No. 21-8001

In the United States Court of Appeals for the District of Columbia Circuit

IN RE EXXON MOBIL CORPORATION, PETITIONER

ON PETITION FOR PERMISSION TO APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (CIV. NO. 20-1815) (THE HONORABLE TIMOTHY J. KELLY, J.)

MOTION OF APPELLANTS FOR AN EMERGENCY STAY OF THE REMAND ORDER PENDING APPEAL

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GLOSSARY OF ABREVIATIONS

CAFA ..... Class Action Fairness Act of 2005

Consumer Protection Act ..... D.C. Consumer Protection Procedures Act

ExxonMobil ..... Exxon Mobil Corporation

INTRODUCTION

Petitioner Exxon Mobil Corporation (ExxonMobil) moves for a stay of the execution of the district court's remand order until this Court resolves the pending petition for permission to appeal under CAFA as well as any appeal subsequently granted. In addition, petitioner moves for an immediate administrative stay of the remand order to allow the Court to consider whether a longer stay is warranted. The district court denied petitioner's motion for a stay of the remand order at 9:48 AM today and ordered the clerk to issue the remand order "immediately." Absent a stay, the Clerk of the district court will issue a certified copy of the remand order, which will return jurisdiction to the Superior Court of the District of Columbia. *See* 28 U.S.C. 1447(c). For that reason, ExxonMobil was unable to file this motion at least seven days before court action is needed. Counsel for ExxonMobil left a voicemail and e-mail for counsel for Beyond Pesticides regarding this emergency motion.

A stay of the remand order is amply warranted here. The Court is likely to grant review of the question whether a representative action filed on behalf of all consumers in the District of Columbia under Section 28-3905(k)(1) of the D.C. Consumer Protection Procedures Act qualifies as "class action" under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d)(1)(B). The Court is also likely to reverse the district court's determination that such actions are not "class actions," given the D.C. Court of Appeals decision in *Rotunda* v.

Marriott International, Inc., 123 A.3d 980 (2015), that a plaintiff's representative action under the Consumer Protection Act was governed by the D.C. equivalent of Federal Rule of Civil Procedure 23. The Court is further likely to reverse the district court's rejection of ExxonMobil's separate and independent ground for removal under diversity jurisdiction because the potential costs to ExxonMobil—either in complying with the injunctive relief requested or paying the attorneys' fees demanded—easily exceed the jurisdictional threshold.

Should this case return immediately to the D.C. Superior Court, ExxonMobil and Beyond Pesticides will be forced to litigate before two separate courts simultaneously. In the process, the parties and the courts will be forced to invest substantial resources that will be wasted should the remand order be reversed. Entry of a stay pending appeal obviates all of those concerns. The motion for a stay of the remand order pending appeal should therefore be granted.

BACKGROUND

1. Respondent Beyond Pesticides, plaintiff below, is a nonprofit corporation headquartered and incorporated in the District of Columbia. D. Ct. Dkt. 1-4, at 20 (Compl.); D. Ct. Dkt. 1-2. Petitioner ExxonMobil, defendant below, is an energy company headquartered in Texas and incorporated in New Jersey. Compl. 22.

In May 2020, Beyond Pesticides filed a complaint against ExxonMobil in D.C. Superior Court under the D.C. Consumer Protection Procedures Act. The complaint alleges that ExxonMobil engaged in "deceptive advertising" prohibited by the Consumer Protection Act by informing consumers about its efforts to invest billions of dollars in renewable energy and environmentally protective technology. Compl. 3-4. In Beyond Pesticides' view, ExxonMobil's advertisements, though factually accurate, were misleading because those expenditures did not form a sufficiently "significant proportion" of ExxonMobil's "overall business." *Id.* at 3.

The complaint asserts a single claim under Section 28-3905(k)(1)(D) of the Consumer Protection Act, which permits a "public interest organization" to file suit "on behalf of the interests" of a "class of consumers" if those consumers could have proceeded in their own right and the organization has a "sufficient nexus" with the consumers' interests to represent them "adequately." The complaint seeks declaratory and injunctive relief "on behalf of" Beyond Pesticides and "the general public of the District of Columbia." Compl. 23, 26. Beyond Pesticides also seeks "costs and disbursements," including "reasonable attorneys' fees." Compl. 26; *see* D.C. Code § 28-3905(k)(2)(B).

2. ExxonMobil removed this action to federal court based on two grounds. *See* D. Ct. Dkt. 1. One ground was the Class Action Fairness Act.

D. Ct. Dkt. 1, at 8-11. Of particular relevance here, ExxonMobil argued that CAFA's definition of "class action" includes actions brought under a "[s]tate statute" that authorized "an action to be brought by 1 or more representative persons as a class action," 28 U.S.C. § 1332(d)(1)(B), and that Beyond Pesticides was purporting to proceed on behalf of a "class of consumers" under Section 28-3905(k)(1)(D). *See* D. Ct. Dkt. 1, at 9-10. ExxonMobil further argued that, in *Rotunda* v. *Marriott International, Inc.*, 123 A.3d 980 (2015), the D.C. Court of Appeals held that a representative action under the Consumer Protection Act requires the plaintiff to proceed under D.C. Superior Court Rule of Civil Procedure 23—which is "identical" to its federal counterpart (*see* D.C. Super. Ct. R. Civ. P. 23 cmt.). *See* D. Ct. Dkt. 1, at 10.

