UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON MOBIL CORPORATION,	:	
	:	No. 17-CV-2301 (VEC) (SN)
Plaintiff,	:	
	:	
-against-	:	ECF Case
	:	
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.	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE NEW YORK ATTORNEY GENERAL'S MOTION TO DISMISS THE ACTION

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PRELIMINARY STATEMENT

This reply submission by the NYOAG concludes the fourth round of briefing on whether a federal court should dismiss this action seeking to quash two sets of state investigative document demands issued to Exxon in, respectively, late 2015 and early 2016.[1] The first round of briefing occurred when AG Healey moved to dismiss Exxon's initial complaint, filed in the Northern District of Texas. The second was necessitated by Exxon's thereafter joining AG Schneiderman as a defendant, also in Texas. And the third and fourth have been at this Court's direction, after the case was transferred here to remedy Exxon's improper choice of venue. In all that time, despite repeated opportunities, Exxon has not come close to articulating a coherent, let alone cognizable, claim for relief.

Without imposing strict "page limits," the Court instructed the parties that "less is more" for this round of Rule 12(b)(6) briefing, given the amount "of ink that's already been spilled." Nov. 30, 2017 Hr'g Tr. at 79. Disobeying that command, Exxon filed an opposition brief approaching *fifty pages*, replete with references to a (simultaneously filed) proposed *second amended complaint*. Exxon's nonresponsive defense of a non-operative complaint appears calculated to burden the Court and defendants with sifting through the arguments and allegations to determine which among them are properly at issue. The NYOAG objects to this irregular, eleventh-hour attempt at amendment—which, in any event, does nothing to shore up Exxon's deficient claims. For the reasons that follow, and those set forth in the NYOAG's previous briefs, the Court should dismiss the action with prejudice.

[1] Capitalized undefined terms have the meanings given in the NYOAG's opening brief, filed on December 21, 2017. *See* ECF No. 247. That submission is referred to as "Mem." and Exxon's opposition as "Opp."

ARGUMENT

A. Exxon's Allegations of Political Motive Cannot Transform the NYOAG's Investigative Document Subpoena into a First Amendment Violation.

The NYOAG's prior submission exposed the flaws in Exxon's theory that a document subpoena that neither targets nor curtails any particular speech, as here, will violate the First Amendment if "politically motivated." *See* Mem. at 3–10. Exxon's arguments in opposition do not—and cannot—plug the holes in its free-speech claim. *Cf. Alroy v. City of N.Y. Law Dep't*, 69 F. Supp. 3d 393, 402 (S.D.N.Y. 2014) (Caproni, J.) (holding alleged abuse of civil process, without more, not actionable under 42 U.S.C. § 1983).

Exxon's tardily proffered allegations about the NYOAG's motives cannot overcome the "presumption of regularity" attending the NYOAG's official actions. *See Hartman v. Moore*, 547 U.S. 250, 263 (2006).[2] To begin with, despite Exxon's mischaracterization, the NYOAG does not maintain that Exxon's corporate speech garners no First Amendment protection "*because* it amounts to 'fraudulent misstatements.'" Opp. at 20 (emphasis added). Rather, the NYOAG is investigating "*potential* fraud" by Exxon. Mem. at 3 (emphasis added). Exxon's concession that the NYOAG's investigative requests are not a "regulation of speech" (Opp. at 22) itself distinguishes this case from those Exxon cites involving direct speech restrictions.[3] And *if* the

[2] Although Exxon contends that *Hartman*'s "burden shifting framework" should await summary judgment (Opp. at 23), *Hartman* rejected burden shifting for claims of retaliatory prosecution, holding a lack of objective basis for the action taken to be "an element of the plaintiff's case." 547 U.S. at 259, 264.

[3] *See* Mem. at 4 n.2 (discussing *Rosenberger*, *R.A.V.*, and *Okwedy*); *see also Wandering Dago, Inc. v. Destito*, --- F.3d ----, 2018 WL 265383, at *7 (2d Cir. Jan. 3, 2018) (denial of permit to food truck because of potentially offensive business name); *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 100 (2d Cir. 2010) (restrictions on placement of signs near arterial highways); *Pittsburgh League of Young Voters Educ. Fund v. Port Auth.*, 653 F.3d 290, 297 (3d Cir. 2011) (refusal to run advertisements on public transit); *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 86 (1st Cir. 2004) (same).

corporate speech under inquiry amounts to fraud, then it will "not [be] protected by the First Amendment." *United States v. Rowlee*, 899 F.2d 1275, 1280 (2d Cir. 1990).

As Exxon is well aware, the NYOAG is investigating the basis of certain of Exxon's public disclosures. They include those in the March 2014 report entitled *Energy and Carbon—Managing the Risks*, regarding Exxon's exposure to stranded assets and use of a "proxy cost" of carbon in assessing projects' economic viability.[4] *See* ECF No. 136, at 11–12. The NYOAG's subpoena explicitly seeks documents relating to those statements (*see* App. 8), which fall well "within the limitations period" (Opp. at 12). Yet Exxon's opposition brief engages with none of those disclosures. Instead, Exxon attempts to discredit published reports concluding, based on company documents, that Exxon might years ago have believed that climate change poses serious risks, yet sowed confusion on the topic. *See id.* at 10–11. Exxon calls its past conduct "not a scheme to defraud" (*id.* at 11); by contrast, Harvard researchers found "that ExxonMobil misled the public."[5] Given this ongoing dispute about what Exxon knew and when, Exxon's cursory denials of historic misconduct cannot defeat the NYOAG's present right of inquiry.

In general, while the First Amendment "applies" to investigations (Opp. at 16), a State "violates no constitutional rights by merely investigating," *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 628 (1986). And Exxon musters no authority for the proposition that an alleged "political" difference between investigator and target creates a First Amendment shield to *any* fact-gathering of the target. To the contrary, Exxon's cited decisions confirm States' power to request—and receive—any information to which no specific First Amendment objection applies. For example, although Alabama's effort in the 1950s "to oust" the

[4] http://cdn.exxonmobil.com/~/media/global/files/energy-and-environment/report---energy-and-carbon---managing-the-risks.pdf.

[5] G. Supran & N. Oreskes, *Assessing ExxonMobil's climate change communications (1977–2014)*, at 1.

NAACP from that State had a "political" dimension, the NAACP—unlike Exxon here—"assert[ed] no right to absolute immunity from state investigation" into the entity's compliance with state law. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958). Similarly, the "political" aspect of New Hampshire's past inquiry into Communist Party activity did not excuse an investigative target, a college lecturer, from "answer[ing] virtually all questions" on that topic. *Sweezy v. New Hampshire ex rel. Wyman*, 354 U.S. 234, 239 (1957). If Exxon prefers not to reveal certain "communications with trade associations and industry groups" (Opp. at 18), then it can raise a First Amendment objection to those *specific* documents—which it has done (*see* Compl. ¶ 67). Such objections (whether valid or not) cannot vitiate every other request, lest agencies forfeit all right of inquiry by crafting subpoenas that subjects deem less than perfectly acceptable.

The requirement of First Amendment injury also remains unmet. *See* Mem. at 4–5. Exxon does not allege that the NYOAG's subpoena has, at any point in the past twenty-six months, affected Exxon's corporate speech. Instead, Exxon claims actionable injury from the "burden and expense" of producing responsive, non-privileged documents.[6] Opp. at 21. Such routine compliance does not bring Exxon within the "limited" exception to the rule that a free-speech plaintiff establish actual chilling of speech. *Zherka v. Amicone*, 634 F.3d 642, 645 (2d Cir. 2011). A contrary holding would open the floodgates to blanket free-speech objections by any and every corporation served with a document subpoena.

Finally, despite several opportunities to do so, Exxon still fails to identify the *protected* corporate speech or viewpoint that the NYOAG supposedly has "targeted" with document

[6] Exxon's sudden characterization of its document production as "forced" (Opp. at 21) walks back its many prior attempts to portray its compliance as being by voluntary agreement (*see* ECF No. 68, at 88 (to Judge Kinkeade: Exxon was "served a subpoena" by the NYOAG and is "cooperating with it"); ECF No. 228, at 34 (to this Court: Exxon has faced only rulings on "technical compliance," not any order "to compel" production)). A party may not flip positions where doing so "inject[s] an unacceptable level of uncertainty into" the proceedings. *Adelphia Recovery Tr. v. Goldman, Sachs & Co.*, 748 F.3d 110, 119 (2d Cir. 2014).

demands. *See* Opp. at 20. And "[a] complaint of retaliation that is wholly conclusory can be dismissed on the pleadings alone." *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996) (quotation marks omitted). In response to this point, Exxon vaguely touts its own "longstanding" participation in climate-change debate (Opp. at 19)—while citing an allegation that Exxon "has widely and publicly confirmed that it recognizes that the risk of climate change and its potential impacts on society and ecosystems may prove to be significant" (ECF No. 252-1 ¶ 120). That protected speech is not plausibly under political siege.

Alternatively, Exxon now speculates that the NYOAG's subpoena was payback for Exxon's formerly questioning whether "existing or reasonably anticipated climate policies and technology" could satisfy the Paris Accords' goal to "limit global temperature increase to two degrees Celsius by 2100." Opp. at 19. The Court should ignore this newly unveiled theory. *See Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998) (disregarding allegation raised "for the first time" in brief opposing dismissal). Nor was this alleged viewpoint of Exxon mentioned at the March 2016 press conference—where, Exxon claims, defendants "identified" the "speech they disfavored."[7] Opp. at 16.

B. Exxon's Allegations of Political Animus Cannot Form the Basis of a Federal Civil-Rights Conspiracy Claim.

The absence of a plausible First Amendment violation bars Exxon's conspiracy claim under 42 U.S.C. § 1985. *See* Mem. 8–10. The latter claim requires a showing that the plaintiff was "injured in his person or property or deprived of any right or privilege of a citizen of the United

[7] The only reference to the Paris Accords at that press conference was by former Vice President Gore, who called the agreement "historic" and "comprehensive." ECF No. 227-1, at 11. Exxon presumably agrees, having since hailed the Paris Accords as "an effective framework for addressing the risks of climate change," which our nation "is well positioned to complete." Mar. 22, 2017 Ltr. from Peter W. Trelenberg to G. David Banks at 1, https://www.eenews.net/assets/2017/03/28/document_gw_05.pdf. More to the point, Exxon does not claim to have reached this conclusion due to coercion from a subpoena.

States." *Dolan v. Connolly*, 794 F.3d 290, 296 (2d Cir. 2015) (quotation marks omitted). Any injury here would arise from the "wrongful act" of issuing a subpoena, "not the conspiracy" to do so. *Temple of Lost Sheep Inc. v. Abrams*, 930 F.2d 178, 184–85 (2d Cir. 1991) (quotation marks omitted); *see also Gray v. Town of Darien*, 927 F.2d 69, 73 (2d Cir. 1991) (rejecting conspiracy claim under § 1985 where there was "no showing of a constitutional deprivation").

The conspiracy claim also fails for a separate—and even more fundamental—reason. Section 1985(3) prohibits conspiracies to deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." To state a claim, a plaintiff must therefore "allege membership in a class protected under Section 1985(3)." *Dolan*, 794 F.3d at 296. In this respect, Exxon falls short.

Section 1985(3) does not "reach conspiracies motivated by economic or commercial animus." *United Bhd. of Carpenters & Joiners of Am., Local 610 v. Scott*, 463 U.S. 825, 838 (1983). As a result, the federal conspiracy laws do not shield oil and gas companies from allegedly concerted economic "pressure" by elected officials, third-party activists, or others. *See* Compl. ¶¶ 4, 12, 47, 51, 76, 92. That conclusion makes sense: as this Court remarked, nobody is "concerned that Exxon is going to be killed" by document requests.[8] Nov. 30, 2017 Hr'g Tr. at 54.

In its opposition brief, Exxon clarifies that its federal conspiracy claim arises "out of political animus." Opp. at 26 n.25. This theory fares no better. Exxon cites dicta in *Dolan v. Connolly* as support for the idea that "'political affiliation' is a protected classification" under § 1985(3). *See id.* (quoting 794 F.3d at 296). For that point, *Dolan* cited *Keating v. Carey*, which held "that Republicans are a protected class for the purpose of § 1985(3)." 706 F.2d 377, 379 (2d

[8] Nor is Exxon at risk of being "detained for a lengthy period of time" and "fingerprinted" or "photographed," as the government permissibly did to possible terrorist sympathizers in a case that Exxon compares to its own. *Tabbaa v. Chertoff*, 509 F.3d 89, 102 (2d Cir. 2007), *cited in* Opp. at 21.

Cir. 1983). Exxon is not a registered Republican. And in *Gleason v. McBride*, the Second Circuit expressly limited *Keating* as applying only to membership in "political parties," rather than mere affiliation with "political groups." 869 F.2d 688, 694 (2d Cir. 1989).

Gleason squarely forecloses Exxon's claim of a politically motivated conspiracy. There, the Second Circuit held that § 1985(3) does *not* apply where a plaintiff has "alleged only that he was discriminated against because he was a political opponent of the defendants." *Id.* at 695. Here, Exxon alleges that defendants have used legal process to discriminate against their perceived "political opponents." Compl. ¶¶ 25, 49, 66; Opp. at 2, 19. As *Gleason* further held, without the plaintiff's "membership in" a protected class, § 1985(3) liability cannot be predicated on alleged "personal malice [of] the conspirators." 869 F.2d at 695 (quotation marks and alterations omitted). As a result, because Exxon is not a member of a protected class—only of an unprotected and amorphous group of self-identified "political opponents"—allegations that the NYOAG had an "illicit" (Compl. ¶ 52) or "ulterior" (*id.* ¶ 107) purpose in subpoenaing Exxon cannot sustain a federal conspiracy claim. *See also Dolan*, 794 F.3d at 296 (reaffirming that "class" under § 1985(3) "unquestionably connotes something more than a group of individuals" who allegedly share a "disfavor[ed]" view).

The conspiracy claim's legal insufficiency destroys Exxon's proffered rationale for pursuing this federal case—i.e., that this is the "only action" in which Exxon can assert its "conspiracy claims" against "both Attorneys General." ECF No. 228, at 29–30. Rather than yield to controlling Second Circuit authority, however, Exxon proposes to renew its complaint. No amount of proof that defendants "are engaged in a conspiracy" against their purported political opponent, Exxon, will remedy the legal insufficiency of Exxon's § 1985(3) claim. *See* Exxon's Mem. in Support of Mot. for Lv. to Amend, ECF No. 251, at 9.

In any event, even if Exxon's political conspiracy theory were viable, the purportedly new information that Exxon offers would not make this claim plausible. As relevant to the NYOAG, Exxon now alleges that in 2015: (i) an outside researcher informed the NYOAG of the energy industry's "history of misinformation"; (ii) the NYOAG emailed with the Rockefeller Family Fund about the "activities of specific companies regarding climate change"; and (iii) the Rockefeller Family Fund expressed "concern" to AG Schneiderman about Exxon's climate-change disclosures, and was "encouraged by [AG] Schneiderman's interest." Opp. at 6 (citing ECF No. 252-1 ¶¶ 46, 56, 58). According to Exxon, these sources demonstrate that the NYOAG acted "in conformity with the aims" of others when subpoenaing Exxon. *Id.* at 25. Even if true, that fact would not make the subpoena *illegal*—just as a criminal prosecutor violates no rights by bringing charges "in conformity with the aims" of complainants, and just as the Texas Attorney General violated no law by dutifully filing an amicus brief in this litigation "in conformity with the aims" of Exxon. *See generally Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 184 (2d Cir. 2012) (allegations merely consistent with independent, parallel conduct do not state plausible conspiracy claim).

C. Exxon's Remaining Claims Lack Merit.

As shown in the NYOAG's opening brief, none of Exxon's other claims withstands Rule 12(b)(6) review. *See* Mem. at 10–17. Exxon's defense of these claims is unavailing.

First, Exxon fails to demonstrate how any remaining requests under the 2015 subpoena violate the Fourth Amendment. *See* Opp. at 28–32. Whether or not Exxon initially preserved objections to the subpoena (*id.* at 29), since then Exxon has willingly produced responsive material to the point where Exxon, in its own words, has "complied fully" with the subpoena, "finish[ed] the document production," and "certif[ied] that the process was over." App. 461, 521. A § 1983

plaintiff may pursue only *prospective* relief against the State—a bedrock principle that the State may raise "at any time during the course of proceedings," even if the defense "did not exist at the outset." *McGinty v. New York*, 251 F.3d 84, 94, 101 (2d Cir. 2001). Exxon's claim of disproportion thus cannot rest on having to produce historical climate-change research (Opp. at 31), which Exxon alleges has already been produced (Compl. ¶ 26). Nor can it be unconstitutionally burdensome for Exxon to have to recover its former CEO's emails, which Exxon *knowingly failed to preserve and then destroyed*—a set of circumstances that, as Exxon's counsel testified, posed a "test" of the NYOAG's investigative abilities. App. 385.

Second, the amended complaint does not allege that the NYOAG has any extraneous interest in civil subpoena compliance. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980). Instead, Exxon repackages its contentions of political motive and bias into a claim that the subpoena violates due process. *See* Opp. at 32–35. At the same time, Exxon has "no objection" to the NYOAG's interviewing company officers—up to and including the "boss[es]" who "can tell you everything." App. 461, 465. And despite Exxon's contention (Opp. at 34), statements by AG Schneiderman at the March 2016 press conference about Exxon's Arctic drilling—transcribed in the margin[9]—cannot show prejudgment, when Exxon does not dispute the basic facts underlying these remarks.[10] Much less would a reasonable observer view this recitation of publicly available information as negating AG Schneiderman's caveats about a lack of prejudgment in the investigation. *See* Mem. at 15.

[9] "They are using the best climate models so that when they spend shareholder dollars to raise their oil rigs, which they are doing, they know how fast the sea level is rising. . . . And yet they have told the public for years that there were no 'competent models,' was the specific term used by an Exxon executive not so long ago, no competent models to project climate patterns, including those in the Arctic."

[10] *See* Inside Climate News, *Exxon: The Road Not Taken* (Sept. 22, 2015) (reciting comments by Lee Raymond in 1997 before the World Petroleum Congress: "'1990's models were predicting temperature increases of two to five degrees Celsius by the year 2100,' he said, without explaining the source of those numbers. 'Last year's models say one to three degrees. Where to next year?'").

Third, Exxon cites no authority for the idea that possible enforcement of facially nondiscriminatory state antifraud laws, against a company with a significant in-state presence, violates the U.S. Constitution's Commerce Clause. *See* Opp. at 35–39. That is because the Commerce Clause erects no bar to regulations intended "to prevent fraud or deception" in transactions "*within* the state." *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 557 (1917). Rather, the Clause prevents States (without Congressional permission) from regulating economic transactions occurring wholly beyond state boundaries. *See, e.g.*, *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (invalidating Illinois law that "could be applied to regulate a tender offer which would not affect a single Illinois shareholder"); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003) (enjoining Vermont's ban on online distribution of indecent material to minors, as applied to Internet business based in Connecticut). As previously explained, the fraud laws at issue here have in-state elements. *See* Mem. at 12–13. And "at the subpoena enforcement stage," a court cannot assume that these laws will be misapplied. *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 470 (2d Cir. 1996). Moreover, any purported burden on the "interstate flow of political speech" (Opp. at 38) cannot extend to *Exxon's* speech, as to which Exxon refuses to admit even the slightest "chill" (*id.* at 21). Conclusory allegations such as these do not permit "inferences of excessive burden" on commerce, *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 108 (2d Cir. 2017), especially given that Exxon sells oil and gas—not statements about oil and gas.

Fourth, the amended complaint fails to state a claim for federal preemption of the NYOAG's subpoena. *See* Opp. at 39–42. As Exxon recognizes, this claim requires the plausible allegation that *all* conceivable lines of state inquiry are "fully preempted by federal law." *Id.* at 40. To the contrary, federal law explicitly permits States "to investigate" possible securities fraud and, if appropriate, to "bring enforcement actions" under state law. 15 U.S.C. §§ 77r(c)(1)(A),

78bb(f)(4). These savings provisions readily distance this case from those Exxon cites, in which Congress explicitly barred States from seeking information on designated topics or from specified sources.[11] Nor is it apparent how the Securities and Exchange Commission (SEC) rule defining "proved" oil and gas reserves, *see* 17 C.F.R. § 210.4-10(a)(22), blocks all inquiry into Exxon's knowledge regarding climate change, risk of stranded assets, capital investment decisions, or impairment conclusions (*see* Opp. at 31 (reciting these as proposed justifications for NYOAG's investigation)). None of those inquiries would have Exxon report its "proved" oil reserves in a manner other than as the SEC directs. Rather, they concern distinct representations made by Exxon regarding the *economic viability* of its proved and non-proved reserves, among other subjects of potential importance to investors. Such statements, like any, must "fairly align[ ] with the information in the issuer's possession at the time." *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1328–29 (2015).

Fifth, Exxon's state law claims do not satisfy any "ultra vires" exception to Eleventh Amendment immunity. *See* Opp. 42–43. That rarely invoked theory applies only where the challenged state action is taken with a total "lack of delegated power." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 n.11 (1984) (quotation marks omitted). Here, the pertinent New York fraud statutes unambiguously delegate subpoena power to the NYOAG. *See* N.Y. Gen. Bus. Law §§ 349(f), 352(2); N.Y. Exec. Law § 63(12). Because Exxon cannot show that the NYOAG proceeds "without any authority whatever," *Minotti v. Lensink*, 798 F.2d 607, 609 (2d Cir. 1986), the state law claims must be dismissed.

[11] *See Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 945 (2016) (explicit preemption by ERISA of state healthcare reporting requirement necessarily voided subpoena for such information); *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 536 (2009) (explicit preemption by National Bank Act of state visitorial powers over national banks necessarily voided informational requests of such entities).

CONCLUSION

The Court should dismiss Exxon's amended complaint, with prejudice, for the failure to state a plausible claim for relief.

Dated: New York, NY
January 19, 2018

Respectfully submitted,

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