UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY; BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; and CITY OF BOULDER, Plaintiffs, v. SUNCOR ENERGY (U.S.A.) INC.; SUNCOR ENERGY SALES INC.; SUNCOR ENERGY INC.; and EXXON MOBIL CORPORATION, Defendants.	Case No. 1:18-cv-1672-WJM-SKC

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR A STAY OF THE REMAND ORDER PENDING APPEAL[*]

Plaintiffs' opposition to defendants' motion for a stay pending appeal is largely an exercise in avoidance. Plaintiffs spend half of their opposition arguing that the court of appeals can only address removal under the federal-officer removal statute and must ignore defendants' other arguments. But the scope of appellate review is an open question in the Tenth Circuit, the circuits are divided on the issue, and many of the cases on plaintiffs' side of the conflict predate a key Supreme Court decision that all but resolves the question in defendants' favor. When plaintiffs finally do reach the merits of defendants' arguments for removal, they primarily argue that defendants cannot obtain a stay without convincing the Court that it will be reversed on appeal.

[*] Defendants submit this reply subject to and without waiver of any defense, affirmative defense, or objection, including personal jurisdiction, insufficient process, or insufficient service of process.

But that cannot be the standard—this Court would not have ruled as it did if it expected to be reversed. And as this Court recognized, the Tenth Circuit has not addressed whether federal courts have jurisdiction over climate-change cases, and district courts have divided on the issue. Nor do plaintiffs dispel defendants' legitimate concern that, absent a stay, their right to appeal could potentially become meaningless. Given that plaintiffs identify no serious harm to their interests from a stay, defendants' motion should be granted.

A. Defendants Are Sufficiently Likely To Prevail On Appeal To Warrant A Stay Of The Remand Order

As defendants explained in their motion (at 3-9), the court of appeals has jurisdiction to review this Court's entire remand order, and defendants' arguments in favor of removal are "so serious, substantial, difficult, and doubtful as to make [them] ripe for litigation and deserving of more deliberate investigation." *FTC* v. *Mainstream Marketing Services, Inc.*, 345 F.3d 850, 852-853 (10th Cir. 2003) (citation omitted). Plaintiffs nevertheless argue that defendants are not sufficiently likely to prevail on appeal to warrant a stay. None of their arguments is persuasive.

1. The Court Of Appeals Has Jurisdiction To Review This Court's Entire Remand Order

Section 1447(d) of Title 28 of the United States Code confers jurisdiction on the courts of appeals to review an "order remanding a case" to state court where, as here, the case is removed under the federal-officer removal statute, 28 U.S.C. § 1442. "To say that a district court's 'order' is reviewable is to allow appellate review of the *whole* order, not just of particular issues or reasons." *Lu Junhong* v. *Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015). Accordingly, the court of appeals has appellate jurisdiction to consider all of the grounds for removal that defendants

asserted, and this Court should therefore consider the merits of all of those grounds when assessing likelihood of success on the merits.

Plaintiffs offer a number of responses to that straightforward syllogism. Each falters.

As an initial matter, plaintiffs suggest (Opp. 4-5) that the Tenth Circuit has already determined the scope of appellate review under Section 1447(d) in its unpublished decision in *Sanchez* v. *Onuska*, 2 F.3d 1160, 1993 WL 307897 (1993). But "as an unpublished decision, [*Sanchez*] is not binding," *United States* v. *Hansen*, 929 F.3d 1238, 1268 (10th Cir. 2019), and the Tenth Circuit commonly declines to follow unpublished authority. *See, e.g.*, *Allen* v. *United Services Automobile Ass'n*, 907 F.3d 1230, 1239 n.5 (10th Cir. 2018); *Lexington Insurance Co.* v. *Precision Drilling Co.*, 830 F.3d 1219, 1224 (10th Cir. 2016) (Gorsuch, J.). In any event, *Sanchez* is not persuasive. It relies entirely on *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), which did not involve removal under one of the exceptions recognized in Section 1447(d). *See Sanchez*, 1993 WL 307897, at *1. *Sanchez* also predates the Supreme Court's decision in *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199 (1996), as well as the Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545, which amended Section 1447(d) to make cases removed under the federal-officer removal statute reviewable on appeal. Because Congress is presumed to have been aware of the decision in *Yamaha*, its choice to retain the reference to reviewable "orders" in 2011 confirms that it intended to authorize plenary review on appeal. *See Dobbs* v. *Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1282 (10th Cir. 2010).

