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 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

The Office of the Attorney General for the Commonwealth of Massachusetts (the "Attorney General") is at the forefront of an effort to cleanse the public square of political opposition it believes has "delay[ed] meaningful action to address climate change." (Am. Compl. ¶ 720.) The Attorney General objects to ExxonMobil's production and promotion of fossil fuels, despite the lawful and highly regulated nature of those activities—and their essential contribution to modern life. In the Attorney General's telling, since 2012, Massachusetts citizens have been misled into supporting political policies and making lifestyle choices that do not align with its clean energy agenda. And the Attorney General's perceived political opponents are to blame. Those, like ExxonMobil, who decline to parrot the Attorney General's call for an immediate transition to renewable energy are not simply diverse viewpoints in a public debate with state, federal, and global policy implications, but targets who must be silenced through "lawfare."

Under the guise of an investor and consumer deception suit, the Attorney General seeks to impose its own views about appropriate environmental policies and practices by chilling petitioning deemed an obstacle to its policy objectives. The Attorney General brought this pretextual action against ExxonMobil to penalize and enjoin its petitioning activities, thereby pressuring ExxonMobil and others with similar views to support the Attorney General's preferred climate policies, or at least stymying their efforts to engage with policymakers and the public on this issue. (Am. Compl. ¶¶ 745-46, 759-60, 769-70.)

Recognizing the harm done when litigants like the Attorney General misuse the legal system to punish and chill petitioning activity, Massachusetts law allows parties to bring a special motion to dismiss an action that is based on a party's "exercise of its right of petition under the constitution of the United States or of the commonwealth." G.L. c. 231, § 59H. Here, there can

be no doubt the Attorney General's suit is based on ExxonMobil's protected participation in public discourse on climate policy. The improper motive behind this suit is apparent on the face of the Amended Complaint, which seeks to hold ExxonMobil liable for failing to espouse the Attorney General's policy objectives. Indeed, the Attorney General assails ExxonMobil's public statements precisely because they purportedly influenced climate policy. This action is an assault on activities protected by the First Amendment and Article XIX of the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts. It should be dismissed in its entirety.

STATEMENT OF FACTS

A. ExxonMobil Has Long Engaged in Advocacy on Energy Policy.

As one of the world's largest public energy companies, ExxonMobil actively engages in public discourse on energy policy by sharing its insights on issues such as energy demand, risks associated with climate change, and potential regulatory measures to curb environmental impacts. (Am. Compl. ¶ 495.) ExxonMobil shares its perspective with policy makers, regulators, and the public alike. As the Attorney General admits, ExxonMobil "engag[es] regulators on regimes and approaches" to improve the "sustainability of operations" (*id.*) and it purportedly "attempt[s] to influence" environmental policies by engaging with the European Union Commission and the Council on Foreign Relations among others (*id.* ¶¶ 197, 583, 671), as well as purportedly promoting "campaigns" against certain restrictive emissions regulations. (*Id.* ¶¶ 665-72; Ex. 13.)

This engagement also entails public advocacy, including through executive speeches, "advertorials" in major newspapers (Ex. 15), and publications on ExxonMobil's website, blog, and in its corporate reports. (Am. Compl. ¶¶ 165, 197, 365, 495, 665-71.) ExxonMobil routinely "articulate[s] [its] policy positions in [its] annual Energy Outlook, Corporate Citizenship Report, and Carbon Disclosure Project submission." (*Id.* ¶ 495.) To "improve scientific understanding, assess policy options, and achieve technological breakthroughs," including by scaling up existing

technologies, ExxonMobil conducts "scientific, economic and technological research on climate change" and publishes papers in peer-reviewed literature. (*Id.*) As part of its public dialogue, ExxonMobil has widely and publicly recognized the risks climate change presents to society. In response to those risks, ExxonMobil has voiced its support for climate policy that "reduce[s] the risks posed by climate change at minimum societal cost, in balance with other societal priorities such as poverty eradication, education, health, security and affordable energy." (Ex. 23 at 30; Am. Compl. ¶ 683.) For instance, ExxonMobil supports the Paris climate accords. (Ex. 24 at 3, 7, 9.)

