

COMMONWEALTH OF MASSACHUSETTS  
APPEALS COURT

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COMMONWEALTH OF MASSACHUSETTS,	)	
	)	
<i>Plaintiff/Respondent,</i>	)	
	)	No. 2022-J-0200
<i>v.</i>	)	
	)	Lower Ct. No:
EXXON MOBIL CORPORATION,	)	1984CV03333-BLS1
	)	
<i>Defendant/Petitioner.</i>	)	

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MEMORANDUM OF THE COMMONWEALTH IN OPPOSITION TO EXXON  
MOBIL CORPORATION'S PETITION FOR INTERLOCUTORY RELIEF  
PURSUANT TO G.L. c. 231, § 118 (first para.)

MAURA HEALEY  
*Attorney General*

RICHARD A. JOHNSTON  
*Chief Legal Counsel*

CHRISTOPHE G. COURCHESNE  
*Deputy Chief*

SETH SCHOFIELD  
*Senior Appellate Counsel*  
Energy and Environment Bureau  
Office of the Attorney General  
One Ashburton Place, 18th Flr.  
Boston, Massachusetts 02108  
(617) 963-2436  
seth.schofield@mass.gov

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## **INTRODUCTION**

Defendant Exxon Mobil Corporation's petition for interlocutory relief from the Superior Court's decision to strike the company's improper motive defenses (Nos. 30-33, 35) should be denied for two independent reasons.<sup>1</sup> First, ExxonMobil litigated and lost on the improper motive issue on a nearly identical record in a prior federal action between the parties and issue preclusion thus bars ExxonMobil's attempt to relitigate that issue again here. Second, ExxonMobil's pleadings also failed to satisfy the well-settled, rigorous standard that applies to the improper motive defenses the company seeks to relitigate in this law enforcement action. The Superior Court (Krupp, J.) correctly held that the at-issue defenses are insufficient as a matter of law on both of those independent grounds. That holding was neither a clear error of law nor a clear abuse of discretion.

## **STATEMENT**

On March 29, 2016, the Attorney General announced that her Office was investigating ExxonMobil for possible violations of Chapter 93A with respect to the company's disclosures about climate change in its marketing and advertising to Massachusetts investors and consumers. *Exxon Mobil Corp. v. Attorney Gen.*, 479 Mass. 312,

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<sup>1</sup> ExxonMobil has not challenged the additional reasons the Superior Court struck defenses 33 and 35. Add-40-41 n.10. Thus, there is no claimed basis at all for disturbing the Superior Court's decision to strike them.

327 (2018), *cert denied*, 139 S. Ct. 794 (2019). In furtherance of that investigation, the Attorney General served ExxonMobil with a civil investigative demand (CID). *Id.* In particular, the Attorney General requested materials ExxonMobil used to market ExxonMobil's securities to Massachusetts investors and its fossil fuel products to Massachusetts consumers. In short, the investigation sought to discover what ExxonMobil knew about climate change risks to its business and to the public, when it obtained that knowledge, and how it disclosed that knowledge to Massachusetts investors and consumers.

ExxonMobil sought to bar the Attorney General's investigation in both a Texas federal court and a Massachusetts state court. *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679 (S.D.N.Y. 2018), *aff'd in part and dismissed in part sub nom., Exxon Mobil Corp. v. Healey*, 28 F.4th 383 (2d Cir. 2022).<sup>2</sup> With 42 U.S.C. § 1983 as its vehicle, ExxonMobil alleged in its federal action that the Attorney General's investigation "was the culmination of a behind-the-scenes push by climate activists," motivated by an improper purpose to retaliate against ExxonMobil for its speech on climate change in violation of its First and Fourteenth Amendment rights.

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<sup>2</sup> ExxonMobil's federal action was later transferred from the Northern District of Texas to the Southern District of New York based on improper venue. *Exxon Mobil*, 316 F. Supp. 3d at 694.

*Id.* at 689-91. ExxonMobil asserted similar claims in its state court action based "on substantially the same factual allegations." *Id.* at 691. According to ExxonMobil, the Attorney General's pursuit of the company for potential Chapter 93A violations is "all about ... regulating speech" and "viewpoint discrimination." *Id.* at 702 (citation & quotations omitted). Both courts rejected ExxonMobil's claims.

