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**

REPLY MEMORANDUM OF EXXON MOBIL CORPORATION IN SUPPORT OF ITS SPECIAL MOTION TO DISMISS THE AMENDED COMPLAINT PURSUANT TO G.L. c. 231, § 59H

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PRELIMINARY STATEMENT

Equal protection of law—administered neutrally and fairly, without fear or favor—is a hallmark of the American system of justice. All must have recourse to protect their legal rights, irrespective of race, religion, wealth, or political belief. ExxonMobil brought this motion to vindicate that principle. It moved to dismiss a complaint the Office of the Attorney General for the Commonwealth of Massachusetts (the "Attorney General") filed in response to ExxonMobil's petitioning activity, a right protected by the First Amendment to the U.S. Constitution and Article XIX of the Declaration of Rights of the Massachusetts Constitution. As demonstrated in ExxonMobil's opening brief, the Attorney General disagrees with ExxonMobil's positions on energy and climate policy and filed its complaint to limit ExxonMobil's right to advocate its views to lawmakers and voters.

The Attorney General's response to ExxonMobil's motion is as dangerous as it is disingenuous. Doubling down on its view that disfavored speakers have fewer rights, the Attorney General claims that G.L. c. 231, § 59H ("the anti-SLAPP statute") is inapplicable here because ExxonMobil is not a "person of modest means." The anti-SLAPP statute contains no such requirement. As a law of general application, it applies to *all* parties, rich and poor, individual and organization, alike.

The Attorney General further claims it is not subject to the anti-SLAPP statute. In its view, only "large private interest[s]"—not governments—are prohibited from filing lawsuits to deter petitioning activity. Once again, the Attorney General's position finds no support in the statutory text or the binding decisions of the Massachusetts Supreme Judicial Court. The First Amendment and Article XIX of the Massachusetts Declaration of Rights protect the right to petition from *government* infringement, a protection that is just as vital today as it was at the founding. The Attorney General's claim to be above the law (and beyond judicial review) should be rejected.

Left to shoulder the anti-SLAPP statute's burden-shifting framework, the Attorney General fails to rebut ExxonMobil's threshold showing that this suit is based on its petitioning activity. Nor has the Attorney General carried its burden of showing that its action is both colorable and not retaliatory. Accordingly, the Court should reject the Attorney General's assault on ExxonMobil's petitioning rights, and grant the special motion to dismiss.

ARGUMENT

I. The Anti-SLAPP Statute Applies to Both ExxonMobil and the Commonwealth

A. The Anti-SLAPP Statute Protects ExxonMobil's Constitutional Rights

According to the Attorney General, the anti-SLAPP statute applies only in the "typical" case where "large private interests" sue "common citizens" of "modest means." (Opp. 1, 6-7, 12.)[1] Massachusetts case law squarely addresses and rejects this contention. It is well established that "the Legislature intended to go beyond the 'typical' case by enacting 'very broad protection for petitioning activities.'" *Baker* v. *Parsons*, 434 Mass. 543, 549 (2001) (quoting *Duracraft Corp.* v. *Holmes Prods. Corp.*, 427 Mass. 156, 162 (1998)); *McLarnon* v. *Jokisch*, 431 Mass. 343, 347 (2000). It is beyond dispute that the anti-SLAPP statute protects "organizations" as well as individuals. *See Hanover* v. *New Eng. Reg'l Council of Carpenters*, 467 Mass. 587, 595 (2014).

The financial status of the parties is irrelevant. "It has been firmly established that the anti-SLAPP statute can be invoked where both parties are persons of modest means." *MacDonald* v. *Paton*, 57 Mass. App. Ct. 290, 295 (2003). It may be invoked regardless of financial resources. For instance, in *Baker*, the Supreme Judicial Court rejected the contention that the anti-SLAPP statute did not apply merely because the defendant was a "wealthy and politically well-connected environmental organization." 434 Mass. at 548–49.

[1] "Br." refers to ExxonMobil's opening brief, and "Opp." refers to the Attorney General's opposition brief.

