UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEYOND PESTICIDES, Plaintiff, v. EXXON MOBIL CORPORATION, Defendant.	Case No. 1:20-cv-01815-TJK Hon. Timothy J. Kelly

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINITFF'S MOTION TO REMAND AND FOR FEES AND COSTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Plaintiff Beyond Pesticides, a non-profit organization, brings a D.C. Consumer Protection Procedures Act ("CPPA") claim on behalf of the general public of D.C. for injunctive and declaratory relief. Private-attorney-general actions of this kind are not uncommon and therefore, there is substantial precedent in this District on the question of whether such actions are properly removable to federal court. This precedent has ***universally*** held that (1) the non-aggregation principle applies to the cost of compliance with injunctive relief in a CPPA action brought on behalf of the general public, and (2) CPPA actions seeking only injunctive and declaratory relief are not subject to the Class Action Fairness Act ("CAFA").

Nonetheless, Defendant ExxonMobil Corporation ("ExxonMobil") asks the Court to disregard or ignore all of this well-established precedent. ExxonMobil cannot meet its burden to satisfy the jurisdictional threshold under the pro-rata cost-of-compliance standard that has been ***unanimously*** applied to CPPA actions seeking purely injunctive relief on behalf of the general public. Indeed, ExxonMobil has not cited to a single decision that used the total (rather than pro-rated) cost of compliance as the amount-in-controversy under these circumstances. Similarly, ExxonMobil cannot point to a single case from this District applying CAFA to a private-attorney-general CPPA action for injunctive relief.

Moreover, even if the Court were to accept ExxonMobil's arguments and throw out over a decade of unanimous precedent, ExxonMobil has offered no evidence sufficient to establish that the jurisdictional amount would be met. In lieu of an actual estimate of its cost of compliance with Beyond Pesticides requested injunctive relief (namely, removal of the challenged marketing statements), ExxonMobil provides nothing more than its ***total*** advertising budgets for the past several years. Instead of any evidence regarding attorneys' fees, ExxonMobil points to the

attorneys' fees in a random assortment of unrelated cases involving CPPA claims for damages and asks the Court to conclude that attorneys' fees in ***every*** CPPA action must therefore exceed the jurisdictional threshold. Such baseless speculation is insufficient to meet ExxonMobil's burden of satisfying the amount-in-controversy requirement.

In short, ExxonMobil's attempt to remove this case is frivolous and without basis. This case, like all similar actions, should be remanded to D.C. Superior Court. Moreover, based on ExxonMobil's disregard for the settled precedent of this Court and failure to provide any evidence in support of its position, Beyond Pesticides' request for attorneys' fees and costs should be granted.

I. Neither ExxonMobil's Purported Cost-of-Injunction nor the Requested Attorneys' Fees Satisfy the Amount in Controversy.

ExxonMobil argues that the amount in controversy necessary for diversity jurisdiction is satisfied by either ExxonMobil's cost of compliance with injunctive relief or Beyond Pesticides' requested attorney's fees. (Defendant's Memorandum in Opposition to Remand ("Opp.") at 2.) But the estimates put forth by ExxonMobil for both of these costs are wildly speculative and unreasonable. Moreover, ExxonMobil cannot overcome the substantial and unanimous precedent of this District holding that the cost of injunctive relief and attorneys' fees must be divided among all beneficiaries—satisfying the amount-in-controversy requirement for ***each*** potential beneficiary in order to effectuate the CPPA's intent to expand D.C.-state-court jurisdiction over cases that could benefit the general public and consumers. *See* D.C. Code § 28-3905(k)(1)(D).

A. ExxonMobil Cannot Meet Its Burden to Satisfy the Pro-Rata Cost-of-Compliance Standard That Has Been Unanimously Applied to CPPA Actions Seeking Only Injunctive Relief Pursuant to D.C. Code § 28-3905(k)(1)(D).

ExxonMobil has failed to meet its burden to demonstrate the cost of compliance with the requested injunctive relief. ExxonMobil states that, in order to comply with Beyond Pesticide's

requested injunction, it would need to "recall advertising that it currently runs prior to the planned end of that advertising campaign." (Opp. at 9.) But ExxonMobil has provided ***no*** evidence regarding the costs related to recalling its current false or misleading advertisements within the District of Columbia. (*See* Plaintiff's Memorandum in Support of Remand ("Mem.") at 6-7.) ExxonMobil also states that "[i]t would then need to develop new advertising campaigns solely as a consequence of this litigation." (Opp. at 9). If ExxonMobil chooses to produce new advertising, it will do so of its own volition because it could instead choose to air any of its other advertisements that do not have the false and misleading representations in them. Nevertheless, ExxonMobil has failed to show the costs related to modifying or producing these new advertisements. *See* Decl. of Alan Jeffers ¶ 4 (providing simply the amount of ExxonMobil's ***total*** advertisement expenditures for the years 2014-2019).

