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' JOINT MOTION TO STAY EXECUTION OF REMAND ORDER PENDING APPEAL

DELAWARE DEPARTMENT OF JUSTICE

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January 25, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

The State of Delaware filed its complaint in this case in the Delaware Superior Court on September 10, 2020, more than sixteen months ago. Since then, no responsive pleadings or preliminary dispositive motions have been filed or adjudicated, no discovery has been propounded, no party has made its initial disclosures, and the case has made virtually no progress. Defendants' delay tactics worked as intended, until this Court remanded the State's case to Delaware Superior Court 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 Delaware v. BP Am. Inc.*, No. CV 20-1429-LPS, 2022 WL 58484 (D. Del. Jan. 5, 2022) ("Remand Order"). Defendants might prefer to remain in the federal system, but this Court determined it lacks subject-matter jurisdiction, and "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." 15A Wright & Miller, FED. PRAC. & P. § 3914.11 (2d ed.). The Court should deny Defendants' meritless Joint Motion to Stay Execution of Remand Order Pending Appeal, Doc. 127 (Jan. 14, 2022) ("Stay Mot."), and allow the case to proceed in Superior Court, where it belongs.

Defendants' Motion does not satisfy any of the factors that could warrant a stay. Their likelihood of success on the merits is negligible; defendants have made identical arguments in opposition to motions to remand in similar cases alleging climate-change related injuries in ten different district courts,[1] and have accumulated a "batting average of .000." *See City & Cty. of*

[1] State and local government plaintiffs have successfully moved to remand similar cases to state court in California, Colorado, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, New Jersey, and Rhode Island. Defendants have appealed each order, except in Massachusetts. *See City of Hoboken v. Exxon Mobil Corp.*, No. 20-CV-14243, 2021 WL 4077541 (D.N.J. Sept. 8, 2021); *Connecticut v. Exxon Mobil Corp.*, No. 3:20-CV-1555 (JCH), 2021 WL 2389739 (D. Conn. June 2, 2021); *Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656 (D. Minn. Mar. 31, 2021); *City & Cty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-

Honolulu v. Sunoco LP, No. 20-CV-00163-DKW-RT, 2021 WL 839439, at *2 n.3 (D. Haw. Mar. 5, 2021) ("*Honolulu* Stay Denial"). Defendants also cannot show they are likely to suffer irreparable harm, both because the cost of litigation is *per se* not irreparable harm and because it is unlikely in the extreme that the Superior Court will proceed through extensive discovery and motion practice to a final judgment while their appeal is pending. Without either showing, Defendants are not entitled to a stay. Even if they could overcome those hurdles, the interests of the State and the public outweigh any of Defendants' purported hardships. The Court should not sanction further tactical delay unsupported by the law.

II. ARGUMENT

A. Legal Standards: Third Circuit Courts Balance the Traditional Stay Factors on a "Sliding Scale."

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 (citation omitted). "The first two factors of the traditional standard are the most critical." *Id.*

DKW-RT, 2021 WL 531237 (D. Haw. Feb. 12, 2021); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020); *Bd. of Cty. Commissioners of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019); *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018).

The Third Circuit provided clear guidance on applying the *Nken* factors in *In re Revel AC, Inc.*, 802 F.3d 558 (3d Cir. 2015). The court there noted that it "ha[s] viewed favorably what is often referred to as the 'sliding-scale' approach," under which "the necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other stay factors." *Id.* at 569 (cleaned up). "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). "Keeping in mind that the first two factors are the most critical," however, "if the chance of success on the merits is only better than negligible and the possibility of irreparable injury is low, a stay movant's request fails" without need to consider the other factors. *Id.* at 570. "[T]hus the analysis should proceed as follows":

> Did the applicant make a sufficient showing that (a) it can win on the merits (significantly better than negligible but not greater than 50%) *and* (b) will suffer irreparable harm absent a stay? If it has, we balance the relative harms considering all four factors using a 'sliding scale' approach. However, if the movant does not make the requisite showings on either of these first two factors, the inquiry into the balance of harms and the public interest is unnecessary, and the stay should be denied without further analysis.

Id. at 571 (cleaned up).

B. Defendants' Likelihood of Success on Appeal Is Negligible at Best.

Defendants have not made a strong showing they will prevail on appeal because, bluntly, identical arguments in factually analogous cases have never prevailed anywhere. As this Court observed, "the overwhelming weight of authority in other similar cases against fossil fuel companies supports" remand on each of Defendants' removal theories. Remand Order, 2022 WL 58484, at *15. "Defendants have achieved one, fleeting success on the issue of removal," which "has [since] been overturned" by *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020). *See Honolulu* Stay Denial, 2021 WL 839439, at *2 n.3. Defendants' contention that their "appeal

presents a host of novel, and potentially complex, issues" related to removal jurisdiction, Stay Mot. 9, does not demonstrate a reasonable chance that the Third Circuit will reverse.

The first *Nken* factor asks "whether the stay applicant has made a strong showing that he is likely to succeed on the merits." *Nken*, 556 U.S. at 426. "Just how strong of a merits case must a stay applicant show? . . . [A] sufficient degree of success for a strong showing exists if there is 'a reasonable chance, or probability, of winning.'" *In re Revel AC, Inc.*, 802 F.3d at 568 (quoting *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (en banc)). "Thus, while it is not enough that the chance of success on the merits be 'better than negligible,' the likelihood of winning on appeal need not be 'more likely than not.'" *Id.* (cleaned up).[2]

None of the issues Defendants highlight in their Stay Motion have a reasonable chance of success. First, every court that has considered Defendants' contention that claims like Delaware's "necessarily 'arise under' federal common law," *see* Stay Mot. 9, has rejected it. Most relevant to Defendants' likelihood of success on appeal here, the Ninth Circuit held in *Oakland* that Defendants' position is incorrect in both form and substance. That court held that "it is not clear that the claim requires an interpretation or application of federal law at all, because the Supreme Court has not yet determined that there is a federal common law of public nuisance relating to

[2] Defendants' citation to *Moutevelis v. United States*, 564 F. Supp. 1554 (M.D. Pa. 1983), *aff'd*, 727 F.2d 313 (3d Cir. 1984), for the proposition that a stay is especially warranted when the appeal presents questions of first impression, is badly misleading. The petitioner there had sought to quash an investigative summons served by the I.R.S. on the petitioner's bank for certain of the petitioner's banking records. *Id.* at 1555. The court first denied the motion to quash in part, but on reconsideration denied the motion in its entirety and granted the United States' separate motion for summary enforcement of the summons. *See id.* at 1555–56. The petitioner sought a stay pending appeal, *which the United States did not oppose*, and the court granted the stay in part because disclosure of the petitioner's bank records pending appeal would entirely moot the protection from disclosure the petitioner sought, causing irreparable injury. *See id.* at 1556. The court separately observed that its opinion "may well involve issues of first impression in this Circuit," but did not explain which factor this statement supported. *See id.* Finally, the Third Circuit's affirmance there went to the merits of the motion to quash, not the district court's stay analysis. *See generally* 727 F.2d 313. The *Moutevelis* case has no value here.

interstate pollution," and that "[e]ven assuming that the [plaintiff] Cities' allegations could give rise to a cognizable claim for public nuisance under federal common law, . . . the district court did not have jurisdiction under § 1331 because the state-law claim for public nuisance fails to raise a substantial federal question" pursuant to *Grable*. *City of Oakland v. BP PLC*, 969 F.3d 895, 906 (9th Cir. 2020). Like this Court, the Ninth Circuit declined to hold that "a complaint expressly asserting state-law claims that happen to implicate federal common law can create an additional exception to the well-pleaded complaint rule and confer removal jurisdiction on federal courts." Remand Order, 2022 WL 58484, at *5. When the defendants unsuccessfully raised the same argument the *Honolulu* case, the Ninth Circuit denied a stay of remand pending appeal in part because the defendants had "not made a sufficient showing on the merits considering [the court's] recent opinions rejecting the very same jurisdictional arguments advanced in the motions to stay." 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). Defendants have presented no basis for the Court to conclude that they will fare better before the Third Circuit than they have everywhere else.

Second, Defendants' arguments that they are entitled to removal because they "produce oil and gas from reserves owned by the government from the Outer Continental Shelf ["OCS"] at the direction, and under close supervision, of federal officials," Stay Mot. 14, do not have a strong likelihood of success. The Court correctly noted in the Remand Order that "[t]he First, Fourth, Ninth, and Tenth Circuits have examined the same OCS leases at issue here," and each held they do not confer jurisdiction, for the same reasons this Court did. *See* Remand Order, 2022 WL 58484, at *13 n. 24; *see also Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 464–68 (4th Cir. 2020); *Bd. of Cty. Commissioners of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792, 820–27 (10th Cir. 2020); *Cty. of San Mateo v. Chevron Corp.*, 960 F.3d 586,

602–03 (9th Cir. 2020); *Rhode Island v. Shell Oil Prod. Co.*, 979 F.3d 50, 59–60 (1st Cir. 2020). Defendants offer no reason to think the Third Circuit will reach a different result.

