

No. 21-1446

**In the United States Court of Appeals
for the Second Circuit**

STATE OF CONNECTICUT, PLAINTIFF-APPELLEE

v.

EXXON MOBIL CORPORATION, DEFENDANT-APPELLANT

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT (CIV. NO. 20-1555)
(THE HONORABLE JANET C. HALL, J.)*

**MOTION OF APPELLANT
FOR A STAY OF THE REMAND ORDER PENDING APPEAL**

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INTRODUCTION

Defendant-Appellant Exxon Mobil Corporation (ExxonMobil) moves to stay execution of the district court's remand order until this Court resolves the appeal from that order. The district court denied ExxonMobil's motion for a stay of the remand order on June 11, but entered an administrative stay so that this Court could decide whether a stay is warranted. Absent a stay from this Court, the clerk of the district court will issue a certified copy of the remand order, which will return jurisdiction to the Connecticut Superior Court for the Judicial District of Hartford.

A stay is amply warranted here. ExxonMobil has a statutory right to appeal the district court's order, and this Court has jurisdiction to address all of the grounds for removal encompassed by the remand order. A stay pending appeal will thus protect ExxonMobil's appellate rights while providing this Court an opportunity to address important legal questions, some of which are, as the district court acknowledged, questions of first impression in this circuit. Absent a stay, ExxonMobil will suffer irreparable harm by becoming subject to duplicative proceedings in federal and state court. And given the nature of the State's claims and the public interests involved, the balance of harms tilts decidedly in ExxonMobil's favor. A stay of the remand order pending appeal is therefore warranted.

STATEMENT OF FACTS

1. Plaintiff-appellee is the State of Connecticut; defendant-appellant is ExxonMobil. In September 2020, the State filed a complaint against ExxonMobil in Connecticut state court, alleging violations of the Connecticut Unfair Trade Practices Act (CUTPA), Conn. Gen. Stat. § 42-110b. Compl. 36-43. The State alleges that ExxonMobil deceived Connecticut consumers about the impact of fossil fuels on climate change. *Id.* The State further alleges that ExxonMobil's production, sale, and promotion of fossil fuels have contributed to climate change and caused wide-ranging harm to Connecticut, its citizens, and fossil-fuel consumers within the State. Compl. 2, 34-36. The State seeks injunctive relief, restitution, disgorgement, civil penalties, and other equitable relief under Connecticut General Statutes Section 42-110m. Compl. 44-45.

2. ExxonMobil removed this action to federal court on six grounds. *See* D. Ct. Dkt. 1. Among those grounds, ExxonMobil asserted that the district court had federal-question jurisdiction because federal common law necessarily governed the State's claims. *See id.* at 12-22; 28 U.S.C. § 1331. ExxonMobil explained that the claims implicate three uniquely federal interests that require the application of federal common law: namely, transboundary pollution, navigable waters of the United States, and international affairs and commerce. D. Ct. Dkt. 1, at 13. While the State styled the complaint as alleging only state-law claims, ExxonMobil contended that the State could not plead around the complaint's focus on climate-change-related harms. *Id.* at

22. ExxonMobil further argued that, even if the claims did not directly arise under federal law, they necessarily raised disputed federal issues and thus were removable under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005). *See* D. Ct. Dkt. 1, at 22.

ExxonMobil also argued that removal was appropriate under the federal-officer removal statute, 28 U.S.C. § 1442, citing several different examples of activities taken at the direction of federal officers. *See* D. Ct. Dkt. 1, at 31-48. ExxonMobil noted that it had entered into supply agreements with the armed forces to produce special fuels, including high-octane aviation fuel. *Id.* at 33-38. In addition, ExxonMobil has long produced oil and gas belonging to the federal government on the Outer Continental Shelf pursuant to governmental leases; those leases gave the government control over various aspects of ExxonMobil's operations, including approval of exploration and production plans, regulation of extraction rates, and a right of first refusal during wartime to purchase all oil, gas, and minerals extracted. *Id.* at 38-39. ExxonMobil argued that it had also acted under federal officers in producing oil and operating infrastructure for the Strategic Petroleum Reserve. *Id.* at 40-44.

ExxonMobil separately asserted that removal was permissible under the Outer Continental Shelf Lands Act, federal-enclaves jurisdiction, and diversity jurisdiction. *See* D. Ct. Dkt. 1, at 12.

The State moved to remand the case to state court. *See* D. Ct. Dkt. 36. The State contended that, even though the complaint seeks damages allegedly caused by the effects of global climate change, the claims asserted do not relate to transboundary pollution. *Id.* at 13. The State further argued that the claims do not necessarily implicate any federal issues or have a sufficient causal connection to ExxonMobil's activities taken at the direction of federal officers. *Id.* at 11, 22-23.

3. The district court granted the motion to remand. App., *infra*, 1a-32a. It recognized that “several of the issues raised by ExxonMobil are novel within the Second Circuit.” *Id.* at 32a. For example, in addressing ExxonMobil's argument that federal common law was a basis for removal, the district court acknowledged that the “Supreme Court's decisions pertaining to the well-pleaded complaint rule have not squarely addressed federal common law.” *Id.* at 16a. Nevertheless, the district court held that federal common law cannot be an independent basis for removal. *Id.* The court reasoned that at least one decision from this Court suggesting otherwise had been implicitly abrogated by intervening law. *See id.* at 14a & n.6 (citing *Republic of Philippines v. Marcos*, 806 F.2d 344, 354 (2d Cir. 1986)). The court acknowledged that “[t]he precise scope of the artful-pleading doctrine is not entirely clear” within this circuit, but nevertheless concluded the doctrine's use is limited to the context of *Grable* jurisdiction. *Id.* at 23a n.10 (citation omitted).

With respect to federal-officer removal, the district court observed that, “through various arrangements for the production of fossil fuels, the federal government has at times exercised a significant degree of control and direction over ExxonMobil’s operations.” App., *infra*, 23a-24a. But, relying on this Court’s decision in *Isaacson v. Dow Chemical Co.*, 517 F.3d 129 (2008), the district court determined that it had to find a *causal* nexus between the State’s claims and ExxonMobil’s acts taken under color of a federal officer. App., *infra*, 24a. The court did not address the intervening Removal Clarification Act of 2011, Pub. L. 112-51, 125 Stat. 545, which amended the statute to allow removal of suits involving acts “for or relating to” a federally directed action. 28 U.S.C. § 1442(a)(1) (emphasis added); see, e.g., *County Board of Arlington County v. Express Scripts Pharmacy, Inc.*, 996 F.3d 243, 256-257 (4th Cir. 2021); *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 292 (5th Cir. 2020) (en banc); *In re Commonwealth’s Motion to Appoint Counsel*, 790 F.3d 457, 471-472 (3d Cir. 2015).

The district court also declined to exercise jurisdiction under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b)(1), despite observing that the State’s complaint “details” the alleged “harms caused by combustion of fossil fuels in order to explain why ExxonMobil’s statements violate” state law. App., *infra*, at 27a. The court rejected the other grounds for removal. *Id.* at 27a-31a.

4. On June 11, 2021, the district court granted ExxonMobil's motion for a temporary stay in order to allow ExxonMobil to seek a stay from this Court. The district court otherwise denied ExxonMobil's motion for a stay, concluding that ExxonMobil did not have a likelihood of success on the merits. *See* D. Ct. Dkt. 56. The court did not rule on whether ExxonMobil would suffer irreparable harm or whether the balance of the equities were in ExxonMobil's favor.

ARGUMENT

Federal courts have inherent authority to stay the execution of an order pending appeal. *See Nken v. Holder*, 556 U.S. 418, 426 (2009); *see also* Fed. R. App. P. 8(a)(2). This Court assesses whether to issue a stay pending appeal by considering four traditional factors: “(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.” *SEC v. Citigroup Global Markets Inc.*, 673 F.3d 158, 162 (2d Cir. 2012). Each factor supports a stay of the remand order pending review by this Court.

A. ExxonMobil Is Likely To Prevail On Appeal

The first of the traditional stay factors is likelihood of success on the merits. “The necessary level or degree of possibility of success will vary according to the court’s assessment of the other stay factors.” *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002). When a litigant presents “serious legal questions” on appeal, a stay is warranted where “the balance of hardships favors the applicant.” *Id.* at 100-101.

Here, the prospect of irreparable harm and the balance of equities weigh heavily in favor of a stay, reducing ExxonMobil’s burden to make a preliminary showing of success on the merits. *See* pp. 18-22, *infra*. In all events, ExxonMobil has a substantial likelihood of success on the merits. ExxonMobil has presented several compelling grounds for federal jurisdiction, and each of those grounds is reviewable because ExxonMobil removed this action in part under the federal-officer removal statute, 28 U.S.C. § 1442. *See* D. Ct. Dkt. 1, at 31-48; 28 U.S.C. § 1447(d); *BP p.l.c. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1538 (2021).

1. This Court is likely to conclude that the State’s claims are governed by federal common law.

a. Federal common law applies where “the basic scheme of the Constitution so demands.” *American Electric Power Co. v. Connecticut*, 564 U.S.

410, 421 (2011). In such disputes, the “federal system does not permit the controversy to be resolved under state law,” because “the interstate or international nature of the controversy makes it inappropriate for state law to control.” *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). If “the dispositive issues stated in the complaint require the application” of a uniform rule of federal law, the action “arises under” federal law for purposes of 28 U.S.C. § 1331, *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (*Milwaukee I*), and the case is removable to federal court, *see* 28 U.S.C. § 1441(a); *Republic of Philippines v. Marcos*, 806 F.2d 344, 354 (2d Cir. 1986); *Treiber & Straub, Inc. v. UPS, Inc.*, 474 F.3d 379, 383 (7th Cir. 2007); *In re Otter Tail Power Co.*, 116 F.3d 1207, 1213-1214 (8th Cir. 1997).

