

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

STATE OF MINNESOTA, BY ITS ATTORNEY
GENERAL, KEITH ELLISON,

Plaintiff,

v.

AMERICAN PETROLEUM INSTITUTE,
EXXON MOBIL CORPORATION,
EXXONMOBIL OIL CORPORATION, KOCH
INDUSTRIES, INC., FLINT HILLS
RESOURCES LP, and FLINT HILLS
RESOURCES PINE BEND,

Defendants.

Case No. 20-cv-1636-JRT-HB

**REPLY IN SUPPORT OF DEFENDANTS' EMERGENCY MOTION FOR A
TEMPORARY STAY OF EXECUTION OF THE REMAND ORDER**

Defendants American Petroleum Institute, Exxon Mobil Corporation, ExxonMobil Oil Corporation, Koch Industries, Inc., Flint Hills Resources LP, and Flint Hills Resources Pine Bend (“Defendants”) write in response to Plaintiff’s Opposition (Dkt. 80, “Opposition”) to Defendants’ Emergency Motion for a Temporary Stay of Execution of the Court’s Remand Order (Dkt. 77, “Emergency Motion”). Defendants’ Emergency Motion seeks limited relief: a *temporary* stay of execution of the remand order until the Court resolves Defendants’ forthcoming motion for a stay pending appeal of the Remand Order. Defendants filed their notice of appeal of that decision earlier today. (Dkt. 81).

As Defendants explained in their Emergency Motion, a temporary stay is warranted “to preserve Defendants’ appellate rights and spare the parties and the Minnesota state court from what could be a substantial amount of unnecessary and ultimately futile litigation.” Emergency Motion at 2. Defendants are diligently preparing their motion for a stay pending appeal, and, as stated in the Emergency Motion, they will submit that motion no later than April 7, or as soon as the Court requests. *Id.* at 4.

Plaintiff’s Opposition skips over Defendants’ argument for temporary relief pending resolution of the forthcoming motion, and jumps straight into a premature response to a forthcoming motion for stay pending appeal that Defendants have not yet had the opportunity to submit. The Opposition argues that “Defendants have not made a strong showing that they are likely to succeed on the merits.” Opposition at 1. However, in the absence of a temporary stay, Defendants would be deprived of an opportunity to make such an argument and to persuade this Court that a stay pending appeal is warranted. For example, Defendants’ forthcoming motion to stay pending appeal will alert the Court to recent Second Circuit precedent, issued earlier today,

holding that federal common law, and not state law, governs claims seeking redress for global climate change, and that “[a]rtful pleading cannot transform” a complaint seeking such redress into “anything other than a suit over greenhouse gas emissions.” *City of New York v. Chevron Corp.*, No. 18-2188, --- F.3d ---, 2021 WL 1216541 at *5 (2d Cir. Apr. 1, 2021) (attached as Exhibit A). Thus, despite Plaintiff’s premature argument, Defendants will make a strong showing in their forthcoming motion that they are likely to succeed on the merits. Denying Defendants the opportunity to present their arguments to the Court would unfairly prejudice Defendants, while causing Plaintiff no cognizable deprivation whatsoever, other than the additional week or so that such briefing might require.

The question at this juncture is not whether Defendants or Plaintiff are right about whether a stay pending appeal is warranted. Rather, the question right now is whether the Court should temporarily pause pending proper briefing on that issue. Once Defendants move the Court for a stay pending appeal, the arguments in Plaintiff’s Opposition brief may ripen. Today, however, they are not germane to the Emergency Motion for a temporary stay, which is purely to allow time for proper briefing on the request for a stay pending appeal.

The Opposition notably does not even mention or attempt to respond to any of the numerous orders from other district courts, cited by Defendants in their Emergency Motion, granting the exact same type of *temporary* relief that Defendants ask for here. Emergency Motion at 3 (citing five such orders). Those numerous persuasive precedents, which also underscore the irreparable harm faced by Defendants here, weigh in favor of temporarily staying execution of the remand order pending further briefing on and resolution of the forthcoming motion to stay.

Plaintiff cites the Ninth Circuit’s decision denying a stay pending appeal in *City & Cty. of Honolulu v. Sunoco LP*, No. 21-15313, 2021 WL 1017392, at *1 (9th Cir. Mar. 13, 2021) as

persuasive authority, *see* Opposition at 2, but that decision is inapposite for at least two reasons. First, it involved a motion for a stay pending full resolution of the appeal. That is not the relief that Defendants are seeking in this motion. All that Defendants are asking for here is a short window of time in which to present full briefing on the question of whether a stay is warranted based on full consideration of all the factors. Second, in that case, the Ninth Circuit motions panel applied Ninth Circuit precedent from 1977 for the proposition that “litigation expenses do not constitute irreparable injury.” Plaintiff cites no Eighth Circuit authority supporting application of that principle here. Because Defendants are unlikely to recover any of the sunk costs from the governmental Plaintiff due to burdensome and ultimately unnecessary state court litigation, the harm here is irreparable. *See Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304-05 (2010).

Accordingly, Defendants respectfully request that the Court grant its request for a temporary stay pending resolution of Defendants’ forthcoming motion to stay pending appeal. As indicated in the Emergency Motion, and reiterated here, Defendants will submit that motion by April 7, or an earlier date if the Court so directs.

Date: April 1, 2021

Respectfully submitted,

/s/ Jerry W. Blackwell

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