B. The Commonwealth Is a "Party" Under the Anti-SLAPP Statute

The Attorney General, who brings its suit "in the name of the commonwealth," G.L. c. 93A, § 4, contends that the Commonwealth is immune from scrutiny under the anti-SLAPP statute because it does not qualify as a "party." (Opp. 4.) The Attorney General's argument ignores the plain text of the statute, which expressly applies "*[i]n any case* in which a party asserts that the civil 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." G.L. c. 231, § 59H (emphasis added).[2] The Attorney General also ignores precedent in which Massachusetts courts applied the anti-SLAPP statute against government entities. *See Hanover*, 467 Mass. at 587 (reversing denial of anti-SLAPP motion against the town of Hanover); *Healer* v. *Dep't of Env't Prot.*, No. 200600700, 2006 WL 4526748 (Mass. Super. Ct. Dec. 22, 2006) (granting special motion to dismiss counterclaims asserted by town in suit challenging Massachusetts Department of Environmental Protection).

The Attorney General identifies no authority supporting its statutory construction; the decisions it relies on do not even construe the term "party." For example, the Attorney General cites the 1912 case, *Donohue* v. *City of Newburyport*, for the proposition that, "'[w]hen the Legislature . . . intend[s] to include' both the government and private parties within a statute's scope, it must do so expressly." (Opp. 4 (quoting 211 Mass. 561, 567 (1912)).) But *Donohue* did not interpret the term "party," or address a state entity at all. Rather, it interpreted the term "corporation," and specifically whether it encompassed "cities and towns." 211 Mass. at 566. Similarly, *Hanson* v. *Commonwealth* interpreted the term "persons" in a statute that applied to

[2] The Attorney General argues it cannot be a responding "party" under the anti-SLAPP statute because "[t]he attorney general . . . may intervene to defend or otherwise support the moving party on such special motion." (Opp. 5 (citing G.L. c. 231, § 59H).) But the statute provides the Attorney General a *discretionary* right to intervene, which need not be exercised, particularly when the Commonwealth is already a party.

"persons who are engaged in the same industry, trade, craft or occupation." 344 Mass. 214, 219 (1962). Again, *Hanson* did not interpret the term "party"—but, notably, did use the phrase "party respondent" to refer to the Commonwealth. *Id.* at 216.[3]

The Attorney General's appeal to cases interpreting the anti-SLAPP statutes of *other states* is unavailing. It relies on *People* v. *Health Lab'ys of N. Am., Inc.*, which upheld an express exemption in the text of the California anti-SLAPP statute for public prosecutors. 87 Cal. App. 4th 442 (2001). As the Attorney General concedes (Opp. 8 n.8), no similar exemption exists in the text of the Massachusetts anti-SLAPP statute. Indeed, by expressly applying in "any case" in which a party challenges "civil claims," Massachusetts's anti-SLAPP statute creates an exemption for *criminal* prosecutors, while plainly encompassing all civil suits. *See* G.L. c. 231, § 59H. The Attorney General's reliance on *Madawaska* v. *Cayer*, 103 A.3d 547, 552 (Me. 2014), is contradicted by binding Massachusetts precedent. In *Cayer*, the Maine court declined to apply Maine's anti-SLAPP statute to an enforcement action brought by a town. *Id.* By contrast, the Massachusetts Supreme Judicial Court *has* applied Massachusetts' anti-SLAPP statute to towns, under analogous circumstances. *See, e.g.*, *Hanover*, 467 Mass. at 587. These cases confirm that the Massachusetts anti-SLAPP statute does not exclude civil enforcement suits from its scope.

C. The Attorney General's Remaining Arguments Do Not Bar Judicial Review

The Attorney General's speculative policy concerns do not justify creating a new categorical bar on anti-SLAPP motions in civil enforcement suits. The Attorney General cites a risk of delay. (Opp. 7-8.) But ExxonMobil's anti-SLAPP motion has caused no delay to date in these proceedings, since it was filed prior to—and within the stipulated deadline for—ExxonMobil's motion to dismiss. The Attorney General's suggestion that it has been thwarted

[3] The doctrine of sovereign immunity does not shield the Attorney General from *defenses* in a proceeding that the Attorney General initiated, especially where the defendant seeks to recover no money from the Commonwealth.

from seeking discovery by ExxonMobil's anti-SLAPP motion is similarly baseless. The Attorney General served no discovery on ExxonMobil in the nine months before ExxonMobil served its anti-SLAPP motion. And according to the Attorney General, it has already conducted an "exhaustive" investigation, which (if true) would render any further discovery unnecessary.