ExxonMobil also asserted that the district court had diversity jurisdiction under 28 U.S.C. § 1332(a). *See* D. Ct. Dkt. 1, at 3-8. With respect to the amount-in-controversy requirement, ExxonMobil explained that the cost for it to comply with the requested injunctive relief would exceed $75,000. *See id.* at 4-7. ExxonMobil further alleged that any statutory award of attorney's fees would almost certainly exceed $75,000 given the complex nature of the case and the rates previously charged by Beyond Pesticides' counsel. *See id.* at 7-8.

3. Beyond Pesticides filed a motion to remand and sought fees and costs. On March 22, 2021, the district court issued an order holding that the

case was not removable on CAFA or diversity grounds. *See* App., *infra*, 1a-7a. The court denied the request for fees and costs, citing "the lack of binding precedent on the issues presented." *Id.* at 6a. The corresponding docket entry stated that the case was to be remanded by April 1. *See* D. Ct. Dkt. 14.

Later that same day, ExxonMobil moved for a temporary stay of execution of the remand order until it could file a more formal stay motion. D. Ct. Dkt. 15. The district court denied the order four days later but permitted ExxonMobil to file a more robust stay motion. *See* D. Ct. Dkt., Minute Order (Mar. 26, 2021). ExxonMobil filed its stay motion three days later, D. Ct. Dkt. 18, and the district court ordered the clerk not to remand the case until that stay motion was resolved. *See* D. Ct. Dkt., Minute Order (Mar. 30, 2021).

On April 1, ExxonMobil filed a timely petition for permission to appeal the remand order under CAFA, 28 U.S.C. 1453(c)(1). The district court denied ExxonMobil's stay motion at 9:48 AM this morning and instructed the clerk of court to issue the remand order "immediately." *See* D. Ct. Dkt., Minute Order (Apr. 6, 2021).

ARGUMENT

Federal Rule of Appellate Procedure 8(a)(2) authorizes a court of appeals to stay entry of an order or judgment, including a remand order, pending the resolution of a petition for permission to appeal under CAFA. *See*, *e.g.*, *Morgan* v. *Gay*, 471 F.3d 469, 471 (3d Cir. 2006); *DiTolla* v. *Doral Dental IPA of*

New York, LLC, 469 F.3d 271, 274 (2d Cir. 2006). 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." *Clean Air Council* v. *Pruitt*, 862 F.3d 1, 8 (D.C. Cir. 2017) (per curiam). The Court balances those factors against each other, such that the probability of success necessary to obtain a stay is "inversely proportional" to the amount of irreparable injury absent a stay. *See Cuomo* v. *Nuclear Regulatory Commission*, 772 F.2d 972, 974 (D.C. Cir. 1985). Here, each of the traditional stay factors are easily satisfied.

A. The Court Is Likely To Grant The Petition For Permission To Appeal

The first stay factor requires an appellant to show only that its appeal presents a "serious legal question." *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977); *see*, *e.g.*, *WP Co.* v. *Small Business Administration*, Civ. No. 20-1240, 2020 WL 6887623, at *2 (D.D.C. Nov. 24, 2020). And when deciding whether to grant review under CAFA, courts of appeals consider factors such as whether the petition for permission to appeal presents a novel, important, and recurring question and whether the district court's decision was "fairly debatable." *See*,

e.g., *Dominion Energy, Inc.* v. *City of Warren Police & Fire Retirement System*, 928 F.3d 325, 334 (4th Cir. 2019); *Estate of Pew* v. *Cardarelli*, 527 F.3d 25, 29 (2d Cir. 2008). That is true of the CAFA question as well as the diversity question, which the Court has jurisdiction to reach. The petition for permission to appeal is thus likely to be granted.

1. The petition for permission to appeal first presents the question whether a representative action filed on behalf of all consumers in the District of Columbia under Section 28-3905(k)(1) of the Consumer Protection Act qualifies as "class action" under CAFA. The Court is likely to grant review of that question and reverse the district court's determination.

a. Actions filed in D.C. Superior Court under Section 28-3905(k)(1) are frequently removed to federal court under CAFA, and district judges have issued numerous decisions addressing whether such actions qualify as "class actions." *See, e.g.*, *Toxin Free USA* v. *J.M. Smucker Co.*, Civ. No. 20-1013, 2020 WL 7024209, at *3 (D.D.C. Nov. 30, 2020); *Hackman* v. *One Brands, LLC*, Civ. No. 18-2101, 2019 WL 1440202, at *3-*4 (D.D.C. Apr. 1, 2019); *Animal Legal Defense Fund* v. *Hormel Foods Corp.*, 249 F. Supp. 3d 53, 64 (D.D.C. 2017); *National Consumers League* v. *Flowers Bakeries, LLC.*, 36 F. Supp. 3d 26, 35-36 (D.D.C. 2014); *Zuckman* v. *Monster Beverage Corp.*, 958 F. Supp. 2d 293, 305 (D.D.C. 2013); *Stein* v. *American Express Travel Related Services*, 813 F. Supp. 2d 69, 73 (D.D.C. 2011); *National Consumers League* v. *General*

Mills, Inc., 680 F. Supp. 2d 132, 137 (D.D.C. 2010); *Breakman* v. *AOL LLC*, 545 F. Supp. 2d 96, 102 (D.D.C. 2008).