The structure of our constitutional system requires that federal law exclusively govern claims seeking redress for interstate pollution. The States are “coequal sovereigns” in our system, *PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012), and no State may “impos[e] its regulatory policies on the entire Nation,” *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 585 (1996). Accordingly, for more than a century, the Supreme Court has applied uniform federal rules of decision to common-law claims seeking redress for interstate pollution. *See, e.g., American Electric Power*, 564 U.S. at 420-423; *Milwaukee I*, 406 U.S. at 103, 107 & n.9; *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). The State seeks redress for the effects of global greenhouse-gas

emissions on the global climate, and federal common law necessarily governs such claims.¹

In *City of New York v. Chevron Corp.*, 993 F.3d 81 (2021), this Court recognized the need for uniform rules of decision for national problems when holding that federal common law governs climate-change claims materially similar to those alleged here. The Court reasoned that “the City intends to hold the [p]roducers liable, under New York law, for the effects of emissions made around the globe over the past several hundred years.” *Id.* at 92. It then determined that a lawsuit seeking damages from such global emissions would “implicat[e] the conflicting rights of [s]tates [and] our relations with foreign nations,” *id.* (quoting *Texas Industries*, 451 U.S. at 641), and that the suit would “upset[] the careful balance that has been struck between the prevention of global warming . . . on the one hand, and energy production, economic growth, foreign policy, and national security, on the other,” *id.* at 93. Therefore, “[s]uch a sprawling case is simply beyond the limits of state law,” and federal common law must supply the rule of decision. *Id.* at 92.

¹ Federal common law also applies here because the State alleges injury through “environmental and economic destruction” in federal “navigable waters” in Connecticut, *see Milwaukee I*, 406 U.S. at 102; *Michigan v. Army Corps of Engineers*, 667 F.3d 765, 771 (7th Cir. 2011), and because the State’s case is intended to—and would—have significant impacts on United States foreign policy. *See* D. Ct. Dkt. 1, at 19-22.

That reasoning applies with equal force to the State’s CUTPA claims. Like the City of New York, the State seeks relief from ExxonMobil “precisely *because* fossil fuels emit greenhouse gases—which collectively ‘exacerbate global warming.’” 993 F.3d at 91; *see, e.g.*, Compl. 34-36 (listing flood, drought, extreme weather, and other effects as harms Connecticut has allegedly suffered due to climate change). And like the City’s lawsuit, the State’s lawsuit here implicates the conflicting rights of other states and relations with foreign nations that this Court cited in *City of New York*. *See* 993 F.3d at 92. By seeking disgorgement, civil penalties, and other remedies for the harm caused by climate change, the State attempts to regulate ExxonMobil’s conduct well outside of Connecticut—indeed, across the world. *See id.* Just like the efforts of the City of New York, the State’s efforts to manage fossil-fuel emissions must be governed by federal rules of decision.

The State may not avoid federal jurisdiction by declining to cite in its complaint the federal common law that governs its claims. Such a maneuver is barred by the artful-pleading doctrine, a corollary to the well-pleaded complaint rule that does not allow a plaintiff to “exalt form over substance,” *Standard Fire Insurance Co. v. Knowles*, 568 U.S. 588, 595 (2013), and thereby “disguise [an] inherently federal cause of action.” 14C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3722.1, at 131-132 (4th ed.

2018). Given the harms for which the State seeks relief and the theory underlying the cause of those harms, “[a]rtful pleading cannot transform the [State’s] complaint into anything other than a suit over global greenhouse gas emissions.” *City of New York*, 993 F.3d at 91.

b. In rejecting federal common law as a basis for removal, the district court reasoned that the State’s complaint was brought under state law—CUTPA—and not federal common law. It did so because it believed that federal common law could not convert a state-law claim into a federal claim, *see App., infra*, 16a, and it reasoned that the artful-pleading doctrine could not be used to defeat the State’s framing of its complaint, *id.* at 23 n.10; *see also id.* 11a (declining to follow cases that allowed “federal courts to disregard plaintiffs’ characterization of their claims”). The district court erred in both respects.

First, the precedent of this circuit allows for federal common law to provide a basis for removal. For example, in *Republic of Philippines*, 806 F.2d at 354, this Court recognized that a state-law claim that has “necessary implications” for American foreign policy “probably” arises under federal common law for purposes of removal. While the Court’s decision in that case rests on other grounds, its recognition that federal common law could provide a viable basis for removal is relevant here.

The observation in *Republic of Philippines* that federal common law provides a path to removal is undisturbed by *Marcus v. AT&T Corp.*, 138 F.3d 46 (2d Cir. 1998). There, this Court held that the Federal Communications Act (FCA) does not completely preempt state law by action of statute or through the related federal common law. *Id.* at 54. In this case, the district court held that *Marcus* and related cases foreclosed federal common law from providing a grounds for removal, despite the express recognition of such a possibility in *Republic of Philippines*. App., *infra*, 14a n.6. That is not a fair reading of *Marcus*, which addressed whether the FCA and the common law it authorized provided a basis for removal under the complete-preemption doctrine. See 138 F.3d at 54.

The question for this case is different: namely, whether state law can even operate in climate-related suits such as this one, or whether federal law instead *must* govern given our constitutional structure. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981). This Court already answered that question in *City of New York* with an unambiguous “no.” But unlike *City of New York*, see 993 F.3d at 94, this case provides the Court with the first opportunity to confirm squarely what the *Republic of Phillipines* court recognized: that where, as here, federal common law necessarily governs the claim at issue, it provides a route to removal.²

² The Court’s observation that its decision did not “conflict with” decisions

Second, the district court erred when it determined that the artful-pleading doctrine is “coextensive with *Grable*.” App., *infra*, 23a. Far from being limited to “prevent[ing] a plaintiff from avoiding *Grable* jurisdiction,” *id.*, the artful-pleading doctrine has been applied in a variety of contexts without reference to *Grable* or its equivalents. See, e.g., *Romano v. Kazacos*, 609 F.3d 512, 519-520 (2d Cir. 2010). And post-*Grable* precedent has noted only that the application of the doctrine is “not entirely clear.” *Sullivan v. American Airlines, Inc.*, 424 F.3d 267, 272 n.4 (2d Cir. 2005). Contrary to the district court’s conclusion, App., *infra*, 23a n.10, the doctrine prevents exactly the sort of maneuvering in which the State has engaged here: namely, cloaking a lawsuit about the global phenomenon of climate change and its transborder impacts in the garb of a state-law cause of action.

2. Even if federal common law does not on its own support removal, this action raises multiple, substantial federal issues that are actually disputed, warranting the exercise of federal-question jurisdiction under *Grable*

from other courts remanding climate-change cases to state court does not foreclose review here; the Court reserved decision on the question whether putative state-law claims governed by federal common law are removable to federal court. See *City of New York*, 993 F.3d at 93-94. In any event, this case is not like other cases in which the defendants “argu[ed] that they anticipated raising federal preemption defenses,” *id.* at 94. ExxonMobil argues instead that the State’s claims arise under federal law in the first instance. See pp. 7-12, *supra*.

& Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, 545 U.S. 308 (2005).

Consistent with its decision in *City of New York*, the Court will likely hold that federal common law exclusively governs the State's claims because our constitutional design does not allow state law to control. That fact independently establishes *Grable* jurisdiction, because a claim "raises substantial questions of federal law by implicating federal common law." *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540, 542 (5th Cir. 1997); *see also Battle v. Seibels Bruce Insurance Co.*, 288 F.3d 596, 607-608 (4th Cir. 2002). Accordingly, federal jurisdiction is present even under the district court's interpretation of the artful-pleading doctrine. Nothing in the district court's decision explains why that is not so. The court simply rejected federal common law as a basis for jurisdiction under *Grable* in a footnote, referring to its decision that federal common law could not provide a basis for removal alone. App., *infra*, 21a n.9. It did not address the application of the artful-pleading doctrine.

The Court is also likely to conclude that the State's novel CUTPA claims here necessarily implicate questions of federal law. As the district court observed in its remand order, a court applying CUTPA will be required to look to public-policy considerations to determine whether ExxonMobil's actions were unfair or deceptive when applying the relevant statutory tests. App., *infra*, 20a (citing *Ulbrich v. Groth*, 78 A.3d 76, 100 (Conn. 2013)). Given that

the policy at issue is the balance between energy production and environmental protection, “[t]here is a real risk that subjecting [ExxonMobil’s] global operations to a welter of different [S]tates’ laws could undermine important federal policy choices.” *See City of New York*, 993 F.3d at 93.³

3. ExxonMobil also has a substantial likelihood of success on the merits because this case is properly removed under the federal-officer removal statute. *See* 28 U.S.C. § 1442(a). The State’s claims relate to many actions ExxonMobil took under federal direction.

As the district court explained, “through various arrangements for the production of fossil fuels, the federal government has at times exercised a significant degree of control and direction over ExxonMobil’s operations.” App. *infra*, 24a. ExxonMobil is thus the “paradigmatic example” of a private party that can invoke the federal-officer removal statute. *Id.* at 23a; *see also Minnesota v. American Petroleum Institute*, Civ. No. 20-1636, 2021 WL 1215656, at *9 (D. Minn. Mar. 31, 2021) (finding it “plausible” that ExxonMobil acted under direction of federal officers).

³ The district court primarily focused its analysis of the *Grable* doctrine on whether Connecticut’s reliance on the interpretations of the Federal Trade Commission necessarily implicated federal law. App., *infra*, 19a. But that question of statutory interpretation is distinct from the question of whether federal public policies conflict with the public policy of Connecticut.

The State's claims also have the requisite nexus with the actions ExxonMobil took at the behest of federal officers so as to permit removal on federal-officer grounds. In the Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545, Congress "broadened federal officer removal to actions, not just *causally* connected, but alternatively *connected or associated*, with acts under color of federal office." *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 292 (5th Cir. 2020) (en banc); accord *County Board of Arlington County v. Express Scripts Pharmacy, Inc.*, 996 F.3d 243, 256-257 (4th Cir. 2021); *In re Commonwealth's Motion to Appoint Counsel*, 790 F.3d 457, 471-472 (3d Cir. 2015). Accordingly, as long as the actions for which ExxonMobil is being sued are "*relating to any act under color of such office*," removal is permissible. 28 U.S.C. § 1442(a)(1) (emphasis added).