The new cases Defendants rely on, *see* Stay Mot. 13–14, are not from the Third Circuit, and do not support a stay in any event. In *Cty. Bd. of Arlington Cty., Virginia v. Express Scripts Pharmacy, Inc.*, 996 F.3d 243, 252–53 (4th Cir. 2021), the Fourth Circuit found the removing defendants acted under the federal government because they "largely performed the day-to-day administration" of a mail order pharmacy the Department of Defense is required by statute to maintain for veterans, "pursuant to a lengthy and detailed" statement of work. The defendants thus "were carrying out the duties of DOD" and "were at all times, subject to the federal government's guidance and control." *Id.* at 253. The plaintiff's claims were directly related to that relationship, moreover, because they were "predicated on [the defendants'] alleged failure to implement a specific formulary, specific opioid utilization limits, or restrictions different from those the DOD mandated." *Id.* at 256–57. The facts here are different, as the Fourth Circuit itself held in *Baltimore*: Defendants were not "'acting under' the Secretary of the Interior in extracting, producing, and selling fossil fuel products on the OCS"; even if they had been, "[a]ny connection between fossil fuel production on the OCS and the conduct alleged in the Complaint [wa]s simply too remote" to support removal. 952 F.3d at 455, 456. Those holdings remain correct, and *Arlington* does not undermine the *Baltimore* decision from same court just a year earlier.

The Eighth Circuit's recent decision in *Buljic v. Tyson Foods, Inc.*, No. 21-1010, 2021 WL 6143549 (8th Cir. Dec. 30, 2021), provides Defendants even less support. The court there *affirmed* an order granting remand to state court, finding that Tyson Foods was not acting under the federal government by keeping its meat processing operations open during the 2020 COVID pandemic, notwithstanding statements by President Trump and others that "the food and

retail sectors were 'working hand-in-hand with the federal government . . . to ensure food and essentials are constantly available.'" *Id.*, at *1. The Eighth Circuit held that "while the federal government may have an interest in ensuring a stable food supply, it is not typically the 'duty' or 'task' of the federal government to process meat for commercial consumption" as required for a private company to invoke federal officer removal. *Id.*, at *5. Defendants insist that performing a task of the federal government is "exactly what Defendants have done here," because *inter alia* they produced fuel during World War II, sell specialty fuels to the military, and have supplied oil for the Strategic Petroleum Reserve. *See* Stay Mot. 14. But this Court rejected those additional arguments as unrelated to the State's claims: "Defendants are simply wrong in their insistence that all of their production activities, including those pre-dating the misconduct alleged by Plaintiff, are relevant to satisfying the 'for, or relating to' requirement," "including the operation of petroleum reserves and the sales of 'specialized petroleum products' to the U.S. military." Remand Order, 2022 WL 58484, at *10. Multiple other district courts have rejected these same arguments and Defendants' "new" evidence in support of them. *See City & Cty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW-RT, 2021 WL 531237, at *5 (D. Haw. Feb. 12, 2021) (granting remand, holding that defendants' new arguments "merely rearranged the deckchairs"); *Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656, at *9 (D. Minn. Mar. 31, 2021).

Third, Defendants' arguments under the Outer Continental Shelf Lands Act have virtually no chance of success on appeal. This Court's holding that Defendants "must show a 'but for' connection between 'the cause of action and the OCS operation'" to obtain jurisdiction is consistent with all the available case law interpreting OCSLA, and Defendants offer no new or different authority to rebut the courts' uniform application of the statute. *See* Remand Order,

2022 WL 58484, at *13–14; Stay Mot. 15. The Supreme Court's decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), is entirely irrelevant. That case did not interpret any statutory language, let alone OCSLA. The Court there clarified its own constitutional personal jurisdiction precedents, specifically its statement that there must be "a 'connection' between a plaintiff's suit and a defendant's activities" in the forum state before a court can exercise personal jurisdiction over the defendant. *Id.* at 1026 (quoting *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cty.*, 137 S. Ct. 1773, 1780 (2017)). The opinion says nothing about how *Congress* intended to shape the scope of *subject-matter jurisdiction* under OCSLA through the language that "the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with" operations on the OCS. *See* 43 U.S.C. § 1349(b)(1). Defendants' likelihood of success here is, again, negligible.

Finally, Defendants' bare contention that "there is a reasonable probability that the Third Circuit will sustain *Grable* jurisdiction" is baseless. Stay Mot. 15. Every court that has considered Defendants' *Grable* arguments has rejected them, including the Ninth Circuit. *See Oakland*, 969 F.3d at 906–07. The most Defendants say is that "this is a question of first impression because the Third Circuit has never considered whether climate change-related actions are removable under *Grable*." Stay Mot. 15. But the Third Circuit has produced cases interpreting *Grable* in multiple contexts, and Defendants cite no cases for their position because there are none. Defendants have not provided any basis to conclude there is a strong likelihood the Third Circuit will diverge from the unanimous, on point persuasive authority resolving identical jurisdictional issues.

C. Defendants Face No Risk of Irreparable Harm Absent a Stay.

Defendants' arguments that they will be irreparably harmed absent a stay are even weaker than their unsupported assertions of success on the merits. Defendants present no evidence they

will be injured in the absence of a stay, and the speculative injuries they assert are neither likely nor irreparable. Their arguments that "a final state court judgment or order" might issue while their appeal is pending, *see* Stay Mot. 15, is highly speculative and ignores the typical pace of matters of the scope and with the number of defendants here. The Defendants' further suggestion that, in the event of reversal, this Court might have to "wrestle with the effects of any state court rulings" issued in the interim, *id.* at 18, does not describe irreparable harm. And their assertion that they might have to expend "substantial non-monetary company resources (including significant time and effort by company personnel)" and might face "burden and expense" litigating in state court accurately portrays the task of litigating in any court. There is no showing that litigating in state court would cost Defendants more than litigating in federal court; even if there were such a showing, the law is clear that litigation expense is not the type of "harm" that will support a stay. *See* Stay Mot. 17. Defendants' asserted potential harms are quintessentially not irreparable harm, and allowing the State to litigate in its chosen forum will not prejudice Defendants in any fashion that could support a stay.

"On the second factor, [Defendants] must show that irreparable injury is 'likely,' not merely possible, in the absence of a stay." *In re MTE Holdings LLC,* No. BR 19-12269-CTG, 2022 WL 58511, at *5 (D. Del. Jan. 4, 2022) (quoting *In re Revel AC, Inc.*, 802 F.3d at 569). They "must also establish a resulting injury 'that cannot be redressed by a legal or equitable remedy.'" *Id.* (quoting *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989)). The Third Circuit has repeatedly held that "a purely economic injury, compensable in money, cannot satisfy the irreparable injury requirement" unless "the potential economic loss is so great as to threaten the existence of the movant's business." *See In re Revel AC, Inc.*, 802 F.3d at 572 (quoting *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 255

(3d Cir. 2011)). When the Court assesses this factor, "the adequacy of the proof provided plays an important role in evaluating the harm that will occur depending upon whether or not a stay is granted." *Id.* (citation omitted).

1. Defendants' Appeal Would Not Be "Hollow" Without a Stay.

Defendants say they will face irreparable harm in three ways if the Remand Order is not stayed. First, they argue that denying a stay "could render [their] right to appeal hollow" if the Superior Court reaches a final judgment while their appeal is pending. Stay Mot. 16. But their own cases show that the mere fact of returning to state court is not irreparable harm. In *Forty Six Hundred LLC v. Cadence Educ., LLC*, 15 F.4th 70, 81 (1st Cir. 2021), for example, the court noted that even though the case was improperly and prematurely remanded to state court, the "long and storied history of comity and cooperation between state and federal courts in this circuit" gave it "confiden[ce] that the district court can enlist the state court's cooperation and restore the action to its own docket (where the case belongs)." Even there, where a stay pending appeal had been denied and remand had already occurred, the harm was not irreparable and was, in fact, repaired. So too here, even in the unlikely event of reversal, there will be no irreparable harm in returning the case to the Superior Court in the interim.