But some of ExxonMobil's positions on climate policy do not align with the Attorney General's climate policy orthodoxy. Chief among that orthodoxy's tenets is that society must "rapidly transition[] away from fossil fuel use" to exclusive reliance on renewables. (Am. Compl. ¶ 663; *see also id.* ¶¶ 497, 693, 718, 720.) By contrast, ExxonMobil has taken the position that, to meet growing energy demand, "none of our energy options should be arbitrarily denied, dismissed, penalized or promoted." (Ex. 25 at 51.) Another central point of disagreement relates to the feasibility of certain types of "aggressive regulatory action" (Am. Compl. ¶ 497), including "policy responses to climate change" that would "reduce GHG emissions 80 percent . . . through 2040" (*id.* ¶ 493). ExxonMobil has urged a robust dialogue about the feasibility of any plan to "stabiliz[e] world temperature increases not to exceed 2 degrees Celsius by 2100." (Ex. 26 at 8-12.) And it has questioned "the potential for renewable energy to displace fossil fuels through 2040." (Am. Compl. ¶ 492.) ExxonMobil has also highlighted the risk that this "low carbon scenario"—even if achievable—might "harm those least economically developed populations who are most in need of affordable, reliable and accessible energy." (Ex. 26 at 11; Ex. 27.)

B. The Attorney General Conspired with Private Interests to Pressure ExxonMobil to Alter Its Positions on Climate Policy.

ExxonMobil's position on climate policy is anathema to a well-funded coalition of public

and private interests who have long urged state law enforcement officials to pressure perceived political opponents into supporting their preferred climate policies. Members of this coalition convened in June 2012 at a gathering in La Jolla, California, denominated a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies," where they plotted strategies for "maintaining pressure on the [fossil fuel] industry that could eventually lead to its support for legislative and regulatory responses to global warming." (Ex. 1 at 27.) Peter Frumhoff, the Director of Science and Policy for the Union of Concerned Scientists, helped "conceive[]" of this workshop and recruited attorney Matthew Pawa, who unsuccessfully sued ExxonMobil in 2009 for allegedly causing global warming, to speak as a panelist. (*Id*. at 2, 12-13, 32.) Recognizing the broad power of attorneys general, the La Jolla participants noted that "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light." (*Id.* at 11.) Frumhoff 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." (Ex. 5.)

The Rockefeller Family Fund (the "Rockefellers") also helped devise the playbook the Attorney General has dutifully followed. In January 2016, the Rockefellers convened a meeting, attended by Pawa, to discuss the "Goals of an Exxon campaign." (Ex. 2.) According to the agenda for that meeting, which was published by *The Washington Free Beacon*, those "goals" included:

- "To 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."
- "To delegitimize [ExxonMobil] as a political actor."
- "To force officials to disassociate themselves from Exxon, their money, and their historic opposition to climate progress . . . ."
- "To drive divestment from Exxon."

- "To drive Exxon & climate into [the] center of [the] 2016 election cycle."

(*Id*.) Those overtly political goals are not legitimate objectives of any bona fide law enforcement action. Nevertheless, the Rockefellers identified "AGs" as one of the "the main avenues for legal actions & related campaigns" for "creating scandal." (Ex. 3 at 1.) In December 2016, the Rockefellers admitted, after initially failing to disclose the connection, that they had financed the so-called investigative journalism that the Attorney General later offered as a pretextual basis for its investigation of ExxonMobil. (Am. Compl. ¶ 3; Ex. 32.)

C. The Attorney General Publicly Aligned Itself with Other Activist Attorneys General Seeking to Use the Courts to Establish Climate Policy.

On March 29, 2016, the Attorney General publicly appeared in New York City with a coalition of partisan attorneys general, self-styled the "Green 20," at a press conference they titled "AGs United for Clean Power." (Ex. 4 at 1-2.) Then-New York Attorney General Eric Schneiderman, who hosted the event, began by attacking the "fossil fuel industry" and lamenting perceived "gridlock in Washington" caused by "morally vacant forces that are trying to block every step by the federal government to take meaningful action." (*Id.* at 2-4.) He then stated that he and his fellow "state actors" would "step into this [legislative] breach" by "battl[ing]" perceived political opponents. (*Id.* at 3-4.)

Attorney General Healey publicly aligned herself with that agenda. She too blamed the public's failure to embrace her desired climate policies on "[f]ossil fuel companies," who she claimed had caused "many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts." (*Id.* at 12.) She asserted that those who purportedly "deceived" the public—by influencing "public perception" about climate policy—"should be, must be, held accountable." (*Id.*) In the next breath, Attorney General Healey declared that she had "joined in investigating the practices of ExxonMobil." (*Id*.)

Mere hours earlier, Attorney General Healey and others attended closed-door workshops in New York City led by La Jolla architects Pawa and Frumhoff. In those secret meetings, Pawa delivered a presentation on "climate change litigation," while Frumhoff delivered a presentation on the "imperative of taking action now on climate change." (Ex. 7 at 2.) When a reporter contacted Pawa the next day, the New York Attorney General's Office advised him to "not confirm that [he] attended or otherwise discuss the event." (Ex. 6.) The Massachusetts Attorney General also sought to shield information by entering into a "Climate Change Coalition Common Interest Agreement," purportedly to advance the "common legal interest in limiting climate change and ensuring the dissemination of accurate information about climate change." (Ex. 8 at 1; Ex. 31.)

D. The Attorney General Issued a CID to ExxonMobil, Which Resulted in State and Federal Court Challenges.

Just weeks after the March 2016 "AGs United for Clean Power" New York City press conference, the Attorney General issued a Civil Investigative Demand ("CID") to ExxonMobil, seeking over 40 years of records pertaining to speech and research on climate change and communications with mainstream think tanks including the Heritage Foundation, the American Enterprise Institute, and Americans for Prosperity. (Ex. 9 at 12-20.)

ExxonMobil challenged the CID in federal and state court. *First*, ExxonMobil sued in the United States District Court for the Northern District of Texas, where it is headquartered, for violations of its rights under the U.S. Constitution. District Judge Kinkeade concluded that "Attorney General Healey's actions leading up to the issuance of the CID cause[d] the Court concern and present[ed] the Court with the question of whether Attorney General Healey issued the CID with bias or prejudgment about what the investigation of Exxon would discover." *Exxon Mobil Corp.* v. *Healey*, 215 F. Supp. 3d 520, 522 (N.D. Tex. 2016). In his subsequent transfer order, he expressed concern that the Attorney General's investigation sought "to further [its]

personal agenda[ ] by using the vast power of the government to silence the voices of all those who disagree with [it]." (Ex. 33 at 5, 12.) After transfer to the Southern District of New York, the case was dismissed. ExxonMobil's appeal of that dismissal is pending in the United States Court of Appeals for the Second Circuit. *Second*, to preserve its rights under Massachusetts law, ExxonMobil also filed a petition to quash the CID in Massachusetts Superior Court. In those summary proceedings, the Massachusetts courts rejected ExxonMobil's challenges to the validity of the CID, including on personal jurisdiction grounds. The Superior Court's ruling—which was expressly made in the context of the government's broad discretion to conduct investigations—was affirmed by the Massachusetts Supreme Judicial Court on appeal.

After ExxonMobil filed these challenges, the Attorney General requested a tolling agreement. On June 24, 2016, the parties executed an agreement (i) extending the limitations period on the Attorney General's possible claims, and (ii) relieving ExxonMobil from any obligation to comply with the CID for the pendency of the ensuing litigation, including through appeals. (Ex. 10.) Pursuant to the agreed-upon terms of the Tolling Agreement, ExxonMobil has not produced any documents to the Attorney General in response to the CID; nor have any ExxonMobil employees testified before the Attorney General, as the CID requested. Despite expressly agreeing to the Tolling Agreement, the Attorney General now mischaracterizes ExxonMobil's compliance with the agreement, alleging "[f]or more than three years, ExxonMobil has refused to comply with the Attorney General's demand for documents." (Am. Compl. ¶ 3.)

E. The Attorney General Commenced This Baseless Suit, While Litigation Over the CID Remained Pending, Without First Conducting an Investigation.

The Attorney General commenced this suit on October 24, 2019, the third day of ExxonMobil's trial in an action brought by the New York Attorney General ("NYAG"). Its Amended Complaint purports to bring claims for investor and consumer deception under G.L. c.

93A, and includes allegations of securities fraud ripped nearly verbatim from NYAG's complaint. While G.L. c. 93A, § 4 requires the Attorney General to provide notice and an opportunity to meet and confer prior to filing a lawsuit, the Attorney General provided that notice just days before the NYAG trial began. The Attorney General's rush to the courthouse despite the Tolling Agreement and despite having obtained no evidence from ExxonMobil during its so-called investigation was a calculated ploy to interfere with ExxonMobil's trial preparations while garnering media attention. (Ex. 11.)

The content of the Amended Complaint confirms the Attorney General's true motive to curtail ExxonMobil's petitioning activity—and drum up publicity. Notwithstanding the four-year statute of limitations, nearly all of the first 60 pages of the Amended Complaint is devoted to baseless allegations about ExxonMobil's climate science research and purported climate denial dating back to the 1970s. (Am. Compl. ¶¶ 1-16, 39-40, 69-255.) Recognizing that this conduct cannot support a claim, the Amended Complaint characterizes these allegations as mere "context" for its meritless claims. (*Id.* at Part IV.) Meanwhile, the allegations actually pleaded in support of its claims target ExxonMobil's public statements on climate policy, not because they are false or misleading, but because the Attorney General believes ExxonMobil "urge[d] delay in regulatory action" and "delay[ed] meaningful action to address climate change by perpetuating reliance on fossil fuels" rather than "swiftly shift[ing] away from fossil fuel energy," as the Attorney General urges. (*Id.* ¶¶ 165, 663, 720.) Even if the pleadings accurately characterized ExxonMobil's conduct (which they do not), they amount to nothing more than public policy disagreements.

F. The New York Supreme Court Exonerated ExxonMobil in an Equally "Ill-Conceived" Action Brought by the New York Attorney General.

On December 10, 2019, Justice Barry Ostrager of the New York Supreme Court ruled in favor of ExxonMobil in NYAG's climate-change lawsuit. *See People* v. *Exxon Mobil Corp.*, No.

452044/2018, 2019 WL 6795771 (Sup. Ct. N.Y. Cty. Dec. 10, 2019). Justice Ostrager's verdict followed a two-week bench trial that exposed NYAG's claims as unsupported by any evidence and exonerated ExxonMobil on each and every claim. In finding the allegations against ExxonMobil to be "without merit," Justice Ostrager pointedly noted the absence of evidence supporting NYAG's claims despite "three and one-half years of investigation and pre-trial discovery that required ExxonMobil to produce millions of pages of documents and dozens of witnesses for interviews and depositions." *Id.* at *1, 3. Justice Ostrager observed that NYAG "produced no testimony [] from any investor who claimed to have been misled by any disclosure, even though the Office of the Attorney General had previously represented it would call such individuals as trial witnesses." *Id.* at *30.

Justice Ostrager characterized NYAG's complaint (from which the Attorney General here heavily borrows) as "hyperbolic" and the "result of an ill-conceived initiative of the Office of the Attorney General." *Id.* at *2, 26. He also recognized that the lawsuit originated in "politically motivated statements by former New York Attorney General Eric Schneiderman"—a reference to the Green 20 Press Conference in New York City that the Attorney General also joined. *Id.* at *1. Following this victory, ExxonMobil agreed to allow the Attorney General to amend its complaint. But instead of abandoning those discredited allegations, the Attorney General recklessly continues to disseminate them unmoored from a cause of action that it knows cannot be proven—and, in fact, has been conclusively disproven.

G. Another Court Recognized the Attorney General's Improper Motives to Restrict Speech on Climate Policy.

ExxonMobil's allegations concerning the Attorney General's coordination with private interests behind the La Jolla playbook and the Rockefeller agenda were also addressed in proceedings against Pawa and California municipal officials arising from their efforts to suppress

ExxonMobil's speech about climate policy. In that action, ExxonMobil presented evidence of a conspiracy among private interests and public officials, including the Attorney General, as a basis for exercising personal jurisdiction. Judge R. H. Wallace of the District Court of Tarrant County, Texas, found ExxonMobil's evidence sufficient to support exercising personal jurisdiction in the matter. *See City of San Francisco* v. *Exxon Mobil Corp.*, No. 096-297222-18, 2018 Tex. Dist. LEXIS 1, at *14 (Tarrant Cty. Tex. Apr. 24, 2018).

Although the Texas Court of Appeals concluded it was bound to reverse Justice Wallace's ruling on personal jurisdiction under Texas precedent, it did not disturb the lower court's factual findings. *City of San Francisco* v. *Exxon Mobil Corp.*, No. 02-18-00106-CV, 2020 WL 3969558, at *20 (Tex. App. June 18, 2020). Indeed, it recounted Attorney General Healey's participation in the "AGs United for Clean Power Press Conference" and reiterated that "[d]uring the press conference, 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*. at *3. After expressing its displeasure that Texas personal jurisdiction doctrine did not permit it to retain the action, the appellate court concluded by admonishing that "[l]awfare is an ugly tool by which to seek the environmental policy changes the California Parties desire, enlisting the judiciary to do the work that the other two branches of government cannot or will not do . . . ." *Id.* at *20.

LEGAL STANDARD

When analyzing a special motion to dismiss under the anti-SLAPP statute, courts apply a burden-shifting framework. The moving party "must demonstrate, at the threshold stage, that the claims filed against it . . . are based solely on the moving party's petitioning activity." *477 Harrison Ave., LLC* v. *JACE Boston, LLC*, 483 Mass. 514, 516 (2019). If the trial court determines that the moving party has satisfied this burden, "then the burden shifts to the nonmoving party . . . to demonstrate at the second stage that the anti-SLAPP statute, G.L. c. 231, § 59H, does not require

dismissal of its claims." *Id.* ExxonMobil has more than satisfied its threshold burden here.

ARGUMENT

I. The Attorney General's Claims Target ExxonMobil's Petitioning Activity and Have No Other Substantial Basis.

The Amended Complaint should be dismissed pursuant to G.L. c. 231, § 59H because it takes aim squarely at ExxonMobil's petitioning activity and lacks any other substantial basis.

A. The Attorney General's Claims Are "Based On" ExxonMobil's "Exercise of Its Right of Petition".

The Attorney General's suit targets petitioning activity within the meaning of the anti-SLAPP statute, which defines "petitioning" to embrace "any written or oral statement" that:

> (i) is made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding;
>
> (ii) is made in connection with an issue under consideration or review by any governmental proceeding;
>
> (iii) is reasonably likely to encourage consideration or review of an issue by a governmental proceeding;
>
> (iv) is reasonably likely to enlist public participation in an effort to effect such consideration; or
>
> (v) falls within constitutional protection of the right to petition government.