The Southern District of New York, for its part, identified "improper motive" as an "essential element" of ExxonMobil's First and Fourteenth Amendment claims. *Id.* at 705. The district court then dismissed ExxonMobil's claims on the merits after reviewing an extensive record and hearing argument. *Id.* at 687-95, 704-12.<sup>3</sup> In particular, the district court found that ExxonMobil had "not plausibly alleged [facts showing] that" the Attorney General was pursuing ExxonMobil for potential violations of Chapter 93A "in bad faith, motivated by a desire to impinge on Exxon[Mobil]'s constitutional rights." *Id.* at 704; see also *id.* at 686 ("extremely thin allegations and speculative inferences"), 689 ("a wild stretch of logic"). Instead, the court found that

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<sup>3</sup> The Superior Court likewise rejected ExxonMobil's improper motive claims and the Supreme Judicial Court affirmed that decision. *In re Civil Investigative Demand No. 2016-EPD-36*, C.A. No. 16-1888F, 2017 WL 627305 (Super. Ct. 2017) (Brieger, J.), *aff'd*, 479 Mass. at 327-28 (affirming rejection of claims that investigation based "solely" on "a pretext" to violate ExxonMobil's free-speech rights or on any "actionable bias").



ExxonMobil's "allegations that the [Attorney General was] pursuing [a] bad faith investigation[] to violate Exxon's constitutional rights [we]re implausible." *Id.* at 687. The Second Circuit affirmed the dismissal as to the Attorney General on claim preclusion grounds, *Exxon Mobil*, 28 F.4th at 398-402, but left undisturbed the district court's merits decision, *id.* at 396-97.

The Attorney General, after continuing her investigation, notified ExxonMobil on October 10, 2019 that she intended to sue the company for violating Chapter 93A at the end of a five-day meet-and-confer period required by the statute. In response, ExxonMobil sought to delay the lawsuit, alleging that "improper motives animate[d]" the "office's decision to file suit." RA:427. The Superior Court rejected ExxonMobil's attempt to forestall the lawsuit's filing as having no "statutory" basis "whatsoever." RA:455. The Attorney General then commenced this action on behalf of the Commonwealth on October 24, 2019. RA:7. ExxonMobil's removal of the action to federal court was also rejected, *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020), and, on remand, the Commonwealth filed an amended complaint. RA:14. On June 24, 2021, the Superior Court (Green, J.) denied ExxonMobil's special motion to dismiss under the anti-petitioning statute (i.e., the anti-SLAPP statute), RA:665, and its motion to dismiss for

lack of personal jurisdiction and failure to state plausible Chapter 93A claims, RA:638.<sup>4</sup>

ExxonMobil filed its answer on July 27, 2021, which included forty-one separate defenses. RA:221. The Commonwealth then served a motion to strike defenses 30-33 and 35 (improper motive-related defenses), 34 (state-compelled speech defense), 4, 7-8, and 23-26 (tort and equitable defenses), and 27 (insufficient meet-and-confer defense). RA:305. ExxonMobil responded with an amended answer, which withdrew defenses 4, 26, and 27, but then recast the allegations from its failed challenge to the investigation under the heading "The Attorney General Filed this Meritless Lawsuit Based on Improper Motives." RA:572. After considering the parties' briefs and hearing argument, the Superior Court (Krupp, J.) allowed the Commonwealth's motion. Add-26. As relevant here, the court struck defenses 30-33 and 35 because they are issue precluded by the Southern District of New York's opinion, and because, in any event, ExxonMobil failed to make allegations sufficient to show an entitlement to litigate the challenged defenses. Add-36-40. ExxonMobil filed the instant petition to seek review of the court's decision to strike defenses 30-33 and 35.

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<sup>4</sup> ExxonMobil's interlocutory appeal of the trial court's denial of its anti-SLAPP motion is awaiting a decision from the Supreme Judicial Court. *Commonwealth v. Exxon Mobil Corp.*, SJC-13211 (argued March 9, 2022).

## STANDARD OF REVIEW

A single justice reviews interlocutory trial court orders for "clear error of law or abuse of discretion." *Jet-Line Servs., Inc. v. Selectman of Stoughton*, 25 Mass. App. Ct. 645, 646 (1988); see also *Aspinall v. Philip Morris, Cos.*, 442 Mass. 381, 390 (2004) (same).<sup>5</sup> While a single justice has authority to vacate a trial court's order, *Ashford v. MBTA*, 421 Mass. 563, 566 (1995), that authority is exercised "sparingly and only in situations where a petitioner has shown a clear entitlement to relief," *Edwin R. Sage Co. v. Foley*, 12 Mass. App. Ct. 20, 23 (1981). Here, ExxonMobil has failed to demonstrate such a clear entitlement to relief.

