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' REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS

Plaintiff's opposition makes clear why a stay is appropriate.[1] Plaintiff acknowledges (at 7 n.3) that the Vermont and Connecticut Attorneys General "both seek to enforce state consumer protection statutes and both allege that Defendants' fossil fuel products have contributed to greenhouse gas emissions, global climate change, and attendant physical harms." Plaintiff also does not deny that both cases involve overlapping removal grounds, or that the Second Circuit's decision in *Connecticut* will clarify the legal standard for one or more of those grounds and thus guide this Court's analysis of subject-matter jurisdiction. The *Connecticut* appeal therefore has great relevance to the issues in this case, and the Second Circuit's decision will bear heavily on resolution of the issues here regardless of whether the relief sought in each case is identical.

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

Consistent with Defendants' argument that a stay is appropriate here, Judge Caproni of the Southern District of New York recently stayed removal proceedings in a similar action brought by the City of New York against several of the Defendants in this action. *See City of New York v. Exxon Mobil Corp.*, No. 1:21-CV-4807 (S.D.N.Y. Nov. 12, 2021), Dkt. 58 ("*City of New York Stay Order*"). Judge Caproni's order staying further proceedings pending resolution of the *Connecticut* appeal is in line with the stay request here, including as to the type of relief sought: the City of New York, like Plaintiff, has not sought restitution. Plaintiff has not even attempted to argue why that order is not persuasive; the Opposition does not mention Judge Caproni's stay order, even though that order issued *before* Plaintiff filed its Opposition here.

Despite the obvious relevance of the *Connecticut* appeal to the issues in this case, Plaintiff suggests that it is "irrelevant" because the cases are not the "same." But that is not the standard. 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." *LaSala v. Needham & Co.*, 399 F. Supp. 2d 421, 427 (S.D.N.Y. 2005). And although Plaintiff does not seek restitution for climate-related injuries, Plaintiff does seek substantial monetary relief—disgorgement and statutory penalties—that functionally would penalize Defendants for their promotion and sale of fossil fuel products. Indeed, the goal of Plaintiff's action is to suppress fossil fuel sales and thereby abate greenhouse gas emissions precisely because, according to Plaintiff, "the 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." *See* Notice of Removal ¶ 17, Dkt. 1 (quoting Compl. ¶ 179, Dkt. 1-68).

There are no compelling reasons for this Court to plunge ahead with remand proceedings.

This Court has inherent authority to manage its docket, *see Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936); the Second Circuit has admonished that district courts "should stay further proceedings" in like circumstances, *Marshel v. AFW Fabric Corp.*, 552 F.2d 471, 472 (2d Cir. 1977); and another district court in a substantially similar action also stayed proceedings pending the Second Circuit's decision in *Connecticut*, *see City of New York Stay Order*. The requested stay is not open-ended, and briefing in the expedited *Connecticut* appeal is now complete. A brief pause will not prejudice Plaintiff but rather will preserve the Court's and the parties' resources. This Court should stay all further proceedings until after the Second Circuit issues its mandate in *Connecticut*.

I. ARGUMENT

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

A stay pending the Second Circuit's decision in *Connecticut* is warranted and prudent because "resolution of that appeal should guide this Court in ruling on one of the key issues in this litigation." *Goldstein v. Time Warner New York City Cable Grp.*, 3 F. Supp. 2d 423, 439 (S.D.N.Y. 1998). Plaintiff does not deny the substantial similarities between this case and the *Connecticut* action. And Plaintiff does not deny that the Second Circuit's review of the *Connecticut* remand order encompasses all grounds for removal, which overlap with the grounds for removal here. The Second Circuit's decision in *Connecticut* will therefore guide, if not control, the determination of federal jurisdiction here.

Plaintiff contends that the Second Circuit's decision in *Connecticut* will be "irrelevant" because the cases are not the "same." Opp. at 1, 8. But the legal standard for a stay in this circumstance does not require that the pending appeal involve an identical case. Rather, as numerous courts have found, a stay is appropriate when "a higher court is close to settling an

issue of law bearing on the action," "even if such proceedings are not necessarily controlling of the action that is to be stayed." *LaSala*, 399 F. Supp. 2d at 427 & n.39; *see Goldstein*, 3 F. Supp. 2d at 439 (stay appropriate because "D.C. Court of Appeals" decision "should guide this Court in ruling on one of the key issues in this litigation"); *Credit Suisse*, 2019 WL 2325609, at *3 (stay appropriate because "[a]lthough the Ninth Circuit's decision will not be binding on this Court . . . 'resolution of that appeal [may] guide this Court in ruling on . . . the key issues in this litigation'") (quoting *Goldstein*, 3 F. Supp. 2d at 439). Plaintiff failed to address or meaningfully distinguish any of these authorities.

Sidestepping the applicable standard, Plaintiff's only argument for proceeding with remand briefing immediately is that Vermont, unlike Connecticut, does not seek "restitution" for climate harms allegedly caused by greenhouse gas emissions. This attempt to distinguish the removal issues in this case from the issues pending before the Second Circuit in *Connecticut* fails for two reasons.