The district court's reliance on this Court's decision in *Isaacson v. Dow Chemical Co.*, 517 F.3d 129, 137 (2008), was thus erroneous. There, under the *prior* version of the federal-officer removal statute, the Court stated that "non-governmental corporate defendants . . . must demonstrate that the acts for which they are being sued . . . occurred *because of* what they were asked to do by the Government." *Id.* at 137 (emphasis added). That interpretation does not reflect the current text of the statute. Applying the current language, this Court will likely conclude that jurisdiction is authorized. Indeed, the district

court itself determined that “Connecticut’s allegations that ExxonMobil misrepresented the dangers of fossil fuels for the Earth’s climate *relate to* ExxonMobil’s production of fossil fuels.” App., *infra*, 25a (emphasis added). Only its erroneous interpretation of Section 1442 prevented it from concluding that removal was proper on this basis.

4. Federal jurisdiction is also present under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1349(b)(1). OCSLA provides that claims “arising out of, or in connection with” operations on the outer continental shelf may be removed. *Id.* The statute’s nexus requirement is broad and supports removal so long as the activities on the outer continental shelf contribute to the injury of which the plaintiff complains. *See Tennessee Gas Pipeline v. Houston Casualty Insurance Co.*, 87 F.3d 150, 155 (5th Cir. 1996). Moreover, OCSLA jurisdiction is properly exercised over a dispute, like this one, that would “alter[] the progress of production activities” on the outer continental shelf, and thus “threaten[] to impair the total recovery of the federally-owned minerals from the reservoir or reservoirs underlying the [shelf].” *Amoco Production Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988).

There can be no dispute that ExxonMobil has engaged in substantial operations on the outer continental shelf. ExxonMobil and its affiliates operate a large share of the over 5,000 active oil and gas leases on the nearly 27 million

acres of the outer continental shelf that the Department of the Interior administers under OCSLA. D. Ct. Dkt. 1, at 46.

This Court is likely to agree that this case is properly characterized and considered as an attempt to hold ExxonMobil responsible for damages allegedly caused by climate change. Such an attempt necessarily targets ExxonMobil's fossil fuel production activities, including on the outer continental shelf. *See City of New York*, 993 F.3d at 91.

* * * * *

In sum, when this Court reviews all of ExxonMobil's asserted bases for removal,⁴ it will likely conclude that this action was properly removed under one or more of them. ExxonMobil has made a strong showing of a likelihood of success on the merits on the substantial and novel issues here. At the very least, ExxonMobil has presented "serious legal questions" on appeal, which suffices to warrant a stay where, as here, "the balance of hardships favors the applicant." *Reno*, 309 F.3d at 100-101.

B. 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 district court's remand order before this Court and

⁴ Removal is additionally proper because injuries of which the State complains occurred on federal enclaves, *see* U.S. Const. Art. I, § 8, cl. 17, and because the people of Connecticut, not its Attorney General, are the true parties in interest, thereby creating diversity jurisdiction, *see* 28 U.S.C. § 1332(a)(1).

potentially the Supreme Court while simultaneously defending itself against the State's claims in Connecticut state court. *See* 28 U.S.C. § 1447(c). ExxonMobil will suffer irreparable harm in the process for at least two reasons.

First, while ExxonMobil's appeal is pending, the Connecticut state court could rule on various substantive and procedural motions, such as a motion to dismiss under local rules or a special motion to dismiss under Connecticut's anti-SLAPP statute. The state court may also decide discovery motions.

There is a concrete risk that those motions would be decided differently than they would be in federal court. Connecticut courts follow more lenient discovery rules, without limitations (for example) on depositions and interrogatories. *Compare* Fed. R. Civ. P. 30, 33, *with* Conn. Prac. Book § 13-6, 13-26. Because Connecticut state courts adhere to different pleading standards and discovery rules than federal courts, the outcome of those motions in state court could be different than in federal court. Should ExxonMobil, for example, be directed to submit to discovery greater than would be required by a federal forum due to differences in procedural rules, there will be no way to undo the cost and burden of that discovery; its ability to take advantage of the federal forum would be "effectively mooted," and it would suffer irreparable harm as a result. *See Suarez v. Saul*, Civ. No. 19-173, 2020 WL 5535625, at *1 (D. Conn. Sept. 15, 2020).

Second, ExxonMobil will face a substantial burden if forced to litigate the merits of the State's claims in Connecticut state court while its appeal is pending. Without a stay, ExxonMobil would be forced to devote substantial resources to litigating in state court, including by preparing dispositive motions and potentially engaging in discovery. *See Lafalier v. Cinnabar Service Co.*, Civ. No. 10-5, 2010 WL 1816377, at *2 (N.D. Okla. Apr. 30, 2010); *Citibank, N.A. v. Jackson*, Civ. No. 16-712, 2017 WL 4511348, at *2-3 (W.D.N.C. Oct. 10, 2017). If this Court or the Supreme Court holds that this case is properly removable, any resources devoted to preparing those motions and conducting discovery would be wasted. Because ExxonMobil is unlikely to recover any of those sunk costs from the state, such harm is irreparable. *See Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304-1305 (2010) (Scalia, J., in chambers).

C. The Balance Of Harms Favors ExxonMobil

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 a stay of the remand order pending appeal. Where, as here, the government is the opposing party, the third and fourth stay factors (harm to the opposing party and the public interest) “merge” and should be considered together. *Id.* at 435.

The State will not be “substantially injur[ed]” if this Court enters a stay. *SEC v. Citigroup Global Markets Inc.*, 673 F.3d 158, 162 (2d Cir. 2012). To the

contrary, the State will *benefit* from such a stay, which would conserve its resources by allowing it to litigate ExxonMobil's appeal without being saddled with simultaneous and potentially unnecessary litigation in state court. *See Dalton v. Walgreen Co.*, Civ. No. 13-603, 2013 WL 2367837, at *2 (E.D. Mo. May 29, 2013); *see also Bimber's Delwood, Inc. v. James*, Civ. No. 20-1043, 2021 WL 235889, at *2 (W.D.N.Y. Jan. 25, 2021) (determining that plaintiffs would be "injured in an economic sense if they [we]re required to prepare, file, and proceed on a second amended complaint" simultaneously). Similarly, with a stay in place, the State will avoid the same risk of harm from inconsistent outcomes if the remand order is reversed on appeal. *See Raskas v. Johnson & Johnson*, Civ. No. 12-2174, 2013 WL 1818133, at *2 (E.D. Mo. Apr. 29, 2013).

Finally, the public interest will be served by staying the remand order. The Connecticut state court would be spared from wasting scarce judicial resources on adjudicating an action that may later be returned to federal court. *See, e.g., Bimber's Delwood*, 2021 WL 235889, at *2; *In re Gorsoan Ltd.*, Civ. No. 18-431, 2020 WL 4194822, at *8 (S.D.N.Y. July 21, 2020). And the district court would be spared from confronting the "rat's nest of comity and federalism issues" that would inevitably arise if that court had to evaluate the precedential or persuasive force of any intervening merits or discovery orders issued by the Connecticut state court. *Northrop Grumman Technical Services, Inc. v. DynCorp International LLC*, Civ. No. 16-534, 2016 WL 3346349, at *4

(E.D. Va. June 16, 2016). Accordingly, all relevant factors support the issuance of a stay here.

CONCLUSION

The motion to stay execution of the remand order pending appeal should be granted.

Respectfully submitted,

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JUNE 18, 2021

**CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS**

I, Kannon K. Shanmugam, counsel for appellant Exxon Mobil Corporation and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 27(d)(2)(A), that the foregoing Motion of Appellant for a Stay of the Remand Order Pending Appeal is proportionately spaced, has a typeface of 14 points or more, and contains 5,031 words. I further certify that the electronic version of this petition and the attached appendix were automatically scanned for viruses and found to contain no known viruses.

JUNE 18, 2021

/s/ Kannon K. Shanmugam

KANNON K. SHANMUGAM

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for appellant Exxon Mobil Corporation and a member of the bar of this Court, certify that, on June 18, 2021, the attached Motion of Appellant for a Stay of the Remand Order Pending Appeal was filed through the Court's electronic filing system. I certify that all participants in the case are registered users with the electronic filing system and that service will be accomplished by that system.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

APPENDIX

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

STATE OF CONNECTICUT,	:	CIVIL CASE NO.
Plaintiff,	:	3:20-cv-1555 (JCH)
	:	
v.	:	
	:	
EXXON MOBIL CORPORATION,	:	
Defendant.	:	JUNE 2, 2021
	:	
	:	

RULING ON MOTION TO REMAND (DOC. NO. 36)

I. INTRODUCTION

Plaintiff, the State of Connecticut, has moved for an order remanding the case to the Superior Court of Connecticut and awarding costs and attorneys' fees. See Pl.'s Mot. to Remand to Superior Court and for Costs and Fees ("Pl.'s Mot.") (Doc. No. 36). Defendant, Exxon Mobil Corporation ("ExxonMobil") opposes this Motion. See Br. of Def. in Opp'n to Pl.'s Mot. to Remand ("Def.'s Opp'n") (Doc. No. 37). The court heard argument in connection with the Motion on May 21, 2021. See Min. Entry (Doc. No. 51).

For the reasons stated below, the court grants the Motion to Remand and denies Connecticut's request for costs and fees.

II. BACKGROUND

A. Allegations in the Complaint

ExxonMobil is a "multinational energy and chemicals company" incorporated in New Jersey, with its principal place of business in Texas. Ex. 12, Notice of Removal

(“Compl.”) (Doc. 1-2 at 34-78) ¶ 47.¹ ExxonMobil manufactures, transports, and sells a variety of fossil fuels, such as crude oil, natural gas, and petroleum products. Id. ¶¶ 53-54. ExxonMobil has sold substantial quantities of fossil fuels in Connecticut, including through gas stations. Id. ¶¶ 59-60.