The cases Defendants cite, including *Forty Six Hundred LLC*, are in any event nothing like this one. In *Providence J. Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 889 (1st Cir. 1979), for example, the district court had ordered that sensitive "FBI documents be forthwith disclosed" to the plaintiff newspaper, which allegedly "reflect[ed] the results of an unauthorized and illegal wiretap which the FBI maintained" at a business owned by Rhode Island crime boss Raymond Patriarca. The First Circuit held that the FBI's "right of appeal [would] become moot" unless a stay was granted, because "[o]nce the documents are surrendered . . . confidentiality w[ould] be lost for all time" and "[t]he status quo could never be restored." Analogously in *In re*

Voluntary Purchasing Groups, Inc., the Fifth Circuit held that the district court erred by denying a stay pending appeal from an order confirming a Chapter 11 bankruptcy plan, in part because without a stay "the confirmed plan may begin to be consummated." *See* 196 F.3d 1258, 1999 WL 800198, at *2 (5th Cir. 1999) (per curiam) (unpublished). In that case "the [creditor] Railroads' right to contest the confirmation order could be thwarted," *id.*, because the debtor company could begin dispersing its limited assets to other creditors "before the Railroads' claims are paid in full," *see id.*, at *1. And in *Forty Six Hundred LLC*, 15 F.4th at 73 & n.2, the district court "denied [the defendant's] motion to stay [its abstention-based remand order] without explanation and proceeded immediately to execute the remand," even though the defendant had filed an emergency motion to stay with the court of appeals. The First Circuit reversed the remand order and observed that district courts "may wish to avoid immediately certifying the remand order" and instead "hold the matter in abeyance *for a brief period*" to "give the removing party *an opportunity to move for a stay*, to seek reconsideration, and/or *to appeal the order and request a stay from the court of appeals*." *Id.* at 81 (emphasis added). It did not hold that anyone suffered or would suffer irreparable harm, and repeated its "confiden[ce] that this case's uneventful time in state court neither affects the merits of [the appellant's] appeal nor the remedy we invoke," "especially since the state-court proceedings are still in their early stages and no judgment has yet been entered." *Id.* at 79–80. None of those cases suggest irreparable harm is likely here.

The district court orders granting stays on which Defendants rely are equally inapposite. In *Northrop Grumman Tech. Servs., Inc. v. DynCorp Int'l LLC*, No. 1:16CV534(JCC/IDD), 2016 WL 3346349, at *3 (E.D. Va. June 16, 2016) ("*Northrop Grumman* Stay Order"), the court held that the harm to the removing party "would be immediate and potentially severe" if it did not stay remand. But there, the parties had been in active, "somewhat contentious" litigation in state court

for more than a year prior to removal, including extensive fact and expert discovery. *See Northrop Grumman Tech. Servs., Inc. v. Dyncorp Int'l LLC*, No. 1:16CV534(JCC/IDD), 2016 WL 3144330 (E.D. Va. June 6, 2016) (order granting remand), *aff'd sub nom. Northrop Grumman Tech. Servs., Inc. v. DynCorp Int'l LLC*, 865 F.3d 181 (4th Cir. 2017). The parties would likely "both face the burden of having to simultaneously litigate the appeal before the Fourth Circuit and the underlying case in state court" absent a stay, and there was a real risk that "an intervening state court judgment or order could render the appeal meaningless." *Northrop Grumman* Stay Order, 2016 WL 3346349, at *3. There has been no discovery or any merits litigation in Delaware's case, and the risks of "immediate" burdensome proceedings in state court or of an intervening state court judgment while the appeal is pending are remote indeed.

In *Indiana State Dist. Council of Laborers & Hod Carriers Pension Fund v. Renal Care Group, Inc.*, No. CIV. 3:05-0451, 2005 WL 2000658 (M.D. Tenn. Aug. 18, 2005), the court denied reconsideration of its order staying remand while the removing defendant sought an appeal pursuant to the Class Action Fairness Act. That Act provides that the Court of Appeals "may accept an appeal from an order of a district court granting or denying a motion to remand a class action" if the application is made within seven days after entry of the order, and mandates that the court of appeals "shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted" of not more than ten days. 28 U.S.C. § 1453(c)(1), (c)(2). For that reason, the district court granted a stay "until the Sixth Circuit Court of Appeals acts upon the defendants' appeal or until the time deadlines set out in 28 U.S.C. § 1453(c) have expired, such that the appeal is deemed denied." *See Indiana State Dist. Council of Laborers & Hod Carriers Pension Fund v. Renal Care Group, Inc.*, No. CIV. 3:05-0451, Doc. 91 at 2 (M.D. Tenn. Aug. 19, 2005). In its one-paragraph order

denying reconsideration, the court stated without citation that "[i]f the case is actually remanded, and the state court proceeds to move it forward, the appellate right would be an empty one," but did not analyze the *Nken* factors or hold that the defendant would suffer irreparable harm. There is no statutory guarantee of a speedy appeal here that Defendants would lose if remand is executed. There is simply nothing to learn from Defendants' cases that supports a stay here.

2. Burdensome Litigation in State Court Pending Appeal is Not Likely Absent a Stay, and Would Not Be Irreparable Harm.

Defendants' second irreparable harm argument is that litigating in state court might be expensive, and might somehow depart from the path that litigation would take in federal court. *See* Stay Mot. 17–18. But the cost of defending a case does not establish irreparable harm regardless of the forum, and the risk of inconsistent results here is low. First, as stated above, Defendants "must show that irreparable injury is 'likely,' not merely possible, in the absence of a stay," *In re MTE Holdings LLC*, No. BR 19-12269-CTG, 2022 WL 58511, at *5. But their own averments betray that irreparable inconsistent outcomes are, at best, a remote possibility. Defendants argue that during appeal, "the Delaware Superior Court *could* rule on various substantive and procedural motions," and "*could* also decide discovery motions," and that applying Delaware procedural rules "*rais[es] the possibility* that the outcome of these motions in state court would be different than in federal court." Stay Mot. 17 (emphasis added). They provide no citations, examples, or evidence in support of their conjecture, and have not shown that they are likely to be "harmed by conflicting court decisions" when the case is remanded. *Id.*

Second, they complain that they might expend "substantial non-monetary company resources" litigating in state court, namely staff time, and that they are "are unlikely to recover much (if any) of their burden and expense incurred" in the case. *Id.* But the law is clear: "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."

Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974). The lone case Defendants cite in support of their expense argument is not to the contrary. In *Kennecott Corp. v. Smith*, 637 F.2d 181, 182 (3d Cir. 1980), the plaintiff announced a takeover bid of another corporation, but believed that "it was not possible to comply with the commencement provisions of both federal and state law," because federal law required it to commence the offer within five days of the announcement while New Jersey law prohibited it from commencing the offer until twenty days after the announcement. The plaintiff sued the Chief of the New Jersey Bureau of Securities, seeking preliminary and permanent injunctive relief against enforcement of the New Jersey law. *Id.* The Third Circuit held in relevant part that a preliminary injunction was warranted, because delay would "caus[e] the offeror to incur substantial financial costs which are not recoverable." *Id.* at 189. Importantly, however, the court was *not* referring to litigation expense. It stated that if the offer were delayed by enforcement of the New Jersey law, the offeror would have to make interest payments on any money it borrowed to support the takeover, and would "also have to forego its right to earn interest on the money that it must hold in reserve, because were it not for the outstanding offer these funds could be invested at the current high interest rates." *Id.* at 190. Defendants do not and cannot argue any similar unrecoupable expenses are at issue here.

Courts in this district routinely reject similar economic injury arguments. In *In re Nine Point Energy Holdings, Inc.*, No. 21-10570 (MFW), 2021 WL 3410242, at *5 (D. Del. Aug. 4, 2021), for example, a bankruptcy creditor moved to stay several bankruptcy court orders pending appeal, arguing in relevant part that allowing the orders to go into effect "would have devastating effect on [the creditor's] finances and operations," which it supported with a declaration. However, the declarant "did not state that the loss of appellate rights would threaten [the creditor's] business" but instead "merely speculated that it '*may potentially* threaten the viability

of its continuing business.'" *Id.* at *6 (emphasis added). The court held that the creditor had not satisfied the exception that "purely economic injury" can constitute irreparable harm when it "actually threaten[s] a movant's business," and denied a stay. *Id.* at *6 (emphasis added). Here, Defendants have not supported their assertions with any evidence, and their arguments are even more speculative than those of the declarant in *In re Nine Point Holdings*. There is simply no risk of irreparable financial harm.

3. Even if the Remand Order Were Reversed, Proceedings in State Court Would Advance the Case Toward Resolution and Create No Prejudice.

Lastly, Defendants argue that a "rat's nest of comity and federalism issues" would plague the courts if the case proceeds in state court pending appeal of the Remand Order. *See* Stay Mot. 18 (quoting *Northrop Grumman* Stay Order, 2016 WL 3346349, at *4). But the procedure when a case is removed after substantive proceedings in state court is not mysterious: "All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court." 28 U.S.C. § 1450. Thus, "once a case has been removed to federal court, it is settled that federal rather than state law governs the future course of proceedings, notwithstanding state court orders issued prior to removal," and "Section 1450 implies as much by recognizing the district court's authority to dissolve or modify injunctions, orders, and all other proceedings had in state court prior to removal," the same way this Court may reconsider any other interlocutory order. *See Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cnty.*, 415 U.S. 423, 437 (1974).

These circumstances arise routinely where, for example, the defendant discovers a basis for removal after conducting some discovery, or where a plaintiff voluntarily amends its complaint in a way that creates federal jurisdiction: "if the case stated by the initial pleading is not removable," the defendant may still remove "within thirty days after receipt . . . of a copy of an

amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(3); *see also, e.g.*, *Nikollaj v. Fed. Ins. Co.*, 472 F. Supp. 3d 1138, 1140 (M.D. Fla. 2020) (denying motion to remand where discovery responses first showed diversity jurisdiction was satisfied). Not only is there no irreparable harm in litigating in state court before removal, the United States Code expressly contemplates it. The district court in the *Baltimore* case rejected the same argument that a stay "would avoid costly, potentially wasteful litigation in state court," precisely because state court proceedings could *expedite* resolution of the case, not complicate and delay it.

> [E]ven 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). *See also Broadway Grill, Inc. v. Visa Inc.*, No. 16-CV-04040-PJH, 2016 WL 6069234, at *2 (N.D. Cal. Oct. 17, 2016) (denying stay of remand pending appeal) ("[I]f the case proceeds in state court but then ultimately returns to federal court, the interim proceedings in state court may well help advance the resolution of the case.").

In any event, the early stages of this case would look much the same in state or federal court. The parties would resolve challenges to the complaint, and may initiate paper discovery. The court would issue a scheduling order.[3] This is already occurring in the Hawaii state court in the *Honolulu* matter where motions to dismiss are pending, and motions to dismiss have been briefed but are currently stayed in the *Rhode Island* matter. *See, e.g., State v. Chevron Corp.*,

[3] As in this Court, the Superior Court would issue a scheduling order providing for initial disclosures, document production, interrogatories and requests for admission, followed by the depositions of fact witnesses and experts. *Compare* Del. Super. Ct. R. Civ. P. 16(b), *with* Fed. R. Civ. P. 16(b). In a case with thirty named defendants and seventy-eight counsel of record (at last count), submitted to the Superior Court Complex Commercial Litigation docket, it is implausible, to say the least, that the discovery process would be completed prior to disposition of the appeal.

No. PC-2018-4716, 2020 WL 4812764 (R.I. Super. Aug. 13, 2020) (deferring consideration of motions to dismiss pending resolution of related proceedings in United States and Rhode Island Supreme Courts). The same is true here. "[T]he Delaware Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure," such that discovery and preliminary 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. R. Civ. P. 12); *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 261 (Del. 1995) (analogizing to federal case law in interpretation work product protections under Del. Super. Ct. R. Civ. P. 26). Defendants have not explained how they would be harmed, let alone irreparably so, by engaging in similar discovery and motion practice under equivalent rules in state court rather than federal court during the pendency of their appeal. Their arguments ignore this Court's firmly established authority, in the unlikely event the Remand Order is reversed, to reconcile any discrepancies with the state court proceedings and resume the litigation.

In sum, Defendants have fallen far short of showing that they will likely suffer irreparable harm in the absence of a stay.

D. The Potential Harm to the State and the Public Interest Both Favor Denial of the Stay Motion.

The Court need not consider the third and fourth *Nken* factors, given Defendants' failure to demonstrate any reasonable chance of success on the merits or that they will suffer irreparable harm. If the Court does reach the potential harm to the State and the public interest as counterpoints, however, they weigh decisively in favor of denying a stay. As Defendants correctly note, when the party opposing a stay pending appeal is a public entity, "the harm to the opposing party and weighing the public interest . . . merge" into a single factor. *See Minard Run Oil Co. v.*

U.S. Forest Serv., 670 F.3d 236, 256 (3d Cir. 2011). Here, the interests of the State and the public support executing the remand order now, without further prejudicial delay.

This case has already waited nearly a year and a half without any factual or legal inquiry into the merits by any party or any court. With each day that passes there is a risk documentary and testimonial discovery materials will be lost, and memories will fade. The State alleges that much of the scientific research developed by Defendants on the science of climate change—knowledge that underpins the deceptive nature of Defendants' subsequent conduct—occurred during the 1960s and 1970s. *See, e.g.*, Complaint at ¶¶ 58, 66–79, D.I. 1-1. Similarly, many of the deceptive practices alleged in the complaint occurred during the 1980s and 1990s. *See, e.g.*, *id.* at ¶¶ 104–30. There is a substantial risk that potential witnesses may become unavailable if their testimony is not preserved, a risk that compounds as time passes. Even if "the outcome of this lawsuit cannot turn back the clock on the atmospheric and ecological processes that defendants' activities have allegedly helped set in motion," *see* Stay Mot. 7 (quoting *City of Annapolis v. BP P.L.C.*, 2021 WL 2000469, at *4 (D. Md. May 19, 2021)), it would significantly prejudice the State's ability to prosecute its case if essential facts accessible through discovery are irretrievably lost while the parties continue to litigate non-merits jurisdictional issues.[4] *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

[4] The decision granting a stay in *City of Annapolis v. BP P.L.C.*, is not relevant to this Court's decision, because it arose in a critically different posture. There, the Court stayed *briefing* on the plaintiff's motion to remand to state court, because the Fourth Circuit's still-pending decision in the *Baltimore* appeal will "have direct bearing on defendants' removal arguments here." 2021 WL 2000469, at *2. The court held that a stay of briefing was "worth the wait," while denying a stay "would force both sides . . . to brief the Remand Motion while the legal landscape is shifting beneath their feet," and "could result in a decision by this Court with the proverbial half a deck." *Id.*, at *4. Here, the Court has already granted the motion to remand. There is no further work for the parties in this court and no risk of duplicative briefing unless and until the Third Circuit reverses or vacates the Remand Order. The *Annapolis* court's concerns are not present here.

three years to begin litigation on the merits, is consigned to waiting once more."). The State respectfully asks the Court not to countenance further delay.

E. The Court Should Not Indefinitely Delay This Case.

Unable to satisfy *Nken*, Defendants ask the court to use its inherent docket-control power to stay remand pending appeal for reasons of "judicial economy and conservation of resources." *See* Stay Mot. 5 (quoting *City of Hoboken v. Exxon Mobil Corp., et al.*, No. 20-cv-14243, Dkt. 133 at 5 (D.N.J. Dec. 15, 2021); *id.* at 6 (quoting *Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 3711072, at *4 (D. Minn. Aug. 20, 2021)). However, Defendants do not support this extraordinary request with any showing of how judicial resources would ultimately be conserved by delaying litigation. With due respect to Judge Vasquez of the District of New Jersey and Chief Judge Tunheim of the District of Minnesota, concerns about conserving judicial resources are more appropriate for the *state* court to consider on remand. There is no risk of wasting *federal* judicial resources if this case exits the federal system, and the Delaware judiciary is capable of protecting its own resources and the resources of the parties. The Superior Court, with input from the parties, could limit or tailor discovery and motion practice to minimize potential inconsistency if the Remand Order is reversed, or could stay the case if it believes circumstances warrant. In any event, an indefinite stay in this court pending appeal is not the only tool, or even an effective one, to ensure the interested parties' resources are allocated justly, efficiently, and in timely fashion.

Moreover, the Delaware courts are competent to ensure that any activity there will advance the litigation and not create waste or duplicative proceedings, mindful of the possibility that the case may return to federal court. 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." *Baltimore*, No. CV ELH-18-2357, 2019 WL 3464667, at *6.

III. CONCLUSION

Defendants have not shown that they are entitled to a stay under any of the *Nken* factors, and this Court should therefore deny a stay pending appeal. The Court should not countenance an end run around those factors by staying the case under its inherent authority. Doing so would ignore the "heavy burden" Defendants must bear in seeking the "extraordinary relief" of a stay pending appeal. *See Winston–Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971). Such a delay would not serve the public interest in the effective and timely resolution of disputes in litigation. The State asks respectfully, once again, that this case be returned promptly to its proper forum, the Delaware Superior Court.

Respectfully submitted,

Dated: January 25, 2022

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