SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York, Plaintiff, -against- EXXON MOBIL CORPORATION, Defendant.	Index No. 452044/2018 IAS Part 61 Hon. Barry R. Ostrager Motion Sequence No. 2

EXXON MOBIL CORPORATION'S REPLY BRIEF IN FURTHER SUPPORT OF ITS CROSS-MOTION FOR LEAVE TO AMEND

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

Attorneys for Defendant
Exxon Mobil Corporation

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Exxon Mobil Corporation ("ExxonMobil" or the "Company") submits this reply brief in further support of its cross-motion for leave to file its proposed amended answer ("Amended Answer" or "AA").

PRELIMINARY STATEMENT

In its Amended Answer and throughout these proceedings, ExxonMobil has identified factual allegations that fully support its defenses of selective enforcement, conflict of interest, and official misconduct. Those misconduct allegations are well-travelled territory, as the Attorney General recognizes. For that reason, the Attorney General does not even attempt to oppose amendment for being untimely or otherwise prejudicial. Nor could it. Instead, the Attorney General asks this Court to deny ExxonMobil's motion for leave to amend (which should be freely granted) solely because of the alleged futility arising from illusory pleading deficiencies. The Attorney General's argument is meritless, contrary to precedent, and should be rejected.

In its opposition brief, the Attorney General scrupulously avoids addressing the factual allegations ExxonMobil set out in its Amended Answer. It also ignores recently produced documents that confirm ██████████ Even a cursory review of those allegations and documents establishes a more than adequate factual basis for ExxonMobil's defenses. *First*, the Attorney General's public statements vilifying ExxonMobil and the Attorney General's coordination with private special interests—who have long sought to find a "sympathetic" attorney general to help them "delegitimize" ExxonMobil "as a political actor"—demonstrate that the Attorney General improperly targeted ExxonMobil because of disagreements about climate policy (and not any legitimate law enforcement purpose). *Second*, the Attorney General has attempted to conceal this misconduct from the public by meeting with third parties

behind closed doors and directing them to mislead the press. *Third*, the Attorney General's receipt of third-party funding conditioned on the Attorney General's pursuit of litigation hostile to conventional energy companies, including this present action, has created an unlawful appearance of impropriety.

Rather than address ExxonMobil's adequate factual allegations, the Attorney General prefers to discuss a decision from a federal judge in a related case that no party argues has any preclusive force here. But the Attorney General ignores the decisions of another federal judge and a state judge who found that ExxonMobil's allegations against the Attorney General may establish "bad faith." Regardless of what other courts and investigative bodies have said or done, all that matters for this motion is whether amendment would be futile. In light of the ample support ExxonMobil's factual allegations provide for its defenses, leave to amend should be granted.

ARGUMENT

I. ExxonMobil's Cross-Motion for Leave to Amend Its Answer Should Be Granted.

"[L]eave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party." *Kocourek* v. *Booz Allen Hamilton, Inc.*, 85 A.D.3d 502, 504 (1st Dep't 2011); *see also* CPLR § 3025(b). A party seeking leave to amend "need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp.* v. *Greystone & Co.*, 74 A.D.3d 499, 500 (1st Dep't 2010) (citation omitted).

When considering whether allegations state a defense, a court must view the allegations "in the light most favorable to the defendant" and must give the defendant "every reasonable intendment of the pleading, which is to be liberally construed." *Granite State Ins. Co.* v. *Transatl. Reins. Co.*, 132 A.D.3d 479, 481 (1st Dep't 2015) (citation omitted); *see also Scholastic, Inc.* v. *Pace Plumbing Corp.*, 129 A.D.3d 75, 80 (1st Dep't 2015) (citing CPLR § 3026). A court should

find that a defense is stated "where there are questions of fact requiring trial." *534 E. 11th St. Hous. Dev. Fund Corp.* v. *Hendrick*, 90 A.D.3d 541, 542 (1st Dep't 2011).

The Attorney General would suffer no prejudice from amendment because, as it concedes, it is "undisputed" that it is aware of the allegations underlying ExxonMobil's defenses. (Opp. 15.[1]) That is why the Attorney General must rely solely on flawed arguments about futility to oppose amendment. Those arguments are meritless. As described below, ExxonMobil's defenses are fully supported by the factual allegations in the Amended Answer.

A. ExxonMobil Has Stated a Defense of Selective Enforcement.

ExxonMobil has adequately pleaded a selective enforcement defense based on allegations that the Attorney General targeted ExxonMobil because of its speech on climate policy. To state a selective enforcement defense, a defendant must allege that (i) it "is selectively treated differently from others who are similarly situated," and (ii) such treatment is based on "impermissible considerations," such as an "intent to inhibit or punish the exercise of constitutional rights," including First Amendment rights, or a "malicious or bad faith intent to injure a person." *Kreamer* v. *Town of Oxford*, 96 A.D.3d 1130, 1133 (3d Dep't 2012) (quoting *Bower Assocs.* v. *Town of Pleasant Valley*, 2 N.Y.3d 617, 631 (2004)).

Both the Attorney General's public statements and subpoena requests demonstrate an effort to single out ExxonMobil (and not other energy companies) because ExxonMobil expresses views on climate policy the Attorney General disfavors. (AA ¶¶ 57–59.) For example, at a public press conference, Attorney General Schneiderman described "clean power" as the only legitimate response to climate change. (AA ¶ 41.) He stated that there could be "no dispute" about the proper

[1] "Opp." refers to the Attorney General's brief opposing ExxonMobil's cross-motion to amend its answer; "Second Anderson Aff." refers to the affirmation of Justin Anderson filed on April 16, 2019; "Montgomery Aff." refers to the Montgomery affirmation filed on March 4, 2019; "Second Montgomery Aff." refers to the Montgomery affirmation filed on April 9, 2019.

policy responses to climate change, and he denounced "misperceptions" about climate change purportedly created by those "with an interest in profiting from the [so-called] confusion." (*Id.*) He vowed to take action and boasted that he had already issued a subpoena to ExxonMobil. (AA ¶¶ 41–42.) The subpoena's contents further indicated an intent to target ExxonMobil for discussing climate policy. It demanded ExxonMobil's communications with industry groups that promote oil and gas, rather than renewable energy. (AA ¶ 46.)

The Attorney General's coordination with special interests who have plotted to chill ExxonMobil's speech further supports this defense. For example, at a meeting held at the Rockefeller Family Fund offices, Pawa and other attendees discussed ways "[t]o delegitimize [ExxonMobil] as a political actor," including by using "AGs" to "get[] discovery" and "creat[e] scandal." (AA ¶ 38.) (AA ¶ 35.)

Despite these detailed factual allegations, the Attorney General argues that ExxonMobil's defenses are meritless because ExxonMobil has failed to overcome a good faith presumption, which purportedly requires ExxonMobil to allege that the Attorney General's improper motives were the "*but-for* cause of the action." (Opp. 3–7.) The Attorney General has identified no binding authority, and ExxonMobil is aware of none, that supports this proposition. In *United States* v. *Armstrong*, the Supreme Court considered the *showing* a criminal defendant must make to obtain discovery on a selective prosecution defense. 517 U.S. 456, 469 (1996). *Armstrong* did not address state court civil pleading standards.

Even if *Armstrong* were applicable to civil litigation, *Armstrong* does not support the "but for" standard the Attorney General claims is the law. *Armstrong* held instead that a criminal defendant seeking discovery must provide "some evidence that similarly situated defendants . . . could have been prosecuted, but were not." *Id.* Similarly, in *Hartman* v. *Moore*, the Supreme Court held that, in a federal action alleging malicious and retaliatory prosecution, a defendant may need to provide only "[s]ome sort of allegation . . . to address the presumption of prosecutorial regularity." 547 U.S. 250, 263 (2006). ExxonMobil has done exactly that. It has alleged that the Attorney General targeted ExxonMobil and not other energy companies or bond-issuing municipalities (who made no cautionary climate change disclosures) because the Attorney General did not agree with ExxonMobil's climate policy speech.

Similarly, the Attorney General's focus on "separation-of-powers concerns" (Opp. 6–7) neither heightens ExxonMobil's burden nor insulates the Attorney General's conduct from judicial review. Courts can and should intervene when a government official abuses its power. *See California* v. *Grace Brethren Church*, 457 U.S. 393, 417 n.37 (1982) ("State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law."). The Attorney General's ability to craft self-serving justifications for its conduct "will not save [conduct] that is in reality a façade" for a pretextual purpose. *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985). *Hartman* similarly acknowledges that even if a government official "show[s]" that it had a reasonable basis for its conduct, that showing "does not guarantee" that the conduct was not driven by improper motives. 547 U.S. at 265. Whether the Attorney General's justifications for its action are genuine or pretextual will turn on contested facts that cannot be resolved at the pleadings stage. *See Harlen Assocs.* v. *Inc. Vill. of Mineola*,

273 F.3d 494, 502 (2d Cir. 2001) ("[T]he issue of whether an action was motivated by malice generally is a question of fact properly left to the jury.").

Even if the "but for" standard applied, ExxonMobil has alleged the Attorney General's animus toward ExxonMobil and its policy positions was the but for cause of the investigation and resulting civil action. As alleged in the Amended Answer, the Attorney General targeted ExxonMobil because of disagreements about climate policy. (AA ¶¶ 41–42, 46–47, 55–59.) The Attorney General's self-serving, unsworn statements about its purported good faith when launching the investigation and proceeding with an enforcement action (Opp. 3–4) do not defeat ExxonMobil's allegations, which are presumed true at this stage of the case. *See Wells Fargo Bank, N.A.* v. *Rios*, 160 A.D.3d 912, 913 (2d Dep't 2018). Notably, the Attorney General's opposition ignores much of the factual allegations in the Amended Answer, including Attorney General Schneiderman's public statements criticizing "confusion" sowed by companies like ExxonMobil and his email exchanges with Pawa, [redacted] (AA ¶¶ 35, 41–42.)

Contrary to the Attorney General's argument (Opp. 4, 9–10), a federal judge's decision in a related case has no bearing here. The Attorney General does not argue that preclusion bars ExxonMobil's defenses, nor could it. Moreover, two other judges who reviewed similar allegations disagreed with the federal court's decision, which is currently on appeal to the Second Circuit. One federal judge opined that ExxonMobil's allegations, if proven, would establish "bad faith."[2] And a state judge held that the Attorney General "promoted regulating the speech of energy companies, including ExxonMobil, whom [it] perceived as an obstacle to enacting [its] preferred responses to climate change."[3] Moreover, last year, the SEC closed its parallel

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[2] Second Anderson Aff., Ex. A.
[3] Second Anderson Aff., Ex. B.

investigation of ExxonMobil on the same subject matter and recommended no enforcement action.[4] More recently, the SEC concluded that ExxonMobil's climate policy disclosures were sufficiently robust to permit the exclusion of shareholder proposals seeking more information about greenhouse gas emissions.[5]

The Attorney General is also mistaken to discount the precedents referenced in ExxonMobil's brief as "inapposite to its allegations." (Opp. 14.) A cursory review of those decisions demonstrates their relevance. In *Kreamer*, for example, the Third Department held that a party had adequately stated a selective enforcement claim based on allegations that the party, like ExxonMobil, was targeted for "exercising [its] constitutional rights to express [its] opinions." 96 A.D.3d at 1133.

B. ExxonMobil Has Stated a Defense of Conflict of Interest.

ExxonMobil has adequately pleaded a conflict of interest defense arising from the Attorney General's participation in a "fellows program" funded by private, partisan interests and its efforts to solicit financial benefits from third parties. To state a defense of conflict of interest, a defendant must allege that a public official has improperly "inject[ed] a personal interest," political, financial, or otherwise, into its "prosecutorial decision[s]." *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 249–50 (1980). The Attorney General has done just that.

The Attorney General has allowed the State Energy and Environmental Impact Center (the "Center") to fund so-called fellows who work in the Attorney General's office but are compensated by and report to private interests promoting an agenda hostile to ExxonMobil and other conventional energy companies. (AA. ¶¶ 50–53.) At least one such fellow has been assigned to

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[4] *See* Claire Ballentine, *Inquiry Ends Into Exxon Mobil's Accounting Tied to Climate Change*, N.Y. Times (Aug. 3, 2018), https://www nytimes.com/2018/08/03/business/exxon-mobil-sec-climate-change.html.

[5] *See* Keith Goldberg, *SEC Sets Limits on Shareholder Climate Actions*, Law360 (Apr. 9, 2019), https://www.law360.com/articles/1147947/sec-sets-limits-on-shareholder-climate-actions.

the present action, while another fellow signed an amicus brief opposing ExxonMobil's position in another case. (AA ¶ 51.) By participating in the fellows program, the Attorney General receives financial and in-kind incentives to pursue and prioritize the Center's agenda. Those incentives create at least the appearance of a conflict: the Attorney General is duty-bound to take action in the public's interest, but the financial incentives provided by the Center could lead the Attorney General to prioritize the Center's interests over the public's interest.[6]

The Center's agreement with the Attorney General makes the appearance of a conflict unmistakable by granting the Center leverage over the Attorney General. For example, the Center can terminate its agreement with the Attorney General with just seven days' notice if the Attorney General fails to (i) staff a fellow "primarily on matters relating to clean energy, climate change, and environmental matters of regional and national importance," or (ii) provide periodic reports demonstrating "the contribution that the legal fellow has made to the clean energy, climate change, and environmental initiatives." (AA Ex. 17, Agreement ¶¶ A.6, B.2., D.3.) Moreover, the Attorney General must "collaborate" with the Center "on public announcements relating to clean energy, climate change, and environmental matters in which the Legal Fellow is engaged." (AA Ex. 17, Agreement ¶ D.5.)

The Attorney General ignores ExxonMobil's allegations concerning these provisions. Instead, it points to other provisions stating the Attorney General "retains *sole discretion* to determine whether to undertake any action." (Opp. 12.) The Attorney General misses the point. The issue is not whether the Attorney General has formally retained discretion to initiate a prosecution. Rather, the issue is whether external interests can improperly influence its exercise

[6] Recognizing the impropriety of this arrangement, the Virginia legislature passed a budget that prohibits the Virginia Attorney General from hiring fellows funded by the Center. *See* HB 1700 (Conf. Rep.), Va. Budget Amendments (Va. 2019), https://budget.lis.virginia.gov/amendment/2019/1/HB1700/Introduced/CR/56/1c.

of that discretion, thus giving rise to a conflict. The fellows program does just that by creating strong financial incentives for the Attorney General to prioritize investigation and enforcement actions in line with the Center's agenda, including opposition to ExxonMobil. (AA ¶ 50–52.)

The Attorney General also points to a December 18, 2018 informal opinion of the Joint Commission on Public Ethics ("JCOPE"), which purportedly "concluded that the fellowship program does not violate any ethical rules pertaining to conflicts of interest or gifts." (Opp. 13.) But this informal opinion—which the Attorney General sought almost a year *after* it hired two fellows—expressly states that it is dependent "upon the accuracy and completeness of the information [the Attorney General] provided" and that "[n]o person other than [the Attorney General] may rely upon this informal opinion." (Second Montgomery Aff., Ex. A at 5.) Even if this informal opinion were entitled to any weight, its discussion is limited to the Public Officers Law. It does not address the Attorney General's ethical obligations under the Rules of Professional Conduct or the constitutional dimensions of the alleged conflicts. And JCOPE fails to address those provisions of the agreement that influence the Attorney General's exercise of its discretion. JCOPE's statement that "[t]he Impact Center has placed no improper conditions on the Legal Fellows' services" (Second Montgomery Aff., Ex. A at 5) is belied by the agreement's plain text. As discussed, the agreement expressly requires the Attorney General to staff the fellows primarily on matters involving climate change, and allows the Center to pull the fellows if the Attorney General "fail[s] to assign the Legal Fellow work and responsibility" on such matters. (AA Ex. 17, Agreement ¶¶ A.6, B.2.)

Moreover, JCOPE's *informal* opinion should be given no weight because its analysis is both incomplete and contradicted by *formal* opinions of the New York State Ethics Commission ("Ethics Commission"). That body has repeatedly emphasized that an agency "may not accept a

gift which is conditioned in any way by the donor." N.Y. State Ethics Comm'n, Advisory Op. No. 97-6 at 5 (Mar. 17, 1997). Gifts must be for general agency use, so as to not "unduly restrict the [agency head] in applying agency resources" and so that the agency head, and not the donor, can "determine the allocation of the agency's resources statewide based upon his or her best judgment." N.Y. State Ethics Comm'n, Advisory Op. No. 95-38 at 5 (Dec. 19, 1995). The Ethics Commission has held that donations with even the thinnest strings attached could violate the Public Officers Law. *See, e.g.*, *id.* (donation of equipment could not be conditioned upon its use in a particular geographic region); N.Y. State Ethics Comm'n, Advisory Op. No. 97-6 at 5 (Mar. 17, 1997) (agency could not accept a donation of table at luncheon where donor specified who could be seated at table); N.Y. State Ethics Comm'n, Advisory Op. No. 96-2 at 4 (Mar. 11, 1996) (agency could not accept donation of computer equipment to publish agency opinions if donor included conditions limiting how the computer was used to publish or distribute the opinions).

The Attorney General's conflict of interest does not end with the fellows program. The Attorney General does not deny ExxonMobil's allegation that, in March 2016, Attorney General Schneiderman arranged a meeting with a California billionaire who has long targeted ExxonMobil, hoping to discuss "support for his race for governor" and the "Exxon case." (AA ¶ 49.) Instead, the Attorney General casts doubt on the source and suggests the call may not have materialized. (Opp. 9 & n.5.) Even if that were true, the Attorney General's pursuit of a "pay-to-play" arrangement represents another conflict.

The Attorney General attempts to distinguish ExxonMobil's conflict of interest cases by characterizing them as "involving personal enrichment." (Opp. 14.) But allegations concerning personal enrichment are not required to state a conflict of interest defense. Even if they were, Attorney General Schneiderman's efforts to enhance his personal political standing and attempts

to build stronger ties with potentially significant campaign contributors are clearly relevant to ExxonMobil's conflict of interest defense.

C. ExxonMobil Has Stated a Defense of Official Misconduct.

ExxonMobil has pleaded a defense of official misconduct arising from the Attorney General's improper motivations and unfairly prejudicial public commentary about ExxonMobil. To state a defense of official misconduct, a defendant must allege that a prosecutor has used "improper methods calculated to produce" an illegitimate result. *Berger* v. *United States*, 295 U.S. 78, 88 (1935). For example, a prosecutor's conduct may not be motivated by having "an axe to grind against" the subject of an investigation. *Wright* v. *United States*, 732 F.2d 1048, 1056 (2d Cir. 1984).

The Attorney General's motives for pursuing this action are improper, so much so that the Attorney General refuses to defend them. As ExxonMobil has alleged, the Attorney General has colluded with special interests intent on "delegitimiz[ing] [ExxonMobil] as a political actor." (AA ¶¶ 30, 38, 65.) In its opposition, the Attorney General ignores ExxonMobil's allegation that climate activists Pawa and Peter Frumhoff briefed the Attorney General in a clandestine meeting just hours before the March 2016 press conference. (AA ¶ 43.) Nor does the Attorney General address why the chief of its Environmental Protection Bureau encouraged Pawa to deceive a reporter and "not confirm" that he attended the meeting. (*Id.*) Instead, the Attorney General claims "there is nothing unreasonable about . . . taking a meeting with someone who is concerned about misinformation." (Opp. 8.) But if that were so, why would the Attorney General encourage Pawa to lie? Plainly, the Attorney General is conscious of the impropriety of its own conduct. *See United States* v. *Zichettello*, 208 F.3d 72, 105 (2d Cir. 2000) (jury's finding that defendant was a member of the conspiracy was supported by evidence that defendant intended to "conceal the scheme, evidencing consciousness of guilt").

The Attorney General also engaged in official misconduct by prejudging the investigation and making unfairly prejudicial comments about ExxonMobil to the press. (AA ¶ 41–42.) Prosecutors "must respect the presumption of innocence" and "refrain[] from speaking in public about pending and impending cases except in very limited circumstances." *United States* v. *Bowen*, 799 F.3d 336, 354 (5th Cir. 2015).

The Attorney General defends the public statements because, in the midst of prejudging ExxonMobil's liability, Attorney General Schneiderman stated that it was "too early to say" what his investigation would show. (Opp. 10.) That fig leaf only underscores the impropriety of the Attorney General's public commentary, which he knew to be unsubstantiated. Attorney General Schneiderman should have said nothing. Instead, the Attorney General faulted ExxonMobil for "know[ing] how fast the ice sheets are receding," while allegedly simultaneously telling "the public for years that there were 'no competent models.'" (AA ¶ 42.) He also told *The New York Times* that there "may be massive securities fraud" at ExxonMobil. (*Id.*) Through these unfounded public accusations—made when it was "too early to say"—the Attorney General prejudged his investigation, declared presumptively that ExxonMobil had engaged in unlawful conduct, and set the tone for his subordinates in conducting the investigation.