The non-aggregation principle was established by *Snyder v. Harris*, 394 U.S. 332 (1969), and *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973). This principle holds that the value of different claims cannot "be aggregated to meet the required jurisdictional amount." *Snyder*, 394 U.S. at 336. Its objective is to limit "transfer[s] into the federal courts [of] numerous local controversies involving exclusively questions of state" law. *Id.* at 340. The Court's view was that "[s]uits involving issues of state law and brought on the basis of diversity of citizenship can often be most appropriately tried in state courts." *Id.* at 341. Accordingly, it instructed lower courts to "'strictly construe[]'" the jurisdictional amount to prevent an end-run around Congress's "determin[ation] that cases involving lesser amounts should be left to be dealt with by the state courts." *Id.* at 340 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

In asking this Court to apply the cost-to-defendant test, ExxonMobil is improperly asking the Court to allow parties to "do indirectly that which they cannot do directly" under the non-

aggregation principle. *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1050 (3d Cir. 1993). This is why D.C. District Courts have ***universally*** rejected ExxonMobil's argument in the past. "Viewing the jurisdictional amount issue from the defendant's point of view is simply another way of aggregating claims which is what the Supreme Court disallowed in *Snyder*." *Nat'l Org. for Women v. Mut. of Omaha Ins. Co.*, 612 F. Supp. 100, 108 (D.D.C. 1985) (Flannery, J.). The cost-to-defendant test "'would allow a plaintiff who has no claim for the requisite compensatory damages merely to request injunctive relief, assign to that request a value measured in terms of defendant's compliance, and then litigate in the federal courts'." *Breakman v. AOL, LLC*, 545 F. Supp. 2d 96, 105 (D.D.C. 2008) (Bates, J.) (quoting *Nat'l Org. for Women*, 612 F. Supp. at 108). The only recent case ExxonMobil's relies on to show that this Court should apply the cost-to-defendant test, *GEO Specialty Chemicals, Inc. v. Husisian*, 951 F. Supp. 2d 32, 39-40 (D.D.C. 2013) (Leon, J.), which denied a defendant's motion to dismiss for lack of subject-matter jurisdiction, is inapposite, however, because (1) it came before the District Court on a motion to dismiss, not a motion for remand; (2) the plaintiff in *Husisian* did not assert claims under the CPPA, but alleged breach of fiduciary duty; and (3) the plaintiff in *Husisian* sought both monetary and injunctive relief. *Id.*

Every court of this District that has analyzed this issue has held that the cost of an injunction on behalf of the "general public" under the CPPA must be divided by the consumers who benefit from the injunction and satisfy the amount-in-controversy requirement for each consumer. *See Fahey v. Godiva Chocolatier, Inc.*, No. 19-2128 (JDB), 2020 U.S. Dist. LEXIS 27073, *9 (D.D.C. Feb. 18, 2020) ("Courts in this Circuit have consistently applied [the non-aggregation] principle when a plaintiff seeks injunctive relief under the CPPA on behalf of the public."); *Organic Consumers Ass'n v. Handsome Brook Farm Grp. 2, LLC*, 222 F. Supp. 3d 74, 78 (D.D.C. 2016)

(Cooper, J.); *Witte v. Gen. Nutrition Corp.*, 104 F. Supp. 3d 1, 6 (D.D.C. 2015) (Huvelle, J.); *Breakman*, 545 F. Supp. 2d at 107. Because the CPPA favors non-profit actions in state court, if the defendant does "not attempt[]" to satisfy the amount-in-controversy requirement for each consumer (as ExxonMobil does not), the action must be remanded. See *Witte*, 104 F. Supp. 3d at 6.

Instead of dividing the cost by the consumers who benefit from the injunction, ExxonMobil asks this Court to apply an "interest-distribution test" and find that Beyond Pesticides asserts a "common and undivided" interest in the requested injunctive relief. (Opp. at 11.) This approach also runs afoul of the non-aggregation principle, and courts in this district have overwhelmingly found no common or undivided interest in private attorney general suits such as this. In its entire argument (Opp. at 10-11), ExxonMobil musters only three cases from this district, each of which are easily distinguishable: both *Williams v. Purdue Pharma Co.*, No. 02-0556 (RMC), 2003 U.S. Dist. LEXIS 19268 (D.D.C. Feb. 27, 2003), and *Nat'l Welfare Rights Org. v. Weinberger*, 377 F. Supp. 861, 866 (D.D.C. 1974) (Pratt, J.), were class actions; and *Aetna U.S. Healthcare, Inc. v. Hoechst Aktiengesellschaft*, 48 F. Supp. 2d 37, 41 (D.D.C. 1999) (Lamberth, J.), was an antitrust action seeking disgorgement of profits—an "integrated claim," meaning that the corporations who would benefit from the relief had a "common and undivided interest." The instant case is neither a class action, as discussed further below, nor is it seeking disgorgement of profits, only declaratory and injunctive relief. *Cf. Nat'l Consumers League v. Flowers Bakeries, LLC*, 36 F. Supp. 3d 26, 32 n.3 (D.D.C. 2014) (Huvelle, J.) (citing *Williams* for the proposition that "Courts within this district have drawn a distinction between claims for ***damages*** and claims for ***disgorgement***. The former, as here, is payable to individual consumers and therefore may not be aggregated. The latter

is taken directly from defendant to a common fund and is therefore considered a 'common and undivided interest'.").

