UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

HUS HARI BULJIC, et al., *Plaintiffs-Appellees*, v. TYSON FOODS INC., et al., *Defendants-Appellants*.	No. 21-1010

OSCAR FERNANDEZ, *Plaintiff-Appellee*, v. TYSON FOODS INC., et al., *Defendants-Appellants*.	No. 21-1012

APPELLEES' MOTION FOR
RECONSIDERATION OF STAY ORDER

Pursuant to Local Rule 27A(d), Appellees respectfully move for reconsideration of this Court's February 8, 2021 order granting Appellants' motions for a stay pending appeal. That order failed to comply with Federal Rule of Appellate Procedure 27(a)(3)(A), which states that any party may file a response within 10 days after service of a motion. Rule 27(a)(3)(A) further directs that a motion authorized by Rule 8, such as those filed by Appellants here, "may be granted before

the 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner."

In these cases, Appellants filed their motions for stay on January 29, 2021. Under Rule 27(a)(3)(A), Appellees oppositions were therefore due on February 8, 2021, and they were in the process of finalizing their oppositions when the Court issued its order. The Court gave no notice that the motions might be granted before the 10-day period had run. The order issued this morning was thus in violation of Rule 27. The Court should thus reconsider the motion granting the stay motions and, moreover, deny those motions in light of the arguments in Appellees' oppositions.

In support of their motion for reconsideration, Appellees attach the oppositions to the motions to stay that they were preparing to file before the Court issued its order.

Respectfully submitted,

/s/ Adam R. Pulver

Thomas P. Frerichs
FRERICHS LAW OFFICE, P.C.
106 E. 4th Street, P.O. Box 328
Waterloo, IA 50704-0328
(319) 236-7204

Adam R. Pulver
Scott L. Nelson
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

John J. Rausch
RAUSCH LAW FIRM, PLLC
3909 University Ave., P.O. Box 905
Waterloo, IA 50704-0905
(319) 233-3557

Mel C. Orchard, III
G. Bryan Ulmer, III
Gabriel Phillips
THE SPENCE LAW FIRM, LLC
15 S. Jackson Street
P.O. Box 548
Jackson, WY 83001
(307) 337-1283

Attorneys for Plaintiffs-Appellees

February 8, 2021

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the motion exempted by Fed. R. App. P. 32(f), it contains 218 words.

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 MSO in 14-point Times New Roman.

3. This motion has been scanned for viruses and is virus-free.

February 8, 2021

/s/ Adam R. Pulver
Adam R. Pulver
Attorney for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Adam R. Pulver
Adam R. Pulver
Attorney for Plaintiffs-Appellees

No. 21-1010

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

HUS HARI BULJIC, et al.,

Plaintiffs-Appellees,

v.

TYSON FOODS INC., et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Iowa
Case No. 20-cv-02055
Hon. Linda E. Reade

APPELLEES' OPPOSITION TO MOTION FOR STAY PENDING APPEAL

Thomas P. Frerichs
FRERICHS LAW OFFICE, P.C.
106 E. 4th Street, P.O. Box 328
Waterloo, IA 50704-0328
(319) 236-7204

John J. Rausch
RAUSCH LAW FIRM, PLLC
3909 University Ave., P.O. Box 905
Waterloo, IA 50704-0905
(319) 233-3557

Adam R. Pulver
Scott L. Nelson
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Mel C. Orchard, III
G. Bryan Ulmer, III
Gabriel Phillips
THE SPENCE LAW FIRM, LLC
15 S. Jackson Street
P.O. Box 548
Jackson, WY 83001
(307) 337-1283

Counsel for Plaintiffs-Appellees

February 8, 2021

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INTRODUCTION

Sedika Buljic, Reberiano Garcia, and Jose Luis Ayala, Jr., worked at defendant-appellant Tyson Foods's pork-processing facility in Waterloo, Iowa. Despite numerous requests from local officials and the hospitalization of nearly two dozen plant employees on April 12, 2020, Tyson failed to take basic precautions to minimize the spread of the coronavirus. Rather, for weeks after defendants Tyson and its management (collectively, Tyson) learned that COVID-19 was spreading throughout its facilities, Tyson employees, including Ms. Buljic, Mr. Garcia, and Mr. Ayala, worked elbow to elbow, mostly without face coverings. Tyson neither tested nor quarantined employees who Tyson knew had been exposed to the coronavirus before allowing them to enter and move about the Waterloo facility. Tyson officials made false representations to plant workers about the presence and spread of COVID-19 at the facility and the adequacy of the few safety measures Tyson was taking.

In April and May 2020, Ms. Buljic, Mr. Garcia, and Mr. Ayala each died from complications of COVID-19.

Alleging that the three workers contracted the coronavirus while working at the Waterloo facility, their survivors, Plaintiffs-Appellees here, commenced this lawsuit in Iowa state court. Their petition states claims against Tyson under state tort

law for negligence and fraudulent misrepresentation based on Tysons' actions and inaction before April 22, 2020—when Tyson eventually shut down the facility.

Tyson removed the action to federal court, relying on 28 U.S.C. § 1442(a)(1), which provides for removal in cases filed in state court against federal officers. Tyson asserted that it "was under a Presidential order to continue operations pursuant to the supervision of the federal government," citing a variety of materials issued *after* April 22, 2020. D.Ct.Dkt.1 at 3, 4–8. Plaintiffs moved to remand the case to state court, and the district court granted the motion. Among other things, the court noted the obvious: Tyson could not have been acting under the direction of a federal officer before the claimed directions were issued. *See* D.Ct.Dkt.57 at 25. The court also rejected Tyson's belated argument that generic interactions before April 22 constituted the sort of direction required to make Tyson a federal officer under § 1442(a)(1). *Id.* at 25–26. In addition, the district court found that Tyson failed to meet its burden of establishing two other requirements for federal officer removal: causation and a colorable federal defense. *Id.* at 25–27.[1]

[1] The court also held that Tyson failed to establish federal question jurisdiction. This Court's precedent forecloses appellate review of that holding. *See Jacks v. Meridian Res. Co., LLC*, 701 F.3d 1224, 1229 (8th Cir. 2012). The Supreme Court is considering in *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189, whether, when appealing a remand order addressing federal officer jurisdiction, appellees may address other bases for removal. Tyson's motion, however, does not rely on federal question jurisdiction.

The district court was correct as to all three elements, and Tyson's motion for a stay should be denied on that basis alone. But Tyson's motion is also moot. Because the district court's remand order has already been carried out, there is nothing to stay; the status quo is that the state court has jurisdiction over the case. Tyson's suggestion that a stay *must* be available in this case, and in *every* case in which a defendant appeals a remand order involving "colorable" assertions of federal officer removal, in order to allow meaningful appellate review is incorrect. The U.S. Supreme Court and courts of appeals have repeatedly denied motions to stay remand orders in cases involving assertions of federal officer removal jurisdiction, and later addressed appeals of those remand orders on the merits.

For the same reasons, the Court should reject Tyson's request that this Court jettison what Tyson refers to as the "traditional" standard that governs requests for stays pending appeal and replace it with a "colorable basis" standard. Under the correct standard, Tyson has not met its high burden.

BACKGROUND

Plaintiffs commenced this action in the Iowa District Court for Black Hawk County on June 25, 2020. D.Ct.Dkt.3. Tyson removed the case to the U.S. District Court for the Northern District of Iowa on July 27, 2020, citing the federal officer removal statute, 28 U.S.C. § 1442(a)(1), and federal question jurisdiction under 28 U.S.C. § 1331(a)(1). D.Ct.Dkt.1. On August 26, 2020, Plaintiffs moved to remand

the action to state court, and on December 28, 2020, the district court granted the motion and ordered the case remanded. D.Ct.Dkt.57. That same day, the district court clerk mailed a copy of the remand order to the state court. Clerk's Office Entry at D.Ct.Dkt.57. On January 7, 2021, the state court filed the remand order on its docket. D.Ct.Dkt.62-1.

On December 31, 2020, Tyson filed a notice of appeal. On January 8, 2021, it filed in the district court a motion for a stay pending appeal. It did not seek expedition of that request. Briefing was completed when Tyson filed its reply on January 25. D.Ct.Dkt.63. On January 28, the district court denied the motion, finding that it lacked jurisdiction to issue the requested relief, while also noting that it would deny a stay in any event. D.Ct.Dkt.64.

On January 29, 2021, Tyson filed in this Court a motion for an "administrative stay" and a motion for a stay of the district court's December 28 remand order pending appeal.

ARGUMENT

I. Tyson's stay request is moot.

A stay pending appeal "suspends judicial alteration of the status quo." *Nken v. Holder*, 556 U.S. 418, 429 (2009). Here, the status quo is that the state court has resumed its jurisdiction over this case pursuant to 28 U.S.C. § 1447(c). Thus, Tyson's request that this Court "stay" the district court's remand order is moot.

A. The state court has jurisdiction pursuant to 28 U.S.C. § 1447(c).

Section 1447(c) provides that, upon the district court clerk's mailing of a certified copy of the order of remand to the clerk of the State court, "the State court may thereupon proceed with such case." Here, that mailing occurred on December 28, 2020, and the state court filed the order on its docket on January 7, 2021.

Tyson maintains that the remand order was stayed automatically pursuant to Federal Rule of Civil Procedure Rule 62(a) until January 27, 2021. *See* Motion at 8. Rule 62(a) provides that "execution on a judgment and proceedings to enforce it" are stayed for 30 days unless the court orders otherwise. By its plain language, Rule 62(a) would not seem to apply to the district court's remand order. *See Arnold v. Garlock, Inc.*, 278 F.3d 426 (5th Cir. 2001) (holding that Rule 62 does not apply to remand orders). Even putting that aside, Rule 62 has no bearing on Tyson's entitlement to a stay. Any Rule 62 stay would have expired on January 27, 2021—before Tyson made this motion. Accordingly, the remand order was effective no later than that date; as Tyson concedes, state court procedural deadlines have already begun to run.

Because the state court has resumed jurisdiction, the motion to "stay" the remand order is moot. *See Hammer v. U.S. Dep't of Health & Human Servs.*, 905 F.3d 517, 524 n.1 (7th Cir. 2018) ("HHS moved this court to stay the remand, but we denied the motion because the district court had already certified its remand

orders and the case had returned to state court; therefore, there was nothing for this court to stay."); *Hudson United Bank v. LiTenda Mortg. Corp.*, 142 F.3d 151, 154 n.6 (3d Cir. 1998) ("Hudson also moved for a stay of the remand order. As the remand order had already been sent to state court, however, this motion was moot."). As in *Hammer*—which also involved federal officer removal—so too here: "there [is] nothing for this [C]ourt to stay."

B. Tyson's policy arguments do not overcome mootness.

Tyson is wrong that a stay *must* be available to permit meaningful appellate review. In both *Hammer* and *Hudson United*, for example, the courts issued lengthy opinions addressing appellants' arguments as to the propriety of removal, despite having denied a stay. Indeed, in *Hammer*, the court reversed the remand order. *See* 905 F.3d at 530. Similarly, the Supreme Court denied a motion for a stay pending appeal of a remand order in *BP p.l.c. v. Mayor & City Council of Baltimore*, 140 S. Ct. 449 (2019), but later granted a petition for certiorari to review that order, 141 S. Ct. 222 (2020). In the interim, the Fourth Circuit issued a 24-page opinion reviewing the remand order. *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452 (4th Cir. 2019). In each case, the parties obtained meaningful appellate review—absent a stay.

Importantly, that the request for a *stay* is moot does not mean that the Court cannot provide relief if it rules for Tyson on the merits. Rather, "the appeal of a

remand order would only be rendered moot in the unlikely event that a final judgment is reached in state court before the resolution of their appeal." *Mayor & City Council of Balt. v. BP P.L.C.*, 2019 WL 3464667, at *5 (D. Md. July 31, 2019). Until that point, if Tyson prevails, this Court may direct the district court to recall its remand order, as Tyson now concedes. *See* Admin. Stay Reply at 5 (citing *Reddam v. KPMG LLP*, 457 F.3d 1054, 1062 (9th Cir. 2006)). "[F]ederal courts are fully capable of ensuring that the proceeding in state court returns to federal court if a remand order is vacated, including by enjoining state proceedings if the state court failed to give effect to the decision reversing remand." *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 423 F. Supp. 3d 1066, 1075 (D. Colo. 2019); *see also Skiles v. CarePlus Health Plans, Inc*., 2014 WL 5320135, at *2 (S.D. Fla. Oct. 16, 2014) ("Denial of Defendant's requested relief will not necessarily prohibit the purported federal officer from making its way back into federal court.").

C. Tyson has not moved this Court for any relief other than a stay.

In its reply in support of its administrative stay motion, Tyson recharacterized this stay motion as one seeking an order requiring the district court to "recall its remand order and *then* grant a stay" pending appeal pursuant to the All Writs Act. Admin. Stay Reply at 5 (emphasis added). But the motion before this Court does not ask for that relief or even cite the All Writs Act. *See* Fed. R. App. P. 27(a)(2)(A) ("A motion must state with particularity the grounds for the motion, the relief sought,

and the legal argument necessary to support it."); *see also Navarijo-Barrios v. Ashcroft*, 322 F.3d 561, 564 n.1 (8th Cir. 2003) ("It is well settled that we do not consider arguments raised for the first time in a reply brief.").

A motion seeking an order that the district court *recall* its remand order seeks to compel that court to take action and alter the status quo. The appropriate procedural vehicle for such relief is a request for a writ of mandamus. *See, e.g., In re DaimlerChrysler Corp.*, 294 F.3d 697, 698 (5th Cir. 2002); *In re Continental Casualty Co.*, 29 F.3d 292 (7th Cir. 1994). Such relief is proper only where the movant can show "exceptional circumstances." *In re Lombardi*, 741 F.3d 888, 893 (8th Cir. 2014) (*en banc*). Here, not only did Tyson not request mandamus relief, it could not meet (and did not attempt to meet) that standard, particularly given its failure to move the district court to recall its order. Tyson's inability to show a strong likelihood of success in its appeal on the merits, *see infra* III.A, also means it has not established a "clear and indisputable" right to relief, *see Lombardi*, 741 F.3d at 894.

II. The "traditional" stay standard, not Tyson's suggested "colorable basis" test, applies.

In determining whether to grant a stay pending appeal pursuant to Rule 8(a), this Court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially

injure the other parties interested in the proceeding; and (4) where the public interest lies." *Brakebill v. Jaeger*, 905 F.3d 553, 557 (8th Cir. 2018) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Nken*, 556 U.S. at 425–26. "The most important factor is likelihood of success on the merits, although a showing of irreparable injury without a stay is also required." *Brakebill*, 905 F.3d at 557 (citing *Brady v. NFL*, 640 F.3d 785, 789 (8th Cir. 2011)).

Tyson, however, asks the Court to adopt a special standard for stays pending appeal in federal officer removal cases, and issue stays whenever "there is a colorable basis for federal-officer removal." Stay Mot. at 10. First, Tyson's argument is based on the incorrect premise that a stay is necessary for a meaningful appeal. *See supra* I.B. Furthermore, a "colorable basis" standard is not supported by the federal officer removal statute or by the practice of the Supreme Court and the courts of appeals. The Supreme Court, courts of appeals, and district courts have frequently denied stays of remand orders rejecting federal officer removal, despite "colorable" bases for removal. *See, e.g.*, *Hammer*, 905 F.3d at 524 n.1. And several courts of appeals have, in analogous cases, explicitly applied the *Nken* standard. *See, e.g.*, *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.), Inc.*, No. 19-1330 (10th Cir. Oct. 17, 2019), Exhibit 1 at 1–2; *Mays v. City of Flint, Mich.*, No. 16-2484 (6th Cir. Jan. 13, 2017), Exhibit 2 at 1–2; *Wilde v. Huntington Ingalls, Inc.*, 616 F. App'x 710, 712 (5th Cir. 2015). This Court should do the same.

III. Tyson is not entitled to a stay under the applicable standard.

Under the applicable standard, Tyson's motion should be denied because none of the four factors weighs in favor of a stay.

A. Tyson is not likely to succeed on the merits.

"Four elements are required for removal under § 1442(a)(1): (1) a defendant has acted under the direction of a federal officer, (2) there was a causal connection between the defendant's actions and the official authority, (3) the defendant has a colorable federal defense to the plaintiff's claims, and (4) the defendant is a 'person,' within the meaning of the statute." *Jacks*, 701 F.3d at 1230. Here, the district court concluded that Tyson did not establish *any* of the first three elements. Tyson has not made a strong showing that the court was incorrect as to any of the three, much less all three.

1. Tyson was not acting under the direction of a federal officer.

Tyson's notice of removal was explicitly grounded on the assertion that "Tyson was under a Presidential order to continue operations pursuant to the supervision of the federal government and pursuant to federal guidelines and directives, including directives from the Secretary of Agriculture and guidance from the CDC and OSHA." D.Ct.Dkt.1 at 3. The "Presidential order" cited was Executive Order 13917, issued on April 28, 2020—after the dates of the challenged action and inaction. *See* 85 Fed. Reg. 26,313 (May 1, 2020). In addition, that order does not

direct Tyson or any other entity to "continue operations"; the only directions are to the Secretary of Agriculture. *See id.* at 26,314. Likewise, the removal notice cites a communication from the Secretary of Agriculture to industry dated May 5, 2020. *See* D.Ct.Dkt.1 at 6 (citing USDA, Letter to Stakeholders (May 5, 2020)). Again, this document post-dates the time period relevant to Plaintiffs' claims. In any event, the only "directive" it contains is that "plants contemplating reductions of operations or recently closed since Friday May 1, and without a clear timetable for near term resumption of operations" should "submit written documentation of their operations and health and safety protocol developed based on the CDC/OSHA guidance to USDA." *Id.* Finally, the CDC/OSHA guidance referenced in Tyson's removal notice was not issued until April 26, 2020. *See* Meat and Poultry Processing Workers and Employers: Interim Guidance from CDC and the Occupational Safety and Health Administration (OSHA), https://stacks.cdc.gov/view/cdc/87280. Nothing in this guidance—which by definition was not binding—constituted a direction, even after it was issued.

As the district court stated, and as Tyson now appears to concede, none of these documents could constitute "federal direction" before the documents existed. *See* D.Ct.Dkt.57 at 5. Tyson thus now relies on a *gestalt* theory of federal direction, noting (1) that in a March 15, 2020, conference call, President Trump made generic statements about the importance of the food supply and of industry and government

"working hand-in-hand"; (2) that the meatpacking industry is considered "critical infrastructure"; (3) that the meatpacking industry continued to be subject to inspection for food safety regulation compliance by USDA; and (4) that federal agencies helped Tyson get "necessary PPE and other critical supplies." Stay Mot. at 2–3, 14–15. Tyson is unlikely to succeed in its argument that these general interactions between a heavily regulated industry and the federal government constitute federal officer direction that supports removal.

To begin with, Tyson's current theory of federal officer jurisdiction is not based on the averments of Tyson's removal notice, and thus not properly before the Court. *See, e.g.*, *Rader v. Sun Life Assur. Co. of Canada*, 941 F. Supp. 2d 1191, 1196 (N.D. Cal. 2013) ("a defendant [cannot] present new grounds for removal for the first time in opposition to a motion for remand" (citing *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality of Mont.*, 213 F.3d 1108, 1117 (9th Cir. 2000))); *see also James Valley Coop. Tel. Co. v. S.D. Network, LLC*, 292 F. Supp. 3d 938, 946 (D.S.D. 2017) (rejecting attempt to advance "different theory for removal than what [defendant] asserted in its Notice of Removal"). Because Tyson's new argument does more than "set out more specifically the grounds for removal that already have been stated in the original notice," but rather introduces *different* grounds for removal—well beyond the expiration of time to remove—it is improper. Wright & Miller, 14C Fed. Prac. & Proc. Juris. § 3733 (Rev. 4th ed.).

In any event, these interactions with government officials do not constitute federal direction, as the district court ruled. D.Ct.Dkt.57 at 25. Federal officer removal "requir[es] more than mere compliance (or noncompliance) with federal laws, rules, and regulations … even if highly detailed, and even if the private firm's activities are highly supervised and monitored." *Jacks*, 701 F.3d at 1232. Rather, "a relationship must be formed such that the individual or company has agreed to act on behalf of the federal officer or agency to further a federal purpose." *Castillo v. Snyders*, 2020 WL 6287402, at *2 (N.D. Ill. Oct. 27, 2020) (citing *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 153 (2007)).

Tyson's theory "would expand the scope of the statute considerably, potentially bringing within its scope state-court actions filed against private firms in many highly regulated industries." *Watson*, 551 U.S. at 153. The federal government has designated *sixteen* different sectors, representing tens and thousands of companies and private persons in the United States, as "critical infrastructure." *See* Presidential Policy Directive/PPD-21, Critical Infrastructure Security and Resilience (Feb. 12, 2013), https://bit.ly/3jqTgcY. The sectors include "food and agriculture," and other heavily regulated industries such as communications, information technology, financial services, and transportation systems. *Id.* Under Tyson's theory that no specific directive need be identified, the pandemic would have converted all

of these industries into deputies of the federal government, at all times, with respect to all of their operations. Such an argument is untenable.

Tyson is correct that the "acting under" element of § 1442(a)(1) does not "turn on the level of formality with which the government issues instructions." Stay Mot. at 15. The issue here is not the level of formality, though, but whether the government has issued instructions at all. Tyson gives as an example a situation where "a federal officer jumps into the passenger seat and tells a private individual to drive in pursuit of a fleeing suspect." *Id*. An example more analogous to this case would be a federal officer appearing at a rally and stating, "Capturing criminals is a good thing." If a vigilante left the rally and kidnapped someone whom he suspected of committing a crime on the street, he would not be entitled to claim that he was acting as a federal officer based on the officer's generic statement.

The grab-bag of interactions on which Tyson relies shows that (1) the meatpacking industry was in frequent contact with the federal government, (2) the meatpacking industry is subject to federal regulation, and (3) the federal government thought the meatpacking industry was important, both before and during the pandemic. Plaintiffs do not dispute any of these propositions. But the propositions do not show that Tyson was acting under a federal officer's direction. They do not show that Tyson was aiding the federal government in carrying out governmental

tasks; they show, at most, that the federal government was aiding Tyson in the operation of its business.

2. The challenged actions and inactions do not "relate to" the claimed federal direction.

Tyson has further failed to show that the actions and inaction that form the basis for Plaintiffs' action are "related to" any federal directives, as required by the federal officer removal statute, 28 U.S.C. § 1442(a)(1). To meet this requirement, removing parties must show "that the challenged acts 'occurred *because of* what they were asked to do by the Government.'" *Goncalves by & through Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1245 (9th Cir. 2017) (quoting *Isaacson v. Dow Chemical Co.*, 517 F.3d 129, 137 (2d Cir. 2008)); *see also Jacks*, 701 F.3d at 1230 n.3 (citing *Isaacson* and applying "because of" standard). Tyson advocates a lower "connection or association" standard, citing Fourth Circuit precedent, Stay Mot. at 16 (citing *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017)—which the district court applied. *See* Dist.Ct.Dkt.57 at 23–24, 27. Under either standard, Tyson's argument fails.

Tyson's causation argument is based on a single purported federal direction—the direction "to continue operating in accordance with CDC guidance." Stay Mot. at 17. But as noted above, that guidance was issued *after* the conduct that forms the basis for this action. Whether or not Tyson became subject to a federal directive on

a related topic *after* the actions underlying the lawsuit, that directive cannot satisfy the causation requirement of § 1442(a)(1).

Tyson faults the district court for "ignoring the significant federal interaction before" the April 28, 2020 Executive Order. Stay Mot. at 17. It fails, however, to identify any aspects of that "interaction" that constituted directives to which Plaintiffs' claims relate. As the district court explained, Tyson was *not* under any federal direction to keep its plants open in the relevant time period. Indeed, Tyson suspended operations completely at its Columbus Junction plant on or about April 6, 2020, and then shut down the Waterloo facility on April 22, 2020. Dist.Ct.Dkt.57 at 27. In any event, the allegations here are that Tyson was negligent in *how* it operated its plant while it remained open and that Tyson made fraudulent misrepresentations to workers in doing so. *Id.* at 26–27. Tyson has identified no directive that caused Tyson to "[f]ail[] to promptly isolate and send home sick or symptomatic workers," or "[f]ail[] to educate and train workers and supervisors, including those with limited or non-existent English language abilities, about how they can reduce the spread of, and prevent exposure to COVID-19." D.Ct.Dkt.3 at ¶¶ 119(e), (t) and 135(e), (t).

As the district court explained, "[n]o federal officer directed Tyson to keep its Waterloo facility open in a negligent manner … or make fraudulent misrepresentations to employees at the Waterloo facility regarding the risks or

severity of the coronavirus pandemic and COVID-19 outbreak at the Waterloo facility." D.Ct.Dkt.57 at 27. In this respect, this case is similar to *BP*, where the Fourth Circuit, applying *Sawyer*, found that claims about the concealment and misrepresentation of fossil fuels' known dangers were too attenuated from the claimed federal control of production and sales of such fuels to be "related to" such federal direction. 952 F.3d at 467. So too here, Plaintiffs' claims that Tyson fraudulently misrepresented the safety of its workplace are insufficiently related to any federal officer direction Tyson was purportedly acting under.

3. Tyson lacks a colorable federal defense.

Finally, Tyson claims federal defenses relating to the Defense Production Act (DPA) and the Federal Meat Inspection Act (FMIA). Neither is colorable.

Although Title I of the DPA *can* be exercised through informal means, Stay Mot. at 19 (citing *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 994 (5th Cir. 1976)), Tyson has offered *no* colorable basis to show that it was. Title I of the DPA concerns orders to prioritize the performance of certain contracts over others. 50 U.S.C. §§ 4511–18. There is no evidence that this authority was deployed as to Tyson—either before the April 28, 2020 Executive Order or after. The Executive Order simply directed the Secretary of Agriculture to *consider* doing so "as he deem[ed] appropriate." 85 Fed. Reg. at 26,314.

Moreover, Tyson's DPA theory would not provide a colorable defense in any case, because the DPA's narrow immunity provision, 50 U.S.C. § 4557, would not apply to Plaintiffs' tort claims. In reasoning adopted by this Court in *United States v. Vertac Chemical Corp.*, 46 F.3d 803, 812 (8th Cir. 1995), the Federal Circuit explained that section 4557 merely codifies the common-law doctrine of impossibility by "provid[ing] a defense for a DPA contractor against a suit by a non-government customer in the event that the DPA contractor is forced to breach another contract to fulfill the government's requirements." *Hercules Inc. v. United States*, 24 F.3d 188, 203 (Fed. Cir. 1994); *see also E. Air Lines*, 532 F.2d at 997. Such a defense is irrelevant here, even if the Secretary had invoked the DPA's contract-priority scheme.

To the extent that Tyson argues that the DPA preempts Plaintiffs' claims in some other way, that argument is also precluded by Circuit precedent. "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 599–600 (8th Cir. 2005) (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992)). By providing that the DPA preempts only contract claims, Congress has expressed its judgment that tort claims can co-exist without frustrating that statutory scheme. And there is no conflict: Even if the federal government had ordered Tyson to perform certain contracts, Tyson could have done

so without lying to its employees and while taking adequate safety measures. As the federal government explained in *Vertac*, "allowing a government contractor to violate the laws with impunity, so long as it is performing a rated contract" would be an "absurd result." 46 F.3d at 812 (characterizing government's argument). This Court rejected that absurd result in *Vertac* and should do so here.

Tyson's arguments as to the FMIA, which the district court suggested were frivolous, Dist.Ct.Dkt.57 at 28, fare no better. No court has held that the FMIA preempts workplace safety laws as applied to meatpacking plant workers—and for good reason. "The FMIA regulates a broad range of activities at slaughterhouses to ensure both the safety of meat and the humane handling of animals." *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 455 (2012). As USDA has itself explained, under the FMIA, "the Agency does not have the authority to regulate issues related to establishment worker safety." FSIS, USDA, Final Rule, Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300, 52,305 (Oct. 1, 2019). "OSHA is the Federal agency with statutory and regulatory authority to promote workplace safety and health." *Id.*

To read the FMIA as preempting state tort law claims by injured workers would create an absurd tension with the Occupational Safety and Health Act—which expressly provides that such claims are *not* displaced by that statute. 29 U.S.C. § 653(b)(4).

B. Tyson will not suffer irreparable harm absent a stay.

Tyson has not established that it will suffer irreparable injury absent a stay. The only cited harm is the need to litigate in state court. "These mere injuries in terms of energy, effort, money, etc., are simply not irreparable harms." *Tennessee ex rel. Slatery v. Tenn. Valley Auth.*, 2018 WL 3092942, at *6 (M.D. Tenn. June 22, 2018); *see also 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.").

Every movant for a stay pending appeal of a remand order, or any interlocutory appeal, could cite the harm of litigation in multiple fora on "parallel tracks," Stay Mot. at 21, yet courts regularly hold that such claims do not demonstrate irreparable injury. *See*, *e.g.*, *Suncor*, 423 F. Supp. 3d at 1074; *BP*, 2019 WL 3464667, at *5; *Slatery*, 2018 WL 3092942, at *6; *Washington v. Monsanto Co.*, 2018 WL 9669810, at *1 (W.D. Wash. Mar. 23, 2018); *Morgan v. Dow Chem. Co.*, 2017 WL 7833615, at *10 (M.D. La. July 18, 2017). The only impending state court deadline Tyson references is for filing a responsive pleading—which is hardly a significant undertaking, given that Tyson filed a motion to dismiss in this action while it was pending in the district court. Dist.Ct.Dkt.23.

C. The balance of hardships weighs against a stay.

Tyson will have to litigate this case *somewhere* even if it prevails on appeal, and thus any hardship to it is minimal. If, as it argues, Plaintiffs' claims are barred as a matter of Iowa workers' compensation law, *see* Stay Mot. at 21, the Iowa state court is capable of resolving that state-law issue. In contrast, "[i]ssuing a stay pending an appeal that is not likely to succeed on the merits would be against the interests of the Plaintiffs." Dist.Ct.Dkt.64 at 7. Plaintiffs filed their case in state court more than seven months ago and have still not received a responsive pleading in that court. Putting this case on hold pending resolution of a meritless appeal will further delay their ability to pursue justice on behalf of their deceased family members. *Cf. Dakota, Minn. & E. R.R. Corp. v. Schieffer*, 742 F. Supp. 2d 1055 (D.S.D. 2010) (delaying resolution of litigant's claim in another forum would be prejudicial).

D. The public interest is not served by a stay.

The public interest would not be served by allowing justice to be delayed by a meritless appeal. Tyson's argument as to the public interest is based on its incorrect assertion, discussed above, that denying a stay would foreclose meaningful appellate review. This Court, however, can evaluate Tyson's arguments on the merits without a stay.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees respectfully request the Court deny Defendants-Appellants' motion for a stay.

Respectfully submitted,

/s/ Adam R. Pulver

Thomas P. Frerichs
FRERICHS LAW OFFICE, P.C.
106 E. 4th Street, P.O. Box 328
Waterloo, IA 50704-0328
(319) 236-7204

Adam R. Pulver
Scott L. Nelson
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

John J. Rausch
RAUSCH LAW FIRM, PLLC
3909 University Ave., P.O. Box 905
Waterloo, IA 50704-0905
(319) 233-3557

Mel C. Orchard, III
G. Bryan Ulmer, III
Gabriel Phillips
THE SPENCE LAW FIRM, LLC
15 S. Jackson Street
P.O. Box 548
Jackson, WY 83001
(307) 337-1283

Attorneys for Plaintiffs-Appellees

February 8, 2021

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the motion exempted by Fed. R. App. P. 32(f), it contains 5187 words.

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 MSO in 14-point Times New Roman.

3. This motion has been scanned for viruses and is virus-free.

February 8, 2021

/s/ Adam R. Pulver
Adam R. Pulver
Attorney for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Adam R. Pulver
Adam R. Pulver
Attorney for Plaintiffs-Appellees

No. 21-1012

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

OSCAR FERNANDEZ,

Plaintiff-Appellee,

v.

TYSON FOODS INC., et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Iowa
Case No. 20-cv-02079
Hon. Linda E. Reade

APPELLEES' OPPOSITION TO MOTION FOR STAY PENDING APPEAL

Thomas P. Frerichs
FRERICHS LAW OFFICE, P.C.
106 E. 4th Street, P.O. Box 328
Waterloo, IA 50704-0328
(319) 236-7204

John J. Rausch
RAUSCH LAW FIRM, PLLC
3909 University Ave., P.O. Box 905
Waterloo, IA 50704-0905
(319) 233-3557

Adam R. Pulver
Scott L. Nelson
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Mel C. Orchard, III
G. Bryan Ulmer, III
Gabriel Phillips
THE SPENCE LAW FIRM, LLC
15 S. Jackson Street
P.O. Box 548
Jackson, WY 83001
(307) 337-1283

Counsel for Plaintiff-Appellee

February 8, 2021

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INTRODUCTION

Isidro Fernandez worked at defendant-appellant Tyson Foods's pork-processing facility in Waterloo, Iowa. Despite numerous requests from local officials and the hospitalization of nearly two dozen plant employees on April 12, 2020, Tyson failed to take basic precautions to minimize the spread of the coronavirus. Rather, for weeks after defendants Tyson and its management (collectively, Tyson) learned that COVID-19 was spreading throughout its facilities, Tyson employees, including Mr. Fernandez, worked elbow to elbow, mostly without face coverings. Tyson neither tested nor quarantined employees who Tyson knew had been exposed to the coronavirus before allowing them to enter and move about the Waterloo facility. Tyson officials made false representations to plant workers about the presence and spread of COVID-19 at the facility and the adequacy of the few safety measures Tyson was taking.

On April 26, 2020, Mr. Fernandez died from complications of COVID-19.

Alleging that Mr. Fernandez contracted the coronavirus while working at the Waterloo facility, his surviving son, Plaintiff-Appellee here, commenced this lawsuit in Iowa state court. His petition states claims against Tyson under state tort law for negligence and fraudulent misrepresentation based on Tysons' actions and inaction before April 22, 2020—when Tyson eventually shut down the facility.

Tyson removed the action to federal court, relying on 28 U.S.C. § 1442(a)(1), which provides for removal in cases filed in state court against federal officers. Tyson asserted that it "was under a Presidential order to continue operations pursuant to the supervision of the federal government," citing a variety of materials issued *after* April 22, 2020. D.Ct.Dkt.1 at 3, 4–8. Plaintiff moved to remand the case to state court, and the district court granted the motion. Among other things, the court noted the obvious: Tyson could not have been acting under the direction of a federal officer before the claimed directions were issued. *See* D.Ct.Dkt.49 at 23. The court also rejected Tyson's belated argument that generic interactions before April 22 constituted the sort of direction required to make Tyson a federal officer under § 1442(a)(1). *Id.* at 23–24. In addition, the district court found that Tyson failed to meet its burden of establishing two other requirements for federal officer removal: causation and a colorable federal defense. *Id.* at 25–27.[1]

The district court was correct as to all three elements, and Tyson's motion for a stay should be denied on that basis alone. But Tyson's motion is also moot. Because the district court's remand order has already been carried out, there is

[1] The court also held that Tyson failed to establish federal question jurisdiction. This Court's precedents forecloses appellate review of that holding. *See Jacks v. Meridian Res. Co., LLC*, 701 F.3d 1224, 1229 (8th Cir. 2012). The Supreme Court is considering in *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189, whether, when appealing a remand order addressing federal officer jurisdiction, appellees may address other bases for removal. Tyson's motion, however, does not rely on federal question jurisdiction.

nothing to stay; the status quo is that the state court has jurisdiction over the case. Tyson's suggestion that a stay *must* be available in this case, and in *every* case in which a defendant appeals a remand order involving "colorable" assertions of federal officer removal, in order to allow meaningful appellate review is incorrect. The U.S. Supreme Court and courts of appeals have repeatedly denied motions to stay remand orders in cases involving assertions of federal officer removal jurisdiction, and later addressed appeals of those remand orders on the merits.

For the same reasons, the Court should reject Tyson's request that this Court jettison what Tyson refers to as the "traditional" standard that governs requests for stays pending appeal and replace it with a "colorable basis" standard. Under the correct standard, Tyson has not met its high burden.

BACKGROUND

Plaintiff commenced this action in the Iowa District Court for Black Hawk County on August 5, 2020. D.Ct.Dkt.2 Tyson removed the case to the U.S. District Court for the Northern District of Iowa on October 2, 2020, citing the federal officer removal statute, 28 U.S.C. § 1442(a)(1), and federal question jurisdiction under 28 U.S.C. § 1331(a)(1). D.Ct.Dkt.1. On November 2, 2020, Plaintiff moved to remand the action to state court, and on December 28, 2020, the district court granted the motion and ordered the case remanded. D.Ct.Dkt.49. That same day, the district court clerk mailed a copy of the remand order to the state court. Clerk's Office Entry

at D.Ct.Dkt.49. On December 31, 2020, the state court filed the remand order on its docket. D.Ct.Dkt.54-1.

On December 31, 2020, Tyson filed a notice of appeal. On January 8, 2021, it filed in the district court a motion for a stay pending appeal. It did not seek expedition of that request. Briefing was completed when Tyson filed its reply on January 25. D.Ct.Dkt.55. On January 28, the district court denied the motion, finding that it lacked jurisdiction to issue the requested relief, while also noting that it would deny a stay in any event. D.Ct.Dkt.56.

On January 29, 2021, Tyson filed in this Court a motion for an "administrative stay" and a motion for a stay of the district court's December 28 remand order pending appeal.

ARGUMENT

I. Tyson's stay request is moot.

A stay pending appeal "suspends judicial alteration of the status quo." *Nken v. Holder*, 556 U.S. 418, 429 (2009). Here, the status quo is that the state court has resumed its jurisdiction over this case pursuant to 28 U.S.C. § 1447(c). Thus, Tyson's request that this Court "stay" the district court's remand order is moot.

A. The state court has jurisdiction pursuant to 28 U.S.C. § 1447(c).

Section 1447(c) provides that, upon the district court clerk's mailing of a certified copy of the order of remand to the clerk of the State court, "the State court

may thereupon proceed with such case." Here, that mailing occurred on December 28, 2020, and the state court filed the order on its docket on December 31, 2020.

Tyson maintains that the remand order was stayed automatically pursuant to Federal Rule of Civil Procedure Rule 62(a) until January 27, 2021. *See* Stay Mot. at 8. Rule 62(a) provides that "execution on a judgment and proceedings to enforce it" are stayed for 30 days unless the court orders otherwise. By its plain language, Rule 62(a) would not seem to apply to the district court's remand order. *See Arnold v. Garlock, Inc.*, 278 F.3d 426 (5th Cir. 2001) (holding that Rule 62 does not apply to remand orders). Even putting that aside, Rule 62 has no bearing on Tyson's entitlement to a stay. Any Rule 62 stay would have expired on January 27, 2021—before Tyson made this motion. Accordingly, the remand order was effective no later than that date; as Tyson concedes, state court procedural deadlines have already begun to run.

Because the state court has resumed jurisdiction, the motion to "stay" the remand order is moot. *See Hammer v. U.S. Dep't of Health & Human Servs.*, 905 F.3d 517, 524 n.1 (7th Cir. 2018) ("HHS moved this court to stay the remand, but we denied the motion because the district court had already certified its remand orders and the case had returned to state court; therefore, there was nothing for this court to stay."); *Hudson United Bank v. LiTenda Mortg. Corp.*, 142 F.3d 151, 154 n.6 (3d Cir. 1998) ("Hudson also moved for a stay of the remand order. As the

remand order had already been sent to state court, however, this motion was moot."). As in *Hammer*—which also involved federal officer removal—so too here: "there [is] nothing for this [C]ourt to stay."

B. Tyson's policy arguments do not overcome mootness.

Tyson is wrong that a stay *must* be available to permit meaningful appellate review. In both *Hammer* and *Hudson United*, for example, the courts issued lengthy opinions addressing appellants' arguments as to the propriety of removal, despite having denied a stay. Indeed, in *Hammer*, the court reversed the remand order. *See* 905 F.3d at 530. Similarly, the Supreme Court denied a motion for a stay pending appeal of a remand order in *BP p.l.c. v. Mayor & City Council of Baltimore*, 140 S. Ct. 449 (2019), but later granted a petition for certiorari to review that order, 141 S. Ct. 222 (2020). In the interim, the Fourth Circuit issued a 24-page opinion reviewing the remand order. *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452 (4th Cir. 2019). In each case, the parties obtained meaningful appellate review—absent a stay.

Importantly, that the request for a *stay* is moot does not mean that the Court cannot provide relief if it rules for Tyson on the merits. Rather, "the appeal of a remand order would only be rendered moot in the unlikely event that a final judgment is reached in state court before the resolution of their appeal." *Mayor & City Council of Balt. v. BP P.L.C.*, 2019 WL 3464667, at *5 (D. Md. July 31, 2019).

Until that point, if Tyson prevails, this Court may direct the district court to recall its remand order, as Tyson now concedes. *See* Admin. Stay Reply at 5 (citing *Reddam v. KPMG LLP*, 457 F.3d 1054, 1062 (9th Cir. 2006)). "[F]ederal courts are fully capable of ensuring that the proceeding in state court returns to federal court if a remand order is vacated, including by enjoining state proceedings if the state court failed to give effect to the decision reversing remand." *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 423 F. Supp. 3d 1066, 1075 (D. Colo. 2019); *see also Skiles v. CarePlus Health Plans, Inc*., 2014 WL 5320135, at *2 (S.D. Fla. Oct. 16, 2014) ("Denial of Defendant's requested relief will not necessarily prohibit the purported federal officer from making its way back into federal court.").

C. Tyson has not moved this Court for any relief other than a stay.

In its reply in support of its administrative stay motion, Tyson recharacterized this stay motion as one seeking an order requiring the district court to "recall its remand order and *then* grant a stay" pending appeal pursuant to the All Writs Act. Admin. Stay Reply at 5 (emphasis added). But the motion before this Court does not ask for that relief or even cite the All Writs Act. *See* Fed. R. App. P. 27(a)(2)(A) ("A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it."); *see also Navarijo-Barrios v. Ashcroft*, 322 F.3d 561, 564 n.1 (8th Cir. 2003) ("It is well settled that we do not consider arguments raised for the first time in a reply brief.").

A motion seeking an order that the district court *recall* its remand order seeks to compel that court to take action and alter the status quo. The appropriate procedural vehicle for such relief is a request for a writ of mandamus. *See*, *e.g.*, *In re DaimlerChrysler Corp.*, 294 F.3d 697, 698 (5th Cir. 2002); *In re Continental Casualty Co.*, 29 F.3d 292 (7th Cir. 1994). Such relief is proper only where the movant can show "exceptional circumstances." *In re Lombardi*, 741 F.3d 888, 893 (8th Cir. 2014) (*en banc*). Here, not only did Tyson not request mandamus relief, it could not meet (and did not attempt to meet) that standard, particularly given its failure to move the district court to recall its order. Tyson's inability to show a strong likelihood of success in its appeal on the merits, *see infra* III.A, also means it has not established a "clear and indisputable" right to relief, *see Lombardi*, 741 F.3d at 894.

II. The "traditional" stay standard, not Tyson's suggested "colorable basis" test, applies.

In determining whether to grant a stay pending appeal pursuant to Rule 8(a), this Court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Brakebill v. Jaeger*, 905 F.3d 553, 557 (8th Cir. 2018) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Nken*, 556 U.S. at 425–26. "The most

important factor is likelihood of success on the merits, although a showing of irreparable injury without a stay is also required." *Brakebill*, 905 F.3d at 557 (citing *Brady v. NFL*, 640 F.3d 785, 789 (8th Cir. 2011)).

Tyson, however, asks the Court to adopt a special standard for stays pending appeal in federal officer removal cases, and issue stays whenever "there is a colorable basis for federal-officer removal." Stay Mot. at 10. First, Tyson's argument is based on the incorrect premise that a stay is necessary for a meaningful appeal. *See supra* I.B. Furthermore, a "colorable basis" standard is not supported by the federal officer removal statute or by the practice of the Supreme Court and the courts of appeals. The Supreme Court, courts of appeals, and district courts have frequently denied stays of remand orders rejecting federal officer removal, despite "colorable" bases for removal. *See*, *e.g.*, *Hammer*, 905 F.3d at 524 n.1. And several courts of appeals have, in analogous cases, explicitly applied the *Nken* standard. *See*, *e.g.*, *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.), Inc.*, No. 19-1330 (10th Cir. Oct. 17, 2019), Exhibit 1 at 1–2; *Mays v. City of Flint, Mich.*, No. 16-2484 (6th Cir. Jan. 13, 2017), Exhibit 2 at 1–2; *Wilde v. Huntington Ingalls, Inc.*, 616 F. App'x 710, 712 (5th Cir. 2015). This Court should do the same.

III. Tyson is not entitled to a stay under the applicable standard.

Under the applicable standard, Tyson's motion should be denied because none of the four factors weighs in favor of a stay.

A. Tyson is not likely to succeed on the merits.

"Four elements are required for removal under § 1442(a)(1): (1) a defendant has acted under the direction of a federal officer, (2) there was a causal connection between the defendant's actions and the official authority, (3) the defendant has a colorable federal defense to the plaintiff's claims, and (4) the defendant is a 'person,' within the meaning of the statute." *Jacks*, 701 F.3d at 1230. Here, the district court concluded that Tyson did not establish *any* of the first three elements. Tyson has not made a strong showing that the court was incorrect as to any of the three, much less all three.

1. Tyson was not acting under the direction of a federal officer.

Tyson's notice of removal was explicitly grounded on the assertion that it "continued to operate the Waterloo facility" following "directions and supervision from federal officers, including directives from the President and the Secretary of Agriculture and guidance from the CDC and OSHA." Dist.Ct.Dkt.1 at 3. The "Presidential order" cited was Executive Order 13917, issued on April 28, 2020—after Mr. Fernandez died. *See* 85 Fed. Reg. 26,313 (May 1, 2020). In addition, that order does not direct Tyson or any other entity to "continue operations"; the only directions are to the Secretary of Agriculture. *See id.* at 26,314. Likewise, the removal notice cites a communication from the Secretary of Agriculture to industry dated May 5, 2020. *See* D.Ct.Dkt.1 at 8 (citing USDA, Letter to Stakeholders (May

5, 2020)). Again, this document post-dates Mr. Fernandez's death. In any event, the only "directive" it contained was that "plants contemplating reductions of operations or recently closed since Friday May 1, and without a clear timetable for near term resumption of operations" should "submit written documentation of their operations and health and safety protocol developed based on the CDC/OSHA guidance to USDA." Stakeholder Letter. Finally, the CDC/OSHA guidance referenced in Tyson's removal notice was not issued until April 26, 2020. *See* Meat and Poultry Processing Workers and Employers: Interim Guidance from CDC and the Occupational Safety and Health Administration (OSHA), https://stacks.cdc.gov/view/cdc/87280. Nothing in this guidance—which by definition was not binding—constituted a direction, even after it was issued.

As the district court stated, and as Tyson now appears to concede, none of these documents could constitute "federal direction" before the documents existed. *See* D.Ct.Dkt.49 at 23. Tyson thus now relies on a *gestalt* theory of federal direction, noting (1) that in a March 15, 2020, conference call, President Trump made generic statements about the importance of the food supply and of industry and government "working hand-in-hand"; (2) that the meatpacking industry is considered "critical infrastructure"; (3) that the meatpacking industry continued to be subject to inspection for food safety regulation compliance by USDA; and (4) that federal agencies helped Tyson get "necessary PPE and other critical supplies." Stay Mot. at

2–3, 14–15. Tyson is unlikely to succeed in its argument that these general interactions between a heavily regulated industry and the federal government constitute federal officer direction that supports removal.

To begin with, Tyson's current theory of federal officer jurisdiction is not based on the averments of Tyson's removal notice, and thus not properly before the Court. *See, e.g.*, *Rader v. Sun Life Assur. Co. of Canada*, 941 F. Supp. 2d 1191, 1196 (N.D. Cal. 2013) ("a defendant [cannot] present new grounds for removal for the first time in opposition to a motion for remand" (citing *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality of Mont.*, 213 F.3d 1108, 1117 (9th Cir. 2000))); *see also James Valley Coop. Tel. Co. v. S.D. Network, LLC*, 292 F. Supp. 3d 938, 946 (D.S.D. 2017) (rejecting attempt to advance "different theory for removal than what [defendant] asserted in its Notice of Removal"). Because Tyson's new argument does more than "set out more specifically the grounds for removal that already have been stated in the original notice," but rather introduces *different* grounds for removal—well beyond the expiration of time to remove—it is improper. Wright & Miller, 14C Fed. Prac. & Proc. Juris. § 3733 (Rev. 4th ed.).

In any event, these interactions with government officials do not constitute federal direction, as the district court ruled. D.Ct.Dkt.49 at 24. Federal officer removal "requir[es] more than mere compliance (or noncompliance) with federal laws, rules, and regulations … even if highly detailed, and even if the private firm's

activities are highly supervised and monitored." *Jacks*, 701 F.3d at 1232. Rather, "a relationship must be formed such that the individual or company has agreed to act on behalf of the federal officer or agency to further a federal purpose." *Castillo v. Snyders*, 2020 WL 6287402, at *2 (N.D. Ill. Oct. 27, 2020) (citing *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 153 (2007)).

Tyson's theory "would expand the scope of the statute considerably, potentially bringing within its scope state-court actions filed against private firms in many highly regulated industries." *Watson*, 551 U.S. at 153. The federal government has designated *sixteen* different sectors, representing tens and thousands of companies and private persons in the United States, as "critical infrastructure." *See* Presidential Policy Directive/PPD-21, Critical Infrastructure Security and Resilience (Feb. 12, 2013), https://bit.ly/3jqTgcY. The sectors include "food and agriculture," and other heavily regulated industries such as communications, information technology, financial services, and transportation systems. *Id.* Under Tyson's theory that no specific directive need be identified, the pandemic would have converted all of these industries into deputies of the federal government, at all times, with respect to all of their operations. Such an argument is untenable.

Tyson is correct that the "acting under" element of § 1442(a)(1) does not "turn on the level of formality with which the government issues instructions." Stay Mot. at 15. The issue here is not the level of formality, though, but whether the

government has issued instructions at all. Tyson gives as an example a situation where "a federal officer jumps into the passenger seat and tells a private individual to drive in pursuit of a fleeing suspect." *Id*. An example more analogous to this case would be a federal officer appearing at a rally and stating, "Capturing criminals is a good thing." If a vigilante left the rally and kidnapped someone whom he suspected of committing a crime on the street, he would not be entitled to claim that he was acting as a federal officer based on the officer's generic statement.

The grab-bag of interactions on which Tyson relies shows that (1) the meatpacking industry was in frequent contact with the federal government, (2) the meatpacking industry is subject to federal regulation, and (3) the federal government thought the meatpacking industry was important, both before and during the pandemic. Plaintiff does not dispute any of these propositions. But the propositions do not show that Tyson was acting under a federal officer's direction. They do not show that Tyson was aiding the federal government in carrying out governmental tasks; they show, at most, that the federal government was aiding Tyson in the operation of its business.

2. The challenged actions and inactions do not "relate to" the claimed federal direction.

Tyson has further failed to show that the actions and inaction that form the basis for Plaintiff's action are "related to" any federal directives, as required by the federal officer removal statute, 28 U.S.C. § 1442(a)(1). To meet this requirement,

removing parties must show "that the challenged acts 'occurred *because of* what they were asked to do by the Government.'" *Goncalves by & through Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1245 (9th Cir. 2017) (quoting *Isaacson v. Dow Chemical Co.*, 517 F.3d 129, 137 (2d Cir. 2008)); *see also Jacks*, 701 F.3d at 1230 n.3 (citing *Isaacson* and applying "because of" standard). Tyson advocates a lower "connection or association" standard, citing Fourth Circuit precedent, Stay Mot. at 16 (citing *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017)—which the district court applied. *See* Dist.Ct.Dkt.49 at 22–23, 25–26. Under either standard, Tyson's argument fails.

Tyson's causation argument is based on a single purported federal direction—the direction "to continue operating in accordance with CDC guidance." Stay Motion at 17. But as noted above, that guidance was issued *after* Mr. Fernandez died. Whether or not Tyson became subject to a federal directive on a related topic *after* the actions underlying the lawsuit, that directive cannot satisfy the causation requirement of § 1442(a)(1).

Tyson faults the district court for "ignoring the significant federal interaction before" the April 28, 2020 Executive Order. Stay Motion at 17. It fails, however, to identify any aspects of that "interaction" that constituted directives to which Plaintiff's claims relate. As the district court explained, Tyson was *not* under any federal direction to keep its plants open in the relevant time period. Indeed, Tyson

suspended operations completely at its Columbus Junction plant on or about April 6, 2020, and then shut down the Waterloo facility on April 22, 2020. Dist.Ct.Dkt.49 at 25. In any event, the allegations here are that Tyson was negligent in *how* it operated its plant while it remained open and that Tyson made fraudulent misrepresentations to workers in doing so. *Id.* at 26–27. Tyson has identified no directive that caused Tyson to "[f]ail[] to promptly isolate and send home sick or symptomatic workers," or "[f]ail[] to educate and train workers and supervisors, including those with limited or non-existent English language abilities, about how they can reduce the spread of, and prevent exposure to COVID-19." D.Ct.Dkt.2 at ¶¶ 109(e),(t) and 125(e),(t).

As the district court explained, "[n]o federal officer directed Tyson to keep its Waterloo facility open in a negligent manner … or make fraudulent misrepresentations to employees at the Waterloo facility regarding the risks or severity of the coronavirus pandemic and COVID-19 outbreak at the Waterloo facility." D.Ct.Dkt.49 at 25–26. In this respect, this case is similar to *BP*, where the Fourth Circuit, applying *Sawyer*, found that claims about the concealment and misrepresentation of fossil fuels' known dangers were too attenuated from the claimed federal control of production and sales of such fuels to be "related to" such federal direction. 952 F.3d at 467. So too here, Plaintiff's claims that Tyson

fraudulently misrepresented the safety of its workplace are insufficiently related to any federal officer direction Tyson was purportedly acting under.

3. Tyson lacks a colorable federal defense.

Finally, Tyson claims federal defenses relating to the Defense Production Act (DPA) and the Federal Meat Inspection Act (FMIA). Neither is colorable.

Although Title I of the DPA *can* be exercised through informal means, Stay Mot. at 19 (citing *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 994 (5th Cir. 1976)), Tyson has offered *no* colorable basis to show that it was. Title I of the DPA concerns orders to prioritize the performance of certain contracts over others. 50 U.S.C. §§ 4511–18. There is no evidence that this authority was deployed as to Tyson—either before the April 28, 2020 Executive Order or after. The Executive Order simply directed the Secretary of Agriculture to *consider* doing so "as he deem[ed] appropriate." 85 Fed. Reg. at 26314.

Moreover, Tyson's DPA theory would not provide a colorable defense in any case, because the DPA's narrow immunity provision, 50 U.S.C. § 4557, would not apply to Plaintiff's tort claims. In reasoning adopted by this Court in *United States v. Vertac Chemical Corp.*, 46 F.3d 803, 812 (8th Cir. 1995), the Federal Circuit explained that section 4557 merely codifies the common-law doctrine of impossibility by "provid[ing] a defense for a DPA contractor against a suit by a non-government customer in the event that the DPA contractor is forced to breach

another contract to fulfill the government's requirements." *Hercules Inc. v. United States*, 24 F.3d 188, 203 (Fed. Cir. 1994); *see also E. Air Lines*, 532 F.2d at 997. Such a defense is irrelevant here, even if the Secretary had invoked the DPA's contract-priority scheme.

To the extent that Tyson argues that the DPA preempts Plaintiff's claims in some other way, that argument is also precluded by Circuit precedent. "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 599–600 (8th Cir. 2005) (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992)). By providing that the DPA preempts only contract claims, Congress has expressed its judgment that tort claims can co-exist without frustrating that statutory scheme. And there is no conflict: Even if the federal government had ordered Tyson to perform certain contracts, Tyson could have done so without lying to its employees and while taking adequate safety measures. As the federal government explained in *Vertac*, "allowing a government contractor to violate the laws with impunity, so long as it is performing a rated contract" would be an "absurd result." 46 F.3d at 812 (characterizing government's argument). This Court rejected that absurd result in *Vertac* and should do so here.

Tyson's arguments as to the FMIA, which the district court suggested were frivolous, Dist.Ct.Dkt.49 at 27, fare no better. No court has held that the FMIA

preempts workplace safety laws as applied to meatpacking plant workers—and for good reason. "The FMIA regulates a broad range of activities at slaughterhouses to ensure both the safety of meat and the humane handling of animals." *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 455 (2012). As USDA has itself explained, under the FMIA, "the Agency does not have the authority to regulate issues related to establishment worker safety." FSIS, USDA, Final Rule, Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300, 52,305 (Oct. 1, 2019). "OSHA is the Federal agency with statutory and regulatory authority to promote workplace safety and health." *Id.*

To read the FMIA as preempting state tort law claims by injured workers would create an absurd tension with the Occupational Safety and Health Act—which expressly provides that such claims are *not* displaced by that statute. 29 U.S.C. § 653(b)(4).

B. Tyson will not suffer irreparable harm absent a stay.

Tyson has not established that it will suffer irreparable injury absent a stay. The only cited harm is the need to litigate in state court. "These mere injuries in terms of energy, effort, money, etc., are simply not irreparable harms." *Tennessee ex rel. Slatery v. Tenn. Valley Auth.*, 2018 WL 3092942, at *6 (M.D. Tenn. June 22, 2018); *see also 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.").

Every movant for a stay pending appeal of a remand order, or any interlocutory appeal, could cite the harm of litigation in multiple fora on "parallel tracks," Stay Mot. at 21, yet courts regularly hold that such claims do not demonstrate irreparable injury. *See, e.g.*, *Suncor*, 423 F. Supp. 3d at 1074; *BP*, 2019 WL 3464667, at *5; *Slatery*, 2018 WL 3092942, at *6; *Washington v. Monsanto Co.*, 2018 WL 9669810, at *1 (W.D. Wash. Mar. 23, 2018); *Morgan v. Dow Chem. Co.*, 2017 WL 7833615, at *10 (M.D. La. July 18, 2017). The only impending state court deadline Tyson references is for filing a responsive pleading—which is hardly a significant undertaking, given that Tyson filed a motion to dismiss in this action while it was pending in the district court. Dist.Ct.Dkt.21.

C. The balance of hardships weighs against a stay.

Tyson will have to litigate this case *somewhere* even if it prevails on appeal, and thus any hardship to it is minimal. If, as it argues, Plaintiff's claims are barred as a matter of Iowa workers' compensation law, *see* Stay Mot. at 21, the Iowa state court is capable of resolving that state-law issue. In contrast, "[i]ssuing a stay pending an appeal that is not likely to succeed on the merits would be against the interests of the Plaintiff." Dist.Ct.Dkt.64 at 7. Plaintiff filed this case in state court more than sixth months ago and has still not received a responsive pleading in that

court. Putting this case on hold pending resolution of a meritless appeal will further delay Plaintiff's ability to pursue justice on behalf of his deceased father. *Cf. Dakota, Minn. & E. R.R. Corp. v. Schieffer*, 742 F. Supp. 2d 1055 (D.S.D. 2010) (delaying resolution of litigant's claim in other forum would be prejudicial).

D. The public interest is not served by a stay.

The public interest would not be served by allowing justice to be delayed by a meritless appeal. Tyson's argument as to the public interest is based on Tyson's incorrect assertion, discussed above, that denying a stay would foreclose meaningful appellate review. This Court, however, can evaluate Tyson's arguments on the merits without a stay.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellee respectfully requests the Court deny Defendants-Appellants' motion for a stay.

Respectfully submitted,

/s/ Adam R. Pulver

Thomas P. Frerichs
FRERICHS LAW OFFICE, P.C.
106 E. 4th Street, P.O. Box 328
Waterloo, IA 50704-0328
(319) 236-7204

Adam R. Pulver
Scott L. Nelson
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

John J. Rausch
RAUSCH LAW FIRM, PLLC
3909 University Ave., P.O. Box 905
Waterloo, IA 50704-0905
(319) 233-3557

Mel C. Orchard, III
G. Bryan Ulmer, III
Gabriel Phillips
THE SPENCE LAW FIRM, LLC
15 S. Jackson Street
P.O. Box 548
Jackson, WY 83001
(307) 337-1283

Attorneys for Plaintiff-Appellee

February 8, 2021

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the motion exempted by Fed. R. App. P. 32(f), it contains 5,147 words.

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 MSO in 14-point Times New Roman.

3. This motion has been scanned for viruses and is virus-free.

February 8, 2021

/s/ Adam R. Pulver
Adam R. Pulver
Attorney for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Adam R. Pulver
Adam R. Pulver
Attorney for Plaintiff-Appellee

FILED
United States Court of Appeals
Tenth Circuit

October 17, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY; BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; CITY OF BOULDER,

Plaintiffs - Appellees,

v.

SUNCOR ENERGY (U.S.A.), INC.; SUNCOR ENERGY SALES INC.; SUNCOR ENERGY INC.; EXXON MOBIL CORPORATION,

Defendants - Appellants.

No. 19-1330
(D.C. No. 1:18-CV-01672-WJM-SKC)
(D. Colo.)

ORDER

Before **LUCERO** and **McHUGH**, Circuit Judges.

Appellants request an emergency stay of the district court's remand order pending this court's determination of their appeal. In deciding whether to grant a stay pending appeal, this court considers, "(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." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks omitted). The decision

whether to grant a stay involves "an exercise of judicial discretion," *id.* at 433 (internal quotation marks omitted), and "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion," *id.* at 433-34.

Upon consideration, we conclude that Appellants have not made the necessary showing to warrant entry of a stay pending appeal. Accordingly, the motion for stay is denied. The deadline for Appellees to file a response to the motion is vacated, and Appellants' motion for clarification is denied as moot.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

No. 16-2484

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 13, 2017
DEBORAH S. HUNT, Clerk

MELISSA MAYS, et al.,)
)
Plaintiffs-Appellees,)
)
v.) O R D E R
)
CITY OF FLINT, MICH., et al.,)
)
Defendants,)
)
PATRICK COOK, et al.,)
)
Defendants-Appellants.)

Before: COLE, Chief Judge; GILMAN and GRIFFIN, Circuit Judges.

The defendants-appellants are current or former employees of the Michigan Department of Environmental Quality ("MDEQ") who removed this action arising from the Flint water crisis to district court under the federal-officer removal statute, 28 U.S.C. § 1442, and on the ground that the action raised a substantial federal question. They appeal the October 6, 2016 order remanding the case to state court, where the case is now proceeding. The MDEQ defendants move for a stay of the remand order. The plaintiffs oppose the motion for a stay.

As the movants, the MDEQ defendants "bear[] the burden of showing that the circumstances justify" our exercise of discretion to grant a stay of the remand order pending appeal. *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). We consider four factors: (1) whether the MDEQ defendants have a likelihood of success on the merits; (2) whether they will suffer

irreparable harm in the absence of a stay; (3) whether the requested injunctive relief will substantially injure other interested parties; and (4) where the public interest lies. *Id.* at 434; *see also Ohio St. Conference of N.A.A.C.P. v. Husted*, 769 F.3d 385, 387 (6th Cir. 2014); *Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012). These four factors "are not prerequisites that must be met, but interrelated considerations that must be balanced." *In re EPA*, 803 F.3d 804, 806 (6th Cir. 2015). However, the first two factors, the likelihood of success on the merits and irreparable harm, "are the most critical." *Nken*, 556 U.S. at 434.

Generally, a party is required to seek a stay pending appeal in the first instance in the district court. Fed. R. App. P. 8(a)(1). But the district court's delay in ruling on the pending motion for a stay renders it impracticable for the MDEQ defendants to continue waiting for relief from that court. *See* Fed. R. App. P. 8(a)(2).

Federal-officer removal applies not only to federal officers and agencies but to private persons acting under them. "[A]cting under" generally involves guidance or control and "must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 151–52 (2007). And "the help or assistance necessary to bring a private person within the scope of the statute does *not* include simply *complying* with the law." *Id.* at 152; *see also Bennett v. MIS Corp.*, 607 F.3d 1076, 1086 (6th Cir. 2010). The MDEQ defendants have not shown a strong likelihood of success on the merits of their claim that they were acting under the Environmental Protection Agency or its officers within the meaning of § 1442. Nor have they demonstrated that they will suffer irreparable harm by having to litigate this action in state court while their appeal is pending. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.").

Accordingly, the motion for a stay of the remand order is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk