PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 AVENUE OF THE AMERICAS NEW YORK, NEW YORK 10019-6064
TELEPHONE (212) 373-3000

WRITER'S DIRECT DIAL NUMBER
(212) 373-3089
WRITER'S DIRECT FACSIMILE
(212) 492-0089
WRITER'S DIRECT E-MAIL ADDRESS
twells@paulweiss.com

UNIT 5201, FORTUNE FINANCIAL CENTER
5 DONGSANHUAN ZHONGLU
CHAOYANG DISTRICT, BEIJING 100020, CHINA
TELEPHONE (86-10) 5828-6300

HONG KONG CLUB BUILDING, 12TH FLOOR
3A CHATER ROAD, CENTRAL
HONG KONG
TELEPHONE (852) 2846-0300

ALDER CASTLE
10 NOBLE STREET
LONDON EC2V 7JU, UNITED KINGDOM
TELEPHONE (44 20) 7367 1600

FUKOKU SEIMEI BUILDING
2-2 UCHISAIWAICHO 2-CHOME
CHIYODA-KU, TOKYO 100-0011, JAPAN
TELEPHONE (81-3) 3597-8101

TORONTO-DOMINION CENTRE
77 KING STREET WEST, SUITE 3100
P.O. BOX 226
TORONTO, ONTARIO M5K 1J3
TELEPHONE (416) 504-0520

2001 K STREET, NW
WASHINGTON, DC 20006-1047
TELEPHONE (202) 223-7300

500 DELAWARE AVENUE, SUITE 200
POST OFFICE BOX 32
WILMINGTON, DE 19899-0032
TELEPHONE (302) 655-4410

February 26, 2019

By NYSCEF and Hand Delivery

The Hon. Barry R. Ostrager
Supreme Court, New York County
60 Centre Street, Room 232
New York, New York 10007

Re: ***People of the State of New York*** **v.** ***Exxon Mobil Corporation*****, No. 452044/2018**

Dear Justice Ostrager:

We write on behalf of Exxon Mobil Corporation ("ExxonMobil") in response to the New York Attorney General's ("NYAG") February 22, 2019 letter regarding potential motions to dismiss ExxonMobil's defenses and, in the alternative, limit discovery on those defenses. NYAG should not be permitted to file either motion. ExxonMobil has properly raised the challenged defenses in its Answer and should be afforded appropriate discovery to support them.

NYAG's motion to dismiss is meritless and premature. In its Answer, ExxonMobil asserted defenses grounded in NYAG's official misconduct, conflict of interest, official improprieties, selective enforcement, and violations of the First Amendment and Due Process Clause (collectively the "Defenses"). (Separate Defense Nos. 29–30, 34–36.) At this stage of the case, the Defenses cannot be dismissed unless NYAG establishes "that the defenses are without merit as a matter of law," even after every reasonable inference is drawn in favor of the defendant. *534 E. 11th St. Hous. Dev. Fund Corp.* v. *Hendrick*, 935 N.Y.S.2d 23, 24 (1st Dep't 2011).

NYAG has not provided the Court with a valid basis to reach such a conclusion. Instead, NYAG claims that the Defenses are barred by a presumption of good faith, but that presumption (which is likely inapplicable to these civil proceedings in any event) does not defeat the Defenses as a matter of law. Under NYAG's own authorities, the presumption serves an evidentiary function at trial or on a dispositive motion. *See 303 W. 42nd St. Corp.* v. *Klein*, 416 N.Y.S.2d 219, 223–24 (1979) (ordering an "evidentiary

hearing" on claim of selective enforcement and noting that "the burden of demonstrating a violation, albeit heavy, must not be so heavy as to preclude any realistic opportunity for success"). It does not establish a barrier at the pleading stage to defenses rooted in official misconduct.