ExxonMobil's "same cost" argument has also been considered and decisively rejected by this Court. This Court has already held that it "is not convinced by Defendant's argument that non-aggregation concerns are irrelevant because the injunctive relief sought would cost Defendant the same amount regardless of the number of beneficiaries." *Animal Legal Def. Fund v. Hormel Foods Corp.*, 249 F. Supp. 3d 53, 61 (D.D.C. 2017) (Kollar-Kotelly, J.). As the court in *Animal Legal Def. Fund v. Hormel Foods Corp.* explained, "The key question courts consider with respect to aggregation is not whether an injunction would cost Defendant more or less depending on the number of beneficiaries, but instead whether Plaintiff and the members of the general public have separate and distinct claims that could be brought independently against Defendant with respect to the challenged conduct." *Id*. at 61-62. Here, the general public and consumers of D.C. do not have an undivided interest in the injunction but have "separate and distinct claims for relief" since each could bring an action predicated on, *inter alia*, the violation of their right to truthful information. *Id. See, also, Food & Water Watch, Inc. v. Tyson Foods, Inc.*, Case No. 19-cv-2811 (APM), 2020 U.S. Dist. LEXIS 38232, at *14 (D.D.C. March 5, 2020); *Organic Consumers Ass'n v. R.C. Bigelow, Inc.*, 314 F. Supp. 3d 344, 350 (D.D.C. 2018) (Walton, J.).

None of ExxonMobil's extra-circuit authority concerns how to address the amount in controversy where the state legislature purposefully expanded the state courts' jurisdiction to retain such actions, as is the case here. *See, e.g., Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 648 (7th Cir. 2006) (case under federal common law, not state law); *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 718 (D. Md. 2001) (state common law claims, not

statutory claims); *see also Food & Water Watch, Inc.*, 2020 U.S. Dist. LEXIS 38232, at *12 (noting that courts in this jurisdiction have rejected the reasoning in *Synfuel* "with good reason").

Finally, ExxonMobil provides no justification for dismissing a dozen years of jurisprudence regarding the CPPA and its arguments for differentiating these cases each fail to address the fact that, regardless of their factual differences, they all come to the same conclusion: when a CPPA case on behalf of the general public seeks only declaratory and injunctive relief, the cost of compliance must be calculated on a per-affected-individual basis. *See* Mem. at 3-4 (collecting cases). Either ExxonMobil is saying that each of these related decisions from this district over the past 12 years was wrongly decided or else it is asking the Court to ignore these decisions in favor of finding federal diversity jurisdiction.

B. Beyond Pesticides' Request for Attorneys' Fees Does Not Create Diversity Jurisdiction

ExxonMobil's last-ditch attempt is to establish diversity jurisdiction through Beyond Pesticides' request for attorney's fees independent of other relief. This argument is unavailing. First, ExxonMobil's estimate of Beyond Pesticides' request is baseless and speculative. Second, ExxonMobil once again cannot overcome the ***universal*** case law of this District holding that the non-aggregation rule applies to attorneys' fees in CPPA cases seeking injunctive relief on behalf of the general public.

As the removing party, ExxonMobil has the burden of establishing by a preponderance of the evidence that attorneys' fees are likely to exceed the jurisdictional amount:

> IFTIM's decision not to limit the attorney's fees it seeks says nothing about whether the attorney's fees related to this matter will "more likely than not" exceed $35,000, and with respect to ***that*** contention, Total Health has put forward zero proof. (Notice of Removal ¶ 8.) Thus, this Court has no basis upon which to find, by a preponderance of the evidence, that the cost of the injunction or the attorney's fees in this case are the amounts that Total Health asserts . . . .

Inst. for Truth in Mktg. v. Total Health Network, 321 F. Supp. 3d 76, 90-91 (D.D.C. 2018) (Jackson, J.); *see also, e.g.*, *Animal Legal Def. Fund*, 249 F. Supp. 3d at 63 ("Defendant's showing regarding attorneys' fees is too speculative. Numerous courts have rejected similar attempts to create federal jurisdiction through speculative assertions as to the potential for an award of attorneys' fees."); *Nat'l Consumers League v. Bimbo Bakeries USA*, 46 F. Supp. 3d 64 at 74 (D.D.C. 2014) (Lamberth, J.) ("Defendant's speculation or conclusory statements as to the amount of attorney's fees is insufficient to establish a jurisdictional amount."); *Your Girl Friday, LLC v. MGF Holdings, Inc.*, No. 06-0385 (ESH), 2006 U.S. Dist. LEXIS 20665, at *8 (D.D.C. Apr. 18, 2006) ("defendant's conjecture regarding the possible amount of fees is inadequate to support an assertion of diversity jurisdiction in this case"). ExxonMobil's conjecture is insufficient to meet this standard. The only purported evidence offered by ExxonMobil is the billing rate of Beyond Pesticides' counsel. (Notice at 9.) From there, ExxonMobil argues that, based on the quoted billing rate of Mr. Richman, Beyond Pesticides' attorneys' fees will exceed $75,000 if that particular attorney bills over 110 hours. (*Id.*) But ExxonMobil offers absolutely no evidence to support the conjecture that Beyond Pesticides' counsel will bill over 110 hours, or that all of those hours will be billed by Mr. Richman as opposed to by his associates, who bill at lower rates. None of the cases cited by ExxonMobil in its Notice support this conjecture or qualify as evidence. These are cases brought by different counsel on significantly different (and more complicated) issues. The ***only*** thing the cases have in common is that they involve some form of CPPA claim—but not a single one involves a sole false advertising claim for only injunctive relief.[1] Effectively,

