UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEYOND PESTICIDES, Plaintiff, v. EXXON MOBIL CORPORATION, Defendant.	Case No. 1:20-cv-01815-TJK Hon. Timothy J. Kelly

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO STAY EXECUTION OF THE REMAND ORDER PENDING APPEAL

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INTRODUCTION

"[I]t must be remembered that granting a stay pending appeal is 'always an extraordinary remedy' . . . and that the moving party carries a heavy burden to demonstrate that the stay is warranted[.]" *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 988, 990 (D.D.C. 2006) (quoting *B'hood of Rwy. & Steamship Clerks, Freight Handlers & Station Emps. v. Nat'l Mediation Bd.*, 374 F.2d 269, 275 (D.C. Cir. 1966), and citing *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985)). Nothing has changed since the Court denied ExxonMobil's purported "emergency" motion for a stay.[1] This new petition still turns on the same fact: ExxonMobil does not like the state of the law regarding D.C. Consumer Protection Procedures Act ("CPPA") private-attorney-general suits and therefore wishes to stall Beyond Pesticides' action for a "substantial duration" (Defendant's Brief in Support of Motion for Stay ("Def. Br."), ECF No. 18, at 8) while chasing multiple baseless appeals of this Court's remand decision. ExxonMobil is entitled to neither a stay pending appeal nor any temporary stay while it petitions the Circuit Court. This public-interest action to enjoin ongoing conduct directed at District of Columbia consumers has been delayed almost a year already. With due regard for the Court's crowded calendar, Beyond Pesticides files this Opposition early and respectfully seeks speedy denial of ExxonMobil's motion to stay.

[1] Given that ExxonMobil was able to file this well before April 1, it is not clear why ExxonMobil thought to use the Court's, and Plaintiff's, time on an "emergency" motion. *See infra*, Part III. In any event, it was rightly denied, for much the same reasons that the instant motion should be denied.

ARGUMENT

I. ExxonMobil Has Not Met Its Burden of a Strong Showing That Its Proposed Petition for Leave to Appeal, or Substantive Appeal, Would Be Likely to Succeed on the Merits.

In order to justify a stay pending appeal, ExxonMobil bears the burden of making a "strong showing" that (1) it is likely to persuade the Circuit Court to hear its appeal, and then that (2) it will convince the Circuit Court that every single decision considering whether a CPPA private-attorney-general action for injunctive relief belongs within CAFA has been wrongly decided. This Court has already determined that "it is unlikely that Defendant will be granted permission to appeal, let alone prevail on the merits." (3/26/21 Minute Order (citing *In re General Mills, Inc.*, No. 10-8001, 2010 U.S. App. LEXIS 13195, at *1 (D.C. Cir. June 25, 2010); *In re U-Haul Int'l, Inc.*, No. 08-7122, 2009 U.S. App. LEXIS 7163, at *1-2 (D.C. Cir. April 6, 2009)).) In light of this, ExxonMobil now tries to change the standard, suggesting repeatedly that it need ***not*** show a likelihood of success, but only present "a serious legal question." (Def. Br. 3, 4, 7.) That, however, is a standard that might apply "where the balance of harms favors a stay."[2] As set forth *infra*, Part II, the balance of harms does not favor a stay. What ExxonMobil must present is a strong showing of a likelihood of success. *See, e.g.*, *Citizens for Responsibility & Ethics v. FEC*, 904 F.3d 1014, 1019 (D.C. Cir. 2018) ("Crossroads' appeal shows little prospect of success—an arguably fatal

[2] For this proposition, ExxonMobil cites *WP Co. LLC v. United States SBA*, Nos. 20-1240 & 20-1614 (JEB), 2020 U.S. Dist. LEXIS 221447 (Nov. 24, 2020). That decision goes on to deny the stay pending appeal, noting:

> In assessing the propriety of a stay, the Court bears in mind that it is an 'extraordinary remedy,' *Cuomo*, 772 F.2d at 978, that is 'not a matter of right, even if irreparable injury might otherwise result' to the movant. *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks and citation omitted).

WP Co., 2020 U.S. Dist. LEXIS 221447, at *5. In any event, ExxonMobil would fail even to meet a "serious legal question" standard. Every single decision to consider either of these remand questions (CAFA applicability or diversity jurisdiction) has decided against ExxonMobil's position. ExxonMobil not liking the law does not create a "serious legal question."

flaw for a stay application." (citing *Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014))). ExxonMobil does not come close to meeting that burden.

