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November 15, 2019

By ECF

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

Re: *Exxon Mobil Corp. v. Healey*, No. 18-1170

Dear Ms. Wolfe:

We write on behalf of ExxonMobil to update the Court about recent developments in parallel litigation. This information is relevant because it provides further evidence of the coordinated, ongoing assault on ExxonMobil's First Amendment rights. ExxonMobil would include these facts in its amended complaint if the case is remanded to the District Court.

First, the trial of the New York Attorney General's ("NYAG") action against ExxonMobil began in New York Supreme Court on October 22 and concluded on November 7. A decision is expected within a month. At that trial, NYAG promised to unmask "a longstanding fraudulent scheme," amounting to a "Potemkin village" to deceive investors about climate change, that "was sanctioned at the highest levels of the company." Compl. ¶¶ 1, 8, 19. But the trial unmasked NYAG's allegations as slanderous hyperbole. In its summation, NYAG proceeded as though it had not brought any fraud counts against ExxonMobil. When the trial court inquired whether NYAG had abandoned those claims, NYAG asked the court to dismiss its fraud counts (two of the four counts in the complaint), effectively conceding it had failed to introduce any evidence of intent or reliance—core elements of fraud.¹ Ex. A at 2072:7–2073:10. NYAG's decision to bring those charges and proceed to trial with baseless counts it knew it could not prove corroborates the pretextual nature of NYAG's investigation of and litigation against ExxonMobil. With its concession that ExxonMobil did not commit fraud, NYAG can no longer contend that its

¹ An excerpt from the transcript of the trial proceedings is attached as Exhibit A to this letter.

fraud allegations insulate it from scrutiny under the First Amendment. NYAG Br., ECF No. 113, at 28, 34–35, 38. NYAG's actions at trial provide further factual support for ExxonMobil's claim that attorneys general have abused the powers of their office in an attempt to suppress ExxonMobil's speech.

Second, the Massachusetts Attorney General ("MAAG") filed a civil complaint against ExxonMobil on October 24, 2019, the third day of the NYAG trial. Following NYAG's lead, MAAG's four-count complaint includes a claim of securities fraud ripped nearly verbatim from NYAG's complaint. Under Massachusetts law, MAAG is required to provide notice and an opportunity to meet and confer prior to filing a lawsuit. G.L. c. 93A, § 4. MAAG provided that notice just days before the NYAG trial began in a calculated ploy to (i) interfere with ExxonMobil's trial preparations, (ii) garner media attention for itself,² and (iii) deprive ExxonMobil of its right to meaningfully meet and confer. The parties' tolling agreement relieved MAAG of any conceivable time pressure to file its complaint, and MAAG offered no explanation for its unwillingness to delay filing by one month, at which time the NYAG trial would have been concluded. In the three and a half years since the tolling agreement was executed, MAAG never expressed a sense of urgency to resolve its potential claims and did not interview a single ExxonMobil witness or require ExxonMobil to produce a single document. MAAG's rush to the courthouse during the NYAG trial, despite having obtained no evidence during its so-called investigation, provides further proof of the pretextual nature of MAAG's official actions. And its complaint—which objects at length to ExxonMobil's views on climate policy—supports ExxonMobil's First Amendment claims.

These developments demonstrate the ongoing nature of NYAG and MAAG's unconstitutional conduct. It remains within the power of this Court to prevent further injury by remanding the case to the District Court so ExxonMobil's claims can be adjudicated on the merits.

Sincerely,

/s/ Justin Anderson

Justin Anderson

cc: All counsel of record (by ECF)

² MAAG's press release is attached as Exhibit B to this letter.

Exhibit A

In The Matter Of:
People of the State of NY v.
Exxon Mobil Corporation

November 7, 2019

1 NEW YORK STATE SUPREME COURT
NEW YORK COUNTY : CIVIL TERM : PART 61

2 -----X

3 PEOPLE OF THE STATE OF NEW YORK, BY LETITIA
4 JAMES, Attorney General of the State of New York,

5 Plaintiff,

6 -against-

7 EXXON MOBIL CORPORATION,

8 Defendant.

9 -----X

10 Index No. 452044/18

11

12 New York Supreme Court
13 60 Centre Street
14 New York, New York 10007
15 November 7, 2019

16 B E F O R E: HON. BARRY R. OSTRAGER
17 Supreme Court Justice

18 A P P E A R A N C E S:

19

20 STATE OF NEW YORK OFFICE OF THE ATTORNEY GENERAL
21 Attorneys for the Plaintiff
22 28 Liberty Street
23 New York, New York 10005
24 BY: KEVIN WALLACE, ESQ., Of Counsel
25 AND: KIM A. BERGER, ESQ., Of Counsel
AND: JONATHAN C. ZWEIG, ESQ., Of Counsel
AND: SAMANTHA LISKOW, ESQ., Of Counsel

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A P P E A R A N C E S: (Continued)

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Official Court Reporters

SUMMATION - ZWEIG

2071

1 THE COURT: All right. Mr. Zweig.

2 MR. ZWEIG: Thank you very much, your Honor. At
3 the end of the day this case is about two things. And those
4 two things are quite simply the elements of The Martin Act.
5 Falsity and materiality.

6 As to falsity, the question is whether Exxon's
7 statements and omissions had a tendency to deceive or
8 mislead investors. And for materiality, the question is
9 whether there is substantial likelihood that a reasonable
10 investor would have considered the statements or omissions
11 significant in light of the total mix of information.

12 Falsity and materiality are the only elements of
13 liability under The Martin Act.

14 THE COURT: I don't mean to interrupt you, but
15 there are three other claims that the Attorney General
16 advances in its complaint. Are you going to address those
17 claims as well?

18 MR. ZWEIG: Your Honor, for purposes of this
19 presentation, I'll be focussing on The Martin Act.

20 THE COURT: Is that a concession that there is no
21 common law fraud?

22 MR. ZWEIG: Yes, your Honor.

23 THE COURT: All right.

24 MR. ZWEIG: Again, your Honor, no showing of intent
25 to defraud under The Martin Act is required. Under the law

SUMMATION - ZWEIG

2072

1 falsity and materiality are what we have to prove by a
2 preponderance of the evidence, and that's what we have shown
3 at this trial. As we explained in our opening, the evidence
4 for those elements and the appropriateness of the relief
5 we're seeking is actually pretty straightforward and it
6 relies almost entirely on facts that aren't even in dispute.

7 THE COURT: Are you conceding that the second --
8 the second and third counts of the complaint are also out of
9 this case?

10 MR. ZWEIG: Your Honor, for purposes of this
11 presentation, focussing on The Martin Act, the elements of
12 Executive Law -- Executive Law 6312 overlap, but we are
13 conceding that the -- that the common law fraud and
14 equitable fraud claims we're not conceding those.

15 THE COURT: And what about the fraud claim?

16 MR. ZWEIG: Not advancing that at this time, your
17 Honor.

18 THE COURT: I'm sorry?

19 MR. ZWEIG: Not advancing the actual common law
20 fraud claim at this time, your Honor. I believe that's
21 count four.

22 THE COURT: If you're not advancing it at this
23 time, does that mean it's out of the case?

24 MR. ZWEIG: Yes, your Honor. I'm sorry if I worded
25 that in a confusing way, your Honor.

SUMMATION - ZWEIG

2073

1 THE COURT: And the second count of the complaint,
2 is that in the complaint? Is that in the case or out of the
3 case?

4 MR. ZWEIG: It is, your Honor. And the Executive
5 Law 6312 claim, the elements, as we understand, overlap with
6 The Martin Act. So, I was using a bit of shorthand.

7 THE COURT: So, we're dealing with counts one and
8 two of the complaint and we're stipulating that counts three
9 and four are out of the case?

10 MR. ZWEIG: Yes, your Honor.

11 THE COURT: Okay. I didn't mean to interrupt you.

12 MR. ZWEIG: No. That's quite all right, your
13 Honor. Let's start by briefly running through the
14 undisputed timeline of facts. First, Exxon used two sets of
15 carbon cost assumptions for years. Exxon spent a lot of
16 time at trial establishing that fact, but it was never in
17 dispute. In projecting demand for oil and gas, Exxon used
18 costs reaching \$60 per ton in developed countries by 2030
19 and \$80 per ton by 2040. But in projecting costs associated
20 with its own emissions from its investments and operations,
21 which total about 120 million tons of CO2 equivalent every
22 year, Exxon applied much lower costs or no costs at all.
23 And meanwhile the figures that Exxon was quoting publically
24 were \$60 per ton in 2030 and \$80 per ton in 2040.

25 In 2010 Exxon's corporate Greenhouse Gas manager

Exhibit B

PRESS RELEASE

AG Healey Sues Exxon for Deceiving Massachusetts Consumers and Investors

Massachusetts Becomes First State to Challenge Company's Ongoing Campaign to Mislead Both Consumers and Investors About the Climate-Driven Risks Posed by its Fossil Fuel Products

FOR IMMEDIATE RELEASE:

10/24/2019

Office of Attorney General Maura Healey

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BOSTON — Massachusetts Attorney General Maura Healey today sued Exxon Mobil Corporation (Exxon), the world's largest publicly traded oil and gas company, for deceptive advertising to Massachusetts consumers and for

misleading Massachusetts investors about the risks to Exxon's business posed by fossil fuel-driven climate change—including systemic financial risk.

The [complaint](#), filed today in Suffolk Superior Court, alleges that Exxon has repeatedly violated the state's consumer and investor protection law and related regulations. Specifically, the complaint alleges that Exxon systematically and intentionally has misled Massachusetts investors about material climate-driven risks to its business and has deceived consumers about the central role its fossil fuel products play in causing climate change. The complaint alleges that Exxon's violations have taken the form of both significant factual misstatements and the failure to make disclosures to investors and consumers that would have been material to decisions by Massachusetts investors to purchase, sell, retain, and price ExxonMobil securities and by Massachusetts consumers to purchase ExxonMobil oil and gasoline products.