[1] *Cf. Williams v. First Gov't Mortg. & Investors Corp.*, 225 F.3d 738 (D.C. Cir. 2000) (case challenging mortgage foreclosure under numerous causes of action); *Beck v. Test Masters Educ. Servs.*, 73 F. Supp. 3d 12 (D.D.C. 2014) (Lamberth, J.) (case seeking damages on behalf of multiple plaintiffs under multiple causes of action); *In re InPhonic, Inc.* 674 F. Supp. 2d 273 (D.D.C. 2009) (Huvelle, J.) (multi-district litigation, originally filed as a putative class action for damages, involving over a dozen plaintiffs represented by ten law firms); *Dist. Cablevision Ltd. P'shp v. Bassin*, 828 A.2d 714 (D.C. 2003) (class action involving over $3,000,000 in damages); *Jackson v. Byrd*, No. 01-825, 2004

ExxonMobil is arguing that because attorneys' fees in some unrelated CPPA cases have exceeded $75,000, ***every*** CPPA case should be subject to removal. This is an absurd and untenable position. In short, ExxonMobil's baseless conjecture "is inadequate to support an assertion of diversity jurisdiction." *Your Girl Friday, LLC*, 2006 U.S. Dist. LEXIS 20665, at *8.

Of course, ExxonMobil's estimate of attorneys' fees also runs afoul of the well-established non-aggregation rule. "Courts in this district generally agree that if attorneys' fees are recoverable by statute, they can be included in the amount-in-controversy calculation but must be apportioned amongst the individual consumers. And only each individual plaintiff's share can be considered as part of the amount in controversy." *Handsome Brook Farm Grp. 2, LLC*, 222 F. Supp. 3d at 78. *See also, e.g.*, *Nat'l Consumers League v. Gen. Mills, Inc.*, 680 F. Supp. 2d 132, 141 (D.D.C. 2010) (Kennedy, J.) ("[L]ike aggregation of damages, aggregation of attorneys' fees is not appropriate in a CPPA case.") (citations omitted); *Breakman*, 545 F. Supp. 2d at 107 (holding that "[b]ecause this Court strictly construes the scope of its removal jurisdiction, and because the non-aggregation principle logically should extend to claims of attorneys' fees ... attorneys' fees should be apportioned among all of the consumer plaintiffs"); *Nat'l Org. for Women*, 612 F. Supp. at 109 (concluding that "the amount of requested attorneys' fees cannot be aggregated for determining the jurisdictional amount"). ExxonMobil does not cite to a single case in its argument that the Court ignore this principle because payment of the fees would be "awarded to and benefit only one plaintiff." (Opp. at 16.)

ExxonMobil then argues that valuation of attorney's fees articulated in *Zuckman v. Monster Beverage Corp.*, 958 F. Supp. 2d 293, 301 (D.D.C. 2013) (Bates, J.),—that the "proper balance" is to assign no fees to the named plaintiff—is inapplicable in this case because Beyond Pesticides

WL 3249692 (D.C. Super. Sept. 3, 2004) (case concerning an unconscionable sales price in a real estate transaction, involving over $400,000 in damages).

is only seeking injunctive relief. ExxonMobil Br. 18. This argument fails to appreciate that *Zuckman*, which was ultimately remanded, is but one opinion applying this principle, including cases that involve only injunctive relief. *See, e.g., Handsome Brook Farm Grp. 2, LLC*, 222 F. Supp. 3d at 78-79 ("But when, like here, a plaintiff 'is suing under [the private attorney general provision of the DCCPPA] and is recovering no independent damages, the amount of attorneys' fees applicable to it for jurisdictional purposes are $0.'") (quoting *Bimbo Bakeries USA*, 46 F. Supp. 3d at 73).

II. This Case Is Not a Class Action and CAFA Does Not Apply.

This District has held ***repeatedly and without exception*** that a private-attorney-general CPPA action for injunctive relief is not a class action for purposes of CAFA jurisdiction. The weight of this precedent is overwhelming, as evidenced by ExxonMobil's inability to cite to even a single case from this District holding to the contrary.

> The Class Action Fairness Act expressly states that when "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action," the suit will not be deemed a mass action and will not be removable pursuant to 28 U.S.C. § 1332(d).

Breakn, 545 F. Supp. 2d at 101 (quoting CAFA, 28 U.S.C. § 1332(d)(11)(B)(ii)(III)). This exception to CAFA jurisdiction applies directly to this action. ExxonMobil's legal contortions to argue around § 1332(d)(11)(B)(ii)(III) are unavailing. As shown in Beyond Pesticides' opening Memorandum, only if a CPPA action on behalf of consumers seeks ***money damages***—as opposed to just declaratory and injunctive relief—does the action become "essentially a class action," as in *Rotunda v. Marriott Int'l*, 123 A.3d 980 (D.C. 2015). *See, e.g.*, *Hackman v. One Brands, LLC*, No. 18-2101 (CKK), 2019 U.S. Dist. LEXIS 55635, at **8-10 (D.D.C. Apr. 1, 2019); *Smith v. Abbott Labs., Inc.*, No. 16-501 (RLJ), 2017 U.S. Dist. LEXIS 135478, at **4-5 (D.D.C. Mar. 31, 2017).

