**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

BEYOND PESTICIDES,

Plaintiff,

v.

EXXON MOBIL CORPORATION,

Defendant.

No. 1:20-cv-01815-TJK

**NOTICE OF MOTION TO STAY EXECUTION**
**OF THE REMAND ORDER PENDING APPEAL**

Defendant Exxon Mobil Corporation ("ExxonMobil"), by and through its undersigned counsel, and pursuant to Federal Rule of Civil Procedure 7 and Federal Rule of Appellate Procedure 8(a)(1)(A), moves to stay execution of this Court's Order remanding this action to the District of Columbia Superior Court pending the resolution of ExxonMobil's forthcoming appeal to the U.S. Court of Appeals for the District of Columbia Circuit.

A brief in support of the motion and a proposed order are attached. Pursuant to Local Civil Rule 7(m), counsel for ExxonMobil informed Plaintiff on March 29, 2021 of its intention to file this motion. Plaintiff did not consent to the relief requested.

DATE: March 29, 2021

Respectfully Submitted,

EXXON MOBIL CORPORATION,

By its attorneys,

PAUL, WEISS, RIFKIND,
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EXXON MOBIL CORPORATION

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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

BEYOND PESTICIDES,

Plaintiff,

v.

EXXON MOBIL CORPORATION,

Defendant.

No. 1:20-cv-01815-TJK

**BRIEF OF DEFENDANT EXXON MOBIL CORPORATION IN SUPPORT OF ITS MOTION FOR A STAY OF EXECUTION OF THE REMAND ORDER PENDING APPEAL**

# TABLE OF CONTENTS

**Page**

# TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**TABLE OF AUTHORITIES**
**(Continued)**

**Page(s)**

**TABLE OF AUTHORITIES**
**(Continued)**

**Page(s)**



**STATUTES**

## TABLE OF AUTHORITIES
**(Continued)**

**Page(s)**



**OTHER AUTHORITIES**

## INTRODUCTION

To spare the parties and the courts from what could be a substantial amount of unnecessary and ultimately futile litigation, Exxon Mobil Corporation ("ExxonMobil") respectfully requests that this Court stay execution of its Order remanding this case (the "Remand Order") until the D.C. Circuit and, if needed, the Supreme Court have had the opportunity to determine whether this action was properly removed.[1]

The D.C. Circuit is likely not only to grant ExxonMobil's forthcoming petition for review under 28 U.S.C. § 1453, but also to hold that this case is properly removable under either the Class Action Fairness Act ("CAFA") or diversity jurisdiction. The D.C. Circuit is likely to review CAFA's applicability to private attorney general actions under the D.C. Consumer Protection Procedures Act because it is a recurring and important question. That Court is likely to go on to hold that CAFA is satisfied because, under D.C. Court of Appeals precedent, such private attorney general actions must be litigated as class actions under Rule 23. In addition or in the alternative, the D.C. Circuit is likely to hold that diversity jurisdiction is properly exercised because ExxonMobil's costs—either in complying with the injunctive relief requested, or paying the attorneys' fees demanded—easily exceed the jurisdictional threshold of $75,000. The non-aggregation principle does not require disaggregating those costs because ExxonMobil's expenditures are unaffected by the number of D.C. consumers on whose behalf Plaintiff purports to sue.

Should this case be immediately remanded to the D.C. Superior Court, both ExxonMobil and Plaintiff will be forced to simultaneously litigate ExxonMobil's forthcoming appeal before the

[1] By filing this motion, ExxonMobil does not waive any right, defense, affirmative defense, or objection, including any challenges to personal jurisdiction over ExxonMobil.

D.C. Circuit, and the merits of Plaintiff's claims before the D.C. Superior Court. In the process, both parties will be forced to invest substantial resources that will be wasted should the D.C. Circuit or Supreme Court later hold that this case is removable. Similarly, the D.C. Superior Court will be forced to squander scarce judicial resources to adjudicate potentially unnecessary issues. And this Court will, in turn, be faced with the unnecessary burden of evaluating the precedential or persuasive force of any intervening orders issued by the D.C. Superior Court. Staying the Remand Order pending appeal, by contrast, obviates all of these concerns. Indeed, for these and other reasons, courts have often granted stays pending Section 1453 removal appeals. *See, e.g.*, *Morgan* v. *Gay*, 471 F.3d 469, 471 (3d Cir. 2006); *DiTolla* v. *Doral Dental IPA of N.Y., LLC*, 469 F.3d 271, 274 (2d Cir. 2006); *Lafalier* v. *Cinnabar Serv. Co.*, No. 10-05, 2010 WL 1816377 (N.D. Okla. Apr. 30, 2010).

