NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
Civil No. 19-3333-BLS1

COMMONWEALTH OF MASSCHUSETTS
Plaintiff

vs.

EXXON MOBIL COROPRATION
Defendant

MEMORANDUM AND ORDER ON MOTION TO STRIKE CERTAIN DEFENSES

The Commonwealth brings this action against Exxon Mobil Corporation ("Exxon") for violations of G.L. c. 93A, alleging that Exxon has "systematically and intentionally . . . misled Massachusetts investors and consumers about climate change" by being "dishonest with investors about the material climate-driven risks to its business and with consumers about how its fossil fuel products cause climate change." The Commonwealth now moves to strike 12 of Exxon's defenses. For the following reasons, the motion is allowed.

BACKGROUND[1]

I. Pre-Suit Litigation

In April 2016, believing that Exxon's marketing or sale of fossil fuel products in Massachusetts may have violated G.L. c. 93A, Massachusetts Attorney General Maura Healey ("the Mass. AG" or "MAG"), issued a civil investigative demand ("CID") to Exxon under G.L. c. 93A, § 6. The CID sought documents and information concerning Exxon's knowledge of and

[1] The following procedural history and background is drawn from the pleadings, and from records and judicial opinions in related proceedings as to which I may take judicial notice. See Amato v. District Att'y for Cape & Islands Dist., 80 Mass. App. Ct. 230, 232 n.5 (2011); Reliance Ins. Co. v. Boston, 71 Mass. App. Ct. 550, 555 (2008).

activities related to climate change. When the CID was issued, New York Attorney General Eric Schneiderman ("the NYAG"), was also in the midst of an investigation into whether Exxon had engaged in deceptive and fraudulent acts in violation of New York law.

In June 2016, Exxon took a series of steps to try to block the investigations. On June 15, 2016, Exxon filed suit in the United States District Court for the Northern District of Texas, alleging that the Mass. AG and the NYAG conspired together and with climate activists to violate Exxon's constitutional rights. Exxon Mobil Corp. v. Healey, C.A. No. 4:16-CV-469 (N.D. Tex.). In its First Amended Complaint, Exxon alleged a conspiracy to deprive it of its constitutional rights pursuant to 42 U.S.C. § 1985; a violation of its rights under the First Amendment; and violations of its right to Due Process under the Fourteenth Amendment.

The following day, Exxon filed a motion in Suffolk Superior Court under G.L. c. 93A, § 6(7), to set aside or modify the CID. The Mass. AG cross-moved to compel Exxon to comply with the CID. In January 2017, the Court (Brieger, J.) denied Exxon's motion and allowed the cross motion to compel. See In re Civil Investigative Demand No. 2016-EPD-36, C.A. No. 16-1888-F, Order on Emergency Motion of ExxonMobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order and the Commonwealth's Cross-Motion to Compel ExxonMobil Corporation to Comply with Civil Investigative Demand No. 2016-EPD-36 (Jan. 11, 2017).[2]

On March 29, 2017, the federal court in Texas acted *sua sponte* and transferred Exxon's case to the Southern District of New York (hereinafter, "the New York Action"). A year later, United States District Judge Valerie Caproni dismissed Exxon's First Amended Complaint for

[2] On Exxon's appeal, the Supreme Judicial Court affirmed. Exxon Mobil Corp. v. Attorney Gen., 479 Mass. 312 (2018), cert. denied, 139 S. Ct. 794 (2019).

failure to state a claim and denied Exxon leave to file a Second Amended Complaint ("SAC") because Exxon's proposed amendment would have been futile.[3] Exxon Mobil Corp. v. Schneiderman, 316 F. Supp. 3d 679, 686-687 (S.D.N.Y. 2018), aff'd in relevant part, ___ F.4th ___, 2022 WL 774517 (2d Cir. Mar. 15, 2022). In reaching this conclusion, Judge Caproni described Exxon's allegations, in relevant part, as follows:

> The Complaint alleges that the CID and the [NYAG's] Subpoena are part of a conspiracy to "silence and intimidate one side of the public policy debate on how to address climate change." . . . The overt portion of this campaign is a coalition of state attorneys general, including Healey and Schneiderman, . . . [who] held a conference and press event . . . in New York on March 29, 2016, to announce a plan to take "progressive action to address climate change." . . .
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> The Complaint alleges that the March 29, 2016, conference was the culmination of a behind-the-scenes push by climate change activists . . . [and] describes the development by [activists Matthew] Pawa, [Peter] Frumhoff, and the private Rockefeller Family Fund of a strategy to promote litigation against fossil fuel producers, including, in particular, Exxon. . . .
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> According to the SAC, Pawa, Frumhoff, and others hatched a scheme to promote litigation against Exxon at a June 2012 conference in La Jolla, California. . . . These activists saw litigation as a means to uncover internal Exxon documents regarding climate change and to pressure fossil fuel companies like Exxon to change their stance on climate change. . . . In January 2016, at a conference at the offices of the Rockefeller Family Fund, the activists discussed the "'the main avenues for legal actions & related campaigns,' including 'AGs,' 'DOJ,' and 'Torts,'" and which options "had the 'best prospects' for (i) 'successful action,' (ii) 'getting discovery,' and (iii) 'creating scandal.'" . . . Exxon connects this strategy to a few meetings attended by staff from various state attorneys general, . . . and records of communications and information-sharing between the activists, the NYAG, and other state attorneys general. . . . For example, there was a conference at Harvard Law School in April 2016 entitled

