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

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STAY EXECUTION OF THE REMAND ORDER PENDING APPEAL

INTRODUCTION

The Attorney General contends that a stay pending appeal is unwarranted because this Court already ruled against Defendants by ordering remand. ECF No. 91 at 11-22. That argument is circular and unpersuasive because an adverse ruling is the basis for every appeal. If losing in the district court prevented a stay pending appeal, no stay would ever be granted. That is not the law. As Defendants demonstrated in their opening brief, stays pending appeal are granted where, as here, the appealing party *lost* on the underlying remand issue. *See* ECF No. 88 at 21 (citing numerous district court decisions granting stays pending appeal of remand orders).

The Attorney General concedes that Defendants need only show "serious questions going to the merits" to establish a likelihood of success. ECF No. 91 at 6. Defendants have done so. As this Court acknowledged, "Defendants question whether there can be a state law action for alleged climate change injuries at all. *The Court does not disagree that assessing this type of injury raises broad and complicated questions*." ECF No. 76 at 22 (emphasis added). In fact, this Court stated that it "has some reluctance in remanding such significant litigation to state court." *Id*. at 33.

Persuasive and well-reasoned authority from the U.S. Court of Appeals for the Second Circuit—which was not before this Court at the time it decided the underlying remand motion—demonstrates the federal nature of the claims asserted. That decision, *City of New York* v. *Chevron Corp.*, No. 18-2188, 2021 WL 1216541 (2d Cir. Apr. 1, 2021), correctly holds that federal common law, not state law, governs the Attorney General's claims seeking redress for global climate change. Contrary to the Attorney General's assertions, *City of New York* applies here because the Attorney General expressly seeks damages for injuries allegedly caused by climate change. As that decision rightly observed, a party, such as the Attorney General here, cannot "disavow[] any intent to address emissions" while "identifying such emissions" as the source of the alleged harm. *Id.* at *5.

The Attorney General further incorrectly posits that the requested stay pending appeal was somehow already decided as part of the Court's remand order, arguing that "nothing has changed" since this Court denied the FHR Defendants' previous motion to stay. ECF No. 76. The FHR Defendants' motion sought entirely different relief: a stay of the ruling on the remand motion, based on the pendency of two cases before the Supreme

Court, *BP p.l.c.* v. *Mayor & U. City Council of Baltimore*, No. 19-1189 (U.S.) (argued Mar. 30, 2021) and *Chevron Corp. et al.* v. *City of Oakland, et al.* (U.S., *pet. for cert. filed* Jan. 8, 2021). This Court denied that motion, concluding the issues in the Supreme Court cases did not "bear upon" the merits of the remand motion. ECF No. 76 at 34. In contrast, this motion to stay seeks a stay of execution of the remand order pending ***direct appellate review*** of this Court's remand ruling. There is no question of a tenuous relationship between the two proceedings. This Court acknowledged that distinction, noting that the issue in *Baltimore* regarding the scope of appellate review "will arise [] if Defendants appeal the Court's decision to grant the motion to remand." *Id*. at 35. Granting a stay here would serve an entirely different purpose: allowing the appellate proceedings to proceed without potentially duplicative and unnecessary parallel proceedings in state court.

Turning to the other factors bearing on the stay request, the Attorney General contends that any injury Defendants would suffer from simultaneously litigating in two forums at once cannot be irreparable. But that is not the case where, as here, "expenditures cannot be recouped" and "the resulting loss may be irreparable." *Philip Morris USA Inc.* v. *Scott*, 561 U.S. 1301, 1304 (2010). The Attorney General points to no authority suggesting that Defendants would have recourse to recoup the money they would have to expend litigating in duplicative federal and state court proceedings should removal be affirmed on appeal. Unrecoverable costs are, by definition, irreparable.

And, while claiming that this action does "not implicate the regulation of greenhouse gas emissions," the Attorney General tellingly asserts that a stay is not in the public interest because "the climate change crisis presents an emergency" that the State's

case seeks to address. ECF No. 91 at 23. As the Second Circuit recognized (and the Eighth Circuit likely will recognize), the Attorney General cannot have it both ways, claiming injury from climate change and then denying its claims implicate climate change.

Finally, the Attorney General does not—and cannot—dispute that scarce judicial resources would be wasted should the remand order be reversed on appeal, which can be avoided with a stay pending appeal.

ARGUMENT

A. The Scope of Appellate Review Is Not Limited.

The Attorney General claims, as a threshold matter, that the scope of Defendants' appeal to the Eighth Circuit will be limited to federal officer jurisdiction and the Class Action Fairness Act ("CAFA"). ECF No. 91 at 7. The Eighth Circuit is likely, however, to have jurisdiction to review all of Defendants' asserted bases for removal, and is likely to hold that this action was properly removed under one or more of them.

With respect to federal officer jurisdiction, although the Eighth Circuit held that its scope of review was limited to only the federal officer question in *Jacks* v. *Meridian Res. Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012), that decision will almost certainly not be binding law by the time Defendants' appeal is adjudicated. There is a conflict among the circuits on the scope of reviewability of federal officer remand orders, and the Supreme Court will resolve that conflict in *Baltimore*. The Court's decision in *Baltimore* is expected by no later than June, and the Supreme Court will have ruled before Defendants' appeal in the Eighth Circuit has even been fully briefed, as the current briefing schedule extends into July.

The Attorney General also opines that the Supreme Court is unlikely to abrogate the Eighth Circuit's decision, but this argument ignores the plain language of 28 U.S.C. § 1447(d) and the numerous persuasive appellate cases that have applied that plain language to hold that the entire remand order is reviewable on appeal. *See Lu Junhong* v. *Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015); *Mays* v. *City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017); *Decatur Hosp. Auth.* v. *Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017). Under those decisions, because an appeal of a remand "order" has been authorized by statute, a court of appeals may consider all of the legal issues entailed in the decision to remand. Based on those precedents, Defendants respectfully submit that it is likely that the Supreme Court will conclude that federal officer remand orders are not limited to only the federal officer question.

Defendants' separate petition under CAFA also provides the Eighth Circuit with an opportunity to review multiple aspects of this Court's remand order. In their opening brief, Defendants cited pertinent Eighth Circuit authority establishing this scope. ECF No. 88 at 8 (citing *Wullschleger* v. *Royal Canin U.S.A., Inc.*, 953 F.3d 519 (8th Cir. 2020)). The Attorney General's opposition completely ignores *Wullschleger*, in which the defendants removed the case on both federal-question and CAFA grounds, and their petition for permission to appeal under CAFA presented three questions: two that related to the CAFA ground and one that related to the federal-question ground. The Eighth Circuit "granted the defendants' petition for review under 28 U.S.C. § 1453(c)(1)," but exercised its discretion to limit review to the issue of federal question jurisdiction—thus reflecting a

conclusion that the non-CAFA grounds for appeal are in fact reviewable. *Id.* at 520; *see also George* v. *Omega Flex, Inc*., 874 F.3d 1031, 1032 (8th Cir. 2017) (per curiam).

Instead of addressing *Wullschleger*, the Attorney General attempts to rely on a decision from fourteen years earlier, *Saab* v. *Home Depot U.S.A., Inc.*, 469 F.3d 758, 759 (8th Cir. 2006), in support of its contention that the scope of CAFA review is limited only to the CAFA issues. In *Home Depot*, the Eighth Circuit merely held that review under Section 1453(c)(1) is only available for class actions that are argued to be removed under CAFA. It did not address the ***scope*** of appellate review once a petition for CAFA review has been accepted.

Here, Defendants have raised federal-common-law and *Grable* grounds for removal in their CAFA petition, such that even if the *Baltimore* case narrowly construes appellate review under the federal officer statute, the Eighth Circuit will nevertheless have authority to consider removal under federal common law and *Grable*, pursuant to its jurisdiction under CAFA.

B. Defendants Are Likely to Succeed on the Merits.

The Attorney General argues that Defendants have not made a strong showing that they will succeed on the merits because this Court has already rejected Defendants' opposition to remand. ECF No. 91 at 11. However, Defendants have established the existence of "serious questions going to the merits," sufficient to demonstrate a likelihood of success on the merits. *See* ECF No. 91 at 6.

As this Court stated in its remand order, "Defendants question whether there can be a state law action for alleged climate change injuries at all. The Court does not disagree

that assessing this type of injury raises broad and complicated questions." ECF No. 76 at 22. This Court further stated that "state court would most certainly be an inappropriate venue" for a case "seeking a referendum on the broad landscape of fossil fuel extraction, production, and emission." *Id*. at 33. Although this Court did not view the Attorney General's complaint as requesting such a referendum, even now, the Attorney General argues against Defendants' requested stay on the basis that "the climate change crisis presents an emergency" which the State's complaint is intended to address. ECF No. 91 at 23. Moreover, although this Court declined to find federal jurisdiction over the Attorney General's claims, it acknowledged that "[t]he Supreme Court has specifically recognized federal common law in the arena of transboundary pollution and environmental protection." ECF No. 76 at 11-12; "the complex features of global climate change certainly present many issues of great federal significance that are both disputed and substantial," *id*. at 21; and Defendants identified "plausible ways in which Defendants may have acted under the direction of federal officers," *id*. at 23.

