

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

STATE OF DELAWARE, *ex rel.*
KATHLEEN JENNINGS, Attorney
General of the State of Delaware,

Plaintiff,

v.

BP AMERICA INC., BP P.L.C., CHEVRON
CORPORATION, CHEVRON U.S.A. INC.,
CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY,
PHILLIPS 66, PHILLIPS 66 COMPANY, EXXON
MOBIL CORPORATION, EXXONMOBIL OIL
CORPORATION, XTO ENERGY INC., HESS
CORPORATION, MARATHON OIL CORPORATION,
MARATHON OIL COMPANY, MARATHON
PETROLEUM CORPORATION, MARATHON
PETROLEUM COMPANY LP, SPEEDWAY LLC,
MURPHY OIL CORPORATION, MURPHY USA INC.,
ROYAL DUTCH SHELL PLC, SHELL OIL
COMPANY, CITGO PETROLEUM CORPORATION,
TOTAL S.A., TOTAL SPECIALTIES USA INC.,
OCCIDENTAL PETROLEUM CORPORATION,
DEVON ENERGY CORPORATION, APACHE
CORPORATION, CNX RESOURCES
CORPORATION, CONSOL ENERGY INC., OVINTIV,
INC., and AMERICAN PETROLEUM INSTITUTE,

Defendants.

C.A. No. 1:20-cv-01429-LPS

**PLAINTIFF'S OPPOSITION TO DEFENDANTS' EMERGENCY MOTION TO STAY
EXECUTION OF REMAND ORDER**

DELAWARE DEPARTMENT OF JUSTICE

Christian Douglas Wright (#3554)
Jameson A.L. Tweedie (#4927)
Ralph K. Durstein III (#0912)
820 N. French Street
Wilmington, DE 19801
Tel.: (302) 577-8600

SHER EDLING LLP

Victor M. Sher, *pro hac vice*
Matthew K. Edling, *pro hac vice*
100 Montgomery Street, Suite 1410
San Francisco, CA 94104
Tel.: (628) 231-2500

Attorneys for Plaintiff State of Delaware

January 14, 2022

I. INTRODUCTION

This Court remanded the State of Delaware’s case against Defendants to Delaware Superior Court, where it was originally filed and directed the Clerk of Court to transmit a certified copy of the order to the Superior Court, consistent with 28 U.S.C. § 1447(c). *See* Memorandum Opinion & Order, Docs. 120 & 121 (Jan. 5, 2022). The Court should permit the remand order to go into effect without further delay and deny Defendants’ Emergency Motion for a Temporary Stay of Execution, Doc. 122 (Jan. 5, 2022) (“Em. Mot.”), so this litigation might proceed in the Superior Court, as contemplated Order. Defendants never raised the possibility of a stay during briefing or argument on the State’s motion to remand or in the time the motion was pending, despite their “batting average of .000” opposing remand in similar cases around the country. *City & Cty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW-RT, 2021 WL 839439, at *2 (D. Haw. Mar. 5, 2021) (*Honolulu Stay Denial*). This reason alone warrants denying emergency relief now.

Defendants insist they have weighty arguments for reversal, but as the Court thoroughly recounted in its opinion granting remand, none of those arguments have persuaded *any* court to date. So, too, courts at every level of the federal judiciary have denied stays pending appeals in similar cases against many of the Defendants here.¹ Defendants may prefer to remain in federal