G.L. c. 231, § 59H. Massachusetts courts broadly construe "petitioning" to include "all 'statements made to influence, inform, or at the very least, reach governmental bodies—either directly or indirectly.'" *N. Am. Expositions Co.* v. *Corcoran*, 452 Mass. 852, 862 (2009). In determining whether statements constitute petitioning, courts do not consider them in isolation, but rather "in the over-all context in which they are made." *See id*. That the speech is made by an "organization" rather than an individual does not exclude it from qualifying as petitioning activity. *See Hanover* v. *New Eng. Reg'l Council of Carpenters*, 467 Mass. 587, 595 (2014).

Massachusetts courts have repeatedly found conduct to be petitioning where, as here, a

lawsuit was premised on statements made to the press or to the public about an issue under consideration by the government. For instance, in *Blanchard* v. *Steward Carney Hospital, Inc.*, a defendant's statements to the *Boston Globe* qualified as "petitioning activity" because "[d]ecision makers at [the agency], and members of the public wishing to weigh in on [the agency's action] could reasonably have been expected to read [the] statements." 477 Mass. 141, 151 (2017). Petitioning statements also may be made on the defendant's website. *MacDonald* v. *Paton*, 57 Mass. App. Ct. 290, 293-94 (2003).

ExxonMobil readily meets its threshold burden to show that its statements identified by the Attorney General as the basis for its three claims constitute "petitioning" activity within the meaning of G.L. c. 231, § 59H. *See Blanchard*, 477 Mass. at 148-49, 153 n.19. The Amended Complaint expressly targets quintessential petitioning activity including lobbying activities and ExxonMobil's statements to regulators, policymakers, public officials, and the press on climate policy. (*See, e.g.*, Am. Compl. ¶¶ 165, 190-97, 573, 583, 663-72, 688-89.) The "broad definition" of petitioning under the anti-SLAPP statute plainly embraces "communications with [government agencies] and with elected official[s]" as well as communications "urging" the public "to petition against" agency action. *See Office One, Inc.* v. *Lopez*, 437 Mass. 113, 122 (2002).

The Attorney General itself characterizes all the challenged activity as an effort to enlist public support for climate policies with which the Attorney General disagrees. (Am. Compl. ¶¶ 164-65, 195, 197, 496, 573, 583.) It takes issue with ExxonMobil's publicly stated policy positions on a matter of public concern precisely because, through these communications, ExxonMobil purportedly responded to "increasing calls on governments to declare a climate emergency" by allegedly "downplaying the need for any immediate action to mitigate climate change." (*Id.* ¶¶ 26, 38, 41, 533-36, 663, 693, 720.) These admissions bring the Amended

Complaint within the ambit of the anti-SLAPP statute. In *Cardno ChemRisk, LLC* v. *Foytlin*, the Supreme Judicial Court readily concluded that a blog post by an "environmental activist" accusing BP and its experts of "deceptive tactics" was petitioning activity where the post was part of an "ongoing effort[] to influence governmental bodies by increasing the amount and tenor of coverage" around an environmental issue. 476 Mass. 479, 485-86 (2017). The Attorney General's claims are based on this same form of petitioning activity, regarding nearly the same subjects.

First Cause of Action: *"Systemic Climate Change Risks."* The First Cause of Action takes aim at ExxonMobil's statements in public investor communications, including corporate reports, regarding its (i) projections for future energy demand, (ii) assessment of potential regulatory responses to climate change, and (iii) use of a proxy cost of carbon to represent the impact of potential future regulatory risks on energy demand. (Am. Compl. ¶¶ 256-69, 358-379, 403, 483-536, 736.) The complained-of "deception" is nothing more than ExxonMobil's "forward-looking" opinions on future regulatory and economic landscapes in response to "escalating investor and regulator concerns about climate change." (*Id.* ¶¶ 484-85, 488.)

Even a cursory review of the allegations makes clear that ExxonMobil's communications are not attacked for a failure to disclose or analyze climate risks to its business, but rather for disagreeing with the Attorney General's policy assessment. (*Id.* ¶¶ 483, 497, 501-16.) The Attorney General expressly acknowledges such communications were intended to "proactively engag[e] regulators," "the public and thought-leaders" and "policy makers" on climate change by sharing "policy positions." (*Id.* ¶ 495.) Indeed, the pleadings in support of this claim are littered with references to regulatory and related audiences of ExxonMobil's statements, including investors and the public (*id.* ¶¶ 258-59), energy market analysts (*id.* ¶ 262), U.N. policymakers (*id.* ¶ 263), U.S. financial regulators (*id.* ¶¶ 263, 264, 297-304), and rating agencies (*id.* ¶ 353).