[3] Judge Caproni also concluded that Exxon's claims as against the Mass. AG were barred under the doctrine of claim preclusion because Exxon could have been raised them in the Massachusetts Superior Court case seeking to set aside or modify the CID. See Exxon Mobil Corp., 316 F. Supp. 3d at 700-704.

> "Potential State Causes of Action Against Major Carbon Producers: Scientific, Legal and Historical Perspectives," which included an hour-long session on "state causes of action" such as "consumer protection claims" and "public nuisance claims." . . .
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> Based on these allegations, Exxon alleges the NYAG and MAG are retaliating against Exxon for its speech relative to climate change and the "policy tradeoffs of certain climate initiatives."

Exxon Mobil, 316 F. Supp. 3d at 688–691 (citations omitted).

Judge Caproni concluded that "Exxon's allegations that the AGs are pursuing bad faith investigations in order to violate Exxon's constitutional rights are implausible." Id. at 687. Accord Id. at 704 ("Exxon has not plausibly alleged that either attorney general is proceeding in bad faith, motivated by a desire to impinge on Exxon's constitutional rights."). She explained, in relevant part:

> The centerpiece of Exxon's allegations is the press conference . . . in New York on March 29, 2016. According to Exxon, the [Mass. AG's and NYAG's] statements at the press conference evince their intent to discriminate against other viewpoints regarding climate change. . . . [However, r]ead in context, the NYAG's comments suggest only that he believes that an investigation is justified in light of news reports regarding Exxon's internal understanding of the science of climate change. . . . It is not possible to infer an improper purpose from any of these comments; none of which supports Exxon's allegation that the NYAG is pursuing an investigation even though the NYAG does not believe that Exxon may have committed fraud. . . . Like Schneiderman's statements, Healey's statement [at the press conference] that Exxon "may not have told the whole story" in no way suggests that Healey . . . wants to retaliate against it for its truthful statements because it disagrees politically. To the contrary, Healey's statement suggests that she believes Exxon may have made false statements to its investors and the public and may have committed fraud. . . .
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> The SAC presents this press conference as the culmination of a campaign by climate change activists to encourage elected officials to exert pressure on the fossil fuel industry. . . . The relevance of these allegations depends on two inferences: first, that the activists have an improper purpose – that is, that they know state investigations of Exxon will be frivolous, but they see such investigations as politically useful; and second, that this Court can

> infer from the existence of meetings between the AGs and the activists, that the AGs share the activists' improper purpose. The Complaint and SAC do not plausibly allege facts to permit the Court to draw either inference. . . .
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> [T]he SAC does not include any factual allegations to suggest that Pawa and Frumhoff and their confederates do not believe that Exxon has committed fraud. At best (for Exxon) the meetings are evidence that the activists recognize that the discovery process could reveal documents that would benefit their public relations campaign by showing that Exxon has made public statements about climate change that are inconsistent with its internal documents on the subject. This evidence falls short of an inference that the activists – to say nothing of the AGs – do not believe that there is a reasonable basis to investigate Exxon for fraud.
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> Exxon attempts to provide the missing link between the activists and the AGs by pointing to a series of workshops, meetings, and communications between and among Pawa and Frumhoff and other climate change activists and the AGs or their staffs. For example, Exxon alleges that . . . Frumhoff and Pawa made presentations to the AGs shortly before the press conference on March 29, 2016. . . . But even if the climate activists did encourage the AGs to investigate Exxon as a means to uncover internal documents or to pressure it to change its policy positions without a good faith belief that Exxon had engaged in wrongdoing, another logical leap is required to infer the NYAG and MAG agreed to do so without having a good faith belief that their investigations of Exxon were justified. . . .
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> In sum, whether viewed separately or in the aggregate, Exxon's allegations fall well short of plausibly alleging that the NYAG and MAG are motivated by an improper purpose. The Complaint and SAC do not allege any direct evidence of an improper motive, and the circumstantial evidence put forth by Exxon fails to tie the AGs to any improper motive, if it exists, harbored by activists like Pawa and Frumhoff. This issue is fatal to Exxon's claims for violations of the First . . . and Fourteenth Amendments, . . . and its claim for conspiracy pursuant to Section 1985.

Id. at 706-712 (citations and footnotes omitted; emphasis added).[4]

[4] Judge Caproni also found that Exxon's allegations that the CID and the NYAG's subpoena were precipitated by investigative journalism funded by the Rockefeller Family Fund, that the NYAG and the Mass. AG entered into a common-interest agreement, and that the Mass. AG and the NYAG sought documents beyond the relevant limitations period as well as

II. The Instant Case

The Commonwealth filed this case on October 24, 2019, alleging violations of G.L. c. 93A. Exxon removed the case to the federal court, but the matter was remanded. On June 5, 2020, the Commonwealth filed an Amended Complaint, alleging three violations of G.L. c. 93A: that Exxon has: (1) misrepresented and failed to disclose material facts regarding systemic climate change risks to Massachusetts investors (Count I); (2) deceived Massachusetts consumers by misrepresenting the purported environmental benefit of using its Synergy™ and Mobil 1™ products and failed to disclose the climate change risks posed by its fossil fuel products (Count II); and (3) misled Massachusetts consumers by conducting "greenwashing" campaigns (Count III). The Commonwealth requests injunctive relief, $5,000 for each violation of G.L. c. 93A, and an award of costs and attorneys' fees.

In response, Exxon filed a special motion to dismiss under the anti-SLAPP statute and a motion to dismiss under Mass. R. Civ. P. 12(b)(2) and 12(b)(6). The Court (Green, J.) denied both motions in June 2021. See Commonwealth v. Exxon Mobil Corp., 2021 WL 3493456 (Mass. Super. June 22, 2021), and 2021 WL 3488414 (Mass. Super. June 22, 2021). Exxon's appeal from the denial of the anti-SLAPP motion is pending. Commonwealth v. Exxon Mobil Corp., SJC-13211 (argued Mar. 9, 2022).

III. Exxon's Amended Answer

Exxon filed an Answer to the Amended Complaint in July 2021 and an Amended Answer in October 2021. The Amended Answer asserts 38 defenses in a section titled Separate Defenses ("SD"). See Amended Answer at 67-94. The allegations related to many of these defenses are

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communications between Exxon and outside groups, did not plausibly suggest an improper motive. Exxon Mobil, 316 F. Supp. 3d at 709-711.

detailed in SD ¶¶ 1-40, which is divided into two parts. In SD ¶¶ 1-21, Exxon alleges the risks of climate change have been well known in Massachusetts for decades, the Commonwealth has encouraged and benefited from Exxon's production and promotion of natural gas and other fossil fuel products, and Exxon has relied on this encouragement in investing in and developing natural gas and other fossil fuel products. In the remaining section, SD ¶¶ 22-40, Exxon's allegations purport to demonstrate that the Mass. AG filed the instant case based on improper motives, repeating many – if not all – of the allegations it made in the New York Action.

With respect to the latter section – the Mass. AG's purported improper motives – Exxon asserts that the Mass. AG "has colluded for many years with private, special interests to use government power to coerce acceptance of its climate policy agenda." SD ¶ 22. Exxon describes the June 2012 meeting in La Jolla, California led by Pawa and Frumhoff; emails showing that between December 2015 and January 2016, Pawa encouraged the Mass. AG to bring an action against Exxon and provided a presentation to her "on what Exxon knew" based on certain articles that were financed by the Rockefeller Family Fund; the January 2016 conference at the Rockefeller Family Fund's office attended by Pawa and others; and the April 2016 Harvard Law School conference, which Mass. AG representatives attended. SD ¶¶ 22-30.

Exxon also asserts that the Mass. AG publicly aligned herself with other activist attorneys general to use law enforcement to establish climate policy and that she concealed her connections to private activists. SD ¶¶ 31-34. Specifically, Exxon describes the March 29, 2016 press conference; the "secret workshops" hosted by Pawa and Frumhoff that took place immediately before the press conference; and the common-interest agreement between the Mass. AG and other "activist attorneys general," allegedly designed to "shield information concerning [her] closed-door meetings with climate activi[sts]." Id.

Exxon next asserts that another court has recognized the Mass. AG's improper motives to restrict speech on climate policy. It describes a decision by Judge R. H. Wallace of the District Court of Tarrant County, Texas, which was issued in proceedings against Pawa and California municipal officials, but not against the Mass. AG, which the Texas Court of Appeals subsequently overturned. Judge Wallace's decision found that Exxon had presented evidence sufficient to support exercising personal jurisdiction.[5] Id. at ¶ 35.

