UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

STATE OF VERMONT, Plaintiff, v. EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, SHELL OIL PRODUCTS COMPANY LLC, MOTIVA ENTERPRISES LLC, SUNOCO LP, SUNOCO, LLC, ETC SUNOCO HOLDINGS LLC, ENERGY TRANSFER (R&M), LLC, ENERGY TRANSFER LP, and CITGO PETROLEUM CORPORATION, Defendants.	)	Case No. 2:21-cv-260

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS

Although Defendants style their motion as a request "to stay proceedings," the Court has already stayed all case deadlines except those related to Plaintiff's motion to remand, and has scheduled the briefing of that motion. (Doc. 17) The Court did so in response to Defendants' request (to which the parties stipulated) to postpone their response to the Complaint until after the remand motion is decided. That stay sensibly conserves the Court's and the parties' resources. However, Defendants' new request—to also stay remand proceedings—is based on the inaccurate proposition that this action is the same as a pending appeal in the Second Circuit. Defendants use this procedural motion to mischaracterize Vermont's case. This Court should deny Defendants' motion.

In their effort to stay all proceedings, Defendants draw a false equivalence between the State of Vermont's specific claims here and those of the State of Connecticut on appeal in the Second Circuit, *Connecticut v. ExxonMobil Corp.*, No. 21-1446 (2d Cir. June 10, 2021)

("*Connecticut*"). Connecticut seeks restitution for expenditures that it has made and will have to make to combat the effects of climate change. Relying on *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021) ("*City of New York*"), ExxonMobil argues in the Second Circuit that, because Connecticut seeks such redress, the action should be removable on the theory that all such claims are governed by federal common law. However availing or meritless ExxonMobil's arguments may be in that case, Vermont seeks no such relief. This is a critical distinction, no matter how many times Defendants mischaracterize the complaints as "substantially similar" or assert that a win for ExxonMobil in the *Connecticut* appeal would be "controlling" here. It simply is not so.[1]

In *City of New York,* a proceeding filed in federal court in the first instance, the Second Circuit held that state tort claims seeking to hold oil companies liable for damages caused by global greenhouse gas emissions are displaced by federal common law. But it had no occasion to address whether such claims may be removed from state court given the heightened standard for removal. *See id.* at 94-95.

Even if the Second Circuit were to conclude that Connecticut's claims may be removed, such a holding would not control here because Vermont's Complaint by its specific terms *does not* seek monetary relief for climate change injuries caused by Defendants' production, marketing, or use of their fossil fuel products, or by extension, greenhouse gas emissions. Rather, Vermont's action seeks to halt Defendants' ongoing unfair and deceptive marketing practices in the State under its statutory law, and to impose penalties for their prior unlawful

[1] To be clear, the State of Vermont does not agree with ExxonMobil's arguments in *Connecticut*. The point is that, even if ExxonMobil prevails in its argument that "seeking redress for climate-change-induced harms" makes a case removable, such a holding is irrelevant to Vermont's case because Vermont does not seek such relief.

marketing activities. No court has ever ruled that claims such as Vermont's are governed by federal common law, and that issue is not before the Second Circuit in *Connecticut*.

To the contrary, the only court known to have addressed whether claims such as Vermont's are removable concluded that they were *not*, and ordered the case remanded to state court. *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020) ("*Massachusetts*"). Although Massachusetts, like Vermont here, merely seeks injunctive relief and penalties under a state consumer protection statute, ExxonMobil put forth the same arguments it and the other Defendants use here: mischaracterizing the complaint as asserting claims like those in *City of New York.*

The tactic did not work in *Massachusetts* and it should not work here. The court in *Massachusetts* found that, when "fairly read," the allegations in Massachusetts' complaint, like the allegations here, "do not require any forays into foreign relations or national energy policy" and are "far afield of any 'uniquely federal interest'" that might otherwise warrant application of federal common law. 462 F. Supp. 3d at 43-44. The court distinguished Massachusetts' claims from those in *City of New York*, which sought "damages tied to the impact of climate change." *Id.* at 43. Massachusetts sought no such damages, and neither does Vermont here. ExxonMobil did not even bother to appeal the remand order in *Massachusetts*. Yet it and the other Defendants seek another bite of the apple in this Court by distorting the specific allegations of Vermont's claims.

