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By E-Filing

The Honorable Peter B. Krupp
Suffolk County Superior Court - Civil
Suffolk County Courthouse, 12th Floor
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Dear Justice Krupp:

We write in response to the Attorney General's submission on the Second Circuit's recent decision in *Exxon Mobil Corp.* v. *Healey*, No. 18-1170, 2022 WL 774516 (2d Cir. Mar. 15, 2022). The Second Circuit's decision demonstrates why ExxonMobil's defenses are not precluded by prior litigation concerning the enforceability of a Civil Investigative Demand ("CID") issued by the Attorney General over three years before it filed the complaint in this action.

In *Healey*, ExxonMobil asserted Section 1983 claims to enjoin the Attorney General's CID. *Id.* at *1. The Second Circuit held that res judicata (claim preclusion) barred those claims because ExxonMobil had challenged the CID in state court. *Id.* at *12 (finding that "the claims brought in the federal action could have been raised in the CID proceeding and are therefore identical for purposes of Massachusetts res judicata law.") The Court explained: "Exxon's state court petition and federal complaint . . . [b]oth identify the same relevant injury: ***the CID's*** alleged violation of various federal constitutional provisions and their state analogues." *Id.* at *10 (emphasis added). Because the state court proceedings challenging the CID had already been resolved in favor of the Commonwealth, the Second Circuit concluded that any further challenge to the CID was precluded. *Id.* at *13.

The Second Circuit's analysis demonstrates why the Commonwealth's motion to strike should be denied insofar as it is based on issue preclusion for two reasons. *First*, the Second Circuit correctly identifies the subject matter of the prior litigation in state and federal court: the validity of the Attorney General's CID. *See id.* at *10. ExxonMobil's defenses in this action are not based on the validity of the CID issued in 2016. They arise from the Commonwealth's civil action, which was filed over three years later in 2019. The civil complaint was not the subject of the prior proceedings in state or federal court, and the Second Circuit's decision does not refer to the complaint or to ExxonMobil's defenses based on the content of the complaint or the timing of its filing.

The Attorney General misconstrues the Second Circuit's decision as a certification of the Attorney General's good faith in all of its past, present and future dealings with ExxonMobil. There is no basis in law or logic for treating it as such, and the law constraining government enforcement is to the contrary. For instance, "a finding by the jury of probable cause to arrest should not preclude consideration of an abuse of process claim" because "[p]robable cause at the time of the arrest does not equate necessarily with subjective good faith in filling out an arrest report at a later time." *Gutierrez* v. *Mass. Bay Transp. Auth.*, 437 Mass. 396, 408 (2002). The same reasoning applies here: upholding a CID does not bar challenges to a later-filed civil action. To hold otherwise would convert the Attorney General's considerable advantage in CID proceedings, in which a "party moving to set aside a CID bears a heavy burden to show good cause why it should not be compelled to respond," into an unfair advantage in subsequent civil proceedings where the burdens facing plaintiff and defendant are meant to be level. *CUNA Mut. Ins. Soc.* v. *Att'y Gen.*, 380 Mass. 539, 544 (1980).

Second, the standard for claim preclusion, which the Second Circuit applied, differs significantly from the standard for issue preclusion applicable to the Commonwealth's motion. Issue preclusion requires a showing that the issue was "***actually*** decided" in the earlier proceeding, but claim preclusion requires only that the claim "***could have*** been raised" in the prior proceeding. *Lucky Brand Dungarees, Inc.* v. *Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1594 (2020) (emphasis added). The Second Circuit applied the claim

preclusion standard to find that the claims ExxonMobil brought in federal court "could have been raised" in the CID proceeding. *Healey*, 2022 WL 774516, at *12. That does not support a finding of issue preclusion here, which requires issues to be ***actually*** litigated and decided. Indeed, it is impossible for the propriety of the civil complaint itself to have been decided in the CID challenges analyzed by the Second Circuit because the civil complaint was filed in 2019, well after both the CID challenges had been resolved by the state and federal trial courts. Thus, whether the filing of the civil complaint violated ExxonMobil's rights under the First and Fourteenth Amendments has never been litigated, much less decided. And if the Commonwealth's motion is allowed, that issue never will be.

For these reasons, the Second Circuit's recent decision demonstrates that ExxonMobil's defenses are not precluded and should not be struck on that basis.

Sincerely,

/s/ Justin Anderson

Justin Anderson

cc: Counsel of Record (by email)