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

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Plaintiffs,

v.

EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; BP P.L.C.; BP AMERICA INC.; CHEVRON CORPORATION; CHEVRON U.S.A. INC.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; SHELL PLC; SHELL OIL COMPANY; and AMERICAN PETROLEUM INSTITUTE,

Civil Action No. 3:22-cv-06733-ZNQ-RLS

Hon. Zahid N. Quraishi, U.S.D.J.
Hon. Rukhsanah L. Singh, U.S.M.J.

(Document Electronically Filed)

Return Date: March 20, 2023

Oral Argument is Requested

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS

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INTRODUCTION

Plaintiffs urge this Court to rush to brief and decide the question of federal jurisdiction and disregard the fact that there are *five* certiorari petitions before the Supreme Court that present *that precise question*, and which will likely be decided in a matter of months. *See* Mot. at 1. A sixth petition from the Third Circuit's decision in *Hoboken* will be filed within two weeks. *See Chevron Corp. v. City of Hoboken*, No. 22A528 (U.S.). Defendants' motion is a practical one. The Parties agree that the next step in this case is to brief Plaintiffs' forthcoming motion to remand. If the Supreme Court grants one or more of the pending petitions, it will be poised to issue a dispositive ruling on whether these types of climate change-related cases should proceed in federal or state court—the *exact* issue that will be raised in Plaintiffs' motion to remand. If the Supreme Court denies certiorari, the Third Circuit's decision in *Hoboken* will remain binding precedent, and Defendants will not have arguments to oppose Plaintiffs' motion, other than to preserve them for appeal. Indeed, in their notice of removal, Defendants recognized that the removal grounds asserted here are the same ones recently rejected by the Third Circuit in two similar climate change-related cases. Dkt. 1 at 4. Accordingly, the pending Supreme Court proceedings will resolve Plaintiff's motion to remand before this Court, regardless of their outcome.

It therefore makes eminent sense to wait for the Supreme Court's guidance before the Parties brief and the Court resolves Plaintiffs' motion to remand. Indeed, briefing and having the Court decide these issues now, without guidance from the Supreme Court, would waste judicial and party resources. Plaintiffs mistakenly contend that "[a] stay will not simplify a single issue in Plaintiffs' motion to remand." Opp. at 2. But a stay will not only *simplify* these issues, it will almost certainly *dispose* of *all* of them for this Court's purposes. Staying these proceedings will avoid unnecessary briefing, the possibility of a ruling from this Court that is inconsistent with

forthcoming decisions from the Supreme Court, and the potential harms that would result from a premature remand.

In any event, there are good reasons to believe that the Supreme Court will grant certiorari, all of which Plaintiffs attempt to downplay in their Opposition. In particular, the Supreme Court issued an order on October 3, 2022, inviting the Solicitor General to file a brief expressing the views of the United States on the petition for a writ of certiorari in *Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder County*, No. 21-1550 (U.S.) ("*Suncor*"). This shows that at least four Justices—the same number required to grant certiorari—believe there is a sufficiently substantial question presented regarding federal jurisdiction to warrant the rare step of seeking the views of the United States as to certiorari. Mot. at 6. In fact, Plaintiffs do not—and cannot—dispute that petitions in which the Court seeks the Solicitor General's views are "*over 46 times more likely to be granted*" than the average petition. *Id.* (citation omitted). It was precisely because of the Supreme Court's order that a Maryland District Court recently stayed execution of its remand orders in two nearly identical climate change-related cases—*after* briefing concluded and *after* the court issued its opinions. *City of Annapolis v. BP P.L.C.*, 2022 WL 15523629, at *5 (D. Md. Oct. 27, 2022); *Anne Arundel County v. BP P.L.C.*, 2022 WL 15523629, at *5 (D. Md. Oct. 27, 2022). A stay makes even more sense here because briefing has not yet commenced and a stay would save the Parties and this Court from that burdensome and likely pointless exercise.

