UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEYOND PESTICIDES, Plaintiff, v. EXXON MOBIL CORPORATION, Defendant.	No. 1:20-cv-01815-TJK

REPLY IN SUPPORT OF EXXONMOBIL'S MOTION FOR A STAY OF EXECUTION OF THE REMAND ORDER PENDING APPEAL

Defendant Exxon Mobil Corporation ("ExxonMobil") writes in reply to Plaintiff's opposition to ExxonMobil's motion for a stay pending appeal (ECF No. 19).

A. The D.C. Circuit is Likely to Grant Review.

Plaintiff argues that appellate review of this Court's Remand Order is unlikely because in prior cases, the D.C. Circuit declined to resolve an issue implicated by the forthcoming appeal: whether private attorney general actions under the D.C. Consumer Protection Procedures Act ("CPPA") are "class actions" within the meaning of the Class Action Fairness Act ("CAFA"). This elides a key point asserted in ExxonMobil's motion: the reason the Circuit previously gave for declining review in 2013 and earlier was that the D.C. Court of Appeals had not yet resolved whether private attorney general actions under the CPPA must be litigated as class actions. *See* Mot. at 4 (collecting orders). In 2015, the D.C. Court of Appeals did address that issue, s*ee* *Rotunda* v. *Marriott International, Inc.*, 123 A.3d 980 (D.C. 2015). The D.C. Circuit has not been presented with an opportunity to take this question up since then. Accordingly, the issue is now ripe for the D.C. Circuit to rule on, and ExxonMobil respectfully submits that appellate review is

likely. Plaintiff has no response to that critical point, which completely undermines its reliance on prior rulings of the D.C. Circuit.

Plaintiff suggests that the D.C. Circuit may not accept review because several district courts have held, following *Rotunda*, that CPPA private attorney general actions are not "class actions" within the meaning of CAFA. But as ExxonMobil previously explained, ECF No. 11 at 25-26, nearly all of those district court decisions involved claims brought under a different private attorney general provision than at issue here. Only Section 28-3905(k)(1)(D), under which Plaintiff sues, expressly authorizes actions to be brought "on behalf of the interests of a consumer *or class of consumers*." *See* D.C. Code § 28-3905(k)(1)(D) (emphasis added). And in any event, as asserted above, no case has presented the D.C. Circuit with the opportunity to consider the issue post-*Rotunda*.

Plaintiff also argues that it is "far from clear" whether the D.C. Circuit will have jurisdiction under Section 1453 to resolve whether this case was properly removed under diversity jurisdiction. On the contrary, multiple courts of appeals have held Section 1453 vests courts of appeals with discretion to review other bases for removal alongside CAFA. *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) Only one court of appeals has suggested otherwise, and it declined to review the additional issues primarily because it was "[f]acing [its] CAFA deadline." *City of Walker* v. *Louisiana*, 877 F.3d 563, 567 (5th Cir. 2017). And although the D.C. Circuit has not interpreted Section 1453's scope, it has interpreted a remarkably similar statute, 5 U.S.C. § 7123(a), under which a court of appeals has jurisdiction over any "final order" of the Federal Labor Relations Authority relating to an arbitration award if the order "involves an unfair labor

practice." As the D.C. Circuit explained just last year, "[t]he most natural interpretation" of that provision is that, "[b]y granting the court jurisdiction to review the entire order," the court is not limited to reviewing "only the portion of the order that discusses the alleged unfair labor practice." *Nat'l Weather Serv. Emps.* v. *Fed. Labor Relations Authority*, 966 F.3d 875, 879-80 (D.C. Cir. 2020).

Plaintiff notes that other district courts have applied the non-aggregation principle in the same way as the court did here, for purposes of the diversity analysis, and suggests that makes acceptance of the appeal less likely. On the contrary, the fact that this issue has come up repeatedly reflects its importance, and that it has not yet been the subject of a ruling from the D.C. Circuit tends to increase the likelihood that the D.C. Circuit will exercise its discretion to hear the appeal. *Cf. Estate of Pew* v. *Cardarelli*, 527 F.3d 25, 29 (2d Cir. 2008) (exercising discretionary appellate jurisdiction over an "important and consequential" issue).

B. Executing the Remand Order Would Result in Irreparable Harm.

Plaintiff declares that there is no risk of inconsistent rulings. Not so. The D.C. Superior Court will be bound—and may be persuaded—by different precedent than would this Court. The upshot is that ExxonMobil may face a ruling on a motion to dismiss or discovery issue that this Court would later need to unnecessarily decide anew, if the D.C. Circuit determines that this case belongs on federal court.

Plaintiff also contends that any monetary injury ExxonMobil would suffer from litigating in two forums at once cannot be irreparable. That is incorrect. Where, as here, "expenditures cannot be recouped, the resulting loss may be irreparable." *Philip Morris USA Inc.* v. *Scott*, 561 U.S. 1301, 1304 (2010). Plaintiff has not shown that ExxonMobil would have any recourse to recoup the money it would have to expend litigating in two forums, including with respect to issues

that may be re-litigated in federal court following an initial phase of litigation in the local court upon remand.

C. The Remaining Factors Favor a Stay.

Plaintiff does not—and cannot—dispute that scarce judicial resources would be wasted should this action be immediately remanded, only later to be returned to this Court. For example, the D.C. Circuit has held that a defendant may not bring a special motion to dismiss under the District of Columbia's anti-SLAPP statute if the action is pending in federal court, but may bring such a motion in the local court. *See Tah* v. *Glob. Witness Publishing, Inc.*, No. 19-7133, 2021 WL 1045205 (D.C. Cir. Mar. 19, 2021). If this action is remanded and then returned to this court following appeal, the local court may be required to consider and adjudicate an anti-SLAPP motion that cannot ultimately be brought in federal court.

Instead of addressing the possibility of wasting scarce judicial resources, Plaintiff responds that such a scenario is unlikely because ExxonMobil will not prevail on the appeal. But that just doges the question. For the reasons articulated above and in ExxonMobil's motion, the D.C. Circuit is likely to grant review and that creates the serious risk that any proceedings in Superior Court will have been entirely unnecessary if the matter returns to federal court. Plaintiff dodges the question further with its baseless accusation that ExxonMobil sought a temporary stay for any reason other than to ensure that the remand order would not be transmitted prior to April 1. If the record was clear that transmittal would not occur before that date, Plaintiff would not have felt compelled to oppose a motion which it now contends simply requested maintenance of the status quo. And none of this has anything to do with the risk of judicial resources being squandered in the Superior Court if the D.C. Circuit finds jurisdiction.

Finally, Plaintiff incorrectly argues that "no temporary stay is required to preserve any right ExxonMobil possess." That is incorrect, because ExxonMobil has a right, by statute, to petition

for appellate review. *See* 28 U.S.C. § 1453(c). Courts within this District routinely provide litigants with stays pending appeal in order to provide parties with an opportunity to pursue their appellate rights. *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) (providing defendant agency "a week to notice its appeal and seek an administrative stay in the D.C. Circuit if it so chooses").

For all these reasons, and those set forth in ExxonMobil's opening brief, this Court should stay execution of the remand order pending appeal. At a minimum, the Court should stay execution of the remand order pending a ruling from the D.C. Circuit on whether a stay pending appeal should be granted under these unique circumstances. *See, e.g.*, *City & County of Honolulu* v. *Sunoco LP*, No. 20-163, 2021 WL 839439, at *3 (D. Haw. Mar. 5, 2021).

DATE: March 31, 2021

Respectfully Submitted,

EXXON MOBIL CORPORATION,

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