Because Defendants' motion for a broader stay proceeds from a demonstrably faulty premise, their conclusion that briefing remand issues at this time "would waste the parties' and this Court's resources" is incorrect, and their assertion of "serious" and "substantial" hardship absent a broader stay is similarly wrong. Consistent with the previously ordered briefing

schedule and the overarching goal to "secure the just, speedy, and inexpensive determination of every action," Fed. R. Civ. P. 1, Defendants' Motion to Stay Proceedings should be denied.

BACKGROUND

On September 14, 2021, the State of Vermont filed this action in Vermont Superior Court seeking to remedy past and ongoing violations of the Vermont Consumer Protection Act, 9 V.S.A. § 2453 ("VCPA"). The Complaint alleges that Defendants have violated the VCPA by engaging in deceptive acts and unfair practices in the marketing, distribution, and sale of gasoline and other fossil fuel products to Vermont consumers. The State alleges that Defendants have sought to mislead those consumers about the risks and dangers of their products, including the causal connection between their products and climate change, and thereby deny Vermont consumers the opportunity to make accurately informed decisions regarding their purchases and consumption of fossil fuels. The State alleges that these unfair and deceptive acts and practices are ongoing.

While it is certainly true that "the use of [Defendants'] fossil fuel products … is and remains a leading cause of global warming and, unless abated, will bring about grave consequences" (Mot. (Doc. 19) at 2-3, partially quoting Compl. ¶ 98), the State's action expressly does not seek relief to address climate change harms. Instead, the connection between Defendants' products and climate change is the subject about which Defendants' are alleged to have misled Vermont consumers. The State does not seek relief that would force Defendants to discontinue, reduce, or eliminate their extraction or production of fossil fuels, or eliminate the sale of Defendants' fossil fuel products to Vermont consumers or impose limits on the quantities sold here. Compl. ¶ 6 (Ex. 68 to Doc. 1). Nor does the State seek damages or restitution for

environmental degradation or remediation in Vermont or elsewhere, whether caused by greenhouse gas emissions or otherwise. *Id*.

Rather, the State seeks to enforce a Vermont statute, *i.e.*, the VCPA, that requires Defendants to market their products to Vermont consumers based on fair and honest disclosures, and free of unfair and deceptive acts and practices. *Id.* As such, for relief, Vermont seeks: (i) injunctive relief prohibiting Defendants from engaging in unfair and deceptive acts and requiring Defendants to take appropriate steps to rectify their prior and ongoing misconduct; (ii) disgorgement of funds acquired and/or retained as a result of that misconduct; (iii) statutory civil penalties; and (iv) litigation costs and fees. *Id.* at 67-68 (Request for Relief). It is by its terms a state consumer protection action seeking to halt unfair and deceptive trade acts and practices, not an environmental remediation claim.

On October 22, 2021, Defendants removed the case to this Court. (Doc. 1) On October 25, 2021, the parties filed a "Stipulation and Order to Stay Deadlines and for a Coordinated Briefing Schedule." The Court signed and ordered the Stipulation on October 28, 2021. (Doc. 17) The schedule provides that Vermont's opening brief in support of its forthcoming motion to remand is due on December 17, 2021; Defendants' consolidated memorandum in opposition is due on February 18, 2022; and Vermont's reply memorandum is due on March 18, 2022. *Id*. ¶¶ 1-2.

LEGAL STANDARD

The power to stay proceedings "is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). The party seeking a stay bears the burden of demonstrating its need. *Clift v. City of Burlington, Vt.*, No. 2:12-CV-

214, 2013 WL 12347196, at *1 (D. Vt. Apr. 8, 2013), citing *Clinton v. Jones*, 520 U.S. 681, 708 (1997). If there is "even a fair possibility" that the sought-after stay "will work damage to someone else," the party seeking the stay "must make out a clear case of hardship or inequity in being required to go forward." *Landis*, 299 U.S. at 255. As shown below, Defendants' attempt to delay this case based on mischaracterization of the State's claims will unduly prejudice the State and its consumers. Denying Defendants the delay they seek will work no "serious hardship" or inequity as they claim; it will require them to submit page-and-time limited briefing on their removal notice, which they already have submitted.