A. ExxonMobil's Rotunda Argument Has Been Considered and Rejected by Opinion After Opinion.

ExxonMobil contends that, when deciding whether to grant an appeal petition, courts of appeal emphasize the "novelty and importance of the issue presented." (Def. Br. 4.) There is nothing novel about ExxonMobil's proposed appeal petition. To the contrary, ExxonMobil acknowledges that, at least thrice, the Circuit Court has denied permission to appeal the question of whether CAFA provides federal jurisdiction for a CPPA private-attorney-general action that seeks only injunctive relief. (Def. Br. 4 (citing *Monster Beverage Corp. v. Zuckman*, No. 13-8006 (D.C. Cir. Dec. 16, 2013) (per curiam) (order attached hereto as Ex. A); *In re General Mills, Inc.*, 2010 U.S. App. LEXIS 13195 (per curiam) ("*General Mills*"); *In re U-Haul International, Inc.*, 2009 U.S. App. LEXIS 7163 (per curiam).) This Court also indicated as much in its Minute Order dated March 26, 2021 ("3/26/21 Minute Order").

Undaunted, ExxonMobil suggests that the result will be different this time based on the D.C. Court of Appeals' decision in *Rotunda v. Marriott International, Inc.*, 123 A.3d 980 (D.C. 2015)—based on a mistaken assertion that, in *Rotunda*, the D.C. Court of Appeals held that this action should be treated as a class action. ExxonMobil puts forth that argument despite knowing—because it has already been briefed in this case and been explained by this Court (3/22/21 Order at 6 n.2)—that such a misreading of *Rotunda* has been rejected, and rejected again, and rejected again. The *Rotunda* decision is limited to collective actions seeking damages, and has been specifically held inapplicable to an action not seeking monetary damages. *See, e.g.*, *Toxin Free USA v. J.M. Smucker Co.*, No. 20-cv-1013 (DLF), 2020 U.S. Dist. LEXIS 222520, at **7-8 (D.D.C. Nov. 30, 2020) ("*Rachael Ray Nutrish*") ("[T]he *Rotunda* court's concern—that not

requiring compliance with *Rule 23* would preclude members of the public from asserting their own claims for damages, *see Rotunda*, 123 A.3d at 986—does not apply here . . . because Toxin Free seeks injunctive relief and not damages on behalf of the general public." (citing *Animal Legal Def. Fund v. Hormel Foods Corp.*, 249 F. Supp. 3d 53, 64-65 (D.D.C. 2017) (Kollar-Kotelly, J.) ("The Court need not resolve the parties' dispute on this issue [regarding the amount in controversy], however, because class action jurisdiction under CAFA is absent here for a much more fundamental reason: Plaintiff has not brought this case as a class action."))); *Hackman v. One Brands, LLC*, No. 18-2101 (CKK), 2019 U.S. Dist. LEXIS 55635, at **8-10 (D.D.C. Apr. 1, 2019) (holding that *Rotunda* is inapplicable where "Plaintiff seeks only injunctive relief on behalf of members of the general public"); *Smith v. Abbott Labs., Inc.*, No. 16-501 (RJL), 2017 U.S. Dist. LEXIS 135478, at **4-5 (D.D.C. Mar. 31, 2017) ("*Abbott Labs*") (limiting *Rotunda* "solely to suits for money damages").

Thus, *Rotunda* does not disturb the court's numerous prior holdings that CAFA jurisdiction does not apply to CPPA private-attorney-general actions for injunctive relief. *See also, e.g.*, *Nat'l Consumers League v. Bimbo Bakeries USA*, 46 F. Supp. 3d 64, 76-77 (D.D.C. 2014) (Lamberth, J.) ("Because of the conspicuous lack of class certification requirements in the statute, the precedent holding that private attorney general actions are not class actions, and the public policy reasons discussed in footnote 5, *supra*, the Court concludes that this case is not removable as a class action under CAFA."); *Nat'l Consumers League v. Flowers Bakeries, LLC*, 36 F. Supp. 3d 26, 36 (D.D.C. 2014) (Huvelle, J.) ("The Court therefore sees no reason to depart from the well-reasoned conclusion of Judge Bates in *Breakman* (*v. AOL, LLC*, 545 F. Supp. 2d 96 (D.D.C. 2008) (Bates, J.)) and *Zuckman* that removal is not permitted under CAFA's class action provision for actions brought by a private attorney general under D.C. Code § 28-3905(k)(1) where plaintiff has

not brought a 'class action' under D.C. Superior Court Rule 23."); *Margolis v. U-Haul*, No. 2007 CA 005245 B, 2009 D.C. Super. LEXIS 8, at *25 (Dec. 17, 2009) (holding that "Rule 23 of the Superior Court Rules of Civil Procedure is applicable to claims for money damages brought under the CPPA on behalf of third parties").

