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December 18, 2019

VIA THE CM/ECF SYSTEM

Catherine O'Hagan Wolfe
Clerk of the Court
U.S. Court of Appeals for the
Second Circuit
40 Foley Square
New York, NY 10007

Subj: No. 18-1170 – *Exxon Mobil Corp. v. Healey*

Dear Clerk Wolfe:

Defendant-appellee Massachusetts Attorney General Healey submits this letter in response to plaintiff-appellant Exxon Mobil Corporation's (Exxon) November 15, 2019 letter purporting to "update the Court about recent developments in parallel litigation." Ltr. 1. Transparently attempting to induce this Court to permit Exxon yet another chance to state claims against the Attorney General by introducing evidence from outside the record of this case, Exxon's letter contains the same "wild stretch[es] of logic" (MassAG Br. Addendum (Add-) 7 (2d Cir. ECF No. 112)) that both the district court below and the Massachusetts state courts have already rejected. Indeed, contrary to Exxon's "update," the Attorney General, as explained below, is simply moving forward on behalf of the Commonwealth of Massachusetts (Commonwealth) to advance the Office of the Massachusetts Attorney General's mandate to protect Massachusetts consumers and investors from unlawful business practices in Massachusetts.

Exxon initiated this case on June 15, 2016, by filing a complaint against the Attorney General in the United States District Court for the Northern District of Texas. Exxon filed a parallel action in the Massachusetts Superior Court. In both actions, Exxon sought to enjoin enforcement of an April 2016 administrative subpoena served by the Attorney General as part of her investigation into whether Exxon's marketing and sale of fossil-fuel products and securities to Massachusetts consumers and investors violated Massachusetts' Consumer Protection Act. Grounded on the same allegations, Exxon alleged in both its state and federal actions that the Attorney General in issuing the April 2016 administrative subpoena abused her Office's power and violated Exxon's constitutional rights to, among other things,

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free speech. Both the Massachusetts Superior Court and Supreme Judicial Court rejected Exxon's claims, including Exxon's claim that the court should disqualify the Attorney General from pursuing the investigatory subpoena, and the Massachusetts judgment is final. *See* 2d Cir. ECF No. 213. As the district court below held, that state court judgment bars Exxon's federal claims here. MassAG Br. Add-28-32; *see also* MassAG Br. 48-55 (2d Cir. ECF No. 112).

Soon after Exxon filed its state and federal actions, the Attorney General entered into an agreement with Exxon to preserve the Commonwealth's potential claims against the company until Exxon's challenges to the investigatory subpoena were finally resolved. In exchange, the Attorney General agreed that Exxon did not have to comply with the subpoena until both cases were decided and any subsequent appeals were exhausted. The Attorney General continued to investigate Exxon's conduct in the intervening years through other available avenues. Following that investigation, the Attorney General, on October 10, 2019, served Exxon with a standard, statutorily-required pre-suit notice of the Commonwealth's intention to commence a civil consumer and investor protection action against Exxon, *see* Mass. Gen. Laws ch. 93A, § 4 (¶ 2),¹ and invited Exxon to confer with the Attorney General to discuss possible resolution of the Commonwealth's claims.

Exxon, citing its trial with New York, declined to have an initial conversation with the Attorney General. Instead, Exxon chose to prepare and then file an "emergency" motion in state court on October 17, 2019 seeking an order enjoining the Attorney General from filing suit until after Exxon's New York trial ended. After a hearing, the court denied Exxon's unprecedented and legally-baseless request. The Attorney General then filed a 205-page complaint alleging that Exxon committed, and continues to commit, numerous violations of the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A, §§ 1-11, in its marketing and sale of its fossil fuel products and securities to Massachusetts consumers and investors.

Exxon claims that the Attorney General refused to delay filing the Commonwealth's complaint "in a calculated ploy to (i) interfere with ExxonMobil's trial preparations, (ii) garner media attention for itself, and (iii) deprive ExxonMobil of its right to meaningfully meet and confer." Ltr. 2 (footnote omitted). These allegations are based on the same "pure speculation" as the ones in its amended complaint below. MassAG Br. Add-40. Indeed, after the Commonwealth's complaint was filed, the Attorney General *agreed* to extend Exxon's time to answer or otherwise

¹ The five-day pre-suit statutory notice requirement provides: "[a]t least five days prior to the commencement of any action . . . , the attorney general shall notify the person of [her] intended action, and give the person an opportunity to confer with the attorney general in person or by counsel or other representative as to the proposed action." Mass. Gen. Laws ch. 93A, § 4 (¶ 2).