First, as Defendants explained in their Notice of Removal, Plaintiff functionally seeks to abate greenhouse gas emissions by shifting consumer demand away from fossil fuels due to their alleged impact on the environment. *See* Notice of Removal ¶¶ 10-23, Dkt. 1. Plaintiff expressly alleges that Defendants' conduct was "material[]" because "Vermont consumers would choose to buy and consume lower quantities of [Defendants'] fossil fuel products, or perhaps stop buying them altogether." Compl. ¶ 2; *see also id.* ¶ 118 (alleging that Defendants' failure to disclose that the "use of their fossil fuel products . . . *increases* greenhouse gas emissions and is a leading cause of global warming[] and that the continued use of these products will cause catastrophic effects on the environment if unabated" was "material to the purchasing decisions of Vermont consumers"). And Plaintiff's requested relief—disgorgement, civil penalties, and an

injunction requiring the "disclosure of the role of fossil fuels in climate change at every point of sale in the State of Vermont," *id.* at 68—demonstrates that Plaintiff aims to suppress fossil fuel sales and thereby abate greenhouse gas emissions. As ExxonMobil argued in its reply brief in the Second Circuit, "[w]hether in the form of restitution, disgorgement, compensatory damages, or punitive damages, financially penalizing energy companies for their promotion and production of fossil fuels is tantamount to regulating cross-border emissions." Reply Br. of Exxon Mobil Corp. at 7-8, *Connecticut v. Exxon Mobil Corp.*, No. 21-1446 (2d Cir. Nov. 15, 2021), Dkt. 116. The Second Circuit's consideration of that issue, and the propriety of removal under federal common law, is therefore relevant to this Court's jurisdiction.

Second, contrary to Plaintiff's suggestion, the merits of a stay do not depend on whether Plaintiff requested restitution. *See Credit Suisse Sec. (USA) LLC v. Laver*, 2019 WL 2325609, at *3 & n.4 (S.D.N.Y. May 29, 2019) (stay appropriate because "although the relief Credit Suisse seeks in this case differs from that sought in the California Action, both actions raise the same question"). Indeed, Judge Caproni ordered a stay pending the Second Circuit's decision in *Connecticut* in a substantially similar climate-change case even though the City of New York also does not seek restitution. As reflected by Judge Caproni's decision, it would be odd to suppose that any difference in *remedy* would justify withholding a stay when the *liability* theories of City of New York, Connecticut, and Plaintiff are functionally the same. Like Plaintiff here, the City of New York purportedly seeks to enforce a consumer protection statute and seeks an injunction and civil penalties. *See City of New York v. Exxon Mobil Corp.*, No. 1:21-cv-04807-VEC (S.D.N.Y. May 28, 2021), Compl. at 53-54 (Relief Sought), Ex. 5, Notice of Removal, Dkt. 1-5 (*originally filed* Apr. 22, 2021). And in that case the court entered a stay even though plaintiff's remand motion was fully briefed, whereas in this case the parties have not

started briefing Plaintiff's remand motion, which makes a stay all the more warranted here. *See Goldstein*, 3 F. Supp. 2d at 438 ("Considerations of judicial efficiency counsel in favor of staying the current proceedings" because "the parties here have not provided extensive briefing" on the questions presented.).

Ignoring the obvious efficiencies of a stay, Plaintiff cites *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020). But that out-of-circuit district court case predates *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), which held that lawsuits like this one challenging the promotion of fossil fuels because of their contribution to climate change are governed by federal law. *See id.* at 91, 95. As Defendants explained in their stay motion (at 8 n.3) and Notice of Removal (at Pt. I), and as ExxonMobil argued in the pending *Connecticut* appeal, the court's holding that such claims "must be brought under federal common law" supports federal removal jurisdiction in these climate change-related cases. 993 F.3d at 95. The Second Circuit's application of *City of New York* to the removal issues in *Connecticut* thus has clear relevance to this case.

In sum, the Second Circuit's forthcoming decision in *Connecticut* will be highly probative for determining the question of federal jurisdiction here. "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." *Hoover v. HSBC Mortg. Corp. (USA)*, 2014 WL 12781322, at *2 (N.D.N.Y. July 9, 2014).

B. Plaintiff Fails To Show Any Prejudice From A Stay

Plaintiff fails to identify any prejudice from a pause in proceedings. Indeed, Plaintiff does not even attempt to do so; its Opposition contains no section devoted to any prejudice. Plaintiff makes (at 11) unsubstantiated claims of "delay" but does not deny that a stay will

promote efficient consideration of any remand briefing in the short term by avoiding the need to address the Second Circuit's decision in additional submissions. Plaintiff also tacitly concedes that a stay will not affect the overall course of proceedings in the long term given the early stage of this case. *See LaSala*, 399 F. Supp. 2d at 428 (finding "the public interest, and the court's interest outweigh . . . nonspecific claims of prejudice resulting from a stay").

"This is not an open-ended stay. Rather it is expressly contingent upon the Second Circuit's resolution of the appeal in [*Connecticut*]." *Hoover*, 2014 WL 12781322, at *2. Briefing in the Second Circuit is now complete, and the Court of Appeals will proceed with its expedited consideration of the case. Plaintiff ignores the cases Defendants cited where courts in this Circuit properly concluded that a stay was appropriate in these circumstances. *See id.* (stay appropriate where "resolution of the appeal" was "likely to take a year or less"); *Credit Suisse*, 2019 WL 2325609, at *2 (stay appropriate where "the appeal in the Ninth Circuit is fully briefed").

Plaintiff also has not shown the urgency in prosecuting this action that it now demands of this Court in deciding its remand motion. Plaintiff targets activities and statements allegedly made *decades* ago. According to Plaintiff's Complaint, "[Defendants] have known for decades that the Earth's climate has been changing because of emissions of CO_2 and other greenhouse gases, and that the fossil fuels they sell are the primary source of those emissions." Compl. ¶ 2; *see also id.* ¶ 4 (alleging "lies and deception propagated for decades by Defendants" that "had material effects on consumers in Vermont, [including] on the choices that they were able to make about fossil fuel purchase and consumption"). Plaintiff concedes (at 7) that "numerous other cases brought against the oil companies," dating back to 2017, remain pending in state and

federal courts around the country.[2] *See* Notice of Removal at 5-6 nn.6-7, Dkt. 1. And Plaintiff does not deny that those cases target the same or similar alleged activities and statements about which it complains. *See* Mot. at 10. After waiting years to file its own Complaint, Plaintiff cannot complain now about a short pause pending the Second Circuit's forthcoming guidance.

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

In contrast, Defendants face substantial and unnecessary hardship if remand briefing proceeds absent the requested stay because they will be forced to brief the question of subject-matter jurisdiction under a legal framework that could materially change following the Second Circuit's decision in *Connecticut*. That exercise may prove unnecessary if the Second Circuit concludes that there is federal jurisdiction over actions alleging harms from global climate change. And, although Plaintiff disputes whether *Connecticut* will control jurisdiction here, the Second Circuit's decision will at least define the applicable legal standard for one—and up to six—removal grounds asserted here. *See Credit Suisse*, 2019 WL 2325609, at *3. Indeed, Plaintiff concedes (at 12) that additional briefing will be necessary after the Second Circuit's decision. There is thus no reason for the parties—or the Court—to expend time and resources litigating Plaintiff's motion to remand prematurely before the Second Circuit provides guidance on these issues.

Plaintiff tries to brush aside these concerns by arguing (at 1, 12) that the Court has already stayed all case deadlines except those related to Plaintiff's motion to remand, and that briefing the remand motion is merely an "ordinary" burden of litigation. But the point is that, absent a stay, Defendants will be prejudiced by being forced to brief Plaintiff's remand motion

[2] Indeed, Plaintiff joined a coalition of state attorneys general over five years ago in early 2016 vowing to combat climate change. *See* Notice of Removal, Dkt. 1, Exs. 1, 2.

before the Second Circuit's precedential decision that will at least focus and potentially narrow the scope of litigation.

Plaintiff misplaces reliance on *Clift v. City of Burlington, Vermont*, which involved a different posture and different circumstances that militated against a stay. 2013 WL 12347196 (D. Vt. Apr. 8, 2013). There, the plaintiffs sought a stay pending their interlocutory appeal of the Court's denial of their motion for a preliminary injunction. The Court denied a stay because "[p]laintiffs' as-applied claims will remain regardless of the outcome of their pending appeal"; discovery would therefore "hasten disposition of th[e] case." *Id*. at *1. Here, by contrast, the parties have already stipulated, and the Court has already ordered, to defer proceedings pending adjudication of subject-matter jurisdiction—the only question is whether to brief the remand motion before the Second Circuit issues its decision in a substantially similar case that will address some of the same removal grounds. In these circumstances, a stay will promote the efficient and inexpensive adjudication of the threshold jurisdictional question. *See* Fed. R. Civ. P. 1. Plaintiff fails even to address *Hoover*, which reflects that a stay is warranted here because "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.

II. CONCLUSION

The Second Circuit's decision in *Connecticut* will bear substantially on the removal grounds asserted by Defendants here, regardless of whether the relief sought in each case is exactly the same. Because briefing is now complete in the Second Circuit, and the Court of Appeals will proceed with its expedited consideration of the case, the requested stay here is limited and will not prejudice Plaintiff. Rather, the stay will avoid the need for an additional

round of briefing on the Second Circuit's decision, which will address one or more of the overlapping removal grounds asserted here. The Court should therefore stay proceedings in this case until the Second Circuit issues its mandate in *Connecticut*.

DATED: November 23, 2021

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*)
Daniel J. Toal (*pro hac vice*)
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*)
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

Patrick J. Conlon (*pro hac vice*)
EXXON MOBIL CORPORATION
22777 Springwoods Village Parkway
Spring, TX 77389
Tel.: (832) 624-6336
Email: patrick.j.conlon@exxonmobil.com

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

/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/ 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

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*)
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*)
Sterling A. Marchand (*pro hac vice*)
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.