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. 20-01555) (THE HONORABLE JANET C. HALL, J.)

RESPONSE IN OPPOSITION TO THE MOTION OF APPELLANT FOR A STAY OF THE REMAND ORDER PENDING APPEAL

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INTRODUCTION

On, June 18, 2021, the Defendant-Appellant, ExxonMobil Corporation ("ExxonMobil") filed with this Court, pursuant to Fed. R. App. P. 8(a)(1), a motion for stay pending appeal of the District Court's decision granting the motion to remand filed by the Plaintiff-Appellee, the State of Connecticut ("State"), and remanding this matter to Connecticut Superior Court. ExxonMobil has a high burden to establish that a stay is necessary because it must prove that it is likely to prevail on the merits of its appeal of the granting of remand, that proceeding with the underlying litigation will cause it irreparable injury, and that the balance of the equities favors a stay.

The district court disagreed with ExxonMobil – denying its motion for stay before the State could even file its objection and holding that ExxonMobil was unlikely to succeed on the merits of its appeal and implying that the balance of the equities favored the State. D. Ct. Dkt. No. 56. Examination of the district court's thorough decision on the merits of the underlying remand motion supports such a conclusion. Additionally, because ExxonMobil cannot demonstrate irreparable harm absent stay and because of the strong public policy presumption

in favor of government action for regulatory enforcement of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110m, ExxonMobil's stay should be denied.

STATEMENT OF FACTS

On September 14, 2020, the State filed an eight count Complaint against ExxonMobil in the Superior Court of Connecticut. All eight counts of the Complaint allege violations of the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110a *et. seq.*, with counts two, four, six, and eight alleging that such violations were willful, as is required for the imposition of civil penalties pursuant to Conn. Gen. Stat. § 42-110o (b). The State's Complaint alleges only one theory of liability: a series of CUTPA violations related to ExxonMobil's statements to public consumers located in Connecticut.

On October 14, 2020, ExxonMobil removed this matter to the Federal District Court, District of Connecticut, and filed a notice of removal with the Superior Court of Connecticut. D. Ct. Dkt. No. 1. On December 2, 2020, the State moved to remand the matter back to the Superior Court of Connecticut. D. Ct. Dkt. No. 36. Following briefing and argument, on June 2, 2021, the district court (*Hall, J.*) granted the

State's motion and issued an order remanding this case back to state court. D. Ct. Dkt. No. 52. On June 8, 2021, ExxonMobil filed a Notice of Appeal to the Second Circuit Court of Appeals regarding the remand order, *see* D. Ct. Dkt. No. 53, and moved to stay any remand during the pendency of the appeal. D. Ct. Dkt. No. 54. On June 11, 2021, the district court denied ExxonMobil's motion to stay, concluding that ExxonMobil had failed to show a substantial likelihood of its success on the merits and implied that the balance of the equities was not in its favor. D. Ct. Dkt. No. 56. On June 18, 2021, ExxonMobil filed a motion for stay with this Court. ECF No. 31. This response follows.

ARGUMENT

When evaluating a motion for stay pending appeal, the United States Supreme Court has articulated that the standard of review consists of four 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." (Emphasis added.) *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting

Hilton v. Braunskill, 481 U.S. 770, 776 (1987)). "The first two factors are the most critical, but a stay is not a matter or right, even if irreparable injury might otherwise result." *Ledesma v. Garland*, 2021 U.S. App. LEXIS 9840 at *11 (2d Cir. 2021) (*quoting Uniformed Fire Officers Ass'n v. De Blasio*, 973 F.3d 41, 48 (2d Cir. 2020)). Because a stay pending appeal is "an intrusion into the ordinary process of administration and judicial review," *Nken,* 556 U.S. at 427, ExxonMobil has the burden of demonstrating that the circumstances justify a stay pursuant to all four factors. *Id.* at 434. The Court must evaluate these factors in its discretion based upon the circumstances of this particular case. *Id.* at 433.

These factors are treated in the Second Circuit as a sliding scale, as this Court has explained that "the necessary level or degree of possibility of success [on the merits] will vary according to the court's assessment of the other stay factors and . . . the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay. Simply stated, more of one excuses less of the other." (Internal quotation marks omitted.) *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006).

Moreover, this Court has articulated that the absence of one factor leaves the remaining factors insufficient to support a stay. *See De Blasio*, 973 F.3d at 49. Here, ExxonMobil cannot demonstrate satisfaction of any of the four factors, and thus its motion should be denied.

A. ExxonMobil is Not Substantially Likely to Succeed on the Merits of its Appeal

In the instant matter, to borrow this Court's own turn of phrase, ExxonMobil has "shown no likelihood of success on the merits of [its] claims against the [State], much less the strong showing required by *Nken*." *De Blasio*, 973 F.3d at 49. Indeed, this was exactly what the district court found as a result of ExxonMobil's motion below. ECF No. 56. In the context, moreover, of the complete lack of irreparable injury alleged by ExxonMobil, *see Infra* Part B, and the sliding scale used by this Circuit, ExxonMobil fails to meet the already "high burden" for an appellant seeking stay. *Nken,* 556 U.S. at 439 (Kennedy, J., concurring).

