UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON MOBIL CORPORATION,

Plaintiff,

-against-

ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity,

Defendants.

No. 17-CV-2301 (VEC) (SN)

ECF Case

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF ATTORNEY GENERAL HEALEY'S RENEWED MOTION TO DISMISS

MAURA HEALEY
ATTORNEY GENERAL OF
MASSACHUSETTS

OFFICE OF THE ATTORNEY GENERAL
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

At the Court's direction, Attorney General Healey herein provides supplemental briefing under Second Circuit law in support of her Renewed Motion to Dismiss (Doc. No. 216) Exxon Mobil Corporation's ("Exxon") First Amended Complaint (Doc. No. 100, with exhibits in Doc. No. 101;"Amended Complaint" or "FAC"), pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6).[1] In addition to the other grounds detailed in Attorney General Healey's prior briefs, this Court must dismiss Exxon's Amended Complaint because Exxon failed to allege a plausible entitlement to relief for any of its claims. Instead, Exxon's Amended Complaint rests only on its own speculative conspiratorial theories about the Attorney General's reasons for investigating the company for investor and consumer fraud, and otherwise fails to state any cognizable claim for relief.[2]

II. BACKGROUND

In response to Attorney General Healey's civil investigative demand ("CID") pursuant to Massachusetts General Law chapter 93A ("Chapter 93A"), for information about whether Exxon misled Massachusetts investors and consumers, Exxon went on the offensive, resisting any

[1] Attorney General Healey filed four briefs in support of dismissal in the Northern District of Texas prior to transfer of the case to this Court. Doc Nos. 42, 65, 125, 169. At the initial status conference after transfer, this Court directed the Attorneys General to update their briefs to focus on personal jurisdiction, ripeness, *Colorado River* abstention, and collateral estoppel and res judicata. Doc. No. 198. At the November 30, 2017, hearing on the motions to dismiss, the Court further directed the Attorneys General to update their briefing on dismissal pursuant to Rule 12(b)(6) to reference Second Circuit law.

[2] For the reasons set forth in Attorney General Healey's prior briefs to this Court, Exxon's claims are also subject to dismissal under Rule 12(b)(6) in light of the preclusive effect of the January 11, 2017, order of the Massachusetts Superior Court, which denied Exxon's petition to set aside or modify Attorney General Healey's Civil Investigative Demand ("CID") and granted Attorney General Healey's motion to compel the company's compliance with the CID. *See* Doc. No. 217 at 8-14; Doc. No. 233 at 2-6. Attorney General Healey respectfully reserves grounds for dismissal not presented herein or in her prior briefs to this Court.

production of documents, despite its ongoing compliance with a substantially similar subpoena by New York Attorney General Schneiderman. Exxon pursued two aggressive, vexatious legal actions against Attorney General Healey: one recently argued before the Massachusetts Supreme Judicial Court,[3] and the one now pending before this Court. Exxon's strategy seeks to turn the tables by investigating the investigators, claiming that Attorney General Healey's statutorily-authorized investor and consumer fraud investigation is pretextual. Exxon has thus attempted to shift the focus away from *its own conduct*—whether Exxon, over the course of nearly forty-years, misled Massachusetts investors and consumers about the role of Exxon products in causing climate change, and the impacts of climate change on Exxon's business—to its chimerical theory that Attorney General Healey issued the CID to silence and intimidate Exxon.

The fatal flaw with Exxon's theory is that Exxon has failed to identify any facts that would make out a plausible legal claim against Attorney General Healey—despite having had two chances, in its original complaint and its amended complaint, to do so. And, in response to repeated requests from this Court at oral argument on November 30, 2017, for Exxon to point to facts that show Attorney General Healey is relying on her CID authority to discriminate against Exxon, Exxon failed to identify a single plausible allegation in support of its theory.[4] Indeed, in

[3] In the Massachusetts litigation, the Massachusetts Supreme Judicial Court heard oral argument on December 5, 2017, in Exxon's appeal of the Massachusetts Superior Court decision, *inter alia*, denying Exxon's motion to set aside Attorney General Healey's CID. The Supreme Judicial Court is expected to issue a ruling within approximately four months. The Massachusetts Supreme Judicial Court online docket for the case is available at the following address: http://ma-appellatecourts.org/display_docket.php?src=party&dno=SJC-12376.

[4] *See, e.g.*, Transcript of Oral Argument (Doc. No. 244, citations to expedited copy; "Tr."), at 27, lines 2-3 ("You have to have plausible allegations. That is where, I think, you may be foundering."); *id.* at 32, lines 4-10 ("Point me to what you want me to focus on, that they are using their power of subpoena to discriminate against you . . . ."); *id.* at 35, lines 17-22 ("Again, please give me what you view as your best facts, facts that passed *Iqbal* to show that they are not truly engaged in a legitimate fraud investigation . . . .").

response to the Court's direct inquiries, Exxon contended at one point that "one of the strongest pieces of evidence that there is something out of the ordinary here and that there is an improper purpose being pursued by the attorneys general" is the fact that twelve state attorneys general filed an amicus brief on Exxon's behalf in the Texas federal district court. Tr. at 32, lines 15-19.[5] That contention, like Exxon's other wild leaps of logic, simply is not credible.