## ARGUMENT

Courts should, as the Superior Court correctly did here, strike any defense that "is insufficient as a matter of law." *Kaiser Aluminum & Chem. Shales v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1057 (5th Cir. 1982). And that is for a good reason: baseless "defense[s]," like the ones at issue here, "confuse the issues in the case," 5C Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1381 (3d ed. 2004 & Supp. 2021), and cause "the expenditure of time and money that ...

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<sup>5</sup> ExxonMobil is wrong to claim that the standard of review is *de novo*. Compare ExxonMobil Mem. 12, with *Manfrates v. Lawrence Plaza Ltd. P'ship*, 41 Mass. App. Ct. 409, 412 & n.4 (1996).

arise[s] from litigating spurious issues," *Kennedy v. City of Cleveland*, 797 F.2d 297, 305 (6th Cir. 1986).

**I. ExxonMobil's Improper Motive Defenses Are Barred by A Prior Federal Action That Resolved the Same Issue on the Merits.**

The law, for good reason, precludes "'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). Issue preclusion--the doctrine relevant here--"protect[s] against 'the expense and vexation attending multiple lawsuits, conserv[es] judicial resources, and foste[rs] reliance on judicial action by minimizing the possibility of inconsistent decisions.'" *Id.* (citation omitted). Casting aside that doctrine's clear dictates and animating purposes, ExxonMobil asks this Court to resurrect its stricken defenses so that it may relitigate the *exact same issue* the Southern District of New York decisively rejected. *Exxon Mobil*, 316 F. Supp. 3d at 704. And it does so despite conceding that the issue was "previously litigated" in that federal action. Mem. 14.

The context, of course, is somewhat different here, a point ExxonMobil belabors. Mem. 13-15. But that is irrelevant to the application of issue preclusion. As the Supreme Court explained, issue preclusion applies

even if the legal or factual issue arises in a later suit between the same parties in a different context. *Taylor*, 553 U.S. at 892. Indeed, the allegations ExxonMobil relies on to support its improper motive defenses lay bare the legal jiu-jitsu it is attempting here. Before the federal court, ExxonMobil was emphatic: "[o]ur position is that this is all about bad faith. This is about regulating speech. It's about viewpoint discrimination." *Exxon Mobil*, 316 F. Supp. 3d at 702. ExxonMobil is just as emphatic here: "the Commonwealth's ... claims ... seek to regulate constitutionally-protected speech." Mem. 15.

To support both its prior improper motive claims and its improper motive defenses now, ExxonMobil also relies on the very same allegations, including private meetings with climate activists, a 2016 press conference, and the Attorney General's 2016 CID. Compare *Exxon Mobil*, 316 F. Supp. 3d at 688-91 (describing federal allegations), with RA:572-80 (amended answer); see also Add-38 ("same pre-suit conduct"). In its federal action, as ExxonMobil also concedes, the company alleged that "[t]he CID targeted ExxonMobil's speech," RA:578 (¶36), and here it similarly alleges that the amended complaint "targets ExxonMobil's speech," Mem. 11. The idea, pressed by ExxonMobil, that the Commonwealth should have to relitigate the improper motive issue again and be subject to a discovery fishing expedition is entirely

antagonistic to the issue preclusion doctrine and the policies that inform it. *Supra* p.12.

ExxonMobil's claim that it "had no prior opportunity to litigate" the at-issue defenses is also baseless. Mem. 16. Indeed, it is based on the same self-serving mischaracterization of the record that it has deployed at other stages of this litigation. *Massachusetts*, 462 F. Supp. 3d at 44, 47. In this instance, ExxonMobil asserts that "the Commonwealth insisted that ExxonMobil could 'defend itself and raise objections in Massachusetts state court when and if' an action was filed," Mem. 16-17, but fails to tell this Court that the Commonwealth made those arguments in support of abstention and ripeness arguments that the district court did not reach or accept. *Exxon Mobil*, 316 F. Supp. 3d at 687, 694-96.