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respond to the complaint until more than *two months* after the New York trial's conclusion—from November 19, 2019 to January 13, 2020.² Exxon's complaints about being deprived of its alleged "right" to pre-suit conferral was thus a consequence of Exxon's own *choice* to file an unprecedented motion seeking to enjoin the Attorney General from filing a complaint, instead of conferring with the Attorney General. And the Attorney General's decision to issue a press release regarding the complaint's filing was consistent with the Office's practice of notifying Massachusetts citizens of legal filings by the Commonwealth and the Office's work on matters of public interest³—a practice that is "integral" to her job. Br. of MassAG 44-45 (citation omitted).⁴

Exxon also claims that the Attorney General has never "expressed a sense of urgency to resolve its potential claims" and "did not interview a single ExxonMobil witness or require ExxonMobil to produce a single document" (the implication being that the Attorney General "obtained no evidence" during the Office's investigation). Ltr. 2. But, in fact, the Attorney General has twice urged this Court to resolve this case expeditiously, so that the Attorney General may finally enforce her subpoena and obtain the evidence the subpoena requests from Exxon itself. 2d Cir. ECF No. 44, at 1 (opposing Exxon's request to remove case from expedited calendar because it would "further delay the Attorney General's ability to advance her investigation."); 2d Cir. ECF No. 263, at 1 (asking the Court to schedule case for argument during a proposed week in October 2019 because "further delay . . . would be prejudicial to the Attorney General"). And the Attorney General has not "interview[ed] a single ExxonMobil witness" or secured any documents from the company because Exxon has steadfastly refused to cooperate with the Attorney General's April 2016 subpoena. Evidence, however, as Exxon knows, can be obtained from many sources other than

² Exxon then removed the case to the United States District Court for the District of Massachusetts. See Exxon's Notice of Removal in *Commonwealth of Massachusetts v. Exxon Mobil Corp.*, Civ. A. No. 19-cv-12430-MLW (D. Mass. Nov. 11, 2019) (ECF No. 1). The Attorney General intends to file a motion to remand the case to Massachusetts state court in due course.

³ *E.g.*, Press Release, Massachusetts Attorney General, AG Healey Sues Purdue Pharma, Its Board Members and Executives for Illegally Marketing Opioids and Profiting From Opioid Epidemic (June 12, 2018), <https://www.mass.gov/news/ag-healey-sues-purdue-pharma-its-board-members-and-executives-for-illegally-marketing-opioids>.

⁴ MassAG Br. Add-42 & n.29 (district court finding that Exxon's "inference" is unreasonable because, "[a]s public officials the AGs 'have an obligation to speak out about matters of public concern'" (citation omitted)); *id.* at Add-60-61 (same finding by Massachusetts Superior Court); *id.* at Add-78 (same finding by Massachusetts Supreme Judicial Court).

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the target, and the Attorney General pursued those other sources in the course of her investigation.

None of the “developments” described in Exxon’s letter thus “demonstrate the ongoing nature of [the New York or Massachusetts Attorneys General’s] unconstitutional conduct.” Ltr. 2. They do, however, demonstrate Exxon’s continued, desperate attempts to spin a false conspiratorial narrative based on nothing more than sheer speculation and fanciful inferences. They also further demonstrate why it is time to resolve this appeal. As the New York Attorney General explained in her December 3, 2019 letter, Exxon’s claims against the New York Attorney General are moot and accordingly should be dismissed now; *see* Ltr. 1-2 (2d Cir. ECF No. 271); indeed, since the date of Exxon’s letter and the New York Attorney General’s response, Exxon has prevailed at trial, thus making all the clearer that the appropriate venue for Exxon’s objections to the states’ investigatory subpoenas is state-court.⁵ And, as noted above, Exxon’s claims against the Massachusetts Attorney General are all claim-precluded. MassAG Br. 48-55.

The Court has proposed to hold argument during the week of February 18, 2020, and the Attorney General requests that it so schedule this matter so the Attorney General’s Office can turn its full attention to pursuing Exxon’s violations of Massachusetts’ Consumer Protection Act.

Respectfully submitted,

/s/ Seth Schofield

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Cc: All Counsel of Record (by ECF)

⁵ *New York v. Exxon Mobil Corp.*, Index No. 452044/2018, 2019 N.Y. Slip Op. 51990(U), 2019 WL 6795771 (N.Y. Sup. Ct. Dec. 10, 2019).