As this Court observed, Exxon does not "have the right to lie in [its] securities filings. That's what [the attorneys general] are investigating. If they are wrong, then they don't have a case. If they are right, then Exxon should be held to account." Tr. at 34, lines 16-19. Chapter 93A prohibits Exxon from misleading Massachusetts investors and consumers, and the Massachusetts Superior Court has already determined that Attorney General Healey has undertaken her investigation in good faith. Exxon has failed to state a plausible or cognizable claim for relief, and its Amended Complaint must be dismissed.

III. STATEMENT OF PROCEEDINGS

Exxon filed its initial complaint in this action in the Northern District of Texas on June 15, 2016. Attorney General Healey first moved for dismissal on August 8, 2016, focusing on the threshold grounds of lack of personal jurisdiction in the Northern District of Texas, *Younger* abstention, lack of ripeness, and improper venue. Doc. Nos. 41 & 42. In briefing on that motion, Attorney General Healey made clear that Exxon's allegations also failed to state a claim for relief under Rule 8(a)(2). Doc. No. 65 at 1-3.

Exxon's Amended Complaint, filed in the Northern District of Texas on November 10, 2016, alleges that Attorney General Healey and New York Attorney General Schneiderman

[5] Of course, Exxon cannot rely on an amicus brief to supply the necessary predicate for its claims. It is worth noting that twenty attorneys general submitted an amicus brief in support of Attorney General Healey in Texas. Doc. No. 54.

"have joined together with each other as well as others known and unknown to conduct improper and politically motivated investigations of ExxonMobil in a coordinated effort to silence and intimidate one side of the public policy debate on how to address climate change." FAC at 1. Following an extended and fanciful account of Exxon's conspiracy theory, the Amended Complaint contains seven purported "causes of action":

1. "conspiracy" under 42 U.S.C. § 1985 and Texas common law, FAC ¶¶ 105-108;
2. "violation of ExxonMobil's First and Fourteenth Amendment rights" and a cognate provision of the Texas Constitution, *id.* ¶¶ 109-111;
3. "violation of ExxonMobil's Fourth and Fourteenth Amendment rights" and a cognate provision of the Texas Constitution, *id.* ¶¶ 112-114;
4. "violation of ExxonMobil's Fourteenth Amendment rights" to "due process," and a cognate provision of the Texas Constitution, *id.* ¶¶ 115-117;
5. "violation of ExxonMobil's rights under the Dormant Commerce Clause," *id.* ¶¶ 118-121;
6. "federal preemption," *id.* ¶¶ 122-126; and
7. "abuse of process under common law," *id.* ¶¶ 127-128.

As to Attorney General Healey, Exxon's prayer for relief focuses solely on the CID, seeking a declaratory judgment that the CID violates Exxon's federal and state constitutional rights and "common law"; "[a] preliminary and permanent injunction prohibiting enforcement of . . . the CID"; "[s]uch other injunctive relief to which Plaintiff is entitled"; and "[a]ll costs of court together with any and all such other and further relief as this Court may deem proper." *Id.* at 47.

On November 28, 2016, Attorney General Healey moved to dismiss the Amended Complaint in the Northern District of Texas on multiple grounds, including that the Amended Complaint failed to state a claim for relief under Rule 12(b)(6). *See* Doc. No. 125 at 22-25 & Doc. No. 169 at 8-10.

Attorney General Healey incorporates by reference the Statement of Facts in her earlier brief to this Court in support of dismissal, as updated by her letter to the Court dated August 1, 2017, and statements at the November 30, 2017, hearing on pending motions to dismiss. *See* Doc. No. 217 at 2-7; Doc. No. 236.

One development subsequent to that hearing is noteworthy. On December 11, 2017, Exxon filed a Form 8-K with the U.S. Securities and Exchange Commission ("SEC") stating that Exxon's board of directors had "reconsidered" a shareholder proposal requesting analysis of "impacts of climate change policies" on Exxon's business, which was spearheaded by the New York State Common Retirement Fund and earned the support of a majority of shareholders at Exxon's 2017 shareholder meeting in May. The board disclosed that it "has decided to further enhance the Company's disclosures consistent with the . . . proposal and will seek to issue these disclosures in the near future," including "energy demand sensitivities, implications of two degree Celsius scenarios, and positioning for a lower-carbon future."[6] This filing makes clear that, at a minimum, Exxon's prior disclosures to investors, including Massachusetts investors, may not have adequately accounted for the effect of climate change on its business and assets.

[6] *See* Exxon Form 8-K (Dec. 11, 2017), *available at* https://www.sec.gov/Archives/edgar/data/34088/000003408817000057/r8k121117.htm; *see also* Letter to Office of the New York State Comptroller from Exxon Mobil Corporation, (Dec. 11, 2017), *available at* http://www.osc.state.ny.us/press/releases/dec17/exxon-agreement-letter.pdf ("The risk of climate change is an important matter and one that requires thoughtful and objective engagement across society.").

IV. ARGUMENT

THE COURT MUST DISMISS THE AMENDED COMPLAINT BECAUSE NONE OF EXXON'S CLAIMS IS PLAUSIBLE OR LEGALLY COGNIZABLE

A. LEGAL STANDARD FOR A RULE 12(b)(6) MOTION TO DISMISS.

When presented with a motion to dismiss under Rule 12(b)(6) the Court considers "the legal sufficiency of the complaint, taking its factual allegations to be true and drawing all *reasonable* inferences in the plaintiff's favor." *Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009) (emphasis added). Under Rule 8(a)(2) and governing Supreme Court and Second Circuit decisions, this review requires the Court to apply a "'plausibility standard,' which is guided by '[t]wo working principles.'" *Id.* at 72 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "First, although 'a court must accept as true all of the allegations contained in a complaint,' that 'tenet' 'is inapplicable to legal conclusions,' and '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Harris*, 572 F.3d at 72 (quoting *Iqbal*, 556 U.S. at 678). "Second, only a complaint that states a plausible claim for relief survives a motion to dismiss," and "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Harris*, 572 F.3d at 72 (quoting *Iqbal*, 556 U.S. at 678); *see also Biro v. Conde Nast*, 807 F.3d 541, 544 (2d Cir. 2015) ("[a] claim is plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged'" (quoting *Iqbal*, 556 U.S. at 678)).

For the reasons set forth below, Exxon's Amended Complaint fails to state a plausible or legally cognizable claim for relief and therefore is subject to dismissal under Rule 12(b)(6).

B. EXXON'S PRINCIPAL CLAIMS MUST BE DISMISSED BECAUSE THEY FAIL TO MEET THE MINIMUM PLEADING STANDARDS OF RULE 8(a)(2).

The Court must dismiss the Amended Complaint's principal claims because its bald, baseless allegations that the Attorney General has, out of personal animus and in bad faith, undertaken her investigation to chill Exxon's political speech fail to meet the pleading standards of Rule 8(a)(2); those allegations therefore cannot sustain Exxon's causes of action for (i) conspiracy under federal law and Texas common law; (ii) violation of Exxon's First, Fourth, and Fourteenth Amendment rights and cognate rights under the Texas Constitution; or (iii) abuse of process under Texas common law (causes of action 1, 2-4, and 7, respectively). The rule is that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. As to Attorney General Healey, the Amended Complaint consists almost wholly of such "conclusory statements," which are insufficient to withstand dismissal under *Iqbal*.

1. EXXON'S ALLEGATIONS ARE INADEQUATE UNDER *IQBAL*.

Despite the length of the Amended Complaint's "factual" narrative, Exxon effectively offers no more than three facts as to Attorney General Healey: (1) the Attorney General participated in a single event in New York that included a meeting and press conference where she stated that climate change is a major challenge and that she would investigate Exxon, based on reports and internal corporate documents[7] indicating that Exxon knew more about climate

[7] The reports, by the *Los Angeles Times* and Pulitzer Prize-winning news organization *InsideClimate News*, included interviews with former Exxon employees and a review of Exxon's internal documents, many of which were posted online. The reports indicated that Exxon had concluded internally, decades ago, that climate change was both real and potentially catastrophic to life on this planet; that fossil fuel use contributed greatly to greenhouse gas emissions and therefore climate change, thus putting Exxon's core business at risk; and that Exxon chose to shift its resources from climate research into a campaign to sway public opinion and prevent government action to reduce greenhouse gas emissions. *See* Doc. No. 43-3, at App. 430-45 (*Los*

change than it revealed to investors and consumers, FAC ¶¶ 2-3, 6, 27, 29, 32, 33, 37, 41; (2) the Attorney General is a party to a routine common interest agreement with other state attorneys general covering climate change-related litigation, *id.* ¶¶ 52-53; and (3) the CID was issued, *id.* ¶¶ 69-73.[8]

Pointing to no other facts, Exxon speculates in the Amended Complaint that Attorney General Healey, "in an *apparent* effort to silence, intimidate, and deter those possessing a particular viewpoint from participating in [a policy] debate" (*id.* ¶ 110 (emphasis added)):

- "issued . . . the CID based on [her] disagreement with ExxonMobil regarding how the United States should respond to climate change"—an "illegal purpose . . . not substantially related to any compelling governmental interest" (*id.* ¶ 111);
- thereby engaged in "an abusive fishing expedition . . . without any legitimate basis for believing that ExxonMobil violated . . . Massachusetts law" (*id.* ¶ 114); and
- undertook these actions because she is "biased against ExxonMobil" (*id.* ¶ 117) and has "an ulterior motive . . . namely, an intent to prevent ExxonMobil from exercising its right to express views with which [she] disagree[s]" (*id.* ¶ 128).[9]

Angeles Times report); and Doc. No. 43-3, at App. 446-65, Doc. No. 43-4, at App. 466-514, and Doc. No. 43-5, at App 515-550 (*InsideClimate News* series).

[8] *See, e.g.*, FAC ¶¶ 18, 107. An unofficial Exxon-prepared transcript of the Attorney General's remarks at the press conference can be found in Exhibit B of the Amended Complaint, App. 020-021, the accuracy of which Attorney General Healey does not concede.

[9] Exxon's alleged "injuries" are likewise conclusory. *See* FAC ¶ 99 ("As a result of the improper and politically motivated investigation[] launched by Attorney[] General . . . Healey, ExxonMobil has suffered, now suffers, and will continue to suffer violations of its rights. . . . "). As the Court observed at the November 30, 2017, hearing, Tr. at 19, Exxon has not alleged that its speech has been or will be chilled by the CID, which is fatal to its speech-related claims. *See, e.g.*, *Spear v. Town of West Hartford*, 954 F.2d 63, 67-68 (2d Cir. 1992); *Kaminsky v. Schriro*, No. 3:14-cv-01885 (MPS), 2016 WL 3460303, *12 (D. Conn. June 21, 2016) (in 42 U.S.C. § 1983 action alleging First Amendment injury, "to state a claim, [the plaintiff] must either allege *facts* showing that [the defendant] 'silenced him' . . . or some *actual* chilling effect resulting from [the defendant's] conduct that is neither 'conclusory' nor 'speculative'" (emphasis added) (quoting *Williams v. Town of Greenburgh*, 535 F.3d 71, 78 (2d Cir. 2008) and *Spear*, 954 F.2d at 67)). Indeed, Exxon's claims of speech-related injury, i.e., that the CID will "silence, intimidate, and deter" Exxon from participating in public debates on climate change, are belied by the Amended Complaint itself, which states that "ExxonMobil intends—and has a constitutional right—to continue to advance its perspective in the national discussions over how

These allegations are no more than "naked assertions, devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). Indeed, they are notably similar to the conclusory pleadings that the Supreme Court found lacking in *Iqbal*. There, the plaintiff claimed that former Attorney General John Ashcroft and former FBI Director Robert Mueller "'each knew of, condoned, and willfully and maliciously agreed to subject' [him] to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest,'" naming "Ashcroft as the 'principal architect' of the policy" and "Mueller as 'instrumental in [its] adoption, promulgation, and implementation.'" *Id.* at 669. The *Iqbal* Court disregarded the plaintiff's conclusory statements as not entitled to a presumption of truth and held that the plaintiff's complaint lacked the "factual content to 'nudg[e]' his claim of purposeful discrimination 'across the line from conceivable to plausible'" as required to survive a motion to dismiss. *Id.* at 683 (quoting *Twombly*, 550 U.S. at 570).

Removing Exxon's conclusory allegations and their repetition throughout the Complaint, in the manner of the *Iqbal* Court, Exxon offers solely the three facts—the New York event, the common interest agreement, and the CID—to support its claims that the Attorney General issued the CID as part of an intentional, malicious conspiracy to violate Exxon's constitutional rights and state and federal law.

Those facts are insufficient. Indeed, as is clear from documents Exxon itself attached to its Amended Complaint, Attorney General Healey has a clear, supported basis for believing her office's investigation of Exxon is warranted based on her office's review of a significant number of internal Exxon documents, made available by journalists in 2015, illustrating Exxon's

---

best to respond to climate change." *Compare* FAC at 1 & ¶ 110 *with id.* ¶ 98.

advanced scientific knowledge of climate change, the likely adverse impacts of efforts to address climate change on Exxon's business, and Exxon's involvement in efforts to cause the public to doubt the science of climate change. FAC, Ex. A, App. 004-06; Ex. J, App. 111-12; Ex. NN, App. 357-61; Ex. RR, App. 439. Based on this review and her broad authority to issue CIDs, *Att'y Gen. v. Bodimetric Profiles*, 533 N.E.2d 1364, 1367 (Mass. 1989), the Attorney General satisfied the statutory requirement that she have a "belief" that the target of an investigation has violated or is violating the statute. Indeed, the Massachusetts Superior Court—charged under Massachusetts law with determining the validity of the CID, *see* Mass. Gen. Laws ch. 93A, § 6(7)—found that Attorney General Healey satisfied that statutory requirement in its January 2017 opinion, where it rejected Exxon's claims that the CID should be set aside as arbitrary, capricious, and in violation of its constitutional rights. *See In re Civil Investigative Demand No. 2016-EPD-36*, No. SUCV20161888F, 2017 WL 627305 (Mass. Super. Jan. 11, 2017) (Doc. No. 218-1). The reasonableness of that belief is further supported by the fact that other jurisdictions are investigating the same conduct, FAC, Ex. QQ, App. 435, including Attorney General Schneiderman and the FBI, as confirmed by the U.S. Attorney General, *id.*, Ex. DD, App. 247-249.[10]

[10] As was disclosed in press reports, the SEC also is investigating Exxon's accounting practices, including the valuation of its reserves, in light of the future impacts of climate change regulation on its business and other factors. *See* Doc. Nos. 95-4, 95-5. On October 28, 2016, Exxon announced a thirty-eight percent drop in earnings as a result of low energy prices, and "acknowledged that it faced what could be the biggest accounting revision of its reserves in its history." Doc. No. 95-4. In early 2017, Exxon did write down the value of its oil reserves, debooking about 3.3 billion barrels of so-called "proved" reserves and appreciably shrinking the value of one of the largest companies in the world. *See* Joe Carroll, *Exxon Caves to Oil Crash With Historic Global Reserves Cut*, Bloomberg, Feb. 22, 2017, *at* https://www.bloomberg.com/news/articles/2017-02-22/exxon-takes-historic-cut-to-oil-reserves-amid-crude-market-rout. And now, in response to pressure from its own shareholders, Exxon has *agreed* to make additional disclosures to investors regarding climate change risks, plainly calling into question the adequacy of its past disclosures on climate change. *See supra* p. 5. The SEC investigation and

So here, as in *Iqbal*, "[a]s between [an] 'obvious alternative explanation'" for the CID "and the purposeful, invidious discrimination [Exxon] asks us to infer, discrimination" based on Exxon's views—as well as "an abusive fishing expedition," biased prosecutors, abuse of process, and a conspiracy to deprive Exxon of its rights—"is not a plausible conclusion." 556 U.S. at 68; *see also SEC v. McGoff*, 647 F.2d 185, 194 (D.C. Cir. 1981) (upholding subpoena against "diffuse speculations" regarding its political motive).[11]

Moreover, as the Court recognized at the November 30, 2017, hearing, *see* Tr. at 18-19, there is a telltale contradiction at the heart of Exxon's account of viewpoint-based persecution. Exxon asserts that Attorney General Healey has joined in an illegal conspiracy to violate Exxon's rights because she does not agree with Exxon's views about climate change. Yet Exxon also states that it now endorses climate science, the existence of climate change, and efforts to combat it—consistent with Attorney General Healey's position (and for that matter, federal and Massachusetts law). *See* FAC at ¶ 98. In this context, Exxon's narrative of constitutional harm is not only implausible: it is nonsensical. *Fisk v. Letterman*, 401 F. Supp. 2d 362, 368 (S.D.N.Y. 2005) (courts are "not obliged to reconcile plaintiff's own pleadings that are contradicted by other matters asserted or relied upon or incorporated by reference by a plaintiff in drafting the complaint").

Exxon's own accounting decisions further confirm that E xxon's narrative of unconstitutional persecution is implausible.

[11] Indeed, Exxon's federal conspiracy claim is further deficient on its face, due to the fact that Exxon did not even bother to cite a specific subsection of 42 U.S.C. § 1985 on which to rest its claim, nor did it even attempt to track the elements of a cognizable claim under the statute. *Compare* FAC ¶¶ 106-108, *with, e.g., Zemsky v. City of New York*, 821 F.2d 148, 151 (2d Cir. 1987) ("A plaintiff states a viable cause of action under Section 1985 . . . only by alleging a deprivation of his rights on account of his membership in a particular class of individuals" (citing *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 834-35 (1983)).

Because Exxon's allegations are incapable of sustaining its burden of providing "factual content to 'nudg[e]' [its] claim[s] . . . 'across the line from conceivable to plausible,'" Exxon's causes of action for conspiracy under federal law and Texas common law, violation of Exxon's First, Fourth, and Fourteenth Amendment rights and cognate rights under the Texas Constitution, and abuse of process under Texas common law (causes of action 1, 2-4, and 7, respectively) must be dismissed. *Iqbal*, 556 U.S. at 683 (quoting *Twombly*, 550 U.S. at 570).

2. EXXON'S ARGUMENTS IN PRIOR BRIEFING FURTHER UNDERSCORE THAT ITS AMENDED COMPLAINT FAILS TO PLEAD SUFFICIENT FACTS TO STATE PLAUSIBLE CLAIMS.

Exxon already has had repeated opportunities to state plausible claims, but, unsurprisingly, it has failed to do so, since the theory underlying its vexatious lawsuit against Attorney General Healey is baseless. Given the chance to defend the sufficiency of its allegations, Exxon failed entirely, resorting to reliance on yet more innuendo. For example, in its opposition to Attorney General Healey's first motion to dismiss the Amended Complaint, Exxon strained to compile a list of allegations that, it argued, render its "constitutional claims . . . plausible on their face" to avoid dismissal under Rule 12(b)(6). Doc. No. 165 at 23-25. Exxon stated that "[t]hese are not legal conclusions; they are detailed factual allegations, supported by the facts from the public record, which are entitled to a presumption of truth." *Id.* at 25. Yet it is clear that each self-described "fact" is either a legal conclusion, misrepresentation, or unsupportable inference that Exxon disingenuously has labeled a "fact." Taking each in turn:

First, Exxon presented as a "fact" in support of its claims that "the Attorney General announced in a press conference her 'moral obligation' to fight climate change, plan to control 'public perception' on that issue, and finding that ExxonMobil is liable before even issuing the CID[.]" Doc. No. 165 at 24. That Attorney General Healey believes that society has a "moral obligation" to fight climate change—as do millions of people around the world—does not

plausibly support the inference that she is part of a political conspiracy to "silence" Exxon. Doc. No. 165 at 24; *see Twombly*, 550 U.S. at 557 (allegations must "plausibly *suggest*[] (not merely [be] consistent with)" claim to meet Rule 8(a)(2) threshold (emphasis added)). Likewise, Attorney General Healey did not "announce" at the press conference any "plan to control 'public perception,'" nor did she announce any "finding" that Exxon is "liable" for anything, as reading Exxon's own transcript of the press conference reveals. *See* FAC Ex. B, at App. 020 (transcript). She announced that she was investigating the disconnect between what Exxon was telling the public and what Exxon appeared to understand internally for decades, as reported in the popular press based on Exxon's internal documents, which are referenced in Exxon's own attachments to the Amended Complaint. *Id.*; *see also supra* pp. 9-10. Exxon's "facts" are not facts at all—they are Exxon spin.[12]

Second, Exxon presented as a "fact" in support of its claims that the Attorney General's supposed "plan to control 'public perception'" was the "culmination of [climate activists] collective efforts to enlist state law enforcement officers to join them in a quest to silence political opponents, enact preferred policy responses to climate change, and obtain documents for private law suits[.]" Doc. No. 165 at 24. Exxon's bald assertion that third party activists hoped that state attorneys general would "join them in a quest to silence political opponents"—itself a wild, unsupported allegation—is not evidence that any such "quest" actually existed, let alone that Attorney General Healey is somehow involved in or responsible for that quest. Doc. No. 165 at 24; *see Twombly*, 550 U.S. at 556 ("[A]n allegation of parallel conduct and a bare

[12] *See also In re Civil Investigative Demand No. 2016-EPD-36*, 2017 WL 627305, at *6 (Attorney General's remarks at press conference "do not evidence any actionable bias" and that "[n]othing in the Attorney General's comments at the press conference indicates to the court that she is doing anything more than explaining reasons for her investigation to the Massachusetts consumers she represents").

assertion of conspiracy will not suffice.").[13] That these same activists allegedly hoped to "obtain documents for private law suits"—again, without any facts offered in support—is also irrelevant, since any documents Attorney General Healey obtains from Exxon under the CID are confidential and cannot, as a matter of Massachusetts law, be disclosed to third parties. *See* Mass. Gen. Laws. ch. 93A, § 6(6) ("Any documentary material or other information produced by any person pursuant to this section shall not, unless otherwise ordered by a court of the commonwealth for good cause shown, be disclosed to any person other than the authorized agent or representative of the attorney general, unless with the consent of the person producing the same . . . .").

Third, Exxon presents as a "fact" in support of its claims that "Attorney General Healey, along with sixteen other attorneys general, signed a common interest agreement in order to conceal the fact that the real goal of their investigations is to 'limit[] climate change' and 'ensur[e] the dissemination of accurate information about climate change[.]'" Doc. No. 165 at 24. That a group of state attorneys general share "common legal interests" in "limiting climate change" and "ensuring the dissemination of accurate information about climate change," *see* FAC Ex. V, at App. 195—legitimate common goals reflected in their respective state laws, *see, e.g.*, Global Warming Solutions Act, Mass. St. 2008, ch. 298, and goals with which Exxon now claims to agree—does not plausibly support the allegation that those attorneys general are engaged in a secret conspiracy to abuse Exxon's constitutional rights. That the attorneys general formalized those goals in a routine common interest agreement does not support that implausible

[13] Likewise, that advocates allegedly made efforts to "enact their preferred policy preferences," thereby exercising their petition and free speech rights, does not support any inference of wrong-doing by them, let alone Attorney General Healey.

allegation, either.[14] State attorneys general's offices often enter into common interest agreements when cooperating on multistate issues, just as individuals and corporations—including, undoubtedly, Exxon—do when cooperating in litigation. *See, e.g.*, *Schaeffler v. United States*, 806 F.3d 34, 40 (2d Cir. 2015) (discussing common interest privilege as applied in Second Circuit); *Hanover Ins. Co. v. Rapo & Jepsen Ins. Serv., Inc.*, 870 N.E.2d 1105, 1109 (Mass. 2007) (recognizing common interest privilege under Massachusetts law). Exxon's attempt to make something so commonplace into something nefarious falls flat, and certainly fails to nudge its claims into the realm of the plausible.

Fourth, Exxon presents as a "fact" in support of its claims that "the Attorney General lacked a reasonable belief at the time she issued the CID that ExxonMobil could be held liable for any of the claims within the scope of the CID, which seeks 40 years of ExxonMobil's records relating to climate change." Doc. No. 165 at 24. Exxon's assertion that "the Attorney General lacked a reasonable belief" to support the CID is not a fact—it is a legal conclusion without the support of any fact in the record. *Id.* at 24; *see Twombly*, 550 U.S. at 555 ("[C]ourts are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotes omitted).). Simply repeating it does not make it true. Indeed, as noted above, the Massachusetts Superior Court reached the opposite legal conclusion in its January 2017 opinion, finding that Attorney General Healey had presented sufficient grounds for issuing the CID and rejecting Exxon's claims that the Attorney General was engaging in viewpoint discrimination and was biased. *See supra* pp. 1 n.2 & 10. As also discussed above, the Attorney General has ample basis

[14] To the contrary, query whether, if the alleged state attorneys general conspirators' "real goal" was so nefarious and illegal, they would include that goal in a written instrument, signed by representatives of all seventeen attorneys general, that Exxon could obtain, as it apparently did, by a public records request.

for believing an investigation of Exxon is warranted, as Exxon's own attachments to the Amended Complaint illustrate. *See supra* pp. 9-10.

Fifth, Exxon presents as a "fact" in support of its claims that "the CID, which regulates out-of-state speech, is a product of this effort to control the public debate related to climate change policy as it targets organizations which express views with which the Attorney General disagrees." Doc. No. 165 at 24. As discussed below, the CID does nothing to "regulate" speech, either in fact or as a matter of law. *See infra* p. 17. Similarly, Exxon's assertions that the CID "is a product of this effort to control the public debate" and "target[] organizations which express views with which the Attorney General disagrees" are just assertions, not facts, and are not plausibly supported by the paltry facts in the Amended Complaint. *Compare Iqbal*, 556 U.S. at 681 ("[T]he allegations are conclusory and not entitled to be assumed true."); *see also supra* p. 11.

Finally, Exxon presents as a "fact" in support of its claims that "Attorney General Healey's professed investigative theories are in conflict with federal regulations." Doc. No. 165 at 24. Despite the immediately following sentence protesting, "[t]hese are not legal conclusions; they are detailed factual allegations," Exxon's assertion that the state law rationale for Attorney General Healey's investigation is "in conflict with federal regulations" *is plainly a legal conclusion*, not a fact, and is, in any case, belied by *the SEC's investigation into the same conduct* and the black letter law that state investor protection laws are not as a rule preempted by federal law and regulations. *See supra* p. 10 n.10 and *infra* p. 18.

Clearing away Exxon's conclusory assertions, Exxon is, once again, left with three facts: (1) Attorney General Healey's participation in the New York event, (2) her entry into a routine common interest agreement, and (3) the issuance of the CID. A transcript of the remarks and the

texts of the agreement and CID are before the Court. Taken together, without Exxon's conclusory, conspiratorial flourishes, they simply do not "nudge" Exxon's claims that Attorney General Healey is biased against Exxon and engaged in a conspiracy to silence it "across the line from conceivable to plausible," and as such, Exxon's claims must be dismissed. *Twombly*, 550 U.S. at 570.

C. EXXON'S OTHER CLAIMS ARE FACIALLY DEFICIENT AS A MATTER OF LAW AND MUST BE DISMISSED.

Exxon's remaining claims—violation of Exxon's rights under the Dormant Commerce Clause and federal preemption (causes of action 5 and 6, respectively)—and the Texas state law cognates to its federal claims (in causes of action 1-4 and 7) fail as a matter of law and therefore must be dismissed pursuant to Rule 12(b)(6).