ExxonMobil, having convinced the district court to reach the merits of its improper motive claims, must now face the preclusive consequences. *Temple of Lost Sheep Inc. v. Abrams*, 930 F.2d 178, 185 (2d Cir. 1991) (party precluded from relitigating improper motive issue where they "chose to place conspiracy allegations, which were central to their section 1983 claims, directly in issue in" prior "proceeding"). As explained above, the district court identified "improper motive" as the "essential element" of ExxonMobil's constitutional claims, 316 F. Supp. 3d at 705, and ExxonMobil has conceded here

that improper motive is an essential element of each of the stricken defenses too, Mem. 19. In other words, the improper motive issue was "at the heart of ... [its federal] complaint." *Exxon Mobil*, 316 F. Supp. 3d at 699; see also Add-38 ("necessary, indeed central, to" district court decision). And the district court soundly rejected it: "Exxon[Mobil] has not plausibly alleged that ... [the] attorney general is proceeding in bad faith, motivated by a desire to impinge on Exxon[Mobil]'s constitutional rights." 316 F. Supp. 3d at 704. Litigation choices have consequences, and here the Superior Court correctly discerned that ExxonMobil may not relitigate the improper motive issue again.

**II. ExxonMobil's Improper Motive Defenses Fail, in Any Event, to Satisfy the More Rigorous Pleading Standard that Applies to Them.**

Nor did the Superior Court commit a "clear error of law or abuse of discretion" when it struck the at-issue defenses for the alternative, independent reason that ExxonMobil failed to satisfy the more rigorous pleading standard that applies to improper motive defenses. Add-39-40; *Jet-Line*, 25 Mass. App. Ct. at 646; *United States v. Am. Elec. Power Serv. Corp.*, 258 F. Supp. 2d 804, 807-09 (S.D. Ohio 2003) (*AEP*) (holding that defendant asserting improper motive defense must make a "colorable showing ... to pursue the defense"); see also *United States v. Armstrong*, 517 U.S. 456, 465, 468 (1996)

(explaining why a "rigorous standard" applies to improper motive defenses). Indeed, in so holding, the Superior Court came to the same conclusion as the Southern District of New York after considering the very same allegations as the federal court, *supra* pp.13-14, and, again, ExxonMobil concedes that "improper motive" is the keystone to each of the defenses, Mem. 19. Despite those facts, ExxonMobil argues that the Superior Court erred by assessing whether the company had made a sufficient showing to demonstrate that it should be entitled to litigate the defenses. That argument is meritless.<sup>6</sup>

ExxonMobil claims that the Superior Court erred by employing the presumption of regularity to a civil enforcement action, yet it fails to cite a single case for that proposition. Mem. 17-19. That is because there is none. In *Armstrong*--the leading case on the selective prosecution defense (i.e., improper enforcement motive)--the U.S. Supreme Court stated that "'[t]he presumption of regularity supports' ... prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts

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<sup>6</sup> This Court need not wade into the issue whether ExxonMobil must satisfy a plausibility standard akin to the one applicable under Mass. R. Civ. P. 12(b)(6) because, as the Superior Court made clear, ExxonMobil's defenses fail under either standard. Add-40 n.8. Nevertheless, *Deutsche Bank Nat'l Trust Co. v. Gabriel*, 81 Mass. App. Ct. 564 (2012), plainly held that the question whether a party has pleaded viable defenses "is governed by the same standards as a motion to dismiss pursuant to" Rule 12(b)(6). 81 Mass. App. Ct. at 571-72.



presume that they have properly discharged their official duties." 517 U.S. at 465 (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)). For that reason, the Court made clear that "a criminal defendant must present 'clear evidence to the contrary.'" *Id.* (quoting *Chemical Found.*). To be sure, the Court made those statements in a criminal case (rather than a civil one) but, significantly, the Court adopted that rule from a *civil* case--*Chemical Found.* ExxonMobil's argument that "[t]here is no basis to extend" that presumption to a civil enforcement action is thus nonsensical. See Mem. 17. Indeed, even if that were not so clear, it makes even more sense to apply the presumption in civil enforcement actions where the more severe consequences of criminal liability are absent (i.e., imprisonment).

