COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION No. 1984-CV-03333-BLS1

COMMONWEALTH OF MASSACHUSETTS, *Plaintiff*, v. EXXON MOBIL CORPORATION, *Defendant*.	)	**Service by e-mail**

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

TABLE OF CONTENTS

ADDENDUM TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Miscellaneous

INTRODUCTION

Defendant ExxonMobil, in its amended answer, has correctly withdrawn three of the defenses the Commonwealth sought to strike: Nos. 4, 26, and 27. Incorrectly, ExxonMobil seeks to salvage the remaining challenged defenses (Nos. 7, 8, 22-25, and 30-35) by mischaracterizing the prior federal action between the parties, the law, and the Commonwealth's claims. Indeed, ExxonMobil makes the fantastical statement, contradicted by prior federal and Massachusetts court rulings, that this Court should be "more outraged by" the Commonwealth's conduct than its own alleged deception of Massachusetts investors and consumers. Am. Answer pp.86-87 ¶ 68. Seen accurately, the remaining defenses challenged by the Commonwealth's motion are barred, as matter of law, and ExxonMobil's amended answer does not change that conclusion.[1]

ARGUMENT

I. ExxonMobil's Selective Enforcement Defenses (Defenses 30-33 and 35) Are Categorically Barred by the Southern District of New York's Opinion.

ExxonMobil's effort to save its selective enforcement defenses is based on a gross mischaracterization of the federal action that precludes it from relitigating those issues again here. First, ExxonMobil asserts that the Attorney General "stated that ExxonMobil would have a 'full and fair opportunity to raise its constitutional and other . . . defenses in any future action,'" and that the Company "may defend itself and raise objections in Massachusetts state court" if the Attorney General filed a lawsuit alleging it violated Chapter 93A. Opp. 2. Disingenuously, however, it fails to inform this Court that the Attorney General made those statements in support

[1] For that reason, the Commonwealth asks that this Court construe its original motion as filed against the same defenses in the amended answer, which are legally unchanged; the Court should also strike ExxonMobil's retelling of its already-rejected conspiracy theory in the preamble to its defenses in the amended answer (pp.68-82 (¶¶ 1-38)), since that preamble was added only to support the challenged defenses, Opp. 12. Should the Court prefer, the Commonwealth will file an amended motion or other supplement to the briefs at the Court's direction.

of abstention and ripeness arguments that the District Court did not reach or accept. *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 687, 694-96 (S.D.N.Y. 2018).[2]

Second, the District Court, having decided to reach the merits of ExxonMobil's improper purpose claims, rejected them: "the Court finds that 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." *Id.* at 704. ExxonMobil ignores that holding by focusing on the relief it sought—an injunction barring enforcement of the CID—instead of on the underlying basis for that request—the issue whether the CID was issued solely on an improper purpose. *See* Opp. 8. That it would attempt that sleight of hand is remarkable—though consistent with its past mischaracterization of the underlying record, *e.g.*, *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 44, 47 (D. Mass. 2020)—since "bad faith" and "viewpoint discrimination," among other issues in common with ExxonMobil's defenses here, were "at the heart of . . . [its federal] complaint," *Exxon Mobil*, 316 F. Supp. 3d at 699. Indeed, ExxonMobil's statement that the issues presented by its selective enforcement defenses "were not [even] before" the federal court is demonstrably false. *See* Opp. 9.

Third, ExxonMobil resorts to a similar sleight of hand in its claim that issue preclusion does not apply here because it was faced with a heavier burden in "the earlier proceedings." Opp. 9-10. The company focuses *only* on the burden it faced in its *state* court CID challenge and omits any reference to the lower burden it faced in its federal court challenge, the latter of which is the basis for the Commonwealth's issue preclusion argument. Mass. Mem. 10-12. That misdirection, too, is remarkable, because ExxonMobil successfully opposed the Attorney

[2] ExxonMobil also misrepresents what the Commonwealth stated during this Court's hearing on the company's motions to dismiss. Opp. 3. There, the Commonwealth made clear that ExxonMobil had already raised its First Amendment arguments and lost. Add-2 (lines 17-20).

General's issue preclusion argument in the federal action precisely because it convinced the District Court that it enjoyed the lower preponderance-of-evidence standard—the very same burden it faces here on its defenses—in that action. *Exxon Mobil*, 316 F. Supp. 3d at 699-700.[3]

Finally, ExxonMobil filed an amended answer on October 29, 2021 to retell the *exact* same theatrical story the District Court rejected as "implausible." *Compare* Am. Answer pp.74-82, *with* Add-39 (ExxonMobil Opp. to Defs.' Mots. to Dismiss), *and Exxon Mobil*, 316 F. Supp. 3d at 686-91 (describing ExxonMobil's federal allegations). For that reason, the Court need not address its baseless argument that the presumption of regularity does not apply or whether those previously implausible allegations can now defeat the presumption. But if it were to reach those issues, the presumption applies to civil disputes,[4] and ExxonMobil cannot overcome it where this Court has already held that the Commonwealth has stated valid Chapter 93A claims, Add-17-28. The fact that a Texas trial court judge adopted, nearly verbatim, ExxonMobil's implausible story in a *pre-suit* discovery petition does not help it: the Attorney General was *not* a party to or a participant in that case and the trial court's decision was *reversed*, making it a legal nullity.[5]

II. ExxonMobil's Petitioning Defense (Defense 35) Was Already Resolved Against It.

ExxonMobil also argues wrongly that it has stated a valid a petitioning defense and that this Court's denial of its anti-SLAPP motion does not preclude it. Opp. 15-17. Tellingly, ExxonMobil relies *exclusively* on anti-SLAPP cases to make those arguments, *id.*, which, of

---

[3] ExxonMobil Opp. to Defs.' Mots. to Dismiss at 36, *Exxon Mobil v. Schneiderman*, Civ. A. No. 17-CV-2301 (S.D.N.Y. June 16, 2017) (ECF No. 228) ("In federal court . . ., ExxonMobil need only prove by a 'preponderance of the evidence' . . . that its rights have been violated.").

[4] *E.g.*, *General Outdoor Advert. Co. v Dep't of Public Works*, 289 Mass. 149, 192 (1935); *Arrigo v. Planning Bd. of Franklin*, 12 Mass. App. Ct. 802, 811 (1981).

[5] *Compare* Add-88-107 (ExxonMobil's Proposed Findings of Fact & Conclusions of L.); *with In re Exxon Mobil Corp.*, Cause No. 096-297222-18 (Tarrant Cty. Tex. Apr. 24, 2018) (Add-108-23), *rev'd by City of San Francisco v. Exxon Mobil Corp.*, 2020 WL 2969558 (Tex. App. 2020), *appeal pending Exxon Mobil Corp. v. City of San Francisco*, No. 20-0558 (Tex.).

course, confirms the Commonwealth's point: this Court has already held that ExxonMobil cannot prevail on its petitioning defense. MA Mem. 16-17. It is irrelevant, even if true, that "some Exxon[Mobil] statements referenced in the complaint constitute petitioning," Opp. 16, or that ExxonMobil alleges that "the Attorney General seeks to punish ExxonMobil for its 'lobbying' on climate policy," *id*. at 15-16, because this Court has already held, as a matter of law, that the Commonwealth's claims are based on the company's statements to Massachusetts investors and consumers, not on petitioning, Add-3, 17-28, 30, 32-37.

III. ExxonMobil's Compelled Speech Defense (Defense 34) Is Not A Defense, and the Commonwealth Never Suggested Otherwise.

ExxonMobil has not cited any case that holds that the compelled speech doctrine is an affirmative defense. Opp. 17-18. Instead, it relies on case law regarding a recognized defense that it has not asserted and that has no bearing on this case whatsoever. With no law on its side, ExxonMobil states that the Commonwealth conceded the issue, *id.* at 17, but, as the record makes clear, the Commonwealth *actually* asked this Court to strike that defense, noting only that ExxonMobil is free to argue, in the remedy phase, that any proposed "corrective statements run[] afoul of the First Amendment's compelled speech doctrine." Mass. Mem. 15-16. There is thus no "risk" that striking this defense will preclude it from asking the Court to modify any proposed corrective statement to conform with the First Amendment. Opp. 18. But what ExxonMobil cannot be permitted to do is leverage that supposed defense to engage in discovery, which it will undoubtedly do at great expense to both the Commonwealth and this Court if it is not stricken.

IV. ExxonMobil's Equitable (7-8) and Tort (22-25) Defenses Fail as a Matter of Law.

ExxonMobil's arguments with respect to the other remaining defenses also fail. First, as the only Massachusetts case ExxonMobil cites makes clear, the company cannot invoke estoppel against the Commonwealth where, as is the case here, doing so would "negate requirements of

law intended to protect the public interest." *Sullivan v. Chief Justice for Admin. & Mgmt. of Trial Ct.*, 448 Mass. 15, 30-31 (2006) (citations omitted).

Second, ExxonMobil asserts that the Commonwealth "cite[d] no legal support" for its argument that the company cannot invoke an unclean hands defense to prevent the Commonwealth from enforcing a law that protects the public interest. Not so. MA Mem. 18 (citing two exemplary federal cases and one U.S. Supreme Court opinion). While there is no Massachusetts case on point, those and other courts have employed a rationale for that rule that is on all fours with the Supreme Judicial Court's rationale for not applying estoppel against the government here, *e.g.*, *Sullivan*, 448 Mass. at 30-31.

Third, ExxonMobil cannot assert causation-based defenses where the Commonwealth's Chapter 93A action seeks only *injunctive relief* and *civil penalties*. Opp. 19.[6] So instead ExxonMobil misstates that the Commonwealth has requested restitution, as the Commonwealth did in its Chapter 93A action against Purdue Pharma, L.P.[7] But the Commonwealth has not requested restitution in *this* case, Am. Compl. p.201, and it is thus "not required to allege or prove that any individual consumer [or investor] was actually harmed by the allegedly . . . deceptive act or practice," dooming ExxonMobil's causation-based defenses, as a matter of law. *Commonwealth v. Equifax, Inc.*, 2018 WL 3013918, at *5 (Super. Ct. Apr. 3, 2018).

CONCLUSION

This Court should strike, with prejudice, Separate Defenses 7-8, 22-25, and 30-35, and the preamble in the amended answer (pp.68-82 ¶¶ 1-38) that was added to support them.

[6] ExxonMobil offers no separate and distinct response to the Commonwealth's motion to request that this Court strike defense 25 (*in pari delicto*).

[7] Compl. p.76 ¶ d., *Commonwealth v. Purdue Pharma L.P.*, Civ. A. No. 1884-CV-01808-BLS2 (Super. Ct. June 13, 2018), https://www.mass.gov/doc/purdue-complaint-filed/download.

Dated: November 8, 2021

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS,

By its attorneys,

MAURA HEALEY
ATTORNEY GENERAL

/s/ Seth Schofield

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

JAMES A. SWEENEY, BBO No. 54363
State Trial Counsel
MATTHEW Q. BERGE, BBO No. 560319
Senior Trial Counsel, Public Protection and Advocacy Bureau
Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108

CERTIFICATE OF SERVICE

I, Seth Schofield, certify that on November 8, 2021, I served the foregoing document by sending a copy thereof by electronic service to:

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

Counsel of Record for ExxonMobil Corporation

/s/ Seth Schofield
SETH SCHOFIELD

ADDENDUM

Volume: I
Pages: 1-76
Exhibits: 0

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* * * * * * * * * * * * * * * * * *

COMMONWEALTH OF MASSACHUSETTS

v. DOCKET NO. 1984CV03333

EXXON MOBIL CORPORATION

* * * * * * * * * * * * * * * * * *

RULE 12 HEARING
BEFORE THE HONORABLE KAREN GREEN

APPEARANCES:

For the Commonwealth:
Energy and Environment Bureau
1 Ashburton Place, 18th Floor
Boston, MA 02108-1698
By: Mr. Seth Schofield and Mr. Christophe Courchesne

For the Defendant:
224 Hinckley Road, Boston, MA 02186
By: Mr. Thomas Frongillo
and
Paul, Weiss, Rifkind, Wharton & LLP
1285 Avenue of Americas, New York, NY 10019
By: Mr. Justin Anderson, Mr. Theodore Wells, Mr. Daniel Toal,
Ms. Jamie Brooks, Mr. Parker Murray, and
Mr. Patrick Conlon, Exxon Mobil Corporation Legal Dept.

Suffolk
Courtroom 1309
March 12, 2021

Linda L. Wesson, CVR
Approved Court Transcriber

The issue was not presented to the Court in either of those cases.

Finally, on the other hand, the main SJC did -- which did address this very question in *Madawaska* held that Maine's materially identical anti-SLAPP statute does not apply to government enforcement actions.

There's also no reason to worry about preventing defendants facing government enforcement actions like Exxon from invoking the anti-SLAPP statute. That is because they have ways to raise their First Amendment grievances that defendants in actual SLAPP suits, suits brought by private interests or harass private citizens do not. Namely, an affirmative defense or Section 1983 counterclaim claiming that the government action violates its free-speech rights. Such a defense is not available in ordinary SLAPP. In an ordinary SLAPP suit between private parties because the (Inaudible) clause does not apply to private restrictions on speech. Exxon knows this already. Indeed, it has tried and been rebuffed by this court and the federal court in New York on that basic claim, which speaks volumes about the legal jujitsu it is engaging in here.

For these reasons, we ask the Court to reach this issue and hold like the Maine SJC in *Madawaska* that the anti-SLAPP statute simply does not apply.

On the merits, Your Honor, Exxon's special motion to dismiss also failed to the threshold because the Commonwealth's

NOTIFY

06/22/ 42

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1984CV03333-BLS1

COMMONWEALTH OF MASSACHUSETTS

vs.

EXXON MOBIL CORPORATION

Notice sent 06.23.21 TCF CC to pc DJT TWJ VA AJC SAK CGC MQB TJR GSC MAH AAG RS JAS AAG SS LAG MD

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

The Commonwealth of Massachusetts, by its Attorney General, brings this action against Exxon Mobil Corporation ("Exxon") for violations of G.L. c. 93A. The Commonwealth claims that Exxon has "systematically and intentionally … misled Massachusetts investors and consumers about climate change"; more specifically, that Exxon "has been dishonest with investors about the material climate-driven risks to its business and with consumers about how its fossil fuel products cause climate change …." Amended Complaint, ¶ 1.

The Commonwealth filed its original complaint, alleging four violations of c. 93A, in this court on October 24, 2019. On November 29, 2019, Exxon removed the case to the United States District Court for the District of Massachusetts. The Commonwealth moved to remand on December 26, 2019, and on March 17, 2020, the District Court remanded the case to this court. On June 5, 2020, the Commonwealth filed an Amended Complaint, alleging three violations of c. 93A. Specifically, the Commonwealth claims 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 risks of climate change caused by its fossil fuel product (Count II); and (3) deceived

Massachusetts consumers by promoting false and misleading "greenwashing" campaigns (Count III).[1] The Commonwealth requests injunctive relief, $5,000 for each violation of c. 93A, and an award of costs and attorneys' fees.

The matter is now before me on Exxon's Motion to Dismiss for lack of personal jurisdiction and for failure to state a claim upon which relief can be granted, pursuant to Mass. R. Civ. P. 12(b)(2) and 12(b)(6), respectively. For the reasons that follow, Exxon's motion is **DENIED**.

BACKGROUND

The Comonwealth's Amended Complaint, which is 202 pages and contains 770 paragraphs, cites to and quotes from numerous Exxon documents. I provide only a general overview of the Commonwealth's allegations here. I discuss other pertinent facts and allegations in the respective sections of the Discussion.

Since at least the late 1970s, Exxon has known that its fossil fuel products cause climate change. Exxon also knew the dangerous effects of global warming, resulting from increasing use of fossil fuels, on the global ecosystem. In the past, Exxon has described the impacts of climate change and global warming as akin to other "existential threats to human survival, such as 'a nuclear holocaust or world famine'" and "globally catastrophic." Amended Complaint, ¶¶ 86, 90, 96. Exxon knew that, once measurable, climate change effects "might not be reversible," and that "[m]itigation of the 'greenhouse effect' would require major reductions in fossil fuel." *Id.* at ¶ 107. Exxon understood the risk climate change poses to its business.

Despite knowing this information, Exxon has deceived Massachusetts investors in its marketing of securities by misrepresenting and failing to disclose the risk posed by climate

[1] In its original complaint, the Commonwealth also claimed that Exxon's allegedly materially false and misleading statements to Massachusetts investors regarding its use of a proxy cost of carbon violated c. 93A.

change to Exxon's business. For example, Exxon knows the "physical risks" from climate change, such as sea level rise, extreme weather, drought, and excessive heat, would harm fossil fuel demand because of efforts to reduce greenhouse gas emissions and market shifts to cleaner energy. These climate risks threaten the value of Exxon's business prospects and the value of Exxon securities held by Massachusetts investors. Instead of disclosing this information, Exxon has told Massachusetts investors that Exxon faces few if any financial risks from climate change, and little risk that its fossil fuel assets will be stranded, *i.e.*, "rendered economically incapable of being developed because of governmental limits on emissions and other measures that increase the cost of developing fossil fuel reserves and shift demand away from fossil fuels." Amended Complaint, ¶ 19.

Exxon has also deceived Massachusetts consumers by misrepresenting and failing to disclose that normal use of its fossil fuel products, like gasoline and motor oil, causes climate change. For example, Exxon deceptively markets Synergy™ as a product that improves, rather than harms, the environment. Finally, Exxon deceptively advertises itself as a company that protects the environment even though it knows continued reliance on its fossil fuels will harm the environment.

DISCUSSION

I. Personal Jurisdiction[2]

Exxon first argues that this court lacks personal jurisdiction over it because Exxon is an out-of-state resident and the Commonwealth's claims challenge Exxon's statements and activities outside Massachusetts.

[2] When a defense of lack of personal jurisdiction is raised, the court should resolve that issue before dealing with other questions, such as a Rule 12(b)(6) motion, that goes to the case's merits. See *Attorney Gen.* v. *Industrial Nat'l Bank of Rhode Island*, 380 Mass. 533, 534 (1980).

"For a nonresident to be subject to the authority of a Massachusetts court, the exercise of jurisdiction must satisfy both the Massachusetts's long-arm statute, G.L. c. 223A, § 3, and the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution." *Exxon Mobil Corp.* v. *Attorney Gen.,* 479 Mass. 312, 314 (2018), citing *SCVNGR, Inc.* v. *Punchh, Inc.*, 478 Mass. 324, 325 (2017). Exxon is a New Jersey corporation with a principal place of business in Texas. The Supreme Judicial Court ("SJC") has determined that Exxon is not subject to general jurisdiction in Massachusetts. See *Exxon Mobil Corp.* v. *Attorney Gen.*, 479 Mass. at 314 (concluding that total of Exxon's activities in Massachusetts does not approach volume required for assertion of general jurisdiction); see also *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 919 (2011) (court may assert general jurisdiction over corporation when its affiliations with the State are so "continuous and systematic" as to render them essentially at home in the forum State). Thus, the question is whether Exxon's contacts with Massachusetts are sufficient to confer specific jurisdiction under Massachusetts's long-arm statute, G.L. c. 223A, § 3.

"Specific jurisdiction exists when there is a demonstrable nexus between a plaintiff's claims and a defendant's forum-based activities, such as when the litigation itself is founded directly on those activities." *Massachusetts School of Law at Andover, Inc.* v. *American Bar Association*, 142 F.3d 26, 34 (1st Cir. 1998); see G.L. c. 223A, § 3 (granting jurisdiction over claims "arising from" certain enumerated grounds occurring within Massachusetts). It is confined to adjudication of "issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 919 (quotations and citation omitted). "Or put just a bit differently, 'there must be "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place

in the forum State and is therefore subject to the State's regulation."'" *Ford Motor Co.* v. *Montana Eighth Judicial District Court*, __U.S. ____, 141 S. Ct. 1017, 1025 (2021), quoting *Bristol-Myers Squibb Co.* v. *Superior Court of Cal., San Francisco Cty.*, 582 U.S. ___, 137 S.Ct. 1773, 1780 (2017). Thus, the question is whether a nexus exists between Exxon's in-state activities and the Commonwealth's legal claims. See *Exxon Mobil Corp.*, 479 Mass. at 315.

The Commonwealth's claims are based on G.L. c. 93A, "a statute of broad impact" that prohibits "unfair methods of competition" and "unfair or deceptive acts or practices in the conduct of any trade or commerce." *Slaney* v. *Westwood Auto, Inc.*, 366 Mass. 688, 693-694 (1975); G.L. c. 93A, § 2(a). The Commonwealth alleges that Exxon has misled Massachusetts consumers and investors about the impact of fossil fuels on both the Earth's climate and the company's value, in violation of c. 93A. See *Exxon Mobil Corp.*, 479 Mass. at 316. In its Amended Complaint, the Commonwealth claims that Exxon has made "significant factual misstatements" and failed "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 fossil fuel products that cause climate change." Amended Complaint, ¶ 2. See also *Exxon Mobil Corp.*, 479 Mass. at 316 (Commonwealth claims that "[d]espite [Exxon's] sophisticated internal knowledge" about impact of fossil fuels on both Earth's climate and value of the company, "'Exxon failed to disclose what it knew to either the consumers who purchased its fossil fuel products or investors who purchased its securities'").

A. <u>Burden of Proof and Standard of Review</u>

The Commonwealth "has the burden of establishing the facts upon which the question of personal jurisdiction over [Exxon] is to be determined." *Droukas* v. *Divers Training Academy,*

Inc., 375 Mass. 149, 151 (1978). The Commonwealth "must eventually establish jurisdiction by a preponderance of the evidence at an evidentiary hearing or at trial." *Cepeda* v. *Kass*, 62 Mass. App. Ct. 732, 738 (2004). When a defendant challenges the assertion of personal jurisdiction over it, the court, in its discretion, may either (1) consider the motion under the *prima facie* standard and defer a final determination on the issue until the time of trial, when the plaintiff must establish jurisdiction by a preponderance of the evidence, or (2) hold an evidentiary hearing under the preponderance of evidence standard. See *von Schönau-Riedweg* v. *Rothschild Bank AG*, 95 Mass. App. Ct. 471, 483 (2019); *Cepeda*, 62 Mass. App. Ct. at 739-740; see also Mass. R. Civ. P. 12(d) (motion pursuant to 12(b)(2) "shall be heard and determined before trial ... unless the court orders that the hearing and determination thereof be deferred until the trial").

Courts typically resolve such motions by applying the *prima facie* standard. *Cepeda*, 62 Mass. App. Ct. at 737 (most common approach allows court to determine rule 12(b)(2) motion solely on affidavits and other written evidence without conducting an evidentiary hearing). The plaintiff "must make a *prima facie* showing of evidence that, if credited, would be sufficient to support findings of all facts essential to personal jurisdiction." *Fern* v. *Immergut*, 55 Mass. App. Ct. 577, 579 (2002). In evaluating whether a *prima facie* showing has been made, the court acts as a data collector, not as a fact finder, and the plaintiff's burden is one of production, not persuasion. *Cepeda*, 62 Mass. App. Ct. at 737-738. The court takes "specific facts affirmatively alleged by the plaintiff as true (whether or not disputed) and construe[s] them in the light most congenial to the plaintiff's jurisdictional claim." *Massachusetts School of Law at Andover, Inc.*, 142 F.3d at 34; see *Cepeda*, 62 Mass. App. Ct. at 739 (that facts may be controverted by defendant does not overcome *prima facie* showing). The court then "add[s] to the mix facts put forward by defendants; to the extent they are uncontradicted." *Massachusetts School of Law at*

Andover, Inc., 142 F.3d at 34. Where a court denies a motion pursuant to Mass. R. Civ. P. 12(b)(2), without holding an evidentiary hearing, it "reserves the jurisdictional issue, unless waived by the defendant, for final determination at the trial, pursuant to a preponderance of the evidence standard." *Cepeda*, 62 Mass. App. Ct. at 737.

This court will apply the *prima facie* standard in ruling on Exxon's motion and thereby reserves the jurisdictional issue for final determination at trial based on a preponderance of the evidence. See *id.*

B. Long-Arm Statute

The Massachusetts long-arm statute, G.L. c. 223A, § 3, "sets out a list of specific instances in which a Massachusetts court may acquire personal jurisdiction over a nonresident defendant." *Tatro* v. *Manor Care, Inc.*, 416 Mass. 763, 767 (1994). The Commonwealth asserts specific jurisdiction under section (a), which extends "personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's ... transacting any business" in Massachusetts.[3]

The Commonwealth's allegations in this case may be categorized as (1) allegations that Exxon misled Massachusetts investors in connection with their decisions to buy, hold, and sell

[3] The Commonwealth also contends that Exxon is subject to personal jurisdiction under G.L. c. 223, § 3(c), which authorizes personal jurisdiction over a non-resident who causes "tortious injury" by an "act or omission in this Commonwealth," and § 3(d) which authorizes personal jurisdiction over a non-resident who causes "tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth." Because I conclude that § 3(a) grants personal jurisdiction over Exxon, I need not decide whether § 3(c) and (d) do as well. Nevertheless, there is some indication in the case law that § 3(d) may not be relied upon to establish specific jurisdiction. See *Fletcher Fixed Income Alpha Fund, Ltd.* v. *Grant Thornton LLP*, 89 Mass. App. Ct. 718, 725 (2016), citing *Connecticut Nat. Bank* v. *Hoover Treated Wood Prods., Inc.*, 37 Mass. App. Ct. 231, 233 n.6 (1994) (§ 3[d] "is predicated on general jurisdiction," *i.e.*, defendant having engaged in continuous and systematic activity in forum, unrelated to suit); *Fern*, 55 Mass. App. Ct. at 581 n.9 (referring to claim under § 3[d] as one for general jurisdiction); *Ericson* v. *Conagra Foods, Inc.*, 2020 U.S. Dist. LEXIS 219813 *9 (D. Mass. 2020), and cases cited ("Section 3(d) is the Massachusetts long-arm statute's general personal jurisdiction provision and is applicable only if the defendant is subject to general personal jurisdiction in Massachusetts.").

Exxon securities (Count I); and (2) allegations that Exxon misled Massachusetts consumers in connection with their decisions to purchase Exxon products (Count II and III). Although no Massachusetts state court has specifically adopted a claim-specific analysis under G.L. c. 223A, I will consider the investor claim and the consumer claims separately under c. 223A(a). See *Figawi, Inc.* v. *Horan*, 16 F. Supp. 2d 74, 79 (D. Mass. 1998) (referencing claim-specific nature of "specific" *in personam* jurisdiction under § 3(a)).[4]

"For jurisdiction to exist under § 3(a), the facts must satisfy two requirements — the defendant must have transacted business in Massachusetts, and the plaintiff's claim must have arisen from the transaction of business by the defendant." *Tatro*, 416 Mass. at 767. The court construes these dual requirements "broadly." *Id.* at 771. The transacting business requirement "embraces any purposeful acts performed in Massachusetts whether personal, private, or commercial." *Johnson* v. *Witkowski*, 30 Mass. App. Ct. 697, 713 (1991). The "arising from" requirement creates a "but for" test. See *Tatro*, 416 Mass. at 770-771. Exxon apparently does not dispute that it transacts business in Massachusetts; instead, it argues that the Commonwealth's claims do not "arise from" Exxon's transaction of business in Massachusetts.[5]

1. Count I

[4] The First Circuit "divides [the due process] minimum contacts analysis into three inquires: purposeful availment, relatedness, and reasonableness." *Astro-Med, Inc.* v. *Nihon Kohden America, Inc.*, 591 F.3d 1, 9 (1st Cir. 2009). In evaluating relatedness under the due process analysis, "questions of specific jurisdiction are always tied to the particular claims asserted." *Phillips Exeter Academy* v. *Howard Phillips Fund, Inc.*, 196 F.3d 284, 289 (1st Cir. 1999). "To satisfy the relatedness prong, [the plaintiff] must show a nexus between its claims and [the defendant's] forum-based activities." *A Corp.* v. *All Am. Plumbing, Inc.*, 812 F.3d 54, 59 (1st Cir. 2016).

[5] Exxon also makes this argument in connection with the second due process prong, that is, the requirement that the claim "arise out of or relate to the defendant's contacts with the forum." *Bulldog Investors Gen. P'ship* v. *Secretary of the Commonwealth*, 457 Mass. 210, 217 (2010) (citations and quotations omitted). The court, however, must consider the requirements of the long-arm statute first. See *SCVNGR, INC.*, 478 Mass. at 329-330 (2017) (requirements of G L. c. 223A, § 3 "may not be circumvented by restricting the jurisdictional inquiry to due process considerations").

The Commonwealth claims that Exxon deceived investors about the long-term health of Exxon by failing to disclose the full extent of risks associated with climate change and climate regulation. Exxon contends that the court lacks jurisdiction over the investor deception claim because it does not arise from Exxon's contacts with the forum. More specifically, Exxon argues that any statements the Commonwealth alleges Exxon made regarding the impact of climate risks on future demand for oil and natural gas and Exxon's processes for assessing those risks were not made in Massachusetts. I disagree.

The Commonwealth alleges that Exxon "offers its securities, including its common stock and debt instruments, directly to Massachusetts investors" and "investment managers," that "collectively[] hold millions of shares of [Exxon] common stock worth billions of dollars." Amended Complaint, ¶¶ 270, 273; see *id.* at ¶¶ 271, 274-279, 281-283, 289.[6] The Commonwealth further alleges:

> Notwithstanding the additional anticipated costs it expects to incur as a result of increased efforts to reduce greenhouse gas emissions, [Exxon] insists that its businesses will continue to meet growing demand for fossil fuel energy around the world and its reserves are not at risk of becoming stranded. Over the last decade, [Exxon] assured its Massachusetts ... investors[, including State Street Corporation, Wellington Management Group, Fidelity Investments, and Boston Trust Walden Company and their affiliates,] that it has accounted for such risks by building into its business planning what is known as a 'proxy cost' of carbon, which accounts for the likelihood of increasing costs from policies that will tax or regulate greenhouse gas emissions from [Exxon's] operations and fossil fuel products.
>
> ...
>
> This story of careful risk management was highly misleading, as [Exxon's] actual internal practices were, in fact, inconsistent with its representations to investors and did not actually influence [Exxon's] business decisions.

[6] As an example, the Commonwealth claims that: "As of December 31, 2019, State Street [Corporation and its affiliates] was the third-largest institutional investor in [Exxon] common stock, holding 202,281,808 shares with a total value of approximately $14.1 billion." Amended Complaint, ¶ 275.

Amended Complaint, ¶¶ 20, 358. The Commonwealth also references direct communications between Exxon and Massachusetts investors regarding the impact of climate change and climate change regulation on Exxon's business and Exxon's management of climate risk, including its proxy cost of carbon. *Id.* at ¶¶ 446-469. These included a 2015 meeting with Wellington Management at which Exxon's CEO "relayed ... that Massachusetts Institute of Technology scientists with whom Exxon[] works ha[d] advised [Exxon] that 'the jury is still out,' on climate change"; a 2016 meeting with Fidelity Investments at which Exxon's CEO "expressed his skepticism about the viability of renewable energy and his confidence in Exxon[]'s business model in the context of proposals to increase the use of renewables"; and various other meetings in Boston in 2017 and 2018 between representatives of Exxon and of Massachusetts institutional investors. *Id.* at ¶¶ 452, 455, 459-467.

In notes from its March 17, 2017 meeting with Exxon, State Street writes that Exxon stated that, "the price of carbon is used as a modeling tool and [Exxon] has used this since 2007 and it considered the proxy cost of carbon before COP21 [the United Nations climate change conference] so the [Paris] climate agreement did not impact their strategy because they had already accounted for a global event like that." Exhibit 8 to Affidavit of I. Andrew Goldberg. Further, when asked about "stranded assets," Exxon replied that it "has 13 years of proven reserves but there are opportunities for future development and the resource development planning process is robust and there is a process in place to look at future returns that considers geopolitical risk, regulations, environmental impact assessments, etc." *Id.*

These are examples of statements that the Commonwealth alleges were deceptive because Exxon failed to disclose known risks to its business presented by climate change. Indeed, a few months later, in October 2017, a representative from Wellington Management

pointed this out. The Wellington representative stated in notes from an Exxon meeting, in which several investors participated:

> Despite the strong message from shareholders asking for [Exxon] to address climate risks in its long-term planning, the company continues to avoid the real issue. Instead, [Exxon] responded by focusing on the algae biofuel research results they announced in June. [Exxon] has put a lot of money into advertising this research, which I believe is an effort to improve its image on environmental issues rather than an effort to truly address risks posed by climate change to their business.

Id. at Exhibit 9.

Thus, the Commonwealth has shown that its claim regarding investor deception arises from Exxon's contacts with Massachusetts. The Commonwealth has sufficiently alleged that Massachusetts investors would not have purchased or retained Exxon's stocks but for its misrepresentations and omissions concerning the risk of climate change to its business.

2. Counts II and III

The SJC already has determined that Exxon's "franchise network of more than 300 retail service stations under the Exxon and Mobil brands that sell gasoline and other fossil fuel products to Massachusetts consumers," represents Exxon's "purposeful and successful solicitation of business from residents of the Commonwealth," such that it satisfies the "transacting any business" prong of § 3(a). *Exxon Mobil Corp.*, 479 Mass. at 317-318. If the Commonwealth's consumer deception claims arise from this franchise network of Exxon and Mobil-branded fuel stations, the court can assert personal jurisdiction over Exxon. Again, the SJC has concluded that "[t]hrough its control over franchisee advertising, Exxon communicates directly with Massachusetts consumers about its fossil fuel products ...." *Exxon Mobil Corp.*, 479 Mass. at 320.[7] Exxon argues that because the advertisements at these franchises "do not

[7] Exxon argues that the SJC's analysis does not control here because, according to the SJC, "the [Civil Investigative Demand] context requires that we broaden our analysis to consider the relationship between Exxon's Massachusetts

contain the purported misrepresentations that give rise to the consumer deception claim," Reply Memorandum at page 6, they cannot support personal jurisdiction over Exxon. I am not persuaded.

A person may violate G.L. c. 93A through false or misleading advertising. See *id.* "[A]dvertising need not be totally false in order to be deemed deceptive in the context of G.L. c. 93A.... The criticized advertising may consist of a half-truth, or even may be true as a literal matter, but still create an over-all misleading impression through failure to disclose material information." *Aspinall* v. *Philip Morris Cos.*, 442 Mass. 381, 394-395 (2004); *Underwood* v. *Risman*, 414 Mass. 96, 99-100 (1993) (duty exists under c. 93A to disclose material facts known to a party at time of transaction); 940 Code Mass. Regs. § 3.05(1) ("No claim or representation shall be made by any means concerning a product which directly, or by implication, or by failure to adequately disclose additional relevant information, has the capacity or tendency or effect of deceiving buyers or prospective buyers in any material respect.").

The Commonwealth claims that Exxon "deceives Massachusetts consumers by failing to disclose in advertisements and promotional materials directed at them ... the extreme safety risk associated with the use of [Exxon's] dangerous fossil fuel products, which are causing potentially 'catastrophic' climate change...." Amended Complaint, ¶¶ 578, 579. It further alleges that Exxon's "misleading representations and omissions to consumers are material because disclosure of information that [Exxon] knows regarding the dangerous climate effects of

---

activities and the 'central areas of inquiry covered by the [Attorney General's] investigation, regardless of whether that investigation has yet to indicate [any] ... wrongdoing.'" *Exxon Mobil Corp.*, 479 Mass. at 315. Notwithstanding the SJC's use of the word "broad," the question before this court is whether the Commonwealth's claims arise from Exxon's transaction of business in Massachusetts. To the extent that the Commonwealth alleges that Exxon is deceiving its customers through its franchisees, the SJC's analysis controls.

using [Exxon's] fossil fuel products would influence the purchasing behavior of Massachusetts consumers." *Id.* at ¶ 36.

In response to Exxon's motion to dismiss for lack of personal jurisdiction, the Commonwealth submitted the affidavit of I. Andrew Goldberg, which contains photographs of signs posted at Exxon and Mobil-branded fuel stations in Massachusetts. These signs state that Exxon's Synergy™ "Supreme" gas "provides 2x cleaner engine for better gas mileage," but do not state that the gas causes climate change. It is Exxon's failure to disclose this allegedly material information to Massachusetts consumers that forms the basis of Count II of the Commonwealth's complaint. The Commonwealth claims that Exxon's failure to include allegedly material information in its in-state advertising created an over-all misleading impression in violation of c. 93A. See *Aspinall*, 442 Mass. at 394-395 (criticized advertising may create an over-all misleading impression through failure to disclose material information).[8]

Thus, the Commonwealth's claims regarding consumer deception arise from Exxon's advertisements through its Massachusetts franchisees. More specifically, the alleged injury to Massachusetts consumers, that is, their purchase in Massachusetts of "dangerous" fossil fuel products, would not have occurred "but for" Exxon's failure to disclose additional and allegedly relevant information about those products at its franchise stations.

C. Due Process

The court must also determine whether the exercise of personal jurisdiction over Exxon comports with the requirements of due process. The "touchstone" of this inquiry is "whether the defendant purposefully established 'minimum contacts' in the forum state." *Tatro*, 416 Mass. at

[8] Exxon also argues that the Commonwealth's "greenwashing" claim does not arise from its forum contacts. But part of Exxon's "greenwashing" claim involves the selling of Exxon's products at its Exxon and Mobil-branded fuel stations in Massachusetts, including Mobil 1™, which is "literally colored green by" Exxon. See Commonwealth's Opposition, page 6; Amended Complaint, ¶ 611.

772, quoting *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 474 (1985). "The governing principle [of due process] is the fairness of subjecting a defendant to suit in a distant forum." *Good Hope Indus., Inc.* v. *Ryder Scott Co.*, 378 Mass. 1, 7 (1979). A plaintiff seeking to assert personal jurisdiction over a defendant must establish that: (1) the defendant purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws; (2) the claim arises out of or relates to the defendant's contacts with the forum state; and (3) the assertion of jurisdiction over the defendant does not offend traditional notions of fair play and substantial justice. *Bulldog Investors Gen. P'ship* v. *Secretary of the Commonwealth*, 457 Mass. 210, 217 (2010) (citations and quotations omitted).

The court's exercise of personal jurisdiction over Exxon comports with the requirements of due process. First, the SJC already has held that Exxon has purposefully availed itself of the privilege of conducting business activities in Massachusetts. See *Exxon Mobil Corp.*, 479 Mass. at 321-323.

Further, as discussed above, the claims asserted by the Commonwealth arise out of Exxon's contacts with Massachusetts. See *Tatro*, 416 Mass. at 772, citing *Burger King Corp.*, 471 U.S. at 472 ("The plaintiff's claim must arise out of, or relate to, the defendant's forum contacts."); see also *Ford Motor Co.*, 141 S. Ct. at 1026, 1028 (quotations and citation omitted) (language "or relate to" "contemplates that some relationships will support jurisdiction without a causal showing"; because Ford "had systematically served a market in [States where plaintiffs brought suit] for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States," there was "strong relationship among the defendant, the forum, and the litigation—the essential foundation of specific jurisdiction").

Finally, the exercise of personal jurisdiction over Exxon does not offend "traditional notions of fair play and substantial justice." See *Exxon Mobil Corp.*, 479 Mass. at 323, quoting *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). The Commonwealth has a strong interest in enforcing its consumer protection law, including against allegedly false and misleading statements, in Massachusetts. Meanwhile, Exxon delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in all states, including Massachusetts. See *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297-298 (1980) (forum State does not exceed its powers under Due Process Clause if it asserts personal jurisdiction over corporation that delivers its products into stream of commerce with expectation that they will be purchased by consumers in forum State). Exxon also interacts with investors in Massachusetts with the expectation that they will purchase and retain its securities. Although having to litigate this case in Massachusetts may result in some inconvenience to Exxon, any such inconvenience is outweighed by the Commonwealth's interest in enforcing its laws in a Massachusetts forum. See *Bulldog Investors Gen. P'ship*, 457 Mass. at 218 (Commonwealth's interest in adjudicating violations of Massachusetts securities laws in Massachusetts forum outweighed any inconvenience to out-of-state defendant resulting from having to litigate there).

Because the court's exercise of jurisdiction over Exxon satisfies both the Massachusetts long-arm statute, G.L. c. 223A, § 3, and the due process clause of the Fourteenth Amendment to the United States Constitution, Exxon's motion to dismiss for lack of personal jurisdiction is **denied**.

II. Failure to State a Claim

In deciding the motion to dismiss, the court accepts as true the factual allegations of the complaint and the reasonable inferences that can be drawn from those facts in the plaintiff's favor. *Foster* v. *Commissioner of Correction (No. 2)*, 484 Mass. 1059, 1059 (2020), citing *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 625 n.7 (2008). The court considers whether the allegations, if true, plausibly suggest an entitlement to any relief against the defendant. *Foster*, 484 Mass. at 1060, citing *Iannacchino*, 451 Mass. at 635-636.

Chapter 93A prohibits "unfair methods of competition"[9] and "unfair or deceptive acts or practices in the conduct of any trade or commerce." *Slaney*, 366 Mass. at 693-694; G.L. c. 93A, § 2(a). "A successful G.L. c. 93A action based on deceptive acts or practices does not require proof that a plaintiff relied on the representation ... or that the defendant intended to deceive the plaintiff ... or even knowledge on the part of the defendant that the representation was false." *Aspinall*, 442 Mass. at 394 (internal citations omitted). An act or practice is deceptive if it "has the capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted (i.e., to entice a reasonable consumer to purchase the product)." *Id.* at 396; see *Leardi* v. *Brown*, 394 Mass. 151, 156 (1985) (act or practice is deceptive if it possesses "a tendency to deceive"). One can also violate c. 93A "by failing to disclose to a buyer a fact that might have influenced the buyer to refrain from the purchase." *Greenery Rehabilitation Group, Inc.* v. *Antaramian*, 36 Mass. App. Ct. 73, 78 (1994). In determining whether an act or practice is deceptive, the court considers the effect that the act or practice might reasonably be expected to have upon the general public. *Leardi*, 394 Mass. at 156.[10]

[9] The Commonwealth has not alleged any unfair methods of competition.

[10] The First Circuit has recently reiterated that a deceptive act or practice consists of three elements: "(1) there must be a representation, practice, or omission likely to mislead consumers; (2) the consumers must be interpreting the message reasonably under the circumstances; and (3) the misleading effects must be material, that is likely to affect

A. Count I

In this count, the Commonwealth claims that Exxon violated c. 93A by misrepresenting and failing to disclose the financial risks to Exxon posed by climate change to Exxon's business in its marketing of its securities to Massachusetts investors. The Commonwealth alleges that Exxon's "supposed climate risk disclosures [to investors] assert that [Exxon] has accounted for and is responsibly managing climate change risks and that, in any event, they pose no meaningful threat to the Company's business model, its assets, or the value of its securities." Amended Complaint, ¶ 471. According to the Commonwealth, this is because Exxon claims that "fossil fuel demand is fated to grow in the coming decades, clean energy alternatives are not and will not in the near future be competitive with fossil fuels, and the world's governments are unlikely to constrain fossil fuel use to limit global warming to the levels those governments have agreed is necessary to avert the most harmful potential consequences of climate change." *Id.* Further, "[t]hese communications are deceptive because they deny or ignore the numerous systemic risks that climate change presents to the global economy, the world's financial markets, the fossil fuel industry, and ultimately [Exxon's] own business ... despite [Exxon's] longstanding scientific understanding of the potentially 'catastrophic' nature of these risks." Amended Complaint, ¶ 472.

For example, the Commonwealth alleges that Exxon has "repeatedly said that it was accounting for climate change risks through the use of a high and rising 'proxy cost' of carbon that would capture the future impact of greenhouse gas regulations" on Exxon's business, yet Exxon "did not use proxy costs as represented ...." Amended Complaint, ¶ 358, 364. Instead, Exxon's "use of a proxy cost of carbon was not, in fact, a serious corporate effort to characterize

consumers' conduct or decision with regard to a product." *Tomasella* v. *Nestle USA, Inc.*, 962 F. 3d 60, 72 (1st Cir. 2020) (quotations and citation omitted).

and manage climate change risks. Internally, [Exxon] did not apply proxy costs consistently or uniformly; its internal corporate guidance for planning, budgeting, and reserves calculations did not match its publicly-disclosed proxy costs. For some projects, [Exxon] did not apply a proxy cost at all." Amended Complaint, ¶ 384. All the while, however, Exxon "reassured investors that the coming regulatory costs of climate change posed no risk of asset stranding and indeed no meaningful risk at all to" Exxon. Amended Complaint, ¶ 384.

Exxon contends that this court should dismiss Count I because it fails plausibly to allege that reasonable investors would be misled by Exxon's statements about the risks of climate change. First, Exxon claims that its statements are not actionable as a matter of law because they are "forward looking" statements of opinion and "only statement of facts are actionable." *NPS, LLC* v. *Ambac Assur. Corp.*, 706 F. Supp. 2d 162, 171 (D. Mass. 2010); *von Schönau-Riedweg*, 95 Mass. App. Ct. at 497 (statement on which liability for misrepresentation may be based must be one of fact, not of expectation, estimate, opinion, or judgment). Statements of opinion and belief, however, may be actionable if the "opinion is inconsistent with facts known" at the time the statement is made. *Marram* v. *Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 57 n.24 (2004). Further, a "statement that, in form, is one of opinion, in some circumstances may reasonably be interpreted by the recipient to imply that the maker of the statement knows facts that justify the opinion." *Briggs* v. *Carol Cars, Inc.*, 407 Mass. 391, 396 (1990) (uninformed person purchased used vehicle from used vehicle dealer whose representations that vehicle was in good condition reasonably implied that it was safe and operable and that vehicle's oil requirements would be far less than they turned out to be); see also *McEneaney* v. *Chestnut Hill Realty Corp.*, 38 Mass. App. Ct. 573, 575 (1995) ("[A] statement that in form is one of opinion may constitute a

statement of fact if it may reasonably be understood by the recipient as implying that there are facts to justify the opinion or at least that there are no facts that are incompatible with it.").

The Commonwealth has specifically alleged that Exxon made statements to investors that climate change risks pose no meaningful threat to Exxon's business model, its assets, or the value of its securities despite Exxon's "longstanding scientific understanding of the potentially 'catastrophic' nature of these risks." Amended Complaint, ¶ 472. This is enough to survive a motion to dismiss. See *Marram*, 442 Mass. at 62 (whether statements by defendant "are unactionable 'mere puffery'" cannot be resolved on pleadings); *McEneaney*, 38 Mass. App. Ct. at 575 (distinction between statement of fact and statement of opinion is "often a difficult one to draw"); see also *In re Smith & Wesson Holding Corp.*, 604 F. Supp. 2d 332, 343 (D. Mass. 2009) (information offered by defendants to rebut plaintiffs' claims of falsity "may be pertinent to an assessment of a future motion for summary judgment, but it cannot support dismissal prior to discovery").

Second, Exxon contends that Count I is implausible because "Chapter 93A does not require a company to disclose 'information [that is] readily available to consumers,'" and "Exxon has issued numerous climate risk disclosures." This argument fails for at least two reasons. First, Exxon's reliance on *Tomasella* v. *Nestle USA, Inc.*, 962 F.3d 60, 81-82 (1st Cir. 2020) is misplaced. See *id.* (affirming dismissal of c. 93A claim based on "pure omission" theory; that defendants repeatedly made information about prevalence of worst forms of child labor in their supply chains publicly available through their websites and other media mitigated concern that their omission at point of sale was unethical under c. 93A, regardless of whether plaintiffs were aware of website disclosures). Second, the Commonwealth is not alleging a failure to disclose information readily available to the public; it is alleging that Exxon's public

disclosures regarding the risks to its business presented by climate change were deceptively misleading in light of information Exxon knew, but omitted.

Next, Exxon contends that the Commonwealth has not plausibly alleged that its failure affirmatively to warn investors of systemic climate risks was "knowing[] and willful" as required by c. 93A. See *Underwood*, 414 Mass. at 100 (duty exists under c. 93A to disclose material facts known to party "at the time of a transaction"; there is no liability for failing to disclose what that party does not know); *Mayer* v. *Cohen-Miles, Ins. Agency, Inc.*, 48 Mass. App. Ct. 435, 443 (2000) (c. 93A proscribes material, knowing, and willful nondisclosures that are "likely to mislead consumers acting reasonably under the circumstances"). To the contrary, the Commonwealth has specifically alleged that Exxon knew and purposely concealed such information. These allegations that Exxon deliberately misrepresented and omitted information about the risks of climate change on its company state a viable claim that Exxon engaged in deceptive conduct in violation of G.L. c. 93A.[11]

Exxon also contends that this court should dismiss Count I because it was not engaged in "trade or commerce" at the time it made the statements challenged therein. More specifically, Exxon claims that it did not sell securities directly to Massachusetts investors and, therefore, its purportedly deceptive statements were not made in connection with an offer to sell, or sale of, securities.

Chapter 93A defines "trade and commerce" to include "the advertising, the offering for sale, ... the sale, ... or distribution of ... any security." G.L. c. 93A, § 1. It shall include "any

[11] Exxon also argues that its statements about its use of a proxy cost of carbon would not materially mislead reasonable investors. The Commonwealth's allegations about proxy costs once supported a separate claim for violation of c. 93A, but are now included in Count I. The court will therefore not specifically address Exxon's arguments that its disclosures about proxy costs were neither false nor misleading or that no reasonable investor would have considered the information material except to note that, like most of Exxon's arguments, they are not ones that are appropriately decided at the motion to dismiss stage.

trade or commerce directly or *indirectly* affecting the people of this commonwealth." *Id.* (emphasis added). "By enacting this broad standard for coverage under c. 93A, the Legislature provided protection not only for specific individuals involved in a transaction, but also for the public as a whole." *Manning* v. *Zuckerman*, 388 Mass. 8, 14 (1983). Chapter 93A seeks to deter unfair or deceptive acts or practices between particular individuals, and "to reduce the general danger to the public arising from the potential for such unscrupulous behavior in the marketplace." *Id.*; see also *Ciardi* v. *F. Hoffmann La Roche, Ltd.*, 436 Mass. 53, 66-67 (2002) (c. 93A's language evinces clear statement of legislative policy to protect Massachusetts consumers through authorization of indirect purchaser actions).[12] At this stage, the Commonwealth's allegations are sufficient to state a claim that Exxon was engaged in trade or commerce when it made the allegedly deceptive statements to Massachusetts investors.

B. Count II

In Count II, the Commonwealth alleges that Exxon has misled Massachusetts consumers by advertising that consumer use of certain Exxon products, such as Synergy™ gas and Mobil 1™ motor oil, will reduce greenhouse gas emissions. Amended Complaint, ¶ 538. Further, these advertisements are deceptive because Exxon does not disclose that the "development, refining, and consumer use of [Exxon] fossil fuel products emit large volumes of greenhouse gases, which are causing global average temperatures to rise and destabilizing the global climate system." Amended Complaint, ¶ 538. Further, these allegedly false and misleading misrepresentations are material because they directly influence a consumer's decision to purchase Exxon's products. Amended Complaint, ¶ 537.

[12] I do not find persuasive the single sentence in a twenty-six-year-old, factually distinguishable District Court case on which Exxon relies in support of its argument. See *Salkind* v. *Wang*, 1995 U.S. Dist. LEXIS 4327 *31 (D. Mass. 1995) (company's public dissemination of statements reflecting confidence in company's future – "simply do not constitute 'trade or commerce' as defined under 93A when stock is purchased by investors through open markets").

Exxon argues that the court should dismiss this claim because (1) the Commonwealth does not allege that any statements made by Exxon about Synergy™ and Mobil 1™ were false; (2) Exxon's representations about Synergy™ and Mobil 1™ were not misleading half-truths because a reasonable consumer would not have been misled by them; and (3) Exxon cannot be liable for failing affirmatively to disclose the risks of climate change because a "pure omission" is not a basis for liability under c. 93A. I disagree.

First, "advertising need not be totally false in order to be deemed deceptive in the context of G.L. c. 93A." *Aspinall*, 442 Mass. at 394.[13] Advertising may consist of a half-truth, "or even may be true as a literal matter, but still create an over-all misleading impression through failure to disclose material information." *Id.* at 395; *Greenery Rehabilitation Group, Inc.*, 36 Mass. App. Ct. at 78 ("One can violate § 2 of G.L. c. 93A ... by failing to disclose to a buyer a fact that might have influenced the buyer to refrain from the purchase."). Thus, contrary to Exxon's argument, the Commonwealth does not have to allege that Exxon's representations about the benefits of Synergy™ and Mobil 1™ were false to "plausibly allege" that the representations were misleading.[14]

Next, Exxon argues that no reasonable consumer would be misled by Exxon's advertisements because its statements necessarily imply that their products produce some CO2

[13] See also 940 Code Mass. Regs. § 3.05(1) ("No claim or representation shall be made by any means concerning a product which directly, or by implication, or by failure to adequately disclose additional relevant information, has the capacity or tendency or effect of deceiving buyers or prospective buyers in any material respect."); 940 Code Mass. Regs. § 3.16(2) (providing that an act or practice is a violation of § 2, if "[a]ny person or other legal entity subject to this act fails to disclose to a buyer or prospective buyer any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction"); 940 Code Mass. Regs. § 6.01 (material representation is claim "which has the tendency or capacity to influence the decision of reasonable buyers or reasonable prospective buyers whether to purchase the product"); 940 Code Mass. Regs. § 6.04(1) (misleading representation is material representation which seller knows or should know "is false or misleading or has the tendency or capacity to be misleading"). These regulations are authorized by G.L. c. 93A, § 2(c), have the force of law, and "set standards the violations of which ... constitute violations of c. 93A." *Purity Supreme, Inc.* v. *Attorney Gen.*, 380 Mass. 762, 769-773 (1980).

[14] The case cited by Exxon, *Ortiz* v. *Examworks, Inc.*, 470 Mass. 784, 794 (2015), did not involve advertisements.

emissions and because a reasonable consumer would be aware of the connection between fossil fuels and climate change. "[A]n advertisement is deceptive when it has the capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted (i.e., to entice a reasonable consumer to purchase the product)." *Aspinall*, 442 Mass. at 396. Whether statements made by Exxon would have misled a reasonable consumer or how Exxon's statements would be understood by a reasonable consumer are questions ill-suited for resolution on a motion to dismiss. For example, the court cannot conclude at this stage that no reasonable consumer would be misled by Exxon's promotion of its Synergy™ fuel on its website:

> **Environmental Performance**
>
> Conscientious practices. Rigorous standards.
>
> **Continually improving environmental performance while pursuing reliable and affordable energy.**
>
> Ten years ago, we introduced Protect Tomorrow. Today. – a set of expectations that serves as the foundation for our environmental performance. Guided by a scientific understanding of the environmental impacts and related risks of our operations, these rigorous standards and good practices have become an integral part of our day-to-day operations in every country in which we do business including those with minimal regulations in place....
>
> The following are the three major areas in which we've concentrated our efforts to reduce environmental impacts ....
>
> **Improve efficiency in consumer use of fuels**
>
> We're continually innovating to develop products that enable customers to reduce their energy use and CO2 emissions. For example, we have: ...
>
> Engineered Fuel Technology Synergy fuels to help improve fuel economy and reduce CO2 emissions.

Amended Complaint, ¶¶ 587, 588.

Finally, this claim does not involve a "pure omission" as Exxon contends. A pure omission occurs when a seller "merely stay[s] silent about a subject in circumstances that do not give any particular meaning to [the] silence." *Tomasella*, 962 F.3d at 73 (quotations and citation omitted). Declaring pure omissions to be deceptive would inevitably "expand[] that concept virtually beyond limits," considering the vast universe of "erroneous preconceptions" that individual consumers may have about any given product as well as "[t]he number of facts that may be material to [them]." *Id.* at 75 (quotations and citation omitted). Instead, the Commonwealth's claim is based on Exxon advertising that consumer use of its products will reduce greenhouse gas emissions when "consumer use of fossil fuel products (even products that may yield relatively more efficient engine performance) *increase* greenhouse gas emissions." Amended Complaint, ¶ 582 (emphasis in original). According to the Commonwealth, Exxon is not "merely staying silent" about the subject, but is actually (mis)representing that its products "reduce greenhouse gas emissions." This is not a prior consumer misconception, see *Tomasella*, 962 F.3d at 73; it is a misconception allegedly created by Exxon.

In addition, the Commonwealth does not claim that Exxon had an affirmative duty to warn consumers about climate risks associated with use of its products; it claims that Exxon had a duty to fully disclose those risks once it created the impression that using its products resulted in environmental benefits. See Amended Complaint, ¶ 582. Compare *Tomasella*, 962 F.3d at 67 (First Circuit affirmed dismissal of plaintiff's c. 93A claims and concluded that by not disclosing on packaging of their chocolate products that there are known child labor abuses in their cocoa supply chains, defendants "stay[ed] silent on the subject in a way that [did] not constitute a half-truth or create any misleading impressions about the upstream labor conditions in the cocoa supply chain").

The Commonwealth's allegations about Exxon's deceptive advertising state a viable claim that Exxon engaged in unfair and deceptive practices in violation of G.L. c. 93A.

C. Count III

Finally, the Commonwealth charges Exxon with "greenwashing," which it defines as "advertising and promotional materials designed to convey a false impression that a company is more environmentally responsible than it really is, and so to induce consumers to purchase its products." Amended Complaint, ¶ 540. Exxon's "deceptive 'greenwashing' campaigns ... target Massachusetts consumers with false and misleading messages about [Exxon's] leadership in solving the problem of climate change, support of action to reduce greenhouse gas emissions, and focus on developing clean energy to 'protect tomorrow today,' and to protect future generations." Amended Complaint, ¶ 762. Exxon "promotes its products by falsely depicting [itself] as a leader in addressing climate change ... without disclosing (i) [Exxon's] ramp up of fossil fuel production in the face of a growing climate emergency; (ii) the minimal investment [Exxon] is actually making in clean energy compared to its investment in business-as-usual fossil fuel production; and (iii) [Exxon's] efforts to undermine measures that would improve consumer fuel economy." *Id.* at ¶ 541. These misrepresentations and omissions mislead consumers by "obscuring the extreme effects of climate change caused by the production and normal use of [Exxon's] fossil fuel products." *Id.* at ¶ 763. Further, Exxon "saturat[es] its brand with deceptive 'green' images that portray ExxonMobil as a good environmental steward...." *Id.* at ¶ 633. For example, the Commonwealth alleges that Exxon describes its "Protect Tomorrow. Today." campaign, as "defin[ing] our approach to the environment.... The environment we work in includes clean air, water, and ecosystems, which people, plants, and animals depend upon." Amended Complaint, ¶ 643.

Exxon contends that the court should dismiss this claim because the statements the Commonwealth alleges are deceptive do not violate c. 93A because they are "truthful at best and mere puffery at worst." *von Schönau-Riedweg*, 95 Mass. App. Ct. at 497; see also *Hansmann* v. *Nationstar Mortg., LLC*, 2014 Mass. App. Unpub. LEXIS 797 *3 (2014), citing *Kwaak* v. *Pfizer, Inc.*, 71 Mass. App. Ct. 293, 300-301 (2008) ("permissible puffery" statements are distinct from actionable conduct under c. 93A). The determination, however, of whether statements are actionable misrepresentations or inactionable puffery is not appropriate at a motion to dismiss stage. See *Marram*, 442 Mass. at 62; *NPS, LLC*, 706 F. Supp. 2d at 172 ("Courts vary in their conclusions of just where the line between [civilly actionable] misrepresentation and [inactionable] puffery lies, and often the determination is highly fact-specific.").

Further, as discussed earlier, the Commonwealth does not have to allege that any statement was false nor is it appropriate to resolve at the motion to dismiss stage what a reasonable consumer would think about Exxon's representations. Finally, Exxon argues that it did not make the challenged "greenwashing" statements in connection with the sale or offer to sell any "services" or "property." G.L. c. 93A, § 1. The Commonwealth alleges, however, that Exxon's "greenwashing" campaign is designed to "induce consumers to purchase its products." Amended Complaint, ¶ 540. The Commonwealth has thus sufficiently alleged that Exxon engaged in deceptive practices with respect to the "greenwashing" claim.

III. First Amendment

Exxon contends that the complaint must be dismissed because the Commonwealth seeks to use c. 93A to compel speech in violation of the First Amendment. Commercial speech is protected by the First Amendment if it concerns lawful activity and is not misleading. *Central Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980); see

also *Illinois ex rel. Madigan* v. *Telemarketing Associates, Inc.*, 538 US 600, 612 (2003) (First Amendment does not protect fraud). Here, the Commonwealth alleges that Exxon made misleading statements to consumers and investors in violation of G.L. c. 93A. This court is not in a position, at least at this stage, to determine whether any particular statement is protected by the First Amendment.

ORDER

For the reasons stated and other reasons articulated in the Commonwealth's Opposition, it is hereby **ORDERED** that the Defendant's Motion to Dismiss is **DENIED**.

/s/ Karen F. Green
Karen F. Green
Associate Justice of the Superior Court

Dated: June 22, 2021

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1984CV03333-BLS1

Notice Sent
06.23.21
TCF
CC+Opc
DJT
TVWJ
TA
BOC
SAlc
CGC
MQG
TSR
GSC
MAH
AAG
RT
JAS
AAG
SS
LAG
MD

COMMONWEALTH OF MASSACHUSETTS

vs.

EXXON MOBIL CORPORATION

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S SPECIAL MOTION TO DISMISS THE AMENDED COMPLAINT

The Commonwealth of Massachusetts, by its Attorney General ("Commonwealth"), sued Exxon Mobil Corporation ("Exxon") for alleged violations of G.L. c. 93A. The Commonwealth claims that Exxon has violated c. 93A by: (1) misrepresenting and failing to disclose material facts regarding systemic climate change risks to Massachusetts investors (Count I); (2) misrepresenting the purported environmental benefit of using its Synergy™ and Mobil 1™ products and failing to disclose the risks of climate change caused by its fossil fuel products to Massachusetts consumers (Count II); and (3) promoting false and misleading "greenwashing" campaigns to Massachusetts consumers (Count III).

The matter is now before me on Exxon's Special Motion to Dismiss pursuant to the anti-SLAPP ("Strategic Litigation against Public Participation") statute, G.L. c. 231, § 59H. After a hearing and for the reasons that follow, Exxon's motion is **DENIED**.

DISCUSSION

The Massachusetts Legislature enacted the anti-SLAPP statute to counteract "SLAPP" suits, defined broadly as "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *Duracraft Corp.* v. *Holmes Prods. Corp.*, 427 Mass. 156, 161 (1998) (objective of SLAPP suit is not to

win, but to use litigation to intimidate opponents' exercise of rights of petitioning and speech). Generally, a SLAPP suit has no merit. See *Cadle Co.* v. *Schlichtmann*, 448 Mass. 242, 248 (2007).

The anti-SLAPP statute protects "a party's exercise of its right of petition." G.L. c. 231, § 59H. In relevant part, it provides:

> In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss.

That definition makes clear that "'the statute is designed to protect overtures to the government by parties petitioning in their status as citizens .... The right of petition contemplated by the Legislature is thus one in which a party seeks some redress from the government.'" *Fustolo* v. *Hollander*, 455 Mass. 861, 866 (2010), quoting *Kobrin* v. *Gastfriend*, 443 Mass. 327, 332-333 (2005). The anti-SLAPP statute defines "a party's exercise of its right to petition" as:

> [1] any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; [2] any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; [3] any statement reasonably likely to encourage consideration or review of an issue by a legislative executive, or judicial body or any other governmental proceeding; [4] any statement reasonably likely to enlist public participation in an effort to effect such consideration; or [5] any other statement falling within constitutional protection of the right to petition government.

G.L. c. 231, § 59H. For the purposes of § 59H, "[p]etitioning includes all 'statements made to influence, inform, or at the very least, reach governmental bodies—either directly or indirectly.'" *North American Expositions Co. Ltd. Partnership* v. *Corcoran*, 452 Mass. 852, 862 (2009), quoting *Global NAPS, Inc.* v. *Verizon New England, Inc.*, 63 Mass. App. Ct. 600, 605 (2005).

As the moving party, Exxon, which alleges it has been the target of a SLAPP suit, first must show, by a preponderance of the evidence, that each claim it challenges is "solely based on

[Exxon's] own petitioning activities." *Blanchard* v. *Steward Carney Hosp., Inc.*, 483 Mass. 200, 203 (2019); *Duracraft Corp.*, 427 Mass. at 167-168 (moving party must show that claims against it are based on its petitioning activities alone and have no substantial basis other than or in addition to petitioning activities); *Blanchard* v. *Steward Carney Hosp., Inc.*, 477 Mass. 141, 148 (2017) (as part of threshold burden, moving party must show that conduct complained of constitutes exercise of its right to petition). If Exxon fails to show that the only conduct about which the Commonwealth complains is petitioning activity, the court must deny the special motion to dismiss. See *Benoit* v. *Frederickson*, 454 Mass. 148, 152 (2009).[1]

If Exxon satisfies its threshold burden, then the burden shifts to the Commonwealth to demonstrate that G.L. c. 231, § 59H does not require dismissal of its claims. See *477 Harrison Ave., LLC* v. *JACE Boston, LLC*, 483 Mass. 514, 516 (2019). The Commonwealth can do so in one of two ways. First, it can establish, by a preponderance of the evidence, that "[Exxon's] exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and ... [its] acts caused actual injury to the [Commonwealth]." G.L. c. 231, § 59H. Alternatively, it can establish, "such that the motion judge can conclude with fair assurance," that each of the Commonwealth's claims is not a "'meritless'" SLAPP suit, *i.e.*, that it is both colorable and non-retaliatory. *477 Harrison Ave., LLC*, 483 Mass. at 516, 518-519, citing *Blanchard*, 477 Mass. at 159-160. If the Commonwealth does not meet its burden, the court must grant the special motion to dismiss. G.L. c. 231, § 59H.

In Count I, the conduct complained of is Exxon's alleged misrepresentation of and failure to disclose material facts regarding systemic climate change risks to Massachusetts investors. In

[1] Contrary to the Commonwealth's suggestion, *see* Commonwealth's Opposition at page 11, I may not "pass over" this threshold inquiry. A court should apply the augmented *Duracraft* framework sequentially. *477 Harrison Ave., LLC* v. *JACE Boston, LLC*, 483 Mass. 514, 515, 519 (2019).

Count II, it is Exxon's alleged misrepresentation of the purported environmental benefit of consumer use of its Synergy™ and Mobil 1™ products and failure to disclose the risks of climate change caused by its fossil fuel products to Massachusetts consumers. Count III complains of Exxon's promotion of allegedly false and misleading "greenwashing" campaigns designed to "convey a false impression that [it] is more environmentally responsible than it really is, and so to induce consumers to purchase its products." Amended Complaint, ¶ 540.

Exxon argues that its statements to investors constitute petitioning activity because they ""were issued in a manner that was likely to influence or, at the very least, reach' regulators and 'members of the public wishing to weigh in' on climate policy." Motion, page 14, quoting *Blanchard*, 477 Mass. at 151. Exxon also contends that its public statements regarding its Synergy™ and Mobil 1™ products constitute petitioning activity because, "at a minimum, this speech was intended and reasonably likely to 'enlist the participation of the public' in the [climate] policy debate at the heart of the Attorney General's lawsuit." Motion, page 15. Finally, Exxon argues that the statements the Commonwealth labels as "greenwashing" are actually its "advocacy of climate policy choices under consideration by various government and regulating bodies." Motion, page 16.[2]

Exxon has failed to meet its threshold burden of showing that the Commonwealth's claims are based *solely* on Exxon's petitioning activities.[3] As an initial matter, Exxon has

[2] Exxon does not specify in its papers which definition of § 59H applies to qualify its statements as "exercise[s] of its right of petition." When asked to do so during the hearing, Exxon responded that it relies on all of them.

[3] The parties disagree whether the anti-SLAPP statute applies to civil enforcement actions brought by the Attorney General on the Commonwealth's behalf. Because Exxon has not met its initial burden of showing that the Commonwealth's claims against it are based solely on its petitioning activities, I need not reach this issue.

entirely failed to explain how any of the omissions alleged by the Commonwealth as violating c. 93A qualify as petitioning protected by § 59H, which applies only to "statements."[4]

With respect to statements on which the Commonwealth relies, the mere fact "[t]hat a statement concerns a topic that has attracted governmental attention, in itself, does not give that statement the [petitioning] character contemplated by the statute." *Global NAPs, Inc.*, 63 Mass. App. Ct. at 605. Further, although a commercial motive may not preclude a finding that speech constitutes protected petitioning activity, it "may provide evidence that particular statements do not constitute petitioning activity." *Fustolo*, 455 Mass. at 870 & n.11, citing *North Am. Expositions Co. Ltd. Partnership*, 452 Mass. at 863. For example, speech that is intended to achieve a purely commercial result, such as increasing demand for one's products or services, is not protected petitioning activity. See *Cadle Co.*, 448 Mass. at 250-254 (defendant lawyer's publication of statements on website, allegedly to share with public information about company's allegedly unlawful business practices, which he previously provided to regulatory officials and courts, did not constitute petitioning activity where he "created the Web site, at least in part, to generate more litigation to profit himself and his law firm"); *Ehrlich* v. *Stern*, 74 Mass. App. Ct. 531, 540-542 (2009). The court considers statements in the context in which they were made in determining whether they are protected petitioning. See *Wynne* v. *Creigle*, 63 Mass. App. Ct. 246, 253 (2005).

---

[4] In its complaint, the Commonwealth alleges not only misrepresentations by Exxon, but also failures to disclose information that the Commonwealth contends would be relevant to Massachusetts investors and consumers. For example, ¶ 18 of the Amended Complaint states: "In its communications with investors, including [Exxon's] supposed disclosures about climate change, ... ExxonMobil has failed to disclose the full extent of the risks of climate change to the world's people, the fossil fuel industry, and [Exxon]." Further, "[i]n its marketing and sales of ExxonMobil products to Massachusetts consumers, ... ExxonMobil likewise has failed ... to disclose in those advertisements and promotional materials that the development, refining, and normal consumer use of ExxonMobil fossil fuel products emit large volumes of greenhouse gases, which are causing global average temperatures to rise and destabilizing the global climate system." *Id.* at ¶ 33; see also ¶ 538.

Climate change indisputably is a topic that has attracted governmental attention. And, indeed, some Exxon statements referenced in the complaint constitute protected petitioning within the scope of § 59H because they were made "in connection with an issue under consideration or review by a legislative, executive, or judicial body" and/or "to encourage consideration or review of an issue by a legislative executive, or judicial body or any other governmental proceeding." However, Exxon cannot "obtain dismissal through an anti-SLAPP motion just because *some* of the allegations in the complaint are directed at conduct by the defendants that constitutes petitioning activity." *Haverhill Stem LLC* v. *Jennings*, 99 Mass. App. Ct. 626, 634 (2021). Rather, Exxon must show "that the complaint, fairly read, is based *solely* on petitioning, and to that end the allegations need to be carefully parsed even within a single count." *Id.* (emphasis in original). It is apparent from the context in which they were made that many Exxon statements referenced in the complaint are not protected. See *Cadle Co.*, 448 Mass. at 250 (attorney published statements "not as a member of the public who had been injured by ... alleged practices, but as an attorney advertising his legal services").[5]

Review of a just a few of the Commonwealth's allegations suffices to demonstrate that each of its claims is not based *solely* on Exxon's petitioning activities. First, with respect to Count I, the Commonwealth alleges that Exxon has consistently represented *to investors* that it will "face virtually no meaningful transition risks from climate change because aggressive regulatory action is unlikely, renewable energy sources are uncompetitive, and fossil fuel demand and investment will continue to grow." Amended Complaint, ¶ 497. As an example,

[5] As an example, Exxon's "lobbying efforts" are arguably protected petitioning activities. But the anti-SLAPP inquiry produces an all or nothing result as to each count of the complaint. *Ehrlich*, 74 Mass. App. Ct. at 536. "Either [a] count survives the anti-SLAPP inquiry or it does not, and the statute does not create a process for parsing counts to segregate components that can proceed from those that cannot." *Id.* (citations omitted).

the Commonwealth alleges that, in its 2019 Energy and Carbon Summary issued *to investors*, Exxon modeled a scenario where global temperatures would increase by 2 degrees Celsius. Amended Complaint, ¶ 506. Exxon stated:

> [b]ased on currently anticipated production schedules, we estimate that by 2040 a substantial majority of our year-end 2017 proved reserves will have been produced. Since the 2°C scenarios average implies significant use of oil and natural gas through the middle of the century, we believe these reserves face little risk from declining demand.

Amended Complaint, ¶ 510. In the same document, Exxon claimed that its "actions to address the risks of climate change ... position ExxonMobil to meet the demands of an evolving energy system." Amended Complaint, ¶ 606. One of those "actions" is "[p]roviding products to help [Exxon's] customers reduce their emissions," including its Synergy™ fuels, which "yield better gas mileage, reduce emissions and improve engine responsiveness." *Id.*

Second, as to Count II, the Commonwealth alleges that Exxon markets its Synergy™ brand fuels *to consumers*, on *its promotional website*, as being "engineered for [b]etter gas mileage" and "[l]ower emissions." *Id.* at ¶ 595. For example, Exxon promotes its "Synergy Diesel Efficient™" fuel *to consumers* as the "latest breakthrough technology," and the "first diesel fuel widely available in the US" that helps "increase fuel economy" and "[r]educe emissions and burn cleaner," and represents that it "was created to let you drive cleaner, smarter and longer." *Id.* at ¶ 593. Finally, in support of Count III, the Commonwealth alleges that Exxon's "Protect Tomorrow. Today," *marketing campaign* amounts to deceptive "greenwashing" because Exxon falsely states that "Protect Tomorrow. Today" "defines [its] approach to the environment." *Id.* at ¶¶ 633, 639, 643.

Exxon has not shown, by a preponderance of the evidence, that it made any of these statements solely, or even primarily, to influence, inform, or reach any governmental body,

directly or indirectly. Instead, the statements appear to be directed at influencing investors to retain or purchase Exxon's securities or inducing consumers to purchase Exxon's products and thereby increase its profits. Compare *Cadle Co.*, 448 Mass. at 252 ("palpable commercial motivation behind" defendant's creation of website "so definitively undercuts" petitioning character of statements published on website) with *Cardno ChemRisk, LLC* v. *Foytlin*, 476 Mass. 479, 485-486 (2017) (activists' blog highlighting deceptive practices of company that reported on oil spill was protected petitioning activity, "implicit[ly] call[ing] for its readers to take action" to influence government). Because neither such statements nor the omissions alleged by the Commonwealth are protected under G.L. c. 59H, Exxon's special motion to dismiss must be denied.

ORDER

For the reasons stated above, it is hereby **ORDERED** that Exxon's Special Motion to Dismiss the Amended Complaint pursuant to the anti-SLAPP statute, G.L. c. 231, § 59H, is **DENIED**.

/s/ Karen F. Green
Karen F. Green
Associate Justice of the Superior Court

Dated: June 22, 2021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON MOBIL CORPORATION Plaintiff, v. ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his Official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity, Defendants.	No. 17-CV-2301 (VEC) (SN)

EXXON MOBIL CORPORATION'S OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE AMENDED COMPLAINT

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064

HAYNES & BOONE, LLP
2323 Victory Avenue, Suite 700
Dallas, TX 75219
Tel: (214) 651-5579

CANTEY HANGER LLP
600 W. 6th St. #300
Fort Worth, TX 76102
Tel: (817) 877-2800

Counsel for Exxon Mobil Corporation

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

PRELIMINARY STATEMENT

The Attorneys General of New York and Massachusetts (the "Attorneys General") believe federal courts should slam the courthouse door on lawsuits challenging state action that discriminates based on political viewpoint. If that were so, individuals and organizations holding ideas perceived to be out of step with their local political leaders would find themselves exposed and unprotected. Fortunately, that is not the law.

Where, as here, a litigant makes a prima facie showing of viewpoint discrimination in a well-pleaded complaint, it is manifestly the role of federal courts to interpose themselves between the potential abuse of state power and the free exercise of constitutional rights. To be sure, those challenging state power bear a heavy burden, but that is to be evaluated under the appropriate standard at each stage in the litigation. As recognized by another federal judge who presided over this case and ordered jurisdictional discovery, Exxon Mobil Corporation ("ExxonMobil") has met its threshold burden of pleading viewpoint discrimination, and it has done so with factual allegations supported by information available in the public record. In the absence of discovery, a plaintiff cannot reasonably be expected to come forward with more.

This Court should allow this case to proceed on the merits. Acceptance of the Attorneys General's ripeness argument would strip federal courts of jurisdiction over challenges to state action whenever, as will almost invariably be the case, those challenges could be brought in state court. That is a distortion of the ripeness doctrine unmoored from precedent and laden with pernicious consequences for the critical role federal courts play in protecting civil rights. Nor does *Colorado River* abstention present any barrier to the progress of this comprehensive action, which was filed before any state litigation had commenced. It is telling that in the year that this heavily contested case has been pending, no defendant has seriously argued for abstention under this exceptionally narrow doctrine, and for good reason. The relevant factors, which must weigh strongly in favor of abstention for the doctrine to apply, all support allowing this case to proceed.

It is equally meritless for the Massachusetts Attorney General to assert this action is precluded by the limited-purpose proceedings in Massachusetts state court, where the motion judge expressly declined to consider or decide constitutional objections. Moreover, the argument that this Court lacks jurisdiction over the Massachusetts Attorney General, notwithstanding her active participation in a press conference in this state that is at the heart of ExxonMobil's claims cannot be taken seriously, let alone decided without discovery.

If the Court accepts the Attorneys General's position and dismisses ExxonMobil's complaint at the outset, it will set a precedent with nationwide consequences. Dismissing this case with its deeply political overtones and repeated press leaks by the Attorneys General, notwithstanding the strong showing ExxonMobil has made already, would amount to granting state officials license to harass perceived political opponents unimpeded by review in federal courts. The harm of such an outcome might seem tolerable when the disfavored political views generate little sympathy under prevailing political winds. But the political winds blow in multiple directions in this diverse country. Whose ox is gored by this precedent will depend largely on who exercises state power and who is out of step with the views held by those in power. Free speech rights should not turn on such vagaries, and it is proper for this Court to ensure that they do not.

STATEMENT OF FACTS

The Attorneys General of New York and Massachusetts are active participants in an ongoing conspiracy to violate ExxonMobil's constitutional rights. This conspiracy is firmly rooted in New York City, where the Attorneys General identified disfavored speech about climate change as an obstacle to their political agenda and pledged to use state power to suppress viewpoints unaligned with their own, thereby implementing a playbook developed over the last decade by climate activists and profit-seeking lawyers. ExxonMobil finds itself directly in that conspiracy's crosshairs. Notwithstanding its long-standing acknowledgment of the risks

presented by climate change, its support of the Paris climate accords, and its backing of a revenue-neutral carbon tax, the co-conspirators have singled out ExxonMobil for its perceived unwillingness to embrace the Attorneys General's perspective on the risks of and necessary policy responses to climate change. Faced with these facts, a federal judge ordered discovery to probe the bad faith of the Attorneys General for launching a pretextual investigation of ExxonMobil that discriminates based on viewpoint. The passage of time, which has brought to light further evidence establishing a prima facie case of the Attorneys General's bad faith, has only confirmed the propriety of that ruling.

A. The Attorneys General Pledge to Suppress Speech Because of Opposition to Its Content.

On March 29, 2016, New York Attorney General Eric Schneiderman convened a press conference in New York City that drew national attention. Massachusetts Attorney General Maura Healey spoke at that event, which her office internally described on expense reports as the "trip to NY re: Exxon + climate change."[1] At the press conference, a coalition of Attorneys General, self-styled the "AGs United for Clean Power," announced a plan to regulate speech they considered an obstacle to their "clean power" agenda.[2]

For the Attorneys General, the public policy debate on climate change was settled and any perceived dissent was intolerable. Attorney General Schneiderman declared that there could be "no dispute" about climate change policy, only "confusion" and "misperceptions in the eyes of the American public that really need to be cleared up."[3] Attorney General Healey likewise considered the public's failure to embrace her climate change policies to be the result of speech that caused "many to doubt whether climate change is real and to misunderstand and

[1] Ex. Q at 4-7.
[2] Ex. A at 2-4; Ex. I.
[3] Ex. A at 2.

misapprehend the catastrophic nature of its impacts."[4]

To enforce their views on climate change policy, the Attorneys General vowed to unleash their law enforcement powers against perceived dissenters. Attorney General Schneiderman blamed any departure from his prescribed orthodoxy on those "with an interest in profiting from the [so-called] confusion" about public policy and denounced the "morally vacant forces that are trying to block every step by the federal government to take meaningful action" on climate change.[5] Lamenting the perceived "gridlock in Washington," Attorney General Schneiderman also expressed the coalition's intent "to step into this [legislative] breach," by "battl[ing]" perceived political opponents.[6] Directly linking his investigation of ExxonMobil to those concerns, he boasted that he "had served a subpoena on ExxonMobil" as part of his efforts to promote a clean energy agenda.[7]

Attorney General Healey similarly asserted that those who purportedly "deceived" the public—by disagreeing with her about climate change policy—"should be, must be, held accountable."[8] In the next breath, Attorney General Healey declared that she too had "joined in investigating the practices of ExxonMobil."[9] Revealing the prejudgment tainting her investigation, Attorney General Healey claimed that she had already found a "troubling disconnect between what Exxon knew . . . and what the company and industry chose to share with investors and with the American public."[10] In a thinly veiled reference to ExxonMobil, she then promised "quick, aggressive action" to "hold[] accountable those who have needed to be

---

4 *Id.* at 12.
5 *Id.* at 2, 4.
6 *Id.* at 3-4.
7 *Id.* at 3.
8 *Id.* at 12.
9 *Id.*
10 *Id.*

held accountable for far too long."[11]

B. The Attorneys General Conspire with Private Interests Antagonistic to Free and Open Debate on Climate Change Policy.

The March 2016 press conference was years in the making. Private interests have long urged state officials to misuse their law-enforcement power to restrict disfavored viewpoints on climate change. And they were on hand at the press conference, leading workshops that were not only closed to the public but also meant to be concealed from the public. During one of those secret meetings, Peter Frumhoff, the Director of Science and Policy for the Union of Concerned Scientists,[12] delivered a presentation on the "imperative of taking action now on climate change."[13] Frumhoff has tried to silence ExxonMobil on climate policy since at least 2007, when he contributed to a publication promoting strategies for "[p]utting the [b]rakes" on ExxonMobil's alleged "[d]isinformation [c]ampaign" on climate change.[14] Matthew Pawa "a prominent global warming litigation attorney" who unsuccessfully sued ExxonMobil for allegedly causing global warming also delivered a secret presentation on "climate change litigation."[15] It is unknown whether Pawa disclosed to the public servants in attendance that he stood to profit from any private litigation made possible by documents procured through the attorney general-led investigations of ExxonMobil.[16]

For years, these activists and other private interests have worked to persuade state law enforcement officers to use their investigative powers to pressure those perceived to hold disfavored views on climate change. For example, in 2012, both Frumhoff and Pawa attended a workshop examining ways to obtain the internal documents of companies like ExxonMobil for

---

11 *Id.* at 13.
12 Ex. S at 2.
13 Ex. F at 2.
14 Ex. U at 29.
15 ECF No. 180 at 6; Ex. F at 2; *see also Native Vill. of Kivalina* v. *ExxonMobil Corp.*, 663 F. Supp. 2d 863, 871-77 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).
16 Ex. T at 1.

the purpose of "maintaining pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming."[17] The attendees at that workshop concluded that "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light."[18] Frumhoff began to put that agenda into action by July 2015, when he assured fellow activists that he was exploring "state-based approaches to holding fossil fuel companies legally accountable" and anticipated "a strong basis for encouraging state (e.g., AG) action forward."[19] Three months later, Attorney General Schneiderman issued a subpoena to ExxonMobil.

The Rockefeller Family Fund (the "Fund") also helped to devise the playbook the Attorneys General have followed in conducting their investigations. In January 2016, the Fund convened a meeting, which counted Matthew Pawa among its attendees, to discuss the goals of a so-called "Exxon campaign."[20] Those goals included to (i) "establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," (ii) "delegitimize [ExxonMobil] as a political actor," and (iii) "force officials to disassociate themselves from Exxon . . . ."[21] In December 2016, the President and Director of the Fund admitted, after initially failing to disclose the connection, that the Fund had financed the so-called investigative journalism that the Attorneys General claim inspired their investigations.[22] The Fund further acknowledged that, before the Attorneys General commenced

---

17 Ex. V at 27.

18 *Id.* at 11.

19 Ex. N.

20 Ex. G.

21 *Id.*

22 Ex. X at 2; Ex. Y at 2. These publications advanced the theory that ExxonMobil has known "the truth" about climate change since the late-1970s—supposedly decades before the world's scientists—and lied to the public when it identified and discussed areas of scientific uncertainty. Based on this theory, both Attorneys General demanded production of ExxonMobil documents and communications related to its historic climate change research, despite the fact that ExxonMobil has acknowledged the risks of climate change since at least 2006, well before any applicable statute of limitations. *See* ECF No. 100 ¶¶ 63-66.

their investigations of ExxonMobil, it had "informed [unnamed] state attorneys general of [its] concern" about ExxonMobil's statements on climate change and was "encouraged by [Attorney General] Schneiderman's interest."[23]

The Attorneys General have repeatedly collaborated with these and other private interests devoted to stripping ExxonMobil of its constitutional rights.[24] For instance, in February 2015, the New York Attorney General's Office exchanged a dozen emails with the Fund concerning the "activities of specific companies regarding climate change."[25] An employee of the Fund also emailed the Chief of Attorney General Schneiderman's Environmental Protection Bureau for "Comments on news article" in December 2015, shortly after *Inside Climate News* published the Fund-financed articles.[26] The New York Attorney General's Office also exchanged numerous emails with the staff of Tom Steyer (a self-styled environmental activist, hedge-fund tycoon, and vocal opponent of ExxonMobil), regarding "company specific climate change information," the same week that it issued its subpoena to ExxonMobil.[27] Attorney General Schneiderman then requested a "call with Tom [Steyer] regarding support for his race for governor . . . regarding Exxon case" only days before convening the March 29 press conference.[28]

C. The Attorneys General Conceal Their Links to Private Interests.

The Attorneys General recognized that the behind-the-scenes involvement of these confederates could expose the special interests urging the use of law enforcement's coercive tools in violation of the First Amendment. That is why the New York Attorney General's Office attempted to conceal the involvement of these activists from the public. For instance, when a

---

[23] Ex. Z at 3.
[24] Ex. R.
[25] Ex. O at 4-7.
[26] Ex. P.
[27] Ex. O at 1. In the Summer of 2015, the company that oversees Steyer's political and philanthropic efforts boasted that it was at "the nexus between a handful of exciting and powerful efforts aimed to curb climate change." Ex. W at 1.
[28] Ex. AA at 1.

reporter contacted Pawa shortly after the March 29 press conference and inquired into his involvement, the Chief of the Environmental Protection Bureau of the New York Attorney General's Office advised Pawa, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[29]

In an effort to prevent further evidence of these suspect ties from being unearthed, the coalition also executed a so-called "Climate Change Coalition Common Interest Agreement," the mere existence of which they have likewise attempted to conceal.[30] The New York Attorney General's efforts to conceal records concerning that agreement in response to a Freedom of Information Law request have already resulted in a firm judicial rebuke. The New York Supreme Court recently awarded attorney's fees and costs against the Attorney General for "lack[ing] a reasonable basis" for refusing to produce documents related to the common interest agreement.[31] Nevertheless, the Attorney General continues to resist requests for communications with the Fund related to his investigation of ExxonMobil.[32] Another member of the coalition has gone so far as to concede the political motives behind the coalition's selective disclosures. The Vermont Attorney General's Office recently admitted that it conducts research into those seeking records about the coalition's activities, and upon learning of the requester's affiliation with "coal or Exxon or whatever," the office "give[s] this some thought . . . before we share information with this entity."[33]

D. The Conspiracy's Improper Purpose Is Documented in Instruments the Attorneys General Executed.

The intent to suppress disfavored voices is apparent in the very documents the Attorneys

---

29 Ex. H at 1.
30 Ex. E at 1; Ex. J at 1, 3.
31 *Competitive Enter. Inst.* v. *Att'y Gen.*, No. 5050-16, 2016 WL 6989406, at 1-2 (N.Y. Sup. Ct. Nov. 21, 2016).
32 *Free Mkt. Envtl. Law Clinic* v. *Att'y Gen.*, No. 101759/2016, NYSCEF No. 36 (N.Y. Sup. Ct. May 31, 2017).
33 Ex. DD at 14.

General executed. The subpoena and the CID are trained on speakers and speech that the Attorneys General perceive to run counter to climate change policy that they and their behind-the-scenes allies promote. The subpoena demands ExxonMobil's communications with trade associations and industry groups that promote oil and gas interests, rather than alternative fuels.[34] Attorney General Schneiderman has publicly referred to many of these organizations as "aggressive climate deniers."[35] Similarly, the CID requests ExxonMobil's communications with twelve specific organizations, all of which have been associated with positions on climate policy disfavored by the Attorneys General.[36] The CID also specifically targets statements of pure opinion that do not accord with Attorney General Healey's environmental politics, including the suggestion that "[i]ssues such as global poverty [are] more pressing than climate change."[37]

The Attorneys General's efforts to promote one side of a political debate while restricting speech on the other side are also expressly memorialized in the Common Interest Agreement. That agreement describes the coalition's "common interest" as "limiting climate change" and "ensuring the dissemination of accurate information about climate change."[38] Through these twin goals, the Attorneys General have appointed themselves arbiters of accuracy when it comes to speech about climate policy and confirmed the coalition's willingness to violate First Amendment rights to carry out an agenda that has nothing to do with law enforcement.[39]

E. Three Separate Lawsuits Involve Different Claims, Different Relief, and Different Parties.

1. Texas Federal Court

ExxonMobil brought this lawsuit (the first to be filed in this matter) on June 15, 2016, in

---

34 Ex. B at 8 (Request No. 6).

35 Ex. BB at 3 (naming the American Enterprise Institute, the American Legislative Exchange Council, and the American Petroleum Institute); Ex. CC at 1 (same).

36 *Compare* Ex. D, *with* Ex. C at 13 (Request No. 5).

37 Ex. C at 15 (Request No. 9) (second alteration in original).

38 Ex. E at 1.

39 *Id.*; Ex. I at 1.

federal court in Texas. Based on the foregoing allegations, Judge Kinkeade ordered jurisdictional discovery on Attorney General Healey's bad faith. (ECF No. 73 at 5-6.) Explaining that decision, Judge Kinkeade expressed "concern" that "the anticipatory nature of Attorney General Healey's remarks" at the March 29 press conference "about the outcome of the Exxon investigation" and "Attorney General Healey's actions leading up to the issuance of the CID" exhibited "bias or prejudgment about what the investigation of Exxon would discover." (*Id.* at 3-5.) Judge Kinkeade reaffirmed that conclusion in his transfer order, where he expressed concern that the Attorneys General's investigations were means "to further their personal agendas by using the vast power of the government to silence the voices of all those who disagree with them." (ECF No. 180 at 5.) Judge Kinkeade was also troubled by the Attorneys General's public statements where they "conveniently cherry picked what they share with the media about their investigations," which further suggested bad faith. (*Id.* at 9-10.) For these and other reasons, Judge Kinkeade concluded that "[t]he merits of each of Exxon's claims involve important issues that should be determined by a court." (*Id.* at 2.)

2. Massachusetts State Court

The day after ExxonMobil commenced this action, it filed a petition in Massachusetts Superior Court, solely to avoid the risk of forfeiting its objections to the CID under Massachusetts law. ExxonMobil entered a special appearance in that action to contest the court's jurisdiction, and in the alternative, requested that the CID be set aside, modified, or subjected to a protective order under Massachusetts law.[40] ExxonMobil also moved to stay the state proceedings pending resolution of the federal case. Consistent with its limited appearance, ExxonMobil did not raise its federal claims before the Superior Court. Moreover, because Massachusetts law authorizes only narrow proceedings to challenge a CID, which serve the

[40] Ex. NN at 1-2.

limited function of evaluating the CID's validity, ExxonMobil could not have moved for injunctive or declaratory relief, let alone joined the New York Attorney General as a party.

The Superior Court denied ExxonMobil's petition and granted Attorney General Healey's cross-motion to compel ExxonMobil's compliance with the CID.[41] An appeal of that court's decision is now pending.[42] The Massachusetts Attorney General has agreed, pursuant to a tolling agreement, that ExxonMobil need not produce any documents in response to the CID until the federal and state proceedings are fully resolved, including through any appeals.

3. New York State Court

The New York Attorney General concedes that it did not initiate state court proceedings concerning any subpoena issued to ExxonMobil until November 14, 2016, after the New York Attorney General was already a party to this federal action. (NY Br. 9-10.)[43] Although Attorney General Schneiderman repeatedly references the separate proceedings he initiated one month earlier (*id.* at 20-22), that litigation was brought against PricewaterhouseCoopers ("PwC"), ExxonMobil's independent auditor, over compliance with a subpoena issued to PwC, which is not relevant here.[44]

On October 14, 2016, one day after Judge Kinkeade issued the jurisdictional discovery order, Attorney General Schneiderman filed an order to show cause against PwC in New York Supreme Court, without first making a good faith effort to resolve the issues raised in its

---

41 Ex. OO at 15.

42 Notice of Appeal, *In re CID*, No. 16-1888F (Mass. Sup. Ct. Feb. 8, 2017).

43 "NY Br." refers to the brief in support of dismissal filed by the New York Attorney General (ECF No. 220), and "Mass. Br." refers to the brief in support of dismissal filed by the Massachusetts Attorney General (ECF No. 217).

44 For that reason, the New York Attorney General's assertion that ExxonMobil should have joined PwC as a party to this action is meritless. (NY Br. 20.) Nor can the Attorney General show that ExxonMobil conceded his right to issue the November 2015 subpoena or to receive documents responsive to that subpoena by mischaracterizing and selectively quoting from ExxonMobil's counsel's statements at the October 24, 2016 court conference concerning the PwC subpoena. (NY Br. 17-18, 20.)

application or even attempting to show why the motion required expedited treatment.[45] That motion sought to compel PwC to produce documents responsive to a subpoena issued to PwC in August 2016. ExxonMobil appeared in that action for the sole purpose of asserting that the Texas accountant-client privilege protects certain documents from disclosure by PwC. On October 25, 2016, Justice Barry Ostrager granted the New York Attorney General's motion to compel after deciding that the evidentiary rules of New York, not Texas, govern.[46]

On November 14, 2016, four days after ExxonMobil filed the amended complaint joining Attorney General Schneiderman as a defendant in this action, the New York Attorney General filed an order to show cause seeking court intervention to compel ExxonMobil to produce certain accounting documents.[47] Justice Ostrager denied the Attorney General's request because, as ExxonMobil argued, the requested documents were beyond the scope of the relevant subpoena.[48] Although Attorney General Schneiderman has continued to request court intervention to add custodians or to set production deadlines, none of these discovery disputes has resulted in anything more than rulings on subpoena compliance, including a finding on June 16, 2017, that the Attorney General's most recent document requests were "way beyond proportionality."

In both its briefs and its court appearances before Justice Ostrager, ExxonMobil has forthrightly disclosed the nature of this federal action, including through demonstratives explaining the history and substance of the filings and orders in this case.[49] Having been fully

---

45 Ex. EE at 1-2.

46 *See* Ex. II at 2, 4-5. The First Department affirmed Justice Ostrager's decision on May 23, 2017, Ex. MM, and, on May 26, ExxonMobil filed a motion for reargument and for leave to appeal to the New York Court of Appeals. Ex. PP.

47 Ex. JJ at 1-2.

48 Ex. Ex. LL; KK at 23-24.

49 Ex. GG (timeline demonstrative); Ex. FF at 50 (discussing timeline); Ex. HH; *see also* ExxonMobil's Mem. in Opp. to Mot. to Compel, *People by Schneiderman* v. *PricewaterhouseCoopers LLP*, No. 451962/2016, at 3 (N.Y. Sup. Ct. Nov. 18, 2016) ("Stripped of hyperbole, the Attorney General's motion amounts to a transparent effort to insert this Court into pending litigation in federal court about whether the Attorney General conspired with others to violate ExxonMobil's federal constitutional rights.").

apprised of the nature of the federal proceedings, Justice Ostrager has never once suggested that ExxonMobil should bring its federal constitutional claims in his court, much less faulted ExxonMobil for pursuing its federal claims in federal court.

ARGUMENT

I. EXXONMOBIL'S CONSTITUTIONAL CLAIMS ARE RIPE FOR ADJUDICATION.

The Attorneys General's ripeness arguments, if accepted, would strip federal courts of jurisdiction over Section 1983 challenges to subpoenas and other investigative demands issued by state officials. Such a result would defeat the "very purpose of § 1983" which "was to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972). Under settled precedent, ExxonMobil's claims are ripe for adjudication for at least three independently sufficient reasons: (i) ExxonMobil currently suffers an ongoing violation of its constitutional rights, (ii) ExxonMobil cannot ignore the subpoena or CID without consequence, and (iii) the Attorneys General have already moved to compel ExxonMobil's compliance.

To assert a constitutionally ripe claim, a plaintiff must allege an "actual or imminent" injury rather than one that is "conjectural or hypothetical." *Nat'l Org. for Marriage, Inc.* v. *Walsh*, 714 F.3d 682, 688 (2d Cir. 2013). Prudential ripeness, in turn, permits courts to avoid premature adjudication of cases that "will be better decided later," but only if "the parties will not have constitutional rights undermined by the delay." *Simmonds* v. *INS*, 326 F.3d 351, 357 (2d Cir. 2003) (emphasis omitted). In assessing prudential ripeness, courts consider whether the issues are unfit for adjudication because they are "contingent on future events or may never occur," and whether withholding judicial review will cause hardship to the parties. *Walsh*, 714 F.3d at 691 (quotation marks omitted).

ExxonMobil's claims are both constitutionally and prudentially ripe because the challenged investigations are themselves a direct assault on ExxonMobil's First Amendment rights. A presumption of injury flows from "the alleged violation of a constitutional right," *Jolly* v. *Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (emphasis omitted), and "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). The Amended Complaint alleges just such an injury. It asserts the ongoing investigations are nothing more than pretextual fishing expeditions that seek to discriminate against a disfavored viewpoint on climate change.[50] This unconstitutional action, without more, is sufficient to make out a ripe injury. *See, e.g.*, *NAACP* v. *Patterson*, 357 U.S. 449, 458-62 (1958) (holding compelled disclosure of NAACP membership list sought by Alabama Attorney General violated First and Fourteenth Amendments). As the Second Circuit has explained, "[a] public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decisionmaking authority over the plaintiff, or in some less-direct form." *Okwedy* v. *Molinari*, 333 F.3d 339, 344 (2d Cir. 2003). ExxonMobil's claims would therefore be ripe, independent of the "somewhat relaxed standing and ripeness rules" the Second Circuit applies to First Amendment claims. *See Walsh*, 714 F.3d at 689.

Ignoring this precedent, the Attorneys General submit that ExxonMobil's injuries will not become sufficiently concrete unless and until they bring an enforcement action against the company. (NY Br. 17-18; Mass. Br. 22.) They are wrong. In *Cuomo* v. *Clearing House Ass'n, L.L.C.*, the Supreme Court enjoined "the threatened issuance of executive subpoenas by the Attorney General for the State of New York" long before any enforcement action had

[50] ECF No. 100 ¶¶ 88-89, 97-111.

commenced. 557 U.S. 519, 536 (2009). There, the New York Attorney General sent banks letters of inquiry "in lieu of issuing a formal subpoena" requesting the voluntary production of non-public information. *Clearing House Ass'n, L.L.C.* v. *Cuomo*, 510 F.3d 105, 109 (2d Cir. 2007). The Second Circuit held that the Attorney General's threatened use of his subpoena power presented a ripe controversy because it required companies "to take affirmative steps in response" to the Attorney General's demand "or else risk finding themselves in violation of state law, despite their belief that the Attorney General's authority to enforce such law was federally preempted." *Id.* at 124. The Supreme Court affirmed that decision in relevant part, observing that an injunction would have been equally appropriate if the Attorney General had actually issued the threatened subpoena. *See Clearing House*, 557 U.S. at 536.

As *Clearing House* demonstrates, where a plaintiff challenges the investigation itself, there is no need to defer adjudication pending an enforcement action. That is why the Attorneys General's reliance on precedent like *Cuomo* v. *Dreamland Amusements, Inc*., No. 08 Civ. 6321 (JGK), 2008 WL 4369270 (S.D.N.Y. Sept. 22, 2008), is misplaced. (NY Br. 17; Mass. Br. 21-22 & n.20.) In *Dreamland*, Judge Koeltl deemed a preemption challenge to a potential enforcement action unripe because it was uncertain what theories the Attorney General would pursue in a prosecution, should one ever occur, and whether they would implicate federal law. *Id.* at *8. Here, by contrast, ExxonMobil's challenge is firmly rooted in the harm caused by the investigations already commenced by the Attorneys General, not in the as-yet-undetermined nature of a possible enforcement proceeding in the future.

The Attorneys General next argue that ExxonMobil's challenge is premature because neither the subpoena nor the CID carry direct consequences for non-compliance. (NY Br. 14-15 & n.8; Mass. Br. 22.) But their argument ignores the penalties associated with non-compliance

and the compulsion proceedings each has brought against ExxonMobil. Under Second Circuit precedent, challenges to investigative demands are premature only where "no consequence whatever can befall a [recipient] who refuses, ignores, or otherwise does not comply with [the instrument] until [it] is backed by a . . . court order," at which point "those subject to the proposed order must be given a reasonable opportunity to contest the government's request." *Schulz* v. *IRS*, 395 F.3d 463, 464-65 (2d Cir.), *as clarified on reh'g*, 413 F.3d 297 (2d Cir. 2005). It can hardly be said that ExxonMobil faces "no consequence whatever" for ignoring the subpoena and CID. Under the authorizing statutes, ignoring the subpoena or the CID can result in monetary and other penalties.[51]

Attorney General Schneiderman claims that those penalties should carry no weight because "a subpoena recipient may defend against" them in a subsequent proceeding over the penalties for non-compliance. (NY Br. 14 n.8.) Having an opportunity to defend against the imposition of a penalty for non-compliance cannot be equated with "no consequence whatever." *Schulz*, 395 F.3d at 465. To the contrary, the Attorney General concedes that non-compliance with the subpoena can have the direct consequence of putting the subpoena recipient on the defensive in a proceeding, not just to compel compliance with the subpoena, but to impose a penalty for past non-compliance.

The Second Circuit rejected the Attorneys General's position in its opinion on rehearing in *Schulz* v. *IRS*, 413 F.3d 297 (2d Cir. 2005), which presumably is why the New York Attorney General relies heavily on the pre-rehearing opinion. (NY Br. 13, 14, 16.) In *Schultz*, the IRS argued that "the agency may summon a taxpayer and the taxpayer must choose either to comply

[51] *See* N.Y. Gen. Bus. Law § 352(4) (purporting to make failure to comply with a subpoena issued under § 352 a misdemeanor); M.G.L. c. 93A, §7 (making non-compliance with a CID punishable by fine of up to $5,000). In fact, the New York Court of Appeals has held that the Attorney General may "commence a criminal prosecution" against a party who fails to comply with his subpoena, even after the recipient has moved to quash that subpoena. *See LaRossa, Axenfeld & Mitchell* v. *Abrams*, 62 N.Y.2d 583, 590 (1984).

or, if not, put herself directly at jeopardy of sanction without an intervening opportunity to seek judicial review of the summons." *Id.* at 303. Rejecting that position as unconstitutional, the Second Circuit held that due process required "both judicial review of an IRS summons and an intervening opportunity to comply with a court order of enforcement prior to the imposition of coercive or punitive sanctions." *Id*. Under *Schultz*'s teachings, ExxonMobil cannot be made to wait until the Attorney General seeks to collect sanctions before it can challenge the subpoena.

Even if the authorizing statutes did not contain penalties for non-compliance, the compulsion actions commenced by the Attorneys General would provide an independently sufficient basis to find this action ripe. The Attorneys General each concede that they have moved in their respective state courts to compel ExxonMobil's compliance with the November 2015 subpoena and the CID.[52] As their own authorities dictate, these motions to compel eliminate any doubt about the ripeness of ExxonMobil's claims. *See Schulz*, 395 F.3d at 464; *Google, Inc.* v. *Hood*, 822 F.3d 212, 225 (5th Cir. 2016).

Distorting ripeness doctrine beyond recognition, the Attorneys General ask this Court to accept that when a state forum is available, an otherwise ripe federal case should be dismissed as unripe. (NY Br. 15-16; Mass. Br. 21-22.) That is nonsense and should be rejected as such. "It is well-settled" that "[w]hen federal claims are premised on 42 U.S.C. § 1983," as they are here, "a plaintiff is not required to exhaust state judicial or administrative remedies" or to bring their "federal constitutional challenge[s] in state court before resorting to this Court." *Kachalsky* v. *Cacace*, 817 F. Supp. 2d 235, 250 (S.D.N.Y. 2011), *aff'd sub nom. Kachalsky* v. *Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012) (alterations omitted); *Kwong* v. *Bloomberg*, 876 F.

[52] The Massachusetts Attorney General contends that the parties' agreement relieving ExxonMobil of any obligation to produce documents until this litigation and the one in Massachusetts have been resolved somehow bears on the ripeness analysis, but her brief contains no support for that argument and ExxonMobil is aware of none. (Mass. Br. 22.)

Supp. 2d 246, 253 n.4 (S.D.N.Y. 2012). Were it otherwise, no Section 1983 case would ever proceed to federal court. Far from being anomalous, concurrent jurisdiction between federal and state courts is a "deeply rooted presumption" in our legal system, which generally grants plaintiffs the choice of pursuing their federal claims in either state or federal court.[53] *Mims* v. *Arrow Financial Services*, LLC, 565 U.S. 368, 378 (2012). None of the Attorneys General's arguments call into question the ripe nature of the controversy before this Court.

II. NO EXCEPTIONAL CIRCUMSTANCES JUSTIFY ABSTENTION UNDER *COLORADO RIVER*.

In the year-long pendency of this heavily contested litigation, no party has seriously argued for abstention under the "extraordinary and narrow" doctrine of *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 813 (1976). There is good reason for that silence. Under *Colorado River*, a federal court may abstain from exercising jurisdiction over a federal action that is "parallel" to a state court action "only in exceptional circumstances" where "the resolution of existing concurrent state-court litigation could result in comprehensive disposition of litigation." *Woodford* v. *Cmty. Action Agency of Greene Cnty., Inc.*, 239 F.3d 517, 521-22 (2d Cir. 2001) (citation omitted). As there is no pending state court proceeding capable of satisfying that standard, abstention would be improper in this case.

Abstention under *Colorado River* is exceedingly rare because it runs counter to two core propositions of federal jurisdiction: (i) the "virtually unflagging obligation of federal courts to exercise the jurisdiction given to them," and (ii) the permissibility of "an action in the state court" running parallel "to proceedings concerning the same matter in the Federal court having jurisdiction." *Colorado River*, 424 U.S. at 817. To displace those principles under *Colorado River*, courts must consider six factors: (1) "whether the controversy involves a *res* over which

[53] Despite Attorney General Schneiderman's suggestion to the contrary, ExxonMobil has never taken the position that its injury is an "inability to access a federal forum." (NY Br. 16.)

one of the courts has assumed jurisdiction"; (2) "whether the federal forum is less inconvenient than the other for the parties"; (3) whether abstention "will avoid piecemeal litigation"; (4) "the order in which the actions were filed, and whether proceedings have advanced more in one forum than in the other"; (5) "whether federal law provides the rule of decision"; and (6) "whether the state procedures are adequate to protect the plaintiff's federal rights." *Niagara Mohawk Power Corp.* v. *Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 100-01 (2d Cir. 2012) (citation omitted). When evaluating these factors, "the balance" should be "heavily weighted in favor of the exercise of jurisdiction," and, if a factor "is facially neutral, that is a basis for retaining jurisdiction, not for yielding it." *Id.* at 101 (citation omitted). Because those factors weigh in favor of this Court's retaining jurisdiction, the Attorneys General have failed to carry their "burden of persuasion" that abstention is warranted. *See Remigio* v. *Kelly*, No. 04 Civ. 1877 (JGK) (MHD), 2005 WL 1950138, at *12 (S.D.N.Y. Aug. 12, 2005).

A. Neither State Action Is Parallel to the Federal Action, which Precludes Abstention.

Colorado River abstention is inapplicable at the outset because neither state court action is parallel to the comprehensive proceedings before this Court. Actions are parallel "when the two proceedings are essentially the same; that is, there is an identity of parties, and the issues and relief sought are the same." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.* v. *Karp*, 108 F.3d 17, 22 (2d Cir. 1997). Any doubt as to parallelism should be resolved in favor of retaining federal jurisdiction. *See Artists Rights Enf't Corp.* v. *Estate of Robinson*, No. 15 Civ. 9878 (ER), 2017 WL 933106, at *7 (S.D.N.Y. Mar. 8, 2017).

The state court proceedings are not parallel to this action, where ExxonMobil asserts claims and seeks remedies that are not raised—and could not be litigated—in the state actions. This is the only action in which ExxonMobil has sought declaratory and injunctive relief. It is

the only action that includes both Attorneys General. And it is the only action in which ExxonMobil has asserted violations of its rights under the federal constitutional and conspiracy claims.[54] The Attorneys General do not claim otherwise. (NY Br. 20; Mass. Br. 10, 13.) Moreover, due to the narrow nature of the state proceedings in New York and Massachusetts courts, discussed below in Section II.D and Section III.C, this is the only action in which ExxonMobil could have sought complete relief on the claims asserted here.[55]

Where, as here, the actions are not "essentially the same," there can be no abstention under *Colorado River*. *See Karp*, 108 F.3d at 22. It is not enough even if the federal "action involves much of the same factual material as the suit in state court." *DDR Const. Servs., Inc.* v. *Siemens Indus., Inc.*, 770 F. Supp. 2d 627, 645 (S.D.N.Y. 2011). There must be an "identity of parties" and the same "issues and relief." *Karp*, 108 F.3d at 22. Where those factors are absent, courts will not abstain. For example, in *All. of Am. Insurers* v. *Cuomo*, the Second Circuit held that federal and state actions were not parallel where the plaintiffs in the federal action asserted federal constitutional claims that were not raised in the state action. 854 F.2d 591, 603 (2d. Cir. 1988). The existence of "some overlap of subject matter" was "not sufficient," because differences in issues raised "are strong factors against invoking exceptional circumstances as the basis for dismissal." *Id.* So too here. The fundamental differences between the state actions and this one—as to parties, claims, and relief—preclude a finding of parallelism.

B. This Is Not an *In Rem* Action, which Counsels Against Abstention.

As Attorney General Healey has conceded, the assertion of jurisdiction over property "is

---

[54] Recently, ExxonMobil challenged on preemption grounds a new subpoena the New York Attorney General issued on May 8, 2017, that seeks reserve and impairment documents not covered by the November 2015 subpoena.

[55] Contrary to the New York Attorney General's assertion, ExxonMobil has never admitted that it "could have raised all of its objections" to the subpoena in New York state court. (NY Br. 18.) All ExxonMobil has observed is that it could have filed a motion to quash in New York state court, a point that is not in dispute. ECF No. 214 at 15:15-23. ExxonMobil has never conceded (nor could it) that this lawsuit could have been filed in New York State court, raising the same claims against the same parties and seeking the same relief.

not at issue here," and therefore the first abstention factor "point[s] toward the exercise of federal jurisdiction." (Mass. Br. 15 n.18.) That concession aligns with Second Circuit precedent, recognizing that actions addressing control over real property present unique concerns not present in other types of litigation. *See Niagara*, 673 F.3d at 101; *FDIC* v. *Four Star Holding Co.*, 178 F.3d 97, 102 (2d Cir. 1999). The New York Attorney General distorts this uncontroversial proposition beyond recognition by suggesting it is satisfied because the "New York court has assumed control over Exxon's production of documents." (NY Br. 20.) Not so. Supervising the production of documents entails providing direction to the parties to guide their conduct—not control over property—and "[t]here is no bar against parallel *in personam* actions proceeding in two or more courts." *Woodford*, 239 F.3d at 522. Unsurprisingly, the New York Attorney General provides no authority for this misguided understanding of the first factor. This Court should reject it and mark this factor as weighing against abstention.

C. This Court Is No Less Convenient than the State Courts, which Counsels Against Abstention.

The New York Attorney General concedes that this Court and New York state court are "equally convenient" for him. (NY Br. 21.) Where, as here, the "federal court is just as convenient as the state court" abstention is disfavored.[56] *Woodford*, 239 F.3d at 523.

The Massachusetts Attorney General argues that proceeding in this forum is inconvenient because it would entail litigating "the same claims and issues on two fronts." (Mass. Br. 17-18.) That argument falls flat because litigating on "two fronts" is always present when the *Colorado River* doctrine is under consideration and therefore cannot, by definition, weigh in favor of abstention. *Vill. of Westfield* v. *Welch's*, 170 F.3d 116, 122 (2d Cir. 1999). Nor does the

[56] The New York Attorney General nevertheless argues that this factor weighs against abstention because ExxonMobil initially brought this action in a "dramatically inconvenient forum." (NY Br. 21.) That argument is meritless, as the convenience factor considers where the actions are currently litigated.

inconvenience of travelling from Massachusetts to New York suffice to demonstrate exceptional circumstances. Courts in this district have recognized that, "with modern travel options, the effective distance between this forum (New York) and the state forum [(Massachusetts)] is short and would not appear to pose undue hardship." *SST Glob. Tech., LLC* v. *Chapman*, 270 F. Supp. 2d 444, 465 (S.D.N.Y. 2003). Having travelled with staff to New York to announce and rally support for her investigation of ExxonMobil,[57] at a press conference that is a critical part of ExxonMobil's case, Attorney General Healey should not now be heard to complain that appearing in New York would be "time-consuming and expensive." (Mass. Br. 18.)

D. Abstention Would Not Avoid Piecemeal Litigation.

Abstaining from this action would not prevent piecemeal litigation; it would perpetuate it. The "primary context" in which piecemeal litigation justifies abstention is where declining jurisdiction over a narrower federal action would allow a comprehensive state court action that embraces all defendants and issues to proceed. *Woodford*, 239 F.3d at 524 (collecting cases). By contrast, abstention is disfavored where, as here, the state actions "are already in some sense 'piecemeal'; [while] the single federal case, by contrast, would go to the heart of all the issues in these cases." *Niagara*, 673 F.3d at 102; *see also Standard Chartered Bank* v. *DAA Sales Inc.*, No. 91 Civ. 1018 (LMM), 1991 WL 136033, at *1 (S.D.N.Y. July 17, 1991) (declining to abstain where "[p]iecemeal litigation already exists, and . . . would, no doubt, remain pending" due to pending actions in New York and Hong Kong). The "piecemeal" litigation in New York and Massachusetts courts does not counsel in favor of abstention because this federal action is the only action where all claims, parties, issues, and relief can be addressed.

Under Second Circuit precedent, avoiding piecemeal litigation does not supply a basis to

[57] According to expense reports prepared by her office, Attorney General Healey and at least two members of her staff travelled to New York in March 2016 in connection with her work on "Exxon + climate change." Ex. Q at 4-7.

abstain where the federal action raises even a single claim or issue not addressed in the state action. *See Bethlehem Contracting Co.* v. *Lehrer/McGovern, Inc.*, 800 F.2d 325, 328 (2d Cir. 1986). For instance, in *Woodford*, the Second Circuit held that piecemeal litigation did not favor abstention, even though the claims in all proceedings were based on the same misconduct, because "none of the claims asserted in the state actions is a federal claim." 239 F.3d at 523-24. Here too, abstention would not avoid piecemeal litigation because ExxonMobil asserts federal constitutional claims and conspiracy claims that are not asserted in either state action.

As Attorney General Schneiderman readily acknowledges, ExxonMobil has never claimed the investigation violates its constitutional rights in the New York State proceedings. (NY Br. 6, 15-16.) Nor did ExxonMobil assert a single one of its federal claims in Massachusetts state court. While ExxonMobil moved to set aside the CID in Massachusetts state court in part because it violated the Massachusetts constitution, the Massachusetts court did not address any of ExxonMobil's state constitutional claims, other than to expressly decline to even to consider free speech.[58] Because the question of whether the Attorneys General have violated ExxonMobil's constitutional rights will "not be resolved in [either] state case and will likely require federal resolution regardless of the outcome in [either] state case," abstention will not "reduce the likelihood of piecemeal litigation." *SST Glob. Tech.*, 270 F. Supp. 2d at 466.

Perhaps recognizing as much, the Attorneys General raise the specter of inconsistent rulings as a basis for abstention. (NY Br. 19-20; Mass. Br. 17.) But the "mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction." *Colorado River*, 424 U.S. at 816. That is particularly true in cases such as this one where the federal action joins all defendants, but the state actions do not. While a resolution of the claims before this Court will bind all parties on all claims, a judgment in the

[58] Ex. OO at 9 n.2.

less comprehensive state actions "pose[s] a risk of inconsistent outcomes not preventable by principles of res judicata and collateral estoppel." *Woodford*, 239 F.3d at 524. Indeed, a court in Massachusetts (whether at the appellate or trial level) could find its Attorney General culpable of misconduct, while a court in New York might acquit its Attorney General on essentially the same facts. Allowing this case to proceed to judgment presents no such risk.

Falling even wider of the mark are the Attorneys General's allegations of improper claim splitting. (NY Br. 18; Mass. Br. 19-20.) ExxonMobil filed this lawsuit to seek redress for constitutional violations committed by the Attorneys General before any state court litigation had begun. ExxonMobil never commenced any action in relation to the November 2015 subpoena in the state courts of New York but only responded to an action the New York Attorney General brought against PwC after discovery in this action had already been ordered. The special appearance that ExxonMobil entered in Massachusetts state court after filing this action was unambiguously presented as prophylactic in nature (to avoid forfeiture of rights) and contained a request for a stay.[59] Abstention is unwarranted where, as here, the "plaintiff offered to stay" any "overlapping state-court claims." *Woodford*, 239 F.3d at 524 (quotation marks omitted).

E. The First-Filed Federal Action Has Advanced Further than the State Actions.

The order in which the actions were filed and the course of the proceedings also weigh against abstention. There is no legitimate room to dispute that this action was the first filed. ExxonMobil brought this action on June 15, 2016, which was one day before ExxonMobil moved to set aside the CID in Massachusetts, four months before the New York Attorney General sued ExxonMobil's independent auditor in New York State court (which is irrelevant to these proceedings in any event), and five months before the New York Attorney General sought

[59] *See, e.g.*, Ex. NN at 2.

judicial relief as to ExxonMobil in New York State court.

This action has also advanced further than either state action toward resolving ExxonMobil's federal constitutional and conspiracy claims. Following several rounds of briefing and court appearances, Judge Kinkeade issued two opinions raising concerns about the actions of the Attorneys General and found that "[t]he merits of each of Exxon's [federal] claims involve important issues that should be determined by a court."[60] Meanwhile, ExxonMobil has not even claimed an infringement of its federal constitutional rights in the state forums; the state courts thus cannot have made progress toward the resolution of those federal claims. As a result, "[i]n realistic terms, the federal suit [i]s running well ahead of the state suit[s]," which do not address ExxonMobil's federal constitutional or conspiracy claims. *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

In contrast, aside from the New York Attorney General's unsuccessful attempt to compel ExxonMobil to produce documents outside the scope of the November 2015 subpoena, all that has occurred in the New York action with regard to that subpoena are discovery conferences and letter writing related to ExxonMobil's technical compliance. Not a single opinion has issued from the New York state court, other than a ruling on whether the accountant-client privilege protects materials responsive to the PwC subpoena, which is irrelevant to the federal constitutional claims raised in this action.[61]

Even though the Massachusetts court granted the Massachusetts Attorney General's motion to compel compliance with the CID, that opinion did not affect the progress of the federal

---

[60] ECF No. 180 at 2; *id.* at 5 (expressing concern that the Attorneys General's investigations were means "to further their personal agendas by using the vast power of the government to silence the voices of all those who disagree with them"); ECF No. 73 at 5 ("The Court finds allegations about Attorney General Healey and the anticipatory nature of Attorney General Healey's remarks about the outcome of the Exxon investigation to be concerning to this Court.").

[61] The New York Attorney General argues that the appeal pending in the First Department supports abstention (NY Br. 21), but it pertains only to the assertion of accountant-client privilege in the PwC litigation.

case because it (i) did not adjudicate ExxonMobil's federal constitutional, preemption, or conspiracy claims, (ii) did not address ExxonMobil's claims under the Massachusetts constitution, (iii) applied a different legal standard to ExxonMobil's claims than would apply in a federal action, and (iv) did not offer an opportunity for discovery that may be available in the federal action. Under similar circumstances, courts within the Second Circuit have ruled that a state court decision does not favor abstention. For example, in *NAACP* v. *A.A. Arms, Inc.*, Judge Weinstein rejected abstention, even though a state court had issued a decision, because that decision had "little, if any, impact on the instant case," as it applied different legal standards and discovery was not available. No. 99 CV 3999 (JBW), 2003 WL 1049011, at *4 (E.D.N.Y. Feb. 24, 2003). The limited progress of the later-filed action in Massachusetts cannot justify abstention.

F. Federal Law Provides the Rule of Decision.

Federal law provides the rule of decision for ExxonMobil's principal claims in this action—another factor weighing against abstention. *See Woodford*, 239 F.3d at 522. Where, as here, federal constitutional claims are asserted, "federal courts are more appropriate arbiters." *All. of Am. Insurers*, 854 F.2d at 603. That is so even when the claims arise from allegations of misconduct by state officers. The Attorneys General argue otherwise, claiming that state law authorized them to engage in the conduct that violated ExxonMobil's rights. (NY Br. 21-22; Mass. Br. 19-20.) But under the Supremacy Clause, it is no defense to a charge of unconstitutional official action to say it was authorized by state law. *See Farid* v. *Smith*, 850 F.2d 917, 921 (2d Cir. 1988).

Even if state law provided the rule of decision, this factor would not favor abstention because the "the state law issues" are not "novel or particularly complex." *Vill. of Westfield*, 170 F.3d at 124. Other judges in this district have capably construed the state laws that might be

tangentially relevant here. *See, e.g.*, *MBIA Inc.* v. *Fed. Ins. Co.*, 652 F.3d 152, 159, 162 (2d Cir. 2011) (addressing concerns related to a subpoena issued by the New York Attorney General); *Clearing House*, 510 F.3d at 124 (same); *Miller* v. *Hyundai Motor Am.*, No. 15-CV-4722 (TPG), 2016 WL 5476000, at *5-6 (S.D.N.Y. Sept. 28, 2016) (interpreting and applying M.G.L. c. 93A). And the Massachusetts statute governing the CID instructs courts to "be guided by" federal interpretations of the Federal Trade Commission Act, on which the state law was modeled, when construing its provisions. *See Purity Supreme, Inc.* v. *Att'y Gen.*, 380 Mass. 762, 766 (1980).

G. The State Procedures Are Inadequate to Provide Complete Relief.

The sixth factor—whether "the state court is competent to adjudicate plaintiff's claims"—is "consequential only when the answer is negative and thus weighs in favor of federal jurisdiction." *Dunkin' Donuts Franchised Restaurants LLC* v. *Rijay, Inc.*, No. 06 Civ. 8237 (WCC), 2007 WL 1459289, at *6 (S.D.N.Y. May 16, 2007). Here, ExxonMobil can obtain complete declaratory and injunctive relief for its federal constitutional and conspiracy claims in only one forum: federal court. Because the state-court litigation will not provide "an adequate vehicle for the complete and prompt resolution of the issues between the parties," this factor weighs against abstention. *Vill. of Westfield*, 170 F.3d at 124 (noting this factor is "more important when it weighs in favor of federal jurisdiction").

Where, as here, claims "are not and were not pending in the other [state] actions," courts consider the state proceedings incapable of furnishing complete relief and decline to abstain. *Mersentes* v. *Corrigan*, No. 09 Civ. 486 (LAP), 2010 WL 3959615, at *4 (S.D.N.Y. 2010). State procedures are also inadequate when the federal plaintiff does not have "access to his full range of [federal] remedies in state court." *Wiggins* v. *Conn.*, 205 F.3d 1327, 2000 WL 19094, at *1 (2d Cir. 2000). Even where the state court can afford much of the same relief as the federal court, abstention is disfavored where a single remedy available in federal court is unavailable in

state court. *See Woodford*, 239 F.3d at 525 (declining to abstain where "[a]wards of attorneys' fees are not available on the claims asserted in the state-court actions").

The state court proceedings in New York and Massachusetts are inadequate to provide complete relief to ExxonMobil because they did not afford an opportunity to pursue the same claims or relief that ExxonMobil seeks here. The violation of ExxonMobil's constitutional rights—which is before this Court—is not now and has never been considered by any New York State court. Simply put, there is nothing in New York State court in favor of which to abstain. Even if ExxonMobil attempted to raise all the claims pending here in New York State court (which it is under no obligation to do), the effort would be futile. The proceedings there pertain to compliance with specific subpoenas, and such proceedings are generally limited to "the issues of the authority of the investigating body and whether the inquiry falls within the scope of that authority." *Nicholson* v. *State Comm'n on Judicial Conduct*, 50 N.Y.2d 597, 610 (1980). As for remedies, it is far from clear that a New York State court could issue an injunction in such a proceeding. *See Carlisle* v. *Bennett*, 268 N.Y. 212, 217 (1935); *In re Lipson*, 257 N.Y.S.2d 316, 318-19 (N.Y. Sup. Ct. 1964).

ExxonMobil would fare no better in Massachusetts. Because ExxonMobil entered a special appearance in the Massachusetts Superior Court to contest that court's jurisdiction, ExxonMobil could not have brought any affirmative claims in Massachusetts without waiving its objections to personal jurisdiction. *See Lamarche* v. *Lussier*, 65 Mass. App. Ct. 887, 889 n.8 (2006) ("[A] defendant who files a special appearance, but seeks relief beyond the narrow field covered by that appearance, brings himself within the jurisdiction of the court.").

In addition, the proceedings authorized in Massachusetts to challenge a CID are narrow proceedings, akin to a stand-alone motion for a protective order to prevent improper discovery.

See Att'y Gen. v. *Bodimetric Profiles*, 404 Mass. 152, 154 (1989). The authorizing statute, M.G.L. c. 93A, § 6(7), allows parties to "modify or set aside" a CID "in accordance with the standards set forth" in Mass. R. Civ. P. 26(c), which protects CID recipients from "annoyance, embarrassment, oppression, or undue burden or expense." Such limited proceedings do not provide an opportunity to seek declaratory or injunctive relief, as ExxonMobil does here. *See, e.g.*, *Monsanto Co.* v. *Victory Wholesale Grocers*, No. 08-MC-134, 2008 WL 5100178, at *1 (E.D.N.Y. Nov. 26, 2008) (noting that "no substantive causes of action are involved" where "miscellaneous action was opened solely to address the motion to quash the subpoena"). Nor did they permit ExxonMobil to join the New York Attorney General as a party or to assert freestanding federal constitutional claims.

It is of no moment that the Attorneys General fault ExxonMobil for not asserting federal claims as a defense in the state court actions. (NY Br. 18-19; Mass. Br. 19.) "Having properly brought [its] federal claims in federal court, [ExxonMobil] [is] entitled to pursue those claims" in that forum. *Woodfo*rd, 239 F.3d at 525. ExxonMobil was under no obligation to do otherwise.

H. ExxonMobil's Filing of the Federal Action Was Not Vexatious.

The Attorneys General urge this Court to conclude that it was "vexatious" of ExxonMobil to file this lawsuit. (NY Br. 22-25; Mass. Br. 20 n.19.) The Supreme Court has never adopted this consideration as a seventh factor in its *Colorado River* abstention analysis, *see World Wrestling Entm't, Inc.* v. *Jakks Pac., Inc.*, 425 F. Supp. 2d 484, 513 n.20 (S.D.N.Y. 2006), *aff'd*, 328 F. App'x 695 (2d Cir. 2009), and there is no good reason for this Court to do so here. Even if the Court considered this question, it would find nothing vexatious about the serious claims ExxonMobil has presented here.

Courts have found the filing of a federal action to be vexatious in instances which have no applicability to the current case—where a plaintiff "sues in the federal court on the same

cause of action *after* he has suffered some failures in the earlier state court action" and there is a "hostile history" between the parties. *Telesco* v. *Telesco Fuel & Masons' Materials*, *Inc.*, 765 F.2d 356, 363 (2d Cir. 1985) (emphasis added). In contrast, even when state and federal actions arise out of similar facts, courts have rejected claims of vexatious litigation if the federal plaintiff, like ExxonMobil, asserts additional federal claims against new defendants and seeks different relief in the federal case. *See Linens of Europe, Inc.* v. *Best Mfg., Inc.*, No. 03 Civ. 9612 (GEL), 2004 WL 2071689, at *5 n.5 (S.D.N.Y. Sept. 16, 2004).

While Attorney General Healey accuses ExxonMobil of vexatious conduct, she offers no support for her allegation, despite bearing the burden of proof. (Mass. Br. 20 n.19.) That is reason enough to reject it. The New York Attorney General takes issue with ExxonMobil's choice of venue (NY Br. 23-24), but there is nothing untoward in ExxonMobil's commencing an action in the venue where it is domiciled and where it suffered injury. Nor can Attorney General Schneiderman impute vexatious motives to ExxonMobil solely on the basis that, following the jurisdictional discovery order, ExxonMobil issued discovery requests seeking materials directly related to the allegations Judge Kinkeade found to justify discovery.[62] Assuming this seventh factor is even considered, it nevertheless weighs no more in favor of abstention than do the previous six. On this showing, abstention under *Colorado River* would be improper.

III. THE NARROW DECISION IN MASSACHUSETTS STATE COURT DOES NOT PRECLUDE EXXONMOBIL'S FEDERAL CLAIMS BEFORE THIS COURT.

Preclusion provides no barrier to adjudicating ExxonMobil's claims. Attorney General

[62] Contrary to Attorney General Schneiderman's accusation that ExxonMobil "noticed the deposition of the NYOAG Bureau Chief" in order to obtain "investigative evidence," (NY Br. 23), ExxonMobil noticed the deposition of that staffer because documents released pursuant to public records requests made by third parties reveal that this member of the Attorney General's staff (i) organized, attended, and moderated the closed-door meetings with Frumhoff and Pawa prior to the March 29 press conference, (ii) instructed Pawa not disclose his involvement in those meetings, and (iii) was a party to numerous email exchanges with other special interests, as well as (iv) exchanges between coalition members' offices to develop the improper goals of the coalition and the common interest agreement. Exs. F, H, I, J, K, L, P.

Healey interchangeably invokes both claim and issue preclusion because she cannot meet her burden of proving that either applies. *See Day* v. *Kerkorian*, 61 Mass. App. Ct. 804, 809 (2004). Under Massachusetts law, claim preclusion bars only litigation of claims where a prior action involved (i) the same parties, (ii) the same causes of action, and (iii) a final judgment on the merits. *Kobrin* v. *Bd. of Registration in Med.*, 444 Mass. 837, 843 (2005). Issue preclusion prevents re-litigation of an issue only where (i) the contested issue is "identical" to an issue in the prior case, (ii) that issue was resolved by a "final judgment on the merits," and (iii) the party to be precluded was a party to the prior action. *Tuper* v. *N. Adams Ambulance Serv., Inc.*, 428 Mass. 132, 134 (1998). The Due Process Clause prohibits either form of preclusion in the absence of "a 'full and fair opportunity to litigate' the claim or issue" in the prior action. *Kremer* v. *Chem. Const. Corp.*, 456 U.S. 461, 481-82 (1982) (citation omitted).

Both forms of preclusion are inapplicable here for at least three reasons. First, it is beyond dispute that not one of the federal claims ExxonMobil asserts here was brought in the Massachusetts State court proceedings, which served a different function, afforded different relief, and applied different standards than this federal action. Second, the state court—which considered the enforceability of the CID solely under Massachusetts law—did not render a final decision on the merits of any of the claims or issues ExxonMobil presents here. Third, the Due Process Clause forbids preclusion of a plenary federal action under 42 U.S.C. § 1983 based on a limited state court proceeding governed by rules for adjudicating discovery disputes.

A. The Claims and Issues in the Actions Are Insufficiently Similar.

Attorney General Healey's laundry list of preclusion claims glosses over the essential differences between the claims and issues presented in the state court and those presented here. (Mass. Br. 9-13.) In state court, ExxonMobil sought to quash the CID exclusively under Massachusetts law. Before this Court, however, ExxonMobil seeks injunctive and declaratory

relief for violations of its rights under the U.S. Constitution. ExxonMobil has not raised the claims pending here in Massachusetts state court, nor has it sought the relief it seeks here.

Attorney General Healey does not argue otherwise. Instead, she points to facts that are common to both proceedings. But Massachusetts courts refuse to apply preclusion simply because two actions share underlying facts. The Massachusetts Supreme Judicial Court applied that principle in *Heacock* v. *Heacock*, holding that a prior divorce action did not bar a subsequent tort action between the former spouses based on overlapping facts where the actions did not share "the same underlying claim," did not afford the same relief, and "the purpose" of each action was different. 402 Mass. 21, 24 (1988). So too here. ExxonMobil's causes of action and requested relief are different from those in the prior proceeding, which served only the limited function of adjudicating objections to a CID.[63] Common facts do not eliminate those differences.

Claims and issues likewise cannot be deemed identical where "the law applicable" differs. *See Petrillo* v. *Zoning Bd. of Appeals*, 65 Mass. App. Ct. 453, 458-59 (2006). For instance, in *Tuper*, the Supreme Judicial Court held that a prior proceeding had no preclusive effect on an issue that was decided under a subjective standard, but would be governed by an objective standard in the subsequent case. 428 Mass. at 135-36. That difference made it "possible, and even plausible" that the two proceedings could permissibly reach different results. *Id*. Embracing this fallacy, Attorney General Healey asserts that "Exxon cannot make out a claim for unreasonable search under either the Fourth Amendment or the Massachusetts constitution" because the state court "deemed the CID's requests reasonable under state law."

[63] The Massachusetts Attorney General relies heavily on *Temple of Lost Sheep Inc.* v. *Abrams,* 930 F.2d 178, 181-82 (2d Cir. 1991), but that case did not apply Massachusetts law, which governs here. *See Giannone* v. *York Tape & Label Inc.*, 548 F.3d 191, 192-93 (2d Cir. 2008). In addition, unlike here, the plaintiffs in *Temple* had already raised federal constitutional claims in a prior proceeding. *See Abrams* v. *Temple of the Lost Sheep, Inc.*, 562 N.Y.S.2d 322, 325 (Sup. Ct. 1990).

(Mass. Br. 19.) But state law is different than federal law. To pass muster under the Superior Court's reading of state law, all the Attorney General needed to establish is that she "*believes*" ExxonMobil violated state law and had no burden to satisfy "a 'reasonable' standard."[64] The Fourth Amendment, by contrast, imposes a requirement of "objective reasonableness" on any search and seizure. *See Hudson* v. *N.Y.C.*, 271 F.3d 62, 68 (2d Cir. 2001). As in *Tuper*, the differences between these standards could lead to different results and therefore bar preclusion.

It would be equally improper to deprive ExxonMobil of an opportunity to be heard because it was forced, on pain of forfeiture, to contest the Massachusetts court's jurisdiction and the CID's document demands in a limited proceeding akin to a discovery hearing. *See Bodimetric Profiles*, 404 Mass. at 154 (holding "failure to bring such a motion . . . constitutes waiver" of "all objections to the C.I.D."). In *Beals* v. *Commercial Union Ins. Co.*, the Massachusetts Appeals Court refused to apply res judicata to bar a consumer's "bad faith" claims where factually related claims had been adjudicated under a "statutory mandate [that was] narrow in scope." 61 Mass. App. Ct. 189, 194 (2004). Applying preclusion here would work a similarly impermissible result, barring ExxonMobil's federal claims due to the statutory requirement for filing objections under the narrow parameters of M.G.L. c. 93A § 6(7).

B. The Massachusetts Court Did Not Render a Final Judgment on the Merits.

The absence of a "final judgment on the merits" independently forecloses both forms of preclusion. *See Kobrin*, 444 Mass. at 843. Claim preclusion does not apply because none of ExxonMobil's federal claims were "actually and necessarily decided in a prior action." *Bernier* v. *Bernier*, 449 Mass. 774, 797 (2007). First, there can be no claim preclusion because ExxonMobil's federal constitutional claims, conspiracy claims, and preemption claims were "never at issue in the first action." *Ajemian* v. *Yahoo!, Inc.*, 83 Mass. App. Ct. 565, 572 (2013).

[64] Ex. OO at 2, 8.

Second, the state court declined to address a single one of ExxonMobil's claims under the Massachusetts Constitution, except to expressly state that it would "not address Exxon's arguments regarding free speech at this time."[65] While Attorney General Healey claims that the state court rejected ExxonMobil's Fourth Amendment claims (Mass. Br. 12), it did no such thing. The state court limited its review to specificity, overbreadth, and undue burden in the context of a conventional motion to quash, but had nothing to say about the Fourth Amendment's reasonableness requirement or prohibition of fishing expeditions.[66] Third, the decision does not once discuss the propriety of Attorney General Healey's investigation of *investor* deception, which is the basis for ExxonMobil's preemption claims.

Issue preclusion is equally inapplicable. That doctrine similarly requires that any issue to be precluded was "actually litigated and determined by a valid and final judgment," which "is supported by a reasoned opinion," and in which the issue was "treated as essential." *Jarosz* v. *Palmer*, 436 Mass. 426, 530-31, 533 (2002). None of the issues raised here satisfy that standard. Attorney General Healey believes that the state court's refusal to disqualify her office means that ExxonMobil is "collaterally estopped from litigating in this forum issues related to Attorney General Healey's alleged bad faith and bias." (Mass. Br. 11.) Not so. The Massachusetts Supreme Judicial Court has expressed skepticism that a motion for disqualification can "*ever* represent a final rejection of a claim of fundamental right." *Jarosz*, 436 Mass. at 535 (emphasis added). Moreover, the state court did not resolve the questions of bias or bad faith in the context of a First or Fifth Amendment claim. It evaluated the different questions (i) whether ExxonMobil "met its burden

---

[65] Ex. OO at 9 n.2. The Attorney General maintains that that court's refusal to rule on ExxonMobil free speech claims means that the CID "would not implicate the First Amendment." (Mass. Br. 10.) To the contrary, preclusion requires that claims and issues be "actually and necessarily decided," not decided by implication or, as here, deliberately set aside until an investigation uncovers their merits. *See Leahy* v. *Local 1526, Am. Fed'n of State, Cnty. & Mun. Emps.*, 399 Mass. 341, 352 (1987). Indeed, "preclusion is not available" if there is even "ambiguity concerning the issues, the basis of decision, and what was deliberately left open by the judge." *Kerkorian*, 61 Mass. App. Ct. at 809; *Kirker* v. *Bd. of App. of Raynham*, 33 Mass. App. Ct. 111, 113 (1992).

[66] Ex. OO at 10-11.

of showing that the Attorney General is acting arbitrarily or capriciously toward it," so as to justify quashing the CID, and (ii) whether the Attorney General's remarks at the press conference, taken alone, were sufficient to warrant disqualification.[67] The resolution of those questions does not "conclusively resolve" whether viewpoint discrimination animated Attorney General Healey's investigation or whether her prejudgment and bias violated the Due Process Clause. *See Kelso* v. *Kelso*, 86 Mass. App. Ct. 226, 233 (2014).

C. The State Proceedings Did Not Provide a "Full and Fair Opportunity" to Litigate Claims.

Even if Massachusetts law permitted the preclusion of ExxonMobil's claims, federal law would prevent preclusion here. Preclusion "does not apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue." *Kremer*, 456 U.S. at 480-81 (1982). Preclusion based on an earlier subpoena enforcement proceeding is inappropriate where, as here, the opportunity to litigate was "narrower than the opportunity available in a plenary civil action" due to the proceeding's (i) being "summary in nature," (ii) the "heavy burden" to obtain relief, and (iii) lack "of discovery." *Sprecher* v. *Graber*, 716 F.2d 968, 972 (2d Cir. 1983) (citation omitted).

First, as described above in Section II.G, the state court proceeding was not a plenary civil action, but a narrow, summary proceeding, which merely authorized ExxonMobil to test whether the CID complied with Massachusetts law. And even that right was limited by the fact that ExxonMobil could do little more than challenge the state court's jurisdiction without risking waiver of its jurisdictional objections. *See Lamarche*, 65 Mass. App. Ct. at 890.

Second, the motion to quash proceedings did not afford the aid of discovery, which is available only in a "pending *action*" and not in a limited motion proceeding to challenge a CID.

---

[67] *Id.* at 8-9, 11-13.

Mass. R. Civ. P. 26(b)(1) (emphasis added). Numerous courts have agreed with *Sprecher* that "summary" proceedings "not based on any discovery" do not support preclusion. *See, e.g.*, *In re Parmalat Secs. Litig.*, 493 F. Supp. 2d 723, 736-37 (S.D.N.Y. 2007) (quotation marks omitted).

Third, the burdens ExxonMobil faced in challenging the CID in state court are heavier than those it faces in federal court. As the Superior Court noted, ExxonMobil shouldered a "heavy burden" when challenging the CID in state court.[68] In federal court, by contrast, ExxonMobil need only prove by a "preponderance of the evidence" (the lightest evidentiary burden) that its rights have been violated. *See, e.g.*, *Toliver* v. *N.Y.C. Dep't of Corr.*, 202 F. Supp. 3d 328, 334 (S.D.N.Y. 2016). In light of these critical disparities, the Due Process Clause bars preclusion of ExxonMobil's federal claims.

IV. ATTORNEY GENERAL HEALEY IS SUBJECT TO THIS COURT'S JURISDICTION.

Attorney General Healey's perfunctory objection to this Court's jurisdiction cannot be reconciled with her participation in the March 2016 press conference, which according to Judge Kinkeade formed "a substantial part of the events . . . giving rise to the claim[s]" in this litigation. (ECF No. 180.) By participating in that press conference, Attorney General Healey engaged in conduct satisfying New York's long-arm statute, the requirements of the Due Process Clause, and ExxonMobil's burden at this pre-discovery stage to make a prima facie showing of jurisdiction. *See Kronisch* v. *United States*, 150 F.3d 112, 130 (2d Cir. 1998).

Under the relevant portions of New York's long-arm statute, personal jurisdiction may be asserted over a non-resident who, in person or through an agent, (i) "transacts any business within the state," N.Y.C.P.L.R. § 302(a)(1), or (ii) "commits a tortious act within the state," N.Y.C.P.L.R. § 302(a)(2). Both Sections 302(a)(1) and 302(a)(2) of New York's long-arm

[68] Ex. OO at 2.

statute independently justify the exercise of personal jurisdiction here. Although Attorney General Healey asserts that her participation in "a single meeting and press conference in New York" and the common interest agreement cannot establish sufficient contacts (Mass. Br. 23-24), courts routinely find Section 302(a)(1) satisfied by "proof of a single transaction in New York," *George Reiner & Co.* v. *Schwartz*, 41 N.Y.2d 648, 651-52 (1977), such as a one-day visit, *see Geller* v. *Newell*, 602 F. Supp. 501, 503 (S.D.N.Y. 1984), or a meeting, "which involved defendant's personal presence" and "led to further contacts and dealings" that culminated outside the state, *see M. Fabrikant & Sons, Inc.* v. *Adrianne Kahn, Inc.*, 533 N.Y.S.2d 866, 867-68 (1st Dep't 1988). Indeed, a visit to New York, which merely "la[ys] the groundwork for" the challenged misconduct can justify jurisdiction. *Kronisch*, 150 F.3d at 131.[69]

Jurisdiction is also proper under Section 302(a)(2) because Attorney General Healey was physically present in New York, *Launer* v. *Buena Vista Winery, Inc.*, 916 F. Supp. 204, 210-11 (E.D.N.Y. 1996), where ExxonMobil alleges she engaged in substantial tortious acts, *Bulova Watch Co.* v. *K. Hattori & Co.*, 508 F. Supp. 1322, 1346-47 (E.D.N.Y. 1981). It was during the March 2016 meeting in New York City that Attorney General Healey publicly announced her investigation of ExxonMobil, prejudicially pledged to hold ExxonMobil accountable for speech that did not align with her environmental politics, conspired with other state officials and private interests, and entered into an oral common interest agreement later memorialized in a document describing the Attorneys General's intent to regulate speech.[70] Nothing more is required under Section 302(a)(2). *See Cleft of the Rock Found.* v. *Wilson*, 992 F. Supp. 574, 584-85 (E.D.N.Y.

---

[69] The continued participation of the Massachusetts Attorney General's Office in "a working group to address Exxon specifically, and the fossil fuel industry generally" in the wake of the press conference and leading up to the issuance of the CID, *see* Ex. M at 1, further establishes that the press conference was "important in . . . structuring the relationship among the parties," *Traffix, Inc.* v. *Herold*, 269 F. Supp. 2d 223, 227 (S.D.N.Y. 2003), and solidifying her role in the unlawful conspiracy.

[70] Ex. E; Ex. I at 2.

1998) (exercising jurisdiction under Section 302(a)(2) where "the initial meetings . . . which laid the foundation for the defendants' alleged . . . schemes[ ] occurred in New York"). Indeed, the execution of the common interest agreement alone is sufficient to warrant the exercise of jurisdiction. *See McNamee* v. *Clemens*, 762 F. Supp. 2d 584, 594-96 (E.D.N.Y. 2011).

The requirements of the Due Process Clause are also met here. Due process permits the exercise of specific personal jurisdiction over a defendant where the defendant has "certain minimum contacts" with the forum such "that the exercise of jurisdiction is reasonable in the circumstances." *Eades* v. *Kennedy, PC Law Offices*, 799 F.3d 161, 168-69 (2d Cir. 2015). The requisite minimum contacts exist where the defendant "purposefully availed itself of the privilege of doing business in the forum" and the litigation "arises out of, or relates to," those contacts. *Licci ex rel. Licci* v. *Lebanese Canadian Bank, SAL*, 732 F.3d 161, 170 (2d Cir. 2013).

Despite her extensive suit-related contacts with New York, Attorney General Healey argues that ExxonMobil's claims "lack a 'substantial nexus' to New York" because they pertain only to the CID issued in Massachusetts. (Mass. Br. 24.) That contention not only contradicts the findings underlying Judge Kinkeade's transfer order, but it also disregards ExxonMobil's factual allegations, which are not limited to the issuance of the CID. Rather, ExxonMobil has alleged constitutional violations arising out of the investigation as a whole and "the actions of the attorneys general at, and before, the press conference," as well as their participation in a conspiracy firmly rooted in New York.[71] That the CID issued from Massachusetts is of no moment because "[t]here is no requirement that jurisdiction be grounded upon either the final act or the ultimate act causing the injury." *Southridge Capital Mgmt., LLC* v. *Lowry*, 188 F. Supp. 2d 388, 398 (S.D.N.Y. 2002) (quoting *Legros* v. *Irving*, 327 N.Y.S.2d 371, 373-74 (1st Dep't 1971)). It is sufficient where, as here, the litigation "is related to and grows out of" contacts with

[71] ECF No. 180 at 3.

New York. *Legros*, 327 N.Y.S.2d at 374.

After sufficient minimum contacts have been established (as they have here), the burden is on the defendant "to present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Eades*, 799 F.3d at 169. Attorney General Healey has failed to do so. First, her travel, along with staff, to attend the press conference in New York undercuts any claim of undue hardship. *See Thorsen* v. *Sons of Norway*, 996 F. Supp. 2d 143, 159 (E.D.N.Y. 2014); *see also Launer*, 916 F. Supp. at 210 ("It is important to emphasize that defendants had a choice of where to conduct these meetings and chose New York."). Second, New York has a strong interest in preventing and adjudicating alleged tortious acts committed within its borders. *See LaChapelle* v. *Torres*, 1 F. Supp. 3d 163, 180 (S.D.N.Y. 2014). Third, both ExxonMobil and the interstate judicial system have "a decided interest in a comprehensive resolution of related claims in a single litigation against . . . related defendants," *Simon* v. *Philip Morris, Inc.*, 86 F. Supp. 2d 95, 134 (E.D.N.Y. 2000), because it is "burdensome and inefficient to pursue separate litigation in multiple forums against [non-resident defendants] while an action arising out of the same basic facts is litigated in New York." *LaChapelle*, 1 F. Supp. at 179. Fourth, the sovereign interests of Massachusetts do not render the exercise of jurisdiction unreasonable because due process limits on personal jurisdiction "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Ins. Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). There is nothing unreasonable about a federal court exercising personal jurisdiction over an official of another state who "deliberately travel[s] to" the forum and "extensively interact[s] with officials" of that state. *Lee* v. *City of L.A.*, 250 F.3d 668, 694 (9th Cir. 2001); *Doe* v. *Del. State Police*, 939 F. Supp. 2d 313, 335 (S.D.N.Y. 2013) (citing *Lee* with approval).

CONCLUSION

If the position of the Attorneys General is accepted, federal courts could never adjudicate a challenge brought under federal law to the constitutionality of a subpoena issued by state officials. That would set a dangerous precedent, but there is no reason for this Court to embrace it, unsupported as it is by the doctrines of ripeness or *Colorado River* abstention. ExxonMobil has made a robust showing that the Attorneys General are engaged in a conspiracy to discriminate against perceived viewpoints on climate change policy that do not align with their politics. Because the investigations are currently violating ExxonMobil's First Amendment rights, ExxonMobil's claims are ripe. No exceptional circumstances justify abstaining from adjudicating those claims under the narrow doctrine of *Colorado River*, particularly because neither the New York nor Massachusetts state court has adjudicated or will adjudicate whether these investigations violate ExxonMobil's rights under the United States Constitution. Nor are ExxonMobil's federal constitutional claims precluded by the decision rendered in the narrow Massachusetts state court proceedings, which upheld the CID solely on the basis that it did not exceed the Massachusetts Attorney General's powers under state law. Finally, because a substantial part of the events giving rise to ExxonMobil's claims against Attorney General Healey occurred in New York, she is properly subject to the jurisdiction of this Court. For these reasons, the motions to dismiss should be denied.

Dated: June 16, 2017

EXXON MOBIL CORPORATION

By: /s/ Patrick J. Conlon
Patrick J. Conlon
patrick.j.conlon@exxonmobil.com
Daniel E. Bolia (*pro hac vice*)
daniel.e.bolia@exxonmobil.com
1301 Fannin Street
Houston, TX 77002
(832) 624-6336

/s/ Nina Cortell
Nina Cortell (*pro hac vice*)
nina.cortell@haynesboone.com
HAYNES & BOONE, LLP
2323 Victory Avenue
Suite 700
Dallas, TX 75219
(214) 651-5579
Fax: (214) 200-0411

/s/ Ralph H. Duggins
Ralph H. Duggins (*pro hac vice*)
rduggins@canteyhanger.com
Philip A. Vickers (*pro hac vice*)
pvickers@canteyhanger.com
CANTEY HANGER LLP
600 West 6th Street, Suite 300
Fort Worth, TX 76102
(817) 877-2800
Fax: (817) 877-2807

/s/ Theodore V. Wells, Jr.
Theodore V. Wells, Jr.
twells@paulweiss.com
Michele Hirshman
mhirshman@paulweiss.com
Daniel J. Toal
dtoal@paulweiss.com
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

Justin Anderson
janderson@paulweiss.com
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
2001 K Street, NW
Washington, D.C. 20006-1047
(202) 223-7300
Fax: (202) 223-7420

Counsel for Exxon Mobil Corporation

FILED
TARRANT COUNTY
3/27/2018 12:10 PM
THOMAS A. WILDER
DISTRICT CLERK

CAUSE NO. 096-297222-18

EXXON MOBIL CORPORATION,	§	IN THE DISTRICT COURT OF
	§	
	§	TARRANT COUNTY, TEXAS
Petitioner.	§	
	§	96th JUDICIAL DISTRICT

SUBMISSION OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

Exxon Mobil Corporation ("ExxonMobil") has filed a Request for Findings of Fact and Conclusions of Law. With respect to that request, ExxonMobil submits the Proposed Findings of Fact and Conclusions of Law attached hereto as Exhibit "A." In light of Respondents' stated intention to file an appeal, Texas Rule of Appellate Procedure 28.1(c) provides that the Court may file its findings "within 30 days after the order is signed," which in this case would be April 13, 2018.

Dated: March 27, 2018

Respectfully submitted,

EXXON MOBIL CORPORATION

By: /s/a Patrick J. Conlon
Patrick J. Conlon
State Bar No. 24054300
patrick.j.conlon@exxonmobil.com
Daniel E. Bolia
State Bar No. 24064919
daniel.e.bolia@exxonmobil.com
1301 Fannin Street
Houston, TX 77002
(832) 624-6336

/s/ Ralph H. Duggins
Ralph H. Duggins
State Bar No. 06183700
rduggins@canteyhanger.com
Philip A. Vickers
State Bar No. 24051699
pvickers@canteyhanger.com
600 W. 6th St. #300
Fort Worth, TX 76102
(817) 877-2800
Fax: (817) 877-2807

/s/ Theodore V. Wells, Jr.
Theodore V. Wells, Jr.
(*pro hac vice* pending)
Daniel J. Toal
(*pro hac vice* pending)
Jaren Janghorbani
(*pro hac vice* pending)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

/s/ Nina Cortell
Nina Cortell
State Bar No. 04844500
nina.cortell@haynesboone.com
HAYNES & BOONE, LLP
301 Commerce Street
Suite 2600
Fort Worth, TX 76102
(817) 347-6600
Fax: (817) 347-6650

Justin Anderson
(*pro hac vice* pending)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
2001 K Street, NW
Washington, D.C. 20006-1047
(202) 223-7300
Fax: (202) 223-7420

Counsel for Exxon Mobil Corporation

CERTIFICATE OF SERVICE

I certify that on the 27th of March 2018, true and correct copies of the foregoing document have been served on counsel of record via e-file service as follows:

Robert M. Manley
Richard Kamprath
Colleen Bloss
Benjamin G. Murray
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
Attorneys for Dennis J. Herrera, Edward Reiskin, and the City and County of San Francisco

Marc R. Stanley
Martin Woodward
Scott Kitner
STANLEY LAW GROUP
6116 North Central Expressway, Suite 1500
Dallas, Texas 75206
Attorneys for Barbara J. Parker, Sabrina B. Landreth, City of Oakland, and Matthew F. Pawa

Pete Marketos
Tyler J. Bexley
REESE MARKETOS LLP
750 N. Saint Paul St., Suite 600
Dallas, Texas 75201-3201
Attorneys for County of San Mateo, County of Marin, City of Imperial Beach, City of Santa Cruz, County of Santa Cruz, John Beiers, Serge Dedina, Jennifer Lyon, Brian Washington, Dana McRae, Anthony Condotti, John Maltbie, Andy Hall, Matthew Hymel, Carlos Palacios, and Martín Bernal

/s/ Ralph H. Duggins
Ralph H. Duggins

EXHIBIT A

CAUSE NO. 096-297222-18

EXXON MOBIL CORPORATION,	§	IN THE DISTRICT COURT OF
	§	
	§	TARRANT COUNTY, TEXAS
Petitioner.	§	
	§	96th JUDICIAL DISTRICT

[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 8, 2018, Exxon Mobil Corporation ("ExxonMobil") filed a petition under Rule 202 of the Texas Rules of Civil Procedure seeking pre-suit discovery to evaluate potential claims and preserve evidence related to constitutional violations, abuse of process, and civil conspiracy. ExxonMobil's potential claims arise from an alleged conspiracy by California municipalities to suppress Texas-based speech and associational activities on climate policy that are out-of-step with the prevailing views of California public officials. According to ExxonMobil's petition, the California municipalities alleged facts in their lawsuits against the Texas energy sector that are contradicted by contemporaneous disclosures to municipal bond investors. ExxonMobil seeks pre-suit discovery on whether the lawsuits were brought in bad faith as a pretext to suppress Texas-based speech and associational activities by members of Texas's energy sector.

The potential defendants and prospective witnesses named in ExxonMobil's petition (collectively the "Respondents") challenged this Court's personal jurisdiction by filing special appearances under Rule 120a of the Texas Rules of Civil Procedure. ExxonMobil opposed. Both the Respondents and ExxonMobil filed affidavits and evidence in support of their respective positions. At a hearing held on March 8, 2018, the Court accepted all filed affidavits and evidence, as permitted by Rule 120a. Neither ExxonMobil nor the Respondents objected to the evidence at

the hearing; the parties disputed only the legal significance of the uncontested factual record before the Court. On March 14, 2018, the Court denied all of the special appearances in light of the factual record.

On March 27, 2018, ExxonMobil filed a request for findings of fact and conclusions of law supporting this Court's denial of the special appearances. In accordance with Rule 297 of the Texas Rules of Civil Procedure, the Court makes the following findings of fact and conclusions of law based on the uncontested evidentiary record.

FINDINGS OF FACT

A. Parties

1. Petitioner ExxonMobil is a corporation incorporated under the laws of the State of New Jersey with its principal place of business in Texas. It formulates and issues statements about climate change from its headquarters in Texas. Most of its corporate records pertaining to climate change are located in Texas, and it engages in speech and associational activities in Texas.

2. Potential Defendants the County of San Mateo, the County of Marin, the City of Imperial Beach, the City of Santa Cruz, the County of Santa Cruz, the City of Oakland, and the City of San Francisco are cities or counties in California that do not maintain a registered agent, telephone listing, or post office box in Texas.

3. Potential Defendants Barbara J. Parker, Dennis J. Herrera, John Beiers, Serge Dedina, Jennifer Lyon, Brian Washington, Dana McRae, and Anthony Condotti are California municipal officers who do not reside in Texas or maintain offices or registered agents in Texas.

4. Potential Defendant Matthew F. Pawa is an attorney in private practice,

based in Massachusetts and serving as outside counsel for Potential Defendants the City of Oakland and the City of San Francisco. Mr. Pawa does not maintain an office or registered agent in Texas and is not licensed to practice law in Texas.

5. Prospective Witnesses Sabrina B. Landreth, Edward Reiskin, John Maltbie, Andy Hall, Matthew Hymel, Carlos Palacios, and Martín Bernal are California municipal officers who do not reside in Texas or maintain a registered agent, telephone listing, or post office box in Texas.

B. Preparatory Activities Directed at Texas-Based Speech

Pawa and Others Develop a Climate Change Strategy

6. In June 2012, Potential Defendant Pawa and a group of special interests attended a conference in La Jolla, California, called the "Workshop on Climate Accountability, Public Opinion, and Legal Strategies." Peter Frumhoff, the Director of Science and Policy for the Union of Concerned Scientists; Naomi Oreskes, then a professor at the University of California, San Diego; and Richard Heede, of the Climate Accountability Institute, conceived of this workshop and invited Mr. Pawa to participate as a featured speaker.

7. During the conference, participants discussed strategies to "[w]in [a]cess to [i]nternal [d]ocuments" of energy companies, like ExxonMobil, that could be used to obtain leverage over these companies. The conference participants concluded that using law enforcement powers and civil litigation to "maintain[ ] pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming." One commentator observed, "Even if your ultimate goal might be to shut down a company, you still might be wise to start out by asking for compensation for injured parties."

8. At the conference, the attendees also concluded that "a single sympathetic

state attorney general might have substantial success in bringing key internal documents to light."

9. At the conference, Potential Defendant Pawa targeted ExxonMobil's speech on climate change, and identified such speech as a basis for bringing litigation. Mr. Pawa claimed that "Exxon and other defendants distorted the truth" (as Mr. Pawa saw it) and that litigation "serves as a 'potentially powerful means to change corporate behavior.'" Myles Allen, another participant at the La Jolla conference, claimed that "the fossil fuel industry's disinformation has effectively muted a large portion of the electorate."

10. In January 2016, Mr. Pawa engaged special interests at the Rockefeller Family Fund offices in New York City to further solidify the "[g]oals of an Exxon campaign" that Mr. Pawa developed at the La Jolla conference. According to a draft agenda for the meeting, the goals of this campaign included: (i) "[t]o establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm"; (ii) "[t]o delegitimize [ExxonMobil] as a political actor"; (iii) "[t]o drive divestment from Exxon"; and (iv) "[t]o force officials to disassociate themselves from Exxon, their money, and their historic opposition to climate progress, for example by refusing campaign donations, refusing to take meetings, calling for a price on carbon, etc."

11. According to the draft agenda, Mr. Pawa and the other participants aimed to chill and suppress ExxonMobil's speech through "legal actions & related campaigns," including "AGs" and "Tort[]" suits. The draft agenda notes that participants planned to use "AGs" and "Tort[]" suits to "get[] discovery" and "creat[e] scandal."

State Attorneys General Adopt the Climate Change Strategy

12. On March 29, 2016, New York Attorney General Eric Schneiderman, Massachusetts Attorney General Maura Healey, and other state attorneys general, calling

themselves the "Green 20," held a press conference where they promoted regulating the speech of energy companies, including ExxonMobil, whom they perceived as an obstacle to enacting their preferred policy responses to climate change. Attorneys General Schneiderman and Healey discussed their investigations of ExxonMobil. They were also joined by former Vice President Al Gore, an investor in alternative energy companies.

13. At the press conference, Attorney General Schneiderman discussed the need to regulate the energy industry's speech on climate change, just as Potential Defendant Pawa had urged at La Jolla and at the Rockefeller meeting. He stated, "There is no dispute but there is confusion, and confusion sowed by those with an interest in profiting from the confusion and creating misperceptions in the eyes of the American public that really need to be cleared up." Attorney General Schneiderman denounced the "highly aggressive and morally vacant forces that are trying to block every step by the federal government to take meaningful action" and announced that "today, we're sending a message that, at least some of us—actually a lot of us—in state government are prepared to step into this battle with an unprecedented level of commitment and coordination."

14. Attorney General Healey similarly echoed themes from the strategy Mr. Pawa developed at La Jolla. She stated, "Part of the problem has been one of public perception," and she blamed "[f]ossil fuel companies" for purportedly causing "many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts." Attorney General Healey announced that those who "deceived" the public "should be, must be, held accountable." In the next sentence, she disclosed that she too had begun investigating ExxonMobil and concluded, before receiving a single document from ExxonMobil, that there was a "troubling disconnect between what Exxon knew . . . and what the company and industry chose

to share with investors and with the American public."

15. At the press conference, former Vice President Al Gore praised Attorney General Schneiderman's efforts to "hold to account those commercial interests" who "are now trying to convince people that renewable energy is not a viable option"—a position that aligned well with Mr. Gore's financial stake in renewable energy companies. Mr. Gore also focused on First Amendment-protected activities, condemning the "political and lobbying efforts" of the traditional energy industry.

State Attorneys General Conceal Ties to Pawa

16. At a closed-door meeting held before the March 2016 press conference, Mr. Pawa and Dr. Frumhoff conducted briefings for assembled members of the attorneys general's offices. Mr. Pawa, whose briefing was on "climate change litigation," has subsequently admitted to attending the meeting, but only after he and the attorneys general attempted and failed to conceal it.

17. The New York Attorney General's Office attempted to keep Mr. Pawa's involvement in this meeting secret. When a reporter contacted Mr. Pawa shortly after this meeting and inquired about the press conference, the Chief of the Environmental Protection Bureau at the New York Attorney General's Office told Mr. Pawa, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."

18. Similarly, the Vermont Attorney General's Office—another member of the "Green 20" coalition—admitted at a court hearing that when it receives a public records request to share information concerning the coalition's activities, it researches the party who requested the records, and upon learning of the requester's affiliation with "coal or Exxon or whatever," the office "give[s] this some thought . . . before [it] share[s] information with this entity."

State Attorneys General Target Texas-based Speech, Activities, and Property

19. Attorney General Schneiderman issued a subpoena and Attorney General Healey issued a civil investigative demand ("CID") to ExxonMobil requesting documents and communications concerning climate change and expressly referencing documents in ExxonMobil's possession in Texas.

20. The Massachusetts CID targets specific statements ExxonMobil and its executives made in Texas. For example, it requests documents concerning (i) a 1982 article prepared by the Coordination and Planning Division of Exxon Research and Engineering Company; (ii) former Chairman and CEO Rex Tillerson's "statements regarding Climate Change and Global Warming . . . at an Exxon shareholder meeting in Dallas, Texas"; (iii) ExxonMobil's 2016 Energy Outlook, which was prepared and reviewed in Texas; and (iv) internal corporate documents and communications concerning regulatory filings prepared at ExxonMobil's corporate offices in Texas. Many of the statements under government scrutiny pertain expressly to matters of public policy, such as remarks by ExxonMobil's former CEO that "[i]ssues such as global poverty [are] more pressing than climate change." The Massachusetts CID also seeks documents pertaining to ExxonMobil's associational activities, including its communications with 12 organizations derided as climate deniers and its reasons for associating with those entities.

21. The New York subpoena also targets ExxonMobil's speech and associational activities in Texas, including investor filings, the "*Outlook For Energy* reports," the "*Energy Trends, Greenhouse Gas Emissions, and Alternative Energy* reports," the "*Energy and Carbon - Managing the Risks Report*," and communications with trade associations and industry groups.

22. ExxonMobil filed a lawsuit seeking injunctive and declaratory relief against

Attorneys General Schneiderman and Healey. The Attorney General of the State of Texas, along with ten other state attorneys general, filed an amicus brief in support of ExxonMobil's claims, stating that a state official's power "does not include the right to engage in unrestrained, investigative excursions to promulgate a social ideology, or chill the expression of points of view, in international policy debates." Judge Ed Kinkeade of the U.S. District Court for the Northern District of Texas questioned whether the New York and Massachusetts Attorneys General were attempting to "further their personal agendas by using the vast power of government to silence the voices of all those who disagree with them."

C. Lawsuits Against the Texas Energy-Sector Are Directed at Texas-Based Speech, Activities, and Property

23. With the investigations of the state attorneys general underway, Mr. Pawa next promoted his La Jolla strategy to California municipalities, as potential plaintiffs in tort litigation that would be filed against energy companies, including ExxonMobil.

24. Mr. Pawa sent a memo outlining this strategy to NextGen America, the political action group funded by political activist Tom Steyer. The memo "summarize[d] a potential legal case against major fossil fuel corporations," premised on the claim that "certain fossil fuel companies (most notoriously ExxonMobil), have engaged in a campaign and conspiracy of deception and denial on global warming." Mr. Pawa emphasized that "simply proceeding to the discovery phase would be significant" and "obtaining industry documents would be a remarkable achievement that would advance the case and the cause."

25. Mr. Pawa also gave a number of speeches in which he targeted speech that ExxonMobil formulated and made in Texas. At a 2016 conference, for instance, Mr. Pawa accused ExxonMobil of "undert[aking] a campaign of deception and denial" and targeted a speech concerning climate change delivered by former CEO Tillerson in Texas. In the same speech, Mr.

Pawa also discussed the company's internal memos from the 1980s, where company scientists evaluated potential climate change impacts.

26. Following through on the strategy Mr. Pawa outlined in his memorandum to NextGen America, Potential Defendants Parker, Herrera, and the Cities of Oakland and San Francisco filed public nuisance lawsuits against ExxonMobil and four other energy companies, including Texas-based ConocoPhillips. Mr. Pawa represents the plaintiffs in those actions, and Ms. Parker and Mr. Herrera signed the complaints on behalf of the City of Oakland and the City of San Francisco, respectively. They used an agent to serve the complaints on ExxonMobil's registered agent in California, whose role is to transmit legal process to ExxonMobil in Texas.

27. Potential Defendants Lyon, Washington, Beiers, Herrera, McRae, the City of Imperial Beach, Marin County, San Mateo County, and the City and the County of Santa Cruz filed similar public nuisance complaints against ExxonMobil and other energy companies, including the following 17 Texas-based energy companies: BP America, Inc., Shell Oil Products Company LLC, Citgo Petroleum Corp., ConocoPhillips, ConocoPhillips Company, Phillips 66, Total E&P USA Inc., Total Specialties USA Inc., Eni Oil & Gas Inc., Anadarko Petroleum Corp., Occidental Petroleum Corp., Occidental Chemical Corp., Repsol Energy North America Corp., Repsol Trading USA Corp., Marathon Oil Company, Marathon Oil Corporation, and Apache Corp. Potential Defendants Beiers, Lyon, McRae, Washington, and Condotti signed these complaints. They used an agent to serve the complaints on ExxonMobil's registered agent in Texas.

28. Each of the seven California complaints expressly target speech and associational activities in Texas.

29. The Oakland and San Francisco complaints, for example, target ExxonMobil's Texas-based speech, including a statement by "then-CEO Rex Tillerson" at

"Exxon's annual shareholder meeting" in Texas, where they claim Mr. Tillerson allegedly "misleadingly downplayed global warming's risks." These complaints also target corporate statements issued from Texas, such as ExxonMobil's "annual 'Outlook for Energy' reports," "Exxon's website," and "Exxon's 'Lights Across America' website advertisements." In addition, the complaints target ExxonMobil's associational activities in Texas, including corporate decisions to fund various non-profit groups that perform climate change-related research that the complaints deem to be "front groups" and "denialist groups."

30. The City of Imperial Beach, Marin County, San Mateo County, and the City and County of Santa Cruz complaints similarly focus on ExxonMobil's Texas-based speech and associational activities. For example, they target (i) a 1988 memo from an Exxon public affairs manager that proposes "[r]esist[ing] the overstatement and sensationalization [sic] of potential greenhouse effect"; (ii) a "publication" that "Exxon released" in "1996" with a preface by former "Exxon CEO Lee Raymond"; and (iii) a 2007 Corporate Citizenship Report, issued from the company's Texas headquarters.

31. Each of the seven California complaints also explicitly focus on ExxonMobil property in Texas, including ExxonMobil's internal memos and scientific research. (Imperial Beach Compl. ¶¶ 86-88, 91-92, 95-97, 99-102; Marin County Compl. ¶¶ 86-88, 91-92, 95-97, 99-102; San Mateo Compl. ¶¶ 86-88, 91-92, 95-97, 99-102; Oakland Compl. ¶¶ 60-61; San Francisco Compl. ¶¶ 60-62; County of Santa Cruz Compl. ¶¶ 130-32, 135-37, 140-42, 144-47; City of Santa Cruz Compl. ¶¶ 129-31, 134-36, 139-41, 143-46.)

32. Several Potential Defendants also made statements shortly after filing the lawsuits focusing on Texas-based speech. In a July 20, 2017 op-ed for *The San Diego Union-Tribune*, Potential Defendant Dedina, the mayor of the City of Imperial Beach, justified his

participation in this litigation by accusing the energy sector of attempting to "sow uncertainty" about climate change. In a July 26, 2017 appearance at a local radio station, Mr. Dedina accused ExxonMobil of carrying out a "merchants of doubt campaign."

33. Oakland City Attorney Barbara Parker issued a press release soon after filing suit, asserting that "[i]t is past time to debate or question the reality of global warming." According to Parker, "[j]ust like BIG TOBACCO, BIG OIL knew the truth long ago and peddled misinformation to con their customers and the American public."

34. San Francisco City Attorney Dennis Herrera similarly accused "fossil fuel companies" of launching a "disinformation campaign to deny and discredit what was clear even to their own scientists: global warming is real," and pledged to ensure that these companies "are held to account."

35. These allegations, which pervade Respondents' lawsuits, are contradicted by the Respondents' own municipal bond disclosures. While the California municipalities alleged in their complaints against the energy companies that the impacts of climate change were knowable, quantifiable, and certain, they told their investors the exact opposite. These contradictions raise the question of whether the California municipalities brought these lawsuits for an improper purpose.

36. For example, Oakland and San Francisco's complaints claim that ExxonMobil's and other energy company's "conduct will continue to cause ongoing and increasingly severe sea level rise harms" to the cities. However, the municipal bonds issued by Oakland and San Francisco disclaim knowledge of any such impending catastrophe, stating the Cities are "unable to predict" whether sea-level rise "or other impacts of climate change" will occur, and "if any such events occur, whether they will have a material adverse effect on the

business operations or financial condition of the City" or the "local economy."

37. Similarly, according to the San Mateo Complaint, the county is "particularly vulnerable to sea level rise," with "a 93% chance that the County experiences a devastating three-foot flood before the year 2050, and a 50% chance that such a flood occurs before 2030." Despite this, nearly all of the county's bond offerings contain no reference to climate change, and 2014 and 2016 bond offerings assure that "[t]he County is unable to predict whether sea-level rise or other impacts of climate change or flooding from a major storm will occur."

38. The Imperial Beach Complaint alleges that it is vulnerable to "significant, and dangerous sea level rise" due to "unabated greenhouse gas emissions." Imperial Beach has never warned investors in its bonds of any such vulnerability. A 2013 bond offering, for instance, contains nothing but a boilerplate disclosure that "earthquake . . . , flood, fire, or other natural disaster, could cause a reduction in the Tax Revenues securing the Bonds . . . ."

39. The Marin County complaint warns that "there is a 99% risk that the County experiences a devastating three-foot flood before the year 2050, and a 47% chance that such a flood occurs before 2030." It also asserts that "[w]ithin the next 15 years, the County's Bay-adjacent coast will endure multiple, significant impacts from sea level rise." However, its bond offerings do not contain any specific references to climate change risks, noting only, for example, that "natural or manmade disaster[s], such as earthquake, flood, fire, terrorist activities, [and] toxic dumping" are potential risks.

40. The Santa Cruz complaints warn of dire climate change threats. The county alleges that there is "a 98% chance that the County experiences a devastating three-foot flood before the year 2050, and a 22% chance that such a flood occurs before 2030." The Santa Cruz City Complaint similarly warns that "increased flooding and severe storm events associated with

climate change will result in significant structural and financial losses in the City's low-lying downtown." But none of the city or county bond offerings mention these dire and specific warnings. A 2016 county disclosure merely states that areas within the county "may be subject to unpredictable climatic conditions, such as flood, droughts and destructive storms." A 2017 city bond offering has a boilerplate message that,"[f]rom time to time, the City is subject to natural calamities," including flood and wildfire.

41. Potential Defendants Pawa, Parker, Herrera, Beiers, Dedina, Lyon, Washington, McRae, Condotti, County of San Mateo, County of Marin, City of Imperial Beach, City of Santa Cruz, County of Santa Cruz, City of Oakland, and City of San Francisco either approved or participated in filing the lawsuits against the Texas energy sector. That conduct was directed at Texas-based speech, activities, and property. Prospective Witnesses Landreth, Reiskin, Maltbie, Hall, Hymel, Palacios, and Bernal approved the contemporaneous disclosures that contradict the allegations in the municipal complaints. Those witnesses, along with the Potential Defendants, are likely to have evidence pertaining to that contradiction.

CONCLUSIONS OF LAW

42. Under Rule 202 of the Texas Rules of Civil Procedure, a proper court may allow discovery of a potential claim if the court would have personal jurisdiction over the potential defendants to the anticipated suit.

43. Because this Court is not required to have personal jurisdiction over prospective witnesses who are not potential defendants, the special appearances of Prospective Witnesses Landreth, Reiskin, Maltbie, Hall, Hymel, Palacios, and Bernal are denied.

44. This Court would not have general personal jurisdiction over the Potential Defendants to the anticipated suit.

45. This Court could exercise specific personal jurisdiction over the Potential Defendants for the anticipated claims of constitutional violations, abuse of process, and civil conspiracy.

46. The exercise of personal jurisdiction over the Potential Defendants to the anticipated action would be permitted under the Texas long-arm statute, which allows a Texas court to exercise jurisdiction over nonresidents who commit a tort in whole or in part in Texas. Tex. Civ. Prac. & Rem. Code § 17.042(2). Each of the Potential Defendants is a nonresident within the meaning of the long-arm statute.

47. A violation of First Amendment rights occurs where the targeted speech occurs or where it would otherwise occur but for the violation. ExxonMobil exercises its First Amendment rights in Texas, and Texas is the site of the speech challenged by the Potential Defendants' lawsuits. The anticipated claims therefore concern potential constitutional torts committed in Texas.

48. Exercising jurisdiction over the Potential Defendants in the anticipated action would comport with due process because the potential claims arise from minimum contacts initiated by the Potential Defendants which purposefully target Texas, including speech, activities, and property in Texas.

49. Mr. Pawa initiated contact and created a continuing relationship with Texas by, among other activities, (i) initiating a plan to use litigation to change corporate behavior of Texas-based energy companies at the La Jolla conference; (ii) engaging with the Rockefeller Family Fund to solidify and promote the goal of delegitimizing ExxonMobil as a political actor; (iii) instigating state attorneys general to commence investigations of ExxonMobil in order to obtain documents stored in Texas; and (iv) soliciting and actively promoting litigation by

California municipalities against the Texas energy industry, including ExxonMobil, to target Texas-based speech and obtain documents in Texas.

50. All of the Potential Defendants initiated contact and created a continuing relationship with Texas by (i) developing, signing, approving, and/or filing complaints that expressly target the speech, research, and funding decisions of ExxonMobil and other Texas-based energy companies to chill and affect speech, activities, and property in Texas; and (ii) using an agent to serve ExxonMobil in Texas.

51. The Potential Defendants' contacts were deliberate and purposeful, and not random, fortuitous, or attenuated.

52. Purposeful availment is satisfied where Texas is the focus of the Potential Defendants' activities and where the object of the potential conspiracy is to suppress speech and corporate behavior in Texas. *See, e.g.*, *TV Azteca* v. *Ruiz*, 490 S.W.3d 29, 40 (Tex. 2016); *Hoskins* v. *Ricco Family Partners, Ltd.*, Nos. 02-15-00249-CV, 02-15-00253-CV, 2016 WL 2772164, at *7 (Tex. App.—Fort Worth May 12, 2016).

53. Based on the foregoing findings of fact, ExxonMobil's potential claims of First Amendment violation, abuse of process, and civil conspiracy would arise from the Potential Defendants' contacts with Texas.

54. Exercising jurisdiction over the Potential Defendants for the potential claims would comport with traditional notions of fair play and substantial justice.

55. It would not be burdensome for the Potential Defendants to litigate ExxonMobil's potential claims in Texas, and the Potential Defendants have failed to provide substantial evidence of burden.

56. Texas has a substantial state interest in adjudicating claims concerning

constitutional torts committed in Texas against Texas residents.

57. ExxonMobil has an inherent interest in obtaining convenient and effective relief by litigating its potential claims in Texas.

58. Exercising jurisdiction in this potential action would comport with the interstate judicial system's interest in obtaining the most efficient resolution of controversies because ExxonMobil's anticipated action encompasses claims and parties that are not part of the Potential Defendants' California nuisance suits and ExxonMobil has objected to the exercise of personal jurisdiction in those suits.

59. Exercising jurisdiction in this potential action would support the shared interest of the several states in furthering substantive social policies because ExxonMobil's anticipated action concerns a conspiracy to suppress and chill speech and associational activities of the Texas energy sector. Texas has an inherent interest in exercising jurisdiction over actions that concern the infringement of constitutional rights within its borders.

60. To the extent the Court's findings of fact are construed by a reviewing court to be conclusions of law or vice-versa, the incorrect designation shall be disregarded and the specified finding and/or conclusion of law shall be deemed to have been correctly designated herein.

SIGNED this _____ day of _____ 2018.

_____

R.H. Wallace Jr., Presiding Judge

CAUSE NO. 096-297222-18

EXXON MOBIL CORPORATION,	§	IN THE DISTRICT COURT OF
	§	
	§	TARRANT COUNTY, TEXAS
Petitioner.	§	
	§	96th JUDICIAL DISTRICT

~~[PROPOSED]~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 8, 2018, Exxon Mobil Corporation ("ExxonMobil") filed a petition under Rule 202 of the Texas Rules of Civil Procedure seeking pre-suit discovery to evaluate potential claims and preserve evidence related to constitutional violations, abuse of process, and civil conspiracy. ExxonMobil's potential claims arise from an alleged conspiracy by California municipalities to suppress Texas-based speech and associational activities on climate policy that are out-of-step with the prevailing views of California public officials. According to ExxonMobil's petition, the California municipalities alleged facts in their lawsuits against the Texas energy sector that are contradicted by contemporaneous disclosures to municipal bond investors. ExxonMobil seeks pre-suit discovery on whether the lawsuits were brought in bad faith as a pretext to suppress Texas-based speech and associational activities by members of Texas's energy sector.

The potential defendants and prospective witnesses named in ExxonMobil's petition (collectively the "Respondents") challenged this Court's personal jurisdiction by filing special appearances under Rule 120a of the Texas Rules of Civil Procedure. ExxonMobil opposed. Both the Respondents and ExxonMobil filed affidavits and evidence in support of their respective positions. At a hearing held on March 8, 2018, the Court accepted all filed affidavits and evidence, as permitted by Rule 120a. Neither ExxonMobil nor the Respondents objected to the evidence at

E-MAILED
All Counsel
4-25-18

the hearing; the parties disputed only the legal significance of the uncontested factual record before the Court. On March 14, 2018, the Court denied all of the special appearances in light of the factual record.

On March 27, 2018, ExxonMobil filed a request for findings of fact and conclusions of law supporting this Court's denial of the special appearances. In accordance with Rule 297 of the Texas Rules of Civil Procedure, the Court makes the following findings of fact and conclusions of law based on the uncontested evidentiary record.

FINDINGS OF FACT

A. Parties

1. Petitioner ExxonMobil is a corporation incorporated under the laws of the State of New Jersey with its principal place of business in Texas. It formulates and issues statements about climate change from its headquarters in Texas. Most of its corporate records pertaining to climate change are located in Texas, and it engages in speech and associational activities in Texas.

2. Potential Defendants the County of San Mateo, the County of Marin, the City of Imperial Beach, the City of Santa Cruz, the County of Santa Cruz, the City of Oakland, and the City of San Francisco are cities or counties in California that do not maintain a registered agent, telephone listing, or post office box in Texas.

3. Potential Defendants Barbara J. Parker, Dennis J. Herrera, John Beiers, Serge Dedina, Jennifer Lyon, Brian Washington, Dana McRae, and Anthony Condotti are California municipal officers who do not reside in Texas or maintain offices or registered agents in Texas.

4. Potential Defendant Matthew F. Pawa is an attorney in private practice,

based in Massachusetts and serving as outside counsel for Potential Defendants the City of Oakland and the City of San Francisco. Mr. Pawa does not maintain an office or registered agent in Texas and is not licensed to practice law in Texas.

5. Prospective Witnesses Sabrina B. Landreth, Edward Reiskin, John Maltbie, Andy Hall, Matthew Hymel, Carlos Palacios, and Martín Bernal are California municipal officers who do not reside in Texas or maintain a registered agent, telephone listing, or post office box in Texas.

B. Preparatory Activities Directed at Texas-Based Speech

Pawa and Others Develop a Climate Change Strategy

6. In June 2012, Potential Defendant Pawa and a group ~~of special interests~~ attended a conference in La Jolla, California, called the "Workshop on Climate Accountability, Public Opinion, and Legal Strategies." Peter Frumhoff, the Director of Science and Policy for the Union of Concerned Scientists; Naomi Oreskes, then a professor at the University of California, San Diego; and Richard Heede, of the Climate Accountability Institute, conceived of this workshop and invited Mr. Pawa to participate as a featured speaker.

7. During the conference, participants discussed strategies to "[w]in [a]cess to [i]nternal [d]ocuments" of energy companies, like ExxonMobil, that could be used to obtain leverage over these companies. The conference participants concluded that using law enforcement powers and civil litigation to "maintain[ ] pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming." One commentator observed, "Even if your ultimate goal might be to shut down a company, you still might be wise to start out by asking for compensation for injured parties."

8. At the conference, the attendees also concluded that "a single sympathetic

state attorney general might have substantial success in bringing key internal documents to light."

9. At the conference, Potential Defendant Pawa targeted ExxonMobil's speech on climate change, and identified such speech as a basis for bringing litigation. Mr. Pawa claimed that "Exxon and other defendants distorted the truth" (as Mr. Pawa saw it) and that litigation "serves as a 'potentially powerful means to change corporate behavior.'" Myles Allen, another participant at the La Jolla conference, claimed that "the fossil fuel industry's disinformation has effectively muted a large portion of the electorate."

10. In January 2016, Mr. Pawa engaged ~~special interests~~ participants at the Rockefeller Family Fund offices in New York City to further solidify the "[g]oals of an Exxon campaign" that Mr. Pawa developed at the La Jolla conference. According to a draft agenda for the meeting, the goals of this campaign included: (i) "[t]o establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm"; (ii) "[t]o delegitimize [ExxonMobil] as a political actor"; (iii) "[t]o drive divestment from Exxon"; and (iv) "[t]o force officials to disassociate themselves from Exxon, their money, and their historic opposition to climate progress, for example by refusing campaign donations, refusing to take meetings, calling for a price on carbon, etc."

11. According to the draft agenda, Mr. Pawa and the other participants aimed to chill and suppress ExxonMobil's speech through "legal actions & related campaigns," including "AGs" and "Tort[]" suits. The draft agenda notes that participants planned to use "AGs" and "Tort[]" suits to "get[] discovery" and "creat[e] scandal."

State Attorneys General Adopt the Climate Change Strategy

12. On March 29, 2016, New York Attorney General Eric Schneiderman, Massachusetts Attorney General Maura Healey, and other state attorneys general, calling

themselves the "Green 20," held a press conference where they promoted regulating the speech of energy companies, including ExxonMobil, whom they perceived as an obstacle to enacting their preferred policy responses to climate change. Attorneys General Schneiderman and Healey discussed their investigations of ExxonMobil. They were also joined by former Vice President Al Gore, an investor in alternative energy companies.

13. At the press conference, Attorney General Schneiderman discussed the need to regulate the energy industry's speech on climate change, just as Potential Defendant Pawa had urged at La Jolla and at the Rockefeller meeting. He stated, "There is no dispute but there is confusion, and confusion sowed by those with an interest in profiting from the confusion and creating misperceptions in the eyes of the American public that really need to be cleared up." Attorney General Schneiderman denounced the "highly aggressive and morally vacant forces that are trying to block every step by the federal government to take meaningful action" and announced that "today, we're sending a message that, at least some of us—actually a lot of us—in state government are prepared to step into this battle with an unprecedented level of commitment and coordination."

14. Attorney General Healey similarly echoed themes from the strategy Mr. Pawa developed at La Jolla. She stated, "Part of the problem has been one of public perception," and she blamed "[f]ossil fuel companies" for purportedly causing "many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts." Attorney General Healey announced that those who "deceived" the public "should be, must be, held accountable." In the next sentence, she disclosed that she too had begun investigating ExxonMobil and concluded, before receiving a single document from ExxonMobil, that there was a "troubling disconnect between what Exxon knew . . . and what the company and industry chose

to share with investors and with the American public."

15. At the press conference, former Vice President Al Gore praised Attorney General Schneiderman's efforts to "hold to account those commercial interests" who "are now trying to convince people that renewable energy is not a viable option"~~, a position that aligned well with Mr. Gore's financial stake in renewable energy companies.~~ Mr. Gore also focused on First Amendment-protected activities, condemning the "political and lobbying efforts" of the traditional energy industry.

State Attorneys General Conceal Ties to Pawa

16. At a closed-door meeting held before the March 2016 press conference, Mr. Pawa and Dr. Frumhoff conducted briefings for assembled members of the attorneys general's offices. Mr. Pawa, whose briefing was on "climate change litigation," has subsequently admitted to attending the meeting, but only after he and the attorneys general attempted and failed to conceal it.

17. The New York Attorney General's Office attempted to keep Mr. Pawa's involvement in this meeting secret. When a reporter contacted Mr. Pawa shortly after this meeting and inquired about the press conference, the Chief of the Environmental Protection Bureau at the New York Attorney General's Office told Mr. Pawa, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."

18. Similarly, the Vermont Attorney General's Office—another member of the "Green 20" coalition—admitted at a court hearing that when it receives a public records request to share information concerning the coalition's activities, it researches the party who requested the records, and upon learning of the requester's affiliation with "coal or Exxon or whatever," the office "give[s] this some thought . . . before [it] share[s] information with this entity."

State Attorneys General Target Texas-based Speech, Activities, and Property

19. Attorney General Schneiderman issued a subpoena and Attorney General Healey issued a civil investigative demand ("CID") to ExxonMobil requesting documents and communications concerning climate change and expressly referencing documents in ExxonMobil's possession in Texas.

20. The Massachusetts CID targets specific statements ExxonMobil and its executives made in Texas. For example, it requests documents concerning (i) a 1982 article prepared by the Coordination and Planning Division of Exxon Research and Engineering Company; (ii) former Chairman and CEO Rex Tillerson's "statements regarding Climate Change and Global Warming . . . at an Exxon shareholder meeting in Dallas, Texas"; (iii) ExxonMobil's 2016 Energy Outlook, which was prepared and reviewed in Texas; and (iv) internal corporate documents and communications concerning regulatory filings prepared at ExxonMobil's corporate offices in Texas. Many of the statements under government scrutiny pertain expressly to matters of public policy, such as remarks by ExxonMobil's former CEO that "[i]ssues such as global poverty [are] more pressing than climate change." The Massachusetts CID also seeks documents pertaining to ExxonMobil's associational activities, including its communications with 12 organizations derided as climate deniers and its reasons for associating with those entities.

21. The New York subpoena also targets ExxonMobil's speech and associational activities in Texas, including investor filings, the "*Outlook For Energy* reports," the "*Energy Trends, Greenhouse Gas Emissions, and Alternative Energy* reports," the "*Energy and Carbon - Managing the Risks Report*," and communications with trade associations and industry groups.

22. ExxonMobil filed a lawsuit seeking injunctive and declaratory relief against

Attorneys General Schneiderman and Healey. The Attorney General of the State of Texas, along with ten other state attorneys general, filed an amicus brief in support of ExxonMobil's claims, stating that a state official's power "does not include the right to engage in unrestrained, investigative excursions to promulgate a social ideology, or chill the expression of points of view, in international policy debates." Judge Ed Kinkeade of the U.S. District Court for the Northern District of Texas questioned whether the New York and Massachusetts Attorneys General were attempting to "further their personal agendas by using the vast power of government to silence the voices of all those who disagree with them."

C. Lawsuits Against the Texas Energy-Sector Are Directed at Texas-Based Speech, Activities, and Property

23. With the investigations of the state attorneys general underway, Mr. Pawa next promoted his La Jolla strategy to California municipalities, as potential plaintiffs in tort litigation that would be filed against energy companies, including ExxonMobil.

24. Mr. Pawa sent a memo outlining this strategy to NextGen America, the political action group funded by political activist Tom Steyer. The memo "summarize[d] a potential legal case against major fossil fuel corporations," premised on the claim that "certain fossil fuel companies (most notoriously ExxonMobil), have engaged in a campaign and conspiracy of deception and denial on global warming." Mr. Pawa emphasized that "simply proceeding to the discovery phase would be significant" and "obtaining industry documents would be a remarkable achievement that would advance the case and the cause."

25. Mr. Pawa also gave a number of speeches in which he targeted speech that ExxonMobil formulated and made in Texas. At a 2016 conference, for instance, Mr. Pawa accused ExxonMobil of "undert[aking] a campaign of deception and denial" and targeted a speech concerning climate change delivered by former CEO Tillerson in Texas. In the same speech, Mr.

Pawa also discussed the company's internal memos from the 1980s, where company scientists evaluated potential climate change impacts.

26. Following through on the strategy Mr. Pawa outlined in his memorandum to NextGen America, Potential Defendants Parker, Herrera, and the Cities of Oakland and San Francisco filed public nuisance lawsuits against ExxonMobil and four other energy companies, including Texas-based ConocoPhillips. Mr. Pawa represents the plaintiffs in those actions, and Ms. Parker and Mr. Herrera signed the complaints on behalf of the City of Oakland and the City of San Francisco, respectively. They used an agent to serve the complaints on ExxonMobil's registered agent in California, whose role is to transmit legal process to ExxonMobil in Texas.

27. Potential Defendants Lyon, Washington, Beiers, Condotti, McRae, the City of Imperial Beach, Marin County, San Mateo County, and the City and the County of Santa Cruz filed similar public nuisance complaints against ExxonMobil and other energy companies, including the following 17 Texas-based energy companies: BP America, Inc., Shell Oil Products Company LLC, Citgo Petroleum Corp., ConocoPhillips, ConocoPhillips Company, Phillips 66, Total E&P USA Inc., Total Specialties USA Inc., Eni Oil & Gas Inc., Anadarko Petroleum Corp., Occidental Petroleum Corp., Occidental Chemical Corp., Repsol Energy North America Corp., Repsol Trading USA Corp., Marathon Oil Company, Marathon Oil Corporation, and Apache Corp. Potential Defendants Beiers, Lyon, McRae, Washington, and Condotti signed these complaints. They used an agent to serve the complaints on ExxonMobil's registered agent in Texas.

28. Each of the seven California complaints expressly target speech and associational activities in Texas.

29. The Oakland and San Francisco complaints, for example, target ExxonMobil's Texas-based speech, including a statement by "then-CEO Rex Tillerson" at

"Exxon's annual shareholder meeting" in Texas, where they claim Mr. Tillerson allegedly "misleadingly downplayed global warming's risks." These complaints also target corporate statements issued from Texas, such as ExxonMobil's "annual 'Outlook for Energy' reports," "Exxon's website," and "Exxon's 'Lights Across America' website advertisements." In addition, the complaints target ExxonMobil's associational activities in Texas, including corporate decisions to fund various non-profit groups that perform climate change-related research that the complaints deem to be "front groups" and "denialist groups."

30. The City of Imperial Beach, Marin County, San Mateo County, and the City and County of Santa Cruz complaints similarly focus on ExxonMobil's Texas-based speech and associational activities. For example, they target (i) a 1988 memo from an Exxon public affairs manager that proposes "[r]esist[ing] the overstatement and sensationalization [sic] of potential greenhouse effect"; (ii) a "publication" that "Exxon released" in "1996" with a preface by former "Exxon CEO Lee Raymond"; and (iii) a 2007 Corporate Citizenship Report, issued from the company's Texas headquarters.

31. Each of the seven California complaints also explicitly focus on ExxonMobil property in Texas, including ExxonMobil's internal memos and scientific research. (Imperial Beach Compl. ¶¶ 86-88, 91-92, 95-97, 99-102; Marin County Compl. ¶¶ 86-88, 91-92, 95-97, 99-102; San Mateo Compl. ¶¶ 86-88, 91-92, 95-97, 99-102; Oakland Compl. ¶¶ 60-61; San Francisco Compl. ¶¶ 60-62; County of Santa Cruz Compl. ¶¶ 130-32, 135-37, 140-42, 144-47; City of Santa Cruz Compl. ¶¶ 129-31, 134-36, 139-41, 143-46.)

32. Several Potential Defendants also made statements shortly after filing the lawsuits focusing on Texas-based speech. In a July 20, 2017 op-ed for *The San Diego Union-Tribune*, Potential Defendant Dedina, the mayor of the City of Imperial Beach, justified his

participation in this litigation by accusing the energy sector of attempting to "sow uncertainty" about climate change. In a July 26, 2017 appearance at a local radio station, Mr. Dedina accused ExxonMobil of carrying out a "merchants of doubt campaign."

33. Oakland City Attorney Barbara Parker issued a press release soon after filing suit, asserting that "[i]t is past time to debate or question the reality of global warming." According to Parker, "[j]ust like BIG TOBACCO, BIG OIL knew the truth long ago and peddled misinformation to con their customers and the American public."

34. San Francisco City Attorney Dennis Herrera similarly accused "fossil fuel companies" of launching a "disinformation campaign to deny and discredit what was clear even to their own scientists: global warming is real," and pledged to ensure that these companies "are held to account."

35. These allegations, ~~which pervade Respondents' lawsuits,~~ are contradicted by the Respondents' own municipal bond disclosures. While the California municipalities alleged in their complaints against the energy companies that the impacts of climate change were knowable, quantifiable, and certain, they told their investors the exact opposite. These contradictions raise the question of whether the California municipalities brought these lawsuits for an improper purpose.

36. For example, Oakland and San Francisco's complaints claim that ExxonMobil's and other energy company's "conduct will continue to cause ongoing and increasingly severe sea level rise harms" to the cities. However, the municipal bonds issued by Oakland and San Francisco disclaim knowledge of any such impending catastrophe, stating the Cities are "unable to predict" whether sea-level rise "or other impacts of climate change" will occur, and "if any such events occur, whether they will have a material adverse effect on the

business operations or financial condition of the City" or the "local economy."

37. Similarly, according to the San Mateo Complaint, the county is "particularly vulnerable to sea level rise," with "a 93% chance that the County experiences a devastating three-foot flood before the year 2050, and a 50% chance that such a flood occurs before 2030." Despite this, nearly all of the county's bond offerings contain no reference to climate change, and 2014 and 2016 bond offerings assure that "[t]he County is unable to predict whether sea-level rise or other impacts of climate change or flooding from a major storm will occur."

38. The Imperial Beach Complaint alleges that it is vulnerable to "significant, and dangerous sea level rise" due to "unabated greenhouse gas emissions." Imperial Beach has never warned investors in its bonds of any such vulnerability. A 2013 bond offering, for instance, contains nothing but a boilerplate disclosure that "earthquake . . . , flood, fire, or other natural disaster, could cause a reduction in the Tax Revenues securing the Bonds . . . ."

39. The Marin County complaint warns that "there is a 99% risk that the County experiences a devastating three-foot flood before the year 2050, and a 47% chance that such a flood occurs before 2030." It also asserts that "[w]ithin the next 15 years, the County's Bay-adjacent coast will endure multiple, significant impacts from sea level rise." However, its bond offerings do not contain any specific references to climate change risks, noting only, for example, that "natural or manmade disaster[s], such as earthquake, flood, fire, terrorist activities, [and] toxic dumping" are potential risks.

40. The Santa Cruz complaints warn of dire climate change threats. The county alleges that there is "a 98% chance that the County experiences a devastating three-foot flood before the year 2050, and a 22% chance that such a flood occurs before 2030." The Santa Cruz City Complaint similarly warns that "increased flooding and severe storm events associated with

climate change will result in significant structural and financial losses in the City's low-lying downtown." But none of the city or county bond offerings mention these dire and specific warnings. A 2016 county disclosure merely states that areas within the county "may be subject to unpredictable climatic conditions, such as flood, droughts and destructive storms." A 2017 city bond offering has a boilerplate message that,"[f]rom time to time, the City is subject to natural calamities," including flood and wildfire.

41. Potential Defendants Pawa, Parker, Herrera, Beiers, Dedina, Lyon, Washington, McRae, Condotti, County of San Mateo, County of Marin, City of Imperial Beach, City of Santa Cruz, County of Santa Cruz, City of Oakland, and City of San Francisco either approved or participated in filing the lawsuits against the Texas energy sector. That conduct was directed at Texas-based speech, activities, and property. Prospective Witnesses Landreth, Reiskin, Maltbie, Hall, Hymel, Palacios, and Bernal approved the contemporaneous disclosures that contradict the allegations in the municipal complaints. Those witnesses, along with the Potential Defendants, are likely to have evidence pertaining to that contradiction.

CONCLUSIONS OF LAW

42. Under Rule 202 of the Texas Rules of Civil Procedure, a proper court may allow discovery of a potential claim if the court would have personal jurisdiction over the potential defendants to the anticipated suit.

43. Because this Court is not required to have personal jurisdiction over prospective witnesses who are not potential defendants, the special appearances of Prospective Witnesses Landreth, Reiskin, Maltbie, Hall, Hymel, Palacios, and Bernal are denied.

44. This Court would not have general personal jurisdiction over the Potential Defendants to the anticipated suit.

45. This Court could exercise specific personal jurisdiction over the Potential Defendants for the anticipated claims of constitutional violations, abuse of process, and civil conspiracy.

46. The exercise of personal jurisdiction over the Potential Defendants to the anticipated action would be permitted under the Texas long-arm statute, which allows a Texas court to exercise jurisdiction over nonresidents who commit a tort in whole or in part in Texas. Tex. Civ. Prac. & Rem. Code § 17.042(2). Each of the Potential Defendants is a nonresident within the meaning of the long-arm statute.

47. A violation of First Amendment rights occurs where the targeted speech occurs or where it would otherwise occur but for the violation. ExxonMobil exercises its First Amendment rights in Texas, and Texas is the site of the speech challenged by the Potential Defendants' lawsuits. The anticipated claims therefore concern potential constitutional torts committed in Texas.

48. Exercising jurisdiction over the Potential Defendants in the anticipated action would comport with due process because the potential claims arise from minimum contacts initiated by the Potential Defendants which purposefully target Texas, including speech, activities, and property in Texas.

49. Mr. Pawa initiated contact and created a continuing relationship with Texas by, among other activities, (i) initiating a plan to use litigation to change corporate behavior of Texas-based energy companies at the La Jolla conference; (ii) engaging with the Rockefeller Family Fund to solidify and promote the goal of delegitimizing ExxonMobil as a political actor; (iii) instigating state attorneys general to commence investigations of ExxonMobil in order to obtain documents stored in Texas; and (iv) soliciting and actively promoting litigation by

California municipalities against the Texas energy industry, including ExxonMobil, to target Texas-based speech and obtain documents in Texas.

50. All of the Potential Defendants initiated contact and created a continuing relationship with Texas by (i) developing, signing, approving, and/or filing complaints that expressly target the speech, research, and funding decisions of ExxonMobil and other Texas-based energy companies to chill and affect speech, activities, and property in Texas; and (ii) using an agent to serve ExxonMobil in Texas.

51. The Potential Defendants' contacts were deliberate and purposeful, and not random, fortuitous, or attenuated.

52. Purposeful availment is satisfied where Texas is the focus of the Potential Defendants' activities and where the object of the potential conspiracy is to suppress speech and corporate behavior in Texas. *See, e.g.*, *TV Azteca* v. *Ruiz*, 490 S.W.3d 29, 40 (Tex. 2016); *Hoskins* v. *Ricco Family Partners, Ltd.*, Nos. 02-15-00249-CV, 02-15-00253-CV, 2016 WL 2772164, at *7 (Tex. App.—Fort Worth May 12, 2016).

53. Based on the foregoing findings of fact, ExxonMobil's potential claims of First Amendment violation, abuse of process, and civil conspiracy would arise from the Potential Defendants' contacts with Texas.

54. Exercising jurisdiction over the Potential Defendants for the potential claims would comport with traditional notions of fair play and substantial justice.

55. It would not be burdensome for the Potential Defendants to litigate ExxonMobil's potential claims in Texas, and the Potential Defendants have failed to provide substantial evidence of burden.

56. Texas has a substantial state interest in adjudicating claims concerning

constitutional torts committed in Texas against Texas residents.

57. ExxonMobil has an inherent interest in obtaining convenient and effective relief by litigating its potential claims in Texas.

58. Exercising jurisdiction in this potential action would comport with the interstate judicial system's interest in obtaining the most efficient resolution of controversies because ExxonMobil's anticipated action encompasses claims and parties that are not part of the Potential Defendants' California nuisance suits and ExxonMobil has objected to the exercise of personal jurisdiction in those suits.

59. Exercising jurisdiction in this potential action would support the shared interest of the several states in furthering substantive social policies because ExxonMobil's anticipated action concerns a conspiracy to suppress and chill speech and associational activities of the Texas energy sector. Texas has an inherent interest in exercising jurisdiction over actions that concern the infringement of constitutional rights within its borders.

60. To the extent the Court's findings of fact are construed by a reviewing court to be conclusions of law or vice-versa, the incorrect designation shall be disregarded and the specified finding and/or conclusion of law shall be deemed to have been correctly designated herein.

SIGNED this 27th day of April 2018.

R.H. Wallace Jr., Presiding Judge