On that note, plaintiffs contend (Opp. 6) that *Yamaha* is distinguishable because a court of appeals has discretion to decline review under 28 U.S.C. § 1292(b) (the statute at issue there) whereas it cannot under Section 1447(d) (the statute at issue here). Plaintiffs assert a similar

argument (Opp. 5-6) regarding *Coffey* v. *Freeport McMoran Copper & Gold*, 581 F.3d 1240 (10th Cir. 2009), which involved removal under the Class Action Fairness Act. The problem for plaintiffs is that neither of those decisions relies on the discretionary nature of the appellate review when determining the scope of appellate jurisdiction. Instead, both cases turn on the meaning of the word "order," with the court in *Coffey* reasoning that the definition from *Yamaha* "applie[d] equally" to a different jurisdictional statute. *Coffey*, 581 F.3d at 1247; *see Yamaha*, 516 U.S. at 205. So too here.

Plaintiffs next suggest (Opp. 7) that, under Section 1447(d), "if other grounds for removal are asserted, then the case was not 'removed pursuant to section 1442' and no appeal is permitted at all." *Id.* Plaintiffs cite no authority for that interpretation, and even the courts on its side of the circuit conflict have not adopted it. *See, e.g.*, *Jacks* v. *Meridian Resource Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012); *Davis* v. *Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997); *State Farm Mutual Automobile Insurance Co.* v. *Baasch*, 644 F.2d 94, 96 (2d Cir. 1981).

Plaintiffs next argue (Opp. 7-8) that, under defendants' interpretation of Section 1447(d), the scope of appellate review would turn on whether the district court issued one remand order encompassing all of the asserted grounds for removal or multiple remand orders. Not so. Once the court mails the remand order, it "dissasociates itself from the case entirely." *Quackenbush* v. *Allstate Insurance Co.*, 517 U.S. 706, 714 (1996). In cases where remand turns on a lack of subject-matter jurisdiction, the initial order remanding the case to state court thus resolves all of a defendants' jurisdictional arguments, even those not explicitly rejected by the district court. *See Alabama* v. *Conley*, 245 F.3d, 1292 1293 n.1 (11th Cir. 2001). Any subsequent remand order would lack effect.

Finally, plaintiffs discount the Sixth Circuit's decision in *Mays* v. *City of Flint*, 871 F.3d 437 (2017), because of a nearly 50-year-old case from the Sixth Circuit that declined to review the entirety of a remand order. *See Appalachian Volunteers, Inc.* v. *Clark*, 432 F.2d 530 (6th Cir. 1970). Putting aside that plaintiffs are willing to count the Fifth Circuit in their camp despite conflicting authority among panels of that court, *see* Mot. 5-6; Opp. 6 & n.3, the earlier case that plaintiffs cite predates *Yamaha* as well as the Removal Clarification Act. In any event, the issue of the scope of appellate review under Section 1447(d) is an open question in the Tenth Circuit, and the presence of a conflict of authority on that issue itself supports a stay pending appeal. *See* Mot. 6-7 (citing cases).

2. The Merits Of Defendants' Removal Arguments Satisfy The First Stay Factor

This Court recognized that "United States District Court cases throughout the country are divided on whether federal courts have jurisdiction over state law claims related to climate change." ECF No. 69, at 3. The Court also noted that there are "no dispositive cases" on the issue from the Supreme Court or the Tenth Circuit. *Id.* The lack of binding authority and the conflicting district-court decisions confirm that defendants' appeal presents serious legal questions worthy of further appellate review. Plaintiffs disagree, but each of their responses falls short.

a. Plaintiffs' primary tack (Opp. 1, 8-11) is to set up an impossible-to-satisfy standard for parties seeking a stay pending appeal. They argue that defendants have not shown a sufficient likelihood of success on the merits because the motion for a stay relies on "the same arguments this Court already found meritless." *Id.* at 1. But "common sense dictates that the moving party need not persuade the court that it is likely to be reversed on appeal." *Canterbury Liquors & Pantry* v. *Sullivan*, 999 F. Supp. 144, 150 (D. Mass. 1998). After all, had the Court "thought an

appeal would be successful, [it] would not have ruled as [it] did in the first place." *Westefer* v. *Snyder*, Civ. No. 00-162, 2010 WL 4000599, at *3 (S.D. Ill. Oct. 12, 2010) (citation omitted). "[A] party seeking a stay" thus "need not show that it is more than 50% likely to succeed on appeal; otherwise, no district court would ever grant a stay." *Id.*; *accord Singer Management Consultants, Inc.* v. *Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (en banc); *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