ARGUMENT

I. Rather than Promoting Judicial Economy, Staying the Remand Proceedings Will Only Promote Unnecessary Delay.

Defendants assert that a stay is warranted here because "the precise question at issue in *Connecticut*—whether federal removal jurisdiction lies over claims alleging harm from global climate change—bears directly on this litigation." Mot. (Doc. 19) at 7 (internal quotes and brackets omitted). Not so. The "precise" issue that ExxonMobil is pursuing in *Connecticut* is not on point because Vermont unequivocally does not seek to use state law "to impose liability for harms allegedly attributable to global climate change." *Id.* at 2. Consequently, even if the Second Circuit were to reverse the district court's remand order in *Connecticut*, that would neither "resolve a controlling point of law" nor otherwise "bear upon" this case. *LaSala v. Needham & Co.*, 399 F. Supp. 2d 421, 427 (S.D.N.Y. 2005).[2] Conversely, if the Second Circuit

[2] Defendants cite a string of cases in which stays were issued under circumstances not even remotely similar to those here. In *LaSala*, for example, the court, at the plaintiff's own request, stayed proceedings pending review of a proposed settlement in related litigation being coordinated in the same court. In *Leyva v. Certified Grocers of Cal.,* 593 F.2d 857, 863-64 (9th Cir. 1979), the Ninth Circuit remanded to enable the district court to consider whether non-

rules against removal, it will be one more in the legion of courts that have already so ruled in the numerous other cases brought against the oil companies. *See City of New York*, 993 F.3d at 93 (collecting cases). Either way, a stay pending the Second Circuit's decision is unwarranted and unnecessary.

While Defendants assert that the Vermont and Connecticut complaints are alike "in many respects" (Mot. (Doc. 19) at 4-5), they ignore one crucial distinction: Connecticut seeks an order "directing ExxonMobil to pay restitution to the State for all expenditures attributable to ExxonMobil that the State has made and will have to make to combat the effects of climate change," as well as equitable relief "for past, present and future deceptive acts and practices that will require future climate change mitigation, adaptation, and resiliency." Connecticut Compl. at 44, ¶¶ 3, 5 (*See* Ex. 12 to Doc. 1, Notice of Removal, in *Connecticut v. Exxon Mobil Corp.*, No 3:20-cv-01555-JCH (D. Conn. Oct. 20, 2020)). Vermont seeks neither.[3]

Whatever the outcome of the *Connecticut* action, it is distinct from this action in its request for relief. In *City of New York*, the Second Circuit held that municipalities may not utilize state tort law to hold multinational oil companies liable "for the damages caused by global

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arbitrable claims should be stayed pending arbitration of arbitral claims. In *Marshel v. AFW Fabric Corp.,* 552 F.2d 471, 471 (2d Cir. 1977), the case "turn[ed] on one of the most debated questions in the securities field, whether or not a 'going-private' transaction gives rise to a federal cause of action." A stay was warranted because that precise issue was before the Supreme Court in another case from the Second Circuit, *Green v. Santa Fe Industries, Inc*. Similarly, in *Goldstein v. Time Warner N.Y. City Cable Group,* 3 F. Supp. 2d 423, 438 (S.D.N.Y. 1998), the court staying a case challenging the legality of the FCC's "implicit fee formula" where "that issue has not been the subject of a ruling by a federal court" and was "the central issue on appeal" in a proceeding then pending in the District of Columbia Circuit.

[3] Defendants characterize the Connecticut and Vermont cases as being alike because they both seek to enforce state consumer protection statutes and both allege that Defendants' fossil fuel products have contributed to greenhouse gas emissions, global climate change, and attendant physical harms. Mot. (Doc. 19) at 4-5. But alleging that Defendants' products cause harm (the subject of the deceptive statements) is not the same as seeking to hold them liable for those harms.

greenhouse gas emissions." 993 F.3d at 85. Such claims, the court ruled, were displaced by federal common law which, in turn, is displaced by the Clean Air Act where domestic emissions are involved. *Id*. at 95. The court distinguished the "parade" of cases holding that such state law claims do not arise under federal common law, reasoning that those cases had been removed from state court whereas the *City of New York* case was originally filed in federal court:

> Here, the City filed suit in federal court in the first instance. We are thus free to consider the Producers' preemption defense on its own terms, not under the heightened standard unique to the removability inquiry. So even if this fleet of [removal] cases is correct that federal preemption does not give rise to a federal question for purposes of removal, their reasoning does not conflict with our holding. To the contrary, the cases even acknowledge as much.

Id. at 93-94.

In *Connecticut*, ExxonMobil seeks to have the Second Circuit extend its *City of New York* decision to cases removed from state court; in other words, to rule that any suit filed in state court seeking monetary relief against oil companies for environmental harm caused by global greenhouse gas emissions may be removed to federal court. Whatever the merits or lack thereof of ExxonMobil's position in the *Connecticut* appeal, it is irrelevant to the present action.

ExxonMobil argues in the Second Circuit that state and local governments across the country "have filed over two dozen lawsuits against energy companies for injuries allegedly caused by global climate change," and that Connecticut's lawsuit "is one of those cases" because it "seeks redress for alleged injuries such as flooding, harm to infrastructure, and personal injuries," harms "allegedly caused by emissions associated with the use of fossil fuels by billions of consumers around the world." Brief of Appellant Exxon Mobil Corporation at 1, *Connecticut v. Exxon Mobil,* No. 21-1446*,* (2d Cir. Sept. 21, 2021) (*Connecticut*, Doc. 66). It further argues that the Connecticut lawsuit belongs in federal court "primarily because, as this Court has previously held [in *City of New York*], federal law governs lawsuits alleging injury from and

seeking redress for climate change." *Id.* at 10. *See also id*. at 13-14 ("Just months ago, this Court held in *City of New York* that claims seeking redress for climate-change-induced harms—such as the State's claims here—require the application of a uniform federal rule of decision under federal common law.").

Regardless of the outcome in *Connecticut*, here the State of Vermont unquestionably does not seek to hold Defendants liable "for the damages caused by global greenhouse gas emissions." *City of New York*, 993 F.2d at 85. Rather, as the district court in *Massachusetts* ultimately concluded, claims such as those asserted by Massachusetts (and by Vermont here) "simply do not implicate federal common law." 462 F. Supp. 3d at 42. It found that the allegations in the Massachusetts complaint, like those in Vermont's, are far afield of any "uniquely federal interests" that might warrant application of federal common law. *Id.* at 41. The court explained:

> The complaint, fairly read, alleges that ExxonMobil hid or obscured the scientific evidence of climate change and thus … defrauded consumers of its fossil fuel products. In short, there is no federal common law here because "[n]othing about the allegations in these lawsuits implicates interests that are 'uniquely federal.'"

Id. at 41-42. To the contrary, states "routinely enforce consumer protection … laws alongside the federal government." *Id.* at 44. That analysis applies with equal force here.

Further, the *Massachusetts* court specifically distinguished claims such as those asserted in *City of New York*. *Id.* at 43. The rationale for applying federal common law to claims having *"*a theory of damages tied to the impact of climate change" does not apply to claims such as those asserted in *Massachusetts* or here, because the latter "do not prompt this Court or any other to provide 'answers' to the 'fundamental global issue' of climate change." *Id*. "Much more modestly, the Commonwealth wants 'to hold ExxonMobil accountable for misleading the state's

… consumers.' No one doubts that this task falls within the core of a state's responsibility." *Id.* at 43-44. That more modest but core objective is what the State of Vermont seeks here.

In sum, contrary to Defendants' contentions, Vermont's consumer protection case does not implicate "the precise question at issue in *Connecticut.*" Mot. (Doc. 19) at 7. Because Connecticut seeks a type of relief that Vermont expressly does not seek, a ruling in *Connecticut* in ExxonMobil's favor would not be "controlling" here. And though a ruling *against* ExxonMobil in *Connecticut* (a ruling that Connecticut's claims are not removable) would reinforce the State's arguments here, that outcome presumably would be based upon established principles such as the "well-pleaded complaint" rule, *see generally Connecticut v. Exxon Mobil Corp.,* No. 3:20-cv-1555, 2021 WL 2389739, at *2-7 (D. Conn. June 2, 2021), and provides no basis to delay remand proceedings in this action.

Thus, a stay pending the Second Circuit's decision in *Connecticut* will neither promote judicial efficiency nor serve the public interest. "Government action taken in furtherance of a regulatory or statutory scheme ... is presumed to be in the public interest." *N.Y. ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 662 (2d Cir. 2015) (quoting *Register.com, Inc. v. Verio, Inc.,* 356 F.3d 393, 424 (2d Cir. 2004)). Particularly since the State of Vermont alleges that the offending acts and practices are continuing, the public interest will be served by the prompt resolution of the State's claims. Defendants' request to delay resolution would disserve that interest and should not be countenanced by the Court.

II. Defendants Will Not Face Hardship in the Absence of a Stay.

The State of Vermont has "a legitimate interest in the expeditious prosecution of this case," *Clift,* 2013 WL 12347196, at *1, especially given that Defendants' unlawful marketing and sales tactics are ongoing. "So too does the Court." *Id.* (citing Fed. R. Civ. P. 1) (instructing

courts to construe and administer the Rules "to secure the just, speedy, and inexpensive determination of every action").