ExxonMobil's argument about the "statutory analysis" of *Rotunda* (Def. Br. 5-6) (which was considered at length in the *Rachael Ray Nutrish*, *Hackman*, and *Abbott Labs* opinions) is nothing more than a Hail-Mary assertion that each of the cases cited above was wrongly decided, and this Court's Remand Order was wrongly decided. But an argument that the Court was mistaken about CAFA jurisdiction is simply not enough to justify a stay pending § 1453(c) appeal:

> [Defendant's] *ex parte* application [to stay pending appeal of CAFA jurisdiction] is premised on the assumption that 100 or more plaintiffs have proposed a joint trial and the Court got it wrong when it held otherwise. But nothing in [Defendant's] application provides an adequate basis to challenge the Court's finding that 100 plaintiffs have ***not*** proposed a joint trial. As the Court stated in its remand order, only sixty-five plaintiffs have done so. This is insufficient to trigger mass action jurisdiction under CAFA. The Court therefore concludes that [Defendant] has not raised a substantial case for relief on the merits as is required for a stay.

In re Pfizer, No. SAMC 17-00005, 2017 U.S. Dist. LEXIS 128279, at *486 (C.D. Cal. May 31, 2017); *see also, e.g.*, *McFarland v. Capital One, N.A.*, No. 18-cv-2148, 2019 U.S. Dist. LEXIS 176885, at **9-11 (D. Md. Oct. 10, 2019) (denying stay pending § 1453(c) appeal given unlikelihood of success); *Hawaii ex rel. Louie v. Bristol-Myers Squibb Co.*, No. 14-00180, 2014 U.S. Dist. LEXIS 109252, at *6 (D. Haw. Aug. 5, 2014) (denying motion to stay remand pending appeal where "Defendants have not demonstrated that they are likely to succeed on the merits of their petition. There is no support for Defendants' position that any *parens patriae* action brought by the Attorney General of Hawaii is a class action removable pursuant to CAFA"); *Capital One Bank (USA) N.A. v. Jones*, 710 F. Supp. 2d 634, 636 (N.D. Ohio 2010) (denying motion to stay pending counterclaim defendants' appeal of remand decision where "the plain language and

statutory structure of CAFA's removal provision compel the conclusion that counterclaim defendants may not remove").

B. ExxonMobil's Diversity-Jurisdiction Argument Will Not Convince the Circuit Court to Permit an Appeal, Is Not Subject to Appellate Review, and Is Substantively Without Merit.

ExxonMobil's diversity-jurisdiction argument is equally unpersuasive and is in many respects a red herring. First, in deciding whether to grant permission to appeal, the Circuit Court will consider only the question that (if this were a CAFA case) would be potentially appealable, namely, CAFA jurisdiction. The question of diversity jurisdiction has no bearing on ExxonMobil's likelihood of persuading the Circuit Court to hear its appeal; the only ground for petition for permission to appeal can be CAFA, the same petition denied in *U-Haul*, *In re General Mills*, and *Zuckman*. Moreover, even in the unlikely scenario that the Circuit Court allows the appeal, it is far from clear that the Circuit Court would "also have discretion to review the other basis on which ExxonMobil removed this action, diversity of citizenship." (Def. Br. 3.)[3] As ExxonMobil does not disclose but well knows—for it is a party to the appeal, represented by the same lawyers as here—the United States Supreme Court is currently considering whether other grounds for remand can be reviewed when only one of the grounds is appealable, in *BP P.L.C. v. Mayor & City Council of Baltimore*, No. 19-1189, ExxonMobil and the other defendants (now petitioners) sought certiorari after the Fourth Circuit ruled against them and held that alternative grounds for remand were ***not*** reviewable. *See Mayor of Baltimore v. BP P.L.C.*, 952 F.3d 452 (4th Cir. 2020). Contrary to

[3] ExxonMobil's lone D.C. citation is *Nat'l Weather Service Employees v. Federal Labor Relations Authority*, 966 F.3d 875 (D.C. Cir. 2020) (Def. Br. 4), which is not a decision having anything to do with review of remand. In *National Weather*, the plaintiff union argued that the defendant labor relations authority erred in overturning the arbitrator's award on a breach of contract claim by exceeding its proper standard of review. *See id.* at 879-80 (cited at Def. Br. 4 without parenthetical). It is not clear how ExxonMobil believes this supports its argument about appellate review of remand based of lack of diversity jurisdiction.