As the court below recognized, this Court has not yet decided whether an action under Section 28-3905(k)(1) is a "class action" under CAFA. *See* App., *infra*, 6a. The Court previously considered petitions for permission to appeal in three different cases presenting that question, but the Court denied each petition on the ground that the District of Columbia courts had not yet decided whether such lawsuits must be litigated as class actions. *See* Order, *Monster Beverage Corp.* v. *Zuckman*, No. 13-8006 (D.C. Cir. Dec. 16, 2013); Order, *In re General Mills*, No. 10-8001 (D.C. Cir. June 25, 2010); Order, *In re U-Haul International, Inc.* No. 08-7122, 2009 WL 902414 (D.C. Cir. Apr. 6, 2009).

The D.C. Court of Appeals provided the awaited guidance in *Rotunda* v. *Marriott International, Inc.*, 123 A.3d 980 (2015), affirming the dismissal of a Section 28-3905(k)(1) action because the plaintiff had not proceeded with the case as a class action under D.C. Superior Court Rule of Civil Procedure 23. The question whether a representative action under Section 28-3905(k)(1) qualifies as a "class action" under CAFA is now ripe for adjudication by this Court, and a decision on the issue will be "dispositive of [a district court's] jurisdiction under CAFA" in both this case and many others. *U-Haul*, 2009 WL 902414, at *4 (Rogers, J., dissenting). This case thus presents the Court with

an ideal opportunity—for the first time since the D.C. Court of Appeals' decision in *Rotunda*—to resolve this recurring and important question.

b. This Court is likely to reverse the district court's holding on the CAFA ground for removal. CAFA defines the phrase "class action" to mean "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar [s]tate statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). The question here is whether Section 28-3905(k)(1) of the Consumer Protection Act "authoriz[es]" a "representative person[]" to bring a suit as a "class action" in "similar" fashion to Federal Rule 23. 28 U.S.C. § 1332(d)(1)(B). The ordinary meaning of "class action" is a "lawsuit in which the court authorizes a single person or a small group of people to represent the interests of a larger group." *Black's Law Dictionary* 267 (8th ed. 2004); *accord Newberg on Class Actions* § 1.1 (4th ed. 2002). And CAFA's legislative history indicates that the definition of "class action" should be "interpreted liberally" to include not only lawsuits that are "labeled" as class actions but also lawsuits that "resemble" one. S. Rep. No. 14, 109th Cong., 1st Sess. 35 (2005).

The reasoning of *Rotunda* demonstrates that any action under Section 28-3905(k)(1) is a "class action" for purposes of CAFA. As the D.C. Court of

Appeals held, a representative action under Section 28-3905(k)(1) cannot proceed unless the plaintiff seeks certification under D.C. Civil Rule 23, which is "identical" to Federal Rule of Civil Procedure 23 (*see* D.C. Super. Ct. R. Civ. P. 23 cmt.). *See Rotunda*, 123 A.3d at 984-985. In reaching that conclusion, the court recognized that an action under Section 28-3905(k)(1) is one in which a lead plaintiff represents the interests of absent consumers. *See id.* An action under that provision is therefore a "class action" under the ordinary understanding of that phrase.

In fact, where (as here) a public-interest organization files an action under subsection (D) of Section 28-3905(k)(1), the Consumer Protection Act itself imposes additional safeguards that confirm the class nature of such an action. For example, the statute makes clear that a plaintiff organization cannot proceed on behalf of a "class of consumers" under subsection (D) unless those consumers have a claim in their own right. D.C. Code § 28-3905(k)(1)(D)(i). The statute also requires a plaintiff organization to have a "sufficient nexus" to the class's interests in order to represent them "adequately," as a way of tailoring the Rule 23 requirements of typicality and adequacy to the circumstances of a nonprofit serving as lead plaintiff. D.C. Code § 28-3905(k)(1)(D)(ii).

The district court addressed *Rotunda* in a footnote, concluding that it required only "suits for *damages*" under Section 28-3905(k)(1) to proceed as class actions. App., *infra*, 6a n.2. Citing *Animal Legal Defense Fund*, 249 F.

Supp. 3d at 64, the district court stated that the "concerns" expressed in *Rotunda* about the dangers of representative actions for money damages proceeding outside the Rule 23 framework did not apply in actions seeking injunctive relief. *See* App., *infra*, 6a n.2. Other courts in this circuit have reached the same erroneous conclusion. *See Toxin Free USA*, 2020 WL 7024209, at *3; *Hackman*, 2019 WL 1440202, at *3-4; *Animal Legal Defense Fund*, 249 F. Supp. 3d at 64.