And contrary to Defendants' contention (Mot. (Doc. 19) at 10), neither the fact that this proceeding "is still in its very early stages," nor that the proposed stay may be of "limited duration," counsels in favor of a stay. Delaying resolution of the threshold jurisdictional issue will only serve to further delay ultimate resolution of the State's claims under the VCPA.[4] Moreover, Defendants' speculation as to the timing of a Second Circuit decision in *Connecticut* is just that—speculation—and also irrelevant given that a Second Circuit decision in ExxonMobil's favor would not control here, as explained above. Accordingly, a stay at this stage will not prevent "further, and potentially futile, expenditures of time and resources by the parties and the Court." Mot. (Doc. 19) at 10 (quoting *NAS Nalle Automation Sys., LLC v. DJD Sys. Inc.*, 2011 WL 13141594, at * 1 (D.S.C. Nov. 23, 2011)).

Nor will Defendants face hardship, let alone "serious hardship" (Mot. (Doc. 19) at 11), absent a stay. Defendants undoubtedly are aware of the key distinction between Vermont's consumer protection claims and Connecticut's, yet they continue to press their wrongly premised argument that there "is no reason for the parties to engage in costly and time-consuming briefing—or for the Court to spend its time reviewing such briefing—given the near certainty that the Second Circuit will issue a precedential decision requiring the parties to re-brief the same issues." Mot. (Doc. 19) at 11.

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[4] Defendants' reliance upon *Am. Tech. Servs., Inc. v. Universal Travel Plan, Inc.*, No. CIV.A.1:05CV802(JCC), 2005 WL 2218437, at *3 (E.D. Va. Aug. 8, 2005), for the proposition that a stay causes "little prejudice to either side" when the case is "still in the very early stages of litigation" is misplaced. In *Am. Tech Servs.*, the court stayed the case for 30 days to allow the parties to appear before a Magistrate Judge for a settlement conference. Mediation was "a condition precedent" to initiation of the lawsuit, and the court could not determine whether that condition had been met.

In all events, the "ordinary burdens of litigating in federal court are insufficient to warrant the 'extraordinary remedy' of a stay." *Clift*, 2013 WL 12347196, at *1 (quoting *Jackson v. Johnson*, 985 F. Supp. 422, 424 (S.D.N.Y. 1997)). Here, the burden upon Defendants will be quite limited since they have already filed a 94-page notice of removal (similarly mischaracterizing the State's Complaint) that amounts to a very long brief on removal issues. The removal notice discusses numerous cases, including *City of New York*—although one case that it does not address is the *Massachusetts* decision. In responding to the State's forthcoming remand motion, Defendants need only shorten their removal filing to meet the 50-page limit and address the *Massachusetts* decision. It should not be burdensome for Defendants in the least.

Accordingly, there is no reason why a remand motion cannot be fully and adequately briefed at this time. Even if, as Defendants speculate, there is "a strong likelihood that the Second Circuit will rule before briefing and decision on Plaintiff's anticipated remand motion in this case is even complete" (Mot. (Doc. 19) at 2), the parties can, if appropriate, address the impact of that ruling in a brief supplemental submission, such as is done whenever additional authority becomes available that may be pertinent to an issue already briefed. There would be no need for a full "new round of briefing on the effect of the Second Circuit's decision." *Id*.

Defendants' concern that they may be forced "to proceed simultaneously along at least two tracks" if the Court "grants Plaintiff's motion to remand *before* the Second Circuit rules," and "proceedings in Vermont state court might immediately resume," Mot. (Doc. 19) at 11 n.5, is premature. ExxonMobil did not even bother to appeal the remand order in *Massachusetts*. But even if Defendants were to appeal a remand order here, they will inevitably move for a stay pending appeal. At that time the Court can evaluate whether Defendants face the purportedly "profound risk" of being denied a "right to a federal forum." *Id*.

In sum, this Court should not grant Defendants' request for delay. A ruling in ExxonMobil's favor in *Connecticut* would not be controlling here. Waiting for that ruling would unnecessarily delay resolution of this consumer protection matter, while Defendants continue their ongoing unfair and deceptive acts and practices. The parties have stipulated to, and the Court has ordered, a briefing schedule that already extends into March 2022. Reaffirming that schedule will keep this proceeding on track without unnecessary and inappropriate delay.

CONCLUSION

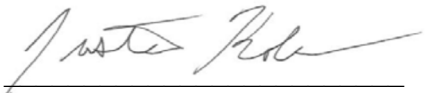
The Court should deny Defendants' motion to stay remand proceedings in this matter.

DATED: November 12, 2021

Respectfully submitted,

STATE OF VERMONT

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

By: 

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