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

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S EMERGENCY MOTION TO STAY EXECUTION OF THE REMAND ORDER

Defendant ExxonMobil Corp.'s Emergency Motion for a Temporary Stay of Execution of the Remand Order ("Motion") should be denied because ExxonMobil, even with additional briefing, has no chance of establishing the necessity of a stay pending appeal. A party who moves for a stay or injunction pending appeal bears the burden of showing that the balance of four factors weigh in favor of the stay/injunction: (1) the likelihood that the party will prevail on the merits of the appeal; (2) the likelihood that the party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting a stay. *See McCammon v. United States*, 588 F. Supp. 2d 43, 47 (D.D.C. 2008) (citing *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 988, 990 (D.D.C. 2006)). It is clear already that none of those factors will favor a stay here. As to the first factor, any petition for permission to appeal filed by ExxonMobil would be futile. The Court of Appeals for this Circuit has already denied two such petitions in virtually identical circumstances, except for the relevant law being ***less*** developed than it is now regarding the fact that CAFA jurisdiction does not encompass private attorney general actions under the D.C. Consumer Protection Procedures Act ("CPPA," D.C. Code § 28-3901 *ff.*). As to the second factor, ExxonMobil's "emergency" motion uses the words "irreparable harm" (Motion ¶ 4) but fails to identify even one way in which litigating in the proper forum, D.C. Superior Court, would harm ExxonMobil's interests. To the contrary, and as to the third factor, other parties would be harmed if the Court were to grant a stay—namely, the general public of the District of Columbia, and Plaintiff Beyond Pesticides, who have already lost nearly a year of time in their action to enjoin pervasive, ongoing conduct aimed at D.C. consumers. Finally, as to the fourth factor, ExxonMobil's motion does not even mention public interest in granting a stay, because the public gains nothing when a private attorney general action is kept out of the proper forum by continual delay tactics.

I. Appeal of the Remand Order Would Be Futile.

Defendant ExxonMobil removed this action on two purported grounds, diversity jurisdiction and CAFA subject-matter jurisdiction. The Court issued a remand order (Memorandum and Order, Dkt. No. 14, filed Mar. 22, 2021 ("Order")) on the basis that ExxonMobil's diversity calculation (cost of compliance with injunctive relief) violated the non-aggregation principle (Order 3-5), and on the basis that a CPPA private attorney general action does not fall within CAFA, 28 U.S.C. § 1332(d)(2) (Order 5-6). ExxonMobil acknowledges that an order remanding a case to state court, generally, is non-appealable (Motion ¶ 3), and therefore does not seek to appeal this Court's ruling on diversity jurisdiction. ExxonMobil contends, however, that because 28 U.S.C. § 1453(c)(1) creates an exception allowing appeal of an order remanding a case removed under CAFA, the Court should temporarily stay its Order while the parties brief the issue of a longer stay pending appeal.

Any such appeal would be futile, because the Court of Appeals would deny the petition. This question has arisen before. In *National Consumers League v. General Mills, Inc.*, 680 F. Supp.2d 132 (D.D.C. 2010) (Kennedy, J.) ("*NCL*"), the plaintiff public-interest organization (NCL) brought a CPPA private attorney general action seeking to enjoin defendant General Mills' representation that Cheerios cereal had "drug-quality properties that would reduce total and 'bad' cholesterol levels when eaten." *Id.* at 134 (quoting complaint). General Mills removed the action, citing CAFA jurisdiction. As in the instant action, the court held that CPPA private attorney general action falls within the exception of 28 U.S.C. § 1332(d)(11)(B)(ii)(III) and therefore is not covered by CAFA: "NCL's suit falls squarely under this exception: it is a civil action in which the sole claim is asserted on behalf of the general public pursuant to a D.C. Code provision that

specifically authorizes such action. As such, it is not a mass action removable under CAFA." *NCL*, 680 F. Supp.2d at 137.

Defendant General Mills petitioned the Court of Appeals for permission to appeal under 28 U.S.C. § 1453(c)(1). In a terse, *per curiam* opinion, the Court of Appeals denied permission to appeal: "It is unclear as a matter of District of Columbia law whether respondent's D.C. Consumer Protection Procedures Act 'private attorney general' action must be litigated as a class action under Rule 23. Accordingly, the District of Columbia courts should determine how this action should proceed." *In re General Mills, Inc.*, No. 10-8001, 2010 U.S. App. LEXIS 13195, at *1 (D.C. Cir. June 25, 2010) ("*General Mills*"). The *General Mills* denial of petition cites *In re U-Haul International, Inc.*, No. 08-7122, 2009 U.S. App. LEXIS 7163 (D.C. Cir. April 9, 2009), a virtually identical decision issued one year earlier:

> U-Haul International, Inc. argues that a 'private attorneys general action' brought under the D.C. Consumer Protection Procedures Act must be litigated as a class action under Rule 23. This is not clear as a matter of District of Columbia law, and the local courts should determine how this action, purported to be a non-class representative action, should proceed.

Id. at **1-2.

In 2015, after the *General Mills* and *U-Haul* decisions, the D.C. Court of Appeals decided in *Rotunda v. Marriot International, Inc.*, 123 A.3d 980 (D.C. 2015), that a CPPA action for ***damages*** can be treated as a mass action for CAFA purposes. But as the Order correctly recognizes (Order 5-6), this Court has never extended that holding to a CPPA private attorney general action, like this one, for ***injunctive*** relief. To the contrary, every decision has solidified the *NCL* opinion that a CPPA private attorney general action for injunctive relief falls under 28 U.S.C. § 1332(d)(11)(B)(ii)(III), the exception to CAFA. *See, e.g.*, *Hackman v. One Brands, LLC*, No. 18-2101 (CKK), 2019 U.S. Dist. LEXIS 55635, at *18 (D.D.C. Apr. 1, 2019); *Animal Legal Def. Fund v. Hormel Foods Corp.*, 249 F. Supp. 3d 53, 64-65 (D.D.C. 2017) (Kollar-Kotelly, J.); *Smith*

v. Abbott Laboratories, Inc., No. 16-501 (RJL), 2017 U.S. Dist. LEXIS 135478, at *5 (D.D.C. Mar. 31, 2017); *Nat'l Consumers League v. Flowers Bakeries, LLC*, 36 F. Supp. 3d 26, 35-36 (D.D.C. 2014) (Huvelle, J.). Those decisions are consistent with decisions issued in similar circumstances nationwide,[1] including at least one other decision remanding a private attorney general case that ExxonMobil removed,[2] and no District of Columbia court has decided otherwise. ExxonMobil's petition for permission to appeal, therefore, would have even less chance for success than General Mills' did 11 years ago or U-Haul's did 12 years ago. In other words, such a petition would be futile.[3]

II. Any Stay Would Harm Plaintiff Beyond Pesticides' Interest in Obtaining Injunctive Relief to Stop Ongoing Harm to Consumers.

Given the clarity of the precedent indicating that any appeal petition by Defendant ExxonMobil would be denied, this Motion to Stay must be considered a delay tactic, to stall litigation of Beyond Pesticides' claim in D.C. Superior Court. *Cf. Lightfoot v. Dist. of Columbia*, Civil Action No. 01-1484 (CKK), 2006 U.S. Dist. LEXIS 4633, at *34 (D.D.C. Jan. 24, 2006) ("[T]he Court further emphasizes Chief Justice Taft's maxim that 'Delay works always for the man with the longest purse'."). ExxonMobil nonetheless declares that, absent a stay, ***it*** faces "irreparable harm." (Motion ¶ 4.) But ExxonMobil makes no indication of what that harm would be. To the contrary, it is Plaintiff Beyond Pesticides (and the general public of the District of

[1] *See, e.g.*, *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1122 (9th Cir, 2014) ("[Private attorney general] actions are also not sufficiently similar to Rule 23 class actions to trigger CAFA jurisdiction."). *Cf. Erie Ins. Exch. v. Erie Indem. Co.*, 722 F.3d 154, 158-59 (3d Cir. 2013) (holding that suit on behalf of unincorporated association, prosecuted by its members, "contains none of the defining characteristics of Rule 23 of the Federal Rules of Civil Procedures"); *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 212 (2d Cir. 2013) ("Indeed, every Circuit to consider this precise issue—including the Fourth, the Seventh, the Ninth and, most recently, the Fifth—has reached the same conclusion we reach today: *parens patriae* suits are not removable as 'class actions' under CAFA.").

[2] *Massachusetts v. ExxonMobil Corp.*, No. 19-cv-12430, 2020 U.S. Dist. LEXIS 93153, at *36 (D. Mass. May 28, 2020) (remanding public attorney general action removed by ExxonMobil pursuant to CAFA, and rejecting ExxonMobil's reliance on Massachusetts Appeals Court decision stating that "an action brought by the Attorney General under [Mass. Gen. Laws ch. 93A, § 4], is comparable to a class action" (citation omitted)).

[3] Plaintiff Beyond Pesticides reserves the right to seek attorneys' fees for any time spent litigating Defendant ExxonMobil's demonstrably futile and frivolous appeal.

Columbia, on whose behalf Beyond Pesticides is acting as a private attorney general) who face harm if this action is stayed. Beyond Pesticides, a nonprofit organization headquartered in the District of Columbia, alleges that ExxonMobil violates the CPPA by falsely representing that its investments and activities in "clean" energy and environmentally beneficial technology comprise a large percentage of its overall business. These false representations, Beyond Pesticides alleges, are ongoing, and through this action, Beyond Pesticides seeks to enjoin ExxonMobil from making the representations to D.C. consumers. Because of ExxonMobil's unfounded removal, which was contrary to all settled law, Beyond Pesticides has already lost some 10 months of time to litigate its CPPA action. With every day that Beyond Pesticides is blocked from the correct forum, more D.C. consumers are exposed to ExxonMobil's representations.

CONCLUSION

No additional briefing is necessary to see that a stay pending appeal would be unwarranted in this case. Because any petition for permission to appeal would be futile, and because a stay harms the interests of Plaintiff Beyond Pesticides and the general public, Defendant ExxonMobil's Emergency Motion for a Temporary Stay of Execution of the Remand Order should be denied.

DATED: March 25, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

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