Further, this Court did not have the benefit of the Second Circuit's recent decision in *City of New York* , when it issued its remand order. There, the Second Circuit held that federal common law—not state law—governs claims seeking redress for climate change, and that "[a]rtful pleading cannot transform" such claims into "anything other than a suit over greenhouse gas emissions." 2021 WL 1216541 at *5. Notwithstanding this Court's holding that the Attorney General has not pled a cause of action for interstate pollution on the face of the complaint, *see* ECF No. 76 at 12-13, the Eighth Circuit is likely to agree with the Second Circuit's persuasive reasoning and apply federal common law to the

Attorney General's artfully pleaded state-law claims requesting relief for alleged injuries from global climate change.

The Attorney General argues that *City of New York* "provides no guidance here" because, in that case, the plaintiff filed its suit in federal court. ECF No. 91 at 10. That the plaintiff originally filed suit in federal court does not change the Second Circuit's holding that federal common law *necessarily governs* claims, like the Attorney General's, that request a "substantial damages award" for alleged injuries stemming from global climate change. 2021 WL 1216541 at *6. Even if this Court agrees that the Second Circuit "answered a different question" than the precise one before the Eighth Circuit on appeal, the Second Circuit's rationale in disposing of the plaintiff's claims—that they "must be brought under federal common law" because they are "federal claims"—unambiguously supports removal here. *Id.* at *9. That is because, regardless of where the Attorney General brings its claims, it seeks redress for the effects of global climate change, just like the plaintiff in *City of New York*. The Attorney General cannot "disavow[] any intent to address emissions" while "identifying such emissions" as the source of its injuries. *Id.* at *5.

The Attorney General also argues that *City of New York* supports remand because the court treated the federal common law argument there as a matter of ordinary preemption. ECF No. 91 at 10. While the Second Circuit was free to consider the defendants' argument in that case as a preemption defense because plaintiff filed in federal court in the first instance, Defendants' arguments here are *not* based on preemption. *See* ECF No. 44 at 34. Rather, Defendants argue that the Attorney General's claims *arise under*

federal common law: an argument that is supported by the reasoning in *City of New York.* Moreover, the Attorney General notes that the "heightened standard unique to the removability inquiry" was not implicated in *City of New York*. ECF No. 91 at 10. But that reference to the artful pleading exception to the well-pleaded complaint rule is met here because the Attorney General's state-law claims request relief for injuries allegedly caused by global climate change.

The Attorney General next argues that none of Defendants' several grounds for appeal is likely to succeed on the merits. As explained in Defendants' opening motion, each of Defendants' grounds for appeal presents a compelling basis for denying remand.

First, the Eighth Circuit is likely to conclude that removal was proper because the Attorney General's claims are necessarily governed by federal common law. *See* ECF No. 87 at 9-10. The Attorney General cites *Rivet* v. *Regions Bank of La.*, 522 U.S. 470, 471 (1998), for the proposition that "[t]he artful pleading doctrine allows removal where federal law completely preempts an asserted state-law claim," and argues that, therefore, the artful pleading doctrine applies *only* where there is complete preemption. But the Attorney General misconstrues a sufficient condition for a necessary one. *Minnesota ex rel. Hatch* v. *Worldcom, Inc.*, is not to the contrary. 125 F. Supp. 2d 365, 373 (D. Minn. 2000). That case simply finds that where a plaintiff has tried to invoke "artful pleading" in a way that overlaps with a "complete preemption" argument, courts often construe the arguments as one in the same so that the two arguments are "subsumed." *Braco* v. *MCI Worldcom Commc'ns, Inc.*, 138 F. Supp. 2d 1260, 1268 n.10 (C.D. Cal. 2001). Contrary to the Attorney General's assertions, the "artful pleading" doctrine may be invoked to support

removal so long as it is "separate from" an assertion that the plaintiff's claims are completely preempted, as is the case here. *Id*.

Second, the Eighth Circuit is likely to conclude that this action raises multiple substantial federal issues, including the application of federal common law, that are actually disputed, warranting the exercise of federal-question jurisdiction under *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308 (2005). *Grable* jurisdiction is also warranted by the "significant federalism concern[]" raised by the Attorney General's claims. *City of New York*, 2021 WL 1216541, at *6. As the Second Circuit found, permitting such a suit to proceed under state law will risk "upsetting the careful balance" struck by Congress and the Executive Branch between preventing climate change, on the one hand, and "energy production, economic growth, foreign policy, and national security, on the other." *Id*. at *7. *Grable* jurisdiction must therefore be exercised over such claims. *See Pet Quarters, Inc.* v. *Depository Tr. & Clearing Corp.*, 559 F.3d 772, 779 (8th Cir. 2009).