ExxonMobil raises four reasons why the State's CUTPA action commands federal jurisdiction: (1) the action arises under federal common law pursuant to 28 U.S.C. § 1331; (2) pursuant to *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005); (3) under

the federal officer removal statute 28 U.S.C. § 1442(a); and (4) under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b)(1).[1] In making these arguments, ExxonMobil asks this Court to essentially ignore the Supreme Court and this Circuit's own precedent on virtually all of these issues. None of these arguments were persuasive to the district court, and none are likely to succeed on appeal.

1. This Matter does not Arise Under Federal Law.

ExxonMobil first argues that it is likely to succeed on its argument that "the State's claims are governed by federal common law" and thus are removable pursuant to 28 U.S.C. § 1331. ECF No. 31 at p. 7. A matter is only removable pursuant to § 1331, however, if it "arises under" federal law *pursuant to the well-pleaded complaint rule. Beneficial Nat'l. Bank v. Anderson,* 539 U.S. 1, 6 (2003). ExxonMobil does not claim that there is a facial federal claim in the State's complaint. Instead, rather than address the complaint that exists in the instant matter, it seeks to craft some other complaint out of thin air – one seeking to regulate its emissions through common law. This

[1] Before the district court, ExxonMobil also argued removal was justified under federal enclave and diversity jurisdiction. Such are relegated to a footnote in the instant motion, and not briefed. ECF No. 31 at p. 18 n.4.

misinterpretation resonates through its entire argument on the likelihood of success on the merits. As Judge Hall clearly explained in great detail, including during argument, such is not the complaint that the State has filed. Tr. 5/21/21 at p. 24-32, Appendix at p. A-3-A-11. This case is about *deceptive statements and marketing,* the *subject matter* of which involved climate change.

ExxonMobil relies on the "artful pleading doctrine" to manifest this false complaint, but that exception to the well-pleaded complaint rule is inapplicable in this matter.[2] This Circuit in *Romano v. Kazacos,* 609 F.3d 512, 519 (2d Cir. 2010), indicated that there are only two circumstances where the doctrine applies – either in circumstances of *complete preemption* by federal statute or when a federal statute *expressly* provides for removal, as articulated in *Beneficial National Bank*. This construction has been reiterated multiple times by the Circuit. *see e.g., Fracasse v. People's United Bank,* 747 F.3d 141, 144 (2d Cir. 2014); *Hinterberger v. Catholic Health Sys.,* 548 Fed. Appx. 3, 4 (2d

[2] The district court rightfully pointed out that ExxonMobil in fact did not truly invoke this doctrine in its briefs, instead only arguing it in response to questions by the court. D. Ct. Dkt. No. 52 at p. 22 n.10.

Cir. 2013). Indeed, just this month the Supreme Court denied certification on the Ninth Circuit's same formulation of the doctrine. *See City of Oakland v. BP P.L.C.,* 969 F.3d 895, 905-906 (9th Cir. 2020), *cert denied sub nom Chevron Corp. v. City of Oakland*, 2021 U.S. LEXIS 3100 (S. Ct. Jun. 14, 2021) (*"Oakland"*).[3] ExxonMobil's attempt to utilize dicta about the doctrine's bounds from *Sullivan v. American Airlines,* 424 F.3d 267, 272 n.4 (2d Cir. 2005) is of no assistance because this Circuit has since positively identified the artful pleading doctrine's contours – complete preemption or express statutory language for removal. Neither apply here.[4]

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[3] The district court's reading of the artful pleading doctrine as "coextensive" with *Grable* is complicated by this Circuit sometimes combining *Grable* with the doctrine – *compare Fracasse,* 747 F.3d at 144; *Marcus v. AT&T Corp.,* 138 F.3d 46, 55 (2d Cir. 1998) – and sometimes not – *with NASDAQ OMX Group, Inc. v. UBS, Sec., LLC*, 770 F.3d 1010, 1019 (2d. Cir. 2014); *Romano,* 609 F.3d at 519. That said, all precedent in this Circuit is clear that there are only the three exceptions to the well-pleaded complaint rule, as was also articulated by the Ninth Circuit in *Oakland. Fracasse, supra* at 144; *Romano, supra* at 519; *Oakland*, 969 F.3d at 905. Moreover, had the district court concluded that the artful pleading doctrine was not coextensive with *Grable*, the court might not have addressed it *at all*, as ExxonMobil has repeatedly disclaimed the other two artful pleading grounds for removal in this case. *See infra* fn. 6.

[4] Moreover, the artful pleading doctrine only permits the court to "read into a complaint elements that the plaintiff omitted" and "construe the

Complete preemption certainly does not provide grounds for removal here.[5] As the Supreme Court held, complete preemption occurs when the "pre-emptive force of a federal statute . . . is so extraordinary that it converts an ordinary state common-law complaint into one starting a federal claim for the purposes of the well-pleaded complaint rule." *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 393 (1987) (internal quotation marks omitted.). ExxonMobil implies that federal common law completely preempts this State CUTPA enforcement action. That said, it strains to avoid explicitly stating such – in part because the Supreme Court and this Court have indicated that complete preemption emerges out of Federal statutes. *See Beneficial Nat'l Bank,* 539 U.S. at 8; *Marcus,* 138 F.3d at 54. Instead ExxonMobil argues that general displacement, not complete preemption, is all that is required for removal. Such was rejected by the cert-denied Ninth Circuit; *see*

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complaint as if it raised the federal claim that actually underlies the plaintiff's suit." *Sullivan*, 271-72. The doctrine, even interpreted at its broadest, would not permit ExxonMobil to entirely reformulate the complaint as it attempts to do here.