To be sure, the facts of *Rotunda* involved a representative suit for damages, and the D.C. Court of Appeals accordingly focused on the need for Rule 23(b)(3)'s notice and opt-out procedures in such an action. *See* 123 A.3d at 985-987. But the Court's analysis did not turn—expressly or implicitly—on the form of the requested relief. Instead, the court analyzed whether the Consumer Protection Act "clearly or explicitly" "abrogated or repealed" the application of D.C. Civil Rule 23 to "representative suits" under the Consumer Protection Act. 123 A.3d at 988 (brackets omitted). The court saw no "unambiguous evidence" that the D.C. Council "meant to displace the Rule 23 framework" in Section 28-3905(k)(1) suits, and it therefore held that the rule applied. *Id.*

Nothing in either the Consumer Protection Act or the D.C. Civil Rules supports distinguishing between actions for damages and actions for injunctive relief in determining whether Rule 23 applies. The Consumer Protection

Act provides a private right of action for both damages and injunctive relief, and it contains no provisions even hinting that the representative nature of the suits it authorizes differs based on the type of relief sought. In addition, the D.C. Civil Rules do not apply differently depending on the type of relief sought; they govern "all civil actions and proceedings in the Civil Division of the Superior Court." D.C. Super. Ct. R. Civ. P. 1. For those reasons, this Court is likely to reverse the district court's determination that this action does not qualify as a "class action" under CAFA.

2. The petition for permission to appeal also presents the question whether the district court incorrectly applied the non-aggregation principle to conclude that this action did not satisfy the amount-in-controversy requirement for diversity jurisdiction. The Court is likely to grant review of that question and, if necessary, reverse the district court's determination.

a. The Court has appellate jurisdiction to reach the diversity question. CAFA authorizes courts of appeals to review an "order" of a district court "granting or denying a motion to remand a class action to the [s]tate court from which it was removed." 28 U.S.C. § 1453(c)(1). The ordinary meaning of "order" is a "command, direction, or instruction," and in particular a "written direction or command delivered by a court or judge." *Black's Law Dictionary* 1129 (8th ed. 2004). The "order" here is thus the command that the case return to state court. And "[t]o say that a district court's 'order' is

reviewable is to allow appellate review of the *whole* order, not just of particular issues or reasons." *Lu Junhong* v. *Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015).

This court has already recognized as much in an analogous setting. Under 5 U.S.C. § 7123(a), a court of appeals has jurisdiction over any "final order" of the Federal Labor Relations Authority relating to an arbitration award if the order "involves an unfair labor practice." As the Court explained just last year, "[t]he most natural interpretation" of that provision is that, "[b]y granting the court jurisdiction to review the entire order," the court is not limited to reviewing "only the portion of the order that discusses the alleged unfair labor practice." *National Weather Service Employees* v. *Federal Labor Relations Authority*, 966 F.3d 875, 879-880 (2020).

The Supreme Court too has interpreted several statutes permitting appellate review of an "order" to permit review of issues fairly encompassed by the order but separate from the particular issue that permitted the appeal. *See*, *e.g.*, *Munaf* v. *Geren*, 553 U.S. 674, 691 (2008) (28 U.S.C. § 1292(a)(1)); *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 204 (1996) (28 U.S.C. § 1292(b)); *White* v. *Regester*, 412 U.S. 755, 761 (1973) (28 U.S.C. § 1253); *see also BP p.l.c.* v. *Mayor & City Council of Baltimore*, No. 19-1189 (argued Jan. 19, 2021) (presenting a similar issue in the context of 28 U.S.C. § 1447(d)).

Adhering to CAFA's plain text, several courts of appeals have held that they have jurisdiction under CAFA to review issues in a remand order beyond the CAFA ground for removal. *See Nevada* v. *Bank of America Corp.*, 672 F.3d 661, 672-673 (9th Cir. 2012); *Coffey* v. *Freeport McMoran Copper & Gold*, 581 F.3d 1240, 1247 (10th Cir. 2009) (per curiam); *Brill* v. *Countrywide Home Loans, Inc.*, 427 F.3d 446, 451 (7th Cir. 2005). Only one court of appeals has suggested otherwise, and it declined to review the additional issues primarily because it was "[f]acing [its] CAFA deadline." *City of Walker* v. *Louisiana*, 877 F.3d 563, 567 (5th Cir. 2017). This Court has not yet decided the issue. But given the plain text of CAFA and the body of precedent involving materially identical statutes, the Court is likely to adopt the majority approach.

b. In the decision below, the district court rejected removal on diversity grounds because, in its view, the amount in controversy was not satisfied. It reached that conclusion by applying the non-aggregation principle, which provides that "multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional-amount requirement" in order for diversity jurisdiction to arise. *Zahn* v. *International Paper Co.*, 414 U.S. 291, 294 (1973). But the non-aggregation principle does not apply where "two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." *Snyder* v. *Harris*, 394 U.S. 332, 335 (1969). Here, Beyond

Pesticides and the parties it represents have an undivided interest in the injunctive relief being sought, because the nature of that relief does not depend on "the number of plaintiffs" or "the values of their individual claims." *Williams* v. *Purdue Pharma Co.*, Civ. No. 02-556, 2003 WL 24259557, at *5 (D.D.C. Feb. 27, 2003); *see Allen* v. *R & H Oil & Gas Co.*, 63 F.3d 1326, 1331 & n.7 (5th Cir. 1995) (collecting cases).