Perhaps recognizing the merits and substantial benefits of a stay while the Supreme Court addresses these important issues, Plaintiffs take the remarkable position that this Court should address Defendants' stay motion not as an exercise of the Court's inherent discretion to manage its own docket but, rather, under the inapplicable standard for a stay pending appeal. That makes no sense for one simple reason: *there is no appeal in this case*. In fact, this is the very *first* motion

to be considered in this case, and thus, it would be illogical and inappropriate to apply a standard for stays pending appeal. Tellingly, Plaintiffs concede, as they must, that courts in this Circuit can "exercise their inherent authority to stay a case 'pending resolution of purportedly related litigation,' if the other litigation 'would substantially impact or otherwise render moot the present action." Opp. at 8 (quoting *Akishev v. Kapustin*, 23 F. Supp. 3d 440, 446 (D.N.J. 2014)). That is precisely the case here, and Plaintiffs' concession should end the inquiry.

In sum, the most reasonable and efficient course of action is to stay this case for a brief period of time and await dispositive guidance from the Supreme Court.[1]

ARGUMENT

A. Defendants' Motion Seeks A Discretionary Stay.

Plaintiffs urge the use of an inapplicable standard, misstate the law, and attempt to undermine the Court's inherent authority to manage its docket by entering a discretionary stay. Plaintiffs argue that Defendants' motion seeks a stay pending appeal, rather than a discretionary stay, and thus should be assessed under the factors set forth in *Nken v. Holder*, 556 U.S. 418, 434 (2009). But the *Nken* test applies only when parties are seeking temporary relief from merits judgments and orders already entered by a court or agency *in the same dispute*. "*Landis* sets forth the standard 'where a party seeks to stay a district court proceeding pending the resolution of another action. The [*Nken*] standard, in contrast, applies where a party seeks to stay enforcement of a judgment or order pending an appeal of that same judgment or order *in the same case*." *Whitworth v. SolarCity Corp.*, 2017 WL 2081155, at *3 n.2 (N.D. Cal. May 15, 2017) (emphasis added) (citation omitted). "Since Defendants are not seeking a stay pending appeal, the [*Nken*] factors do not apply." *Russo v. New Jersey*, 2018 WL 3601234, at *2 n.3 (D.N.J. July 27,

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

2018). Indeed, this Court has not entered any orders from which Defendants could seek temporary relief. Plaintiffs' insistence on an inapposite, heightened standard cannot usurp this Court's inherent authority to manage its own docket by exercising its broad discretion to issue the requested stay.

Here, "[a] stay is particularly appropriate, and within the court's 'sound discretion,'" because it is "the outcome of *another case*" that "may 'substantially affect' or 'be dispositive of the issues'" in this case. *MEI, Inc. v. JCM Am. Corp.*, 2009 WL 3335866, at *4 (D.N.J. Oct. 15, 2009) (emphasis added). As the Third Circuit has explained: "The district court ha[s] inherent discretionary authority to stay proceedings pending litigation in another court." *Rodgers v. United States Steel Corp.,* 508 F.2d 152, 162 (3d Cir. 1975). And "[t]his is especially true where the other case is proceeding in another federal court." *MEI*, 2009 WL 3335866, at *4.

B. A Discretionary Stay Will Promote Judicial Efficiency And Is In The Interests Of The Parties And The Court.

A discretionary stay is appropriate because it would conserve judicial resources and promote judicial economy, without prejudice to Plaintiffs. *See Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936).

First, a stay will conserve judicial resources and promote judicial economy. "[A] stay of proceedings is particularly appropriate, and within the court's 'sound discretion,' where the outcome of another case may 'substantially affect' or 'be dispositive of the issues' in a case pending before a district court. Factors justifying a stay in such circumstances include the interests of justice and judicial economy, which in turn include avoiding inconsistent results, the duplication of efforts, and the waste of judicial resources." *Est. of Maglioli v. Andover Subacute Rehab. Ctr. I*, 2021 WL 2525714, at *3 (D.N.J. June 18, 2021) (internal citations and quotation marks omitted). Those factors are clearly present here. Indeed, Plaintiffs do not—and cannot—dispute that the