[5] During oral argument ExxonMobil repeatedly indicated that it was not attempting to argue complete preemption. Tr. 5/21/21 at p. 33-34, Appx. at p. A-12-A-13.

Oakland, 969 F.3d at 905-908; and is unsupported by binding Supreme Court precedent. *Beneficial Nat'l Bank,* 539 U.S. at 8.[6]

ExxonMobil's arguments are based upon a complete reformulation of the complaint into something it is not; an action to regulate transboundary pollution, rather than one based entirely on a violation of CUTPA for deceptive statements by ExxonMobil. This misrepresentation of the complaint is fatal to ExxonMobil's arguments, and undermines not only ExxonMobil's analysis of the issues on appeal, but also its reliance on this Circuit's recent decision in *City of New York* v. *Chevron,* 993 F.3d 81 (2d Cir. 2021) ("*Chevron*"). In *Chevron,* this Court concluded that the City of New York's state trespass and

[6] ExxonMobil's reliance on *Republic of the Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986) is unhelpful given that the Supreme Court in *Beneficial National Bank* noted that removal may occur in "*only two circumstances*" – express congressional authorization for removal or when a *federal statute* that completely preempts a state law cause of action. *Beneficial National Bank*, 539 U.S. at 8 (emphasis added.). As the district court noted, *Marcos'* language was dicta, and instead based its decision on what would become the *Grable* exception. *Marcos,* 806 F.2d at 354.

nuisance claims, filed originally in federal district court, were *displaced* by federal common law.[7] *Id.* at 95.

Chevron is unhelpful to ExxonMobil for two reasons. First, this Circuit took pains in *Chevron* to distinguish between an analysis of traditional *ordinary preemption* and *complete preemption* for federal jurisdiction by removal, the latter of which is governed by the well-pleaded complaint rule, so as to "reconcile [its] conclusion with the parade of recent opinions" rejecting ExxonMobil's removal arguments found here. *Chevron*, 993 F.3d at 93-94; *see also Whitehurst v. 1199SEIU United Healthcare Workers East*, 928 F.3d 101, 206 n.2 (2d Cir. 2019). Second, this Court's holding did not reach questions of deceptive marketing under CUTPA. As this Court clearly stated, the question in *Chevron* was "whether the application of New York law to the City's *nuisance and trespass claims* would conflict with federal interests." *Id.* at 90 (emphasis added.). As the district court repeatedly noted, however, the instant matter is *not* a nuisance suit nor is it seeking damages for emissions. D. Ct. Dkt. No. 56 at p. 7-8.

[7] ExxonMobil fails to note that *Chevron* additionally held that the federal common law it argues here was *also* displaced by the Clean Air Act. *Id.* at 98.

Thus, *Chevron* involved fundamentally different causes of action, for different forms of relief, under different circumstances, seeking to recover for different activities, while limiting itself to a fundamentally different procedural posture than the instant matter. For these reasons, this action does not arise under federal law, and therefore is not removable under § 1331.

2. This Matter does not Fall Within Grable *Jurisdiction.*

Grable jurisdiction provides that "federal jurisdiction over a state law claim will lie if a federal issue is: (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 v. Minton*, 568 U.S. 251, 258 (2013) (*citing Grable*, 545 U.S. at 314). *Grable* jurisdiction only reaches a "slim category" of cases because "it takes more than a federal element to open the 'arising under' door [of Section 1331]." *Empire Healthchoice Assur., Inc v. McVeigh*, 547 U.S. 677, 701 (2006). ExxonMobil has not demonstrated any federal issue that is "necessarily raised" for purposes of determining subject-matter jurisdiction; such occurs only if it is "a necessary element of one of the well-pleaded state claims." *City of Rome v. Verizon Communications, Inc.,*

362 F.3d 168, 176 (2d Cir. 2004). Instead, ExxonMobil again asserts that the Circuit is likely to displace CUTPA with non-specific federal common law.

Nor is ExxonMobil correct in asserting that a court applying CUTPA is "required to look to public-policy considerations" for determining whether such constitutes unfair or deceptive practices. ECF No. 31 at p. 14. CUTPA contemplates a violation of public policy as one of the factors of an unfair practice only; it is also not a *necessary* factor for making said determination. *See Updike, Kelly & Spellacy, P.C, v. Beckett,* 269 Conn. 613, 655-56 (2004). Nor is the policy at issue the "balance between energy production and environmental protection" as ExxonMobil continues to assert – the policy question at issue is whether a corporation may articulate inaccurate information about its business, industry, and products in an effort to induce additional sales. Moreover, such arguments by ExxonMobil were *also* rejected by the Ninth Circuit in *Oakland* as failing to raise substantial questions of federal law for the purpose of *Grable. Oakland,* 969 F.3d at 906-907. Nothing articulated by ExxonMobil to justify a likelihood of success under *Grable* is persuasive.