Exxon also alleges that the Mass. AG issued the CID and filed this action to suppress Exxon's disfavored viewpoint on climate change. With regard to the CID, it alleges that:

> The CID confirmed the Attorney General's intent to cleanse the climate policy debate of disfavored viewpoints. For example, it demanded [Exxon's] communications with twelve mainstream think tanks, . . . which oppose policies favored by the Attorney General, but not groups that advocate for polic[i]es favored by the Attorney General. The CID also targeted [Exxon's] speech and associational activities . . . [a]nd . . . statements of pure opinion by [Exxon's] former CEOs that are in tension with the Attorney General's politics. For example, the CID demanded materials concerning [Exxon's] suggestion that "[i]ssues such as global poverty [are] more pressing than climate change" and the rhetorical question "[w]hat good is it to save the planet if humanity suffers?" . . . The CID likewise targeted the . . . statements by [Exxon] that would be at home on the opinion page of any newspaper. . . .

SD ¶¶ 36-37 (footnotes omitted). With regard to the Amended Complaint, it alleges that:

> The Attorney General's rush to the courthouse despite a tolling agreement and despite having obtained no evidence from [Exxon] during its so-called investigation was a calculated ploy to interfere with [Exxon]'s trial preparations while garnering media attention.
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> [ ] The content of the Amended Complaint confirms the Attorney General's true motive to curtail [Exxon]'s speech. It expressly

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[5] Paragraph 35 of the Separate Defenses section of the Amended Answer cites In Re Exxon Mobil Corp., 2018 Tex. Dist. LEXIS 1 at *14 (Tarrant Cnty. Tex. Apr. 24, 2018), rev'd, City of San Francisco v. Exxon Mobil Corp., 2020 WL 3969558 (Tex. App. June 18, 2020). I was unable to locate Judge Wallace's decision either at the Lexis citation in the Amended Answer or in a search on Westlaw.

> targets [Exxon's] speech on climate policy, not because it is false or misleading, but because the Attorney General believes [Exxon] "urge[d] delay in regulatory action" rather than advocating "swiftly shift[ing] away from fossil fuel energy," as the Attorney General urges. . . .
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> [ ] Notwithstanding the statute of limitations, nearly all of the first 60 pages of the Amended Complaint is devoted to baseless allegations about [Exxon]'s climate science research and purported climate denial dating back to the 1970s. . . . Recognizing that this conduct cannot support a claim, the Amended Complaint characterizes these allegations as mere "context" for its meritless claims.

SD ¶¶ 38-40 (citations omitted).

DISCUSSION

The Commonwealth moves to strike the following 12 defenses in the Amended Answer under Mass. R. Civ P. 12(f): equitable defenses 7, 8, and 25; causation defenses 22-24; and constitutional defenses 30-35.

A court may strike an "insufficient defense." Mass. R. Civ. P. 12(f). "Because a motion [to strike] challenges the legal sufficiency of the pleading, it is governed by the same standards as a motion to dismiss" under Mass. R. Civ. P. 12(b)(6). Deutsche Bank Nat. Tr. Co. v. Gabriel, 81 Mass. App. Ct. 564, 571 (2012), quoting In re Gabapentin Patent Litigation, 648 F. Supp. 2d 641, 647 (D.N.J. 2009). As such, the court must "take as true the allegations of the answer" and "such inferences as may be drawn therefrom in the defendants' favor," Deutsche Bank, 81 Mass. App. Ct. at 571-572, but need "not accept legal conclusions cast in the form of factual allegations." Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000). The court must determine if the allegations of fact, if true, bring a right to relief "above the speculative level," Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), "plausibly suggesting (not merely consistent with)" a basis for relief. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007).

I address the challenged defenses in the order they are addressed by the parties.

I. Defenses 30-35

Defenses 30-32 are based on purported violations of Exxon's Due Process and Equal Protection rights. Defense 30 asserts that the Mass. AG engaged in official misconduct in violation of Exxon's Due Process rights by "us[ing] improper methods in its investigation and enforcement action, colluding with special interests focused on delegitimizing [Exxon] as a political actor, . . . [and] presumptively declaring that [Exxon] has participated in unlawful conduct." SD ¶ 74. Defense 31 asserts that the Mass. AG has a conflict of interest, which renders this lawsuit a violation of Exxon's Due Process rights, because she "has been influenced, or appears to have been influenced, in its exercise of discretion, both by the Attorney General's personal interests and by a group of external special interests that will or may benefit from the Attorney General's actions," including "private interests that aimed to chill and suppress [Exxon's] speech through legal actions and related campaigns." Id. ¶ 76. Defense 32 asserts that the Mass. AG has engaged in selective enforcement in violation of its Due Process and Equal Protection rights because she "seeks to inhibit [Exxon] from engaging in speech on climate policy that the Attorney General believes has impeded its climate policy objectives, while pressuring [Exxon] to support the Attorney General's preferred policies." Id. ¶ 78.