ExxonMobil's assertion to this Court, the weight of authority holds that 28 U.S.C. § 1447(d)[4] precludes appellate review of any ground for federal jurisdiction other than those appealable by statute, such as the CAFA provision of 28 U.S.C. § 1453(c)(1).[5]

Second, as with *Rotunda*, *supra*, ExxonMobil's argument for diversity jurisdiction is no more than an assertion that ***no fewer than ten times***, and without exception, this district court has wrongly decided the question. At least the following decisions have held that, in a public-interest CPPA case seeking only declaratory and injunctive relief, the non-aggregation principle of *Snyder v. Harris*, 394 U.S. 332, 335 (1969), dictates that the cost of compliance must be calculated on a per-affected-individual basis:

- *Rachael Ray Nutrish*, *supra*, 2020 U.S. Dist. LEXIS 222520, at **9-11;
- *Food & Water Watch, Inc. v. Tyson Foods, Inc.*, No. 19-cv-2811 (APM), 2020 U.S. Dist. LEXIS 38232, at **15-16 (D.D.C. Mar. 5, 2020);
- *Hackman*, *supra*, 2019 U.S. Dist. LEXIS 55635, at **17-18;
- *Inst. for Truth in Mktg. v. Total Health Network Corp.*, 321 F. Supp. 3d 76, 91 (D.D.C. 2018) (Jackson, J.);
- *Organic Consumers Association v. R.C. Bigelow, Inc*., 314 F. Supp. 3d 344, 350 (D.D.C. 2018) (Walton, J.);
- *Animal Legal Defense Fund*, *supra*, 249 F. Supp.3d at 59-60;
- *Abbott Labs, supra*, 2017 U.S. Dist. LEXIS 135478, at *4;
- *Breathe DC v. Santa Fe Natural Tobacco Co.*, 232 F. Supp. 3d 163, 170-171 (D.D.C. 2017) (Huvelle, J.);

[4] "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title [28 USCS § 1442 or 1443] shall be reviewable by appeal or otherwise." 28 U.S.C. § 1447(d).

[5] *E.g.*, *Bd. of County Commrs. v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792, 819 (10th Cir. 2020); *City of San Mateo v. Chevron Corp.*, 960 F.3d 586, 597 (9th Cir. 2020) (to which ExxonMobil was also party); *Wilmington Sav. Fund Soc'y, FSB v. Velardi*, 803 F. App'x 572, 573 (3d Cir. 2020); *Dixit v. Dixit*, 769 F. App'x 879, 880 (11th Cir. 2019); *City of Walker v. Louisiana*, 877 F.3d 563, 566 n.2, 567 n.4 (5th Cir. 2017); *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012).

- *Organic Consumers Association v. Handsome Brook Farm Grp. 2, LLC*, 222 F. Supp. 3d 74, 78-79 (D.D.C. 2016) (Cooper, J.);
- *Witte v. General Nutrition Corp.*, 104 F. Supp.3d 1, 6 (D.D.C. 2015) (Huvelle, J.);
- *Breakman*, 545 F. Supp. 2d at 105.

This Court, in its remand Order, recognized that precedent. (3/22/21 Order 3-4.) ExxonMobil is, again, arguing simply that every single opinion to address this question, including this Court's, was wrongly decided.[6] That is not an argument likely to succeed.

II. ExxonMobil Has Not Met Its Burden to Show Irreparable Injury to Itself Absent a Stay.

ExxonMobil bears the burden of establishing that it will suffer "irreparable injury" absent a stay. *See, e.g.*, *McCammon v. U.S.*, 588 F. Supp. 2d 43, 47 (D.D.C. 2008) (Kollar-Kotelly, J.) ("A party who moves for a stay or injunction pending appeal bears the burden of showing the balance of four factors weigh in favor of the stay/injunction[.]"). In response to ExxonMobil's "emergency" motion for a temporary stay, this Court found that "Defendant's only harm appears to be that it would have to litigate the case on remand, and it cites no authority suggesting such harm is irreparable." (3/26/21 Minute Order.) Despite this, ExxonMobil argues that (1) it faces a theoretical risk of inconsistent rulings if litigation proceeds in D.C. Superior Court while it seeks permission to appeal (Def. Br. 7), and again, that (2) it should not have to "devote substantial resources to litigating in D.C. Superior Court" while the question of federal jurisdiction is appealed (*id.* at 8). Both of these arguments fail:

[6] ExxonMobil's citation to *Williams v. Purdue Pharma Co.*, No. 02-0556 (RMC), 2003 U.S. Dist. LEXIS 19268 (D.D.C. Feb. 27, 2003) (Def. Br. 6), is particularly incongruous. *Williams* involved both a class action and monetary damages, *i.e.*, a putative class action of individual consumers seeking damages arising from the purchase or receipt of pain medication. As to ExxonMobil's assertion neither *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), nor *Snyder*, 394 U.S. 332 , changes the non-aggregation principle of 28 U.S.C. § 1332(a) (Def. Br. 6), that ***specific*** question has been decided, multiple times, in this district, against ExxonMobil's position. *See Witte*, *supra*, 104 F. Supp.3d at 6 ("Defendants' argument—that this Court should consider their total compliance costs in calculating the amount in controversy—would circumvent the non-aggregation principle articulated in *Snyder* and *Zahn*."); *see also, e.g.*, *Breathe DC*, *supra*, 232 F. Supp. 3d at 171; *Breakman*, *supra*, 545 F. Supp. 2d at 105.

A. A Theoretical Chance of "Inconsistent Rulings" Does Not Constitute Irreparable Injury.

As set forth *supra*, Part I, the CAFA and diversity questions that ExxonMobil seeks to raise already have been decided, again and again, against ExxonMobil's position, and the Circuit Court has repeatedly refused permission to appeal. ExxonMobil raises no novel arguments not already heard in that precedent, no reason to affect a sea change in D.C. law. No matter how far ExxonMobil presses appeal, this case will ultimately land in D.C. Superior Court. ExxonMobil faces no burden from litigating in the forum in which this case will ultimately be situated.

ExxonMobil, however, argues that it faces a risk of inconsistent rulings if the D.C. Superior Court issues rulings on arguments that ExxonMobil predicts Plaintiff Beyond Pesticides might make: "For example, Plaintiff may argue that the D.C. Superior Court has different pleading standards or discovery rules than federal courts, raising the possibility that the outcomes of these motions in Superior Court would be different than in federal court." (Def Br. 7.) These twice-removed potential rulings are far too theoretical to justify a stay. *See Citizens for Responsibility & Ethics*, 904 F.3d at 1019 ("Irreparable harm must be 'both certain and great[,]' and 'actual and not theoretical'." (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). Nor does ExxonMobil attempt to provide any details about the purported different standards in D.C. Superior Court regarding discovery or pleading, such as what details Beyond Pesticides' Complaint lacks that would be required in federal court, or why D.C. Superior Court would be more likely to make discovery rulings unfavorable to ExxonMobil.[7] *See, e.g.*, *Olu-Cole v. E.L. Haynes Pub. Charter Sch.*, 930 F.3d 519, 529 (D.C. Cir. 2019) (denying motion for preliminary injunction (similar standards): "This court has said time and again that the degree of proof required

[7] Presumably, ExxonMobil is not worried that D.C. Superior Court will be too restrictive in what discovery it allows.

for 'irreparable harm' is 'high'[.]" (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)); *Wisconsin Gas Co*, 758 F.2d at 674 ("Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will ***in fact*** occur."). ExxonMobil has failed to meet its burden of establishing irreparable injury absent a stay. *See McCammon*, *supra*, 588 F. Supp. 2d at 47. *Cf. Power Mobility Coalition v. Leavitt*, 404 F. Supp. 2d 190, 204 (D.D.C. 2005) (denying preliminary injunction and holding that movant's "failure to meet its burden of establishing irreparable harm is sufficient, in itself, to deny emergency relief").

B. ExxonMobil's Choice to Expend Resources on a Fruitless Judicial Expedition Does Not Mean That Beyond Pesticides Should Be Blocked From Pursuing the Merits of Its Case.

Given the foregoing, ExxonMobil's argument for "irreparable harm" must rest upon its fear of "devoting resources" to litigating in D.C. Superior Court. The Supreme Court disagrees with ExxonMobil's position that litigation expenses justify a stay: "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough" to demonstrate a probability of irreparable injury. *Sampson v. Murray*, 415 U.S. 61, 90 (1974). The D.C. Circuit Court likewise disagrees with ExxonMobil's position: "Where the injuries alleged are purely financial or economic, the barrier to proving irreparable injury is higher still, for it is 'well settled that economic loss does not, in and of itself, constitute irreparable harm'." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (citing *Wisconsin Gas*, *supra*, 758 F.2d at 674); *see also, e.g.*, *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.").