In any event, in an action seeking injunctive relief, the amount in controversy is satisfied "with respect to all of the plaintiffs" when the "costs that the [defendant] would incur if the plaintiffs prevailed" exceeds the jurisdictional threshold. *Committee for GI Rights* v. *Callaway*, 518 F.2d 466, 473 (D.C. Cir. 1975); *see Synfuel Technologies, Inc.* v. *DHL Express (USA), Inc.*, 463 F.3d 646, 652 (7th Cir. 2006). If the cost to the defendant when any individual plaintiff prevails exceeds the jurisdictional threshold, then the amount in controversy as to each individual plaintiff exceeds the threshold. That is because the amount in controversy is not the aggregation of individual claims, but inherent in the claim asserted whether by one or many. As the Seventh Circuit has recognized, that reasoning *implements*—not *ignores*—the non-aggregation principle. *See Synfuel Technologies*, 463 F.3d at 652; *contra*, *e.g.*, *Animal Legal Defense Fund*, 249 F. Supp. 3d at 59; *Breathe DC* v. *Santa Fe Natural Tobacco Co.*, 232 F. Supp. 3d 163, 171 (D.D.C. 2017); *Witte* v. *General Nutrition Corp.*, 104 F. Supp. 3d 1, 6 (D.D.C. 2015).

The district court also erred in applying the non-aggregation principle to Beyond Pesticides' request for statutory attorney's fees. That principle has no logical application where (as here) attorney's fees will be awarded to and benefit only one plaintiff. And while the district court stated that the amount of a likely award of attorney's fees is "speculative" here, *see* App., *infra*, 4a n.1, it is practically certain—and at a minimum "plausible"—that attorney's fees of $75,000 will be reached in complex civil litigation by an attorney charging $700 per hour. *See Dart Cherokee Basin Operating Co.* v. *Owens*, 574 U.S 81, 89 (2014); D. Ct. Dkt. 1, ¶ 21.

The question of how to apply the non-aggregation principle in actions under Section 28-3905(k)(1) is recurring and often dispositive of whether a case can be removed on diversity grounds. This Court is therefore likely to grant review on that question in addition to the CAFA question.

B. ExxonMobil Will Suffer Irreparable Harm Absent A Stay

Unless this Court enters a stay, ExxonMobil will be forced to litigate this appeal while simultaneously defending itself against Plaintiff's claims in the D.C. Superior Court. It will suffer irreparable harm in the process.

Once the D.C. Superior Court receives the remand order, this case will likely proceed there while defendants' appeal is pending. Defendants would then simultaneously have to brief and argue federal jurisdictional issues in the D.C. Circuit while litigating Beyond Pesticides' claims in D.C. Superior Court.

That would be unnecessarily burdensome for defendants and the courts involved alike. *See Lafalier* v. *Cinnabar Service Co.*, Civ. No. 10-5, 2010 WL 1816377, at *2 (N.D. Okla. Apr. 30, 2010). Especially so if discovery occurs in state court and defendants prevail on appeal: "[t]he cost of proceeding with discovery [in state court]—and potentially relitigating discovery issues in federal court—is likely to be high." *Citibank, N.A.* v. *Jackson*, Civ. No. 16-712, 2017 WL 4511348, at *2 (W.D.N.C. Oct. 10, 2017).

Although litigation costs generally do not constitute irreparable injury, *see Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974), courts have held that such costs constitute irreparable harm where, as here, they would be duplicative and unrecoverable. *See, e.g.*, *Philip Morris USA Inc.* v. *Scott*, 561 U.S. 1301, 1304-1305 (2010) (Scalia, J., in chambers); *Citibank*, 2017 WL 4511348, at *2-3; *Ewing Industries Co.* v. *Bob Wines Nursery, Inc.*, Civ. No. 13-931, 2015 WL 12979096, at *3 (M.D. Fla. Feb. 5, 2015); *Wilcox* v. *Lloyds TSB Bank, PLC*, Civ. No. 13-508, 2016 WL 917893, at *5-*6 (D. Haw. Mar. 7, 2016). That is particularly true with respect to a special motion to dismiss under the D.C. Anti-Strategic Lawsuits Against Public Participation Act of 2010, D.C. Code. §§ 16-5501 to 16-5505. Petitioner anticipates filing such a motion if this case is remanded, and the motion will likely be due before the Court decides this appeal. *See* D.C. Code § 16-5502(a). If the remand order is reversed, however, ExxonMobil's effort would be wasted, because this Court

has held that the statute does not apply in federal court. *See Abbas* v. *Foreign Policy Group, LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015).