Defenses 33, 34, and 35 are based on purported violations of Exxon's First Amendment rights. Defense 33 asserts that the Mass. AG committed viewpoint discrimination because she "commenced this suit to inhibit [Exxon] from engaging in speech on climate policy that the Attorney General believes has impeded its preferred climate policy objectives . . . [and] to pressure [Exxon] to voice support for the Attorney General's preferred climate policies." Id. ¶¶ 82-83. Defense 34 asserts that the Mass. AG is seeking to require Exxon to engage in prohibited state-compelled speech because it wants to compel Exxon to place disclosures on its products

and/or securities. Id. ¶¶ 87-92. Defense 35 asserts that the Mass. AG "has violated [Exxon's] right to petition by expressly challenging [Exxon's] public statements concerning climate change and regulatory responses to climate change" and that she has done so because she "believes that [Exxon] thereby attempted to influence environmental policies . . . and that [Exxon] purportedly downplayed the need for any immediate action to mitigate climate change." Id. ¶ 96 (citations omitted).

Defense 34 fails because it is not a defense at all. See Wright v. Southland Corp., 187 F.3d 1287, 1303 (11th Cir. 1999) ("An affirmative defense is generally a defense that, if established, requires judgment for the defendant even if the plaintiff can prove his case by a preponderance of the evidence."). It amounts to a premature challenge to a potential remedy the court could require if it finds that Exxon violated G.L. c. 93A by engaging in false or deceptive marketing. In the remedy phase, Exxon is free to argue that one or more corrective statements run afoul of the First Amendment's compelled speech doctrine. See generally United States v. Philip Morris USA Inc., 566 F.3d 1095, 1142-1145 (D.C. Cir. 2009) (discussing compelled speech challenge to court ordered corrective statements after finding of liability), cert. denied, 561 U.S. 1025 (2010). Exxon has cited no case in a context such as this in which a challenge to a compelled speech remedy was recognized to be an affirmative defense. Exxon cites only to decisions repeating the well-established rule that the failure to mitigate doctrine is an affirmative defense. See, e.g., Pehoviak v. Deutsche Bank Nat. Tr. Co., 85 Mass. App. Ct. 56, 65 (2014). A "failure to mitigate" affirmative defense bears little resemblance to the one Exxon is attempting to assert here. Defense 34 should be stricken.

Defenses 30-33 and 35 require greater discussion. Although pled separately, they amount to a single selective enforcement defense asserting violations of Exxon's Due Process, Equal

Protection, and First Amendment rights, principally focused on the Commonwealth's motive for bringing this case. As explained below, these selective enforcement defenses fail for two reasons. First, they are barred under the doctrine of issue preclusion because the New York Action already resolved against Exxon the issue of whether the Mass. AG's actions are based solely on an unlawful purpose. Second, even if the New York Action has no preclusive effect, for the reasons described by Judge Caproni and as described below, Exxon has failed to suggest plausibly that the Mass. AG's actions constitute selective enforcement.

A. Issue Preclusion

Where, as here, "a State court is faced with the issue of determining the preclusive effect of a Federal court's judgment, it is the Federal law of res judicata which must be examined." Evans v. Lorillard Tobacco Co., 465 Mass. 411, 465-466 (2013), quoting Anderson v. Phoenix Inv. Counsel of Boston, Inc., 387 Mass. 444, 449 (1982). Under federal law, issue preclusion applies, "[w]hen there is an identity of the parties" and where "(1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) the issue [was] actually litigated; (3) the issue [was] determined by a valid and binding final judgment; and (4) the determination of the issue [was] essential to the judgment." Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 30 (1st Cir. 1994).

These elements are satisfied here. First, improper motive was at issue in the New York Action. As in this lawsuit, Exxon relied on allegations relating to events that preceded the CID and asserted that the Mass. AG's decision to pursue it for violating G.L. c. 93A was based on an improper purpose, i.e., to violate Exxon's constitutional rights. Second, the improper motive issue was actually litigated and decided in the New York Action. The Court found, after reviewing the extensive record before it and hearing argument, that Exxon's "allegations f[e]ll

well short of plausibly alleging that the . . . [Mass. AG was] motivated by an improper purpose."[6] Exxon Mobil, 316 F. Supp. 3d at 712. Third, Exxon had a full and fair opportunity to litigate the issue in the New York Action; which was decided based on the same standard the Court must apply in this case, i.e., the Rule 12(b)(6) plausibility standard. Cf. Sprecher v. Graber, 716 F.2d 968, 972 (2d Cir. 1983) (issue preclusion did not apply where party had "substantially disparate opportunities for discovery and differing burdens"). Finally, resolution of the improper motive issue was necessary, indeed central, to the ruling in the New York Action.[7] Exxon Mobil, 316 F. Supp. 3d at 686-687. See Garcia v. Superintendent of Great Meadow Corr. Facility, 841 F.3d 581, 583 (2d Cir. 2016) ("a dismissal for failure to state a claim operates as a final judgment on the merits and thus has res judicata effects") (internal quotations omitted).