At least as early as 1957, ExxonMobil has been aware of research indicating that the combustion of fossil fuels causes dangerous changes to the Earth’s climate. Id. ¶¶ 63-95. This research includes materials created by Exxon’s own employees warning that emissions attributable to fossil fuels “would cause climate variations including a mean temperature increase.” Id. ¶¶ 64, 68-70.

In an effort to resist potential decreases in its revenue that might result from widespread acceptance of the conclusion ExxonMobil itself understood--the causal connection between the combustion of fossil fuels and climate change--ExxonMobil published statements casting doubt on this connection. Id. ¶¶ 96-167. These statements took various forms, including advertisements, interviews, and research papers. Id. ¶¶ 100-03. For example, between 1972 and 2001, ExxonMobil published advertisements in the New York Times, a newspaper circulated to tens of thousands of Connecticut residents, nearly every week. Id. ¶¶ 137-39. One such advertisement, published in 1984, disparaged a scientific theory linking fossil fuels to melting polar ice caps and rising sea levels as “[l]ies they tell our children” and a “myth of the 1960s and 1970s.” Id. ¶ 144(a). Another, published in 1997, warned readers that efforts to

¹ The Complaint uses the label “ExxonMobil” to refer to both Exxon Mobil Corporation and its predecessor entities. Compl. ¶¶ 50-51.

respond to the threat of climate change were based on “speculation” and not on “science.” Id. ¶ 144(h).

B. Procedural Background

Connecticut, through its Office of the Attorney General, filed its Complaint in the Superior Court of Connecticut on September 24, 2020. See Compl. The Complaint asserts eight claims under the Connecticut Unfair Trade Practices Act (“CUTPA”). Id. at 38-43.²

Count One alleges that ExxonMobil made false and/or misleading statements likely to deceive Connecticut consumers, in order to increase its profits, in violation of section 42-110b of the Connecticut General Statutes. Id. at 36-38. Count Three alleges that ExxonMobil’s statements, by “stifling [] an open marketplace for renewable energy, [and] thereby leaving consumers unable to reasonably avoid the detrimental consequences of fossil fuel combustion”, contravened Connecticut’s public policy and constituted an unfair trade practice, also in violation of section 42-110b. Id. at 38-40. Counts Five and Seven assert that a subset of the statements that ExxonMobil made, which Connecticut labels as “greenwashing”, i.e., “deceptive [] campaigns to portray the company as environmentally conscious”, constituted deceptive (Count Five) and unfair (Count Seven) practices, again in violation of section 42-110b. Id. at 40-43. Counts Two, Four, Six, and Eight allege that ExxonMobil’s conduct was willful, triggering penalties under section 42-110o. Id. at 38, 40-43. Connecticut seeks damages,

² The Complaint repeats certain paragraph numbers. The court cites to page numbers in the Complaint when necessary to avoid confusion.

disgorgement of revenues and profits, and multiple forms of injunctive relief, including an order requiring ExxonMobil to “fund a corrective education campaign to remedy the harm inflicted by decades of disinformation.” Id. at 44-45.

On October 14, 2020, ExxonMobil filed its Notice of Removal. See Notice of Removal. In addition to listing several grounds for removal, the Notice of Removal asserts that, “[w]hile purportedly brought under state law and in the name of consumer protection, this lawsuit . . . is the latest product of a multi-year plan . . . to change federal climate and energy policy.” Id. at 1-2.

Connecticut filed its Motion to Remand on December 2, 2020.³ See Pl.’s Mot. ExxonMobil filed its Opposition on January 18, 2021. See Def.’s Opp’n. Connecticut filed a Reply on February 8, 2021. See Pl.’s Reply in Supp. of Mot. to Remand (“Pl.’s Reply”) (Doc. No. 38). In addition, the parties have filed Notices of Additional Authority, in which they bring to the court’s attention decisions by other district courts granting motions to remand in cases involving overlapping issues, as well as a recent decision by the Second Circuit concerning preemption of state nuisance claims pertaining to climate change. See Notices (Docs. Nos. 39, 41, 42, 46, 47).

III. STANDARD OF REVIEW

The federal removal statute permits removal of any “civil action [that] includes . . . a claim arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1441(c). Defendants bear the burden of proving that removal is proper. O'Donnell v.

³ ExxonMobil filed a Motion to Dismiss for Lack of Personal Jurisdiction on November 13, 2020. See Mot. to Dismiss (Doc. No. 35). This Ruling does not address that Motion.

AXA Equitable Life Ins. Co., 887 F.3d 124, 128 (2d Cir. 2018) (citation omitted); see Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32 (2002) (“The right of removal is entirely a creature of statute and a suit commenced in state court must remain there until cause is shown for its transfer under some act of Congress.” (citation and internal quotation marks omitted)).

IV. DISCUSSION

A. The Well-Pleaded Complaint Rule

ExxonMobil argues that removal of this case is proper, because “federal common law necessarily and exclusively governs claims for interstate and international pollution.” Def.’s Opp’n at 16-17. Underlying ExxonMobil’s primary arguments for removal is an insistence that Connecticut’s claims in this case, though labeled as claims for deceptive and unfair practices under CUTPA, are not all that they seem. In effect, ExxonMobil asks the court to view Connecticut’s claims as more akin to nuisance claims that seek to regulate emissions of pollutants through common-law tort liability rules.

This request for the court to look past Connecticut’s characterization of its own Complaint is in tension with Supreme Court precedents concerning removal. Section 1441(a) of title 28 authorizes removal of a “civil action brought in a State court of which the district courts of the United States have original jurisdiction.” 28 U.S.C. § 1441(a). The Supreme Court has described this provision as limiting removal to “state-court actions that originally could have been filed in federal court.” Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987). Thus, according to the Court, in the “[a]bsen[ce] [of] diversity [jurisdiction] . . . federal jurisdiction exists only when a federal question is presented on

the face of the plaintiff's properly pleaded complaint." Id. This rule is known as the "well-pleaded complaint rule." Id.

Two aspects of the well-pleaded complaint rule have significant implications for this case. First, it is beyond dispute that the well-pleaded complaint rule can prevent removal of cases that involve dispositive questions of federal law. As the Supreme Court has explained, "it is [] settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated by the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." Id. at 393 (citation omitted). Thus, unless a defendant can show that a recognized exception to the well-pleaded complaint rule applies, a defendant's argument that a case involves an issue of federal law--even a dispositive issue of federal law--is not sufficient to remove a case under section 1441(a).

Second, it is also well settled that "[t]he well-pleaded complaint] rule makes the plaintiff the master of the claim." Id. at 392. This principle is no mere abstraction: the Supreme Court has expressly observed that a plaintiff "may avoid federal jurisdiction by exclusive reliance on state law." Id. In other words, section 1441(a) affords plaintiffs a degree of strategic control over whether a case will be litigated in state or federal court. Such strategic considerations do not amount to nefarious gamesmanship; they are a direct and recognized result of the text of section 1441(a), as interpreted by the Supreme Court.

With these principles in mind, the court briefly comments on the nature of Connecticut's claims, before discussing the recognized exceptions to the well-pleaded

complaint rule, which are also referred to as corollaries to the rule. Connecticut's Complaint asserts claims for deceptive and unfair practices under CUTPA. See Compl. at 36-43. The claims are asserted pursuant to section 42-110b of the Connecticut General Statutes, and they comprise distinct elements. A deceptive practice claim requires a plaintiff to allege (1) "a representation, omission, or other practice likely to mislead consumers"; (2) that is interpreted "reasonably under the circumstances" by a consumer"; (3) and that is material, i.e., "likely to affect consumer decisions or conduct." Langan v. Johnson & Johnson Consumer Cos., Inc., 95 F. Supp. 3d 284, 288 (D. Conn. 2015) (quoting Smithfield Assocs., LLC v. Tolland Bank, 86 Conn. App. 14, 28 (2004)). With regard to unfair practice claims, Connecticut courts have adopted the "cigarette rule" articulated by the Federal Trade Commission ("FTC"). Ulbrich v. Groth, 310 Conn. 375, 409 (2013) (citation omitted). Under this approach, a plaintiff must allege that a practice (1) "offends public policy as it has been established by statutes, the common law, or otherwise"; (2) "is immoral, unethical, oppressive, or unscrupulous: (3) or "causes substantial injury to consumers." Id. As the Connecticut Supreme Court has explained, "[a] practice may be unfair because of the degree to which it meets one of the[se] criteria or because to a lesser extent it meets all three." Id. (citation omitted).

These causes of action regulate the manner by which business interact with consumers. Consistent with the nature of these claims, Connecticut's claims seek redress for the allegedly deceptive and unfair manner by which ExxonMobil interacted with Connecticut consumers. See supra at 2-3. In short, Connecticut alleges that ExxonMobil lied to Connecticut consumers, and that these lies affected the behavior of those consumers.

The fact that the alleged lies were about the impacts of fossil fuels on the Earth's climate does not empower the court to rewrite the Complaint and substitute other claims for Connecticut's CUTPA claims.⁴ Nor does the possibility that Connecticut might have considered including other claims, but declined to do so, permit the court to rewrite the Complaint to add such claims. The court is aware that other states have asserted common-law nuisance and trespass claims against ExxonMobil and other producers of fossil fuels. See, e.g., City of New York v. Chevron, 993 F.3d 81, 88 (2d Cir. 2021). But Connecticut has not asserted such claims in this case. Unless one of the recognized exceptions discussed below applies, "the plaintiff [is] the master of the claim." See Caterpillar Inc., 482 U.S. at 392.

1. Federal Common Law and Complete Preemption

Under the "complete pre-emption" doctrine, the "pre-emptive force of a [federal] statute" can be "so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" Caterpillar Inc., 482 U.S. at 393 (quoting Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65 (1987)). In other words, "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." Id. (citing

⁴ During oral argument, the parties raised the broad language of Connecticut's fifth request for of relief: "An order pursuant to Conn. Gen. Stat. § 42-110m directing ExxonMobil to pay restitution to the State for all expenditures attributable to ExxonMobil that the State has made and will have to make to combat the effects of climate change." See Compl. at 44. The court construes this request for relief as seeking restitution only for expenditures attributable to ExxonMobil's allegedly deceptive and unfair practices in marketing its products, as alleged in the Complaint. Plainly, the court cannot award relief corresponding with conduct that goes beyond the claims in the Complaint.

Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal., 463 U.S. 1, 24 (1983)).

ExxonMobil's argument "that federal common law necessarily and exclusively governs claims for interstate and international pollution", Def.'s Opp'n at 17, parallels the complete preemption doctrine. See Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 11 (2003) ("Because [sections] 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank."). However, perhaps recognizing that the Supreme Court has only applied complete preemption to claims arising under federal statutes, and that the Second Circuit has indicated that the only case in which it ever determined that federal common law can give rise to complete preemption is no longer good law, ExxonMobil insists that its "invocation of federal common law . . . is not an argument for complete preemption." See Def.'s Opp'n at 17 n.21 (emphasis added). Thus, ExxonMobil's argument raises the issue of whether federal common law can convert state claims into federal claims in the same manner as complete preemption under federal statutes.

ExxonMobil's Opposition to the Motion to Remand cites scant authority in support of this proposition.⁵ See Def.'s Opp'n at 16-18. In Sam L. Majors Jewelers v. ABX, Inc., 117 F.3d 922 (5th Cir. 1997), the Fifth Circuit stated that, notwithstanding the well-pleaded complaint rule, removal is proper if a "cause of action arises under federal

⁵ The two Supreme Court decisions cited by ExxonMobil are inapposite. In City of Milwaukee v. Illinois, 451 U.S. 304 (1981), the Complaint had been filed in federal court, id. at 310, and removal was therefore not an issue. In Standard Fire Insurance Co. v. Knowles, 568 U.S. 588 (2013), the Court addressed whether a plaintiff can evade the scope of the Class Action Fairness Act of 2005 by stipulating that the plaintiff "will not seek damages that exceed \$5 million in total." Id. at 590.

common law principles.” Id. at 924. However, the Fifth Circuit failed to identify any authority for that proposition. See id. Instead, the Fifth Circuit relied on decisions recognizing that federal question jurisdiction exists when a complaint filed in federal court asserts causes of action under federal common law. See id. at 926 (citing Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972)) (other citations omitted).

Left undiscussed in Sam. L Majors Jewelers was the proposition, critical to ExxonMobil’s argument in the current case, that a court may look past a complaint’s labeling of a claim as arising under state law, despite the Supreme Court’s declaration that the well-pleaded complaint rule “makes the plaintiff the master of the claim.” See Caterpillar Inc., 482 U.S. at 392. This power of federal courts to “convert” a claim pleaded under state law into a federal claim is the essence of the complete preemption exception to the well-pleaded complaint rule. See Metro. Life Ins. Co., 481 U.S. at 65 (observing that “extraordinary preemptive power” is required to “convert [] an ordinary state common law complaint into one stating a federal claim for the purposes of the well-pleaded complaint rule”). In other words, the complete preemption doctrine permits courts to look past a plaintiff’s labeling of a claim only in limited circumstances; it is a narrow exception to the general rule that the plaintiff--and not the defendant or the court--is “the master of the claim.” See Caterpillar Inc., 482 U.S. at 392.

The second case relied on by ExxonMobil, Associated X-Ray Corp. v. Federal Express Corp., No. 3:93-CV-2209 (AVC), 1994 WL 897156 (D. Conn. July 22, 1994), observed that, “[w]hen federal law preempts state law, the court may allow removal . . . even though the complaint appears to allege state law claims,” and that district courts have “original jurisdiction over civil actions arising under federal common law.” Id. at *3.

However, as in Sam L. Majors Jewelers, the court did not cite any decisions holding that federal courts may disregard plaintiffs' characterizations of their claims in cases involving federal common law. See id.

In a world without the well-pleaded complaint rule, ExxonMobil's position would be straightforward: federal courts should have jurisdiction over important issues of federal law. The problem for ExxonMobil is that the well-pleaded complaint rule does in fact exist. Through this rule, the Supreme Court has given substantial weight to the principle that "the plaintiff [is] the master of the claim." Caterpillar Inc., 482 U.S. at 392. Again, it is beyond dispute that the well-pleaded complaint rule can prevent removal in cases that involve dispositive issues of federal law. Id. at 393. In such cases, given the availability of a petition for a writ of certiorari from a state court of last resort, a defendant's ability to have a federal defense reviewed by a federal court is narrowed, but it is not extinguished. 28 U.S.C. § 1257(a). The complete preemption doctrine bypasses this arrangement, but only when the "pre-emptive force of a [federal] statute . . . [is] 'extraordinary.'" Caterpillar Inc., 482 U.S. at 393. A different system would be constitutionally permissible, but this court must respect and enforce "the federal-state balance approved by Congress." See Gunn v. Minton, 568 U.S. 251, 258 (2013).

Although the Supreme Court has not expressly addressed whether a defendant may remove a case on the ground that purported state claims actually arise under federal common law, the Supreme Court's articulation of the complete preemption standard suggests that the Court views congressional intent, in relation to the text of a specific federal statute, as an essential prerequisite for overcoming the principle that a plaintiff is the master of a complaint. In Metropolitan Life Insurance Co. and Caterpillar

Inc., the Supreme Court justified permitting courts to look past plaintiffs' characterizations of claims on the ground that specific federal statutes evidenced clear congressional intent to impose "extraordinary preemptive power." Metro. Life Ins. Co., 481 U.S. at 65; Caterpillar Inc., 482 U.S. at 393. More recently, in Beneficial National Bank v. Anderson, 539 U.S. 1 (2003), the Supreme Court provided the following formulation:

[A] state claim may be removed to federal court in only two circumstances--when Congress expressly so provides, such as in the Price-Anderson Act, or when a federal statute wholly displaces the state-law cause of action through complete pre-emption. When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law.

Id. at 8 (emphasis added) (internal citation omitted).

The Supreme Court's analysis of the particular claims at issue in Beneficial National Bank is also instructive for the current dispute. In that case, the defendant sought removal of state usury claims. Id. at 9. The Supreme Court examined whether either of two sections of the National Bank Act justified removal of the state usury claims. Id. The first provision at issue, section 85 of the National Bank Act, caps the rates of interest that banks with national operations may charge. See 12 U.S.C. § 85. The Supreme Court observed that this provision "unquestionably pre-empts any common-law or [state] statutory rule that would treat [] rates [below the statutory limit] as usurious." Beneficial Nat'l Bank, 539 U.S. at 9. However, because section 85 would merely "provide the petitioners with a complete federal defense," section 85 alone "would not justify removal." Id. (citations omitted).

Section 86 of the National Bank Act goes beyond capping interest rates. This provision establishes a private cause of action on the part of any person who pays “a rate of interest greater than is allowed by section 85.” 12 U.S.C. § 86. The Supreme Court held that sections 85 and 86 together permit removal because they evidenced congressional intent to “supersede both the substantive and remedial provisions of state usury laws.” Beneficial Nat’l Bank, 539 U.S. at 9-11. As a result, “there is, in short, no such thing a state-law claim of usury against a national bank.” Id. at 11.

The Second Circuit, for its part, once recognized federal common law as a basis for removal under the complete preemption doctrine, but the Second Circuit later reconsidered this principle after the Supreme Court’s decision in Metropolitan Life Insurance Co. In Nordlicht v. New York Telephone Co., 799 F.2d 859 (2d Cir. 1986), the Second Circuit held that removal of state-law fraud claims challenging a pricing scheme for phone calls was appropriate, because such claims “necessarily ar[o]se under federal common law.” Id. at 862.

However, twelve years later, in Marcus v. AT&T Corp., 138 F.3d 46 (2d Cir. 1998), the Second Circuit rejected an argument that federal common law permitted removal of state-law claims relating to telecommunications, noting that the Supreme Court’s decision in Metropolitan Life Insurance Co. “sharply circumscribed the availability of removal based on complete preemption.” Id. at 54. The Second Circuit concluded:

Thus, after Metropolitan Life, it is clear that the complete preemption doctrine applies only where Congress has clearly manifested an intent to disallow state law claims in a particular field.

Given the narrow scope of the complete preemption doctrine after Metropolitan Life, absent some express statement or other clear manifestation from Congress that it intends the complete preemption doctrine to apply, we believe that federal common law does not completely preempt state law claims in the area of interstate telecommunications.

Id.

Shortly thereafter, in Fax Telecommunications Inc. v. AT&T, 138 F.3d 479 (2d Cir. 1998), the Second Circuit again rejected an argument that federal common law enabled removal of state claims. Id. at 486-87. Moreover, the Second Circuit provided the following description of its holding in Marcus:

In Marcus, we reconsidered Nordlicht in light of the Supreme Court's opinion in Metropolitan Life, which limited the availability of complete preemption removal to "the very narrow range of cases where 'Congress has clearly manifested an intent' to make specific action within a particular area removable."

Id. at 486 (quoting Marcus, 138 F.3d at 54). In this way, the Second Circuit made clear that its only decision squarely recognizing federal common law as a basis for removal no longer is good law.⁶ Further, the Second Circuit gave a clear indication that courts should apply complete preemption analysis to arguments for removal relating to federal common law.

⁶ In Republic of Philippines v. Marcos, 806 F.3d 344 (2d Cir. 1986), the Second Circuit stated that it was "probably" possible for "federal common law in the area of foreign affairs [to be] so 'powerful', or important as to displace a purely state cause of action of constructive trust." Id. at 354. However, acknowledging that it might be "wrong on this point", the Second Circuit ultimately rested its decision in that case on its determination that plaintiff's state-law claim "raises, as a necessary element," an issue of federal law. i.e., what has come to be known as Grable jurisdiction. See id. The Second Circuit's discussion of federal common law as a basis for removal in Republic of Philippines was thus dicta. See Baraket v. Holder, 632 F.3d 56, 59 (2d Cir. 2011) ("[I]t is not substantive discussion of a question or lack thereof that distinguishes holding from dictum, but rather whether resolution of the question is necessary for the decision of the case."). Given the Second Circuit's reconsideration of Nordlicht, this court finds the dicta in Republic of Philippines concerning federal common law to be unpersuasive.

The parties have not identified, and the court has also been unable to find, any decision by the Second Circuit after Nordlicht holding that federal common law can provide a basis for removal.

Here, by arguing that “federal common law necessarily and exclusively governs” Connecticut’s claims, Def.’s Opp’n at 17, ExxonMobil asks the court to conclude that there is no such thing as a CUTPA deceptive or unfair practice claim targeting the marketing interactions between a seller of fossil fuels and Connecticut consumers. ExxonMobil argues that “interstate and international pollution” is an area of law that is so saturated with federal interests and regulation that Connecticut’s claims are therefore also “federal in nature.” See Def.’s Opp’n at 17. However, for the purposes of removal, there is a material difference between a state claim that a federal preemption defense “unquestionably” defeats and a state claim that has been replaced by a federal cause of action with extraordinary preemptive force: only the latter suffices for removal.⁷ See Beneficial Nat’l Bank, 539 U.S. at 9-11. The Supreme Court has directed courts to scrutinize congressional intent and statutory text to distinguish between these two situations. See id. at 9 (“Only if Congress intended [section] 86 to provide the exclusive cause of action for usury claims against national banks would the statute be comparable

⁷ Indeed, the Second Circuit recently commented on the consequences of this distinction for other lawsuits that have been filed by states against producers of fossil fuels. See City of New York, 993 F.3d at 94. In that case, the Second Circuit, which possessed diversity jurisdiction, held that certain state nuisance and trespass claims are preempted by federal common law. Id. at 90-94. After articulating this decision, the Second Circuit “pause[d] [] to reconcile [its] conclusion with the parade of recent opinions holding that state-law claims for public nuisance brought against fossil fuel producers do not arise under federal law.” Id. at 93 (brackets, citations, and quotation marks omitted).

The Second Circuit observed that, “[t]he single issue before each of those federal courts was thus whether the defendants’ anticipated defense could singlehandedly create federal-question jurisdiction under [section] 1331 in light of the well-pleaded complaint rule.” Id. at 94 (citing Caterpillar Inc., 482 U.S. at 398). While the Second Circuit only mentioned these cases in passing, its description of these cases as concerning the effect of an “anticipated federal defense” suggests that the Second Circuit would not view the complete preemption doctrine as applicable in a similar case. As explained above in this Ruling, the Supreme Court has held that a mere “complete federal defense”, as contrasted with complete preemption, does “not justify removal.” Beneficial Nat’l Bank, 539 U.S. at 9 (citations omitted). The court also notes that the Second Circuit’s decision did not address state consumer protection claims.

to the provisions we construed in the Avco and Metropolitan Life cases.”). Federal common law provides no criteria by which a court can discern whether a federal cause of action carries the “extraordinary”, Caterpillar, 482 U.S. at 393, degree of preemption needed for removal.

The strongest argument for altering this framework in the context of federal common law is the principle that defendants should be able to receive prompt review of dispositive issues of federal law, but the Supreme Court has made quite clear that the well-pleaded complaint rule can frustrate this principle. Caterpillar Inc., 482 U.S. at 393 (“[I]t is [] settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated by the plaintiff’s complaint, and even if both parties concede that the federal defense is the only question truly at issue.”). Thus, although the Supreme Court’s decisions pertaining to the well-pleaded complaint rule have not squarely addressed federal common law, the approach it has crafted in cases involving federal statutes is inconsistent with removal of purported state claims merely on the ground that federal common law has displaced such claims. Therefore, the court concludes that ExxonMobil has not shown that federal common law justifies removal of this case.

2. Grable Jurisdiction

ExxonMobil also argues that the doctrine recognized by the Supreme Court in Grable & Sons Metals Products, Inc. v. Darue Engineering & Manufacturing, 545 U.S.

308 (2005), justifies removal of this case. Under the so-called Grable doctrine,⁸ removal is proper if a federal issue is “embedded” within a state law claim. See id. at 314. The embedded federal issue must be “(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.” Gunn, 568 U.S. at 258 (citing Grable, 545 U.S. at 313-14). All four of these elements must be met in order to establish federal jurisdiction. Id.

ExxonMobil’s primary arguments for Grable jurisdiction concern the potential impact of Connecticut’s claims on federal policymaking. See Def.’s Opp’n at 18-20. According to ExxonMobil, Connecticut’s claims amount to an “attempt to countermand federal energy and environmental policy.” Id. at 18. ExxonMobil argues that the relief sought by Connecticut would disrupt the “careful balance between energy production and environmental protection” that “Congress has already struck.” Id. at 19. In addition, ExxonMobil contends that the Complaint’s allegations necessarily imply that the federal government was among the victims of ExxonMobil’s alleged deception. Id. at 19.

Whether a state claim relates to issues of national concern may demonstrate that an embedded federal issue is “substantial”, i.e., the third element for Grable jurisdiction, but such an argument does not address the first Grable element, that is, whether a state claim “necessarily raise[s]” an issue of federal law. See Grable, 545 U.S. at 314. In Grable, the respondent purchased real property that the IRS had seized from the

⁸ The Second Circuit has also referred to this doctrine as “the substantial federal question exception to the well-pleaded complaint rule.” New York v. Shinnecock Indian Nation, 686 F.3d 133, 141 (2d Cir. 2012).

petitioner in satisfaction of a federal tax delinquency. Id. at 310. Five years after the purchase, the petitioner contested ownership of the property through a state quiet title action. Id. The basis for the petitioner's state quiet title claim was an allegation that "the IRS had failed to notify [the petitioner] of its seizure of the property in the exact manner required by [section] 6335(a)" of title 26 of the U.S. Code. Id. at 311. Under the applicable state law, the petitioner was required to "specify the facts establishing the superiority of [its] claim." Id. at 314 (citation and internal quotation marks omitted).

The Supreme Court held that the petitioner's state quiet title claim necessarily raised a federal issue, because "[w]hether [the petitioner] was given notice within the meaning of the federal statute is thus an essential element of its quiet title claim." Id. at 315. The Supreme Court also justified its holding on the ground that "[t]he meaning of the federal tax provision is an important issue of federal law that sensibly belongs in a federal court." Id. at 315. However, it only progressed to this second segment of its analysis after concluding that the federal issue was necessarily raised by the petitioner's state claim. See id. at 314-15. As explained above, federal jurisdiction only exists under the Grable doctrine if "all four . . . requirements are met." Gunn, 568 U.S. at 258.

The requirement that a state claim "necessarily raise" an issue of federal law is underscored by the Second Circuit's decision in New York v. Shinnecock Indian Nation, 686 F.3d 133 (2d Cir. 2012). That case involved a dispute between the State of New York and the Shinnecock Indian Nation over the development of a casino. 686 F.3d at 135-36. The district court conducted a bench trial and issued a permanent injunction prohibiting construction of the casino, unless the Shinnecock Indian Nation complied with state and local laws. Id. at 135. As the Second Circuit observed, whether "federal

Indian law [] preclude[d] the application of state and local law to the Tribe's activities . . . was essentially the only issue in dispute at trial." Id. at 139.

Nevertheless, the Second Circuit concluded that New York's claim did not necessarily raise a federal issue, and that the district court therefore lacked jurisdiction over the claim. Id. at 140-41. As the court explained, "if the Shinnecock were to have established that their construction of the casino complied with state and local law, the court could have resolved the case without reaching the federal issues." Id. at 140.

Here, Connecticut's Complaint asserts claims for defective and unfair acts and practices under CUTPA. Compl. at 38-43. The only argument ExxonMobil makes that pertains to the first element of Grable jurisdiction, i.e., the requirement that a state claim "necessarily raise" an issue of federal law, is that CUTPA looks to the Federal Trade Commission's definition of unfair or deceptive acts for guidance. See Def.'s Opp'n at 20. Section 42-110b(b) codifies "the intent of the [Connecticut] legislature that in construing" CUTPA, "the commissioner and the courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act." Conn. Gen. Stat. § 42-110b(b). Section 42-110b(c) authorizes the Commissioner of Connecticut's Department of Consumer Protection to issue regulations implementing CUTPA but requires that "[s]uch regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the federal courts in interpreting the provisions of the Federal Trade Commission Act." Conn. Gen. Stat. § 42-110b(c).

With respect to section 42-110b(b), to "be guided by interpretations" is not the same as being bound by them. See Conn. Gen. Stat. § 42-110b(b). As the Connecticut

Appellate Court has explained, “[a]lthough the guidance provided by federal law will often be enlightening, federal law is not a straightjacket. . . . In other words, federal law sets a floor for Connecticut law, but not a ceiling.” Johnson Elec. Co., Inc. v. Salce Contracting Assocs., Inc., 72 Conn. App. 342, 352 (2002). Further, although Connecticut courts have adopted the framework of analysis embodied by the federal “cigarette rule”, this rule requires courts to look to public policy, as announced in Connecticut statutes and common law. See Ulbrich, 310 Conn. at 409; see also Artie’s Auto Body, Inc. v. Hartford Fire Ins. Co., 317 Conn. 602, 623-27 (2015) (referring to a Connecticut statute and regulatory scheme to determine whether plaintiffs could prevail on their unfair practice claim). Thus, CUTPA claims do not necessarily raise federal issues by operation of this provision, because a court reviewing a CUTPA claim is not required to apply federal law. Rather, a court refers to federal law for guidance in applying Connecticut law. As for section 42-110b(c), it is not helpful for ExxonMobil because the Complaint does not allege that ExxonMobil violated a regulation issued by the Commissioner of the Department of Consumer Protection. See Compl. at 36-42. Therefore, Connecticut’s claims do not necessarily raise a federal issue.