Similarly, the day it filed this action (and long after Mr. Schneiderman resigned), the Attorney General tweeted that it had "uncovered 97 pages worth of wrongdoing" at the Company. (AA ¶ 68.) The Attorney General fails to acknowledge this tweet in its opposition. The Attorney General's continued public statements about ExxonMobil demonstrate its bias and prejudice and "call[] into question [its] objectivity." *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987) (citation omitted).

The Attorney General also fails to engage the precedent supporting ExxonMobil's official misconduct defenses because they contain different facts. (Opp. 14.) To be relevant, precedent need not present fact patterns identical to the case at hand, and the teaching of those cases applies with full force here.

II. The Attorney General's Motion for a Protective Order Should Be Denied.

The Attorney General's protective order motion should be denied because the Attorney General failed to meet its initial burden of demonstrating the irrelevance of ExxonMobil's discovery requests. *See Liberty Petrol. Realty, LLC* v. *Gulf Oil, L.P.*, 164 A.D.3d 401, 403 (1st Dep't 2018). The Attorney General's "conclusory claims" about irrelevance are insufficient. *Ocean to Ocean Seafood Sales, Inc.* v. *Trans-O-Fish & Seafood Co.*, 138 A.D.2d 265, 266 (1st Dep't 1988). Even if the Attorney General satisfied its initial burden, ExxonMobil's request for documents concerning, among other things, the Attorney General's coordination with climate activists and its common interest agreement are "material and necessary" to ExxonMobil's defenses, which are based on the Attorney General's (i) coordination with private climate activists, (ii) public statements demonstrating prejudice and bias, and (iii) conflict of interest based on seeking and obtaining financial support from third parties. *Liberty*, 164 A.D.3d at 403.

Moreover, the Attorney General's claim that it has provided ExxonMobil with "the type of documents" that are necessary to support ExxonMobil's defenses fails to satisfy the Attorney General's discovery obligations. (Opp. 16.) New York law is clear that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." CPLR § 3101(a).

Finally, the Attorney General incorrectly states that ExxonMobil ignored the Attorney General's request to meet and confer about ExxonMobil's discovery requests. (Opp. 17.) ExxonMobil offered to meet and confer on March 4, 2019. (Montgomery Aff., Ex. G.) Two

weeks later, ExxonMobil proposed reducing the number of search terms and custodians. (Second Montgomery Aff., Ex. D.) As of the filing of this brief, the Attorney General has not responded to that offer.

CONCLUSION

Having waived any argument that it would be prejudiced by amendment, the Attorney General opposes ExxonMobil's cross-motion based solely on futility, but the allegations in the Amended Answer more than adequately support the defenses challenged here. The selective enforcement defense is supported by the Attorney General's collusion with special interests to single out ExxonMobil because of disagreements about climate policy. The Attorney General's conflict of interest results from its acceptance of third-party funding from an organization that requires the funding to be used to promote its climate policy agenda. Finally, the Attorney General has engaged in official misconduct by concealing its ties with special interests and continuing to make prejudicial public statements about ExxonMobil. This Court should therefore grant ExxonMobil's cross-motion for leave to amend and deny the Attorney General's motion for a protective order barring discovery on those defenses.

Dated: April 16, 2019
New York, NY

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

/s/ *Theodore V. Wells, Jr.*
Theodore V. Wells, Jr.
twells@paulweiss.com
Daniel J. Toal
dtoal@paulweiss.com
Nora Ahmed
nahmed@paulweiss.com
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

Justin Anderson
janderson@paulweiss.com
2001 K Street, NW
Washington, D.C. 20006-1047
(202) 223-7300
Fax: (202) 223-7420

Attorneys for Exxon Mobil Corporation

Certification of Compliance with Word Count

Pursuant to Rule 17 of the Rules of Practice for the Commercial Division of the Supreme Court, I certify that this affirmation complies with that rule because it contains 4,189 words, exclusive of the caption, table of contents, table of authorities, and signature block. In making this certification, I relied on Microsoft Word's "Word Count" tool.

Dated: April 16, 2019
New York, New York

By: /s/ *Theodore V. Wells, Jr.*
Theodore V. Wells, Jr.