Exxon argues that "[t]he issue raised in the federal action was whether the pre-suit CID issued by the Attorney General in the investigative context should be enjoined – not whether [Exxon] could assert defenses to claims that the Attorney General had not yet filed or even formulated." Memorandum of Law of Exxon Mobil Corporation in Opposition to the Commonwealth's Motion to Strike Certain Defenses ("Opp.") at 8 (Docket #56). This argument is unavailing. The substantive allegations supporting Exxon's defenses concern the same pre-suit conduct that was the basis of the New York Action, which the New York court determined do

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[6] The Amended Answer contains some allegations, again involving events preceding the CID, which were not before the New York Court. This does not change my analysis. See also Restatement (Second) of Judgments § 27 cmt. c. (1982 & Supp. 2021) ("if the party against whom preclusion is sought did in fact litigate an issue of ultimate fact and suffered an adverse determination, new evidentiary facts may not be brought forward to obtain a different determination of that ultimate fact.").

[7] Exxon does not argue that the Rule 12(b)(6) analysis was dicta or not essential to Judge Caproni's decision. In dismissing the appeal from Judge Caproni's decision as against the NYAG, the Second Circuit expressly declined Exxon's request to vacate the decision so as to deprive it of preclusive effect. Exxon Mobil, 2022 WL 774516 at **8-9.

not plausibly suggest that the Mass. AG was proceeding in bad faith or motivated solely by a desire to impinge upon Exxon's constitutional rights. Cf. SD ¶¶ 22-40, with Exxon Mobil, 316 F. Supp. 3d at 687-691, 706-712 (describing Exxon's allegations in its first and proposed second amended complaints). Indeed, the only allegations relating to improper motive specifically addressing the filing of the present action are found in four conclusory paragraphs, SD ¶¶ 29, 38-40, which are belied by Judge Green's rejection of Exxon's efforts to dismiss the action under Mass. R. Civ. P. 12(b)(6) and the anti-SLAPP statute.

B. Plausibility

Even if Exxon's constitutional defenses were not barred by res judicata, they would still be subject to dismissal. Prosecutors' decisions are shielded by a "presumption of regularity" and a presumption that they have "properly discharged their official duties." United States v. Armstrong, 517 U.S. 456, 464 (1996), quoting United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926). See also Foster from Gloucester, Inc. v. City Council of Gloucester, 10 Mass. App. Ct. 284, 294 (1980) ("There is every presumption in favor of the honesty and sufficiency of the motives actuating public officers in actions ostensibly taken for the general welfare."). To maintain an affirmative defense of selective prosecution, a defendant must do more than simply assert in conclusory fashion that it has been the victim of such a prosecution. Instead, the defendant must make at least a threshold showing that the action has a discriminatory effect (i.e., comparable entities were not prosecuted) and that it was motivated by a discriminatory purpose (e.g., the desire to prevent defendant's exercise of its constitutional rights). See Armstrong, 517 U.S. at 465; Attorney Gen. of U.S. v. Irish People, Inc., 684 F.2d 928, 932 & n. 11 (D.C. Cir. 1982) (elements of selective prosecution defense same in civil and criminal contexts), cert. denied, 459 U.S. 1172 (1983); United States v. American Elec. Power

Serv. Corp., 258 F. Supp. 2d 804, 808-809 (S.D. Ohio 2003). Exxon has failed to put forward allegations plausibly suggesting that it can meet either element of the defense.[8]

Exxon asserts that the Mass. AG, in collusion with and under the influence of climate activists seeking to delegitimize Exxon as a political actor, brought this action to punish Exxon for its political speech about climate policy. However, none of its factual allegations (as opposed to the numerous conclusory ones) in the Amended Answer plausibly suggest that Exxon was singled out for disparate treatment. Nor do they plausibly suggest that the Mass. AG is solely engaged in political retaliation and lacks a good faith belief that Exxon engaged in fraud. For example, although Exxon alleges the Mass. AG met with and was influenced by certain climate activists, it fails to put forward allegations from which one could reasonably infer that these activists did not believe that there was a reasonable basis to investigate Exxon or, even assuming that such belief did not exist, that the Mass. AG shared in the activists' improper motivation to punish Exxon.[9] Exxon cannot satisfy the Rule 12(b)(6) standard that applies to its defenses.[10]

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[8] Irish People and American Elec. both looked to whether the defendant could make a "colorable" showing on each element of the selective prosecution claim. See Irish People, 684 F.2d at 932 ("defendant alleging . . . the selective prosecution defense . . . must offer at least a colorable claim both that the prosecution was improperly motivated and that it was selective in the first place"); American Elec., 258 F. Supp. 2d at 809 ("Defendants have not made out a colorable case of selective enforcement"). The Appeals Court has indicated that faced with a motion to strike, affirmative defenses must satisfy the plausibility standard under Rule 12(b)(6). See Deutsche Bank Nat. Tr. Co., 81 Mass. App. Ct. at 571-572. I need not resolve the question of whether there is a difference between "colorable" and "plausible." Under either measure, Exxon's allegations fall short.