Further, even assuming for the sake of argument that, on account of either of these provisions, Connecticut’s CUTPA claims necessarily raise a federal issue, it is not the federal issue on which ExxonMobil focuses. ExxonMobil makes absolutely no argument that “interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act,” Conn. Gen. Stat. § 42-110b(b), are actually disputed or substantial. See Def.’s Opp’n at 20. In other words, with respect to any federal issue involving the FTCA, ExxonMobil has not satisfied the

remaining elements of Grable jurisdiction, i.e., that an issue is substantial, actually disputed, and capable of resolution without disrupting the federal-state balance approved by Congress. Therefore, ExxonMobil has failed to show that this issue can support federal jurisdiction under the Grable doctrine.

The majority of the remainder of ExxonMobil's arguments in support of Grable jurisdiction are different forms of its argument that Connecticut's claims relate to issues of national concern. See Def.'s Opp'n at 20-23. For example, ExxonMobil argues that Connecticut "seeks to impose one state's energy policy on the rest of the country." Id. at 21. ExxonMobil also contends that, because the U.S. Army Corps of Engineers has exercised its delegated authority to regulate . . . issues of sea level rise", Connecticut's claims "ask this court to second-guess the efficacy of the Corps' programs." Id. Although ExxonMobil seeks to fit these arguments into the first element of Grable jurisdiction, see Def.'s Opp'n at 18-22, arguments of this nature address whether an issue is substantial but not whether an issue is necessarily raised. See Grable, 545 U.S. at 314.⁹

Finally, ExxonMobil briefly contends that Connecticut's claims necessarily raise federal issues because they implicate ExxonMobil's free speech rights under the First Amendment. See Def.'s Opp'n at 22. However, the cases on which ExxonMobil relies address the constitutional limits on defamation and libel claims. See Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767,

⁹ ExxonMobil also repeats its argument concerning federal common law and the well-pleaded complaint rule. See Def.'s Opp'n at 21-22. The court has already addressed why this argument does not justify removal. See supra at 8-16

774-75 (1986); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). ExxonMobil fails to cite any authority for the proposition that these limits apply to consumer protection claims, nor for the proposition that these limits would apply to such claims in a manner that would embed any First Amendment issues within state law claims--as opposed to providing ExxonMobil with a federal defense. Further, ExxonMobil does not address the “subordinate position in the scale of First Amendment values” that the Supreme Court and the Second Circuit have assigned to commercial speech. See Vugo, Inc. v. City of New York, 931 F.3d 42, 49 (2d Cir. 2019) (quoting Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989)). Therefore, the court concludes that ExxonMobil has not shown that Connecticut’s claims necessarily raise First Amendment issues for the purposes of the Grable doctrine.

Accordingly, for all of the above reasons, the court concludes that ExxonMobil has failed to show that the Grable doctrine justifies removal.¹⁰

¹⁰ During oral argument, counsel for ExxonMobil repeatedly emphasized the “artful pleading doctrine.” The court notes that the phrase “artful pleading doctrine” is absent from both ExxonMobil’s 58-page Notice of Removal and 56-page Opposition to the Motion to Remand. See Notice of Removal; Def.’s Opp’n. The phrases “artful pleading” and “artfully pleaded” each appear once on the first page of the Opposition to the Motion to Remand, but without any citation to a specific court decision. See Def.’s Opp’n at 1.

The Supreme Court once appeared to use the term “artful pleading doctrine” as a synonym for complete preemption. See Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 475 (1998) (“The artful pleading doctrine allows removal where federal law completely preempts a plaintiff’s state-law claim.”). However, the Supreme Court also appeared to describe this doctrine as the “principle that ‘a plaintiff may not defeat removal by omitting to plead necessary federal questions.’” Id. (emphasis added).

In Marcus v. AT&T Corp., the Second Circuit analyzed complete preemption and the artful pleading doctrine separately. See 138 F.3d at 53-56. With respect to artful pleading, the Second Circuit concluded that a breach of contract claim was removable, because it was based on a “tariff [] filed with the FCC pursuant to the FCA”, and, therefore, “the breach of warranty claim necessarily raise[d] a substantial federal question.” Id. at 56. The Marcus decision predated the Supreme Court’s decision in Grable, which, as discussed above, clarified when a state law claim is removable on account of an embedded issue of federal law. See Grable, 545 U.S. at 314. Subsequently, in Sullivan v. American

B. Federal Officer Removal Statute

ExxonMobil next argues for removal on the basis of the federal officer removal statute. Section 1442(a)(1) authorizes removal of cases involving claims against “any officer (or any person acting under that officer) of the United States or of any agency thereof.” 28 U.S.C. § 1442(a)(1). In contrast to “the general removal statute[, which] must be strictly construed, both [section] 1442 and especially its ‘acting under’ provision must be read broadly.” Agyin v. Razman, 986 F.3d 168, 175 (2d Cir. 2021) (citations omitted). Private parties that seek removal on the basis of section 1442 must show that (1) “they are person[s] within the meaning of statute who act[ed] under [a federal] officer”, (2) “they performed the actions for which they are being sued under color of [federal] office”, and (3) “they [] raise a colorable federal defense.” Isaacson v. Dow Chem. Co., 517 F.3d 129, 135 (2d Cir. 2008) (citation and quotation marks omitted).

The paradigmatic example of a private party that may avail itself of the federal officer removal statute is “a private company acting pursuant to a contract with the federal government.” See Agyin, 986 F.3d at 175. ExxonMobil argues that it fits this description perfectly, given that it has supplied the federal government with fossil fuels for decades. See Def.’s Opp’n at 24-30. As ExxonMobil details in its Opposition,

Airlines, Inc., 424 F.3d 267 (2d Cir. 2005), which was decided three months after Grable, the Second Circuit noted that “[t]he precise scope of the artful-pleading doctrine is not entirely clear” and acknowledged only that the doctrine “has been relied upon to support federal-court jurisdiction . . . where a plaintiff’s state-law contract claims were construed as asserting rights arising only under federal tariffs.” Id. at 272 n.4 (citing Marcus, 138 F.3d at 55-56).

This court understands the artful pleading doctrine as coextensive with Grable, *i.e.*, the artful pleading doctrine prevents a plaintiff from avoiding Grable jurisdiction by omitting, from the plaintiff’s statement of a state-law claim, an essential element of the claim that necessarily raises a federal issue that is substantial, actually disputed, and capable of resolution without disrupting the federal-state balance approved by Congress. Compare Marcus, 138 F.3d at 55-56, and Grable, 545 U.S. at 314.

through various arrangements for the production of fossil fuels, the federal government has at times exercised a significant degree of control and direction over ExxonMobil's operations. See id.

However, ExxonMobil must show not merely that it has acted under a federal agency or officer but also that it “performed the actions for which [it] is being sued ‘under color of [federal] office.’” Isaacson, 517 F.3d at 135 (emphasis added) (citation omitted). The Second Circuit has observed “[t]he hurdle erected by this requirement is quite low”: a defendant need not show that a plaintiff's claims are “for the very acts” the defendant performed under color of federal office. See id. at 137. Further, a court must “credit [a defendant's] theory of the case” when analyzing this prong of the federal officer removal test. See id.

Nevertheless, under this “causation requirement . . . non-governmental corporate defendants . . . must demonstrate that the acts for which they are being sued . . . occurred because of what they were asked to do by the Government.” Id. Thus, although the strength of the connection between acts performed by a defendant under color of federal office and the acts for which the defendant is sued may be “quite low”, the nature of this connection must be causal. See id.; see also Cnty. Bd. of Arlington Cnty., Va. V. Express Scripts Pharmacy, No. 20-1031, 2021 WL 1726106, *9 (4th Cir. May 3, 2021) (holding that causal connection was sufficient for removal, where pharmacy defendants “were legally bound to follow [the Department of Defense]’s formulary when administering” a mail-order pharmacy program “and had no discretion to deviate from the DOD contract’s requirements”).

Here, ExxonMobil provides no explanation as to how the allegedly deceptive statements that form the basis of Connecticut's consumer protection claims have any causal connection to the production of fossil fuels for or under the direction of the federal government. See Def.'s Opp'n at 30-31. Thus, although Connecticut's allegations that ExxonMobil misrepresented the dangers of fossil fuels for the Earth's climate relate to ExxonMobil's production of fossil fuels, ExxonMobil has not shown why the alleged misrepresentations "occurred because of what [it] was asked to do by the Government." See Isaacson, 517 F.3d at 137. Nowhere does ExxonMobil allege that its contracts with the government required it to publish the advertisements and other misrepresentations alleged by Connecticut. ExxonMobil does not assert, or even suggest, that the federal government directed ExxonMobil to make these allegedly deceptive statements. See Notice of Removal ¶¶ 71-108. As a result, the court's obligation to credit ExxonMobil's theory of the case, see Isaacson, 517 F.3d at 137, does not benefit ExxonMobil with respect to this requirement.

Therefore, even assuming that ExxonMobil can satisfy the first and third prongs of the federal officer removal test, ExxonMobil has failed to satisfy the causation requirement. The court concludes that ExxonMobil has not shown that the federal officer removal statute applies to Connecticut's claims.

C. Outer Continental Shelf Lands Act

Next, ExxonMobil argues that the court possesses jurisdiction on account of the Outer Continental Shelf Lands Act ("OCSLA"). See Def.'s Opp'n at 23-25. Section 1349(b)(1) of title 43 of the U.S. Code provides that

the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter.

43 U.S.C. § 1349(b)(1). The parties have not brought to the court's attention any decisions by the Second Circuit or the Supreme Court discussing the limits of this jurisdictional grant, and the court has not identified any such authority. Instead the parties both cite to decisions of the Fifth Circuit, which appears to have more familiarity with the OCSLA than other Courts of Appeals. In construing the meaning of section 1349(b), the Fifth Circuit has concluded that "the term 'operation' contemplate[s] the doing of some physical act on the [Outer Continental Shelf]." EP Operating Ltd. P'ship v. Placid Oil Co., 26 F.3d 563, 567 (5th Cir. 1994). For example, in Barker v. Hercules Offshore, Inc., 713 F.3d 208 (5th Cir. 2013), the Fifth Circuit concluded that OCSLA jurisdiction existed because a workplace accident occurred on a "jack-up rig attached to the Outer Continental Shelf." Id. at 213.

