully briefed by November 15, 2021. *Hoover*, 2014 WL 12781322, at *2 (granting stay where the appeal was

"likely to take a year or less"); *see also Credit Suisse*, 2019 WL 2325609, at *2.[4]

A limited stay will not only promote judicial economy in the short term, it will also not affect the overall course of the proceedings in the long term. Indeed, this case is still in its very early stages. Plaintiff filed this action on September 14, 2021, and Defendants removed it one month later, on October 22, 2021. *See* Dkt. 1. The parties have not yet commenced discovery or filed any dispositive motions; in fact, Defendants have not even answered the Complaint. Where a case "is still in the very early stages of litigation, there is little prejudice to either side if the Court stays the case." *Am. Tech. Servs., Inc. v. Universal Travel Plan, Inc.*, 2005 WL 2218437, at *3 (E.D. Va. Aug. 8, 2005). On the contrary, "preventing further, and potentially futile, expenditures of time and resources by the parties and the Court weighs in favor of granting [a stay] at this stage of the litigation." *NAS Nalle Automation Sys., LLC v. DJS Sys., Inc.*, 2011 WL 13141594, at *1 (D.S.C. Nov. 23, 2011).

In any event, Plaintiff has demonstrated no urgency in pursuing this action. Although Plaintiff's claims target activities and public statements Defendants allegedly made *decades* ago—and similar climate change-related cases targeting such alleged activities and statements have been pending in state and federal courts since mid-2017, *see* Dkt. 1 at 5-6 nn.6-7—Plaintiff waited until late 2021 to file this action.

In short, a stay of limited duration will promote judicial economy and the public interest by avoiding simultaneous litigation on closely related issues in the district and appellate courts without affecting the overall course of the proceedings.

[4] Oral argument and a decision on the appeal in *Connecticut* could occur within months. *See* Table B-4, U.S. Courts of Appeals, Median Time Intervals in Months for Cases Terminated on the Merits (Sept. 30, 2020), https://www.uscourts.gov/sites/default/files/data_tables/jb_b4_0930.2020.pdf.

C. Defendants Face Serious Hardship In The Absence Of A Stay.

In contrast, Defendants face substantial hardship if proceedings in this case move forward without the benefit of the Second Circuit's decision in *Connecticut* because they will be required to litigate remand issues in this Court without the anticipated forthcoming guidance from the Second Circuit. That exercise may prove entirely unnecessary if the Second Circuit concludes that there is federal jurisdiction over actions alleging harms from global climate change. At a minimum, whatever remand briefs the parties file now would need to be revised once the Second Circuit issues its decision in *Connecticut*. There is no reason for the parties to engage in costly and time-consuming briefing—or for the Court to spend its time reviewing such briefing—given the near certainty that the Second Circuit will issue a precedential decision requiring the parties to re-brief the same issues. Thus, "the second factor also weighs in favor of granting the stay, since a denial of the stay would compel defendants to expend resources litigating this case while a superseding Second Circuit ruling in [*Connecticut*] could substantially limit the scope of this litigation." *Hoover*, 2014 WL 12781322, at *2.[5]

IV. CONCLUSION

The Court should stay proceedings in this case until the Second Circuit issues its mandate in *Connecticut*.

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[5] Moreover, if this Court grants Plaintiff's motion to remand *before* the Second Circuit rules, proceedings in Vermont state court might immediately resume. *See* 28 U.S.C. § 1447(c) ("A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case."). As a result, absent a stay, the parties may be forced to proceed simultaneously along at least two tracks: (1) an appeal to the Second Circuit of the remand order (which will be informed by the resolution of *Connecticut*) and (2) proceedings in state court. This poses a profound risk to Defendants because, if the Second Circuit ultimately sustains federal jurisdiction in *Connecticut* (and, consequently, this case), Defendants will have been denied their right to a federal forum for what could be a considerable period of time. *See Forty Six Hundred LLC v. Cadence Education, LLC*, 15 F.4th 70, 2021 WL 4472684, at *7 (1st Cir. Sept. 30, 2021) ("prematurely returning the case to the state court would

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Respectfully Submitted,

/s/ Ritchie E. Berger
Ritchie E. Berger

Ritchie E. Berger
DINSE P.C.
209 Battery Street, P.O. Box 988
Burlington, VT 05401
Tel.: (802) 864-5751
Fax: (802) 862-6409
Email: rberger@dinse.com

Theodore V. Wells, Jr. (*pro hac vice* forthcoming)
Daniel J. Toal (*pro hac vice* forthcoming)
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Tel.: (212) 373-3089
Fax: (212) 492-0089
Email: twells@paulweiss.com
Email: dtoal@paulweiss.com

Justin Anderson (*pro hac vice* forthcoming)
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, NW
Washington, DC 20006-1047
Tel.: (202) 223-7300
Fax: (212) 223-7420
Email: janderson@paulweiss.com

Counsel for Defendants Exxon Mobil Corp. & ExxonMobil Oil Corp.

defeat the very purpose of permitting an appeal and leave a defendant who prevails on appeal holding an empty bag"). During this time, the parties may well have undergone meaningful litigation in state court—including substantive motions practice and possibly even discovery under different legal standards—which this Court would then have to untangle. That amounts to a "rat's nest of comity and federalism issues" that may be obviated through the issuance of a stay. *Northrup Grumman Tech. Servs., Inc. v. DynCorp Int'l LLC*, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016).

/s/ Matthew B. Byrne
Matthew B. Byrne

Matthew B. Byrne
GRAVEL & SHEA
76 St. Paul Street, 7th Floor
Burlington, VT 05401
Tel.: (802) 658-0220
Fax: (802) 658-1456
Email: mbyrne@gravelshea.com

David C. Frederick (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Daniel S. Severson (*pro hac vice*)
Grace W. Knofczynski (*pro hac vice*)
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Tel.: (202) 326-7900
Fax: (202) 326-7999
Email: dfrederick@kellogghansen.com
Email: jwebster@kellogghansen.com
Email: dseverson@kellogghansen.com
Email: gknofczynski@kellogghansen.com

Counsel for Defendants Royal Dutch Shell plc, Shell Oil Company, and Shell Oil Products Company LLC

,

/s/ Tracie J. Renfroe
Tracie J. Renfroe

Tracie J. Renfroe (*pro hac vice* forthcoming)
Oliver P. Thoma (*pro hac vice* forthcoming)
KING & SPALDING LLP
1100 Louisiana Street, Suite 4100
Houston, TX 77002
Tel.: (713) 751-3200
Fax: (713) 751-3290
Email: trenfroe@kslaw.com
Email: othoma@kslaw.com

Counsel for Defendant Motiva Enterprises LLC

/s/ Timothy C. Doherty, Jr.
Timothy C. Doherty, Jr.

Timothy C. Doherty, Jr.
Walter E. Judge
DOWNS RACHLIN MARTIN PLLC
Courthouse Plaza
199 Main Street
Burlington, VT 05401
Tel.: (802) 863-2375
Fax: (802) 862-7512
Email: tdoherty@drm.com
Email: wjudge@drm.com

J. Scott Janoe (*pro hac vice* forthcoming)
BAKER BOTTS LLP
910 Louisiana Street
Houston, TX 77002
Tel.: (713) 229-1553
Fax: (713) 229-7953
Email: scott.janoe@bakerbotts.com

Megan H. Berge (*pro hac vice* forthcoming)
Sterling A. Marchand (*pro hac vice* forthcoming)
BAKER BOTTS LLP
700 K Street N.W.,
Washington, D.C. 20001
Tel.: (202) 639-7700
Fax: (202) 639-7890
Email: megan.berge@bakerbotts.com
Email: sterling.marchand@bakerbotts.com

Counsel for Defendants Sunoco LP, Sunoco, LLC, ETC Sunoco Holdings LLC, Energy Transfer (R&M), LLC, Energy Transfer LP

/s/ Pietro J. Lynn
Pietro J. Lynn

Pietro J. Lynn
LYNN, LYNN, BLACKMAN & MANITSKY, P.C.
76 St. Paul Street, Suite 400
Burlington, VT 05401
Tel.: (802) 860-1500
Fax: (802) 860-1580
Email: plynn@lynnlawvt.com

Robert E. Dunn (*pro hac vice* forthcoming)
EIMER STAHL LLP
99 S. Almaden Boulevard, Suite 642
San Jose, CA 95113
Tel.: (408) 889-1690
Fax: (312) 692-1718
Email: rdunn@eimerstahl.com

Nathan P. Eimer (*pro hac vice* forthcoming)
Pamela R. Hanebutt (*pro hac vice* forthcoming)
Lisa S. Meyer (*pro hac vice* forthcoming)
EIMER STAHL LLP
224 South Michigan Avenue, Suite 1100
Chicago, IL 60604
Tel.: (312) 660-7600
Fax: (312) 692-1718
Email: neimer@eimerstahl.com
Email: phanebutt@eimerstahl.com
Email: lmeyer@eimerstahl.com

Counsel for Defendant
CITGO Petroleum Corp.