First, Exxon's claim that the CID runs afoul of the Dormant Commerce Clause because it "effectively regulate[s] ExxonMobil's out-of-state speech" and has "the practical effect of primarily burdening interstate commerce" by requesting documents outside Massachusetts fails on its face. FAC ¶¶ 118-121. It is settled law that a CID does not "regulate" speech, either inside or outside Massachusetts; it seeks the production of documents through a process prescribed by law. *See, e.g.*, *McGoff*, 647 F.2d at 187-88 (administrative subpoenas "do not directly regulate the content, time, place, or manner of expression, nor do they directly regulate political associations"). In any event, Exxon's cryptic recitation of doctrine "without providing any additional factual matter that would show that such claims are plausible" or an allegation of "any plausible interstate commerce impact" likewise fails to state a claim under *Iqbal*. *Empire State Beer Distrib. Ass'n ex rel. Alcoholic Beverage Wholesalers v. Patterson*, No. 09 CIV. 10339 (DAB), 2010 WL 749828, at *6 (S.D.N.Y. Mar. 1, 2010); *see also Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 108 (2d Cir. 2017), *petition for cert. filed* (U.S. Nov. 15, 2017) (No. 17-737)

("conclusory allegations do not allow us to make any inferences of excessive burden" sufficient to state a Dormant Commerce Clause claim).

Meanwhile, Exxon has not even identified the federal law that could preempt Attorney General Healey's CID in connection with its Supremacy Clause claim, and that omission is fatal. The governing rule is that federal law does *not* preempt actions by state authorities to protect investors from deception and fraud. FAC ¶¶ 122-126; *see also id.* ¶¶ 77-81 (citing federal regulations and policy statement). *See, e.g.*, 15 U.S.C. § 77r(c)(1) (preserving state authority to investigate "fraud or deceit" despite preemption of certain state regulation of securities); *In re Standard & Poor's Rating Agency Litig.*, 23 F. Supp. 3d 378, 395-400 (S.D.N.Y. 2014) (finding no federal question jurisdiction over claims that state consumer protection lawsuits were preempted by federal credit reporting laws); *Fin. & Trading, Ltd. v. Rhodia, S.A.*, No. 04 Civ. 6083 (MBM), 2004 WL 2754862, at *5 (S.D.N.Y. Nov. 30, 2004) (state investor protection claims "are not created by the [Securities and Exchange Act of 1934] and thus are not subject to exclusive federal jurisdiction, nor are [such] claims in any way preempted by federal securities law").

Finally, Exxon's cognate Texas state law claims—common law conspiracy, viewpoint discrimination, unreasonable search, deprivation of due process, and abuse of process (causes of action 1-4 and 7, respectively)—do not state cognizable claims for relief because they are barred by the Eleventh Amendment, which prohibits lawsuits in federal court against state officials based on alleged violations of state law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (contrary result would "conflict[] directly with the principles of federalism that underlie the Eleventh Amendment"). Thus, the exception to Eleventh Amendment immunity established in *Ex parte Young*, 209 U.S. 123 (1908)—which authorizes suits for prospective

injunctive relief against state officials based on ongoing violations of federal law—is "inapplicable in a suit against state officials on the basis of state law." *Pennhurst*, 465 U.S. at 106 (emphasis added). And the doctrine applies as readily to "state-law claims brought into federal court under pendent jurisdiction" because such jurisdiction cannot authorize "evasion of the immunity guaranteed by the Eleventh Amendment." *Id.* at 121.[15] The *Pennhurst* doctrine is applied widely and uniformly across federal courts, including the Second Circuit. *See, e.g., Allen v. Cuomo*, 100 F.3d 253, 260 (2d Cir. 1996) ("The Eleventh Amendment bars federal suits against state officials on the basis of state law."). Because Exxon's state-law claims ask this Court to pass judgment on the Attorney General's compliance with Texas—not federal—law, all of them are barred by the Eleventh Amendment and must be dismissed.

Because these claims fail as a matter of law, they must be dismissed pursuant to Rule 12(b)(6).

V. CONCLUSION

The Court now has before it several independent grounds that require dismissal of Exxon's Amended Complaint, including the grounds set forth herein. Attorney General Healey respectfully requests that this Court grant her Renewed Motion to Dismiss and dismiss the Amended Complaint as to her, with prejudice.

[15] There is no federal common law "abuse of process" cause of action, leaving Exxon's seventh count to rest only on state law. *Wheeldin v. Wheeler*, 373 U.S. 647, 651-52 (1963); *Berisic v. Winckelman*, No. 03 Civ. 1810 (NRB), 2003 WL 21714930, at *2 (S.D.N.Y. July 23, 2003).

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL OF
MASSACHUSETTS

By her attorneys:

/s/ Christophe G. Courchesne
Richard Johnston (*pro hac vice*)
Chief Legal Counsel
richard.johnston@state.ma.us
Melissa A. Hoffer (*pro hac vice)*
Chief, Energy and Environment Bureau
melissa.hoffer@state.ma.us
Christophe G. Courchesne (*pro hac vice*)
Chief, Environmental Protection Division
christophe.courchesne@state.ma.us
I. Andrew Goldberg
andy.goldberg@state.ma.us
Peter C. Mulcahy (*pro hac vice*)
peter.mulcahy@state.ma.us
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200

Dated: December 21, 2017