Moreover, even if litigation costs were such injury as to justify a stay, "costs would be limited because Section 1453(c) provides for expedited review and requires the [D.C.] Circuit to

complete all action on the appeal within sixty days. 28 U.S.C. § 1453(c)(2)." *In re Pfizer*, 2017 U.S. Dist. LEXIS 128279, at *488. ExxonMobil spends nearly a page arguing that, despite the expedited procedure of § 1453(c), its proposed appeal will actually be of "substantial duration," especially given its intention to take this simple remand all the way to the United States Supreme Court. (Def. Br. 8-9.) But this does not favor ExxonMobil's argument. To the contrary, this is a roadmap for the Court of exactly how long ExxonMobil, if successful, intends to prevent Beyond Pesticides from exercising its statutory right to seek injunctive relief in D.C. Superior Court. (*See infra*, Part III.) ExxonMobil, one of the world's largest publicly traded companies,[8] also laments that it is "unlikely to recover any of these sunk costs from the non-profit Plaintiff." (Def. Br. 8.)[9] Plaintiff Beyond Pesticides would respond (1) that the cost of pursuing an untenable removal through multiple federal courts[10] is surely greater than filing motions on the pleadings in Superior Court; (2) that, should the parties ever actually have to pursue this litigation in federal court, work spent on Superior Court motion practice and discovery[11] would transfer to that forum; and (3) that

[8] *See* ExxonMobil, *Who We Are*, https://corporate.exxonmobil.com/About-us/Who-we-are (last visited Mar. 31, 2021); *see also, e.g.*, *ExxonMobil (XOM)*, Forbes, https://www.forbes.com/companies/exxon-mobil/?sh=4fb15b85601f (last visited Mar. 31, 2021).

[9] ExxonMobil cites *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301 (2010), a case not under 28 U.S.C. § 1453(c)(1), but under 28 U.S.C. § 2101(f), in which the defendant tobacco company sought review of a substantial monetary judgment upon verdict against it, which the Louisiana Supreme Court had declined. In the portion to which ExxonMobil refers, the Supreme Court held that portions of the $270 million (with interest) fund established for Louisiana smokers would re irrevocably paid out if no stay were granted while the Court considered the propriety of that fund. *See id.* at 1304-05. This is wholly unrelated to appeal of remand, to the costs of litigating in a state court while appeal is pending, or to a non-profit plaintiff. With regard to the instant case, ExxonMobil points to no way in which it would be entitled to recover any costs from Beyond Pesticides, stay or no stay. Beyond Pesticides is pursuing a CPPA private-attorney-general action, which is common in D.C. Superior Court (*see* D.C. authorities cited *supra*), to no benefit of its own. The CPPA does not contain any provision for shifting fees to Beyond Pesticides, and it was ExxonMobil that removed to federal court without any legal basis.

[10] Foreshadowing the denial of its petition by the Circuit Court, ExxonMobil asserts six times that it will attempt to appeal this routine remand all the way to the United States Supreme Court. (Def. Br. 1, 2, 7, 8, 9, 10.) Given the clear-cut law against ExxonMobil's argument, this must be seen as one more delay tactic to deny Beyond Pesticides its day in court on behalf of D.C. consumers. *Cf. Lifetree Trading Pte., Ltd. v. Washakie Renewable Energy, LLC*, No. 14-cv-9075, 2017 U.S. Dist. LEXIS 178581, at *9 (S.D.N.Y. Oct. 27, 2017) ("Having already occasioned significant delay and expense . . . Washakie cannot now convincingly argue that continued litigation in federal court is unacceptably injurious.").

[11] ExxonMobil cites its intention to "prepar[e] a motion to dismiss under local rules and a special motion to dismiss under the District of Columbia's anti-SLAPP statute, as well as discovery." (Def. Br. 8.)

the non-profit Plaintiff Beyond Pesticides (despite infinitely more limited resources) is willing to litigate in two fora, because ExxonMobil's conduct toward D.C. consumers is ongoing and should not remain unchecked during the "substantial duration" of this diversion. *See, e.g.*, *Fraihat v. U.S. Immigration & Customs Enf't*, No. 19-cv-1546, 2020 U.S. Dist. LEXIS 211652, at *9 (C.D. Cal. Oct. 30, 2020) (denying motion to stay and holding that "even if Defendants prevail on appeal, Plaintiffs would continue to seek discovery relevant to the broader case, and Defendants would likely still have to incur these costs."); *Torres v. Faxton St. Lukes Healthcare*, No. 16-CV-439, 2017 U.S. Dist. LEXIS 226892, at *11 (N.D.N.Y. Jan. 26, 2017) (denying motion to stay and holding that "defendants will be required to continue to participate in these cases regardless of the outcome of the appeal. . . . And it will still be so whether discovery takes place in a federal or state forum. Any discovery can be used in either forum."); *Hawaii ex rel. Louie*, *supra*, 2014 U.S. Dist. LEXIS 109252, at *9 ("It is not probable that litigating in state court will create irreparable harm to Defendants. Any discovery obtained in state court would be relevant and applicable to the merits of the case, even in the unlikely event that proceeding were removed back to federal court."); *Manigault v. Macy's E., LLC*, No. 06 Cv. 3337, 2008 U.S. Dist. LEXIS 6101, at *2 (E.D.N.Y. Jan. 28, 2008) (finding no irreparable harm in the absence of a stay because "whether this matter ultimately progresses before this Court or in an arbitral forum, information adduced through discovery will be useful to the litigants").[12]