Supreme Court will either grant review and thereafter issue a dispositive decision on the merits of the remand issue, or deny review and thereby leave the Third Circuit's decision as controlling precedent for purposes of this Court's resolution of the remand motion. Even if the Supreme Court denies certiorari, a stay would avoid needless briefing on the removal issues in this Court, because the Court would be bound by existing Third Circuit precedent. Defendants have "recognize[d] that the removal grounds asserted here are the same as those that were recently rejected by the Third Circuit in two similar climate change-related" cases. Dkt. 1 at 4. If the forthcoming petition for a writ of certiorari in the *Hoboken* case is denied, the Third Circuit's decision will bind this Court, thereby effectively resolving the remand issue for this Court's purposes without the need for extensive briefing. Thus, the benefits of a stay do not, as Plaintiffs assert, "hinge[] on the dual contingencies that the Supreme Court will both grant certiorari in a similar case *and* reverse." Opp. at 18. To the contrary, a stay will benefit the Court and the Parties regardless of the Supreme Court's disposition of the petitions.

Plaintiffs emphasize throughout their Opposition that they believe the Supreme Court is unlikely to grant certiorari. But Plaintiffs' speculation is merely that—speculation—and, at any rate, misses the point. A discretionary stay is warranted to allow this Court to see what the Supreme Court will do and benefit from the important guidance the Supreme Court will provide. As one court aptly observed in granting a stay in a similar climate change-related case: "I am not persuaded by the City's other arguments regarding judicial economy for a simple but important reason. The [appellate court's] ruling . . . is *not a foregone conclusion*." *City of Annapolis, Maryland v. BP P.L.C.*, 2021 WL 2000469, at *4 (D. Md. May 19, 2021) (emphasis added). That is even more true here: a stay will benefit the Parties and the Court no matter what decision the

Supreme Court reaches. Any outcome is likely to eliminate, or at least substantially limit, the need for briefing on Plaintiffs' motion to remand.[2]

In any event, there is a very good chance the Supreme Court will grant review, because the underlying Circuit Court decision in the *Suncor* case satisfies several of the Supreme Court's criteria for granting certiorari: it squarely "conflict[s] with the decision of another United States court of appeals on the same important matter"; it "conflicts with relevant decisions of [the Supreme] Court" regarding the application of federal common law to controversies concerning interstate pollution; and it presents "an important question of federal law that has not been, but should be, settled by [the Supreme] Court." Sup. Ct. R. 10(a), (c).

Plaintiffs attempt to explain away the clear circuit split presented in the pending petitions as "manufacture[d]" by Defendants by pointing to the different procedural postures between the Second Circuit's decision in *City of New York* and the other circuit decisions. Opp. at 11. But that *procedural* difference is irrelevant to the *substantive* conflict between the opinions. The Second Circuit unequivocally held that claims seeking damages from injuries allegedly caused by interstate emissions "demand the existence of federal common law." *City of New York v. Chevron Corp.*, 993 F.3d 81, 90 (2d Cir. 2021). By contrast, the Tenth Circuit found in *Suncor* that whether federal common law applied to the plaintiffs' claims was an "unsettled question," and, thus, refused to allow removal. *Bd. of Cnty. Commissioners of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1261 n.5 (10th Cir. 2022). And the Fourth Circuit saw "no reason to fashion any federal common law for [d]efendants," and "reject[ed] [d]efendants' attempts to invoke federal

[2] The Third Circuit's decision not to stay the mandate in *Hoboken*, see Opp. at 7, 12, is inapposite. The standard governing, and considerations underlying, a court of appeals' decision whether to stay *its own mandate* differ from those informing a district court's discretionary stay of its own proceedings pending appeals *in other cases*, which is what Defendants seek here.

common law." *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 203 (4th Cir. 2022). In doing so, the Fourth Circuit refused to follow the Second Circuit's holding that, even though the claims were nominally pleaded under state law, they necessarily were "federal claims" that "must be brought under federal common law." *City of New York*, 993 F.3d at 92 (emphasis added). The Third Circuit in *City of Hoboken* ultimately held that its own precedent "foreclosed" the defendants' argument that federal common law could provide a basis for removal in these cases, but in so doing, it expressly recognized a circuit split on this critical issue. Indeed, the Third Circuit explained that "two circuit cases," in the Fifth and Ninth Circuits, had "relabeled state-common-law claims as federal," but the Court held that it would "not follow those outliers." 45 F.4th at 708.