[9] In opposing the motion, Exxon points to the fact that a Texas trial court judge adopted Exxon's version of events in its pre-suit discovery petition. However, the Mass. AG was not a party to that litigation and the trial judge's decision was reversed, rendering it a legal nullity. In any event, this Court must independently assess the plausibility of Exxon's alleged defenses.

[10] Defenses 33 (viewpoint discrimination) and 35 (petitioning) fail for additional reasons. The Commonwealth's claims under G.L. c. 93A are based on purportedly fraudulent statements and omissions by Exxon. The First Amendment (Defense 33) does not supply a

II. Defenses 7, 8, and 25

Defenses 7, 8, and 25 assert various equitable defenses. Specifically, they allege that the Commonwealth's claims are barred under the doctrine of estoppel because the Commonwealth has promoted the use of natural gas and Exxon detrimentally relied on the Commonwealth's representations that Exxon's oil and natural gas are legal (Defense 7); unclean hands because "the claims are tainted with the inequitableness or bad faith" (Defense 8); and *in pari delicto* because the Commonwealth encouraged the production, promotion, and sale of natural gas and fossil fuel, and therefore participated in the conduct underlying its claims (Defense 25).[11] Such defenses are insufficient here.

Defense 7 fails under the well-established rule that estoppel does not constrain officials exercising their responsibilities where doing so would frustrate public policy intended to protect the public interest. See LaBarge v. Chief Admin. Justice of the Trial Court, 402 Mass. 462, 468 (1988) ("Generally, the doctrine of estoppel is not applied against the government in the exercise of its public duties, or against the enforcement of a statute. Estoppel is not applied to government acts where to do so would frustrate a policy intended to protect the public interest.") (internal quotations and citation omitted); Phipps Prod. Corp. v. Massachusetts Bay Transp. Auth., 387 Mass. 687, 693 (1982) ("This court has been reluctant to apply principles of estoppel to public

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defense to such claims. See Exxon Mobil, 316 F. Supp. 3d at 710 (Exxon conceded "false statements to the market or the public are not protected speech"); Illinois ex. rel. Madigan v. Telemarking Assocs., Inc., 538 U.S. 600, 612 (2003) ("the First Amendment does not shield fraud"). As to Defense 35, Judge Green rejected the proposition that the present action is based solely on Exxon's exercise of its right to petition. See 2021 WL 3488414 at *3 (denying special motion to dismiss under anti-SLAPP statute).

[11] Defense 7 also asserts the Commonwealth's claims are barred under the doctrine of waiver. Defense 8 also asserts that the Commonwealth's claims are barred under the doctrine of unjust enrichment. In response to the Commonwealth's motion, Exxon offers no argument on these aspects of Defenses 7 and 8.

entities where to do so would negate requirements of law intended to protect the public interest."). If the Commonwealth is able to establish that Exxon engaged in unfair and deceptive conduct prohibited under G.L. c. 93A (e.g., fraud), application of this defense would certainly impede the public interest.[12]

The unclean hands and in pari delicto defenses fail for the same reason.[13] Application of these defenses would frustrate public policy intended to protect the public interest should the Commonwealth prove its claims. See United States v. Philip Morris Inc., 300 F. Supp. 2d 61, 75 (D.D.C. 2004) ("When . . . the Government acts in the public interest the unclean hands doctrine is unavailable as a matter of law."); United States v. American Elec. Power Serv. Corp., 218 F. Supp. 2d 931, 938 (S.D. Ohio 2002) ("the defense of unclean hands may not be used against the United States to prevent it from enforcing its laws to protect the public interest"); Merrimack Coll. v. KPMG LLP, 480 Mass. 614, 623 (2018) (in pari delicto defense not applicable "where the public interest requires that [the courts] should, for the promotion of public policy, interpose,

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[12] In arguing the viability of an estoppel defense, Exxon relies on Sullivan v. Chief Justice for Admin. and Mgt. of the Trial Court, 448 Mass. 15 (2006). Sullivan, which allowed an estoppel claim to proceed against a public official, was an exceptional departure from the general rule based on circumstances unlike those alleged in the Amended Answer. See Sullivan, 448 Mass. at 31 (estoppel claim could proceed where "public statements made by the CJAM were not of the sort that negated requirements of law intended to protect the public interest such that the plaintiffs should be precluded from asserting a claim for estoppel" and his "authority to manage court facilities . . . would not be unduly hindered by the application of principles of estoppel"). See also, e.g., Murphy v. Massachusetts State Police, 72 Mass. App. Ct. 1113, 2008 WL 3877185 at *2 (Aug. 22, 2008) (Rule 1:28 decision) (declining to permit estoppel claim where circumstances not comparable to Sullivan).