The Attorney General acknowledges that ExxonMobil's statements in public investor communications were "at bottom, a continuation of its other public-facing campaigns" regarding energy and climate policy. (*Id.* ¶ 483.) The statements "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. *Blanchard*, 477 Mass. at 151. The anti-SLAPP statute protects this public advocacy even where "statements are communicated to other private citizens rather than directly to the government" because "they are closely and rationally related to" consideration of policy issues. *See Plante* v. *Wylie*, 63 Mass. App. Ct. 151, 159 (2005).[1] Any accompanying "commercial motive" is irrelevant. *Corcoran*, 452 Mass. at 863; *Office One*, 437 Mass. at 122. "[T]he anti-SLAPP statute, like the constitutional right it safeguards, protects those looking to 'advanc[e] causes in which they believe, as well as those seeking to protect their own private rights." *See Cardno ChemRisk*, 476 Mass. at 487.

Second Cause of Action: *"Synergy™ and Green Mobil 1™ Products" & "Risks of Climate Change."* The Second Cause of Action addresses ExxonMobil's public and consumer communications, particularly on its website, that promote Synergy and Green Mobil 1 products as reducing emissions relative to standard gasoline and oil products. (Am. Compl. ¶¶ 537-541, 577-632, 752-53.) Here, the alleged "deception" by ExxonMobil is that "technically true" statements about a product's relative improvement of engine performance and efficiency are nonetheless misleading if they fail to communicate the Attorney General's view that *any* fossil fuel use "represents a direct threat to sustainability of human communities and ecosystems." (*Id.* ¶¶ 582, 596, 615, 623, 628, 632.)

Once again, the Attorney General's claim depends on its position that the only acceptable

[1] *See, e.g.*, Am. Comp. ¶ 325-26 (Paris Agreement), ¶ 443 (External Citizenship Advisory Panel), ¶ 495 (alleging former CEO statements on regulatory policies); Exs. 12, 14, 16-26.

policy choice in response to the risks of climate change is to "sharply curtail[] the use of fossil fuels" by transitioning to renewables and "seek[ing] transportation alternatives." (*Id.* ¶¶ 26, 618, 710, 752.) By its own admission, the Attorney General seeks to achieve the same effect through this claim as would legislation that "require[s] climate change warning labels on gas pumps," *id.* ¶¶ 702-03, notwithstanding that no such legislation governed ExxonMobil's statements.[2]

ExxonMobil's public statements regarding its Synergy and Mobil 1 products constitute petitioning because, at a minimum, this speech was intended and reasonably likely to "enlist the participation of the public" in the policy debate at the heart of the Attorney General's lawsuit. *See Hanover*, 467 Mass. at 592; *Corcoran*, 452 Mass. at 864. (Am. Compl. ¶¶ 618-21, 631-32.) Parsing the allegations for what they are, it is clear ExxonMobil's statements to the public promoting the relative environmental benefits of its specific products fall within the ambit of the anti-SLAPP statute because the Attorney General challenges these statements only insofar as they encourage climate policy debate about options for affordable, reliable and accessible energy as a sustainable, short- or long-term response to climate change. (Am. Compl. ¶¶ 592-93.) [3]

The Amended Complaint attempts to side-step ExxonMobil's petitioning activity by conflating allegations about ExxonMobil's admittedly accurate promotion of specific product features with omission allegations that claim ExxonMobil failed to advance the Attorney General's policy stance. (*See id.* ¶¶ 596, 605, 607.) But artful pleading "cannot be dispositive of the matter. Were it otherwise, nonmoving parties could undercut the anti-SLAPP statute and its salutary purpose." *See Blanchard*, 477 Mass. at 155.

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2 Such legislation would be heavily circumscribed by the First Amendment. (*See* Ex. 30.)

3 Am. Compl. ¶¶ 574-76 (alleging ExxonMobil uses "influencer marketing campaigns"); ¶ 614 (citing Lubrigrupo, *Mobil 1 ESP x2 0W 20*, YouTube, https://www.youtube.com/watch?v=dga50ik0euU ("Mobil 1 engineers have continued to effectively solve the challenges of the day with the technology of tomorrow."); Ex. 28.

Third Cause of Action: *"Greenwashing Campaigns."* The Third Cause of Action concerns ExxonMobil's public and consumer communications regarding its actions and policies to address climate change through (i) marketing campaigns, such as "Protect Tomorrow. Today" (Am. Compl. ¶¶ 640-644; (ii) publications discussing ExxonMobil's "engagement efforts," such as its *Corporate Citizenship* and *Sustainability* reports (*id.* ¶¶ 605-07, 673-93), and (iii) statements in *The New York Times*, on YouTube, and on social media that highlight ExxonMobil's "research on lowering emissions, algae biofuel, climate change solutions, clean energy, and carbon capture." (*Id.* ¶¶ 651, 660, 674, 762; *see generally* ¶¶ 633-720.) For instance, the Attorney General targets ExxonMobil's statement in the *New York Times* that "[m]aking energy [from biofuels] could reduce greenhouse gases compared to traditional fossil fuels." (*Id.* ¶ 651.)

The Attorney General alleges that such communications are meant to "position [ExxonMobil] as a technical expert on climate and climate change solutions," particularly in connection with potential regulatory action in the wake of the Paris Agreement. (*Id.* ¶¶ 663-64.) And it claims these statements and activities are deceptive for purportedly failing to disclose that ExxonMobil is allegedly "actively engaged in delaying action to reduce emissions, including by . . . fight[ing] . . . fuel economy and emissions standards." (*Id.* ¶ 583.) It further attacks ExxonMobil's corporate reports for advocating efforts to balance "economic growth, social development and environmental protection" objectives. (*Id.* ¶ 675.) Once again, the purported "deception" is nothing more than ExxonMobil's failure to advocate the Attorney General's preferred policy of "rapidly transitioning away from fossil fuel use." (*Id.* ¶¶ 663, 684, 687.) In short, what the Attorney General derisively labels "greenwashing" is ExxonMobil's advocacy of climate policy choices under consideration by various government and regulating bodies.

To the extent that ExxonMobil allegedly "greenwash[ed] its reputation" by highlighting its

investments and research in alternative energies, that also constitutes "protected petitioning activity." *Blanchard*, 477 Mass. at 151. As the Supreme Judicial Court has held, petitioning includes statements made "primarily to defend the [organization's] reputation to the public" since "[t]his goal" is related to the "objective of convincing" regulators to permit operations. *Id.* That the alleged "greenwashing" here was intended to reach or influence the government is plain from the pleadings. (*See, e.g.*, Am. Compl. ¶¶ 573, 651, 660-68, 672.) *See Blanchard*, 477 Mass. at 151, 153 n.19; *Plante*, 63 Mass. App. Ct. at 159. Accordingly, ExxonMobil has met its burden to establish that its complained-of conduct is petitioning activity.

B. The Attorney General's Claims Have No Substantial Basis Apart from ExxonMobil's Petitioning Activity.

Dismissal is warranted because the Attorney General provides no basis for its claims—substantial or otherwise—apart from ExxonMobil's petitioning activities. *See Baker* v. *Parsons*, 434 Mass. 543, 550 (2001). The circumstances surrounding the Attorney General's suit evince the absence of legitimate grounds.[4] The Attorney General opted to file a complaint without conducting the investigation it had deemed warranted when issuing a CID to ExxonMobil. Since that time, the Attorney General has not obtained any discovery from ExxonMobil or interviewed a single ExxonMobil employee. Instead, the Attorney General's allegations are expressly premised on *public* speech to which it objects precisely because that speech supposedly influenced climate policy.

Seeking the appearance of legitimacy, the Amended Complaint borrows liberally from external sources of accusations against ExxonMobil—all of which the Attorney General knows cannot support its claims under Chapter 93A. For instance, the Amended Complaint's allegations

[4] ExxonMobil reserves the right to seek discovery on the Attorney General's motivation if the Court concludes a bona fide factual dispute exists. *See Nicholson* v. *Woolf*, 2017 WL 3860226, at *5-6 (Mass. App. Ct. 2017).

about ExxonMobil's "longstanding internal scientific knowledge" and purported "public deception campaign" are ripped from articles by *InsideClimate News* and the *Los Angeles Times* that the Attorney General claims justified its investigation. (Am. Compl. ¶ 3.) But the statute of limitations has long expired on any claims arising out of these purported activities, which the Attorney General concedes occurred "decades ago." (*Id.* ¶ 5.)[5] Recognizing that these allegations are not actionable, the Attorney General labels them background "context," and asserts that ExxonMobil's actions "over the last decade"—not its historic research decades earlier—"give rise to" its claims. (*Id.* ¶ 17 and Part IV.)

The Attorney General also cannot legitimize its suit by bringing an investor deception claim that has already been extensively investigated and abandoned by other agencies, and then conclusively rebutted at the NYAG trial. Well over a year before the Attorney General commenced this suit, the SEC closed its investigation into accusations of securities fraud arising from ExxonMobil's climate change disclosures. (Ex. 29.) (An investigation that was doubtless prompted by the accusations of the Attorney General and its fellow coalition members.) Despite the SEC's closure, the NYAG filed a complaint advancing an investor deception theory that is embedded, nearly verbatim, in the pleadings supporting the Attorney General's First Cause of Action here. That theory was never borne out. The New York Supreme Court fully exonerated ExxonMobil on each of the NYAG's claims as unsupported by any evidence.

Nor do the Attorney General's consumer deception claims (the Second and Third Causes of Action) have a substantial basis apart from ExxonMobil's petitioning activity. The Amended Complaint makes plain that the Attorney General objects to ExxonMobil's public statements to consumers precisely because ExxonMobil has not espoused the Attorney General's policy

[5] *See, e.g.*, Am. Compl. ¶ 9 ("[a]s early as 1978"), ¶ 10 ("[i]n 1980"), ¶ 172 ("[a]s late as 2004"). Even the NYAG abandoned this fruitless theory after an extensive inquiry into ExxonMobil's historic climate science research.

positions. (*See, e.g.*, Am. Compl. ¶¶ 596, 605, 607, 753). This policy disagreement is the crux of the Attorney General's consumer deception claims and cannot be stripped out of the Amended Complaint. *See, e.g.*, *477 Harrison Ave.*, 483 Mass. at 526. Therefore, these claims also lack a substantial basis independent of ExxonMobil's petitioning activities.

II. The Attorney General Cannot Establish an Exception to the Anti-SLAPP Statute.

Where, as here, the movant makes the threshold showing that a suit is "based on" petitioning activity, the burden shifts to the non-movant to establish by a preponderance of the evidence that the anti-SLAPP statute does not require dismissal of the claim. *Blanchard*, 477 Mass. at 148, 154. The Attorney General can do so only by establishing either that (1) ExxonMobil's "petitioning activity was a 'sham' and that the [Attorney General] . . . has been injured as a result," or (2) that the Attorney General's "claims are not SLAPP suits at all, i.e., they are both colorable and nonretaliatory," and brought "not to interfere with and burden [defendant's] petition 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 516, 528 (alterations omitted) (quoting *Blanchard*, 477 Mass. at 160). The Attorney General cannot carry its burden here.

First, the Attorney General cannot satisfy either prong of the "sham" exception. For the reasons stated above, the Attorney General's suit targets ExxonMobil's legitimate petitioning activity. The Attorney General cannot satisfy the "very high bar" for establishing that ExxonMobil's admitted and long-standing practice of engagement on climate policy was a "sham," *id.* at 522, because the pleadings expressly admit that the purpose of ExxonMobil's speech was to influence climate policy. (Am. Compl. ¶¶ 26, 38, 41, 165, 536, 583, 671, 720.)

The Amended Complaint also fails to plead an "actual injury to the responding party." *477 Harrison Ave.*, 483 Mass. at 528. The Attorney General expressly limits its claims to ExxonMobil's allegedly deceptive statements "over the last decade" (Am. Compl. ¶ 17), but it

does not allege that any purportedly deceptive statement over this period harmed the Attorney General or the Massachusetts consumers and investors it purports to represent. Notably, even after a twelve-day trial on similar allegations that followed more than three years of investigation, NYAG was unable to produce evidence of "any investor who claimed to have been misled by any disclosure" by ExxonMobil. *See Exxon Mobil Corp.*, 2019 WL 6795771, at *29. The Amended Complaint here seeks only statutory damages, presumably in recognition that it cannot make a showing of actual injury or personal harm. (Am. Compl. at 201.)

Second, the Attorney General cannot show its claims are colorable, non-retaliatory, and not brought to interfere with ExxonMobil's right to petition. The Attorney General's pleadings establish this suit was "brought primarily to chill" ExxonMobil's petitioning activities. *See Blanchard*, 477 Mass. at 159. Evidence in the public record confirms that conclusion. *See supra* at 3-8, 17-19. Nor can the Attorney General avoid dismissal under the anti-SLAPP Act merely by claiming ExxonMobil's protected petitioning was deceptive. *See Baker*, 434 Mass. at 553-54. Even if the Attorney General could make this showing, it would nevertheless fail to qualify for this exception because, as stated above, it has not brought thus action to recover "damages for personal harm." *477 Harrison Ave.*, 483 Mass. at 528. Accordingly, neither exception applies.

CONCLUSION

The Attorney General brought this action to coerce and suppress divergent viewpoints on climate policy precisely because it fears that those viewpoints are persuasive. The Amended Complaint violates G.L. c. 231, § 59H because it has no substantial basis apart from ExxonMobil's petitioning activities. ExxonMobil respectfully requests that the Court dismiss the Amended Complaint with prejudice.

Dated: July 30, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas C. Frongillo, counsel for Defendant Exxon Mobil Corporation, hereby certify that on July 30, 2020, I served a copy of the Memorandum of Exxon Mobil Corporation in Support of Its Special Motion to Dismiss the Amended Complaint Pursuant to G.L. C. 231, § 59h 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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