SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, By LETITIA JAMES, Attorney General of the State of New York, Plaintiff, – against – EXXON MOBIL CORPORATION, Defendant.	Index No. 452044/2018 IAS Part 61 Hon. Barry R. Ostrager Mot. Seq. 10

PLAINTIFF'S OPPOSITION TO ENERGY POLICY ADVOCATES AND ROBERT SCHILLING'S MOTION TO INTERVENE

INTRODUCTION

Plaintiff, the New York State Attorney General on behalf of the People of the State of New York ("OAG"), brought this civil action in October 2018 under New York laws prohibiting fraud, including securities fraud. Defendant, Exxon Mobil Corporation ("ExxonMobil") interposed several affirmative defenses that were "irrelevant" to whether OAG's complaint made out a valid cause of action against ExxonMobil. *See, e.g.* June 14, 2019 Hrg Tr. at 39, Dkt. No. 240. ExxonMobil then sought extensive discovery relating to these defenses, which alleged that OAG had engaged in official misconduct and selective enforcement. In March 2019, OAG moved to dismiss the defenses or, in the alternative, for a protective order halting any further discovery related to such defenses. (Dkt. No. 60.)

While OAG's motion was pending, OAG agreed to produce certain emails between OAG and third parties, notwithstanding its objections and notwithstanding the automatic stay of discovery to which OAG was entitled under C.P.L.R. § 3103(b), in order to avoid delay in the event of an adverse ruling on its motion to dismiss. In light of the sensitivity of the emails, OAG designated them as confidential pursuant to the protective order then in effect. (Dkt. No. 46.)

Upon granting OAG's motion to dismiss ExxonMobil's affirmative defenses, the Court also granted a motion by OAG to seal the documents that OAG had produced under objection in response to the dismissed defenses. As the Court observed, OAG had produced the third-party emails provisionally, "during the pendency of these motions," in order to avoid "jeopardiz[ing] the trial date." (Dkt. No. 240 at 45:13-15.) The Court further observed that, in light of the dismissal of ExxonMobil's misconduct defenses, there was "no need for there to be public disclosure of the material relating to those three defenses." (*Id.* at 45:15-18.)

The parties filed their last submissions with the Court on November 18, 2019, and the

Court entered final judgment on December 10, 2019. The time for appeal ran on January 10, 2020.

An organization and a private individual – Energy Policy Advocates and Robert Schilling – have now moved to intervene in this concluded lawsuit, requesting an order that "[s]ets a hearing for further motions and argument on unsealing certain among the Court's files in this matter." (Dkt. No. 572 at 1.) Proposed intervenors have identified certain documents to which they "specifically" seek access, (Dkt. No. 574 ¶ 2), but have stated that they also may subsequently decide to pursue numerous additional documents. By their own admission, proposed intervenors "have no connection to the substance of the dispute in this matter." (Dkt. No. 575 at 2.)

This Court should deny proposed intervenors' motion to intervene in this case.[1] (Dkt. No. 573.) Their claimed authority for intervening, C.P.L.R. 1013, requires demonstration of a legal standard that the proposed intervenors acknowledge they cannot meet: a showing of a substantial interest in outcome of the case. In addition, although C.P.L.R. 1013 requires that an intervention motion be timely filed, the proposed intervenors waited until this case was over to bring their motion and have offered no justification for their delay. Granting party status under such circumstances would open the door to all manner of interference, because there is no precedent for limiting the scope of an intervention in the manner that the proposed intervenors suggest. If this Court permits Energy Policy Advocates and Schilling to intervene, they could then assert the rights of parties to the case—including by filing motions to modify the final judgment and other rulings in the case.

[1] OAG takes no position on the proposed amicus motion and cross-motion of pending amicus Matthew Pawa. (Dkt. No. 579).

ARGUMENT

The proposed intervenors unambiguously do not meet the legal standard for the *only* authority they cite to support their intervention in this case, C.P.L.R. 1013. That provision permits a nonparty to intervene "[u]pon timely motion" when either "a statute of the state confers" the nonparty a "right to intervene," or when the nonparty's "claim or defense and the main action have a common question of law or fact." *Id.*; *see Schron v. Grunstein*, 41 Misc. 3d 1207(A), 977 N.Y.S.2d 670, at *2 (Sup. Ct. N.Y. Cnty. Oct. 1, 2013). The proposed intervenors must have a "real and substantial interest in the outcome of the proceedings." *Trent v. Jackson*, 129 A.D.3d 1062, 1062 (2d Dep't 2015) (quotation marks omitted).

The proposed intervenors here undisputedly are not presenting any claim or defense that shares a "common question of law or fact" with the main action. As they admit in their memorandum in support of their motion for intervention, they "have no connection to the substance of the dispute in this matter." (Dkt. No. 575 at 2.) Moreover, they do not and cannot identify any New York statute that grants them a right to intervene in this case. *See* C.P.L.R. 1013.

New York courts have recognized that intervention—whether permissive or mandatory—is not the correct procedural mechanism for a non-party seeking access to sealed court documents. As this Court has explained, "[i]ntervention as of right pursuant to CPLR 1012 is not appropriate" when a proposed intervenor "will not be bound by any judgment in [the] action," while "permissive intervention pursuant to CPLR 1013 is not warranted" when a proposed intervenor "does not have a real and substantial interest in the outcome of the proceeding." *Matter of Astor*, 13 Misc. 3d 1203(A), 824 N.Y.S.2d 755, at *2 (Sup. Ct. N.Y. Cnty. Aug. 29, 2006); *see also Schron v. Grunstein*, 41 Misc. 3d 1207(A), 977 N.Y.S.2d 670, at *2 (Sup. Ct. N.Y. Cnty. Oct. 1, 2013) (same); *Coopersmith v. Gold*, 594 N.Y.S.2d 521, 525-26 (Sup. Ct.

Rockland Cnty. 1992) ("intervention is not the mechanism whereby" news media may "be heard on . . . questions of closure or sealing of records"). *Cf. Crain Commc'ns, Inc. v. Hughes*, 74 N.Y.2d 626, 628 (1989) (nonparty seeking records access "may obtain relief from the sealing order via a motion to vacate pursuant to CPLR 5015(a) in which all interested parties may be joined").

Indeed, none of the cases cited by the proposed intervenors support the proposition that permissive intervention is appropriate in these circumstances. As the proposed intervenors acknowledge, several of these cases involved press entities seeking judicial documents through separate Article 78 proceedings, not motions to intervene.[2]

The First Department has permitted nonparty media entities to access sealed or redacted court records, but did not apply C.P.L.R. 1013 in that particular case. *See Maxim Inc. v. Feifer*, 145 A.D.3d 516 (1st Dep't 2016). And C.P.L.R. 1013 is the proposed intervenors' only stated basis for intervention here. *Mancheski v. Gabelli Group Capital Partners*, 39 A.D.3d 499 (2d Dep't 2007), is also readily distinguishable. Unlike the movants there, the proposed intervenors here did not seek to be heard "prior to [this Court's] issuance of an order to seal documents." *Id.* at 501.

Indeed, the proposed intervenors' failure to "timely" file their motion provides an independent ground for denying their motion to intervene. *See* C.P.L.R. 1013. This Court made its sealing decision more than seven months ago. (*See* Dkt. Nos. 238, 240.) And the trial

[2] *See* Dkt. No. 575 at 3 (citing *Westchester Rockland Newspapers Inc. v. Leggett*, 423 N.Y. 2d 630 (1979); *Associated Press v. Owens*, 160 A.D.2d 902 (2d Dep't 1990); *Daily News, L.P. v. Wiley*, 126 A.D.3d 511 (1st Dep't 2015)). In *People v. Macedonio*, the court heard the merits of a request to unseal records brought by a press outlet "in the form of a letter" after determining under the particular facts of that case that "the interests of justice oblige us to overlook the technical defects in the mode of application by Newsday and look instead on its merit." 51 Misc. 3d 1219(A), 41 N.Y.S.3d 451, at *3 (Sup. Ct. Suffolk Cnty. May 4, 2016).

proceedings ended on December 10, 2019, when this Court issued its final judgment. (*See* Dkt. No. 567.)

The proposed intervenors, however, made no effort to be heard on the issue they raise in their motion until this late stage, even though they have been aware of the lawsuit and its connection with the documents they are now seeking to have unsealed. Matthew Hardin—a board member and attorney for proposed intervenor Energy Policy Advocates—represented other non-profits in multiple 2017 FOIL lawsuits seeking communications from the Office of the New York State Attorney General concerning facts related to this case. *See Energy & Envtl. Legal Inst. v. Attorney Gen. of State*, 162 A.D.3d 458 (1st Dep't 2018); Affirmation of Matthew D. Hardin, *Free Market Environmental Law Clinic, et al. v. Attorney General of New York*, Index. No. 101759/2016 (Sup. Ct. N.Y. Cnty. Jan. 31, 2017), *available at* https://tinyurl.com/rznq8sc. The same is true of Francis Menton, the other attorney for proposed intervenors. *See Free Market Environmental Law Clinic, et al. v. Attorney General of New York*, 159 A.D.3d 467 (1st Dep't 2018). Where, as here, proposed intervenors wait months to intervene after learning of a lawsuit, their C.P.L.R. 1013 motion to intervene is not "timely." *See Matter of HSBC Bank U.S.A.*, 135 A.D.3d 534, 534 (1st Dep't 2016); *RKH Holding Corp. v. 207 Second Ave. Realty Corp.*, 236 A.D.2d 254, 255 (1st Dep't 1997).

In this case, there is no longer anything left to intervene in. Final judgment has been entered, the time to appeal has run, and the case is over. It is a "fundamental principle that a court's power to declare the law is limited to determining actual controversies in pending cases," subject to an exception (the exception to the mootness doctrine) that is not present here. *See Matter of David C.*, 69 N.Y.2d 796, 798 (1987). That principle extends to requests to unseal records. As one court has observed, in a case where final judgment has been entered, "it would

seem that no jurisdiction exists to entertain an application by a nonparty to unseal records, absent a statute granting such authority." *Coopersmith*, 594 N.Y.S.2d at 525.

The motion to intervene must also be denied because it is not accompanied by a proposed intervention *pleading*, as required by C.P.L.R. 1014. As appellate courts have recognized, C.P.L.R. 1014 imposes "a statutory requirement that 'a motion to intervene shall be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought,'" and trial courts have "no power to grant leave to intervene without a proposed pleading from the intervenors." *People v. Conley*, 165 A.D.3d 1602, 1603 (4th Dep't 2018), *lv. to app. denied*, 32 N.Y.3d 1203 (2019). The proposed motion to unseal presented by the proposed intervenors here (Dkt. No. 574), is manifestly not a pleading. *See* C.P.L.R. 3011 (defining "Kinds of pleadings" in a civil action as "a complaint and an answer").

Allowing a non-party to intervene in law enforcement proceedings permits it to exercise all the rights of a full party. *See New York Central Railroad Co. v. Lefkowitz*, 19 A.D.2d 548, 548 (2d Dep't 1963). It may then interfere even with the aspects of the proceeding that are wholly irrelevant to its initial claimed interests. Thus, the C.P.L.R. for good reason does not authorize a person or entity without a substantial interest in the outcome of the proceedings to be granted party status, even if the movant claims it will limit its participation to seeking sealed documents or some other specified purpose. Once made a party, intervenors can access *all* case documents, including confidential business material filed under a protective order. And intervenors can access these documents regardless of whether final judgment has already been entered.

Persons admitted as intervenors can wield immense power at different stages in the litigation. A person who is allowed to intervene while settlement discussions are pending could

interfere with the settlement. Or, if a defendant is under a continuing obligation after final judgment has been entered in a case, a late-coming intervenor could move to enforce its own view of the defendant's obligations. In a case where final judgment has been entered, a late-coming intervenor could move to vacate the final judgment, move to renew, note an appeal, or seek stays and injunctions pending appeal. *See, e.g.*, C.P.L.R. 2221, 5015(a). The C.P.L.R. and courts that have received intervention requests thus sensibly limit intervention to people and entities with a "real and substantial interest in the outcome of the proceedings," *Trent*, 129 A.D.3d at 1062. Proposed intervenors who lack such a stake should not be permitted to exercise party status and the powers that accompany it.[3]

CONCLUSION

For the reasons stated above, OAG respectfully submits that this Court should deny the proposed intervenors' motion to intervene.

[3] Because of the limited relief the proposed intervenors seek at this stage, we do not address and this Court should not address, the merits of whether any particular sealed document should be unsealed. At this stage, this Court only has before it the proposed intervenors' motion for intervention and the only relief the motion requests is for "an order that: (a) Proposed intervenors are permitted to intervene in this matter for the limited purpose of moving to unseal judicial documents in this matter"; and "(b) Sets a hearing for further motions and argument on unsealing certain among the Court's files in this matter." (Dkt. No. 573.)

Dated: New York, New York
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Certification of Compliance with Word Count

Pursuant to Rule 17 of the Rules of Practice for the Commercial Division of the Supreme Court, I certify that this brief complies with that rule because it contains 2,197 words, exclusive of the caption and signature block. In making this certification, I relied on Microsoft Word's "Word Count" tool.

Dated: January 27, 2020
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