Plaintiffs assert that the Supreme Court's order inviting the Solicitor General to provide the views of the United States in *Suncor* does not alter the analysis. *See* Opp. at 12. But Plaintiffs do not (because they cannot) dispute that petitions in which the Supreme Court seeks the Solicitor General's views are "*over 46 times more likely to be granted*" than the average petition. Mot. at 6 (citation omitted). An order requesting the views of the Solicitor General is exceedingly uncommon and demonstrates that at least four Justices have a serious interest in the issues presented *and* believe them worthy of further consideration by the Court. *Id.* Indeed, of the nearly 1,000 petitions addressed by the Court in its October 3, 2022 Order List, the Court sought the Solicitor General's views in *only four* cases, one of which was *Suncor*. *Id.* Plaintiffs also conveniently ignore that the District of Maryland recently stayed execution of its remand orders in two similar climate change-related cases because of the Supreme Court's order, explaining that "litigation in the state court now has potential to do more harm than good." *City of Annapolis*, 2022 WL 15523629, at *5.

Plaintiffs' suggestion that the Supreme Court's order is not material because the Solicitor General *might* not recommend that the Court grant certiorari also misses the mark. Opp. at 12. The United States may well take the same views on these issues that it has repeatedly taken in nearly identical cases. But, even if, as Plaintiffs say, the Solicitor General "has good reason to take a fresh look at the issue" in light of the circuit courts that have ruled against the United States' previous positions, Opp. at 13, a shift in position would itself weigh in favor of Supreme Court review by underscoring that the issues of federal jurisdiction are uncertain and unresolved—and signaling that Supreme Court intervention and resolution is necessary in these cases of national importance. Thus, no matter the Solicitor General's response, there is a strong likelihood that the Supreme Court will grant certiorari. But, again, whether or not the Supreme Court grants or denies certiorari, a stay will promote judicial economy because either decision would resolve the remand issue for this Court's purposes, without the need for extensive briefing. Under these circumstances, it can hardly be disputed that a discretionary stay will serve judicial economy. A stay is not only appropriate but is the most logical, reasonable, and efficient course of action.

Second, Plaintiffs will not be prejudiced by a stay. As an initial matter, Plaintiffs do not dispute that they primarily seek monetary damages for their alleged injuries, which can, of course, be awarded at any time. Thus, the relief Plaintiffs seek will be available regardless of whether proceedings are stayed for a short period of time. And given that, as discussed below, Plaintiffs delayed for years before filing this suit, they have no plausible basis for objecting to a short stay. Plaintiffs also cannot dispute that 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).

The *only* potential harm Plaintiffs identify beyond a theoretical delay in obtaining relief on

the merits is the "risk[] [of] thwarting Plaintiffs' access to essential discovery as witnesses age and documents become more stale." Opp. at 17. But Plaintiffs do not allege (nor could they) that Defendants have failed to comply with their document preservation obligations or have otherwise failed to maintain evidence. Nor do Plaintiffs identify a single witness who will become unavailable or whom they urgently need to depose, nor do they explain why ordinary document preservation mechanisms would be insufficient to mitigate these supposed risks.

Moreover, Plaintiffs' own actions belie any suggestion that they could be prejudiced by a stay. As discussed in Defendants' opening brief, Plaintiffs have known the potential impacts of greenhouse gas emissions for decades. Mot. at 11. In addition, Plaintiffs waited more than *five years* after the first similar climate change-related case was filed, and more than *two years* after a municipality within New Jersey's own borders filed a similar case.[3] Moreover, Plaintiffs cannot claim that climate change requires this case to proceed urgently because, as the District of Maryland recently noted in granting a stay of proceedings in a similar climate change case, "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. The urgency of the threat of climate change writ large is distinct from plaintiff's interest in a speedy determination of federal jurisdiction in this suit." *City of Annapolis*, 2021 WL 2000469, at *4. Furthermore, if anything, Plaintiffs will actually benefit from a stay. With a stay in place, Plaintiffs—like Defendants—will avoid the same risk of harm from potentially inconsistent outcomes. *See Raskas v. Johnson & Johnson*, 2013 WL 1818133, at *2 (E.D. Mo. Apr. 29, 2013). Similarly, a stay would conserve

[3] *Compare* Complaint, *County of San Mateo v. Chevron Corp., et al.*, No. 17-Civ-03222 (Cal. Super. Ct.) (filed July 17, 2017) and Complaint, *City of Hoboken v. Exxon Mobil Corp., et al.*, No. HUD-L-003179020 (N.J. Super. Ct.) (filed Sept. 2, 2020), *with* Dkt. 1-2 (Complaint, *Platkin, et al. v. Exxon Mobil Corp., et al.*, No. MER-L-001797-22 (N.J. Super. Ct.) (filed Oct. 18, 2022)).

Plaintiffs' resources—financial and otherwise—by allowing them to avoid the costs of briefing remand when that briefing may be entirely mooted by the Supreme Court. *See Dalton v. Walgreen Co.*, 2013 WL 2367837, at *2 (E.D. Mo. May 29, 2013) ("[N]either party would be required to incur additional expenses from simultaneous litigation.").

As then-Chief Judge Stark of the District of Delaware found in granting a stay in similar circumstances: "[a] stay pending appeal in this case will not substantially harm Plaintiff and will serve the public interest." *Delaware ex rel. Jennings v. BP Am. Inc.*, 2022 WL 605822, at *3 (D. Del. Feb. 8, 2022). He found that "the limited stay authorized by [his] order [would] not 'indefinitely delay the case,'" as plaintiff argued. *Id.* Rather, "as Defendants persuasively observe[d] . . . a relatively short pause of this likely lengthy litigation will not substantially harm Plaintiff's ability to prosecute its case." *Id*. Indeed, "[t]he interests of judicial economy and the conservation of public resources strongly favor a stay. The public interest would be best served by avoiding the possibility of unnecessary or duplicative litigation and concentrating resources on litigating Plaintiff's claims in the proper forum after the [Supreme Court] determines the jurisdictional issues presented in this case." *Id.* The same is true here.

Third, Defendants face serious hardship absent a stay. A stay will prevent the unnecessary burden of needless, duplicative litigation, the costs of which cannot be recovered by the Parties or the Court. Courts routinely find substantial hardship where, as here, there is a substantial "risk of [the] inefficient use of the parties' time and resources," *Pagliara v. Federal Home Loan Mortgage Corp.*, 2016 WL 2343921, at *3 (E.D. Va. May 4, 2016), and absent a stay, the Parties will incur "wasteful, unrecoverable, and possibly duplicative costs," *Ewing Indus. Co. v. Bob Wines Nursery, Inc.*, 2015 WL 12979096, at *3 (M.D. Fla. Feb. 5, 2015). Put simply, a stay will "avoid the 'needless duplication of work and the possibility of inconsistent rulings.'"

Commonwealth of Virginia ex rel. Integra Rec LLC v. Countrywide Securities Corp., 2015 WL 222312, at *4 (E.D. Va. Jan. 14, 2015) (citation omitted).

Moreover, if this action is erroneously remanded to state court, Defendants will be denied their right to a federal forum—the potential consequences of which could be significant. For example, Plaintiffs' Opposition implies an intent to seek discovery from Defendants during the pendency of the certiorari petitions. Opp. at 17. But, if such discovery is propounded in state court under state rules, and it is later determined that the case and any discovery is governed by federal law and should be conducted in federal court, that discovery could not readily be undone. Indeed, in that event, documents produced and deposition testimony elicited in state court could already have been made available to the world in public filings and, thus, could not be clawed back. And even as to discovery materials that had not become public, there is no practical way that a court could prevent a party from using the information it had learned from those documents and testimony.

CONCLUSION

Defendants respectfully submit that this Court should exercise its inherent discretion to stay further proceedings in this case pending the Supreme Court's resolution of the pending and forthcoming petitions for writs of certiorari in substantially similar climate change cases and any further related proceedings before the Supreme Court.

Dated: February 13, 2023

Respectfully submitted,

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