[12] As to ExxonMobil's page-long string cite of unpublished cases for the proposition that courts "routinely grant motions to stay remand orders pending appeal precisely because of the risk of inconsistent outcomes and other burdens" (Def. Br. 9-10), those opinions refer to very different situations. For example, in *Northrop Grumman Technical Services v. DynCorp International LLC*, No. 16-543, 2016 U.S. Dist. LEXIS 78864 (E.D. Va. June 16, 2016), the court found that the issues at bar for appeal were "novel in the context of § 1442 removal," yet to be addressed by the Fourth Circuit, subject to a split among other circuits, and "a true issue of first impression." *Id.* at **7-10. The stay was considered alongside a motion asking the court to order immediate third-party depositions. *See id.* at **3-4. The § 1453(c) cases (Def. Br. 9-10) all involve actual Rule 23 class actions for money damages; none addresses a representative action, with a single plaintiff acting on behalf of the general public to enjoin ongoing harm.

III. The Stay Should Be Denied Based on Harm to the Interests of Beyond Pesticides, on Behalf of the General Public.

The remaining two factors in determining whether a stay is appropriate are injury to the other parties interested in the proceeding, and where the public interest lies. *See McCammon*, 588 F. Supp. 2d at 47 (citing *U.S. v. Philip Morris USA, Inc*., 449 F. Supp. 2d at 990). Plaintiff Beyond Pesticides would urge the Court to consider those two factors together, because in this case, the D.C. public ***are*** the other parties interested in the proceeding. Beyond Pesticides seeks no recovery for itself, only to enjoin conduct directed at D.C. consumers. (Complaint, Dkt. #1-4 (originally filed May 15, 2020), at Prayer.) That conduct, indisputably, is ongoing. (*See, e.g.*, Complaint ¶¶ 21-61.) ExxonMobil contends that Beyond Pesticides would "***benefit*** from such a stay, which would conserve Plaintiff's resources—financial and otherwise—by allowing it to litigate ExxonMobil's appeal without being saddled with simultaneous—and potentially unnecessary—litigation in D.C. Superior Court." (Def. Br. 10.) In addition to the defects enumerated *supra*, Part II.B (transferability of motion practice and discovery efforts, etc.), this contention completely disregards the fact that, with each day wasted awaiting an unsuccessful petition to appeal, the D.C. general public suffers additional harm. *See, e.g.*, *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005) (holding that balance of harms weighs against granting stay where non-moving party "seeks injunctive relief against ongoing and future harm."); *see also, e.g.*, *City of Sacramento v. Wells Fargo & Co.*, No. 18-cv-00416, 2019 U.S. Dist. LEXIS 201711, at *9 (E.D. Cal. Nov. 18, 2019) (denying stay and noting that "plaintiff argues that it seeks injunctive relief to prevent ongoing harm from defendants' FHA violations . . . . Therefore, plaintiff argues, the delay from a stay will harm plaintiff"). It is for that reason that Beyond Pesticides, despite its limited resources, seeks to begin addressing the merits of its claim as soon as possible. *See, e.g.*, *McFarland*, *supra*, 2019 U.S. Dist. LEXIS 176885, at *9 ("[T]his case's detour into federal court

has already delayed the state court litigation by more than one year, dating back to the original removal of this case in July 2018. A stay of the remand order pending resolution of the appeal would extend this delay even further."); *United States ex rel. Barko v. Halliburton Co.*, 4 F. Supp. 3d 162, 170 (D.D.C. 2014) (denying motion to stay pending appeal, noting the history of substantial delay in the litigation, and holding that "[t]his Court does not consider such harm [to non-moving party] to be negligible.").

ExxonMobil then rehashes its arguments about the cost of litigating in two fora, now contending that the harm flows to the D.C. Superior Court and this Court, for the use of judicial resources. (Def. Br. 10.) Beyond Pesticides respectfully suggests that this rehashing is disingenuous:

First, it is ExxonMobil that is choosing to waste the resources of the federal courts in order to delay this action. The removal, as this Court pointed out, was unfounded. (3/22/21 Order.) ExxonMobil's "emergency" motion for a temporary stay, as this Court pointed out, was unnecessary. (3/26/21 Minute Order ("Defendant also argues that at least a temporary stay is warranted so that it can file a more robust motion requesting a stay pending appeal 'no later than April 1.' ECF No. 17 at 1. If Defendant intends to file a more robust motion requesting a stay pending appeal before the remand date, it should simply do so.").) The petition for permission for appeal will be futile. *See supra*, Part I.