At minimum, this Court should enter a brief stay of the Remand Order to enable ExxonMobil to seek a stay pending appeal from the D.C. Circuit. *See* Fed. R. App. P. 8(a)(2); *see, e.g.*, *WP Co.* v. *U.S. Small Business Admin.*, No. 20-1240, 2020 WL 6887623, at *1 (D.D.C. Nov. 24, 2020); *cf. Lincoln Tel. & Tel. Co.* v. *Fed. Commc'ns Comm'n*, 659 F.2d 1092, 1110 (D.C. Cir. 1981).

**PROCEDURAL BACKGROUND**

On May 15, 2020, Plaintiff Beyond Pesticides filed a Complaint against ExxonMobil in the D.C. Superior Court. *See Beyond Pesticides* v. *Exxon Mobil Corp.*, No. 2020 CA002532 B (D.C. Super. Ct. May 15, 2020). On July 6, 2020, ExxonMobil timely removed the case to this Court pursuant to 28 U.S.C. §§ 1332(a), (d); 1367; 1441(a); 1446; and 1453(b). *See* ECF No. 1. On August 5, 2020, Plaintiff moved to remand this case to the D.C. Superior Court, *see* ECF No. 10, which this Court granted in a March 22, 2021 Memorandum and Order, *see* ECF No. 14.

## LEGAL STANDARD

District courts are authorized to stay entry of an order or judgment in proceedings pending before them. *See* Fed. R. App. P. 8(a)(1) ("A party must ordinarily move first in the district court for . . . a stay of the judgment or order of a district court pending appeal."). This includes the authority to stay remand orders pending a Section 1453 appeal. *See, e.g.*, *Lafalier*, 2010 WL 1816377, at *1.

When deciding whether to enter a stay, courts consider: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Clean Air Council* v. *Pruitt*, 862 F.3d 1, 8 (D.C. Cir. 2017) (per curiam) (quoting *Nken* v. *Holder*, 556 U.S. 418, 434 (2009)); *see, e.g.*, *Marshall Cty. Coal Co.* v. *Fed. Mine Safety & Health Review Comm'n*, No. 18-1098, 2018 WL 4600693, at *1 (D.C. Cir. Aug. 27, 2018) (per curiam). Although this is "essentially the same as the test for a preliminary injunction," courts within this District "often recast the likelihood of success factor as requiring only that the movant demonstrate a serious legal question on appeal where the balance of harms favors a stay." *WP Co.*, 2020 WL 6887623, at *2.

## ARGUMENT

### I. ExxonMobil's Appeal Will Present Compelling Grounds for Federal Jurisdiction.

Because ExxonMobil premised removal, in part, on CAFA, it is entitled by statute to petition the D.C. Circuit to review this Court's order "granting . . . a motion to remand a class action to the State court from which it was removed." 28 U.S.C. § 1453(c)(1). Should the D.C. Circuit grant ExxonMobil's petition, it will also have discretion to review the other basis on which ExxonMobil removed this action, diversity of citizenship. *See Nevada* v. *Bank of Am. Corp.*, 672

F.3d 661, 672-73 (9th Cir. 2012); *Coffey* v. *Freeport McMoran Copper & Gold*, 581 F.3d 1240, 1247-48 (10th Cir. 2009); *Brill* v. *Countrywide Home Loans, Inc.*, 427 F.3d 446, 451-52 (7th Cir. 2005); *cf. Nat'l Weather Serv. Empls.* v. *Fed. Labor Relations Authority*, 966 F.3d 875, 879-80 (D.C. Cir. 2020). It is "likely" that the D.C. Circuit will grant ExxonMobil's petition and, with due regard for this Court's ruling, go on to hold that removal was proper under CAFA and/or diversity jurisdiction. *See Clean Air Council*, 862 F.3d at 8. At a minimum, ExxonMobil has shown "a serious legal question on appeal." *WP Co.*, 2020 WL 6887623, at *2.

*First*, the D.C. Circuit is likely to grant ExxonMobil's petition for review. When considering whether to exercise appellate jurisdiction under Section 1453, courts of appeal emphasize the novelty and importance of the issue presented. *See*, *e.g.*, *Dominion Energy, Inc.* v. *City of Warren Police & Fire Ret. Sys.*, 928 F.3d 325, 334 (4th Cir. 2019); *Estate of Pew* v. *Cardarelli*, 527 F.3d 25, 29 (2d Cir. 2008). The issue central to ExxonMobil's petition recurs frequently in this District: whether private attorney general actions filed in the D.C. Superior Court under Section 28-3805(k)(1) of the District of Columbia Consumer Protection Procedures Act (the "CPPA") are removable as "class actions" under CAFA. *See* Remand Order at 5-6 (collecting cases).

Although the D.C. Circuit previously declined to review this issue because D.C. local courts had yet to decide whether Section 28-3905(k)(1) actions must be litigated as class actions, *see* Order, *Monster Beverage Corp.* v. *Zuckman*, No. 13-8006 (D.C. Cir. Dec. 16, 2013) (per curiam); Order, *In re Gen. Mills*, No. 10-8001 (D.C. Cir. June 25, 2010) (per curiam); Order, *In re U-Haul Int'l, Inc.* No. 08-7122, 2009 WL 902414 (D.C. Cir. Apr. 6, 2009) (per curiam), that impediment no longer exists. In *Rotunda* v. *Marriott International, Inc.*, 123 A.3d 980, 982 (D.C. 2015), the D.C. Court of Appeals held that a Section 28-3905(k)(1) action "brought by an

individual on behalf of himself and other similarly situated members of the general public is in essence a class action, whether pled as such or not, and must satisfy the requirements of Rule 23." It is now ripe for the D.C. Circuit to resolve this issue, which will "be dispositive of [a district court's] jurisdiction under CAFA" in both this case and many others. *U-Haul*, 2009 WL 902414, at *4 (Rogers, J., dissenting).

*Second*, with due respect to this Court's order, the D.C. Circuit is likely to hold that this action was properly removed under CAFA. CAFA renders removable "class actions"—"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). Because this case concerns a representative action brought under Section 28-3905(k)(1), the question is whether, "similar" to Rule 23, that provision "authoriz[es]" a "representative person[]" to bring a suit as a "class action." *Id.* The D.C. Court of Appeals has answered that question in the affirmative: A representative action under Section 28-3905(k)(1) cannot proceed, and is subject to dismissal, unless the plaintiff seeks certification under D.C. Superior Court Rule 23, a rule "identical"—and not merely "similar"—to Federal Rule of Civil Procedure 23, D.C. Super. Ct. R. Civ. P. 23 cmt.[2] *See Rotunda*, 123 A.3d at 984-85.

Although, as this Court noted, *Rotunda* involved a representative suit for money damages as opposed to injunctive relief, the Court's statutory analysis did not turn on the form of relief sought. *See* Remand Order at 6 n.2. Instead, it analyzed whether the CPPA "clearly or explicitly" "abrogated or repealed" the application of D.C. Civil Rule 23 to "representative suits under the CPPA." 123 A.3d at 988 (brackets omitted). The court saw no "unambiguous evidence" that the

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[2] For that reason, it is irrelevant whether Section 28-3905 *itself* bears the "hallmarks of Rule 23 actions." *Contra Nat'l Consumers League* v. *Flowers Bakeries, LLC*, 36 F. Supp. 3d 26, 36 (D.D.C. 2014).

D.C. Council "meant to displace the Rule 23 framework in favor of improvised due process and management devices for a whole sub-set of representative actions." *Id.* Moreover, Section 28-3905(k)(1) provides a private right of action for both money damages and injunctive relief, and nothing in its text indicates that the representative nature of such suits differs based on the type of relief sought.

*Third*, the D.C. Circuit is likely to hold that this action was properly removed under diversity jurisdiction. ExxonMobil's potential costs—either in complying with the injunctive relief requested, or paying the attorneys' fees demanded—indisputably "exceed[] the sum or value of $75,000, exclusive of interests and costs." 28 U.S.C. § 1332(a). Section 1332(a)'s non-aggregation principle—pursuant to which "multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional-amount requirement," *Zahn* v. *Int'l Paper Co.*, 414 U.S. 291, 294 (1973)—does not change that fact. For starters, the principle is simply inapplicable where, as here, "two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." *Snyder* v. *Harris*, 394 U.S. 332, 335 (1969). Plaintiff and the District of Columbia consumers on whose behalf it purports to sue have an "undivided interest" in the injunctive relief they seek: The cost to ExxonMobil of modifying its advertising to meet Plaintiff's preferences does not depend on the "number of plaintiffs" or the "values of their individual claims." *Williams* v. *Purdue Pharma Co.*, Civ. No. 02-0556, 2003 WL 24259557, at *5 (D.D.C. Feb. 27, 2003).