Instead, the question is whether the case raises issues "so serious, substantial, difficult, and doubtful as to make [them] ripe for litigation and deserving of more deliberate investigation." *Mainstream Marketing*, 345 F.3d at 852-853; *see Ruiz* v. *Estelle*, 650 F.2d 555, 565 (5th Cir. Unit A 1981) (similar). The Tenth Circuit's decision in *Diné Citizens Against Ruining Our Environment* v. *Jewell*, 839 F.3d 1276 (2016), is not to the contrary; it suggests that the standard is a "reasonable likelihood of success" on the merits, not a "certainty of success." *See id.* at 1282.

b. With respect to defendants' argument that plaintiffs' claims arise under federal common law: plaintiffs contend (Opp. 10) that the Court should ignore the conflict between its decision and *California* v. *BP p.l.c.*, Civ. Nos. 17-6011 & 17-6012, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018), because that decision fails to note the differences between federal-question jurisdiction over removed cases and cases originally filed in federal court. While this Court did distinguish *California* in that way, *see* ECF No. 69, at 16, defendants respectfully submit that the distinction does not hold. Congress expressly tied removal jurisdiction to original jurisdiction, so the two concepts overlap. *See* 28 U.S.C. § 1441(a); Richard H. Fallon, Jr. et al., *Hart and Weschler's The Federal Courts and the Federal System* 809 (7th ed. 2009). In particular, the well-pleaded complaint rule is not a removal-specific concept; it applies to cases filed directly in federal

court too. *See Louisville & Nashville Railroad Co.* v. *Mottley*, 211 U.S. 149, 150 (1908); *Hart and Weschler* 806-811. For that reason, the analysis of whether federal common law governs the plaintiff's claims is the same whether a case is removed from state court or filed directly in federal court.

Defendants submit that, applying the appropriate analysis, the well-pleaded complaint rule does not preclude the exercise of federal-question jurisdiction here. The thrust of the well-pleaded complaint rule is that "a suit arises under federal law only when the plaintiff's statement of his own cause of action shows that [it is] based on federal law." *Turgeau* v. *Administrative Review Board*, 446 F.3d 1052, 1060 (10th Cir. 2006) (internal quotation marks omitted). But defendants' argument is precisely that. Based purely on the factual allegations in the complaint, defendants contend that plaintiffs' common-law causes of action arise under federal law. To be sure, plaintiffs argue to the contrary (even though the complaint does not state that their claims arise under state law, *see* ECF No. 7, ¶¶ 444-488). Yet the question of what source of law provides the rule of decision for common-law claims is a legal determination for the court to make based on the facts pleaded—not based on the plaintiff's say-so. *See American International Enterprises, Inc.* v. *FDIC*, 3 F.3d 1263, 1268 (9th Cir. 1993). Indeed, the traditional "policy" of interpreting pleadings is to elevate "substance over form," to "[f]ocus[] on facts rather than on a choice of legal labels." *Chelsea Family Pharmacy, PLLC* v. *Medco Health Solutions, Inc.*, 567 F.3d 1191, 1198 (10th Cir. 2009); *see* 61A Am. Jur. 2d *Pleading* § 83 (2d ed. West 2019). That approach is not limited to the complete-preemption doctrine; it inheres in the Federal Rules of Civil Procedure. *See Johnson* v. *City of Shelby*, 135 S. Ct. 346, 347 (2014) (per curiam); Arthur R. Miller et al., *Federal Practice & Procedure* § 1219 (3d ed. West 2019).

c. Plaintiffs also disparage defendants' other grounds for removal (Opp. 8-9, 10-11). Their arguments again fall flat.

With respect to federal-officer removal: plaintiffs do not dispute that, for purposes of federal-officer removal, "not *all* of the relevant activities need take place under [federal] control." ECF No. 75, at 8. And defendants submit that the federal control imposed by defendants' leases to extract oil from the Outer Continental Shelf is precisely the type of "subjection, guidance, or control" necessary to invoke federal jurisdiction. *Watson* v. *Philip Morris Cos.*, 551 U.S. 142, 151 (2007). The leases mandate that defendants "*shall* drill such wells and produce at such rates as the federal government may require." ECF No. 1-23, at 4 (§ 10) (emphasis added). The government also maintains certain controls over the disposition of the leased oil and gas after it is removed from the ground. *See id.* at 8 (§ 15). Based on that level of government control, the Tenth Circuit could reasonably conclude that jurisdiction under the federal-officer removal statute is present.

With respect to jurisdiction under *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308 (2005): plaintiffs' only response (Opp. 10-11) is that this Court disagreed with defendants' argument. But that is not a sufficient basis to deny a motion for a stay pending appeal. *See* pp. 5-6, *supra*. And based on the arguments that defendants have presented, *see* ECF No. 48, at 21-29, the court of appeals could reasonably disagree with this Court and hold that evaluating plaintiffs' nuisance claims inherently entails second-guessing federal regulatory decisions that determined whether defendants' conduct was reasonable. *See Board of Commissioners* v. *Tennessee Gas Pipeline Co.*, 850 F.3d 714, 725-726 (5th Cir. 2017). The court of appeals could reasonably disagree with this Court's conclusion on the other grounds that defendants raised for removal as well. *See* ECF No. 48, at 29-40.

B. Defendants Will Suffer Irreparable Harm Absent A Stay

Absent a stay, defendants will be forced to litigate this same case before the Tenth Circuit and in Colorado state court and could possibly lose their appellate rights altogether. That constitutes irreparable harm. Plaintiffs' arguments to the contrary miss the mark.

1. Citing *Bryan* v. *BellSouth Communications, Inc.*, 492 F.3d 231 (4th Cir. 2007), plaintiffs contend (Opp. 14) that "federal courts are fully capable" of bringing a remanded case back to federal court if the court of appeals vacates the remand order. But as *Bryan* itself demonstrates, the legal landscape is murkier than plaintiffs suggest. Plaintiffs' characterization of *Bryan* is simply wrong. There the Fourth Circuit did *not* hold that a district court could, consistent with the Anti-Injunction Act, enjoin state-court proceedings simply because the remand order had been vacated on appeal. Instead, the court of appeals called the issue "difficult" and expressly chose not to resolve it. *See* 492 F.3d at 241-242. And while defendants appreciate plaintiffs' apparent concession, it would not bind the Court if the Anti-Injunction Act is jurisdictional—an issue the Tenth Circuit has not resolved. *See Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1121 (10th Cir. 2013) (en banc), *aff'd*, 134 S. Ct. 2751 (2014). Plaintiffs also concede (Opp. 14) that defendants' appeal will become moot if the state court enters final judgment before the appeal is resolved. At a minimum, defendants have a statutory right to appeal this court's federal-officer ruling, and a loss of that right would be particularly inequitable. A stay is therefore warranted.

2. Plaintiffs argue (Opp. 12-13) that the burden of state-court discovery while the appeal is pending does not constitute irreparable harm because it is "speculative at best." *Id.* at 13. Notably, however, plaintiffs do not say that they will refrain from seeking discovery in state court as quickly as possible. Plaintiffs are also too quick to conclude (Opp. 13-14) that "discovery

will be the same" in state and federal court merely because the "claims are the same." *Id.* at 13. Discovery in state court may be more expansive than in federal court. *Compare, e.g.*, Fed. R. Civ. P. 26(a)(1) *with* Colo. R. Civ. P. 26(a)(1).

C. The Balance Of Harms Favors Defendants

Plaintiffs provide no serious argument that they will be harmed by a stay. They claim (Opp. 14-15) that a stay would prevent them from seeking "prompt redress of their claims," *id.*, but delay alone is insufficient to tip the balance in plaintiffs' favor—especially in light of the long-term nature of their alleged injury. *See Weingarten Realty Investors* v. *Miller*, 661 F.3d 904, 913 (5th Cir. 2011). Plaintiffs also posit (Opp. 15) that a stay would undermine the public interest by "interfer[ing] with state court proceedings." *Id.* But that argument begs the question: whether defendants have a right to litigate these claims in federal court is the precise issue raised in defendants' appeal. Plaintiffs therefore have not shown that they will be harmed by a stay, providing no reason to refuse a stay in light of the merits of defendants' arguments and the irreparable harm in the absence of a stay.

CONCLUSION

For the foregoing reasons and those stated in the motion, defendants' motion for a stay of the remand order pending appeal should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, certify that, on September 23, 2019, the foregoing document was filed through the Court's CM/ECF system and was therefore served on all registered participants identified on the Notice of Electronic Filing.

/s/ Kannon K. Shanmugam
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