IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PEDRO RAMIREZ, JR., Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. EXXON MOBIL CORPORATION, REX W. TILLERSON, ANDREW P. SWIGER, JEFFREY J. WOODBURY, and DAVID S. ROSENTHAL, Defendants.	Case No. 3:16-cv-3111-K

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DIRECT LEAD PLAINTIFF TO PUBLISH NEW NOTICE UNDER THE PSLRA TO NEW PROPOSED CLASS

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PRELIMINARY STATEMENT

As demonstrated in defendants' opening brief, the Consolidated Complaint rests on substantially different factual allegations and legal theories from those in the original complaint, and it does so on behalf of a dramatically expanded alleged class of purchasers of ExxonMobil stock. The Pension Fund tries to obscure these differences by selectively picking isolated words from the original complaint, the initial PSLRA notice, and the Consolidated Complaint. The Pension Fund then argues, based on its erroneous citation of a single district court case, that new notice is inappropriate as long as the allegations of the Consolidated Complaint somehow "follow naturally" from those of the original complaint. Under the correct standard, however, new notice is warranted where an amended or consolidated complaint "substantially alters the claims or class members" by adding new factual and legal theories, including substantially different alleged disclosure violations. That is the case here, and under the correct standard new notice is required.

The Pension Fund also argues that new notice would result in undue delay. It will not. Defendants are filing their motion to dismiss the Consolidated Complaint with this reply, and briefing on that motion can be completed as scheduled on December 21, 2017. If the Pension Fund chooses to publish a new notice *today*, and if, as the Pension Fund contends is highly likely, no class members seek lead plaintiff status, the 60-day PSLRA notice period will expire almost a month before defendants' motion to dismiss is fully briefed. The Pension Fund also, inconsistently, purports to express concern about delay if lead plaintiff status has to be relitigated and, if a new lead plaintiff is appointed, a new consolidated complaint may be filed. But the possibility that a new notice will lead one or more putative class members to seek lead plaintiff status is not a reason to avoid publishing a new notice. On the contrary, that is precisely why new

notice should be published now, so that the parties and the Court are not faced with questions about the Pension Fund's authority after months or years of further litigation.

For these reasons, the Court should direct the Pension Fund to publish a new notice to the new proposed class in compliance with the PSLRA.

ARGUMENT

I. THE PENSION FUND MISSTATES THE STANDARD THE COURT SHOULD APPLY ON THIS MOTION

The Pension Fund relies on a single district court decision to assert that the PSLRA requires new notice after the filing of an amended complaint only if the allegations in the new complaint are "completely unrelated" to those in the original complaint, and that new notice is not required if the claims in the new complaint "follow naturally" from those in the original complaint. (Pl. Br. 2, 7 (citing *In re Thornburg Mortg., Inc. Sec. Litig.*, 629 F. Supp. 2d 1233, 1242 (D.N.M. 2009).)

That, however, is not the standard. As the court stated in *Dube* v. *Signet Jewelers Ltd.*, No. 16-cv-6728 (JMF), 2017 WL 1379385 (S.D.N.Y. Apr. 14, 2017):

> Contrary to Lead Plaintiffs' contentions, . . . republication is not strictly limited to circumstances "where the amended complaint relates to a different class or type of security from that to which the original claims related" or "where there was no serious dispute as to whether the amended complaint added new claims, either because the amended complaint added a new cause of action, or because the plaintiffs admitted that the amended complaint otherwise amounted to a new claim." [quoting Lead Plaintiffs' brief]. Instead, the inquiry is more qualitative, turning on a comparison of the two complaints and an assessment of whether, in light of the amendments, "entire classes of potential lead plaintiffs [were] left out of the notice procedure."

Id. at *1 (quoting *Teamsters Local 445 Freight Division Pension Fund* v. *Bombardier Inc*., No. 05-CV-1898 (SAS), 2005 WL 1322721, at *2 (S.D.N.Y. June 1, 2005)); *see also* Def. Br. 5–6 (citing cases). The *Dube* court held that "courts have required new notice where the amended complaint substantially alters the claims or class members." *Dube*, 2017 WL 1379385, at *1

(quoting *Waldman* v. *Wachovia Corp*., No. 08-CV-2913 (SAS), 2009 WL 2950362, at *1 (S.D.N.Y. Sept. 14, 2009)).

Even the court in *Thornburg* recognized that a new notice is required when a new complaint advances new alleged disclosure violations based on new factual or legal theories and significantly expands the proposed class period. *See Thornburg*, 629 F. Supp. 2d at 1241. The court in that case denied the defendants' request for publication of a new notice after concluding that the new claims were "largely allegations that Thornburg continued to do after the original class period what the Lead Plaintiffs allege Thornburg was doing during that initial period." *Id*. at 1242. That is not remotely the case here.

II. UNDER THE APPROPRIATE STANDARD, THE PENSION FUND SHOULD BE REQUIRED TO PUBLISH A NEW NOTICE

As shown in defendants' opening brief, the Consolidated Complaint here both advances new factual and legal theories and expands the proposed class period by more than two years. (Def. Br. 3–4.) The Pension Fund ignores the key issue on this motion—how the claims in the current Consolidated Complaint compare to those in the original complaint—by focusing on the notice rather than the original complaint, and by selectively quoting snippets from the notice to suggest that its claims are fundamentally unchanged. But while both complaints refer to "climate change" and "reserves," the substance of the Pension Fund's claims in the Consolidated Complaint is substantially different from that of the original complaint.

The differences are evident from the summaries of claims in the respective complaints themselves. The original complaint alleged that defendants' statements during the proposed class period were false and misleading because they failed to disclose three alleged facts:
(i) ExxonMobil's alleged internal reports recognizing the environmental risks caused by climate change; (ii) that, as a result of those risks, a material part of ExxonMobil's reserves were

stranded and would not be economically producible; and (iii) that ExxonMobil employed an "inaccurate 'price of carbon'" in evaluating its assets, thereby overstating the value of those assets. (ECF No. 1 ¶ 3(c).) By contrast, the Consolidated Complaint alleges that ExxonMobil's statements were false or misleading on the grounds that (i) ExxonMobil's investment and valuation process allegedly did not incorporate greenhouse gas or carbon proxy costs consistent with its disclosures; (ii) ExxonMobil allegedly did not incorporate greenhouse gas or carbon proxy costs in its asset impairment process; (iii) for three months before the filing of its 2015 10-K, its Canadian bitumen operations were operating at a loss; (iv) its Kearl operation was allegedly projected not to satisfy SEC definitions of proved reserves as of year-end 2016; and (v) a portion of its Rocky Mountain dry gas operations allegedly should have been impaired in 2015 rather than in 2016. (ECF No. 36 ¶¶ 1–27, 247.) None of these allegations is found in the original complaint.

The Pension Fund downplays the differences between the Consolidated Complaint and the original complaint by selectively quoting out-of-context fragments from the Consolidated Complaint and notice. The Pension Fund contends that its new allegation regarding ExxonMobil's Canadian bitumen and Rocky Mountain operations is related to the original complaint's allegation that portions of ExxonMobil's reserves should have been written down. (Pl. Br. 7–8.) But the original complaint alleged that ExxonMobil "would not be able to extract" a "material portion" of its existing reserves because they were "stranded" due to climate change regulations—not because, as the Pension Fund now alleges, the Company allegedly failed to incorporate a proxy cost of carbon into its impairment analysis or because energy prices declined preceding the original class period. (ECF No. 1 ¶¶ 3(b), 30, 33, 46(b).)

The allegations about carbon "proxy costs" in the Consolidated Complaint likewise are fundamentally inconsistent with the allegations in the original complaint. The theory of the original complaint was that ExxonMobil was secretly aware of the environmental risks of global warming and climate change, and hid those risks from investors. (ECF No. 1 ¶¶ 3(c), 29–30, 33, 46(c).) By contrast, in the Consolidated Complaint, the Pension Fund acknowledges that ExxonMobil disclosed the risks of climate change to its business, but challenges instead its alleged internal methodologies for analyzing that risk. (ECF No. 36 ¶¶ 128–47.) The Pension Fund does not purport to state a claim, as did the original complaint, based upon allegations that ExxonMobil concealed information in its possession about "the environmental risks caused by global warming" (ECF No. 1 ¶ 33).

Finally, in contrast to the Consolidated Complaint, the original complaint did not allege that ExxonMobil's Canadian bitumen operations (which the original complaint did not even mention) were unprofitable for a period of months (ECF No. 36 ¶ 247). To the contrary, the original complaint claimed that government actions to reduce carbon emissions would eventually render all of ExxonMobil's assets entirely "stranded." (ECF No. 1 ¶¶ 3(b), 30, 46(b).) No such allegation appears in the Consolidated Complaint.

The Pension Fund acknowledges that the Consolidated Complaint expands the class period alleged in the original complaint by more than two years, but argues that the expansion of the alleged class period alone does not justify requiring a new PSLRA notice. (Pl. Br. 9–10.) But the dramatic expansion of the alleged class period—from eight to thirty-four months—coupled with the significant changes in the underlying factual allegations, makes it particularly likely that individuals who could only now be considered potential lead plaintiffs—including those whose investment in ExxonMobil common stock suffered during the downturn in energy prices—

"would have disregarded the earlier notice." *Dube*, 2017 WL 1379385, at *2 (quotation omitted); *Teamsters*, 2005 WL 1322721, at *3 (where class membership is substantially expanded, "fairness dictates that those new class members ought to be informed of the existence of pending claims that may affect their rights").

III. FORGOING NEW NOTICE COULD SUBSTANTIALLY DISRUPT AND DELAY THE LITIGATION

The Pension Fund accuses defendants of making this motion solely for purposes of delay. (Pl. Br. 1, 10.) But allowing this case to move forward after the original complaint has been greatly altered without a new PSLRA notice raises substantial and legitimate concerns of potential disruption and delay if the Pension Fund's status is subject to later challenge. (*See* Defs. Br. 7–8.) Absent a new notice, the parties and the Court are vulnerable to a challenge that the Pension Fund was improperly designated.

The Pension Fund dismisses the possibility that a new investor would seek appointment as lead plaintiff (while at the same time arguing inconsistently that notice would cause delay if a new plaintiff comes forward, requiring new briefing on lead plaintiff status). (Pl. Br. 10–13.) The Pension Fund argues that new prospective lead plaintiffs are unlikely to emerge because it is an institutional investor of the type preferred by the PSLRA, and because of what it alleges has been substantial press coverage of this case. (*Id.* 3–4, 12) But, as discussed in defendants' moving brief, the Pension Fund's alleged losses of slightly less than $55,000—most of which are unrealized—are modest at best. ExxonMobil is one of the world's most widely traded stocks, with a market capitalization of $323 billion, outstanding common stock as of the opening of the alleged class period of 4.2 billion shares, and an average daily trading volume during the alleged class period of 12.7 million shares. There are undoubtedly many investors with larger stakes in this dispute. (*See* Defs. Br. 1, 3, 8.)

The Pension Fund also contends that, because of the original notice and extensive press coverage of the filing of the original complaint, any potential lead plaintiff should be presumed to have received notice and had the opportunity to seek to intervene. (Pl. Br. 4.) But that argument misses the point. Class members received no notice of the filing of the *Consolidated Complaint*, and that filing received virtually no press coverage. It appears that no major news source reported on the filing of the Consolidated Complaint, and the only press reference defendants have been able to locate was a brief squib near the bottom of a lengthy entry in an academic blog that tracks and summarizes climate-related litigation. (*See* App. 10.) Thus, absent class members who were not eligible or willing to serve as lead plaintiff under the original complaint, but might have sought that status under the Consolidated Complaint, have never received notice of the class period or claims in that Complaint.

The Pension Fund argues that new notice will result in "delays and additional costs" because it could lead to "relitigating of lead plaintiff motions" and possibly "the filing of another consolidated complaint following the Court's ruling on any renewed lead plaintiff motions." (Pl. Br. 1, 12.) But that argument is misplaced. The possibility that an eligible shareholder might seek lead plaintiff status after receiving notice of the Consolidated Complaint, and that the Court might consider that shareholder a more appropriate lead plaintiff, is precisely why new notice *should* be published, not (as the Pension Fund seems to think) an argument against it. In that circumstance, the notice will have served the purpose of the PSLRA notice requirement of encouraging the most capable representatives of the class, and the member of the putative class with the greatest interest in the litigation, to serve as lead plaintiff. *See, e.g.*, *In re Cyberonics Inc. Sec. Litig.*, 468 F. Supp. 2d 936, 940 (S.D. Tex. 2006) ("Therefore, in keeping with the PSLRA's goal of adequate notice for the purpose of determining the most appropriate lead

plaintiff, the court finds that republication of notice is appropriate."); Defs. Br. 5–6. It is also why a new notice should be published *now*, so that any additional lead plaintiff applications are heard and resolved before the parties and the Court have spent months or years in litigation.

By contrast, if the Pension Fund is correct that "it is not 'likely'—or even remotely plausible—that a potential class member would have previously disregarded" the original notice "but would now be interested in serving as lead plaintiff" (Pl. Br. at 8), then no prospective lead plaintiff will surface and there will be no delay. Defendants are filing their motion to dismiss and a separate motion to strike contemporaneously with this reply, and briefing on those motions can proceed while the Court considers the present motion.

Moreover, any delay that may result from the publication of new notice is entirely the Pension Fund's doing. The Pension Fund was under no obligation to expand the proposed class period and the nature of the claims asserted when it filed the Consolidated Complaint. And, having done so, it was free to issue a new notice voluntarily rather than seeking to litigate the issue. Indeed, if the Pension Fund had published a new notice when it filed the Consolidated Complaint, the notice period would have lapsed on September 24, 2017, two days before the present motion was fully briefed. If it had done so on August 3, 2017, when defendants brought the issue to the Pension Fund's attention (ECF No. 40, App. 1), the period would have expired on October 2, 2017, approximately one week later. In either event, the notice period would have expired well before defendants' motion to dismiss and motion to strike were fully briefed.

IV. THE COURT CAN AND SHOULD DECIDE WHETHER NEW NOTICE IS PROPER ON A MOTION BY DEFENDANTS

Finally, the Pension Fund's gratuitous accusation that defendants are "insincere" in making this motion and are seeking only delay is both baseless and irrelevant. (Pl. Br. 1, 11.) As discussed above, failing to require new notice raises genuine concerns of delay if a class member

challenges lead plaintiff's status at a later stage of the litigation. Indeed, for the straightforward reason that a previously appointed lead plaintiff has no incentive to issue a new notice and expose its lead plaintiff status to challenge, the question of new notice routinely and properly arises, and is presented to the Court, because defendants raise it. (*See* Defs. Br. 8 (citing cases)); *Kaplan* v. *S.A.C. Capital Advisors, L.P.*, 947 F. Supp. 2d 366 (S.D.N.Y. 2013) (letter to court prompted by defendants' letter to current lead plaintiff). The Court should disregard the Pension Fund's unwarranted ad hominem accusations.

CONCLUSION

For the foregoing reasons and those in defendants' moving brief, the Court should enter an order directing the Pension Fund to publish a new notice to the new proposed class in compliance with the PSLRA.

Dated: September 26, 2017

Respectfully submitted,

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