3. The Federal Officer Removal Statute, 28 U.S.C. § 1442(a), does not Apply.

Next, ExxonMobil argues that this Court is likely to agree with its view that unrelated work with the federal government successfully creates federal jurisdiction under the federal officer removal statute, 28 U.S.C. § 1442(a). Four circuit courts and multiple district courts have rejected the argument brought by ExxonMobil in similarly situated cases. *See Mayor of Baltimore v. BP P.L.C.,* 952 F.3d 452, 471 (4th Cir. 2020) (affirming district court holding federal officer removal statute inapplicable); *Cty. of San Mateo v. Chevron Corp.*, 960 F.3d 586, 603 (9th Cir. 2020) (same); *Bd. of Cty. Comm'rs of Boulder v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792, 827 (10th Cir. 2020) (same); *Rhode Island v. Shell Oil Prods. Co.*, 979 F.3d 50, 59-60 (1st Cir. 2020) (same).[8] As the district court noted, although the bar for removal under § 1442(a) is "quite low" and credits the defendant's theory of the case, *see Isaacson*

[8] Although the Supreme Court vacated and remanded portions of *Baltimore, San Mateo, Boulder* and *Rhode Island* on procedural grounds regarding review pursuant to 28 U.S.C. § 1447(d), *see, e.g., BP P.L.C. v. Mayor of Baltimore*, 209 L. Ed. 2d 631, 637 (S.Ct. 2021), the Court was not petitioned for certification on any of the Circuits' unanimous rejection of the fossil fuel defendants' arguments regarding the federal officer doctrine, leaving those portions of the Circuit decisions undisturbed.

v. Dow Chem Corp., 517 F.3d 129, 137 (2d Cir. 2008), there is nonetheless a requirement that a defendant must show that the "acts for which they are being sued . . . occurred *because of what they were asked to do by the Government*." (Emphasis added.) *Id.*

ExxonMobil argues that congressional modifications to § 1442(a) in 2011 resulted in the broad causal requirement of *Isaacson* no longer being considered good law. This is hard to credit when this Court has reiterated *Isaacson's* standards after 2011, *see Veneruso v. Mount Vernon Health Center*, 586 Fed. Appx. 607, 608 (2d Cir. 2014) (reiterating the need for a "causal connection" for the acting under prong of federal officer doctrine), and has reenforced it again this past January, *see Agyin v. Razmzan*, 986 F.3d 168, 175 (2d Cir. 2021). Here, the district court correctly concluded based on the specific facts of this case that ExxonMobil has failed to show how its *advertising decisions and statements* were in any way, shape, or form related to the work of the federal government. Having failed to demonstrate how the government would have any nexus to ExxonMobil's advertising and corporate

statements, the federal officer removal statute does not apply and ExxonMobil will not likely succeed on the merits of said argument.[9]

4. The Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b)(1) does not Apply.

ExxonMobil finally argues that the Outer Continental Shelf Lands Act ("OSCLA"), 43 U.S.C. § 1349(b)(1), provides for jurisdiction because "ExxonMobil has engaged in substantial operations on the outer continental shelf." ("OCS") ECF No. 31 at p. 17. It argues that the Court will likely conclude such activities, unrelated to those described in the complaint, manifest federal jurisdiction.

"Courts typically assess jurisdiction under this provision in terms of whether (1) the activities that caused the injury constituted an operation conducted on the [OCS] that involved the exploration and production of minerals, and (2) the case arises out of, or in connection

[9] Nor can ExxonMobil satisfy the doctrine's "acting under" prong, which the Supreme Court clarified requires a showing of "subjection, guidance, or control" by the federal government. *Watson v. Phillip Morris Cos.,* 551 U.S. 142, 151 (2007). In *Agyin*, this Court further quoted from *Watson*, noting that triggering relationship for § 1442(a) "involves an effort to *assist* or to *carry out,* the duties or tasks of the federal superior." *Agyin,* 986 F.3d at 175 (*quoting Watson,* 551 U.S. at 152). ExxonMobil have not made any showing that its alleged deceptive advertising campaigns were guided or controlled by a federal officer.

with the operation." *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014) (internal quotation marks omitted.). The second prong has been interpreted as a but-for causation requirement. *Id.*[10] As the district court noted, ExxonMobil cannot meet the first criterion because "the term 'operation' contemplate[s] the doing of some physical act on the OCS." *EP Operating Ltd. P'ship v. Placid Oil Co.,* 26 F.3d 563, 567 (5th Cir. 2014). D. Ct. Dkt No. 52 at p. 26. Even at its broadest reading, the activity contemplated must involve the process of "locating mineral resources" or "through the construction, operation, servicing and maintenance of facilities to produce those resources." *Id.* Nor can ExxonMobil meet the second criterion, because there is again no connective analysis as to *how* ExxonMobil's advertising campaigns and statements to the consumers of Connecticut are derived from activity on the Outer Continental Shelf. Since ExxonMobil cannot honestly claim the notion that its marketing

[10] ExxonMobil's reliance on *Tennessee Gas Pipeline v. Houston Cas. Ins. Co.,* 87 F.3d 150 (5th Cir. 2006), is misplaced, as the case applies an earlier but similar variant of *Deepwater Horizon's* "but for" test. *Id.,* 155.

and executive decisions have been and are derived from its activity on the OCS, ExxonMobil cannot succeed on the merits of this argument.[11]

* * * * *

"It is not enough that the chance of success on the merits be better than negligible." *Nken*, 556 U.S. at 434. Under the circumstances of this case ExxonMobil has little, if any, chance of succeeding on any of the merits of its arguments.[12] To do so would require the Second Circuit to not only abandon the well-pleaded complaint rule – which was just reinforced in *Chevron* and *Oakland*, but also ignore a bevy of binding and persuasive precedents from the Supreme Court and this Circuit. ExxonMobil has not met its heavy burden to show a likelihood of success on any of its arguments, especially in light of the lack of

[11] The district court noted the paucity of OSCLA-related caselaw and activity in the Second Circuit. The State believes that the Fifth Circuit's decisions are persuasive in light of extensive analysis of the statute within that Circuit.