Absent money damages, CAFA does not provide for removal of a CPPA private-attorney-general action, regardless of whether that action is brought by an individual pursuant to D.C. Code § 28-3905(k)(1)(B), a non-profit organization pursuant to § 28-3905(k)(1)(C), or by a public-interest organization pursuant to § 28-3905(k)(1)(D). *See, e.g.*, *Hackman*, 2019 U.S. Dist. LEXIS 55635, at *8; *Animal Legal Def. Fund.*, 249 F. Supp. 3d at 64; *Flowers Bakeries, LLC*, 36 F. Supp. 3d at 36; *Bimbo Bakeries*, 46 F. Supp. 3d at 76-77; *Zuckman*, 958 F. Supp. 2d at 305; *Gen. Mills, Inc.*, 680 F. Supp. 2d at 139.

A. ExxonMobil Cannot Distinguish This District's Precedent.

ExxonMobil makes only a cursory attempt at distinguishing this consistent precedent, arguing that every relevant decision from this District should be disregarded because the decisions either (1) predate *Rotunda* or (2) concern a subpart of D.C. Code § 28-3905(k)(1) other than § 28-3905(k)(1)(D). (Opp. at 33.) These distinctions are not supported by the case law.

While D.C. Code § 28-3905(k)(1)(D) ***allows*** for a class action, it does not follow that any action filed under the provision ***must*** be a class action. *Bimbo Bakeries*, 46 F. Supp. 3d at 76-77 ("D.C. Code § 28-3905(k)(1)(D) certainly gives plaintiffs discretion to file class actions under that provision, but that is not what plaintiff NCL chose to do."). Judge Huvell espoused this principle at length in *Flowers Bakeries*:

> Absent the "hallmarks of Rule 23 class actions; namely, adequacy of representation, numerosity, commonality, typicality, or the requirement of class certification," courts have held that private attorney general statutes "lack the equivalency to Rule 23 that CAFA demands." *Baumann* [*v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1123 (9th Cir. 2014)], quoting *Purdue Pharma [L.P. v. Kentucky],* 704 F.3d [208] at 216-17 [(2d Cir. 2013)]); *see also W. Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 175-76 (4th Cir. 2011). The same is true of D.C. Code § 28-3905(k)(1)(D).
>
> The Court therefore sees no reason to depart from the well-reasoned conclusion of Judge Bates in *Breakman* and *Zuckman* that removal is not permitted under CAFA's class action provision for actions brought by a private attorney general

> under D.C. Code § 28-3905(k)(1) where plaintiff has not brought a "class action" under D.C. Superior Court Rule 23.

36 F. Supp. 3d at 36. While this decision dates to 2014, the principle has not been overturned. Indeed, just last year Judge Kollar-Kotelly reaffirmed that, several years after *Rotunda*, the reasoning of *Flowers Bakeries* continues to apply:

> [T]he Court in *National Consumers League [v. Flowers Bakeries]* concluded that removal is not permitted under CAFA for a suit brought under § 28-3905(k)(1)(D) of the DCCPPA. 36 F. Supp. 3d at 36. That provision of the DCCPPA is analogous to the provision under which Plaintiff makes her claim, except for the former applies to public interest organizations and the latter applies to individuals. *Compare* D.C. Code § 28-3905(k)(1)(D) *with* D.C. Code § 28-3905(k)(1)(B). The *National Consumers League* court explained that the plaintiff had brought a case under the DCCPPA and had not brought a "class action" under D.C. Superior Court Rule 23. As such, removal of the case as a class action under CAFA was not permissible.

Hackman, 2019 U.S. Dist. LEXIS 55635, at *8. As ExxonMobil points out, *Hackman* concerns an action brought under D.C. Code § 28-3905(k)(1)(B), not D.C. Code § 28-3905(k)(1)(D). (Opp. at 33.) But ExxonMobil fails to note that the *Hackman* decision explicitly finds these two provisions to be analogous such that the reasoning applicable to one is equally applicable to the other. *Id.; see also Animal Legal Def. Fund*, 249 F. Supp. 3d at 64 (quoting the *Flowers Bakeries* decision and analogizing to a private-attorney-general action brought under D.C. Code § 28-3905(k)(1)(C)). The purported distinction seized on by ExxonMobil—that D.C. Code § 28-3905(k)(1)(D) is the only subpart that includes the language "or a class of consumers"—is a meaningless one. The courts of this District have already established that that language means only that a class action is ***possible*** under D.C. Code § 28-3905(k)(1)(D), not that it is ***required***. *See, e.g.*, *Flowers Bakeries*, 36 F. Supp. 3d at 36; *Bimbo Bakeries*, 46 F. Supp. 3d at 76-77.