[13] Exxon did not separately argue in response to the Commonwealth's request to strike Defense 25.

and the relief in such cases is given to the public through the party"), quoting Choquette v. Isacoff, 65 Mass. App. Ct. 1, 4 (2005).[14]

III. Defenses 22-24

Defenses 22-24 assert causation defenses. Specifically, the Amended Answer asserts that any harm was the result of a superseding or intervening cause (Defense 22); any Chapter 93A violation did not actually or proximately cause any harm (Defense 23); and any purported injury was caused by market conditions or the conduct of others (Defense 24). None of these defenses apply as a matter of law to this enforcement action under G.L. c. 93A, § 4, because the Commonwealth only seeks injunctive relief and penalties.[15] The Commonwealth need not establish that any individual was harmed by the allegedly unfair or deceptive act or practice. See Commonwealth v. Equifax, Inc., C.A. No. 17-3009-BLS2, 2018 WL 3013918 at *5 (Mass. Super. Apr. 3, 2018) (Salinger, J.), citing Commonwealth v. Fall River Motor Sales, Inc., 409 Mass. 302, 312 (1991) and Commonwealth v. Chatham Development Co., Inc., 49 Mass. App. Ct. 525, 528–529 (2000).

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[14] The decisions Exxon cites do not compel a different conclusion. See United States v. Lain, 2018 WL 11252709 at *2 (D. Wyo. Apr. 13, 2018) (allowing unclean hands defense against IRS without relevant analysis); Securities & Exchange Comm'n v. Cuban, 798 F. Supp. 2d 783, 792, 794, 797 (N.D. Tex. 2011) ("affirmative defense of unclean hands is not barred as a matter of law in an SEC enforcement action" but applies in "strictly limited circumstances" involving "egregious" misconduct; dismissing affirmative defense because defendant failed to adequately plead the prejudice prong of his unclean hands defense); State v. United Parcel Serv., Inc., 253 F. Supp. 3d 583, 680-681 (S.D.N.Y. 2017) (unclean hands defense did not apply against government because defendant failed to show egregious misconduct), aff'd, 942 F.3d 554 (2d Cir. 2019).

[15] At the hearing, plaintiff confirmed that it is only seeking such remedies.

ORDER

Plaintiff's Motion to Strike Certain Defenses in Exxon Mobil Corporation's Answer (Docket #54) is **ALLOWED**. Defenses 7-8, 22-25, and 30-35 in defendant's Amended Answer are **STRICKEN**.

Dated: March 21, 2022

Peter B. Krupp
Justice of the Superior Court

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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION No. 1984-CV-03333-BLS1

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

EXXON MOBIL CORPORATION,

Defendant.

11/9/2021 e-filed KG

MOTION OF THE COMMONWEALTH TO STRIKE CERTAIN DEFENSES IN EXXON MOBIL CORPORATION'S ANSWER

The Commonwealth of Massachusetts, pursuant to Rule 12(f) of the Massachusetts Rules of Civil Procedure and Rule 9A of the Massachusetts Superior Court Rules, respectfully requests that the Court strike the Fourth, Seventh, Eighth, Twenty-Second, Twenty-Third, Twenty-Fourth, Twenty-Fifth, Twenty-Sixth, Thirtieth, Thirty-First, Thirty-Second, Thirty-Third, Thirty-Fourth, and Thirty-Fifth Defenses asserted by Defendant Exxon Mobil Corporation (ExxonMobil) in its Answer to the Commonwealth's Amended Complaint. As grounds for this motion, the Commonwealth states that those defenses are insufficient as a matter of law because they are legally invalid, barred by *res judicata*, improperly pleaded, and cannot be applied to the Commonwealth's G.L. c. 93A claims in this action. For the reasons described further in the accompanying Memorandum of Law, the Commonwealth respectfully requests that the Court allow this motion and enter an order striking, with prejudice, those fourteen defenses from ExxonMobil's Answer.

3/21/22 After hearing, ALLOWED. See Memorandum and Order of same date.

Dated: September 24, 2021

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS,

By its attorneys,

MAURA HEALEY
ATTORNEY GENERAL

/s/ Seth Schofield

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CERTIFICATE OF SERVICE

I, Seth Schofield, certify that on September 24, 2021, I served the foregoing document by sending a copy thereof by electronic service to:

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