C. The Remaining Factors Favor A Stay

The remaining stay factors—whether entry of a stay will harm Beyond Pesticides and where the public interest lies—further support a stay.

A stay will not significantly harm Beyond Pesticides. To begin with, "a stay w[ill] not permanently deprive [it] of access to 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). In addition, Beyond Pesticides "would actually be served by granting a stay," because they would not "incur additional expenses from simultaneous litigation before a definitive ruling on appeal is issued." *Raskas* v. *Johnson & Johnson*, Civ. No. 12-2174, 2013 WL 1818133, at *2 (E.D. Mo. Apr. 29, 2013).

A stay will serve the "public interest" as well by preserving judicial resources. *See, e.g., Novenergia II—Energy & Environment (SCA)* v. *Kingdom of Spain*, Civ. No. 18-1148, 2020 WL 417794, at *3 (D.D.C. Jan. 27, 2020); *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain*, 397 F. Supp. 3d 34, 39 (D.D.C. 2019); *cf. Mahaffey* v. *Bechtel Associates Professional Corp., D.C.*, 699 F.2d 545, 546 (D.C. Cir. 1983). Entry of a stay will eliminate the risk of a waste of resources by the D.C. Superior Court if this Court were later to reverse the remand order. The district court's resources will be spared too, avoiding the need for the court to re-evaluate any intervening decisions issued

by the D.C. Superior Court and thereby allowing the district court to sidestep a "rat's nest of comity and federalism issues." *Northrop Grumman*, 2016 WL 3346349, at *4.

* * * * *

A stay of the district court's remand order pending appeal is amply warranted. ExxonMobil's petition for permission to appeal under CAFA presents novel, important, and recurring questions of federal jurisdiction, and the district court resolved them incorrectly. Absent a stay pending appeal, ExxonMobil will be forced to litigate in two forums simultaneous with little or no ability to recoup its costs; by contrast, Beyond Pesticides will suffer little harm from any delay. A stay will preserve scarce judicial resources, both in federal and D.C. local court. All of the traditional stay factors are therefore satisfied, and a stay pending appeal should issue.

CONCLUSION

The motion for a stay of the remand order pending appeal should be granted.

Respectfully submitted,

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APRIL 6, 2021

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kannon K. Shanmugam, counsel for petitioner 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 Appellants for an Emergency Stay of the Remand Order Pending Appeal is proportionately spaced, has a typeface of 14 points or more, and contains 4,504 words.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

APRIL 6, 2021

ADDENDUM

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I, Kannon K. Shanmugam, counsel for petitioner Exxon Mobil Corporation and a member of the Bar of this Court, certify, pursuant to D.C. Circuit Rule 28(a)(1), as follows:

(A) Parties and amici. The parties, intervenors, and amici that appeared before the district court and are participating in this appeal are Exxon Mobil Corporation and Beyond Pesticides.

(B) Rulings under review. The ruling for which permission to appeal is being sought is the district court's memorandum and order of March 22, 2021, remanding the case to state court.

(C) Related cases. The are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

APRIL 6, 2021

CORPORATE DISCLOSURE STATEMENT

Petitioner Exxon Mobil Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEYOND PESTICIDES, *Plaintiff*, v. EXXON MOBIL CORPORATION, *Defendant*.	Civil Action No. 20-1815 (TJK)

MEMORANDUM AND ORDER

Plaintiff Beyond Pesticides filed this lawsuit in the Superior Court of the District of Columbia, asserting claims under the D.C. Consumer Protection Procedures Act for false and misleading advertising. After Defendant Exxon Mobil removed the case, Beyond Pesticides moved to remand and for costs and expenses. For the reasons explained below, the Court will grant Beyond Pesticides' motion to remand for lack of subject-matter jurisdiction but deny its request for fees and costs.

I. Background

In May 2020, Beyond Pesticides filed this lawsuit against Exxon Mobil Corporation ("Exxon Mobil") in the Superior Court of the District of Columbia, asserting claims under the District of Columbia Consumer Protection Procedures Act (DCCPPA), specifically D.C. Code § 28-3905(k)(1)(A) and (D). ECF No. 1-4 ("Compl.") ¶¶ 150–53. Beyond Pesticides alleges that Exxon Mobil's advertising relating to its investments in alternative energy is false and misleading because it overstates how much of Exxon Mobil's business is devoted to clean energy. *See, e.g.*, *id.* ¶¶ 10–12. Beyond Pesticides seeks a declaration that Exxon Mobil's conduct violates the DCCPPA, an order enjoining such conduct, and attorneys' fees, costs, and

prejudgment interest. *Id.* at 26. Not long after, Exxon Mobil removed the case to this Court based on both diversity jurisdiction and the Class Action Fairness Act ("CAFA"). ECF No. 1 ¶¶ 7, 24. Beyond Pesticides then moved to remand and for fees and costs. ECF No. 10.

