

**UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA**

DISTRICT OF COLUMBIA

Plaintiff,

v.

EXXON MOBIL CORP., *et al.*

Defendants.

Civil Action No. 20-1932 (TJK)

**PLAINTIFF DISTRICT OF COLUMBIA'S  
NOTICE OF SUPPLEMENTAL AUTHORITY**

Plaintiff District of Columbia hereby notifies the Court of supplemental authority with respect to its Motion to Remand (Dkt. 46).

*West Virginia State University Board of Governors v. Dow Chemical Co.*, No. 20-1712, \_\_\_ F.4th \_\_\_, 2022 WL 90242 (4th Cir. Jan. 10, 2022) (**Ex. A**), and *Buljic v. Tyson Foods, Inc.*, No. 21-1010, \_\_\_ F.4th \_\_\_, 2021 WL 6143549 (8th Cir. Dec. 30, 2021) (**Ex. B**), are relevant to the Court's consideration of the "acting under" element of Defendants' federal officer removal arguments. *West Virginia State University* also supports the District's argument that there is no disputed and substantial federal issue embedded within its complaint and thus no federal question jurisdiction under *Grable & Sons Metal Products Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005).

In *West Virginia State University*, the Fourth Circuit affirmed an order remanding to state court a case involving state-law tort claims against Dow Chemical and other chemical manufacturers to address contamination on university property. Though the defendants tried to

frame the complaint as “artfully pled” and removable for seeking to “collaterally attack” a cleanup the U.S. Environmental Protection Agency (“EPA”) directed through the Resource Conservation and Recovery Act, the court made clear that the state-law claims “do not draw on federal law as the exclusive basis, or any basis, for holding Defendants liable for their actions,” and thus could not confer federal jurisdiction. 2022 WL 90242, at \*14 & \*18 (cleaned up). Here too, Defendants’ insistence that the District’s CPPA case about deceptive marketing constitutes “an attempt to countermand federal energy and environmental policy” rings similarly hollow. *See* Defs.’ Opp. to Mot. to Remand (Dkt. 51) at 21.

The defendants also removed on federal officer grounds, arguing that they had been “working hand-in-hand with EPA for decades, at EPA’s direction, to assist the federal agency in remediating” the site. 2022 WL 90242, at \*5. The court held that “[a]lthough there is no doubt that Defendants are in a highly regulated sector,” such arguments were “unpersuasive because they would impermissibly expand the federal removal statute by blurring the line *Watson* carefully delineated where ‘a private firm’s compliance (or noncompliance) with federal laws, rules, and regulations *does not by itself* fall within the scope of the statutory phrase ‘acting under’ a federal ‘official.’” *Id.* at \*10–11 (quoting *Watson v. Philip Morris Cos.*, 551 U.S. 142, 153 (2007)). In a similar vein, Defendants here conflate regulatory compliance with a true acting-under relationship.

In *Buljic*, the Eighth Circuit affirmed an order remanding to state court two cases presenting wrongful death claims on behalf of workers who died from the COVID-19 virus, allegedly contracted at a Tyson meat processing facility. Tyson removed on, *inter alia*, federal officer grounds. Tyson argued that federal executive branch statements, guidelines, and policies about the critical importance of the food industry both before and during the pandemic (including

a presidential statement that “the food . . . sector[ was] ‘working hand-in-hand with the federal government . . . to ensure food and essentials are constantly available’”) indicated that it was acting under a federal officer when it employed the decedent workers. *See* 2021 WL 6143549 at \*1, \*5.

The court held that Tyson had not satisfied the “acting under” element for federal officer removal because, despite the meat processing industry’s national importance, Tyson was not fulfilling a “basic governmental task” by processing meat, and was never directed by the government to continue its operations during the pandemic:

[W]hile the federal government may have an interest in ensuring a stable food supply, it is not typically the duty or task of the federal government to process meat for commercial consumption. It cannot be that the federal government’s mere designation of an industry as important—or even critical—is sufficient to federalize an entity’s operations and confer federal jurisdiction.

*Id.* at \*5 (citations omitted).

Just like Tyson in *Buljic*, Defendants here argue that they acted under federal officers because they “protect[ed] the vital national interest of promoting energy security and reducing reliance on oil imported from hostile powers.” Defs.’ Opp. to Mot. to Remand (Dkt. 51) at 41. Both *Bulgic* and *West Virginia State University* demonstrate that neither generalized support for national defense goals nor compliance with federal regulations are sufficient to demonstrate the “acting under” element for federal officer removal.

Respectfully Submitted,

Dated: January 11, 2022

**KARL A. RACINE**  
**Attorney General for the District of Columbia**

By: /s/ Kathleen Konopka

KATHLEEN KONOPKA [5531538]  
Deputy Attorney General  
Public Advocacy Division

JIMMY R. ROCK [493521]  
Assistant Deputy Attorney General  
Public Advocacy Division  
BENJAMIN M. WISEMAN [1005442]  
Director, Office of Consumer Protection  
DAVID S. HOFFMANN [983129]  
Assistant Attorney General  
441 4<sup>th</sup> St., N.W.  
Washington, DC 20001  
(202) 741-5226  
kathleen.konopka@dc.gov  
jimmy.rock@dc.gov  
benjamin.wiseman@dc.gov  
david.hoffmann@dc.gov

By: /s/ Matthew K. Edling

VICTOR M. SHER (*pro hac vice*)  
MATTHEW K. EDLING [1020217]  
KATIE H. JONES (*pro hac vice* forthcoming)  
QUENTIN C. KARPILOW [1659323]  
**SHER EDLING LLP**  
100 Montgomery St., Ste. 1410  
San Francisco, CA 94104  
(628) 231-2500  
vic@sheredling.com  
matt@sheredling.com  
katie@sheredling.com  
quentin@sheredling.com

HASSAN A. ZAVAREEI [456161]  
ANNA C. HAAC [979449]  
KRISTEN G. SIMPLICIO [977556]  
**TYCKO & ZAVAREEI, LLP**  
1828 L Street NW, Suite 1000  
Washington, DC 20036  
(202) 973-0900  
hzavareei@tzlegal.com  
ahaac@tzlegal.com  
ksimplicio@tzlegal.com

*Attorneys for the District of Columbia*