Third, the Eighth Circuit is also likely to embrace federal officer jurisdiction, federal enclave jurisdiction, and the Outer Continental Shelf Lands Act ("OCSLA") as proper grounds for removal. The Attorney General seeks damages relating to injuries allegedly resulting from global greenhouse gas emissions, a substantial amount of which resulted from the combustion of fossil fuels produced under the direction of the federal government. On appeal, the Eighth Circuit will likely reject the Attorney General's attempt to artfully plead its claims as somehow divorced from greenhouse gas emissions, while still seeking

damages for injuries allegedly resulting from those emissions. *See City of New York*, 2021 WL 1216541, at *5.

Similarly, under CAFA, the Attorney General does not deny that the express purpose of this action is to recover the costs of alleged climate change injuries on behalf of Minnesota consumers—costs that Minnesota Statutes Section 8.31 requires the Attorney General to attempt to distribute to those individuals. *See* ECF No. 88 at 18. By suing in a representative capacity on behalf of Minnesota's consumers to obtain relief on their behalf, the Attorney General has chosen to bring what is in substance a class action.

Finally, the Attorney General has failed to allege, as it must under *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982), that Defendants' purportedly deceptive conduct worked widespread harm on consumers such that it would implicate the State's quasi-sovereign interests. *See* ECF No. 88 at 18-19. This Court therefore has diversity jurisdiction because all plaintiffs—the consumers who are the real parties in interest in this action—and no Defendants are citizens of Minnesota.

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

The Attorney General declares that simultaneously litigating in state and federal court could not possibly cause Defendants to lose any procedural or substantive rights. That is incorrect. The Minnesota state court could and likely would rule on numerous substantive and procedural motions, including dispositive motions adjudicating the parties' claims, defenses, and discovery motions. For example, the Attorney General may argue that Minnesota state courts have different pleading standards or discovery rules than federal courts, raising the possibility of a difference in outcome. *Cf. Walsh* v. *U.S.*

Bank, N.A., 851 N.W.2d 598, 603 (Minn. 2014) (noting that the pleading standards articulated in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), are merely "instructive" to Minnesota state courts).

The Attorney General also contends that any monetary injury Defendants would suffer from litigating in two forums at once cannot be irreparable. Not so. While that might be true in many cases, where, as here, "expenditures cannot be recouped, the resulting loss may be irreparable." *Philip Morris*, 561 U.S. at 1304. The Attorney General does not suggest that Defendants would be able recoup such sunk costs, particularly with respect to issues Defendants may be forced to re-litigate in federal court following the remand. Thus, absent a stay, Defendants are certain to suffer irreparable harm for which they will have no remedy.

D. The Remaining Factors Favor a Stay Pending Appeal.

The Attorney General also claims that a stay is not in the public interest because it would delay its receipt of money damages to redress climate change—to which Defendants assert it is not entitled. This is misguided for several reasons. As the Second Circuit recognized, the Attorney General cannot have it both ways: claiming injury from climate change while denying its claims implicate the regulation of greenhouse gas emissions. And a substantial amount of the damages the Attorney General seeks to recover would be compensation for purported costs that have not yet been incurred and which may not be incurred for decades. *See* Compl. ¶ 3 (alleging "dramatic future costs").

The Attorney General also does not—and cannot—dispute that scarce judicial resources would be wasted should this action be immediately remanded. Instead, the

Attorney General dodges that important consideration by insisting that such a scenario is unlikely because Defendants will not prevail on appeal. As discussed above, the Eighth Circuit is likely to grant review, creating a serious risk of unnecessary and wasteful parallel proceedings in state and federal court. A stay would also spare this Court from confronting the "rat's nest of comity and federalism issues " that would inevitably arise when it is later compelled to evaluate the precedential or persuasive force of any intervening merits or discovery orders issued by the Minnesota state court. *Northrop Grumman Tech. Servs., Inc.* v. *DynCorp Int'l LLC*, No. 16-534, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016). The Attorney General admits as much in its opposition by conceding that, if the remand order is reversed on appeal, this Court will then need to revisit all rulings of the state court, in what would amount to a substantial waste of the state court's resources. ECF No. 91 at 33.

Accordingly, all factors support the issuance of a stay here.

E. At a Minimum, the Court Should Stay Execution of the Remand Order Pending the Eighth Circuit's Ruling on a Stay Pending Appeal.

While all factors support the issuance of a stay, at a minimum, the Court should temporarily stay execution of the remand order pending a ruling from the Eighth Circuit on whether a stay pending appeal should be granted under these circumstances. *See, e.g.*, *City & County of Honolulu* v. *Sunoco LP*, No. 20-163, 2021 WL 839439, at *3 (D. Haw. Mar. 5, 2021).

CONCLUSION

For these reasons, and the reasons set forth in Defendants' opening brief, this Court should grant the motion to stay execution of the remand order pending appeal.

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Respectfully submitted,

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