COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.	SUPERIOR COURT CIVIL ACTION NO.: 1984-CV-03333-BLS1
COMMONWEALTH OF MASSACHUSETTS, Plaintiff, v. EXXON MOBIL CORPORATION, Defendant.	**Service Via E-Mail**

MEMORANDUM OF LAW OF EXXON MOBIL CORPORATION IN OPPOSITION TO THE COMMONWEALTH'S MOTION TO STRIKE CERTAIN DEFENSES

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Exxon Mobil Corporation ("ExxonMobil") submits this brief in opposition to the motion of the Commonwealth of Massachusetts (the "Commonwealth" or "Attorney General") to strike certain defenses in ExxonMobil's Answer.

PRELIMINARY STATEMENT

The Attorney General repeatedly told courts that ExxonMobil's challenges to its pre-suit investigation were premature because ExxonMobil would have a full and fair opportunity to litigate its defenses in any civil action the Attorney General filed. But after filing a civil action, the Attorney General's position shifted 180 degrees. The Attorney General now argues that ExxonMobil is precluded from raising its defenses because they have already been litigated. This argument not only contradicts the Attorney General's prior statements, it is contrary to applicable law. Until this action, ExxonMobil could not have raised—or actually litigated—defenses to the specific claims the Attorney General has now asserted. Moreover, the opportunities for discovery and the relative burdens of ExxonMobil and the Commonwealth differed in the proceedings challenging the Attorney General's pre-suit investigation.

This motion, at bottom, seeks to insulate the Attorney General's actions from judicial review by asserting that its law enforcement powers place it above the law. But the Attorney General is subject to the same defenses and burdens of proof applicable to all civil litigants.

The remedy that the Commonwealth seeks—striking certain of ExxonMobil's defenses—is disfavored, and the Attorney General bears a heavy burden to demonstrate entitlement to such relief. The Commonwealth's motion attempts to shift the burden to ExxonMobil to prove its defenses at the pleading stage. But, at this juncture, ExxonMobil is only required to provide notice of the defenses it intends to pursue, which its original Answer and Amended Answer, filed on

October 29, have done.[1] To obtain the disfavored relief that the Commonwealth seeks, the Attorney General must demonstrate that there is no set of facts on which ExxonMobil could assert a defense, with all reasonable inferences drawn in ExxonMobil's favor. The Attorney General has not come anywhere close to meeting that exacting standard—especially because ExxonMobil has now gone above and beyond the requirements of notice pleading by amending its answer to add extensive factual allegations. The Commonwealth's motion should therefore be denied.

BACKGROUND

I. The Attorney General Repeatedly Represented That ExxonMobil Would Have a Full and Fair Opportunity to Litigate Its Defenses to Any Civil Action

A. The Attorney General Made Those Representations at the Pre-Suit Investigation Stage

After the Attorney General issued a Civil Investigative Demand ("CID") to ExxonMobil in April 2016, ExxonMobil challenged the CID in federal and state court. In its motion to dismiss the federal action, the Attorney General stated that ExxonMobil would have "a full and fair opportunity to raise its constitutional and other . . . defenses. . . in any future action arising from enforcement of the CID."[2] The Attorney General also argued that the federal action should be dismissed because the Attorney General had "taken only the initial steps of issuing a CID."[3] The Attorney General explained it had not yet "determined to undertake a Chapter 93A enforcement action against Exxon[Mobil] nor asserted any specific claim," and that ExxonMobil "may defend itself and raise objections in Massachusetts state court when and if that ultimately occurs."[4]

To preserve its rights under Massachusetts law, ExxonMobil also filed a petition in

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1 *See* Ruling Allowing the Unopposed Mot. of the Comm. for an Additional, Two-Week Enlargement of Time to Serve a Mot. to Strike Defenses, Sept. 14, 2021.

2 Mem. of Law in Support of Def. Att'y Gen. Maura Healey's Mot. to Dismiss, *ExxonMobil* v. *Healey*, No. 4:16-cv-00469-K (N.D. Tex. Aug. 8, 2016), ECF No. 42, at 16.

3 Mem. of Law in Support of Def. Att'y Gen. Maura Healey's Mot. to Dismiss the First Am. Compl., *ExxonMobil* v. *Healey*, No. 4:16-cv-00469-K (N.D. Tex. Nov. 28, 2016), ECF No. 125, at 17.

4 *Id.*

Massachusetts Superior Court to set aside or modify the CID. When opposing that petition in those summary proceedings, the Attorney General again asked the court to "disregard" ExxonMobil's "premature free speech objections to the CID."[5]

The prior litigation between the parties took place *before* the Attorney General filed any claims against ExxonMobil, and was focused solely on whether the Attorney General could proceed with a pre-suit investigation. While courts allowed the Attorney General's investigation to proceed, no court was in a position to consider the claims that the Attorney General filed in this action—or ExxonMobil's defenses to them—because at that time, as the Attorney General has acknowledged, a decision whether to file claims against ExxonMobil had not yet been made, and until that occurred, ExxonMobil could not raise defenses to those claims.

B. The Attorney General Also Made Those Representations in This Action

After the Attorney General commenced this action, ExxonMobil filed a special motion to dismiss pursuant to G.L. c. 231, § 59H, the anti-SLAPP statute. The Attorney General asked this Court not to rule on the First Amendment issues in that motion because ExxonMobil would have other "ways to raise their First Amendment grievances . . . Namely, an affirmative defense." Mar. 12, 2021 Hr'g Tr. 27:7-15.

ExxonMobil also filed a Rule 12 motion to dismiss the Complaint in this action, which this Court denied, recognizing it is premature to adjudicate ExxonMobil's constitutional defenses at this stage of the case. Specifically, this Court stated it "is not in a position, at least at this stage, to determine whether any particular statement is protected by the First Amendment." *Commonwealth* v. *Exxon Mobil Corp.*, 2021 WL 3493456, at *14 (Mass. Super. June 22, 2021). There has been

[5] Comm.'s Consol. Mem. Opposing Exxon's Motion to Set Aside or Modify the CID, *In Re Civil Investigative Demand No. 2016-EPD-36, Issued by the Office of the Att'y Gen.*, Civ. No. 16-1888F (Suffolk Super. Ct. Aug. 8, 2016) at 36.

no further development of the factual record in this case since that ruling.

II. Only One Court Has Issued Relevant Factual Findings, and It Recognized the Attorney General's Improper Motives to Restrict Speech on Climate Policy

The only court to make factual findings on ExxonMobil's constitutional challenges recognized that the Attorney General sought to use her investigatory powers to restrict ExxonMobil's speech on climate policy. ExxonMobil's allegations concerning the Attorney General's coordination with private interests and targeting of ExxonMobil's speech were addressed in proceedings seeking pre-suit discovery against Matthew Pawa, a private attorney, and California municipal officials concerning their efforts to suppress ExxonMobil's speech. *In Re Exxon Mobil Corp.*, 2018 Tex. Dist. LEXIS 1, at *4-5 (Tarrant Cty. Tex. Apr. 24, 2018). After a hearing, Justice R. H. Wallace of the District Court of Tarrant County, Texas, concluded that the evidence demonstrated that the Attorney General had worked with others to restrict ExxonMobil's speech, supporting the exercise of personal jurisdiction. *See id.* at *4-6, 22-23.[6]

Justice Wallace found that Attorney General Healey adopted the "climate change strategy" developed by private interests, including Massachusetts-based attorney Matthew Pawa, to "target[] ExxonMobil's speech on climate change." *Id.* at *5. These interests gathered in La Jolla, California in June 2012 at a conference called "Workshop on Climate Accountability, Public Opinion, and Legal Strategies." *Id.* at *4. During the workshop, participants discussed "strategies to '[w]in [a]ccess to [i]nternal [d]ocuments' of energy companies, like ExxonMobil, that could be used to obtain leverage over these companies." *Id.* They advocated "using law enforcement

[6] Although the Texas Court of Appeals reversed on personal jurisdiction, it did not disturb the lower court's factual findings, but reinforced them. *City of San Francisco* v. *Exxon Mobil Corp.*, 2020 WL 3969558, at *3 (Tex. App. June 18, 2020). It specifically recounted the Attorney General's participation in the "AGs United for Clean Power Press Conference" and reiterated that "the AGs promoted regulating the speech of energy companies like Exxon—companies that they perceived as hostile to AGs' policy responses to climate change." *Id.* The case is now pending before the Texas Supreme Court. *Exxon Mobil Corp.* v. *City of San Francisco*, No. 20-0558 (Tex. 2021).

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.'" *Id.* The attendees thus concluded that "'a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.'" *Id.* at *5.

Pawa subsequently engaged participants at multiple meetings across the country. For example, he met with representatives of the Rockefeller Family Fund offices in January 2016 "to further solidify the '[g]oals of Exxon campaign.'" *Id.* According to the agenda, "participants aimed to chill and suppress ExxonMobil's speech through 'legal actions & related campaigns,' including 'AGs,'" which they "planned to use . . . to 'get[] discovery' and 'create scandal.'" *Id.* at *6. Pawa also gave a presentation to the Attorney General regarding his "Exxon Campaign" on January 11, 2016,[7] and on March 29, 2016, *see id.* at *8.

Justice Wallace further found that Massachusetts Attorney General Maura Healey and other state attorneys general, calling themselves the "Green 20," announced their adoption of Pawa's strategy at a March 29, 2016, press conference. The press conference's purpose was to "promote[] regulating the speech of energy companies, including ExxonMobil, whom [the Green 20] perceived as an obstacle to enacting their preferred policy responses to climate change." *Id.* at *7. At the press conference, Attorney General Healey "echoed themes from the strategy Mr. Pawa developed at La Jolla." *Id.* She "blamed '[f]ossil fuel companies,' for purportedly causing 'many to doubt whether climate change is real and to misunderstand the catastrophic nature of its impacts.'" *Id.* at *7-8. And she announced that those who purportedly "deceived" the public—by influencing "public perception" about climate policy—"should be, must be, held accountable." *Id.*

[7] *See* Climate Litigation Watch (Sept. 10, 2019), https://climatelitigationwatch.org/wp-content/uploads/2019/10/Pawa-OAG-recruiting-emails-Records-9-10-19.pdf.

Justice Wallace concluded that the Attorney General had conspired with Pawa and special interests "to chill and suppress ExxonMobil's speech" and "associational activities." *Id.* at *6, 24.[8]

LEGAL STANDARD

The Attorney General must meet an exacting standard to prevail on a motion to strike. A defense may be stricken only if it is "insufficient" or concerns "redundant, immaterial, impertinent, or scandalous matter[s]." Mass. R. Civ. P. 12(f).[9] Such motions are "disfavored." *Bochart* v. *City of Lowell*, 989 F. Supp. 2d 151, 153 (D. Mass. 2013).

To plead defenses, ExxonMobil is required to "set [them] forth affirmatively," Mass. R. Civ. P. 8(c), to "'only give the plaintiff 'fair notice.'" Reporter's Note to Mass. R. Civ. P. 8; *see also Demoulas* v. *Demoulas*, 428 Mass. 555, 575 n.16 (1998) (defendant required only to provide "notice to the plaintiffs of defenses that will be raised"); *Desmarais* v. *Price*, 2019 WL 8331442, at *26 n.25 (Mass. Super. Nov. 13, 2019) (same); *Stonebridge Control Devices, Inc.* v. *Teleflex, Inc.*, 2004 WL 389105 at *5 (Mass. Super. Feb. 17, 2004) ("'[T]he purpose of Rule 8(c) is to provide plaintiff with notice of defenses intend[ed] to [be] raise[d]'") (quoting Smith and Zobel, *Rules Practice*, 6 M.P.S. Sec. 8.6 (2004 Pocket Part)).[10]

To prevail on a motion to strike, the Attorney General must establish that ExxonMobil's defenses are "clearly inadequate as a matter of law," *F.D.I.C.* v. *Gladstone*, 44 F. Supp. 2d 81, 90

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[8] In 2017, a federal judge in the Northern District of Texas considered a similar challenge to the CID. The court found that "[t]he merits of each of Exxon's claims involve important issues that should be determined by a court," and expressed concern that the Attorney General's investigation was a means "to further [its] personal agenda[] by using the vast power of the government to silence the voices of all those who disagree with [it]." *Exxon Mobil Corp.* v. *Schneiderman*, No. 4:16-CV-469-K, at 2, 5 (N.D. Tex., Mar. 29, 2017), ECF No. 180, at 2, 5.

[9] Rule 12(f) of the Massachusetts Rules of Civil Procedure is the same as the federal analogue.

[10] Rule 8 of the Massachusetts Rules of Civil Procedure also mirrors its federal analogue, which the "majority of courts have rightly" held does not require defenses to satisfy the "plausibility" standard for pleading a claim. Wright & Miller, § 1274 Pleading Affirmative Defenses, 5 Fed. Prac. & Proc. Civ. § 1274 (4th 2021). Federal district courts in the First Circuit have adopted this majority position. *See, e.g.*, *Astellas Inst. for Regenerative Med.* v. *ImStem Biotechnology, Inc.*, 458 F. Supp. 3d 95, 110 (D. Mass. 2020); *Asphaltos Trade, S.A.* v. *Bituven Puerto Rico, LLC*, 2021 WL 965645 at *3 (D.P.R. Mar. 15, 2021); *Traincroft, Inc.* v. *Ins. Co. of Pennsylvania*, 2014 WL 2865907, at *3 (D. Mass. June 23, 2014).

(D. Mass. 1999), after "tak[ing] as true the allegations of the answer" and drawing all inferences in ExxonMobil's favor, *Bos. Hous. Auth.* v. *Martin*, 92 Mass. App. Ct. 1103 (2017) (reversing grant of motion to strike). A Rule 12(f) motion "will be granted only if it clearly appears that the plaintiff would succeed despite any state of facts which could be proved in support of [the] defense." *Gladstone*, 44 F. Supp. 2d at 84-85; *Honeywell Consumer Prods., Inc.* v. *Windmere Corp.*, 993 F. Supp. 22, 24 (D. Mass. 1998) (same). As explained below, the Attorney General's motion fails to meet the exacting standard for a motion to strike.

ARGUMENT

I. ExxonMobil's Defenses Are Not Precluded by a Federal Lawsuit and State Court Motion to Quash Filed Three Years Prior to This Action (Defenses 30-33 and 35)

The Attorney General argues that issue preclusion, also referred to as collateral estoppel, bars ExxonMobil's defenses for official misconduct, conflict of interest, selective enforcement, viewpoint discrimination, and violation of ExxonMobil's right to petition.[11] There is no merit to the Attorney General's contention that ExxonMobil's challenges to a pre-suit investigation preclude it from raising defenses to claims that the Attorney General acknowledges did not exist—and were not even formulated—at the time of those challenges.

Issue preclusion requires identity of parties and that "(1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) the issue [was] actually litigated; (3) the issue [was] determined by a valid and binding final judgment; and (4) the determination of the issue [was] essential to the judgment." *Grella* v. *Salem Five Cent Sav. Bank*, 42 F.3d 26, 30 (1st Cir. 1994). Issue preclusion does not arise where the scope of the prior proceeding was more "circumscribed" than the present action, *Faigin* v. *Kelly*, 184 F.3d 67, 79 (1st Cir. 1999), or where

[11] While the Commonwealth's brief refers to "Res Judicata" in the section heading, its preclusion arguments are based solely on issue preclusion/collateral estoppel. Memorandum of Law in Support of the Commonwealth's Motion to Strike Certain Defenses in Exxon Mobil Corporation's Answer at 10 (*hereinafter*, "Mot.").

there were "substantially disparate opportunities for discovery and differing burdens" in the prior proceeding, *Sprecher* v. *Graber*, 716 F.2d 968, 972 (2d Cir. 1983).

Here, the requirements for preclusion are not satisfied for at least two reasons. *First*, the issues raised by ExxonMobil's defenses to this civil action are not identical to the issues actually litigated and decided in the pre-suit investigative proceedings. *Second*, the prior investigative proceedings did not involve the same burdens or opportunities for discovery as this civil action.

A. The Identical Issues Were Not Litigated and Decided

The defenses ExxonMobil asserts in this civil action are not identical to the issues actually litigated and decided in the pre-suit investigative proceedings in the Southern District of New York and this Court. The issue raised in the federal action was whether the pre-suit CID issued by the Attorney General in the investigative context should be enjoined—not whether ExxonMobil could assert defenses to claims that the Attorney General had not yet filed or even formulated. *See Exxon Mobil Corp.* v. *Schneiderman*, 316 F. Supp. 3d 679, 691, 704 (S.D.N.Y. 2018). Judge Caproni, the judge presiding over the federal action, held that ExxonMobil had not established grounds for a preliminary or permanent injunction enjoining the CID. *Id.* at 712. Judge Caproni did not address the merits of the Attorney General's subsequent civil action, or ExxonMobil's defenses to the civil action, which ExxonMobil did not assert until filing its Answer this year.

The prior ruling that the Attorney General could proceed with its investigation does not, as a matter of law, preclude ExxonMobil from raising defenses to this civil action. The law is clear that mere overlap in the facts underlying two actions "does not establish the requisite identity of issues for purposes of collateral estoppel." *Faigin*, 184 F.3d at 78 (citing *Comm'r* v. *Sunnen*, 333 U.S. 591, 601 (1948)). For instance, in *Grella*, the First Circuit held that a prior bankruptcy court decision granting a creditor relief from an automatic stay did not bar a subsequent counterclaim against the creditor, where the prior proceeding merely determined that the creditor's claim was

colorable, 42 F.3d at 33, but "did not, and indeed, could not adjudicate the substantive merits of either the [creditor's] claim, or any possible defenses or counterclaims." *Id.* at 35. The First Circuit therefore held that "the issue" raised by the counterclaim "was not before the court at the relief from stay hearing, was not actually (or even implicitly) litigated, and was not essential to the court's decision to lift the stay." *Id.* Similarly, here, the merits of the Attorney General's claims, and ExxonMobil's defenses to them, were not before the federal court or this Court when those courts concluded the Attorney General could proceed with a pre-suit investigation.

B. The Burdens and Opportunities for Discovery Were Not the Same in the Pre-Suit Challenge

Even if the issues in the prior investigative proceedings were identical to those raised here (and they are not), issue preclusion still would not apply because the prior proceeding involved "substantially disparate opportunities for discovery and differing burdens." *Sprecher*, 716 F.2d at 972. As the Restatement (Second) of Judgments explains, issue preclusion does not apply where: (i) "the party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action"; (ii) "the burden has shifted to his adversary"; or (iii) "the adversary has a significantly heavier burden than he had in the first action." Restatement (Second) of Judgments §28 (1982).

In the prior proceedings challenging the Attorney General's issuance of the CID, ExxonMobil bore "a heavy burden to show good cause why it should not be compelled to respond" to the CID, by establishing that the Attorney General's issuance of the CID was arbitrary and capricious. *Exxon Mobil Corp.* v. *Att'y Gen.*, 479 Mass. 312, 324, 326 (2018) (internal alterations

omitted); *see also* Brief for Defendants-Appellees at 21, *ExxonMobil Corp.* v. *Healey*, 2018 WL 4863426 (2nd Cir. Oct. 5, 2018) ("Exxon faces the same 'heavy burden' [as] in state court.").[12]

Given the nature of the earlier proceedings, it would violate ExxonMobil's right to due process to accord those earlier proceedings' preclusive effect here because the opportunity to litigate was "narrower than the opportunity available in a plenary civil action" due to (i) the "summary" nature of the proceeding, (ii) the absence "of discovery," and (iii) the "heavy burden" to obtain relief. *Sprecher*, 716 F.2d at 971-72 (holding subpoena enforcement action did not preclude plenary action for abuse of process).[13] Moreover, in this civil suit, the Attorney General is not entitled to the deference received at the pre-suit investigatory stage, and must prove its claims by a preponderance of the evidence. It is "black letter law" that issue preclusion "does not apply where a party seeking preclusion 'has a significantly heavier burden than he had in the first action.'" *Intell. Ventures I, LLC* v. *Lenovo Group Ltd.*, 370 F. Supp. 3d 251, 256 (D. Mass. 2019) (citation omitted); *see also Cobb* v. *Pozzi*, 363 F.3 89, 113 (2d Cir. 2004) ("Courts and commentators alike have recognized that a shift or change in the burden of proof can render the issues in two different proceedings non-identical, [making] collateral estoppel inappropriate.").[14]

II. A Presumption of Prosecutorial Regularity Does Not Bar ExxonMobil's Defenses (Defenses 30-33 and 35)

The Attorney General invokes a so-called presumption of prosecutorial regularity,

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[12] *See also In re CID No. 2016-EPD-36*, No. 16-1888F (Mass. Sup. Ct. Aug. 8, 2016), Com. Br. at 23, ("None of Exxon's arguments satisfies its heavy burden to establish that the CID is arbitrary or capricious"); *id.*, Hr'g Tr. 68:22-23, Dec. 7, 2016 ("[T]he burden is very heavy on Exxon.").

[13] In similar circumstances, courts have found no preclusive effect. *E.g.*, *Grella*, 42 F.3d at 33 (finding no preclusion based on prior "summary proceeding of limited effect"); *Foster* v. *Evans*, 384 Mass. 687, 695 (1981) (finding no preclusive effect based on "a motion judge's decision" in "summary" proceedings that "deprive a litigant of such procedural safeguards as an evidentiary hearing, discovery, and cross-examination").

[14] In the federal proceedings, Judge Caproni recognized that issue preclusion did not arise out of the parallel state proceedings, despite purported "factual overlap," because "[i]ssue preclusion does not bar relitigation of the same issue if the second proceeding involves a different or lower standard or burden of proof." *Schneiderman*, 316 F. Supp. 3d at 699. Judge Caproni assumed these same considerations do not apply to claim preclusion, which the Attorney General does not assert here.

claiming it imposes a "rigorous threshold burden" on ExxonMobil of establishing "clear evidence" of a discriminatory motive and effect and, if ExxonMobil fails to overcome that presumption, its Defenses 30-33 and 35 must be stricken. Mot. 12-13. The Attorney General identifies no Massachusetts precedent applying a presumption of prosecutorial regularity to civil pleading standards, much less to a motion to strike defenses under Rule 12(f).

In this civil action, the Attorney General relies principally on criminal cases that do not address civil pleading standards. Mot. 12-15. But there is no basis, and the Attorney General has cited none, to extend presumptions applicable to criminal cases to civil pleading standards.[15] To the contrary, courts have held "there is no sound reason" why "agencies suing to recover money are insulated from affirmative defenses that would be available against any other plaintiff." *Gladstone*, 44 F. Supp. 2d at 89. Because the Commonwealth seeks to recover money, it is subject to the same affirmative defenses as any other plaintiff.

But even if a presumption of prosecutorial regularity applied, ExxonMobil can rebut that presumption by pleading a "colorable claim" of improper motive, which includes infringement of constitutional rights. *Att'y Gen. of U.S.* v. *Irish People, Inc.*, 684 F.2d 928, 932, 935 (D.C. Cir. 1982). Here, ExxonMobil alleges that the Attorney General's motive, in filing this civil action, is "to curtail ExxonMobil's speech" on climate policy, in violation of its constitutional rights. Am. Answer ¶ 39. And without the benefit of discovery, ExxonMobil has already come forth with evidence supporting its claims. Notably, ExxonMobil has documented the Attorney General's ties

[15] Although the Attorney General relies heavily on *United States* v. *Armstrong*, 517 U.S. 456 (1996), that reliance is undermined by other cases it cites that distinguish *Armstrong* as a "criminal case" and therefore subject to "limited" discovery. *United States* v. *Am. Elec. Power Serv. Corp*., 258 F. Supp. 2d 804, 806-07 (S.D. Ohio 2003). The Attorney General also relies on *Shepard* v. *Attorney General*, but that case involved a mandamus action challenging the Attorney General's decision *not* to institute criminal proceedings; it did not address pleading standards for defenses in a civil suit. 409 Mass. 398, 400-01 (1991).

to climate activists and its involvement in the AGs United for Clean Power Press Conference. *See id.* ¶¶ 22-37. This evidence is sufficient to rebut any presumption of prosecutorial regularity.

III. ExxonMobil Has Adequately Alleged Its Defenses (Defenses 30-33 and 35)

ExxonMobil's amended answer sufficiently pleads defenses of official misconduct, conflict of interest, selective enforcement, viewpoint discrimination, and the violation of ExxonMobil's petitioning rights (Defenses 30-33 and 35). ExxonMobil's supplemental allegations, based on the findings of fact issued by Justice Wallace in *In Re Exxon Mobil Corp.*, 2018 Tex. Dist. LEXIS 1 (Tarrant Cty. Tex. Apr. 24, 2018); *see* 4-5 *supra*, should moot the Attorney General's motion as to these defenses. *See Adelphia Agios Demetrios, LLC* v. *Arista Dev., LLC*, 2014 WL 1399411, at *1 n.2 (D. Mass. Apr. 8, 2014) (finding the plaintiff's motion to dismiss counterclaims moot because defendants filed an amended answer, third-party complaint, and counterclaims). As explained below, there is no basis to strike any of those defenses at this early stage of the pleadings.

A. ExxonMobil Has Stated an Official Misconduct Defense (Defense 30)

ExxonMobil has sufficiently pled its official misconduct defense. *See* Am. Answer at ¶¶ 22-40. A defendant can plead a defense of official misconduct in violation of due process by alleging that the Commonwealth's conduct "constitutes a deliberate and intentional undermining of constitutional rights." *Commonwealth* v. *Cotto*, 2017 WL 4124972, at *37 (Mass. Super. June 26, 2017) (quoting *Commonwealth* v. *Light*, 394 Mass. 112, 114 (1985)). ExxonMobil alleges the Attorney General deliberately and intentionally undermined its free speech rights by "collud[ing] for years with private, special interests to use government power to coerce acceptance of its climate policy agenda." Am. Answer ¶ 22. In particular, the Attorney General met secretly with special interests to learn about their campaign to "delegitimize [ExxonMobil] as a political actor," *id.* ¶ 28; publicly aligned itself with a coalition of partisan attorneys general, *id.* ¶ 32; and publicly attacked

ExxonMobil for purportedly "deceiv[ing]" the public by disagreeing with the Attorney General's climate policy, *id.* ¶ 32. Now the Attorney General has filed a Complaint against ExxonMobil that expressly targets ExxonMobil's speech on climate policy. *Id.* ¶ 39. These allegations satisfy ExxonMobil's burden under Rule 8 to plead its official misconduct defense.

B. ExxonMobil Has Stated a Conflict of Interest Defense (Defense 31)

ExxonMobil has sufficiently pled its conflict of interest defense by identifying the Attorney General's biased and prejudicial public statements. *See* Am. Answer ¶¶ 22-40, 75-76. Lawyers for the government are "the representative[s] not of an ordinary party, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 803 (1987). This neutrality principle implicates due process because it ensures fairness to ExxonMobil, and is enshrined in both the United States and Massachusetts Constitutions. *Commonwealth* v. *Ellis*, 429 Mass. 362, 372 (1999) (holding that the Massachusetts due process right to a disinterested prosecutor is "at least equal" to the Fourteenth Amendment's mandate).

To plead a conflict of interest defense, a defendant must allege that a government lawyer was or "appear[ed] to be influenced, in his or her exercise of discretion, either by his or her personal interests or by a person or entity to whom the prosecution . . . will or may bring significant benefits." *Id.*; *see also Doe* v. *Sex Offender Registry Bd.*, 84 Mass. App. Ct. 537, 541-43 (2013) (finding due process violation where plaintiff established "significant doubt" over whether he had "received a hearing conducted by a fair, unbiased, and impartial hearing examiner"). Here, ExxonMobil alleges that the Attorney General has been influenced by persons or entities who will or may benefit from the Attorney General's actions, creating a conflict of interest. As Exxon alleges, and Justice Wallace found, the Attorney General was influenced by private interests that "aimed to chill and suppress ExxonMobil's speech through 'legal actions & related campaigns,'

including 'AGs,'" which they "planned to use . . . to 'get[] discovery' and 'create scandal.'" Am. Answer ¶ 76. The influence by these private interests created a conflict of interest with the Attorney General's obligation to govern impartially. Accordingly, ExxonMobil has adequately alleged a conflict of interest defense at this early stage of the proceedings.

C. ExxonMobil Has Stated a Selective Enforcement Defense (Defense 32)

To plead a selective enforcement defense, a defendant must allege (i) the defendant "'compared with others similarly situated, was selectively treated,'" and (ii) "'such selective treatment was based on . . . the exercise of constitutional rights.'" *Cote-Whitacre* v. *Dep't of Pub. Health*, 446 Mass. 350, 376, (2006) (Spina, J., concurring) (quoting *Rubinovitz* v. *Rogato*, 60 F.3d 906, 909-10 (1st Cir. 1995)), *abrogated on other grounds by Obergefell* v. *Hodges*, 576 U.S. 644 (2015). ExxonMobil's factual allegations support both elements. *See* Am. Answer ¶¶ 22-40. ExxonMobil alleges the Attorney General has "selectively treated ExxonMobil differently from others who are similarly situated" by seeking "to inhibit" it "from engaging in speech on climate policy that the Attorney General believes has impeded its climate policy objectives." *Id.* ¶ 78. This selective treatment was prompted by "ExxonMobil's exercise of its constitutional rights." *Id.* Thus, ExxonMobil has sufficiently pled a selective enforcement defense.[16]

D. ExxonMobil Has Stated a Viewpoint Discrimination Defense (Defense 33)

To plead viewpoint discrimination, the defendant must allege that the state has discriminated against speech "based on its substantive content or the message it conveys." *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995). Here, ExxonMobil alleges that the Attorney General has discriminated against its speech in exactly that

[16] While ExxonMobil has pled that it was treated differently from similarly situated individuals, it is not necessary at this stage to identify those individuals. *See, e.g.*, *United States* v. *Sellers*, 906 F.3d 848, 856 (9th Cir. 2018) (finding that if the party alleging selective enforcement presents evidence of only discriminatory intent, but not discriminatory effect, that provides a sufficient basis for discovery).

manner. *See* Am. Answer ¶¶ 22-40. Attorney General Healey publicly embraced a "[c]lean [p]ower" agenda, *id.* ¶ 31, and expressed concern about the effect of ExxonMobil's speech on public perception. She complained that certain companies, including ExxonMobil, have led "many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts." *Id.* ¶ 32. To silence ExxonMobil's speech, the Attorney General launched a pretextual investigation of ExxonMobil, probing its statements and association. *Id.* ¶ 35-37. The Attorney General imposed those burdens to cleanse the climate policy debate of disfavored viewpoints. *Id*. These factual allegations sufficiently plead a viewpoint discrimination defense.

E. ExxonMobil Has Stated a Petitioning Defense (Defense 35)

"Both the United States Constitution and the Massachusetts Declaration of Rights provide a right to petition that includes the right to seek judicial resolution of disputes." *Blanchard* v. *Steward Carney Hosp., Inc.*, 477 Mass. 141, 157-58 n.24 (2017). To plead a petitioning defense, ExxonMobil must allege that the Commonwealth's Complaint impinges on its right to petition the government. *See id.* at 158. Petitioning is defined broadly to include "all 'statements made to influence, inform, or at the very least, reach governmental bodies.'" *N. Am. Expositions Co. Ltd. P'ship* v. *Corcoran*, 452 Mass. 852, 862 (2009) (quoting *Global NAPS, Inc.* v. *Verizon New England, Inc.*, 63 Mass. App. Ct. 600, 605 (2005)). In determining whether statements constitute petitioning, courts do not consider them in isolation, but rather "in the over-all context in which they were made." *Id.* That the speech is by an "organization" rather than an individual does not exclude it from qualifying as petitioning activity. *Hanover* v. *New Eng. Reg'l Council of Carpenters*, 467 Mass. 587, 595 (2014).

Here, ExxonMobil pleads that the Attorney General has filed this civil action because it disapproves of ExxonMobil's "attempt[s] to influence environmental policies." Am. Answer ¶ 96; *see also id.* ¶¶ 29, 38-40, 93-95. In particular, ExxonMobil alleges that the Attorney General seeks

to punish ExxonMobil for its "lobbying" on climate policy to "regulators, policymakers, public officials, and the press." *Id.* ¶ 97. Those allegations are all that is required to plead a petitioning defense.

IV. The Anti-SLAPP Ruling Does Not Preclude ExxonMobil's Petitioning Defense (Defense 35)

The Court's ruling on ExxonMobil's anti-SLAPP motion does not preclude ExxonMobil from stating a defense that the Attorney General's claims "are barred, in whole or in part" by ExxonMobil's constitutionally protected right to petition. This Court recognized that "some Exxon[Mobil] statements referenced in the complaint constitute protected petitioning." *Commonwealth* v. *Exxon Mobil Corp.*, 2021 WL 3488414, at *3 (Mass. Super. June 22, 2021). ExxonMobil should be permitted to assert its petitioning defense at least for those statements and activities that this Court already acknowledged are protected.[17]

To strike this defense—despite that acknowledgement—would give the Attorney General free rein to pursue conduct that the First Amendment and Massachusetts Declaration of Rights protect. But the law is clear that a plaintiff cannot "elude the protections" for petitioning, *477 Harrison Ave., LLC* v. *Jace Bos., LLC*, 477 Mass. 162, 175 (2017), by "combining into a single count claims that are based on both petitioning and non-petitioning activities." *Reichenbach* v. *Haydock*, 92 Mass. App. Ct. 567, 573 (2017) (quoting *Blanchard*, 477 Mass. at 155). To the contrary, the Attorney General "may proceed only on so much of its . . . claim" as is legitimate. *477 Harrison Ave.*, 477 Mass. at 175.

[17] ExxonMobil is appealing this Court's decision declining to recognize all of ExxonMobil's challenged statements and activities as constitutionally protected petitioning activities. *See Exxon Mobil Corp.* v. *Commonwealth*, Mass. App. Docket No. 2021-P-0860 (Aug. 17, 2021). The company reserves all rights for those arguments.

As to the statements this Court concluded did not constitute protected petitioning, ExxonMobil's petitioning defense should not be precluded until the Court of Appeals rules on ExxonMobil's anti-SLAPP appeal.

V. Fraud Allegations Do Not Displace ExxonMobil's First Amendment Rights (Defenses 33 and 35)

The Attorney General requests that this Court strike ExxonMobil's defenses of viewpoint discrimination (Defense 33) and petitioning (Defense 35), because the First Amendment does not protect fraud. Mot. 15-17. This circular argument gets the Attorney General nowhere because the Commonwealth has not established fraud—but has merely alleged it. "Simply labeling an action one for 'fraud,' of course, will not carry the day." *Illinois ex rel. Madigan* v. *Telemarketing Assocs. Inc.*, 538 U.S. 600, 617 (2003). In response to the argument that the Attorney General makes here, this Court already has concluded it "is not in a position, at least at this stage, to determine whether any particular statement is protected by the First Amendment." *Commonwealth*, 2021 WL 3493456, at *14. Nothing has changed since that ruling, and thus there is no basis to strike ExxonMobil's First Amendment defenses.

VI. The Attorney General Concedes That ExxonMobil Has a Valid Defense Against Compelled Speech (Defense 34)

The Attorney General erroneously challenges ExxonMobil's corrective disclosure defense as premature, asserting that ExxonMobil can raise this defense only if the Court orders ExxonMobil to publish corrective disclosures. Mot. 15-16. But ExxonMobil is permitted to raise defenses that address not only liability, but also the Attorney General's request for relief. For example, mitigation of damages is recognized in Massachusetts as an affirmative defense, *see, e.g.*, *Pehoviak* v. *Deutsche Bank Nat. Tr. Co.*, 85 Mass. App. Ct. 56, 65 (2014), despite the fact that "the failure to mitigate doctrine operates to reduce damages rather than as a barrier to liability," *Murphy* v. *Trader Joe's*, 2017 WL 235193, at *3 (N.D. Cal. Jan. 19, 2017). If ExxonMobil failed

to raise its compelled speech defense now, it would risk the defense being deemed waived at a later stage in the proceedings. *See, e.g.*, *Espinosa* v. *Sisters of Providence Health Sys.*, 227 F.R.D. 24, 26 (D. Mass. 2005).[18] The defense is therefore properly raised now.

VII. The Commonwealth Is Not Immune from Equitable or Common Law Defenses (Defenses 7-8 and 22-25)

The Attorney General argues it is exempt as a matter of law from well-established defenses in civil cases. Mot. 17. The law does not provide such blanket immunity.

A. An Estoppel Defense Can Be Asserted Against the Attorney General in Civil Litigation (Defense 7)

The Attorney General argues that estoppel defenses are categorically barred in suits involving the Commonwealth. But this Court rejected the Attorney General's argument in *Sullivan* v. *Chief Justice for Administration and Management of Trial Court*, which permitted claims of equitable estoppel against the Commonwealth. 448 Mass. 15, 30-31 (2006). Other courts have likewise rejected the argument that government entities are not subject to estoppel defenses. *E.g.*, *Gladstone*, 44 F. Supp. 2d at 90 (denying motion to strike estoppel defenses against government).[19] Accordingly, ExxonMobil's estoppel defense should not be stricken.

B. An Unclean Hands Defense Can Be Asserted Against the Commonwealth in Civil Litigation (Defense 8)

The Attorney General also claims the Commonwealth is immune from an unclean hands defense, but cites no legal support. Mot. 18. Courts routinely allow private parties to assert

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[18] The Attorney General's reliance on *Provident Funding Associates, LP* v. *Jones*, is misplaced, because that case concerned "a summary process proceeding" where a defendant "may only assert affirmative defenses that relate to the validity of legal title." 2013 WL 1324653, at *4 (Mass. Super. 2013). Rule 8 imposes no similar restriction on ExxonMobil's right to plead defenses in this plenary civil action.

[19] The Attorney General's reliance on *Phipps Prod. Corp.* v. *Massachusetts Bay Transp. Auth.*, 387 Mass. 687, 693 (1982), is misplaced. That case was limited to a defense resting on the "individual acts or statements of a government official" that contradicted the government's broader "legislative policy." *Sullivan*, 448 Mass. at 30-31. Here, ExxonMobil's estoppel defense does not rely on the acts of any individual—but rather state-wide conduct that defeats the claims in this suit.

unclean hand defenses against the government. *See, e.g.*, *United States* v. *Lain*, 2018 WL 11252709, at *2 (D. Wyo. Apr. 13, 2018) (allowing unclean hands defense against IRS); *S.E.C.* v. *Cuban*, 798 F. Supp. 2d 783, 790-92 (N.D. Tex. 2011) ("[T]he affirmative defense of unclean hands is not barred as a matter of law in an SEC enforcement action."); *State* v. *United Parcel Serv., Inc.*, 253 F. Supp. 3d 583, 680-81 (S.D.N.Y. 2017) (considering unclean hands defense against government, but concluding facts did not support it), *aff'd*, 942 F.3d 554 (2d Cir. 2019). Thus, there is no basis to strike this defense.

C. Lack of Causation Is a Valid Defense to the Commonwealth's Claims (Defenses 22-25)

Finally, the Attorney General contends that ExxonMobil's causation defenses[20] should be stricken because the Commonwealth is excused from proving causation when seeking civil penalties under Chapter 93A. Mot. 17-18. The Attorney General's position contradicts the express language of Chapter 93A, which authorizes a court to enter an order "necessary to restore any person who has suffered any ascertainable loss *by reason of* the use" of unfair or deceptive practices. G.L. c. 93A, § 4 (emphasis added). Consistent with the statutory language, courts require the Commonwealth to establish causation for a Chapter 93A claim seeking damages or restitution.[21] *See, e.g.*, *Commonwealth* v. *Bragel*, 2013 WL 7855997, at *2 (Mass. Super. Dec. 4, 2013) (dismissing the Commonwealth's Chapter 93A claim for failure to allege "economic or

[20] Specifically, ExxonMobil's Amended Answer pleads that any harm was the result of a superseding or intervening cause (No. 22); the purported Chapter 93A violation did not actually or proximately cause any alleged harm (No. 23); the purported injury was caused by market conditions or the conduct of others (No. 24); and Plaintiff participated in the conduct underlying its claim (No. 25).

[21] The cases cited by the Attorney General do not hold otherwise. *See Heller* v. *Silverbranch Const. Corp.*, 376 Mass. 621, 626 (1978) (noting, in reviewing a post-trial judgment, that the Attorney General need not establish common law fraud, breach of warranty, negligence, or contractual liability to establish its Chapter 93A claim); *Commonwealth* v. *Chatham Dec. Co.*, 49 Mass. App. Ct. 525, 528-29 (2000) (affirming civil penalties, where tenants who were harmed lacked "economic incentive to bring a lawsuit"); *Commonwealth* v. *Fall River Motor Sales, Inc.*, 409 Mass. 302, 312-13 (1991) (affirming contempt judgment for violating consent order, notwithstanding assertion that "advertisement was truthful").

noneconomic" loss had been suffered); *Commonwealth* v. *Purdue Pharma, LP*, 2019 WL 4669561, at *5 (Mass. Super. Sept. 16, 2019) (stating this Court "assume[d] that some causation between the conduct at issue and some quantifiable harm must be established" for the Commonwealth's Chapter 93A claims). Here, the Attorney General does not disclaim an intent to seek damages or restitution, which it concedes would require proof that the violation caused the damages sought. Mot. 17. Accordingly, the Court should deny the Attorney General's request to strike ExxonMobil's causation defenses.

CONCLUSION

The Commonwealth's motion to strike is nothing more than an attempt to deprive ExxonMobil of the opportunity to present its validly stated defenses—notwithstanding the Attorney General's repeated representations that ExxonMobil would have this opportunity if the Attorney General filed a civil action. The claims and defenses asserted in this civil action were not resolved by the federal action filed more than three years before the Attorney General commenced this suit, which challenged the Attorney General's investigation. The Attorney General seeks to circumvent the Commonwealth's burden in this civil action, where it has the burden of proof, and the Attorney General's actions are entitled to no deference: first by invoking a presumption of prosecutorial regularity that does not apply to pleading defenses in a civil action, and second by claiming the Commonwealth is exempt from defenses applicable to other civil litigants, when the law says there is no such exemption. The Attorney General has failed to carry the Commonwealth's heavy burden to show the challenged defenses here fail as a matter of law, drawing all inferences in ExxonMobil's favor and taking into account the extensive factual allegations that have been added in the Amended Answer. Accordingly, the Court should deny the Commonwealth's motion to strike.

Dated: October 29, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas C. Frongillo, counsel for Defendant Exxon Mobil Corporation, hereby certify that on October 29, 2021, I caused a copy of this Memorandum of Law of Exxon Mobil Corporation in Opposition to the Commonwealth's Motion to Strike Defenses to be served on counsel of record by electronic service.

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