It is also worth noting that *Rotunda* itself, the sole authority in this Circuit on which ExxonMobil pins its hopes, was not brought under D.C. Code § 28-3905(k)(1)(D), but under D.C. Code § 28-3905(k)(1)(B). By ExxonMobil's own logic, *Rotunda* should therefore be ignored.

(Opp. at 33 ("All of the remaining decisions, although issued after *Rotunda*, involve claims brought under different CPPA private attorney general provisions than Section 28-3905(k)(1)(D), the one at issue here.").) But this only serves to highlight the absurdity of ExxonMobil's feeble attempt to discount the substantial and unanimous body of precedent rejecting its position.

ExxonMobil is arguing that decisions concerning subparts other than D.C. Code § 28-3905(k)(1)(D) ***cannot*** be applied to a case brought under D.C. Code § 28-3905(k)(1)(D). At the same time, ExxonMobil argues that *Rotunda*— a decision concerning subparts other than D.C. Code § 28-3905(k)(1)(D)— ***must*** be applied to the present D.C. Code § 28-3905(k)(1)(D) case. This is especially bizarre, as ExxonMobil asks the Court to disregard *Hackman* solely because it was brought under D.C. Code § 28-3905(k)(1)(B)—the very same provision under which *Rotunda* was brought. ExxonMobil states that "the decisions Plaintiff relies on arise under Sections 28-3905(k)(1)(B) or (C), which do not refer to a "class of consumers." (Opp. at 33.) Of course, by the same token, the "class of consumers" phrase was not present in *Rotunda* and was thus not relevant to the court's analysis in that case.

The reason that ExxonMobil's argument does not hold up to scrutiny is simple: the courts of this Circuit have never treated the presence or absence of the "or a class of consumers" language as dispositive for CAFA analysis. Instead, the question asked by every court that has ruled on this issue since *Rotunda* has been whether or not damages are being sought. If damages are not sought, removal under CAFA jurisdiction is not appropriate, regardless of which D.C. Code § 28-3905(k)(1) subpart is in play. *See, e.g.*, *Hackman*, 2019 U.S. Dist. LEXIS 55635, at **8-10 ("The Court concludes that Defendant assigns to *Rotunda* a weight that the case cannot bear. In *Rotunda*, the court determined that a DCCPPA claim for money damages brought by an individual on behalf of members of the general public is essentially a class action. . . . Here, Plaintiff seeks only

injunctive relief on behalf of members of the general public."); *Animal Legal Def. Fund*, 249 F. Supp. 3d at 64-65 ("The concerns raised by the District of Columbia Court of Appeals in *Rotunda* related to suits for damages, not for the type of injunctive relief sought here, and that court *repeatedly* described its holding as limited to such suits." (emphasis in original)); *Smith*, 2017 U.S. Dist. LEXIS 135478, at **4-5 (limiting *Rotunda* "solely to suits for money damages").

B. ExxonMobil's Remaining Arguments Are Either Factually Inaccurate or Contrary to Established Law.

ExxonMobil spends several pages arguing that the principles of *Rotunda* should be applied equally to actions for injunctive relief as to actions for damages, despite such arguments already having been rejected, repeatedly and without exception, by the courts of this District. While these arguments are plainly unavailing under established precedent, it is worth examining some of the most glaring flaws in ExxonMobil's arguments.

First, ExxonMobil states, incorrectly, that "Plaintiff does not dispute that CAFA's second, third, and fourth elements are satisfied." (Opp. at 26.) To the contrary, Beyond Pesticides disputes the third (that "at least 100 class members are represented") and fourth (that the "matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs") elements.

As to the size of the class, ExxonMobil cannot prove that a class of at least 100 class members (or of ***any*** size) exists, as Beyond Pesticides has alleged no viable definition of a class. Instead, the relevant paragraphs of Beyond Pesticides' Complaint explain that the CPPA gives a right of action to any consumer, including those who have not purchased the product or service at issue:

> Any consumer has the right to bring an action for redress of ExxonMobil's unlawful behavior, see D.C. Code § 28-3905(k)(1)(A), and the statute ***does not limit consumer plaintiffs according to whether they purchased the product at issue***. Nevertheless, as alleged in this Complaint, the petroleum products are marketed and provided in the District, and consumers within the District have obtained these products under the misrepresentations made by ExxonMobil. Therefore, ***a variety***

> ***of purchasing and non-purchasing consumers*** could bring an action against ExxonMobil based on the misrepresentations and omissions listed in this Complaint.
>
> Pursuant to D.C. Code § 28-3905(k)(1)(D)(i), "a public interest organization may, on behalf of the interests of a consumer or a class of consumers, bring an action seeking relief from the use by any person of a trade practice in violation of a law of the District if the consumer or class could bring an action under subparagraph (A) of this paragraph for relief from such use by such person of such trade practice."

(Compl. ¶¶ 150-51.) Insofar as it is acting on behalf of the general public, Beyond Pesticides represents all participants in the D.C. marketplace ("a variety of purchasing and non-purchasing consumers"), not just those consumers who have purchased a particular product or service.[2] All participants in the D.C. marketplace is an impossible class to define—which is permissible precisely because there is no class in this case. (Mem. at 7-11.) There is not, and never will be, a class (of any size) to certify. That is why the requirements of 28 U.S.C. § 1332(d) cannot be met, regardless of how ExxonMobil would like to define the non-existent class.

