UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EXXON MOBIL CORPORATION,

Plaintiff-Appellant,

v.

No. 18-1170

MAURA TRACY HEALEY, In her official capacity as Attorney General of the State of Massachusetts, BARBARA D. UNDERWOOD, Attorney General of New York, in her official capacity,

Defendants-Appellees.

MEMORANDUM OF LAW IN OPPOSITION TO APPELLANT'S MOTION TO REMOVE APPEAL FROM EXPEDITED CALENDAR

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Dated: May 25, 2018

New York Attorney General Barbara D. Underwood hereby submits this opposition to the request of Exxon Mobil Corporation to remove this appeal from the Court's Expedited Appeals Calendar. This Court should deny Exxon's request because placement of this appeal on the Expedited Appeals Calendar was proper under Second Circuit Local Rule 31.2(b)(1)(B), and because removing the case from the Expedited Appeals Calendar will harm the people of the State of New York by impeding the New York Attorney General's investigation of potentially fraudulent representations that Exxon has made to New York consumers and investors.

The underlying suit is an action that Exxon has brought against the Attorneys General of New York and Massachusetts in their official capacities to enjoin enforcement of subpoenas issued in connection with ongoing law enforcement investigations into whether certain public statements by Exxon regarding the impact of climate change and related government policies on Exxon's business may have violated state laws prohibiting securities, business, or consumer fraud. Exxon's amended complaint alleges that investigative subpoenas issued to Exxon by the New York Attorney General in November 2015 (and civil investigative

demands issued by the Massachusetts Attorney General in April 2016) violate Exxon's rights under the U.S. Constitution's Commerce Clause and First, Fourth, and Fourteenth Amendments, and amount to a conspiracy to deprive Exxon of its constitutional rights in violation of 42 U.S.C. § 1985—among other claims.

In the decision below, the United States District Court for the Southern District of New York (Caproni, J.) dismissed the complaint with prejudice for failure to state a plausible claim for relief, and denied as futile Exxon's request to file a second amended complaint. *See Exxon Mobil Corp. v. Healey*, No. 17-cv-2301, 2018 WL 1605572 (S.D.N.Y. Mar. 29, 2018), ECF No. 265.

On May 18, 2018, this Court informed the parties that Exxon's pending appeal of the dismissal was being placed on the Expedited Appeals Calendar pursuant to Second Circuit Local Rule 31.2(b). *See* No. 18-1170 (2d Cir.), ECF No. 33. According to the briefing schedule in that notice, Exxon's opening appeal brief is due by June 22, 2018, and appellees' briefs are due no later than July 27, 2018. Exxon now asks this Court to remove the appeal from the Expedited Appeals Calendar and

direct instead that the appeal proceed on an ordinary schedule. This Court should deny Exxon's request.

Removing this appeal from the Expedited Appeals Calendar would harm the public interest by prolonging the pendency of this meritless and disruptive lawsuit, which Exxon commenced "on the basis of extremely thin allegations and speculative inferences" in an effort "to stop state officials from conducting duly-authorized investigations into potential fraud." 2018 WL 1605572, at *1; *see also id.* at *5-7 (describing the procedural history of this suit and the oversight of New York's and Massachusetts' investigations by the courts of those States). As the district court noted in dismissing this suit, Exxon does not dispute that defendants have the authority to investigate potential violations of state anti-fraud laws, and that "false statements to the market or the public are not protected speech." *Id.* at *19. And "[d]espite arguing to [the district court] that the document requests" made by the New York Attorney General "are so frivolous that they are evidence of pretext, Exxon did not dispute the validity of the Subpoena requests in New York Supreme Court" before the state court judge overseeing its subpoena compliance. *Id.* at *20. In the words of the district court: "[t]he legal jiu-

jitsu necessary to pursue this strategy would be impressive had it not raised serious risks of federal meddling in state investigations and led to a sprawling litigation involving four different judges, at least three lawsuits, innumerable motions and a huge waste of the AGs' time and money." *Id.* at 20 n.31.

Exxon's arguments for removing this case from the Expedited Appeals Calendar are as meritless as its underlying suit. As an initial matter, Exxon is simply incorrect in contending (Mot. 1-2, 2d Cir. ECF No. 42) that its suit was dismissed on grounds that fall outside the scope of Local Rule 31.2(b). Exxon acknowledges that failure to state a claim "was the sole ground" for the district court's dismissal of its complaint against the New York Attorney General. Mot. 3 n.2. And although the district court's grounds for dismissing the complaint against the Massachusetts Attorney General included res judicata, *see* 2018 WL 1605572, at *12-16, this Court has made clear on numerous occasions that the Court "can affirm the dismissal of a complaint for failure to state a claim based on the affirmative defense of res judicata" where all relevant facts are shown by materials "of which [the Court] can take judicial notice," *AmBase Corp. v. City Investing Co. Liquidating Trust*,

326 F.3d 63, 72 (2d Cir. 2003) (citing *Day v. Moscow*, 955 F.2d 807, 811 (2d Cir. 1992)).

Exxon is likewise wrong in arguing (Mot. 4) that its First Amendment claims present novel or important legal issues that are unsuited to expedited consideration. Persons and entities being investigated for fraudulent conduct not infrequently seek to use the First Amendment as a shield against law-enforcement actions. *See, e.g.*, *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.,* 538 U.S. 600, 617 (2003); *Securities and Exchange Comm'n v. McGoff*, 647 F.2d 185, 189, 194 (D.C. Cir. 1981). Accordingly, the legal standards for evaluating such claims are well-settled, as is the principle that a showing of proper authority to commence a law enforcement action will "defeat a First Amendment claim that is premised on the allegation that defendants" were using law enforcement authority "in an attempt to silence" the target of a law enforcement action, *see Fabrikant v. French*, 691 F.3d 193, 215 (2d Cir. 2012).

Finally, this Court should reject Exxon's bold attempt to turn the procedural morass that Exxon has already created into a justification for further prolonging this suit. As Exxon acknowledges, its efforts to impede

defendants' fraud investigations against it have already commanded extensive time from two district courts, resulted in "two separate sets of Rule 12(b)(6) motions," and caused "motions to dismiss [to be] fully briefed on four different occasions." Mot. 3. And as is clear from the trial record, this duplication was caused by Exxon's improper efforts at forum-shopping: specifically, its decision to commence this suit in a Texas jurisdiction that had no connection to the Attorneys General of New York and Massachusetts, or the law enforcement investigations that Exxon is challenging. *See, e.g.*, 2018 WL 1605572, at *7.

No weight whatsoever is due to Exxon's claim that certain state Attorneys General who have filed amicus briefs supporting Exxon at prior phases of this litigation might not be able to file similar briefs in this Court, if the Court keeps this appeal on the Expedited Appeals Calendar. *See* Mot. 4. Those amici had no difficulty submitting a proposed amicus brief to the district court within twelve days of the district court's order requesting initial submissions from the parties, before the district court had even set a briefing schedule in this case. *See* Order, dated Mar. 30, 2017, No. 17-cv-2301, ECF No. 182 (order directing initial submissions); Mot. for Leave to File Amicus Br., dated Apr. 19, 2017, No.

17-cv-2301, ECF No. 192 (motion containing proposed amicus brief). And in any event, the convenience of Exxon's possible future amici cannot outweigh the many proper reasons for keeping this case on the Expedited Appeal Calendar.[1]

The pendency of Exxon's appeal is an impediment to Exxon's full compliance with the New York Attorney General's subpoenas, and thus the Attorney General's investigation. For almost two years, Exxon has repeatedly invoked the preemption arguments that it made in this litigation—and that the district court rejected—as a justification for its refusal to comply with lawful investigative requests from the New York Attorney General. The company has given every indication it will continue to maintain this obstructionist posture for as long as this meritless litigation persists. The New York Attorney General and the broader public that she serves have an interest in having this appeal resolved as soon as practicable.

[1] Although Exxon makes much of the fact that "thirteen state attorneys general" joined an amicus brief supporting Exxon in the district court proceedings (Mot. 4), twenty state Attorneys General joined an amicus brief explaining why this suit is meritless, disruptive, and deserving of dismissal. Mem. of Law for Amici Curiae in Support of Defs., dated Aug. 17, 2016, No. 17-cv-2301, ECF No. 53.

As a courtesy, the Attorney General would not object to Exxon's receiving an additional ten days to perfect its brief—that is, until July 2, 2018—in the event that this Court denies Exxon's request to remove this case from the expedited calendar.

Dated: New York, New York
May 25, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 27 and 32 of the Federal Rules of Appellate Procedure, Oren L. Zeve, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this document, the document contains 1,453 words and complies with the typeface requirements and length limits of Rules 27(d) and 32(a)(5)-(6).

/s/ Oren L. Zeve