ExxonMobil's argument on this issue fails because the claims Connecticut has chosen to bring in this case seek redress for deceptive and unfair practices relating to ExxonMobil's interactions with consumers in Connecticut--not for harms that might result from the manufacture or use of fossil fuels, let alone from ExxonMobil's operations on the Outer Continental Shelf.¹¹ See Compl. at 36-43. As explained above,

¹¹ ExxonMobil submitted voluminous exhibits that suggest Connecticut may have been motivated to bring the current suit as part of a broader strategy among multiple states' attorneys general to seek redress for harms directly caused by climate change. See Exs. 1-8, Notice of Removal (Doc. No. 1-1 at 1-95; Doc. No. 1-2 at 1-3); Exs. 1-5, Def.'s Opp'n (Docs. Nos. 37-2, 37-3, 37-4, 37-5, 37-6). Even assuming that ExxonMobil is correct about Connecticut's motivations, this does not change the fact that

see supra at 6-8, although the Complaint details the harms caused by combustion of fossil fuels in order to explain why ExxonMobil's statements violate CUTPA, these are not the harms that underlie Connecticut's claims in this case.

Therefore, the court concludes that ExxonMobil has failed to show that OCSLA justifies removal of this case.¹²

D. Federal Enclave Jurisdiction

ExxonMobil also contends that the court possesses jurisdiction on the ground that some of the injuries alleged by Connecticut must have occurred on federal enclaves. See Def.'s Opp'n at 34-36. Section 8 of Article I of the U.S. Constitution authorizes Congress "[t]o exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings." U.S. Const. art. I, § 8. Although "the issue is not entirely settled," some courts have construed this provision as "establish[ing] federal subject matter jurisdiction over tort claims occurring on federal enclaves, and have allowed such claims to proceed even when applying state law." Jograj v. Enter. Servs., LLC, 270 F. Supp. 3d 10, 16 (D.D.C. 2017) (citing Akin v. Ashland Chem. Co. 156 F.3d 1030, 1034 (10th

Connecticut has chosen, in this case, to bring claims seeking redress for deceptive and unfair practices relating to the manner by which ExxonMobil has interacted with consumers in Connecticut.

¹² Although OCSLA jurisdiction is not a familiar issue within the Second Circuit, the court notes that other district courts have rejected similar arguments to those raised by ExxonMobil in this case. See, e.g., Minnesota v. Am. Petroleum Inst., No. 20-CV-1636 (JRT/HB), 2021 WL 1215656, at *10-11 (D. Minn. Mar. 31, 2021) (concluding that OCSLA jurisdiction was not present, because "the State's claims are rooted not in the Defendants' fossil fuel production, but in its alleged misinformation campaign").

Cir. 1998), and Federico v. Lincoln Military Hous., 901 F. Supp. 2d 654, 656 (E.D. Va. 2012)).

ExxonMobil argues that federal jurisdiction is present in the current case because “climate change harms . . . [n]ecessarily impact [] . . . multiple federal enclaves within Connecticut, including military installations . . . national parks . . . and federal prisons.” See Def.’s Opp’n at 35. ExxonMobil also argues that, “by targeting ExxonMobil’s oil and gas operations and their alleged impacts, this action necessarily sweeps in those operations that occur on military bases and other federal enclaves.” See id. at 36.

ExxonMobil’s argument is premised on its characterization of Connecticut’s claims as targeting pollution. However, as the court has already explained, Connecticut’s claims seek redress for the manner by which ExxonMobil has interacted with consumers in Connecticut, not the impacts of climate change. See supra at 6-8. Further, given that national parks, federal prisons, and military installations are located throughout the country, ExxonMobil’s interpretation of federal enclave jurisdiction would appear to give rise to federal jurisdiction in any case involving injuries that occur throughout a state, no matter how minor the injuries occurring on federal enclaves are in relation to the claims at issue. ExxonMobil cites no authority in support of what would amount to a sweeping change to the balance between the jurisdiction of state and federal courts.

Therefore, the court concludes that ExxonMobil has failed to show that removal is proper on account of federal enclave jurisdiction.¹³

E. Diversity Jurisdiction

Finally, ExxonMobil argues that the court possesses diversity jurisdiction because Connecticut is not the real party in interest. See Def.'s Opp'n at 37-39. Section 1332(a)(1) of title 28 vests district courts with "original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States." 28 U.S.C. § 1332(a)(1). "There is no question that a State is not a 'citizen' for purposes of [] diversity jurisdiction." Moor v. Alameda Cty., 411 U.S. 693, 717 (1973). However, "courts must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy." Purdue Pharma L.P. v. Kentucky, 704 F.3d 208, 218 (2d Cir. 2013) (citation and internal quotation marks omitted).

Courts have developed two competing approaches for determining whether a state is a real party in interest: the "claim-by-claim approach" and the "whole-complaint" approach. Id. at 218-19. Courts applying the former approach analyze whether a state is the real party in interest "with respect to each type of relief sought," while courts applying the latter approach "look[] at the lawsuit as a whole." See id. Although the Second Circuit has not definitively adopted the whole-complaint approach, it has

¹³ As with ExxonMobil's arguments in connection with the OCSLA, although authority on the applicability of federal enclaves jurisdiction is sparse, the court notes that other district courts have rejected similar arguments to those raised by ExxonMobil in this case. See, e.g., Minnesota, 2021 WL 1215656, at *11 ("While the various injuries alleged in the complaint may be felt on federal enclaves as much as they are felt anywhere, the Court requires a more substantive and explicit relationship between the actual claims alleged and a specific federal enclave to exercise jurisdiction.").

strongly suggested that it prefers this approach. See id. at 219 (“[W]e note that the ‘claim-by claim’ approach has been roundly criticized, and the ‘whole-complaint’ approach has emerged as the majority rule.”). Accordingly, the court will apply the whole-complaint rule in this case. See In re Standard & Poor’s Rating Agency Litig., 23 F. Supp. 3d 378, 402 (S.D.N.Y. 2014) (“[A]lthough the Second Circuit did not formally reach the question in Purdue Pharma, it is difficult to view that decision as anything but a thumb firmly on the whole-complaint side of the scale.”).

In Connecticut v. Moody’s Corp., No. 3:10-CV-546 (JBA), 2011 WL 63905 (D. Conn. Jan. 2011), the court held that Connecticut was the real party in interest in a suit alleging widespread violations of CUTPA by credit ratings agencies, because it “has a statutory interest under CUTPA ‘to protect the public from unfair practices in the conduct of any trade or commerce.’” Id. at *3 (quoting Eder Bros., Inc. v. Wine Merchants of Conn., Inc., 275 Conn. 363, 380 (2005)). The court also noted that Connecticut did not seek “restitution [] on behalf of specific individuals”, but instead sought a restitution order, pursuant to section 42-110m of the Connecticut General Statutes, “without specifying beneficiaries of that restitution, which the State argues may be ordered paid to the Connecticut Department of Consumer Protection[] . . . to fund positions and other related expenses for the enforcement of Department of Consumer Protection licensing and registration laws.” Id.

Reviewing the Complaint as a whole, the court concludes that Connecticut is suing to protect a quasi-sovereign interest and is therefore a real party in interest. Connecticut seeks redress not simply for the deception allegedly caused by each of ExxonMobil’s statements but rather for a decades-long campaign of alleged

disinformation that resulted in “the stifling of an open marketplace for renewable energy.” See Compl. at 39, ¶ 193. Further, as in Moody’s Corp., Connecticut seeks a restitution order under CUTPA that would fund efforts to respond to ExxonMobil’s allegedly deceptive and unfair practices generally, rather than providing compensation to specific individuals. See id. at 78 (seeking “[a]n order that ExxonMobil fund a corrective education campaign to remedy the harm inflicted by decades of disinformation, to be administered and controlled by the State or such other independent third party as the Court may deem appropriate”); Moody’s Corp., 2011 WL 63905, at *3.

Therefore, the court concludes that Connecticut is a real party in interest, and that the court does not possess diversity jurisdiction.

F. Fees and Costs

The plaintiffs seek costs and attorneys’ fees pursuant to section 1447(c) of title 28 the U.S. Code, which provides that “[a]n order remanding the case may require payment of just costs and any actual expenses, incurred as a result of the removal.” 28 U.S.C. § 1447(c). “Absent unusual circumstances, courts may award attorney’s fees under [section] 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal.” Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005). The Supreme Court has instructed that, “[i]n applying this rule, district courts retain discretion to consider whether unusual circumstances warrant a departure from the rule in a given case.” Id. Here, Connecticut argues that an award of costs and fees is warranted because ExxonMobil’s arguments for removal have been “roundly rejected by district and circuit courts across the country.” See Pl.’s Mem. at 28.

As the court has noted throughout this Ruling, however, several of the issues raised by ExxonMobil are novel within the Second Circuit. Further, although it is true that multiple district courts have rejected similar arguments for removal, those courts are located in different circuits, and many relevant portions of their rulings were not subject to appellate review until very recently. See BP P.L.C. v. Mayor & City Council of Baltimore, No. 19-1189, slip. op. at 6 (U.S. May 17, 2021) (holding that section 1447(d) of title 28 of the U.S. Code “permits appellate review of [a] district court’s remand order--without any further qualification”). Given these circumstances, the court concludes, albeit with some reservation, that ExxonMobil did not lack an objectively reasonable basis for removal. Connecticut’s request for costs and fees is denied.

V. CONCLUSION

For the reasons discussed above, the court grants Connecticut’s Motion to Remand (Doc. No. 36) and denies Connecticut’s request for costs and fees. The Clerk is directed to remand the case to the Superior Court of Connecticut.

SO ORDERED.

Dated this 2nd day of June 2021, at New Haven, Connecticut.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge