UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON MOBIL CORPORATION,

Plaintiff,

v.

ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity,

Defendants.

No. 17-CV-2301 (VEC) (SN)

EXXON MOBIL CORPORATION'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064

HAYNES & BOONE, LLP
2323 Victory Avenue, Suite 700
Dallas, TX 75219
Tel: (214) 651-5579

CANTEY HANGER LLP
600 W. 6th St. #300
Fort Worth, TX 76102
Tel: (817) 877-2800

Counsel for Exxon Mobil Corporation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

Plaintiff Exxon Mobil Corporation ("ExxonMobil") respectfully submits this reply in further support of its motion for leave to file a proposed Second Amended Complaint ("SAC").[1]

PRELIMINARY STATEMENT

Unable (or unwilling) to defend the ever-expanding record of their misconduct, the Attorneys General ask this Court to ignore factual allegations ExxonMobil identified in the public record and included in its SAC. Their evasiveness should come as no surprise. For the better part of two years, the Attorneys General have fought tooth and nail to prevent this case from proceeding to a ruling on the merits. By their own admission, they have filed six rounds of briefing urging dismissal at the threshold on various grounds,[2] but none of those arguments have been accepted by any court. While the Attorneys General express dismay at the multiple rounds of briefs they have chosen to file, neither this Court nor ExxonMobil can be blamed for their incessant submission of meritless briefs. Notwithstanding the Attorneys General's voluminous briefing, the record contains precisely one judicial ruling, which formed the basis for transfer to this district, on whether ExxonMobil's case should move forward. It reads: the "merits of each of Exxon's claims involve important issues that should be determined by a court."[3] Nothing the Attorneys General say in their briefs detract from the continued accuracy of that conclusion.

Opposing amendment at this stage of the proceedings smacks of pure desperation. Under the liberal standard applicable here, amendment should be freely granted unless there is a powerful reason not to do so, such as futility, unfair prejudice, or unreasonable delay. While the Attorneys General present threadbare, conclusory arguments that those factors are present here, even a cursory consideration of them leads to precisely the opposite conclusion. Allowing

1 ECF No. 252-1.

2 ECF. No. 255 at 1 (six rounds of briefing); ECF No. 256 at 1 (20 briefs). By ExxonMobil's count, there have been five rounds of briefing on dismissal. Regardless of those differences, all parties appear to agree that the Attorneys General's unsuccessful efforts to have ExxonMobil's case dismissed generated an exceptional volume of briefing.

3 ECF No. 180 at 2.

ExxonMobil's amendment will further the Second Circuit's strong interest in resolving cases on the merits, rather than technicalities, and be fully consistent with the rationale for transfer to this district—so that the merits of ExxonMobil's claims can be adjudicated. But the Attorneys General do not want a ruling on the merits, nor can they stomach discovery, fearing that it would direct sunlight, the "best of disinfectants," on their unlawful conspiracy to violate the First Amendment rights of those who do not embrace their political agenda. The Attorneys General's campaign of delay and distraction, exhibited most recently in frivolously opposing a routine, pre-discovery request to amend a complaint, should be unambiguously rebuffed.

ARGUMENT

Rule 15(a) of the Federal Rules of Civil Procedure instructs courts to "freely" grant leave to amend a complaint "when justice so requires." As the Attorneys General do not dispute, leave to amend is governed by a "permissive standard," which is consistent with the Second Circuit's "strong preference for resolving disputes on the merits." *Loreley Fin. (Jersey) No. 3 Ltd.* v. *Wells Fargo Sec., LLC*, 797 F.3d 160, 190 (2d Cir. 2015) (citation and internal quotation marks omitted). Courts may deny leave to amend only when "there is a substantial reason to do so." *Friedl* v. *City of New York*, 210 F.3d 79, 87 (2d Cir. 2000). Here, the Attorneys General have identified no substantial reason to deny ExxonMobil leave to amend. Granting the amendment would not be futile because the SAC, just like the First Amended Complaint ("FAC"), contains detailed factual allegations supporting each of ExxonMobil's claims. Nor have the Attorneys General identified any unfair prejudice or improper delay that would result from granting ExxonMobil's motion. Because the SAC alleges facts supporting "proper subject[s] of relief, [ExxonMobil] ought to be afforded an opportunity to test [its] claim[s] on the merits," and leave to amend should be granted. *Foman* v. *Davis*, 371 U.S. 178, 182 (1962).

I. Amendment Is Not Futile.

ExxonMobil seeks amendment in light of developments that have taken place since the FAC was filed over a year ago. During that time, the Attorneys General have filed brief after brief to avoid a resolution of this case on the merits and to evade routine civil discovery (even though they have no right to a stay of discovery while their motions to dismiss are pending). Outside the courtroom, however, additional facts have come to light exposing the unlawful purposes animating their efforts to regulate speech on climate policy, and Attorney General Schneiderman has expanded his coercive efforts against ExxonMobil by issuing multiple subpoenas, all of which are within the scope of the claims asserted here. Amendment will bring the operative complaint in line with the current state of the public record and conform the relief requested to the constitutional violations alleged.

The Attorneys General do not take issue with the new allegations presented in the SAC; in fact, they do not seriously engage with them at all. Instead, they argue amendment should be denied because the new allegations are "little more than a further embellishment" of the allegations in the FAC. (Mass. Opp. 3; N.Y. Opp. 2.[4]) The Attorneys General therefore rely on the same erroneous arguments to oppose amendment that they previously used to urge outright dismissal.[5] (Mass. Opp. 2-5; N.Y. Opp. 1-2.) Those arguments are no more persuasive here, in their recycled form, than they were in the last round of briefing.

At this point, there can be no reasonable dispute that ExxonMobil has stated claims upon which relief can be granted. The SAC, like the FAC, contains concrete factual allegations to support ExxonMobil's claims that the Attorneys General launched objectively unjustified

[4] "Mass. Opp." refers to the Massachusetts Attorney General's opposition to ExxonMobil's motion for leave to amend. (ECF No. 255.) "N.Y. Opp." refers to the New York Attorney General's opposition to ExxonMobil's motion for leave to amend. (ECF No. 256.) "Br." refers to ExxonMobil's memorandum of law in support of its motion for leave to amend. (ECF No. 251.)

[5] Attorney General Healey initially did not even contest the sufficiency of ExxonMobil's claims in her original motion to dismiss (ECF No. 42) but now claims the deficiency is so obvious no amendment should be allowed.

investigations of ExxonMobil to coerce it into embracing their viewpoint on climate policy. As alleged in the SAC, at the March 2016 press conference, the Attorneys General identified so-called "confusion," "misperceptions," and "misunderstand[ings]" about the risks of climate change, which they attributed to the speech of ExxonMobil and others—speech they disfavored. (SAC ¶¶ 2, 28-30.) In order to change "public awareness" and "clear[] up" the public debate on climate change, the Attorneys General pledged to "step into this battle" and "h[o]ld accountable" those "morally vacant forces" whose speech purportedly stalled efforts to promote climate policy the Attorneys General support. (*Id.* ¶¶ 2, 28-35.) To achieve that goal, the Attorneys General pursued pretextual investigations of ExxonMobil, issuing burdensome document requests that inquire into ExxonMobil's speech about climate policy and its communications with the Attorneys General's perceived political opponents, subject matter at the core of the First Amendment. (*Id.* ¶¶ 1-2, 7, 81-82, 90-91.) These document requests were the culmination of a multi-year campaign of special, private interests, including Matt Pawa, Peter Frumhoff, and Naomi Oreskes, who met with the Attorneys General or their staff members many times as part of their efforts to find a "single sympathetic state attorney general" who could "maintain[] pressure on the [energy] industry" and coerce "its support for legislative and regulatory responses to global warming." (*Id.* ¶¶ 39-47.)

Government officials, like the Attorneys General, engage in improper viewpoint discrimination where, as here, they "target[]" speech because of the "particular views taken by speakers." *Wandering Dago, Inc.* v. *Destito*, 879 F.3d 20, 31 (2d Cir. 2018) (citation and internal quotation marks omitted); *see also Rosenberger* v. *Rector & Visitors of Univ. of Virginia,* 515 U.S. 819, 829 (1995) (noting that when the government "targets . . . particular views taken by speakers," it is a "blatant" First Amendment violation). To establish standing to bring a First Amendment challenge to such official misconduct, a plaintiff need show only that "his speech has been adversely affected by the government retaliation or that he has suffered some other concrete harm." *Dorsett* v. *Cty. of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013). ExxonMobil's standing is adequately established by the burden and expense it has incurred responding to the Attorneys General's unlawful investigations. (SAC ¶¶ 2, 90, 92.) Nothing more is required to allege a First Amendment violation at the pleading stage.[6]

The Attorneys General recycle other arguments rebutted at length in ExxonMobil's recent brief opposing dismissal (ECF No. 249) and addressed here only briefly. Attorney General Schneiderman continues to feign ignorance of the speech at issue in these proceedings (N.Y. Opp. 2), but ExxonMobil has unambiguously identified speech about climate policy as the focus of its lawsuit (ECF No. 249 at 19-20). The Attorney General's disingenuous posturing on that issue should cease. Attorney General Schneiderman also contends that a conspiracy against ExxonMobil cannot be sustained under Section 1985 because ExxonMobil does not fall within a protected class. (N.Y. Opp. 2.) Not so. Under *Dolan* v. *Connolly*, federal conspiracy law "covers classes beyond race," such as political affiliations, 794 F.3d 290, 296 (2d Cir. 2015), and *Keating* v. *Carey* holds that, through Section 1985, Congress "did not seek to protect only Republicans, but to prohibit political discrimination in general," 706 F.2d 377, 387 (2d Cir. 1983); *see also N.Y. State Nat'l Org. for Women* v. *Terry*, 886 F.2d 1339, 1359 (2d Cir. 1989) ("[T]his Circuit as well as other Circuits have held that § 1985(3) encompasses women as a class, or classes based on political associations, or those based on ethnicity . . . .").

Attorney General Healey argues that ExxonMobil's Dormant Commerce Clause claim must fail because subpoenas are not an instrument of direct regulation of speech. (Mass. Opp.

---

6 This argument is presented in greater detail in ExxonMobil's brief opposing the Attorneys General's most recent motion to dismiss. (ECF No. 249 at 16-24.)

4.) However, direct regulation of speech is not required for a Dormant Commerce Clause violation. State action violates the Dormant Commerce Clause when it has the "practical effect" of regulating speech outside of that state's borders. *See Am. Booksellers Found.* v. *Dean*, 342 F.3d 96, 102-03 (2d Cir. 2003). Furthermore, as ExxonMobil has explained, government action can have the effect of improperly regulating speech when it "stifle[s] protected speech," even if it is not a direct regulation of speech. (ECF No. 249 at 22 (quoting *Okwedy* v. *Molinari*, 333 F.3d 339, 344 (2d Cir. 2003)); *id.* 36-37.) Attorney General Healey also claims that federal law does not preempt state investigations concerning deception and fraud. (Mass. Opp. 4.) Attorney General Healey once again fails to acknowledge that, while states can enact and apply their own securities laws, they may not enforce laws that conflict with federal securities regulations, as the Attorneys General have done here by claiming that ExxonMobil was required to make additional disclosures about its proved reserves that conflict with federal securities regulations. (ECF No. 249 at 40-41.) Finally, despite Attorney General Healey's claim to the contrary (Mass. Opp. 4), ExxonMobil's state claims are not barred by the Eleventh Amendment because it does not protect state actors, like the Attorneys General, who act beyond the scope of their statutory authority, including by engaging in unconstitutional viewpoint discrimination. *See Minotti* v. *Lensink*, 798 F.2d 607, 609 (2d. Cir 1986); (ECF No. 249 at 42-43).[7]

In a desperate maneuver, Attorney General Healey urges denial of amendment because she is not directly named in the new allegations. (Mass. Opp. 3.) That assertion is false (and would be legally irrelevant even if true). Two of the new allegations in the SAC concern meetings members of her office attended with prominent special interests pushing for an unlawful investigation of energy companies generally. (SAC ¶¶ 46, 69.) Another allegation

[7] To the extent Attorney General Healey claims that ExxonMobil's SAC should be dismissed on the threshold grounds of preclusion, abstention, ripeness, and personal jurisdiction (Mass. Opp. 4), ExxonMobil's prior briefing in defense of the FAC is fully applicable to the SAC. (ECF No. 228.)

notes how, after the March 2016 press conference, Mr. Frumhoff continued to engage with Attorney General Healey. (*Id.* ¶ 47 & n.96.) But even if Attorney General Healey were not named in any of the amendments, that would provide no basis to deny leave to amend. The amendments pertain to Attorney General Healey's co-defendant and to others involved in promoting the Attorneys General's unlawful actions. Such amendments are well within the scope of Rule 15. *See Gym Door Repairs, Inc.* v. *Young Equip. Sales, Inc.*, No. 15-CV-4244 (JGK), 2016 WL 6652733, at *3 (S.D.N.Y. Nov. 10, 2016) (granting plaintiffs' request to amend the complaint to add additional allegations supporting a conspiracy claim against one of several defendants).

II. Amendment Will Not Result in Unfair Prejudice.

Offering only conclusory references to unfair prejudice, the Attorneys General fail to provide any concrete and specific harm that amendment would cause. Attorney General Schneiderman complains that granting ExxonMobil's motion would "prolong this action" and "divert the attention and public resources" of the Attorneys General. (N.Y. Opp. 2-3.) But such "complaints of the time, effort and money . . . expended litigating the matter, without more, [do not] constitute prejudice sufficient to warrant denial of leave to amend." *Pasternack* v. *Shrader*, 863 F.3d 162, 174 (2d Cir. 2017) (alteration and internal quotation marks omitted).

Even if complaints about routine litigation burdens were relevant, it would be of no help to the Attorneys General. By denying any need for further briefing challenging the adequacy of the SAC, the Attorneys General concede that the SAC presents no real burden to them. Attorney General Healey submits that the SAC has only "inconsequential changes" and that, as a result, she would not need to file supplemental briefing urging dismissal. (Mass. Opp. 5 n.5.) Attorney General Schneiderman similarly maintains that the SAC contains "the same core allegations" and the same perceived defects. (N.Y. Opp. 2.) In light of the Attorneys General's representations that no further briefing is required to resolve the sufficiency of the SAC, any complaints about unfair prejudice fall flat.

III. Amendment Is Not Unduly Delayed or Sought with a Dilatory Motive.

ExxonMobil's requested amendment is not unduly delayed and is not sought with a dilatory motive. The Attorneys General argue that ExxonMobil's motion is unduly delayed because ExxonMobil could have amended its complaint with some additional facts at an earlier time. (N.Y. Opp. 3-4; Mass. Opp. 5-6.) On this front, Attorney General Schneiderman faults ExxonMobil for not filing a motion to amend its complaint each time his office issued ExxonMobil a new subpoena or a new fact about the Attorneys General's unlawful conspiracy came to light. (N.Y. Opp. 3.) No rule or precedent requires any such thing. But even if that were the law, it would be satisfied here because the SAC contains allegations that came to light within weeks of ExxonMobil's motion for leave to amend.[8] Surely that would satisfy even Attorney General Schneiderman's novel standard, which is not the law for good reason. ExxonMobil was under no obligation to impose the administrative burden on this Court of seeking leave to amend each time a news article uncovered further official malfeasance or Attorney General Schneiderman issued yet another subpoena. The inefficiency and impracticality of such an approach need no further elaboration.

Such a rule would also be contrary to the holding of courts in this Circuit that "the mere fact that [the plaintiff] could have moved at an earlier time to amend does not by itself constitute an adequate basis for denying leave to amend." *Daniels* v. *Loizzo*, 174 F.R.D. 295, 298 n.1 (S.D.N.Y. 1997); *see also Richardson Greenshields Secs., Inc.* v. *Lau*, 825 F.2d 647, 653 n.6 (2d Cir. 1987) (collecting cases where parties "have been permitted to amend their pleadings to assert new claims long after they acquired the facts necessary to support those claims"). The

[8] Br. 7 (describing allegations concerning conduct from November and December 2017).

cases on which the Attorneys General rely to argue otherwise are distinguishable as they pertain to actions that had progressed further than this one. (N.Y. Opp. 3-4; Mass. Opp. 5.) For example, in two cases, a request for leave to amend was denied when it was sought after discovery was completed, a summary judgment motion was pending, and plaintiffs knew of the basis to amend their complaint prior to discovery ending. *See McCarthy* v. *Dun & Bradstreet Corp.*, 482 F.3d 184, 200-02 (2d Cir. 2007) (noting that granting leave to amend would require reopening discovery and re-deposing experts); *Cresswell* v. *Sullivan & Cromwell*, 922 F.2d 60, 72 (2d Cir. 1990). Here, discovery has not yet begun. As a result, the Attorneys General have failed to articulate any undue delay that would result from granting ExxonMobil's motion. As the Second Circuit has repeated, mere delay, without more, "does not provide a basis for a district court to deny the right to amend." *Pasternack*, 863 F.3d at 174 (internal quotation marks omitted).

Further, Attorney General Healey's argument that ExxonMobil has acted with a dilatory motive and seeks an improper "third bite of the proverbial apple" through its SAC is unsupported and unsupportable. Even the precedent invoked by Attorney General Healey does not support her argument. (Mass. Opp. 6 (quoting *In re Merrill Lynch & Co.*, 273 F. Supp. 2d 351, 391 (S.D.N.Y. 2003), *aff'd sub nom. Lentell* v. *Merrill Lynch & Co.*, 396 F.3d 161 (2d Cir. 2005)).) In *In re Merrill Lynch*, Judge Pollack denied the plaintiffs' motion to file a second amended complaint because the plaintiffs "were advised by the Court, prior to amending their [first] complaints, of certain pleading deficiencies and what the Court would require." 273 F. Supp. 2d at 390. Because the plaintiffs failed to heed the court's instructions, the court rejected the plaintiffs' request for "a third go-around." *Id.* at 390-91. Here, unlike in that case, no court has ruled on or provided instructions concerning the legal sufficiency of ExxonMobil's federal complaint. The only judge who has issued an opinion concerning the allegations in ExxonMobil's complaint stated that the claims should be reviewed on the merits.[9] Because the Attorneys General have identified no reason to deny ExxonMobil's motion to amend, this Court should grant ExxonMobil's motion to file the SAC.

CONCLUSION

At bottom, the Attorneys General seek only one thing: to avoid judicial scrutiny of their actions. That is why they fight at every turn to obstruct the progress of this lawsuit and to avoid a ruling on the merits. Their opposition to the pre-discovery amendment of a complaint never once ruled legally insufficient is willful and opportunistic—and legally unsustainable. Their obstruction should be rejected, and ExxonMobil's motion for leave to amend should be granted.

[9] ECF No. 180 at 2.

Dated: February 1, 2018

EXXON MOBIL CORPORATION

By: /s/ Theodore V. Wells, Jr.
Theodore V. Wells, Jr.
twells@paulweiss.com
Daniel J. Toal
dtoal@paulweiss.com
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

Justin Anderson
janderson@paulweiss.com
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
2001 K Street, NW
Washington, D.C. 20006-1047
(202) 223-7300
Fax: (202) 223-7420

Patrick J. Conlon
patrick.j.conlon@exxonmobil.com
Daniel E. Bolia (*pro hac vice*)
daniel.e.bolia@exxonmobil.com
1301 Fannin Street
Houston, TX 77002
(832) 624-6336

Nina Cortell (*pro hac vice*)
nina.cortell@haynesboone.com
HAYNES & BOONE, LLP
2323 Victory Avenue
Suite 700
Dallas, TX 75219
(214) 651-5579
Fax: (214) 200-0411

Ralph H. Duggins (*pro hac vice*)
rduggins@canteyhanger.com
Philip A. Vickers (*pro hac vice*)
pvickers@canteyhanger.com
CANTEY HANGER LLP
600 West 6th Street, Suite 300
Fort Worth, TX 76102
(817) 877-2800
Fax: (817) 877-2807

Counsel for Exxon Mobil Corporation