[12] As for the remaining two arguments ExxonMobil raises perfunctorily, the State merely notes that it, as well as the public it represents, are not located on enclaves for which there is "exclusive" federal jurisdiction; *Batilla v. Nat'l Air Cargo, Inc.,* 2013 U.S. Dist. LEXIS 151747 at *12-14 (W.D.N.Y. Sept. 30, 2013); nor is it a citizen for the purpose of diversity jurisdiction, *see Moor v. Alameda Cty.,* 411 U.S. 693, 717 (1973), when acting in its sovereign representative capacity. *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981).

irreparable injury. *See infra* Part B. A high volume of arguments on appeal is no more of guarantee of success than throwing the entirety of a kitchen's contents into a pot will guarantee tasty food.

B. ExxonMobil Cannot Demonstrate an Irreparable Injury Absent a Stay

Though ExxonMobil cannot demonstrate a "substantial possibility" of success on the merits, the Court would be equally served, in consideration of *Thapa*, to consider ExxonMobil's alleged irreparable injury – because such injury is purely nonexistent. On that basis alone, the stay should be denied.

"To satisfy the second *Nken* factor, the stay applicant must show more than some possibility of irreparable injury." *Ledesma*, at *13 (internal quotation marks omitted.). An irreparable injury is "an injury that is not remote or speculative but actual and imminent, and for which a monetary award cannot be adequate compensation." *Dexter 345 Inc. v. Cuomo*, 663 F.3d 59, 63 (2nd Cir. 2011). Or, to put it another way, "irreparable harm exists where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties *cannot be returned* to the positions they previously

occupied." *United States SEC v. Daspin*, 557 Fed. Appx. 46, 48 (2d Cir. 2014) (emphasis added.).

ExxonMobil first argues that it will be harmed by having to continue the litigation before the Connecticut state courts while also pursuing this appeal. This argument fails, as it has in other jurisdictions, because the additional burdens and expenses of continued litigation do not constitute an irreparable injury. This principle has been well-settled both before the Supreme Court, *e.g., Renegotiation Board v. Bannercraft Clothing Co.,* 415 U.S. 1, 24 (1974); and also in the courts of this Circuit, *see, e.g., Strougo v. Barclays PLC,* 194 F. Supp. 3d 230, 234 (S.D.N.Y. 2016) ("It is well-established by courts in the Second Circuit, however, that the prospect of incurring litigation costs, even if substantial, is not sufficient to constitute irreparable injury."); *L-7 Designs, Inc. v. Old Navy, LLC,* 964 F. Supp. 2d 299, 320 (S.D.N.Y. 2013) (same). Rather, the need to continue litigation is merely "part of the social burden of living under government." *Tilton* v. *SEC*, 824 F.3d 276, 286 (2d Cir. 2016) (quoting *FTC* v. *Standard Oil Co. of California*, 449 U.S. 232, 244-45 (1980)).

ExxonMobil cites to a handful of district court cases nationally which summarily conclude that the burdens of continued litigation while appealing a stay could constitute irreparable injury. None of those cases cited, however, were decided within this Circuit. Considering the lack of precedent cited by any of said decisions, they should not be considered persuasive in this Circuit, especially in light of this Circuit's long-standing rejection of ExxonMobil's position. *See also Harnage v. Dzurenda*, 2015 U.S. Dist. LEXIS 45139 at *5-6 (D. Conn. Apr. 7, 2015).[13]

Alternatively, ExxonMobil raises the specter that it may be harmed by adverse decisions before the state court that might be "decided differently than before federal court," arguing that there are procedural and substantive differences between the two courts. Such an argument falls afoul of the requirement that an irreparable harm for a stay "must be truly imminent, and not mere possible injury or remote and speculative injury." *Daspin*, 557 Fed. Appx. at 48. Moreover, such

[13] ExxonMobil's citation to *Phillip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304-1305 (2010) is also of no assistance, as that case notably involved expenditures from a fund created as a result of a final judgment, not litigation expenses during the pendency of litigation.

an injury would not occur because 28 U.S.C. § 1450 explicitly accommodates such circumstances. As the Supreme Court noted explicitly, "once a case has been removed to federal court, it is settled that federal rather than state law governs the future course of proceedings, notwithstanding state court orders issued prior to removal. . . . Section 1450 implies as much by recognizing the district court's authority to dissolve or modify injunctions, orders, and all other proceedings had in state court prior to removal." *Granny Goose Foods, Inc. v. Board of Teamsters & Auto Drivers Local of Alameda County,* 415 U.S. 423, 437 (1974).

For that same reason, discovery between the parties also does not constitute an irreparable injury. *See McDonald's Corp. v. Vanderbilt Atl. Holdings LLC,* 2021 U.S. Dist. LEXIS 86330 at *17 (E.D.N.Y. May 5, 2021) ("Any depositions or other discovery taken . . . during the pendency of the appeal could be used in any [matter] that eventually might take place. . . . Therefore, it is difficult to regard such discovery as irreparable injury."). Our district courts have rejected the exact same argument multiple times. *See, e.g., McDonald's Corp.,* 2021 U.S. Dist.

LEXIS 86330 at *16-17; *In re Platinum Partner Value Arbitrage Fund L.P.,* 2018 U.S. Dist. LEXIS 109684 at *6 (S.D.N.Y. June 29, 2018).[14]

ExxonMobil's arguments weigh even weaker in the instant matter than in the plethora of other stays which have been denied elsewhere because it has already telegraphed its next planned move in this litigation. It has filed a motion to dismiss the instant action on the grounds of personal jurisdiction, and has represented to the Court that it intends to file such in state court along with an anti-SLAAP motion to dismiss. Given that jurisdictional challenges freeze all further activity in a case until resolved in the Connecticut state courts, *see Baldwin Piano & Organ Co. v. Blake,* 186 Conn. 295, 297-98 (1982), ExxonMobil's appeal will not be at *imminent* risk from decisions on its own motions challenging state court jurisdiction.

Because the mere burdens of continuing litigation do not constitute irreparable injury and because any risk of decisions adverse to ExxonMobil by the state court may be cured by the district court in

[14] *Suarez v. Saul*, 2020 U.S. Dist. LEXIS 168730 at *1 (D. Conn. Sept. 15, 2020), on which ExxonMobil relies for the alternative, involved the vacating and remand of an administrative agency decision due to the Administrative Law Judge being invalidly appointed, not a remand from a notice of removal.

the event this Court reverses the district court's decision, ExxonMobil's argument for the second *Nken* factor fails.

C. The Remaining Factors Favor Denial of a Stay Pending Appeal

The Supreme Court has held that when a Government is the party opposing a stay, the remaining two factors merge together so that the Court considers both the balancing of equities and the public's interest as one and the same. *Nken*, 556 U.S. at 435; *Hartford Courant Co., LLC* v. *Carroll,* 986 F.3d 211, 224 (2d. Cir. 2021).

CUTPA, enacted as a broad remedial statute, is designed "to protect the public from unfair practices in the conduct of any trade or commerce. . . ." *Noyes v. Antiques at Pompey Hollow, LLC,* 144 Conn. App. 582, 594 (2013). Considering how it is to be "construed in favor of those whom the legislature intended to benefit," *id.* (quoting *Eder Bros., Inc. v. Wine Merchants of Connecticut, Inc.,* 275 Conn. 363, 379 (2005)), the State, as representative of the public, has a strong interest in timely and expeditious enforcement of its protective statutory scheme. *See also Iverson v. Windsor Locks,* 2006 U.S. Dist. LEXIS 107697 at *5-6 (D. Conn. Jan. 9, 2006) (supporting "the public's interest in expeditious resolution of litigation."). As this Court has reiterated multiple times,

"[g]overnment action taken in furtherance of a regulatory or statutory scheme . . . is presumed to be in the public interest." *New York v. Actavis PLC,* 787 F.3d 638, 662 (2d Cir. 2015) (*quoting Register.com, Inc. v. Very, Inc.,* 356 F.3d 393, 424 (2d Cir. 2004)). In the instant matter, where the violative deceptive activity by ExxonMobil is alleged to be current and ongoing, enforcement of CUTPA to alleviate the alleged violations falls within that presumption.

CONCLUSION

For all of the foregoing reasons, ExxonMobil's motion to stay the district court's remand order should be denied.

Respectfully Submitted,

THE STATE OF CONNECTICUT
THE PLAINTIFF-APPELLEE

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CERTIFICATE OF COMPLAINCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Daniel M. Salton, Assistant Attorney General of the State of Connecticut and a member of the Bar of this Court, certify pursuant to Federal Rule of Appellate Procedure No. 27(d)(2)(A), that the foregoing Response in Opposition to the Motion of Appellant for Stay of the Remand Order Pending Appeal is proportionally spaced, has a typeface of 14 points or greater, and contains 5,179 words. I further certify that the electronic version of this petition and the attached appendix were automatically scanned for viruses or malware and were found to contain no known viruses or malware.

JUNE 25, 2021

/S/Daniel M. Salton
DANIEL M. SALTON
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Daniel M. Salton, Assistant Attorney General of the State of Connecticut and a member of the Bar of this Court, certify that on June 25, 2021, the attached Response in Opposition to the Motion of Appellant for Stay of the Remand Order Pending Appeal was filed through the Second Circuit Court of Appeal's electronic filing system. I further certify that all participants in the appeal are registered users with the electronic filing system and that service will be accomplished by that system.

JUNE 25, 2021

/S/Daniel M. Salton
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APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT) Plaintiff)
vs.)
EXXON MOBIL CORP.)
Defendant.)

NO: 3:20cv1555(JCH)
May 21, 2021
10:01 a.m.

141 Church Street
New Haven, Connecticut

ORAL ARGUMENT VIA ZOOM

B E F O R E:

THE HONORABLE JANET C. HALL, U.S.D.J.

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released into the atmosphere, that has caused climate change to become a phenomenon that's causing these consequences in Connecticut. Then the State says we want relief from Exxon. We want them to pay us for the mitigation that we have already undertaken and the mitigation that we intend to take in the future.

As soon as the State says that it wants to recover for injuries that have resulted from the impact of climate change, it is stating a claim governed by the federal common law. It is no longer -- state law cannot governor claims for the impact of the transboundary pollution which is what greenhouse gas and climate change is.

THE COURT: Let's assume that I accept that position what you just pronounced. The problem with your argument is if I got the reporter to go back to the beginning of the answer comment by you, the first thing you said was because of deceptive statements. That's the source of the cause of action. Not the gases in the air and that's why I think under the well-pleaded doctrine or even your artfully pleaded complaint analysis, we're still left with a CUTPA cause of action. Now, I'm not saying -- I'll stop there.

MR. ANDERSON: Your Honor, the relationship between the parties as to who should pay for the seawall

which is what they are asking for, they are asking for compensation whether in the form of restitution or equitable relief. They want to shift the costs on addressing climate change from the State of Connecticut to Exxon Mobil. That's literally the same relief that *New York City* was seeking in their complaint. Your Honor, when they make that request --

THE COURT: So the artfully pleaded complaint, focuses solely on the damage analysis that will flow as opposed to the claim asserted. I never understand that, Attorney Anderson.

MR. ANDERSON: What it does is it says, Your Honor, under the artful pleading doctrine, set aside the cause of action. Look at what law governs the relationship between the parties. That's what the *Marcus* decision says. What law governs the relationship for the parties.

If Connecticut is going to ask Exxon Mobil to incur the cost for climate mitigation in the state of Connecticut, the Second Circuit said that the law that governs the relationship between those parties as to that issue is federal common law and where federal common law governs, there can be no state law and the only reason federal common law exists in the states is because of the constitutional structure and that means where federal

common law governs the relationship between the parties. State law cannot.

THE COURT: I will leave this topic. I will say we have both beaten it to death. I once had a judge in my first appellate argument. I was opposing a pro se appellant in a tax case. I got up and they didn't ask questions, so I gave my argument. Judge Murnaghan in the Fourth Circuit, God rest his soul. It was his first argument, too. I don't think he was -- He wasn't being particularly charitable and he leaned over after about two minutes and he said, Attorney Hall, do you know when to stop beating a dead horse? Anyway. Okay.

So how can -- you want me, in effect, to do a complete preemption under common law. Is that correct or not? Let's get that issue straightened out here. You seem to disavow complete preemption. But I don't know how you get here without it. Putting aside if it is based on statute or common law, how do you get here if you don't have preemption?

MR. ANDERSON: It is a great question, Judge. It has to do with the legal doctrine of complete preemption. Complete preemption is a doctrine that turns on a congressional statute. One of the questions you're supposed to ask is the congressional intent.

THE COURT: Correct.

MR. ANDERSON: When you are referring to federal common law that arises from the structure of the Constitution, looking at federal, looking at congressional intent, based on the passage of a statute is simply irrelevant.

Federal common law exists only when state law cannot because of the structure of the Constitution that provides certain uniquely federal interest that need to be governed by a uniform set of standards.

THE COURT: Is there a unique federal interest in false advertising?

MR. ANDERSON: There's a unique federal interest as the Second Circuit said in regulating transboundary pollution and that was established in the *AP* case, both of the *Milwaukee* cases, the *International Paper* --

THE COURT: We can stop the argument and agree that the entire opposition to the motion to remand turns on your artful pleading argument because I'm going to keep saying to you when you make an argument like that, yes, this case isn't a nuisance case seeking to stop pollution. It is a case that says you have done harm to our citizens by lying. Pay the damages resulting from your lies. That's what the State of Connecticut is saying.

Much like I guess they said in the tobacco case.

They didn't say in the tobacco case stop selling cigarettes. They said stop lying about your cigarettes and pay the damages that have flown from that.

Every time I read papers in this case, I keep thinking it is quite similar in that respect but because it is quite similar, to me it is a suit to stop and punish false advertising. It is not a suit to stop selling gasoline or to clean up the air by stopping selling gasoline or changing climate change.

I'm afraid every time I ask the question I'm going to get an answer that tells me this case is about fill in the blank, your view of the complaint. I'm still struggling with that, sir.

I don't see how you can convert their claim into a nuisance suit like the *City of New York* to stop pollution in effect.

MR. ANDERSON: Well, Your Honor, we're not seeking to convert their case into a nuisance suit. That's not the standard we have to meet in order to have this case heard in federal court. That's not correct at all.

What we're arguing as set out in the complaint from paragraph 1 which references climate change as an existential threat all the way through the forms of relief requested, this complaint is about recovering from

Exxon Mobil for costs the city or the state of Connecticut has incurred and will incur related to climate change.

THE COURT: I have to ask you did you skip paragraphs 96 -- let me see. I haven't finished where they end about deception. 96 to 167 of their complaint is Exxon Mobil deceived consumers. We can't start at paragraph one and go through the remedy and say it is all about pollution and climate change.

MR. ANDERSON: Of course we can. Of course we can. Why does the deception matter?

THE COURT: Because that's the cause of action. Why does it matter?

MR. ANDERSON: What's the injury? The injury is related to climate change.

THE COURT: The injury is the consumers purchased a product based on statements made, as alleged by the State of Connecticut, statements made by your client that were false and that they will seek to prove caused consumers to buy more of your product.

MR. ANDERSON: The complaint certainly doesn't stop there. The complaint then goes onto say not that the injury was some form of an overcharge that consumer, Connecticut consumers paid more for Exxon's gas than they should have because of the false advertising and by the

way, that's what you expect to see in CUTPA cases.