II. Legal Standard

"A civil action filed in state court may only be removed to a United States district court if the case could originally have been brought in federal court." *Nat'l Consumers League v. Flowers Bakeries, LLC*, 36 F. Supp. 3d 26, 30 (D.D.C. 2014) (citing 28 U.S.C. § 1441(a)). Because removal implicates "significant federalism concerns," a court must "strictly construe[] the scope of its removal jurisdiction." *Downey v. Ambassador Dev., LLC*, 568 F. Supp. 2d 28, 30 (D.D.C. 2008) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 107–09 (1941)). "When it appears that a district court lacks subject matter jurisdiction over a case that has been removed from a state court, the district court must remand the case . . . ." *Republic of Venezuela v. Philip Morris Inc.*, 287 F.3d 192, 196 (D.C. Cir. 2002) (citing 28 U.S.C. § 1447(c)–(d)). "The party seeking removal of an action bears the burden of proving that jurisdiction exists in federal court." *Animal Legal Defense Fund v. Hormel Foods Corp.*, 249 F. Supp. 3d 53, 56 (D.D.C. 2017) (quoting *Downey*, 568 F. Supp. 2d at 30).

III. Analysis

Exxon Mobil argues that subject-matter jurisdiction is proper under either (1) the federal diversity jurisdiction statute or (2) a "class action" provision under CAFA. The Court disagrees on both counts.

A. Diversity Jurisdiction

District courts have jurisdiction over an action if complete diversity exists among the parties and the amount in controversy is greater than $75,000. 28 U.S.C. § 1332(a). Beyond

Pesticides does not dispute that the parties are in complete diversity, *see* ECF No. 1 ¶¶ 11–12; Compl. ¶¶ 125, 134, but contends that more than $75,000 is not at issue. In response, Exxon Mobil argues that the amount-in-controversy requirement is satisfied based on the total cost of compliance with the requested injunction—*i.e.,* the cost of correcting advertising or investing more capital in alternative energy—as well as the attorneys' fees that Beyond Pesticides seeks. ECF No. 11 at 6–18.

The problem for Exxon Mobil is that total cost of its compliance is not a proper measure of the amount in controversy because it would violate the non-aggregation principle. Under that rule, "the separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement." *Animal Legal Defense Fund*, 249 F. Supp. 3d at 59–60 (quoting *Snyder v. Harris*, 394 U.S. 332, 335 (1969)). And in suits brought under D.C. Code § 28-3905(k)(1), like this one, courts in this District have consistently applied the non-aggregation principle to hold that, if a purported amount in controversy is calculated by reference to a defendant's cost of compliance with an injunction, the total cost of compliance must be divided by the number of the injunction's beneficiaries. *See, e.g.*, *Animal Legal Defense Fund*, 249 F. Supp. 3d at 60; *Breathe DC v. Santa Fe Nat. Tobacco Co.*, 232 F. Supp. 3d 163, 171 (D.D.C. 2017); *Witte v. Gen. Nutrition Corp.*, 104 F. Supp. 3d 1, 6 (D.D.C. 2015); *Breakman v. AOL LLC*, 545 F. Supp. 2d 96, 105–07 (D.D.C. 2008). Exxon Mobil does not try to do so. Instead, it cites its total alleged cost of compliance and argues that the non-aggregation principle does not apply because of an exception for cases in which "two or more plaintiffs unite to enforce a single title or right in which they have a common interest." ECF No. 11 at 9 (quoting *Snyder v. Harris*, 394 U.S. 332, 335 (1969)). But whatever its applicability in other contexts, no court in this District has ever applied that exception to permit circumvention of the non-

aggregation principle in a case brought by a single plaintiff involving the type of claims and relief at issue here. *See* ECF No. 10-1 at 3–4.

Exxon Mobil also contends that the attorneys' fees sought by Beyond Pesticides satisfy the amount in controversy requirement, but this argument comes up short too. Courts in this District have also applied the non-aggregation principle to attorneys' fees. *See, e.g.*, *Nat'l Consumers League v. Gen. Mills, Inc.*, 680 F. Supp. 2d 132, 141 (D.D.C. 2010); *Breakman*, 545 F. Supp. 2d at 107. As with its cost-of-compliance estimate, Exxon Mobil does not try to calculate Beyond Pesticides' attorneys' fees on a pro rata basis.[1]

Undeterred, Exxon Mobil argues that aggregation is warranted because it will incur the same cost no matter how many plaintiffs assert claims. ECF No. 11 at 11–15. But another court in this District has already persuasively rejected this very argument. In *Animal Legal Defense Fund*, the court explained that "[t]he key question courts consider with respect to aggregation is not whether an injunction would cost Defendant more or less depending on the number of beneficiaries, but instead whether Plaintiff and the members of the general public have separate and distinct claims that could be brought independently against Defendant with respect to the challenged conduct." 249 F. Supp. 3d at 61–62. There, as here, a nonprofit organization challenged certain advertising on behalf of consumers—each of whom has a separate claim. In other words, "this is not a case where no member of the 'general public' could enforce the right at issue in the absence of others." *Breathe DC*, 232 F. Supp. 3d at 171. Accordingly, the non-aggregation principle still applies. Because Exxon Mobil has provided no estimate showing that

[1] Even if the non-aggregation principle did not apply, Exxon Mobil's bald claim that, at lead counsel's $700-an-hour rate, "the amount in controversy will exceed $75,000 so long as [lead counsel] *alone* bills just 110 hours to this complex litigation," ECF No.1 ¶ 21, is too speculative to meet its burden. *See, e.g.*, *Animal Legal Defense Fund*, 249 F. Supp. 3d at 63.

its pro rata cost of compliance would exceed $75,000, it has not met its burden to prove the required amount in controversy. Thus, it has not shown that this Court possesses diversity jurisdiction.