NYAG is equally mistaken to rely on a federal court decision that applied federal pleading standards to ExxonMobil's civil action against NYAG for constitutional violations. *Exxon Mobil Corp.* v. *Schneiderman*, 316 F. Supp. 3d 679, 686 (S.D.N.Y. 2018). That court never considered the viability of state-law defenses of official misconduct, conflicts of interest, or selective enforcement, such as those ExxonMobil asserts here. Moreover, NYAG has urged the Second Circuit, where an appeal is still pending, to affirm dismissal of ExxonMobil's constitutional claims because "New York's civil practice rules provide Exxon with a full opportunity to raise any objections to . . . the civil enforcement action." Mem. in Support of NYAG's Mot. To Dismiss, ECF No. 190 at 6, *Exxon Mobil Corp.* v. *Healey*, No. 18-1170 (2d. Cir. Dec. 7, 2018) (citing CPLR 3018(b)); *see also* Reply Br., ECF No. 207 at 6, *Healey*, No. 18-1170 (2d Cir. Dec. 24, 2018) ("If Exxon believes that its federal claims bear on its state case, it should assert them as defenses there."). Having assured the Second Circuit that ExxonMobil could present the Defenses before this Court, NYAG should not be allowed to take the opposite position now that ExxonMobil has done exactly that.

NYAG's cherry picking of judicial authority should also be rejected. While one federal judge agreed with NYAG that ExxonMobil's constitutional rights complaint should be dismissed, another federal judge opined that ExxonMobil's allegations, if proven, would establish "bad faith," believed that "[t]he merits of each of Exxon's claims involve important issues that should be determined by a court," and recommended that "[d]iscovery regarding this refusal [to disclose information] would seem in order." *See Exxon Mobil Corp.* v. *Schneiderman*, No. 4:16-CV-469-K (N.D. Tex.), ECF No. 180 at 2, 9 (Mar. 29, 2017); *id.*, ECF No. 73 at 5–6 (Oct. 13, 2016). And a state judge in Texas issued findings of fact that NYAG and other state attorneys general "promoted regulating the speech of energy companies, including ExxonMobil, whom they perceived as an obstacle to enacting their preferred responses to climate change." *City of San Francisco* v. *Exxon Mobil Corp.*, No. 096-297222-18, 2018 Tex. Dist. LEXIS 1, at *6 (Tarrant Cty. Tex. Apr. 24, 2018).

Insofar as NYAG challenges the factual basis for the Defenses, ExxonMobil has stated the underlying allegations at length in numerous submissions to this and other courts. In brief, those allegations include:

- NYAG has targeted ExxonMobil because it opposes ExxonMobil's speech for not aligning with NYAG's preferred policy responses to climate change.

- NYAG colluded with climate activists, who advocated using state "AGs" to "delegitimize [ExxonMobil] as a political actor." Documentary evidence shows that NYAG improperly coordinated with environmental activists, including

Matthew Pawa and the Rockefeller Family Fund, to misuse law enforcement authority.

- NYAG inserted into this and related cases privately paid fellows who report to a well-funded organization with an activist agenda of promoting so-called clean energy.

If it is necessary to state those allegations once more in an amended answer, ExxonMobil respectfully requests leave of the Court to do so. *See 170 W. Village Assocs.* v. *G & E Realty, Inc.*, 868 N.Y.S.2d 36, 36 (1st Dep't 2008) ("Leave to replead is ordinarily freely granted . . . absent a showing it would cause surprise or prejudice.").

NYAG's motion for a protective order is frivolous. NYAG believes it need provide discovery only as to "the basis for [its] claims." That is incorrect. New York law requires the "full disclosure of all matter material and necessary in the prosecution *or defense* of an action." C.P.L.R. 3101(a) (emphasis added). The "material and necessary" standard is a generous one, and is "to be 'interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist in the preparation for trial.'" *In re 91st Street Crane Collapse Litig.*, 2011 WL 10798522, at *3 (quoting *Mann* v. *Cooper Tire, Co.*, 816 N.Y.S.3d 45, 51 (1st Dep't 2006)). To obtain relief from its discovery obligations, NYAG must establish that ExxonMobil's requests impose "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice." C.P.L.R. § 3103(a). Not even attempting to meet that standard, NYAG simply offers a parade of horribles: unless discovery is quashed, "any defendant in an enforcement action [will] initiate an onerous investigation of the investigator and risk disrupting law enforcement." That conclusory assertion should be rejected. If NYAG has engaged in wrongdoing, it should not be permitted to hide behind Pandora's box to avoid its discovery obligations.

We are available to discuss these issues with the Court at its convenience.

Respectfully submitted,

/s/ Theodore V. Wells, Jr.
Theodore V. Wells, Jr.

cc: All counsel of Record (by NYSCEF)