Even if the non-aggregation principle were to apply here, it would be satisfied. The "relevant test" is whether "the cost to each defendant of an injunction running in favor of one plaintiff" exceeds $75,000. *Synfuel Techs., Inc.*, v. *DHL Express (USA), Inc.*, 463 F.3d 646, 651 (7th Cir. 2006). If the defendant "could comply with the proposed injunction only by undertaking

a systemic change . . . a change that would cost the same whether it was made for just one [plaintiff] or every [plaintiff]," *id.*, then disaggregation is unwarranted because aggregation of plaintiffs' claims is unnecessary to reach the amount in controversy in the first instance. That is precisely what Plaintiff demands: a dramatic overhaul of ExxonMobil's advertising efforts that "would cost [ExxonMobil] the same whether it was made for just one customer or every customer served by the company." *Id.*

In short, the D.C. Circuit is likely to grant ExxonMobil's petition for review, and is likely to hold that this action was properly removed under CAFA and/or diversity jurisdiction. At the very least, ExxonMobil has presented "serious legal question[s] on appeal," which suffices to warrant a stay where, as here, "the balance of harms favors a stay." *WP Co.*, 2020 WL 6887623, at *2.

## II. ExxonMobil Will Suffer Irreparable Harm Absent a Stay.

Unless this Court stays the Remand Order, ExxonMobil will be forced to litigate its appeal of the Remand Order before the D.C. Circuit and potentially the U.S. Supreme Court while simultaneously defending itself against Plaintiff's claims in the D.C. Superior Court. 28 U.S.C. § 1447(c). It will suffer irreparable harm in the process.

*First*, while ExxonMobil's appeal is pending, the D.C. Superior Court could rule on various substantive and procedural motions, including dispositive motions in which the parties' claims and defenses are adjudicated. It is also possible that the D.C. Superior Court will decide discovery motions. And there is a concrete and substantial risk that these motions would be decided differently than they would be in federal court. For example, Plaintiff may argue that the D.C. Superior Court has different pleading standards or discovery rules than federal courts, raising the possibility that the outcome of these motions in Superior Court would be different than in federal court.

*Second*, ExxonMobil will be greatly burdened by litigating the merits of Plaintiff's claims in the D.C. Superior Court while its appeal is pending. Without a stay, ExxonMobil would be forced to devote substantial resources to litigating in D.C. Superior Court, including the preparation of a motion to dismiss under local rules and a special motion to dismiss under the District of Columbia's anti-SLAPP statute, as well as discovery. If the D.C. Circuit or U.S. Supreme Court subsequently hold that this case is properly removable, the resources devoted to preparing those motions would be wasted. Because ExxonMobil is unlikely to recover any of these sunk costs from the non-profit Plaintiff, this harm is irreparable. *See Philip Morris USA Inc.* v. *Scott*, 561 U.S. 1301, 1304-05 (2010).

Given the substantial duration of federal appeals, ExxonMobil's costs and burdens could be enormous. Section 1453 sets forth a truncated appellate procedure, by which the court of appeals must "complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed." 28 U.S.C. § 1453(c)(2). But the actual length of a Section 1453 appeal can take *much* longer than 60 days. For starters, the 60-day period does not begin until after the court of appeals grants permission to appeal. *See Lewis* v. *Verizon Commc'ns, Inc.*, 627 F.3d 395, 396 (9th Cir. 2010); *Evans* v. *Walter Indus., Inc.*, 449 F.3d 1159, 1162 (11th Cir. 2006); *Patterson* v. *Dean Morris, L.L.P.*, 444 F.3d 365, 370 (5th Cir. 2006). Further, the 60-day period is subject to extension: for "any period of time" if "all parties to the proceeding agree," and up to 10 days "for good cause shown and in the interests of justice." 28 U.S.C. § 1453(c)(2)(A)-(B). Finally, the mandate may not issue, and the case will not be returned to this Court, until long after the 60-day period expires. *See, e.g.*, *Palisades Collections LLC* v. *Shorts*, 552 F.3d 327, 345 (4th Cir. 2009); *Amalgamated Transit Union Local 1309, AFL-CIO,* v. *Laidlaw Transit Servs., Inc.*, 448 F.3d 1092, 1094 (9th Cir. 2006). That is because, under

the Federal Rules of Appellate Procedure, the mandate does not issue until *after* the court of appeals resolves any petition for rehearing or rehearing en banc, and potentially *after* the U.S. Supreme Court's final deposition of the case. *See* Fed. R. App. P. 41. In short, the duration of ExxonMobil's forthcoming appeal could very well be anything but short for reasons beyond the parties' control.