II. The Attorney General's Suit Is Based Solely on ExxonMobil's Petitioning Activity

In its moving papers, ExxonMobil satisfied its threshold burden of showing that the Attorney General's SLAPP suit is based on ExxonMobil's petitioning activities. *See Blanchard* v. *Steward Carney Hosp., Inc.*, 483 Mass. 200, 203 (2019) (hereinafter *Blanchard II*). The Amended Complaint targets quintessential petitioning, including lobbying and ExxonMobil's statements to regulators, policymakers, public officials, and the press on climate policy. (Br. 12 (citing Am. Compl. ¶¶ 165, 190-97, 573, 583, 663-72, 688-89).) It further targets ExxonMobil's public statements concerning regulatory responses to climate change in public meetings, corporate publications, and on its website precisely because the Attorney General believes ExxonMobil "attempt[ed] to influence" environmental policies and "urg[ed] delay in regulatory action" through this speech.[4] (Br. 12, 17 (citing Am. Compl. ¶¶ 165, 197, 492-93, 583, 663-672); Opp. 19 (accusing ExxonMobil of "downplay[ing] concerns about climate change").)

The Attorney General does not defend its focus on petitioning activity. Its brief avoids the statements targeted in the Amended Complaint almost as vigilantly as it seeks to avoid judicial review. Recognizing its allegations about ExxonMobil's "lobbying efforts" fall unambiguously within the scope of the anti-SLAPP statute, the Attorney General asks the Court to disregard them as mere "context." (Opp. 20 n.18.) But Massachusetts law is clear: the court must dismiss any

[4] ExxonMobil is not required to identify "a specific government proceeding" for its petitioning activity. (Opp. 20.) "[P]etitioning" includes statements made to influence "governmental bodies—either directly or indirectly.'" *Corcoran*, 452 Mass. at 862. ExxonMobil need not "directly commence or initiate proceedings." *Plante* v. *Wylie*, 63 Mass. App. Ct. 151, 158 (2005).

claim premised on petitioning activity. *See Reichenbach* v. *Haydock*, 92 Mass. App. Ct. 567, 573 (2017); *477 Harrison Ave., LLC* v. *Jace Bos., LLC*, 477 Mass. 162, 175–76 (2017).

The Attorney General next seeks refuge by mischaracterizing ExxonMobil's petitioning activity as commercial speech. (*See* Opp. 20.) Even if the challenged conduct were commercial speech—and it is not—it is well established that the anti-SLAPP statute applies to speech with a commercial motive. *See Blanchard* v. *Steward Carney Hosp., Inc.*, 477 Mass. 141, 151 (2017) (hereinafter *Blanchard I*); *N. Am. Expositions Co.* v. *Corcoran*, 452 Mass. 852, 863 (2009) ("[T]he fact that the speech involves a commercial motive does not mean it is not petitioning."); *Office One, Inc.* v. *Lopez*, 437 Mass. 113, 123 (2002).

In a final (but equally futile) dodge, the Attorney General urges this Court to strip ExxonMobil's petitioning activity of its protections by labeling it "fraud." (Opp. 17.) Such bootstrapping is impermissible. *See McLarnon*, 431 Mass. at 348. Massachusetts courts allow anti-SLAPP motions to dismiss claims under Chapter 93A, despite allegations of deception. *See, e.g.*, *Corcoran*, 452 Mass. at 871; *SMS Fin. V, LLC* v. *Conti*, 68 Mass. App. Ct. 738, 746 (2007).

III. The Attorney General Has Failed To Show Its Action Is Not a "SLAPP" Suit

Faced with ExxonMobil's threshold showing that the Attorney General's suit is based on ExxonMobil's petitioning activity, the burden of proof shifts to the Attorney General to "make a showing adequate to defeat" the anti-SLAPP motion. *Blanchard II*, 483 Mass. at 205-07. The Attorney General does not even attempt to satisfy this burden under the "high bar" of *Blanchard*'s "first path," which requires that ExxonMobil's "petitioning activity was, in essence, a sham." *Id.* at 204. Instead, the Attorney General seeks to avoid dismissal pursuant to *Blanchard*'s "second path." (Opp. 11.) To do so, the Attorney General is "require[d]" to demonstrate that its suit is (a) "colorable" and (b) "not retaliatory." *Id.* The Attorney General fails to satisfy its evidentiary burden under either element.