"Exxon has known for decades about the catastrophic climate impacts of burning fossil fuels—its chief product," said AG Healey. "Yet, to this day, Exxon continues to deceive Massachusetts consumers and investors about the dangerous climate harms caused by its oil and gasoline products and the significant risks of climate change—and efforts to address it—to Exxon's business. We are suing to stop this illegal deception and penalize the company for its misconduct."

As early as 1982, Exxon predicted the exact amount of carbon dioxide (CO₂) that would be in the atmosphere in 2019—415 parts per million, the highest level in human history, as a result, largely, of increasing fossil fuel use. Exxon also recognized decades ago that reducing emissions and maintaining a safe climate would require "sharply curtailing the use of fossil fuels." One of the company's own scientists described the consequences of climate change as "catastrophic." However, rather than disclosing what it knew about the future impact of its oil and gasoline products on communities and the environment, the complaint alleges that Exxon engaged in a decades-long campaign to deceive consumers and investors about the climate-related impacts of its products that continues to this day.

The complaint alleges that Exxon has hidden from investors its own knowledge of the systemic financial risk of climate change to the global economy and to Exxon's fossil fuel business. Citing internal Exxon documents, the complaint alleges that in 1980, an expert retained by Exxon presented findings to Exxon that the projected rise in global temperatures caused by burning fossil fuels would have "major economic consequences,"

even “bring[ing] world economic growth to a halt.” The complaint alleges that such systemic impacts to the global economy, which regulators and central banks are now predicting will impact home values, bank lending, and insurance, will have a significant effect on Exxon’s business around the world, and its shareholders in Massachusetts. Although major global companies are now disclosing \$1 trillion dollars in climate-related costs, the complaint alleges that Exxon has failed to disclose any such estimates to investors, in violation of Massachusetts law.

The complaint also alleges that, since 2007, the company has illegally misrepresented to its investors that it has factored in to its financial planning and investment decisions the cost of complying with carbon regulations, the so-called “proxy cost of carbon,” when internal documents show that it has not done so. This deception misled Massachusetts investors by inflating the value of the company’s portfolio of oil and gas projects around the world, including its high-cost and heavily polluting oil sands assets in western Canada.

According to the complaint, the company is also engaging in an ongoing campaign to deceive Massachusetts consumers, including the drivers who use the nearly 300 Exxon-branded gas stations in Massachusetts, by making misleading statements in its advertising that its gasoline and diesel products, sold under the name “Synergy,” and its so-called “green” Mobil 1 oil products reduce greenhouse gas emissions. The company claims these products “reduce energy use and CO2 emissions,” and enhance “environmental performance.” In fact, development and use of these fossil fuel products emit large volumes of greenhouse gases, which are causing global average temperatures to rise and destabilizing the global climate system. The complaint alleges that it is deceptive for Exxon to market fossil fuel products as a climate solution.

The AG’s Office is further alleging that the company violates Massachusetts law through a deceptive “greenwashing” marketing campaign that misleadingly presents Exxon as a leader in cutting-edge clean energy research and climate action. The complaint alleges that Exxon’s advertisements and related marketing target consumers with deceptive messaging about Exxon as a good environmental steward and of its products as “green” while the company is massively ramping up fossil fuel production and spending only about one-half of 1% of revenues on developing clean energy.

The AG's Office alleges that the company's misleading statements to consumers and investors about its fossil fuel products and its failure to disclose that the products themselves are disrupting the climate "are particularly deceptive given the stark contrast between the company's long internal knowledge of the role its fossil fuel products play in causing climate change and the extensive marketing statements in which the company promotes the purported environmental benefits of those same products." Exxon's unlawful conduct, the complaint alleges, contributed to decades of delay in market recognition of the climate dangers of fossil fuel products and the urgent need to reduce greenhouse gas emissions.

AG Healey first served the company with a **civil investigative demand** in April 2016, after the release of several detailed national news stories outlining the company's decades-long pattern of deception regarding its knowledge about the impact of burning fossil fuels on the climate and the impacts of climate change on its own business. Rather than comply with the investigation, the company sued the AG's Office in Massachusetts state court and federal court.

Exxon's attacks on the AG's Office and its investigation have been rejected by every court to decide them. In January 2017, the Massachusetts Superior Court **ordered** the company to comply with the AG's investigation. The Massachusetts **Supreme Judicial Court** upheld the ruling in April 2018, and that same month, the Southern District of New York **dismissed** Exxon's federal lawsuit. In January, the U.S. Supreme Court **denied** Exxon's request to hear its appeal of the Supreme Judicial Court ruling. While Exxon's litigation against AG Healey's Office has been pending, AG Healey has continued her investigation of the company's deceptive practices.

By filing the lawsuit, AG Healey is asking the Court to find that the company is violating the state's Consumer Protection Act and order the company to pay civil penalties to the state, perform comprehensive injunctive relief, and pay the AG's Office's reasonable attorney and investigation fees.

This matter is being handled by AG Healey's Energy & Environment Bureau with assistance from her Office's Insurance & Financial Services Division and Consumer Protection Division.