As to the amount in controversy, Beyond Pesticides has already stated that the "costs cited by ExxonMobil are speculative, unreasonable, and/or entirely hypothetical." (Mem. at 5; *see also supra*, Section I.A) The declaration submitted in support of ExxonMobil's Memorandum in Opposition simply lists ExxonMobil's total U.S. advertising budgets for the past several years.

[2] D.C. law specifically contemplates acting on behalf of all participants in the marketplace, as opposed to just product purchasers. The CPPA "establishes an enforceable right to truthful information from merchants about consumer goods and services that are or would be purchased, leased, or received in the District of Columbia." D.C. Code § 28-3901(c). A manufacturer misrepresenting the properties or qualities of consumer goods violates the CPPA regardless of "whether or not any consumer is in fact misled, deceived, or damaged thereby." D.C. Code § 28-3904. Deprivation of the right to a truthful marketplace (separate and apart from any reliance or financial expenditure) constitutes an injury-in-fact that may be remedied through litigation. *See Clean Label Project Found. v. Panera, LLC*, 2019 D.C. Super. LEXIS 14, at **5-6 (Oct. 11, 2019) (citing *Grayson v. AT&T Corp.*, 15 A.3d 219, 247 (D.C. App. 2011); *Shaw v. Marriott Int'l, Inc.*, 605 F.3d 1039, 1042 (D.D.C. 2010) (Griffith, J.)); *Nat'l Consumers League v. Bimbo Bakeries USA*, 2015 D.C. Super. LEXIS 5, at *8 (Apr. 2, 2015) ("NCL can meet the requirement to show an injury-in-fact by showing a deprivation of a statutory right to be free from improper trade practices under the CPPA."); *Mostofi v. Mohtaram, Inc.*, No. 2011 CA 163 B, 2013 D.C. Super. LEXIS 12, at *5 (Nov. 12, 2013) ("A statutory right to 'be free from improper trade practices' under D.C. Code § 28-3904 and D.C. Code § 28-3905(k)(1) 'may constitute an injury-in-fact sufficient to establish standing,' even though a plaintiff 'suffered no judicially cognizable injury in the absence of [the] statute.' [*Grayson*, 15 A.3d] at 248-249 (citation omitted).").

(Jeffers Decl., ECF No. 11-1.) This budget presumably includes advertising that is not challenged in this action, as well as costs for running existing advertisements (as opposed to producing new ones) on various platforms and in various markets. (*See supra*, Section I.A.) There is simply no way—other than through wild speculation—to determine from this information how much ExxonMobil would need to spend to remove or alter the challenged statements from its advertising. (*See id*.) ExxonMobil has therefore failed to meet the amount-in-controversy.

Second, in ExxonMobil's eagerness to point out that Beyond Pesticides alleges an ability to "adequately represent" consumer interests (Opp. at 28), ExxonMobil misses that the other hallmarks of a Rule 23 class action are missing from CPPA actions of this kind. The courts of this District, however, have noticed this discrepancy:

> CAFA defines a "class action" as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). This frames the question as whether § 28-3905(k)(1)(D) is a "state statute or rule of judicial procedure 'similar' to Rule 23 that authorizes a class action." *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1121 (9th Cir. 2014). "A state statute or rule is similar to Federal Rule of Civil Procedure 23 if it closely resembles Rule 23 or is like Rule 23 in substance or in essentials." *Id.* (quoting *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 174 (4th Cir. 2011)). The "hallmarks of Rule 23 class actions [are] adequacy of representation, numerosity, commonality, typicality, [and] the requirement of class certification;" absent these, private attorney general actions lack "the equivalency to Rule 23 that CAFA demands." *Id.* at 1123 (quoting *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 216-17 (2d Cir. 2013)); *see also* Fed. R. Civ. Pro. 23(a).
>
> Here, defendant BBUSA points out that ***§ 28-3905(k)(1)(D)(ii) specifically requires "public interest organizations" to be adequate, however, other important "hallmarks" are absent.*** Particularly, there is no procedural element for class certification and no notice provision for would-be class members.

Bimbo Bakeries, 46 F. Supp. 3d at 76-77 (emphasis added); *see also Hackman*, 2019 U.S. Dist. LEXIS 55635, at **12-13 ("[T]he DCCPPA does not qualify as a statute similar to Rule 23 that itself carries the requisite procedural safeguards." (quoting *Zuckman*, 958 F. Supp. 2d at 305)).

Beyond Pesticides has made no allegations concerning typicality or commonality, has not defined a class, and has brought suit under a statute that lacks any procedural element for class certification or notice. This is quite simply not a class action.