Accordingly, courts that recognize a selective or improper motive defense in the civil context<sup>7</sup> have uniformly applied a heightened standard to evaluate whether the defense is viable. In a case directly on point, for example, the United States District Court for the Southern District of Ohio assumed the defense applied to civil enforcement actions and then struck the defense as insufficiently pleaded in an environmental enforcement

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<sup>7</sup> *E.g.*, *United States v. Fleetwood Enters.*, 702 F. Supp. 1082, 1091-92 & n.26 (D. Del. 1988) (selective enforcement defense unavailable because "a civil penalty action brought by the Federal Government is [not] the punitive equivalent of a criminal action ... and [defense presents no] ... bar to the civil proceeding.").

action brought by the federal and state governments. *AEP*, 258 F. Supp. 2d at 807-09. The court held that the defendants had failed to make the showing necessary "to pursue the defense, even at the discovery stage," having failed to make out a "colorable" claim "that the prosecution was improperly motivated." *Id.*<sup>8</sup>

The rationale for applying a more "rigorous standard" in governmental enforcement actions--civil or criminal--is sound. It applies to address "a number of 'substantial concerns'": the judiciary's inability "to competently assess the basis for a decision to prosecute," the possibility that "courts may 'unnecessarily impair' ... a 'core'" executive function, and the fact that "selective enforcement discovery 'will divert prosecutor's resources and may disclose the Government's prosecutorial strategy.'" *United States v. AT&T Inc.*, 290 F. Supp. 3d 1, 3 (D.D.C. 2018) (quoting *Armstrong*, 517 U.S. at 465, 468). And those concerns apply with even more force in the civil context. See *id.* (noting parties' agreement that *Armstrong* standard controlled in civil action).

The Supreme Judicial Court has expressed similar concerns, noting that "decisions whether and how to prosecute entail policy considerations, such as deterrence value and prosecuting priorities, that are ill

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<sup>8</sup> See also *Att'y Gen. of the U.S. v. Irish People, Inc.*, 684 F.2d 928, 932 n.8 (D.C. Cir. 1982) (applying heightened standard in pre-*Armstrong* civil case).

sued to judicial review." *Commonwealth v. Bernardo B.*, 453 Mass. 158, 167 (2009). Both the Supreme Judicial Court and the Appeals Court have also made clear that such considerations apply in the civil enforcement context as well. *Commonwealth v. Boston Edison Co.*, 444 Mass. 324, 334 (2005) (civil enforcement decisions "not ordinarily judicially reviewable"); *DiCicco v. Dep't of Env'tl. Prot.*, 64 Mass. App. Ct. 423, 427-28 (2005) (same). As the Superior Court indicated, Massachusetts courts have long held that "[t]here is every presumption in favor of the honesty and sufficiency of the motives actuating public officers in actions ostensibly taken for the general welfare." Add-39 (quoting *Foster from Gloucester, Inc. v. City Council of Gloucester*, 10 Mass. App. Ct. 284, 294 (1980)); see also *Gen. Outdoor Advert. Co. v. Dep't of Pub. Works*, 289 Mass. 149, 192 (1935) (courts must "presume[] that public officers ... discharge their duties honestly and in accordance with the rules of law"). And that is the very same rule the Supreme Court adopted in *Armstrong*. *Supra* pp.16-17.

Beyond the legal insufficiency of the at-issue defenses, ExxonMobil's prior litigation tactics illustrate the risks of reinvigorating ExxonMobil's improper motive defenses. In federal court, ExxonMobil attempted to leverage its claims that the Massachusetts and New York Attorneys General conspired together and with so-called climate activists, see, e.g., RA:377-78 (¶106), to

violate the company's constitutional rights--including its First Amendment rights--to initiate an unprecedented discovery expedition into the Attorneys General's motives for investigating ExxonMobil. For example, ExxonMobil served over 100 requests for written discovery and documents, as well as noticed depositions of the Attorney General and two members of her case team.

ExxonMobil ultimately failed in its extraordinary foray, but it exacted the waste of extensive time, money, and resources, including the necessity of the Attorney General's filing a petition for a writ of mandamus in the United States Court of Appeals for the Fifth Circuit.<sup>9</sup> And the Office had to incur those costs even though ExxonMobil's claims were ultimately found wholly "implausible," *Exxon Mobil*, 316 F. Supp. 3d at 687, and the fact that deposing executive officials is inappropriate, absent extraordinary circumstances not present then, or now. *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007) (citing cases). In short, the Superior Court acted well within its discretion in correctly refusing to give ExxonMobil yet another bite at the apple.

#### **CONCLUSION**

The Court should deny the petition.

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<sup>9</sup> Pet. for Writ of Mandamus, *In re Maura T. Healey*, No. 16-11741 (5th Cir. Dec. 9, 2016) (ECF No. 513790755).