Second, no action the D.C. Superior Court takes will be wasted, as all precedent, invariably, holds that this action belongs in D.C. Superior Court, *see supra*, Part I, and that is where the action will ultimately land, regardless of whether ExxonMobil chases nonexistent federal jurisdiction all the way to the Supreme Court (Def. Br. 1, 2, 7, 8, 9, 10), which apparently it intends to do regardless of whether a stay is issued. ExxonMobil's citations regarding "wasting scarce

judicial resources on adjudicating an action that may later be returned to federal court" (*id.* at 10), therefore, are inapposite. There is no reason this case should not immediately be returned to the proper forum, D.C. Superior Court. *See, e.g.*, *McFarland*, *supra*, 2019 U.S. Dist. LEXIS 176885, at *9 (denying stay pending § 1453(c) appeal: "A stay of the remand order pending resolution of the appeal would extend this delay even further. Under these circumstances, where the burden is on the party seeking the stay to establish that the factors are all met, *see Nken*, 556 U.S. at 433, Capital One has failed to demonstrate that McFarland will not be harmed by the issuance of a stay"); *In re Pfizer*, *supra*, 2017 U.S. Dist. LEXIS 128279, at *488 (denying stay pending § 1453(c) appeal and citing *Dunson v. Cordis Corp.*, No. 16-3076, 2016 U.S. Dist. LEXIS 155168, at *6 (N.D. Cal. Nov. 8, 2016), for the proposition that "Plaintiffs deserve their day in court, and '[a]dding further delay would only compound their injuries'").

IV. Federal Rule of Appellate Procedure 8(a)(2) Does Not Entitle ExxonMobil to a Temporary Stay.

In its conclusion, ExxonMobil requests alternative relief, a temporary stay pursuant to Federal Rule of Appellate Procedure 8(a)(2). This relief is not really argued in ExxonMobil's Brief; the only other reference to Rule 8(a)(2) is this reference, in the introduction: "At minimum, this Court should enter a brief stay of the Remand Order to enable ExxonMobil to seek a stay pending appeal from the D.C. Circuit." (Def. Br. 2.) This alternative relief also should be denied. Contrary to ExxonMobil's assertion, in order to preserve a putative appellant's rights, Rule 8(a)(2) requires only that the party ***move*** for a stay of an order of a district court, not that any stay be ***granted***. *See* Fed. R. App. P. 8(a)(2). Quite the opposite, ExxonMobil's rights are preserved when the motion here is denied. *See Whole Woman's Health v. Paxton*, 972 F.3d 649, 653 (5th Cir. 2020) ("Federal Rule of Appellate Procedure 8(a)(2) mandates that the party moving for a stay in a court of appeals must have either first tried and failed to obtain a stay in the district court or, alternately,

'show that moving first in the district court would be impracticable'"). The Rule, therefore, does not provide any alternative ground for relief and fails for all the reasons set forth in this Opposition, and no temporary stay is required to preserve any right ExxonMobil possesses. In addition, as the decisions in *U-Haul*, *In re General Mills*, and *Zuckman* demonstrate (*see supra*, Part I), the Circuit Court will deny leave to appeal, and Beyond Pesticides should not be forced to endure further delay until that denial occurs. *See McFarland*, *supra*, 2019 U.S. Dist. LEXIS 176885, at *9; *In re Pfizer*, *supra*, 2017 U.S. Dist. LEXIS 128279, at *488; *United States ex rel. Barko*, *supra*, 4 F. Supp. 3d at 170.

CONCLUSION

For all the reasons set forth herein, Plaintiff Beyond Pesticides requests that Defendant ExxonMobil's Motion to Stay Execution of the Remand Order Pending Appeal be denied, and that the Court decline to grant any temporary stay with reference to Federal Rule of Appellate Procedure 8(a)(2). Beyond Pesticides appreciates the Court's forbearance in establishing a regular briefing schedule, and understands the Court's heavy docket, but has filed this Opposition early in the hope that ExxonMobil's unfounded motion to stay might be quickly denied, giving Beyond Pesticides an opportunity at last to begin pursuing the merits of its case in D.C. Superior Court.

DATED: March 31, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kim E. Richman, hereby certify that on March 31, 2021, I caused a true and correct copy of the foregoing document to be served on counsel of record for Defendants in the above-captioned Action via ECF:

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