UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

PEDRO RAMIREZ, JR., Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. EXXON MOBIL CORPORATION, et al., Defendants.	§ § § § § § § § § § §	Civil Action No. 3:16-cv-03111-K CLASS ACTION

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO FILE REPLY BRIEF ADDRESSING NEW CASE DEVELOPMENT

Plaintiff Greater Pennsylvania Carpenters Pension Fund ("Plaintiff") respectfully submits this response in opposition to Defendants' Motion for Leave to File Reply Brief Addressing New Case Development ("Motion") (ECF No. 144).

I. ARGUMENT

On October 16, 2020, Defendants filed an unauthorized supplemental reply brief (ECF No. 138) – their ***second*** such unauthorized supplemental brief – in further support of their opposition to Plaintiff's pending motion for class certification (ECF No. 86). *See* N.D. Tex. Civ. L.R. 56.7 ("Except for the motions, responses, replies, briefs, and appendices required by these rules, a party may not, without the permission of the presiding judge, file supplemental pleadings, briefs, authorities, or evidence."); *see also* ECF No. 120 (unauthorized Supplemental Brief Addressing New Case Development). On October 19, 2020, this Court rightfully struck Defendants' unauthorized supplemental reply brief, expressly stating that "[a]ny party seeking to file supplemental materials in the future must formally seek leave of this Court." ECF No. 141 at 2. Two days later, Defendants filed the present Motion seeking leave to file the previously filed (and stricken) unauthorized supplemental reply brief. ECF No. 144. For the reasons set forth below, Plaintiff respectfully submits that Defendants' Motion should not only be denied, it should be stricken as well.

Defendants' Motion, which contains more than three pages of substantive argument summarizing the contents of Defendants' "proposed" supplemental reply brief, blatantly seeks to end-run the Local Rules and this Court's clear directive by attempting to inject the substance of Defendants' unauthorized supplemental reply into the record without the Court's formal approval. *Id.* Defendants' disregard of this Court's rules should not be countenanced. Moreover, aside from Defendants' transparent desire to have "the last word" regarding Plaintiff's pending motion for class certification, there is no valid justification or need for Defendants to file their proposed supplemental reply brief. Plaintiff's response (ECF No. 129) to Defendants' ***first*** unauthorized supplemental brief

did not raise any new issues that warrant a supplemental reply from Defendants. Instead, Plaintiff merely addressed the points raised by Defendants' supplemental brief and soundly explained why they did not justify preclusion of Plaintiff's or the Class's claims or denial of Plaintiff's motion for class certification.

In addition, the Motion's characterization of Plaintiff's supplemental response is inaccurate and misleading. Contrary to Defendants' assertions, Plaintiff's supplemental response clearly demonstrated that the NYAG Action cannot have a preclusive effect on Plaintiff's or the Class's claims because the NYAG was ***not*** legally acting in a representative capacity and was not in privity with either Plaintiff or the Class. *See* ECF No. 129 at 9-10. Defendants' Motion ignores that the NYAG Action was not a class action, did not provide formal notice and did not provide a release of any of Plaintiff's or the Class's claims, let alone the claims asserted in this case. Defendants' citation to *People v. Applied Card Sys., Inc.*, 894 N.E.2d 1 (N.Y. 2008), does nothing to undermine these facts. In *Applied Card*, New York consumers had ***opted into a class action settlement*** after receiving formal court-approved notice and, as a result, had specifically released their claims in exchange for receiving compensation as part of the settlement. *Id.* at 11-12. Thus, *Applied Card* stands for the uncontroversial proposition that res judicata bars a class member who has released its claims as part of one lawsuit from recovering again as part of a second lawsuit brought on its behalf seeking the same relief. Thus, the decision is not informative here. *See* ECF No. 129 at 9-10.

Moreover, every district attorney and state attorney general brings their cases on behalf of the people of the state. But this fact does not in any way trigger the protections and requirements of a Rule 23 class action. *See* ECF No. 120 at 17. In the context of New York's Martin Act in particular, "a Martin Act lawsuit brought by the state Attorney General is fundamentally different" from a "class action . . . brought by a member of [a] putative class." *Matana v. Merkin*, 957 F. Supp. 2d 473, 488-

89 (S.D.N.Y. 2013). The former "does ***not*** purport to aggregate claims of individual plaintiffs"; rather, the Martin Act "is a regulatory tool aimed at vindicating public policy objectives." *Id*. at 489. Defendants are aware of this distinction given that the district court that briefly presided over the Massachusetts Attorney General's action against Exxon held that "the Commonwealth acts here not as a representative of a class of injured citizens but in its own right as a sovereign." *Massachusetts v. Exxon Mobil Corp*., No. 19-12430-WGY, 2020 WL 2769681, at *14 (D. Mass. May 28, 2020). At any rate, Defendants ignore that Plaintiff (a Pennsylvania pension fund) and the vast majority of class members are ***not*** "People of the State of New York." *See* ECF No. 120 at 17.

Further, Plaintiff's response did not "abandon" its claims regarding Defendants' purported use of carbon proxy costs. As amply addressed in Plaintiff's supplemental response, Plaintiff's proxy cost allegations provide an alternative avenue to prove that the Rocky Mountain Dry Gas Assets were impaired. ECF No. 129 at 18. In particular, Defendants misrepresented that unlike its peers, Exxon was able to avoid "the asset write-down trap" by being more conservative, in part because it applied a proxy cost of carbon in connection with all of its investment analyses. ECF No. 105-4 at App. 54. Having touted the use of the carbon proxy cost, Plaintiff alleges Exxon violated GAAP by failing to employ it in its asset impairment analysis. *See* ECF No. 129 at 18; ECF No. 133 at 10-12; SEC Staff Accounting Bulletin No. 114 (requiring that "[t]he assumptions used in developing [impairment] estimates shall be reasonable in relation to the assumptions used in developing other information used by the entity for comparable periods, such as internal budgets and projections"). The parties will of course have an opportunity to litigate these allegations on the merits at trial, after full discovery. They are not, however, appropriately adjudicated in the context of what is actually before the Court, *i.e.*, Plaintiff's pending motion for class certification and Defendants' motion for reconsideration of the Court's order over two years ago denying Defendants' motion to dismiss.

In short, Defendants' self-serving desire to have the last word on Plaintiff's motion is insufficient to warrant granting Defendants' current request, particularly because their supplemental reply brief largely just repeats and rephrases the same arguments set forth in their first unauthorized supplemental brief. The record is more than sufficient for the Court to decide Plaintiff's motion for class certification, including well over 2,100 pages of briefing and exhibits (nearly 900 pages of which relate to the "supplemental" briefing and exhibits). *See* ECF Nos. 86-89, 97-98, 102-106, 109-110, 115-116, 119-121, 125, 129-130, 134-135. Thus, Defendants' Motion should be denied. And given Defendants' attempt to circumvent the Local Rules and this Court's directives by summarizing the substance of their proposed supplemental reply in the Motion, Plaintiff respectfully requests that the Motion be stricken as well.[1]

II. CONCLUSION

In light of the ample evidentiary record, which includes the transcripts of both parties' experts' full-day depositions, Plaintiff respectfully requests that the Court deny and strike Defendants' Motion (ECF No. 144), find that the briefing on Plaintiff's motion for class certification is now closed, and rule on Plaintiff's motion for class certification (ECF No. 86). Alternatively, if the Court would find it helpful, oral argument could be held via video conference at the Court's earliest convenience.

DATED: October 28, 2020

Respectfully submitted,

KENDALL LAW GROUP, PLLC
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s/ Joe Kendall
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[1] In the event the Court elects to grant Defendants' Motion, Plaintiff respectfully requests permission to file a sur-reply not to exceed five pages in length, in order to fully address the inaccurate assertions set forth in Defendants' proposed supplemental reply brief.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on October 28, 2020, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

s/ Joe Kendall

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