Third, ExxonMobil is incorrect to suggest that there is any inconsistency in Beyond Pesticides invoking the non-aggregation principle with regards to diversity jurisdiction and disclaiming to have brought a class action with regards to CAFA jurisdiction. Indeed, Judge Kollar-Kotelly has already discussed and rejected this argument:

> Finally, the Court notes that finding that this case is not a class action for the purposes of CAFA is not in conflict with the Court's conclusion that the non-aggregation principle makes it inappropriate for the Court to consider the total cost to the Defendant of complying with the requested injunction when calculating the amount in controversy for the purposes of diversity jurisdiction. Defendant suggests that these two conclusions "cannot be squared" and allow Plaintiff to "have it both ways." Although Defendant's position may have some intuitive appeal, ***it conflates what are in fact two distinct inquiries***. Considering the total cost of complying with the requested injunction is inappropriate because doing so effectively aggregates separate and distinct claims that each member of the general public has against Defendant regarding the challenged conduct. Finding that CAFA jurisdiction does not apply is simply a matter of determining that Plaintiff has not brought this case as a class action. ***These two determinations are not inherently in conflict.***

Animal Legal Def. Fund, 249 F. Supp. 3d at 65 (emphasis added).

In argument after argument, ExxonMobil attempts to ignore the established precedent of this District. Such arguments must be rejected. As the courts of this District have universally found, CAFA jurisdiction does not apply to a private-attorney-general action seeking only injunctive and declaratory relief.

III. Plaintiff Is Entitled to Attorneys' Fees and Costs.

Payment of costs and expenses is appropriate when the removing party lacks "an objectively reasonable basis for seeking removal." *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 141 (2005). Here, ExxonMobil's argument for removal is inconsistent with both long-standing and

recent case law that is directly contrary, and ExxonMobil provides no objectively reasonable basis for its argument.

ExxonMobil argues that this Court should decline to award costs and fees because no binding case law directly controls this action. (Opp. at 27.) However, this Court has ***uniformly*** found that similar false-advertising cases arising under the DC CPPA and seeking only injunctive and declaratory relief must be remanded. ExxonMobil's belief that only controlling cases can establish settled law has long since evaporated. Plaintiffs have pointed to at least twelve directly-on-point decisions in this District finding a lack of subject matter jurisdiction under diversity jurisdiction and/or CAFA—more than the five decisions that justified a fee award in *Stein v. Am. Express Travel Related Servs.*, 813 F. Supp. 2d 69 (D.D.C. 2011) (Kessler, J.). ExxonMobil, on the other hand, has failed to cite to a single contrary authority from this Circuit, because, as ExxonMobil should be aware through its research in finding cases that have not awarded fees, District Courts have unanimously remanded similar actions and rejected the same arguments that ExxonMobil presents here.

ExxonMobil's attempt to distinguish *Stein* factually is likewise unpersuasive because the plaintiff's "communications" informing defendants that his CPPA action was not removable under either federal question or CAFA jurisdiction was only one relevant factor in the decision to award costs. *Stein*, 813 F. Supp. 2d at 74. The other factors that persuaded Judge Kessler in *Stein* remain even more relevant at present:

> [I]f non-removability is obvious or contrary to well-settled law, courts regularly impose costs and expenses incurred as a result of removal. Given the fact that the applicable case law has been well established, *see Breakman* and its progeny, cited *supra*, the fact that Plaintiffs' counsel initiated communications with Defendants' counsel to advise them of the relevant case law, the fact that Plaintiffs filed the FAC as private attorney generals and relied only on the DCCPA, the Court concludes that it is appropriate to grant the request for an award of costs. Therefore,

> Defendants shall pay the actual costs incurred by Plaintiffs in challenging the removal.

Id. In this case, not only does ExxonMobil have no objectively reasonable basis to remove this case based on well-established case law, it fails to meet its burden of quantifying the amount in controversy. The lack of legal and factual support and general deficiency as to any basis for removal warrants an award of costs and fees to Beyond Pesticides, a non-profit organization. *See Martin*, 546 U.S. at 141 (award of fees turns on "reasonableness of the removal").

CONCLUSION

For all the foregoing reasons, and those set forth in its opening Memorandum, Beyond Pesticides requests an order remanding this action to the Superior Court of the District of Columbia and awarding its costs associated with seeking remand.

DATED: September 21, 2020

Respectfully submitted,

RICHMAN LAW GROUP

By: */s/Kim E. Richman*
Kim E. Richman (Bar No. 1022978)
8 West 126th Street
New York, New York 10027
Telephone: (718) 878-4707
Facsimile: (212) 687-8292
krichman@richmanlawgroup.com

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I, Kim E. Richman, hereby certify that on September 21, 2020, I caused a true and correct copy of the foregoing document to be served on counsel of record for Defendants in the above-captioned Action via ECF:

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP

Patrick J. Conlon (Bar No. 414621)
patrick.j.conlon@exxonmobil.com
22777 Springwoods Village Parkway
Spring, TX 77389
Tel: (832) 624-6336

Theodore V. Wells, Jr. (Bar No. 468934)
Daniel J. Toal
twells@paulweiss.com
dtoal@paulweiss.com
1285 Avenue of the Americas
New York, NY 10019
Tel: (212) 373-3000

Justin Anderson (Bar No. 1030572)
janderson@paulweiss.com
2001 K Street, NW
Washington, DC 20006-1047
Tel: (202) 223-7300

Attorneys for Defendant

/s/ Kim E. Richman
Kim E. Richman