¹ Stays pending appeal from remand orders in similar cases brought by public entities concerning climate change have been denied by district courts in the Districts of Colorado, Hawaii, Maryland, and Rhode Island, the circuit courts of appeals for the First, Fourth, Ninth, and Tenth Circuits, and the United States Supreme Court. *See BP P.L.C. v. Mayor and City Council of Baltimore*, 140 S.Ct. 449 (Oct. 22, 2019); *City & Cty. of Honolulu v. Sunoco LP et al.*, No. 21-15313, Doc. 144 (9th Cir. Mar. 13, 2021); *Bd. of Cty. Commissioners of Boulder County v. Suncor Energy, Inc.*, No. 19-1330, Doc. No. 10687694 (10th Cir. Oct. 17, 2019); *Mayor and City Council of Baltimore v. BP P.L.C.*, No. 19-1644, Doc No. 116 (4th Cir. Oct. 1, 2019); *State of Rhode Island v. Shell Oil Products Company, LLC*, No. 19-1818, Doc. No. 00117499123 (1st Cir. Oct. 7, 2019); *City & Cty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW-RT,

court, but “as 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,” and they will not suffer irreparable harm from remand. *See* 15A Wright & Miller, FED. PRAC. & P. § 3914.11 (2d ed.). The State, meanwhile, would suffer substantial prejudice from a stay pending appeal: additional months and possibly years would pass before any court probes the merits, hindering the interests of the government and the public alike. None of the relevant factors support a stay, and the Court should not countenance open-ended delay while the Third Circuit resolves the appeal.

II. ARGUMENT

A stay pending appeal “is not a matter of right,” but “is instead ‘an exercise of judicial discretion,’” with the “party requesting a stay bear[ing] the burden of showing that the circumstances justify an exercise of that discretion.” *Nken v. Holder*, 556 U.S. 418, 423, 433–34 (2009). The moving party bears a “heavy burden” in seeking this “extraordinary relief.” *Winston–Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971). The Court must consider “four factors: ‘(1) whether the stay applicant has made a strong showing that he 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*, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). “The first two factors of the traditional standard are the most critical.” *Id.*

2021 WL 839439, at *1 (D. Haw. Mar. 5, 2021); *Mayor & City Council of Baltimore v. BP P.L.C.*, No. CV-ELH-18-2357, 2019 WL 3464667 (D. Md. July 31, 2019); *State of Rhode Island v. Shell Oil Prods. Co., LLC*, No. 1:18-cv-395-WES-LDA (D.R.I. Sept. 10, 2019) (“TEXT ORDER granting Motion to Remand to State Court; denying Motion to Stay: The Court DENIES Defendants’ Motion to Stay Remand Order Pending Appeal.”); *Bd. of Cty. Commissioners of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 423 F. Supp. 3d 1066 (D. Colo. 2019).

The Third Circuit “ha[s] viewed favorably what is often referred to as the ‘sliding-scale’ approach” to balancing the *Nken* factors, under which “the necessary ‘level’ or ‘degree’ of possibility of success will vary according to the court’s assessment of the other stay factors.” *In re Revel AC, Inc.*, 802 F.3d 558, 569 (3d Cir. 2015) (cleaned up). “Stated another way, the more likely the [movant] is to win [on appeal], the less heavily need the balance of harms weigh in its favor; the less likely it is to win, the more need it weigh in its favor.” *Id.* (cleaned up).

At best, Defendants’ likelihood of success on the merits is negligible, and the remaining factors do not support a stay. To begin, this case is one of at least fourteen climate-related cases brought by state or local governments that defendants have removed from state court since 2018²—but across “all the cases involving subject matter similar to that here,” the removing defendants have accumulated “[a] batting average of .000,” which “does not suggest a substantial case exists.” *Honolulu Stay Denial* *2. Defendants’ contention that a stay should issue “so that the Third Circuit can address these issues of first impression” presented in their appeal, Em. Mot. at 4, does not demonstrate a substantial likelihood of success. Judge Vazquez acknowledged as much in the *Hoboken* matter, observing that “[w]hile Defendants’ appeal presents issues of first impression for the Third Circuit, these issues have been addressed by numerous courts throughout the country,” and “Defendants’ arguments have largely been rejected across the board.” Order at 3, *City of Hoboken v. Exxon Mobil Corp., et al.*, No. 20-14243, Dkt. 127 (D.N.J. Sept. 9, 2021). Judge Vazquez held that because “every court that has addressed Defendants’ arguments has rejected them,” the defendants there “ha[d] not made a strong showing that they are likely to succeed on the merits,” and therefore “fail[ed] to establish that a stay pending