A. The Presumption of Regularity Is Inapplicable and Unavailing Here

The Attorney General seeks to circumvent its burden by invoking a "presumption of regularity" accorded criminal prosecutors, which purportedly requires the Court to "presume the Commonwealth's action is legitimate and thus colorable." (Opp. 10.) The Attorney General identifies no precedent applying a presumption of good faith to civil enforcement actions generally, much less to anti-SLAPP motions specifically. There is no reason in law or logic to apply a presumption created for criminal cases to the civil lawsuit at issue here.

Even if such a presumption did attach, however, it has been rebutted. The Attorney General relies on *Hartman* v. *Moore* to argue that courts assume a prosecutor generally "'has legitimate grounds for the action [s]he takes' *unless shown otherwise*." (Opp. 10 (quoting 547 U.S. 250, 263 (2006)) (emphasis added).) But the presumption can be rebutted by pleading a "retaliatory motive" or "[s]ome sort of allegation . . . to address the presumption of prosecutorial regularity." *Hartman*, 547 U.S. at 263-65.

ExxonMobil did precisely that by alleging that the Attorney General brought this suit to advance its preferred climate policies by silencing perceived political opponents. (Br. 3-6.) As alleged, the Attorney General has long collaborated with public and private interests dedicated to "delegitimiz[ing] [ExxonMobil] as a political actor" and has dutifully followed their playbook to use its law enforcement powers to "maintain[] pressure" on the company that "could eventually lead to its support for legislative and regulatory responses to global warming." (Br. 4-5 (citing Anderson Aff. Ex. 1 at 27; Ex. 2; Ex. 3).) ExxonMobil's allegation of improper motive is sufficient to rebut any presumption of regularity that might apply here.

B. The Attorney General's Claims Are Retaliatory

The Attorney General offers no rebuttal of ExxonMobil's showing of retaliation. To demonstrate that its suit is not retaliatory, the Attorney General *must* establish that the "primary

motivating goal" in bringing its claim "was not to interfere with and burden [petitioning rights], but to seek damages for the personal harm to [the nonmoving party] from the defendant's alleged" misconduct. *477 Harrison Ave.*, 483 Mass. at 528 (citing *Blanchard I*). The Attorney General has not come forward with any evidence that would support any such finding.

C. The Attorney General's Claims Are Not Colorable

As detailed in ExxonMobil's moving papers, the Attorney General's pretextual claims rest on external sources of accusation that have since been refuted. (Br. 7-8.) The Attorney General offers no evidence to the contrary and does not deny that its allegations mirror claims that were conclusively rejected by Justice Ostrager following trial in New York last year. *See People* v. *Exxon Mobil Corp.*, No. 452044/2018, 2019 WL 6795771 (Sup. Ct. N.Y. Cty. Dec. 10, 2019).

The Attorney General's reliance on rulings of the Superior Court and Supreme Judicial Court is misplaced, as those decisions merely concerned the validity of an investigative document request, not the merits of causes of action that had not yet been filed. *See In re Civ. Investigative Demand No. 2016-EPD-36*, No. SUCV20161888F, 2017 WL 627305, at *4-6 (Mass. Super. Ct. Jan. 11, 2017) (Brieger, J.); *Exxon Mobil Corp.* v. *Attorney Gen.*, 479 Mass. 312 (2018), *cert. denied*, 139 S. Ct. 794 (2019). The determination by those courts—which lacked the benefit of Justice Ostrager's ruling—that the Attorney General could issue document requests does not validate the claims presented here.

The Attorney General's reliance on Judge Young's decision on remand is similarly misplaced, as that decision was expressly limited to evaluating federal jurisdiction under "the well-pleaded complaint rule—nothing more and nothing less." *See Commonwealth* v. *Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 34 (D. Mass. May 28, 2020). The federal court did not—and could not—opine on the merits of the Attorney General's claims.

D. The Discretionary *Blanchard II* Factors Also Favor Dismissal

The Attorney General attempts to discharge its burden with six admittedly "non-dispositive" factors (Opp. 11) that "*may be helpful* in distinguishing an ordinary lawsuit from a SLAPP suit." *Blanchard II*, 483 Mass. at 206-07 (emphasis added). These factors are no substitute for the two *mandatory* elements (retaliatory intent and colorable claims) the Attorney General bears (but failed to carry) the burden of proving. Even if considered, they support dismissal.

Classic Indicia. "[A] 'classic SLAPP case' involve[s] a nonmeritorious lawsuit designed to intimidate or silence an opposing party." *Lopez*, 437 Mass. at 121. This case presents classic indicia of a SLAPP suit because the pleadings expressly target protected speech on climate policy: a matter of public concern. *See Fromm* v. *Bos. Redevelopment Auth.*, No. 032951F, 2005 WL 1812498, at *6 (Mass. Super. Ct. May 13, 2005). Despite the Attorney General's attempt to portray ExxonMobil as a powerful corporation unworthy of Section 59H protection, it is well established that "First Amendment freedoms are most in danger when *the government* seeks to control thought or to justify its laws for that impermissible end." *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 253 (2002) (emphasis added). Given the Attorney General's vast enforcement powers, which it seeks to wield unchecked by Section 59H, this case presents a classic abuse of power to intimidate.

Centrality and Relative Strength of the Challenged Claim. As the Attorney General concedes, ExxonMobil's anti-SLAPP motion calls into question the "entirety" of its suit (Opp. 13), thus satisfying the centrality requirement. *See Aldana* v. *Worcester Digit. Mktg., LLC*, No. WOCV20191689C, 2020 WL 5993103, at *6 (Mass. Super. Ct. Aug. 12, 2020). For the reasons above, the Attorney General has failed to establish its claims are colorable, much less strong.

Timing of Suit. The timing of the suit—filed on the third day of a highly publicized trial between ExxonMobil and the New York Attorney General—also bespeaks an improper motive. The Attorney General's contention that its suit was not commenced "close in time" to the

petitioning activity is also false. (Opp. 12.) It challenges petitioning activity that occurred within the past year, including "recent public statements to investors" at 2019 and 2020 shareholders meetings and in 2019 and 2020 corporate publications. (Am. Compl. ¶¶ 507-516.)

Timing of Motion. ExxonMobil timely filed this anti-SLAPP motion pursuant to the parties' stipulated briefing schedule, which was entered after "ExxonMobil consented to the Commonwealth's proposal" to extend the pleading deadlines "[i]n light of the ongoing COVID-19 pandemic disruptions." (Joint Motion to Amend Pleading Deadlines, May 14, 2020).

Burden. The Attorney General's suit substantially burdens ExxonMobil's right to petition, including by seeking substantial statutory penalties. Attorney General Healey herself told the press that she seeks "untold amounts" of statutory damages arising from "every sale of gas, every sale of securities."[5] The Attorney General further seeks to regulate the Company's protected speech by means of injunction. Moreover, its theory of deception by "omission" threatens liability whenever ExxonMobil speaks and would impose a burden to make "literally infinite" affirmative disclosures. *See Tomasella* v. *Nestlé USA, Inc*., 962 F.3d 60, 73 (1st Cir. 2020).

CONCLUSION

The Attorney General asks this Court to set a novel and dangerous precedent by immunizing the government from scrutiny when it infringes petitioning rights. There is no reason to adopt this categorical bar, unsupported as it is by the text of the anti-SLAPP statute and the binding precedent interpreting it. Applying the familiar burden-shifting framework, the Attorney General has not carried its burden of showing that its suit is not based on ExxonMobil's petitioning activity and is not a SLAPP suit. The Court should grant ExxonMobil's special motion to dismiss.

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[5] Zahra Hirji, *Massachusetts Is Now The Second State Suing The Oil Giant Exxon Over Climate Change*, BuzzFeed News (Oct. 24, 2019), https://www.buzzfeednews.com/article/zahrahirji/exxon-lawsuit-massachusetts-climate-change.

Dated: December 15, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Justin Anderson, counsel for Defendant Exxon Mobil Corporation, hereby certify that on December 15, 2020, I caused a copy of the Reply Memorandum of Exxon Mobil Corporation in Support of Its Special Motion to Dismiss the Amended Complaint Pursuant to G.L. c. 231, § 59h to be served on counsel of record by electronic service in accordance with the Joint Motion to Set Pleading Deadlines, allowed by the Court on April 14, 2020.

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