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY  
*Attorney General*

/s/ Seth Schofield  
RICHARD A. JOHNSTON (No. 253420)  
*Chief Legal Counsel*  
CHRISTOPHE G. COURCHESNE (No. 660507)  
*Deputy Chief, Energy and*  
*Environment Bureau*  
SETH SCHOFIELD (No. 661210)  
*Senior Appellate Counsel,*  
*Energy and Environment Bureau*  
*Office of the Attorney General*  
*One Ashburton Place, 18th Flr.*  
*Boston, Massachusetts 02108*  
*(617) 963-2436*  
*seth.schofield@mass.gov*

May 2, 2022

# **CERTIFICATE OF COMPLIANCE**

I hereby certify that:

1. This opposition complies with the rules of court that pertain to the filing of a response to a petition for relief under G.L. c. 231, § 118 (first paragraph), including Massachusetts Appeals Court Rule 20.0(c), Mass. R. App. P. 16(b)(3) (addendum), and Mass. R. App. P. 21 (redaction), and

2. This motion complies with the format requirements of Massachusetts Appeals Court Rule 20.0(c) and Mass. R. App. P. 20(a)(4)(A) because this opposition has been prepared in double-spaced monospaced font using Microsoft Word with 12-point, Courier New-style font, and does not exceed fifteen pages of text.

Dated: May 2, 2022

/s/ Seth Schofield

Seth Schofield

*Senior Appellate Counsel*

Energy and Environment Bureau  
Office of the Attorney General  
One Ashburton Place, 18th Flr.  
Boston, Massachusetts 02108  
(617) 963-2436  
seth.schofield@mass.gov  
(BBO No. 661210)

**CERTIFICATE OF SERVICE**

I hereby certify that on May 2, 2022, I served the foregoing opposition by the Electronic Filing System and electronic mail on:

Thomas C. Frongillo, Esq.  
Campbell Conroy & O'Neil, PC  
1 Constitution Wharf, Suite 310  
Boston, MA 02129  
tfrongillo@campbell-trial-lawyers.com

*Counsel of Record for Exxon Mobil  
Corporation*

Dated: May 2, 2022

/s/ Seth Schofield  
Seth Schofield  
*Senior Appellate Counsel*  
Energy and Environment Bureau  
Office of the Attorney General  
One Ashburton Place, 18th Flr.  
Boston, Massachusetts 02108  
(617) 963-2436  
seth.schofield@mass.gov  
(BBO No. 661210)

# **ADDENDUM**



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Memorandum and Order on Motion to Strike  
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Corp.*, C.A. No. 19-3333-BLS1 (Mar. 21, 2022)  
(Krupp, J.) .....Add-26

# 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<sup>1</sup>

#### **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

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<sup>1</sup> 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).<sup>2</sup>

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

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<sup>2</sup> 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.<sup>3</sup> 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.” . . .

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. . . .

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

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<sup>3</sup> 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.” . . .

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. . . .

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. . . .

[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.

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. . . .

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).<sup>4</sup>

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<sup>4</sup> 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.<sup>5</sup> *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.

[ ] The content of the Amended Complaint confirms the Attorney General's true motive to curtail [Exxon]'s speech. It expressly

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<sup>5</sup> 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. . . .

[ ] 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.”<sup>6</sup> 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.<sup>7</sup> 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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<sup>6</sup> 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.”).

<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> Exxon cannot satisfy the Rule 12(b)(6) standard that applies to its defenses.<sup>10</sup>

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<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> 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).<sup>11</sup> 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. Telemarketing 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).

<sup>11</sup> 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.<sup>12</sup>

The unclean hands and in pari delicto defenses fail for the same reason.<sup>13</sup> 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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<sup>12</sup> 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).

<sup>13</sup> 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).<sup>14</sup>

### **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.<sup>15</sup> 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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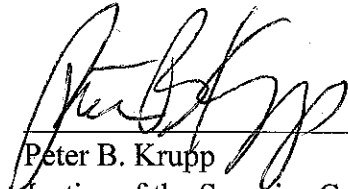
<sup>14</sup> The decisions Exxon cites do not compel a different conclusion. See United States v. Lain, 2018 WL 11252709 at \*2 (D. Wyo. Apr. 13, 2018) (allowing unclean hands defense against IRS without relevant analysis); Securities & Exchange Comm’n v. Cuban, 798 F. Supp. 2d 783, 792, 794, 797 (N.D. 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).

<sup>15</sup> 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

  
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Peter B. Krupp  
Justice of the Superior Court