² This includes cases have been consolidated in the district and circuit courts for purposes of resolving the motions to remand; the actual number of public plaintiffs with pending complaints is at least twenty.

outcome of their appeal is warranted in this matter, based on the *Nken* factors.” *Id.* at 4. *See also* Order Denying Emergency Motion to Stay, *City & Cty. of Honolulu v. Sunoco LP et al.*, No. 21-15313, Doc. 144 (9th Cir. Mar. 13, 2021) (“We also conclude that Appellants have not made a sufficient showing on the merits considering our recent opinions rejecting the very same jurisdictional arguments advanced in the motions to stay.”). Many of the Defendants here are themselves parties to those other cases, including *Hoboken*, and know well that their arguments for removal jurisdiction have been repeatedly rejected for the same reasons this Court rejected them.

Nor will Defendants suffer irreparable harm. In like circumstances, Defendants have argued that proceeding in state court would injure them because procedural and discovery rules are different in state court than federal court and might comparatively disfavor them; because litigation might be expensive; and because they might have to pay for simultaneous litigation in state and federal court. But it is firmly established that “[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.” *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). The Ninth Circuit reached exactly that result when it denied a stay pending appeal in the *Honolulu* matter, holding that “increased litigation burdens and possible inefficiencies if this court later finds the cases were properly removed . . . do not rise to the level of irreparable harm.” *Honolulu* Order Denying Emergency Motion to Stay at 2. As for efficiency, it is just as likely, if not more so, that proceeding in Delaware Superior Court would expedite the just resolution of the case, as compared to unnecessarily delaying consideration of the merits through Defendants’ jurisdictional appeal. The District of Maryland court in *Baltimore* denied a stay in part for that reason: “even if the remand is vacated on appeal, the interim proceedings in state court may well advance the resolution of the case in federal

court. After all, the parties will have to proceed with the filing of responsive pleadings or preliminary motions, regardless of the forum.” *Mayor & City Council of Baltimore v. BP P.L.C.*, No. CV ELH-18-2357, 2019 WL 3464667, at *6 (D. Md. July 31, 2019) (denying stay pending appeal).³

While Defendants also now argue that a stay will promote judicial efficiency and conserve resources, they failed even to indicate their intention to seek a stay if remand was granted and have instead sought emergency relief after the fact. This Court noted in its memorandum opinion granting remand that “Defendants did not formally request a stay,” but “suggested that the Court delay its decision” on remand until the Supreme Court ruled on the appellate jurisdiction question before it in the *Baltimore* case, and resolved petition for certiorari that has since been denied in *Chevron Corp. v. City of Oakland*, 141 S. Ct. 2776 (2021). *See* Mem. Op. at 1 n.1. Defendants never moved to stay the motion and never requested that the order on the motion be stayed once it issued, which it now has. *See also id.* (“No party has suggested there is any reason for further delay in resolving Plaintiff’s motion.”). Judge Vazquez made the same observation in the *Hoboken* case:

“As discussed at length in the remand Opinion, the weight of authority from the other climate change cases demonstrates a lack of subject-matter jurisdiction. As a result, Defendants clearly should have requested in their opposition papers that the Court stay any resulting order if the Court were to disagree with their arguments. Instead, Defendants needlessly turned a straightforward request into an emergency. While Defendants argue that issuing the stay is necessary to preserve resources, their delay in seeking the stay unnecessarily wasted the Court’s time and resources.”

³ It is also well-established that “the Delaware Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure,” such that discovery and motion practice will likely be largely the same between state and federal court. *See Plummer v. Sherman*, 861 A.2d 1238, 1242 (Del. 2004) (analogizing to federal case law in interpretation of Del. Super. Ct. Civ. R. 12); *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 261 (Del. 1995) (analogizing to federal case law in interpretation of Del. Super. Ct. Civ. R. 26).

Hoboken Order on Emergency Stay Request, at 2 n.1. To the extent there is an emergency, it is of Defendants’ own making. Their assertion now that a stay is in the best interest of the court system is, at best, speculative and self-serving.

In any event, the potential harm to the State and the public interest from a lengthy stay outweigh any inconveniences Defendants assert they may face if the remand order goes into effect. The harm-to-the-non-movant and public-interest factors “merge” when a government would be subject to the requested stay, *Nken*, 556 U.S. 435, and the additional potential for years of delay would substantially prejudice the State’s case here. Discovery materials would become staler, and witnesses’ memories would fade. The State is entitled to prosecute its case and should be permitted to do so. *Cf. BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1547 (2021) (Sotomayor, J., dissenting) (Because of lengthy pendency of appeal from remand order, “Baltimore, which has already waited nearly three years to begin litigation on the merits, is consigned to waiting once more.”).

The courts’ decisions to grant stays pending appeal in *Hoboken* and *Minnesota* for docket management reasons should not color this Court’s thinking. Both of those courts granted stays pending appeal primarily because, in their estimation, “[w]ithout a stay, the parties would be required to concurrently litigate this matter in both federal and state court,” which might “needlessly expend resources” if their remand orders were ultimately reversed. *See Hoboken Stay Order* at 5; *Minnesota Stay Order* at 10, 11 (noting that the Supreme Court’s decision in *Baltimore* “significantly expanded the scope of the Eighth Circuit’s review of the remand order,” so “it is possible that the appellate proceedings will be prolonged and may exceed typical timelines for an appeal of this nature,” and that “the public also has an interest in conserving resources by avoiding unnecessary or duplicative litigation”). But whether the parties and the

judiciary are at risk of wasting resources in *state* court is a matter for the state court to resolve. The Delaware judiciary is competent to determine its own allocation of resources, after this Court effectuates remand, and Defendants are free to seek a stay in Superior Court once the case returns there. There is no risk that the federal judiciary will waste resources by letting this case move out of federal court, to which it should never have been removed.

III. CONCLUSION

For the foregoing reasons, the State requests that this Court deny Defendants' Emergency Motion to Stay Execution of Remand order and allow this vital litigation to proceed in the Superior Court, consistent with this Court's Order of Remand. The movants have not made, and cannot make, a strong showing of likelihood of success on the merits, and have not shown that they would sustain irreparable harm absent a stay. In contrast, the State and the public interest will be harmed by the issuance of a stay.

If the Court is inclined to grant a temporary stay to entertain a formal motion to stay remand pending appeal, the State requests that the motion schedule be expedited. Specifically, the State asks that the Court require Defendants to file their full motion no later than Tuesday, January 18, 2022, with the State's opposition due no later than Tuesday, January 25, 2022, and Defendants' reply, if any, due no later than Friday, January 28, 2022.

Respectfully submitted,

Dated: January 14, 2022

/s/ Christian Douglas Wright
Christian Douglas Wright (#3554)
Director of Impact Litigation
Jameson A.L. Tweedie (#4927)
Special Assistant Deputy Attorney General
Ralph K. Durstein III (#0912)
Deputy Attorney General
DELAWARE DEPARTMENT OF JUSTICE
820 N. French Street

Wilmington, DE 19801
Tel. (302) 577-8600
christian.wright@delaware.gov
jameson.tweedie@delaware.gov
ralph.durstein@delaware.gov

Victor M. Sher, pro hac vice
Matthew K. Edling, pro hac vice
Adam M. Shapiro, pro hac vice
SHER EDLING LLP
100 Montgomery Street, Suite 1410
San Francisco, CA 94104
Tel. (628) 231-2500
vic@sheredling.com
matt@sheredling.com
adam@sheredling.com

Attorneys for Plaintiff *State of Delaware*