B. CAFA Jurisdiction

Exxon Mobil also argues that removal is appropriate under a CAFA provision that extends federal jurisdiction to certain class actions. 28 U.S.C. § 1332(d)(2). Under this provision, "federal courts have original jurisdiction over cases where minimal diversity is satisfied (that is, where at least one plaintiff is diverse from at least one defendant), the number of putative class members is greater than one hundred, and the total amount in controversy as to all plaintiffs is greater than $5 million." *Nat'l Consumers League*, 36 F. Supp. 3d at 34. The statute defines "class actions" as any "civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action . . . ." 28 U.S.C. § 1332(d)(1)(B).

Beyond Pesticides makes no allegations in its complaint about a potential class and did not bring its action under Superior Court Rule of Civil Procedure 23. And as it argues, courts in this District have consistently—and persuasively—concluded that suits on behalf of consumers brought under the DCCPPA, including under § 28-3905(k)(1)(D), are "private attorney general suits" and not class actions as defined by CAFA, in cases "where [a] plaintiff has not brought a 'class action' under D.C. Superior Court Rule 23." *Nat'l Consumers League*, 36 F. Supp. 3d at 35–36 ("Absent the 'hallmarks of Rule 23 class actions; namely, adequacy of representation, numerosity, commonality, typicality, or the requirement of class certification,' courts have held that private attorney general statutes 'lack the equivalency to Rule 23 that CAFA demands.'"); *Animal Legal Defense Fund*, 249 F. Supp. 3d at 64 ("This D.C. Code section does not require

class proceedings and is a 'separate and distinct procedural vehicle from a class action,' to which CAFA does not apply." (quoting *Breakman*, 545 F. Supp. 2d at 101)). Exxon Mobil cites no authority to the contrary. For these reasons, this suit is not a class action under CAFA, and the Court lacks jurisdiction under that statute as well.[2]

C. Fees and Costs

Beyond Pesticides seeks "just costs and any actual expenses, including attorney fees, incurred as a result of the removal." ECF No. 10-1 at 11 (quoting 28 U.S.C. § 1447). "A court may award such fees if the removing party lacks 'an objectively reasonable basis for seeking removal.'" *Breathe DC*, 232 F. Supp. 3d at 172 (quoting *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 141 (2005)). The Court cannot say that Exxon Mobil's conduct meets that standard, given the lack of binding precedent on the issues presented, and so it will decline to order fees and costs.[3]

[2] The District of Columbia Court of Appeals has carved out an exception to this rule for suits for *damages* under D.C. Code § 28-3905(k)(1), which it concluded are "in essence . . . class action[s]." *Rotunda v. Marriott Int'l, Inc.*, 123 A.3d 980, 982 (D.C. 2015). But here, Beyond Pesticides does not seek damages, only declaratory and injunctive relief. *See Animal Legal Defense Fund*, 249 F. Supp. 3d at 64–65 ("The concerns raised by . . . *Rotunda* related to suits for damages, not for the type of injunctive relief sought here . . . ." (citing *Rotunda*, 123 A.3d at 985, 988–89)).

[3] Beyond Pesticides points to one DCCPPA case presenting similar removal questions when the court awarded expenses. ECF No. 10-1 at 11. But there, defendants also made other arguments the court characterized as "inappropriate" and "obviously unpersuasive," including a baseless claim of unethical conduct against opposing counsel, and the District of Columbia Court of Appeals had not yet decided *Rotunda*. *Stein v. Am. Exp. Travel Related Servs.*, 813 F. Supp. 2d 69, 71 n.1 (D.D.C. 2011).

IV. Conclusion and Order

For the reasons set forth above, it is hereby **ORDERED** that Plaintiff's Motion to Remand, ECF No. 10, is **GRANTED.** Because the Court lacks subject-matter jurisdiction, this case is **REMANDED** to the Superior Court of the District of Columbia. The Court declines to award fees or costs.

SO ORDERED.

/s/ Timothy J. Kelly
TIMOTHY J. KELLY
United States District Judge

Date: March 22, 2021

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for petitioner Exxon Mobil Corporation and a member of the Bar of this Court, certify that, on April 6, 2021, a copy of the attached Motion of Appellants for an Emergency Stay of the Remand Order Pending Appeal was filed with the Clerk and served on counsel through the Court's electronic filing system. I further certify that all parties required to be served have been served.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

APRIL 6, 2021