"District courts have been sensitive to concerns about forcing parties to litigate in two forums simultaneously when granting stays pending appeal." *Northrop Grumman Tech. Servs., Inc.* v. *Dyncorp Int'l LLC*, No. 16-534, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016). Courts routinely grant motions to stay remand orders pending appeal precisely because of the risk of inconsistent outcomes and other burdens posed by simultaneous litigation in state and federal courts. *See, e.g., Citibank, N.A.* v. *Jackson*, No. 16-712, 2017 WL 4511348, at *2 (W.D.N.C. Oct. 10, 2017) (granting motion to stay remand and noting that litigation costs would be avoided); *Northrop Grumman*, 2016 WL 3346349, at *4 (entering stay because, "[i]f this order is not stayed, Plaintiff and Defendant will also both face the burden of having to simultaneously litigate the appeal before the Fourth Circuit and the underlying case in state court"); *Dalton* v. *Walgreen Co.*, No. 13-603, 2013 WL 2367837, at *2 (E.D. Mo. May 29, 2013) (granting stay to guard against "potential of inconsistent outcomes if the state court rules on any motions while the appeal is pending"); *Raskas* v. *Johnson & Johnson*, No. 12-2174, 2013 WL 1818133, at *2 (E.D. Mo. Apr. 29, 2013) ("The burden of having to simultaneously litigate these cases in state court and on appeal to the Eighth Circuit, as well as the potential of inconsistent outcomes if the state court rules on any motions while the case is pending before the Eighth Circuit, weigh in favor of granting the stays."); *Lafalier*, 2010 WL 1816377, at *2 ("State Farm should not be required to simultaneously respond to plaintiffs' discovery requests and pursue its request for appellate review

of the Court's remand order. This would impose an unfair burden on State Farm."). This authority underscores the irreparable harm ExxonMobil faces here.

**III. The Remaining Factors Militate In Favor of a Stay.**

Although "[t]he first two factors of the traditional standard are the most critical," *Nken*, 556 U.S. at 434, the remaining factors further support staying the Remand Order pending appeal.

*First*, Plaintiff will not be "substantially injured" if this Court enters a stay. On the contrary, Plaintiff will *benefit* from such a stay, which would conserve Plaintiff's resources—financial and otherwise—by allowing it to litigate ExxonMobil's appeal without being saddled with simultaneous—and potentially unnecessary—litigation in D.C. Superior Court. *See Dalton*, 2013 WL 2367837, at *2 ("[N]either party would be required to incur additional expenses from simultaneous litigation."). Similarly, under a stay, Plaintiff will avoid the same risk of harm from potentially inconsistent outcomes of proceedings in the D.C. Superior Court and before this Court if removal is affirmed on appeal. *See Raskas*, 2013 WL 1818133, at *2.

*Second*, the "public interest" will be served by staying remand. The D.C. Superior Court would be spared from wasting scarce judicial resources on adjudicating an action that may later be returned to federal court. *See, e.g.*, *Novenergia II – Energy & Env't (SCA)* v. *Kingdom of Spain*, No. 18-1148, 2020 WL 417794, at *3 (D.D.C. Jan. 27, 2020); *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain*, 397 F. Supp. 3d 34, 39 (D.D.C. 2019); *Beaty* v. *Republic of Iraq*, No. 03-0215, 2007 WL 1169333, at *2 (D.D.C. Apr. 19, 2007). And this Court's resources will be spared, too. Should the D.C. Circuit or U.S. Supreme Court reverse the Remand Order, this Court will be forced to address the effects of any interim rulings by the D.C. Superior Court. Among other things, the Court would need to evaluate the precedential or persuasive force of any intervening merits orders issued by the D.C. Superior Court, revisit the scope of any discovery orders, determine whether and to what extent any discovery that was improperly ordered may be

clawed back or subjected to protective orders, and more. That amounts to a "rat's nest of comity and federalism issues" that may be obviated through the issuance of a stay. *Northrop Grumman*, 2016 WL 3346349, at *4.

**CONCLUSION**

For the foregoing reasons, this Court should grant the motion and stay execution of the Remand Order pending appeal. If the Court decides not to grant a stay pending appeal, ExxonMobil respectfully requests that this Court grant a temporary stay to preserve ExxonMobil's right to seek a stay from the D.C. Circuit. *See* Fed. R. App. P. 8(a)(2).

DATE: March 29, 2021

Respectfully Submitted,

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By its attorneys,

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