The complaint goes on to say no, the injury isn't that anyone paid more or didn't get what their bargained for. What happened was there's more greenhouses gases emitted in the atmosphere and because of that climate change got worse and because of that we need to take these measures to remediate in the state against climate change and, Your Honor, they are asking the state court to give them the relief of having Exxon pay for that.

So once they cross that bridge, once they move from saying consumers were deceived and maybe brought a product they shouldn't and located the harm, located the harm in the affects of climate change, they brought themselves into federal common law because that is an area that's exclusively governed by federal common law and under the artful pleading doctrine, this Court is not bound by the cause of action that are pled to artfully avoid the law that governs the relationship between the parties. That's the question for you, Judge.

THE COURT: You are repeating yourself, sir, and going on into an argument that isn't really my question. To be honest, I will admit I don't remember the question. My problem is you want me to read 50 paragraphs of this complaint and you want me to ignore about 100 paragraphs

of the complaint.

MR. ANDERSON: No, Your Honor.

THE COURT: Let me finish. I haven't asked a question. I assume you are going to say no, Judge. I wouldn't want you to do that. The problem is you are.

For example, remember I identified 96 to 167 of the complaint. 167 ends the 70 plus paragraph description of the alleged deception by your client by saying that through these advertisements, Exxon has deprived consumers of accurate information about their purchasing decisions.

Recent advertising has sought to falsely induce purchases and brand infinity by portraying Exxon Mobil as a company working on a solution to climate change. That isn't saying they polluted the air. It's saying they lied to consumers.

MR. ANDERSON: Your Honor, there are paragraphs in the complaint that don't describe the causal connection between the false statements and the relief that's requested. That's true. We're not saying that every paragraph in the complaint makes it clear this is a case about transboundary pollution. There are certainly paragraphs in here that don't reference that.

It is not our burden to show that every paragraph in the complaint is about transboundary

pollution. It is our burden to show this complaint read in its entirety from the injury that's asserted, the source of the injury and relief requested is one that presents a claim that's actually governed by federal common law. There might be other threads going through this complaint that could be properly governed by state law, there might be.

But the fact that there are claims in here that are governed by federal common law, those are the claims that this Court has jurisdiction over.

After all, Your Honor, in a 45-page complaint, they've mentioned greenhouse gases, climate change emissions over 150 times.

THE COURT: That's because your statement is in your advertising was about. That's why they have referenced it. How else are they going to talk about why they think your advertisements are false?

Anderson: Your Honor, that is not true.

THE COURT: Your advertisements were about climate change, about the loveliness of gas being burned, et cetera. It changed over time. I don't know how they talk about how those are false unless they talk about their view of the source of climate change, but I think we're going to beat a dead horse here between the two of us.

I was struck originally when you responded to this question -- no, I know what you are going to answer, so I won't bother to ask.

I guess I struggled with the idea of what you don't want to nominate as complete preemption because, of course, that label belongs on a statutory preemption argument only. But in effect, you are arguing complete preemption based on common law; is that correct?

MR. ANDERSON: We're arguing that common law displaces state law. Wouldn't fall within the complete preemption document. But it recognizes that the nature of federal common law when it is derived from the construction of the Constitution exists only where state law cannot.

THE COURT: Where in the Constitution and where in analysis of federal common law, do we find that the multiple state unfair practices acts that have been enacted I think in almost every state, certainly in the New England area they exist. Ninety-three days in Mass., CUTPA in Connecticut, that all those causes of action are preempted by -- preempted by your view of the federal common law under the Constitution and decisions. Where am I going to find that?

Anderson: That's not the argument that we're making. We're not arguing that the statute has been

preempted by the Constitution. Not at all. What we're arguing is that the complaint presents claims that are governed exclusively by federal common law no matter how they are nominally pled in the complaint.

THE COURT: We're back to your characterization of the complaint.

MR. ANDERSON: We're back to what the Connecticut Attorney General chose to plead in his complaint, Your Honor.

THE COURT: Let me ask you this hypothetical question. Let's assume the complaint read as follows: Names the parties, says Exxon sold gasoline in the state of Connecticut for the last X years, maybe 100 years and since the nineties, they have been advertising to our consumers that their gasoline doesn't do any harm to the environment and/or really is a green product. It will help the environment. That's false. Therefore, they violated the Unfair Trade Practices Act of Connecticut. We want to restrain their advertising, we want damages -- not damages, excuse me, restitution, fines, et cetera. Would that case be preempted by federal common law under the Constitution?

MR. ANDERSON: Your Honor, based upon that recitation of facts, I would not necessarily be making the same arguments here.

causes frustration to you, but it is a good rule that other district courts should consider.

THE COURT: Other courts don't have it?

MR. ANDERSON: No. In our experience, we had to rush into court right away.

THE COURT: Well, you have at least the 10 day rule in Connecticut.

Anything further? Anything else I should take up? I should have asked that question. Hearing nothing again, we'll recess.

(Whereupon, the above hearing adjourned at 11:41 a.m.)

COURT REPORTER'S TRANSCRIPT CERTIFICATE

I hereby certify that the within and foregoing is a true and correct transcript taken from the proceedings in the above-entitled matter.

/s/ Terri Fidanza

Terri Fidanza, RPR

Official Court Reporter