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

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| PEOPLE OF THE STATE OF NEW YORK, by Letitia James, Attorney General of the State of New York,<br><br>Plaintiff,<br><br>-against-<br><br>EXXON MOBIL CORPORATION,<br><br>Defendant. | Index No. 452044/2018<br><br>IAS Part 61<br><br>Hon. Barry R. Ostrager |

**EXXON MOBIL CORPORATION'S POST-TRIAL MOTION OPPOSING THE ATTORNEY GENERAL'S REQUEST TO DISCONTINUE ITS FRAUD COUNTS**

**PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP**
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

*Attorneys for Defendant*
*Exxon Mobil Corporation*

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Defendant Exxon Mobil Corporation ("ExxonMobil" or the "Company") respectfully submits this post-trial motion opposing the New York Attorney General's ("NYAG") request to discontinue its common law and equitable fraud claims. This motion presents questions of law that can be resolved on the papers and without a hearing.

**PRELIMINARY STATEMENT**

For four years, NYAG has done everything in its power to drag the reputation of ExxonMobil and its employees through the mud. In press interviews and court filings, NYAG repeatedly alleged that ExxonMobil may have committed a "massive fraud"—even as NYAG abandoned theory after theory about what ExxonMobil supposedly did wrong. By the time this case went to trial, NYAG vowed to expose ExxonMobil's climate risk management system as a "Potemkin village" and "a longstanding fraudulent scheme."

After eleven days of trial, however, the only Potemkin village in sight was NYAG's case against ExxonMobil. NYAG's trumped-up common law and equitable fraud claims, as well as its Martin Act and Executive Law § 63(12) claims, proved baseless. In particular, NYAG entirely failed in its case-in-chief to identify any evidence of fraudulent intent or investor reliance on the alleged misrepresentations. This outcome could not have been a surprise to NYAG, which had access to over four million pages of internal documents and over two hundred hours of deposition testimony.

When pressed by the Court at closing arguments about its fraud counts, NYAG reluctantly admitted it was abandoning those claims and, seeking to avoid an adverse ruling, belatedly requested a discontinuance of them. In an instant, NYAG thus sought to wipe the slate clean of the unsupported and indefensible accusations it had hurled against ExxonMobil and its employees over the past four years.

NYAG's last-minute gambit to avoid judicial repudiation of its claims should not be countenanced. *First*, CPLR 3217(b) imposes an absolute bar on unilateral discontinuance of claims after the close of evidence. *Second*, even if the Court had discretion under CPLR 3217(b) to grant NYAG's discontinuance, the exercise of that discretion would not be appropriate here. An eleventh-hour discontinuance would severely prejudice ExxonMobil. Without express acknowledgment that the evidence did not show intent or reliance, ExxonMobil can never repair the reputational damage that NYAG inflicted on the Company and its employees. Nor can it deter the copycat litigants across the country that have repackaged NYAG's allegations word-for-word.

ExxonMobil therefore requests an order dismissing with prejudice the two fraud counts and stating that the evidence at trial did not establish fraudulent intent or reliance on any alleged misstatement. Alternatively, ExxonMobil asks the Court to condition discontinuance on NYAG's stipulation that the evidence at trial did not show the requisite intent or reliance elements for fraud.

## STATEMENT OF FACTS

### A. NYAG Repeatedly Told the Public That Its Investigation of ExxonMobil Sought to Expose a Longstanding Fraudulent Scheme

On the evening of November 4, 2015, NYAG emailed a subpoena *duces tecum* to ExxonMobil. *See* Ex. A. Within hours of its issuance, the *New York Times* reported that NYAG was investigating whether ExxonMobil had "lied to the public." DX-695, at 1. The length of the *New York Times* article, which referenced discussions with NYAG, made unmistakably clear that the media outlet had been provided with the subpoena long before it had been served on ExxonMobil. *Id.* The following week, forsaking his supposed practice of not "comment[ing] on ongoing investigations," Ex. B, former New York Attorney General Eric Schneiderman made the rounds on the press circuit in an effort to publicize his fraud investigation of ExxonMobil. On the

*PBS News Hour*, which aired on November 10, 2015, Mr. Schneiderman told a reporter that "certainly all of [NYAG's] claims would lie in some form of fraud." Ex. C, at 2.

Over the next year, a steady drumbeat of public accusations followed. Most notably, Mr. Schneiderman held a press conference on March 29, 2016. *See* Ex. D. Alongside a host of elected officials—including Massachusetts Attorney General Maura Healey—Mr. Schneiderman announced his plan to "coordinat[e]" a "battle" against the "relentless assault from well-funded, highly aggressive and morally vacant forces." *Id.* at 4. Singling out ExxonMobil, Mr. Schneiderman proclaimed that the First Amendment did not give ExxonMobil "the right to commit fraud." *Id.* at 3-4.

Predictably, when the evidence demonstrated that ExxonMobil did not conceal any "truth" about climate science from the rest of the world, Mr. Schneiderman shifted his theory multiple times in search of a claim that might stick. In August of 2016, he suggested to the press that ExxonMobil might be engaged in a "massive securities fraud" concerning the estimation of its publicly disclosed oil and gas reserves. *See, e.g.*, Ex. E, at 1. When that theory failed to pan out, NYAG announced its current securities fraud theory in a June 2, 2017 court filing. *See* Ex. F. That filing inaccurately suggested that ExxonMobil had "misle[d] investors and the public" with the full "know[ledge]" of executives at the "highest levels" of the Company. *Id.* ¶¶ 21, 23. NYAG claimed that ExxonMobil inappropriately used two sets of books to assess the impact of potential greenhouse gas regulations. *Id.* Despite ExxonMobil's repeated requests that NYAG retract these baseless accusations, *see* Ex. G—which were contradicted by extensive evidence that ExxonMobil had already produced—NYAG continued its investigation undeterred.

On October 24, 2018, NYAG filed a complaint against ExxonMobil that doubled down on its latest theory. Despite the fact that NYAG's allegations had become increasingly arcane and

narrow, NYAG avowed that ExxonMobil had "intentionally, knowingly, or recklessly" misled its investors by erecting a "Potemkin village." Dkt. No. 1 ¶ 19, 260, 322. ExxonMobil's "fraud," NYAG insisted, "was sanctioned at the highest levels of the company." *Id.* ¶ 8. In a press release filed the same day, NYAG proclaimed that ExxonMobil's "management, including former [CEO] Rex W. Tillerson[,] knew for years" about the Company's purported fraud. Ex. H, at 2.

**B. NYAG Withdrew Its Fraud Claims Only After the Close of Evidence**

As the parties proceeded to trial, NYAG's accusations of fraud persisted. Its pre-trial brief explicitly asserted that ExxonMobil was "liable for equitable fraud and common law fraud," and promised that NYAG would satisfy the elements of intent and reliance. *See* Dkt. No. 403, at 46. At trial, NYAG parroted its Complaint allegation that ExxonMobil's disclosures "were reviewed and sanctioned at the highest levels of the company." Trial Tr. 13:21-22.

ExxonMobil, in turn, elicited testimony and presented contemporaneous documentary evidence at trial that refuted any notion of fraudulent intent or investor reliance on any supposed material misrepresentation. Of particular note, ExxonMobil introduced correspondence into evidence that demonstrated its employees took pains to make the key disclosures in the case "more precise." *See* DX-637. Furthermore, every single ExxonMobil employee was asked whether they were "aware of any scheme . . . to mislead investors about climate risk." *E.g.*, Trial Tr. 459:2-20. Each answered in the negative. *E.g.*, *id.* Some went so far as to describe the human toll NYAG's fraud claims had inflicted on "the men and women of the ExxonMobil Corporation" who were "being accused of a fraud." *Id.* at 1125:4-16. "[I]t is not fair to them," former CEO Rex Tillerson lamented. *Id.*

After eleven days of trial, both parties rested their respective cases. *Id.* at 2033:3-14. Closing arguments were scheduled for the next morning. *Id.* at 2033:15-19. Following ExxonMobil's closing argument, NYAG opened its own summation by noting that it planned to

focus its presentation on the claimed Martin Act violation. *Id.* at 2071:2-5. This announcement prompted the Court to inquire whether NYAG intended to pursue its common law and equitable fraud claims. *Id.* at 2071:14-2073:10. After initially deflecting the question, NYAG belatedly requested a discontinuance of its two fraud counts. *Id.* at 2073:7-10.

ExxonMobil strenuously objected to NYAG's surprise request to discontinue the two fraud counts. *See id.* at 2115:22-2121:7. Without findings of fact, a dismissal with prejudice would not remedy the harm to ExxonMobil. *See id.* at 2117:17-25. After all, ExxonMobil and its employees "ha[d] been disparaged" as "criminals and crooks based on the fraud claims." *Id.* at 2117:17-21. Having suffered "reputational harm," ExxonMobil executives and retirees took the stand to "clear their reputations." *Id.* at 2116:10, 2120:17. Counsel argued that NYAG should not be permitted to withdraw its most damaging claims "for strategic reasons" after "the evidence has [already] been presented." *Id.* at 2116:5-10, 2117:6-7. With NYAG in a position to "say that no ruling was issued on those claims," its four years' worth of slander against ExxonMobil and its employees would stand unremedied. *Id.* at 2117:5-6. As a matter of policy, the government should not be permitted to "harass [a] company for three years" and then "say at the last minute, 'oh, never mind.'" *Id.* at 2123:10-15.

In addition to the reputational consequences of NYAG's discontinuance request, counsel drove home the request's legal implications. ExxonMobil observed that NYAG's lawsuit has spawned numerous "copycat cases tracking this case word for word." *Id*. at 2120:25-2121:4. These copycat cases include "private federal securities cases," "books and records cases," and a lawsuit by the Massachusetts Attorney General.[1] *Id.* Accordingly, ExxonMobil asked the Court

[1] *See, e.g.*, Ex. I (Am. Compl., *Ramirez* v. *Exxon Mobil Corp*. (N.D. Tex. July 26, 2017), Dkt. 36); Ex. J (Compl., *Commonwealth* v. *Exxon Mobil Corp.*, No. 19-03333-BLS1 (Mass. Sup. Ct. Oct. 24, 2019), Dkt. 1); Compl., *Saratoga Adv. Tr. Energy & Basic Materials Portfolio* v. *Woods*, No. 3:19-cv-16380 (D.N.J. Aug. 6, 2019), Dkt. 1; Am. Compl., *In re Exxon Mobil Corp. Derivative Litig.*, No. 3:19-cv-01067-K (N.D. Tex. Sept. 20, 2019),

for "a ruling or stipulation" that the evidence did not support NYAG's two fraud counts. *Id.* at 2117:22-24.

The Court responded by expressing concern that the law might not permit a ruling on claims that were no longer "before" it. *Id.* at 2121:12-13. Counsel offered to "go to the library" and brief the Court on its ability to deny or set conditions on a last-minute request for discontinuance. *Id.* at 2123:6-7. The Court accepted this offer, reserving decision on NYAG's application to discontinue its common law and equitable fraud claims. *Id.* at 2123:18-22.

**LEGAL STANDARD**

Once a defendant has filed responsive pleadings in a civil action, the plaintiff may discontinue its claims unilaterally only by order of the court. *See* CPLR 3217(a). A court's discretion to issue such an order "is not unlimited." *O'Neill* v. *Pinkowski*, 41 Misc. 3d 621, 623 (Sup. Ct. Essex Cty. 2013). In particular, a court "may not authorize a unilateral discontinuance after a case has been submitted to the [c]ourt for a determination of facts." *Id.* (citing CPLR 3217(b)); *see also In re Xerox Corp. Consol. S'holder Litig.*, 2019 WL 4400296, at *4 (Sup. Ct. N.Y. Cty. Sept. 10, 2019) (Ostrager, J.) (citing CPLR 3217(b)). The purpose of this rule is to "prevent a discontinuance for the sole purpose of warding off an adverse decision." *See Getz* v. *Harry Silverstein, Inc.*, 205 Misc. 431, 432 (N.Y. City Ct. N.Y. Cty. 1954) (citing earlier version of CPLR 3217).

Even before claims have been submitted, however, courts are "obligat[ed]" to deny requests for discontinuance that would inflict "[p]articular prejudice" on the defendant. *Tucker* v. *Tucker*, 55 N.Y.2d 378, 383-84 (1982); *Matter of Sheena B.*, 83 A.D.3d 1056, 1057 (2d Dep't 2011) (quoting *Tucker*, 55 N.Y.2d at 383-84). In determining whether the party opposing the

Dkt. 12, *Walkover* v. *Exxon Mobil Corp.*, (N.J. Super. Ct. Ch. Div. Oct. 24, 2019); Pl.'s Original Verified S'holder Pet., *Stourbridge Invs. LLC* v. *Avery*, No. 3:19-cv-02267-G (N.D. Tex. Sept. 23, 2019), Dkt. 1-5.

motion for discontinuance would be prejudiced, the court must consider "the stage that litigation has reached; the later the stage, the greater should be the court's scrutiny of the plaintiff's motives." *Kane* v. *Kane*, 163 A.D.2d 568, 570 (2d Dep't 1990). A plaintiff's request for discontinuance should not be granted where "the evident motive" is "simply to avoid an adverse decision on the merits." *Lui* v. *Chinese-Am. Planning Council, Inc.*, 300 A.D.2d 80, 80 (1st Dep't 2002).

To the extent a court determines that discontinuance is appropriate, the court may condition its order on "terms" that it "deems proper." CPLR 3217(b). "Prejudice to the defendant and other special circumstances," such as "inordinate delay in seeking a discontinuance," will "justify imposing" a condition. *Brenhouse* v. *Anthony Indus., Inc.*, 156 A.D.2d 411, 412 (2d Dep't 1989). Where, as here, "the defendant has an interest in having the proceeding conducted to its termination," courts have free reign to craft any "such terms as will fully protect or indemnify the defendant." 1 N.Y. Jur. 2d Actions § 137.

**ARGUMENT**

The Court should not grant NYAG's untimely request to discontinue its common law and equitable fraud claims. Because NYAG first requested discontinuance *after* its claims had been submitted to the Court, the fraud claims cannot be discontinued without ExxonMobil's consent. *See* CPLR 3217(b). Even if both sides had not already rested their cases, discontinuance would be inappropriate here because of the prejudice to ExxonMobil and its employees. By withdrawing its fraud claims after four years of costly investigation and litigation, NYAG is effectively attempting to deny ExxonMobil and its employees the opportunity to clear their names and set the record straight. This is an issue of first impression that falls within the Court's discretion. ExxonMobil requests that the Court exercise that discretion here. The appropriate remedy is an order dismissing with prejudice the two fraud counts and stating that the evidence at trial did not

show the requisite intent or reliance elements for fraud. In the alternative, ExxonMobil requests that the Court condition discontinuance on NYAG's stipulation that the evidence at trial did not establish fraud, including the elements of intent and reliance.

## I. NYAG May Not Discontinue Its Fraud Claims Without ExxonMobil's Consent Because NYAG's Claims Have Already Been Submitted to the Court

NYAG's unilateral request to discontinue its common law and equitable fraud claims was foreclosed as a matter of law. Once a claim has been "submitted to the court" to determine facts, a discontinuance may be granted only upon "stipulation of all parties." CPLR 3217(b). That rule applies here, where NYAG requested a discontinuance only after "the close of all the evidence on the issues tried." CPLR 4016(a) (statute governing closing arguments).[2]

Although there is no settled law on precisely when a claim is considered "submitted" to a court,[3] the decision in *Mahaffey* v. *Mahaffey* is instructive. 52 A.D.2d 1039 (4th Dep't 1976). There, the plaintiff in a legal separation action unilaterally asked for a discontinuance in the middle of trial—raising the question of whether the case had already been submitted under the terms of CPLR 3217(b). *Id.* at 1040. In finding the case had not yet been submitted, the court explained the dispositive factors in its analysis: "[n]either party had rested," the evidentiary record had not "closed," and "important" evidentiary issues in the case had not yet been resolved. *Id.* "In short," the court stated, "the whole case was in the process of being proved, not under advisement." *Id.* For these reasons, the plaintiff could seek a discontinuance without consent of the defendant.

The Fourth Department's analysis in *Mahaffey* strongly suggests that NYAG could not unilaterally discontinue its fraud claims during closing arguments. Unlike the plaintiff in

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[2] *See also, e.g.*, 105 N.Y. Jur. Trial § 351 (explaining that summation occurs at "the close of all evidence on the issues tried"); *U.S.* v. *Gupta*, 699 F.3d 682, 688 (2d. Cir. 2011) (explaining that various testimony was "summarized" during closing arguments).

[3] *See, e.g.*, *O'Neill*, 41 Misc.3d at 623 (noting that the court "could not locate any authority" on the question of whether a case is considered submitted to the court at the summary judgment stage).

*Mahaffey*, NYAG attempted to discontinue its claims *after* both parties had rested and the evidentiary record had closed. There were therefore no important evidentiary issues left to resolve. The Court had already taken "under advisement" the evidence that had been supplied at trial—the parties were merely summarizing the evidence that had been submitted to the Court for fact-finding. *See, e.g.*, CPLR 4016(a).[4] NYAG had therefore already "submitted" its claims, under the terms of CPLR 3217(b), when it unilaterally requested the discontinuance. Accordingly, ExxonMobil requests that the Court issue an order that dismisses with prejudice the two fraud counts, and states that the evidence at trial did not show fraudulent intent or reliance.

## II. An Order Discontinuing NYAG's Fraud Claims Would Unfairly Prejudice ExxonMobil, Its Employees, and the Public Interest

Even if the Court determines that NYAG was permitted to seek a unilateral discontinuance—and it should not—the Court should still exercise its discretion to fashion an appropriate remedy. *See* CPLR 3217(b). In deciding whether to grant a discontinuance, courts consider factors such as reputational harm to the defendant, the impact of a discontinuance on parallel litigations, and an improper motive for the plaintiff's request. *Oneida Indian Nation of N.Y.* v. *Pifer*, 43 A.D.3d 579, 580 (3d Dep't 2007). Here, all three factors weigh in favor of dismissing with prejudice the two fraud counts and finding that the evidence at trial did not show the requisite intent or reliance elements for fraud.

### A. The Court Should Afford ExxonMobil and Its Employees the Opportunity to Clear Their Names

The Court's dismissal order should state that the evidence at trial did not show intent or reliance—in recognition of the serious reputational harm that ExxonMobil and its employees have

[4] *See also supra*, note 2.

suffered to date. Without this express acknowledgment, ExxonMobil and its employees will face severe prejudice that cannot otherwise be remedied. *Tucker*, 55 N.Y.2d at 383-84.

The Fourth Circuit's decision in *Camacho* v. *Mancuso*—which considered the federal analogue to CPLR 3217—addressed precisely the concerns at stake here. 53 F.3d 48 (4th Cir. 1995). There, the Fourth Circuit declined to enforce a stipulation for voluntary dismissal because one party had failed to sign the stipulation as required by Fed. R. Civ. P. 41(a)(1)(ii). *See id.* at 51. Although the court recognized that enforcing the stipulation did "not subvert the parties' original intent," it framed its decision as a defense of defendants' rights in "future cases." *Id.* "A defendant has a strong interest in the resolution of an action," the court emphasized, "especially after he has taken the time and spent the money to file a responsive pleading." *Id.* at 51. For instance, a defendant "might want the opportunity to clear his name or remove a blemish on his reputation." *Id.* The court feared that, without "the requirement of a mutually signed, written stipulation, Rule 41(a)(1)(ii) would become a vehicle by which a plaintiff could dismiss an action at any point without the consent of a defendant." *Id.* These concerns ultimately motivated the court to strictly enforce the procedural safeguards on voluntary dismissals.

The circumstances here are precisely those contemplated by *Camacho*. Over the course of several years, NYAG has continuously claimed that ExxonMobil committed a "massive securities fraud"[5] by creating a "Potemkin Village" that was "sanctioned at the highest levels of the company." Dkt. No. 1 ¶¶ 8, 94; *see also* Trial Tr. 5:10-6:10, 6:25-7:14. As a result of NYAG's crusade, "the men and women of the ExxonMobil Corporation" have been called "crooks and criminals." Trial Tr. 1125:4-16, 2117:17-21. In order to clear their names, ExxonMobil and its employees have "taken the time and spent the money" to try this case to a "resolution." *Camacho*,

[5] *See, e.g.*, Ex. E.

53 F.3d at 51. By granting NYAG's request for a discontinuance without setting the record straight, the Court would allow NYAG to claim it merely withdrew its fraud claims for strategic reasons—not because NYAG failed to meet its burden of proof. ExxonMobil and its employees are entitled to exoneration. The appropriate remedy here is an order dismissing with prejudice the two fraud counts and finding that the evidence failed to show the requisite elements for fraud.

### B. The Court Should Deny NYAG's Discontinuance Request to Promote Efficient Resolution of Copycat Suits

In addition to reputational concerns, the Court should also consider the duplicative litigation ExxonMobil faces from plaintiffs copying NYAG's playbook. Where a plaintiff's claims raise "issues likely to recur, the resolution of which is uncertain," a decision should be made "on the claims' *merits* rather than their discontinuance." *Treuhold Capital Grp., LLC* v. *Wissak*, 2010 WL 5692110, at *22 (N.Y. Sup. Ct. Bronx Cty. July 30, 2010) (emphasis added). This rule helps protect defendants and the public from the harms associated with using "the discontinuance device as a means of harassment and a source of unnecessary repetitive litigation." *Headley* v. *Noto*, 45 Misc. 2d 284, 285 (N.Y. Sup. Ct. Kings Cty. 1965), *aff'd*, 24 A.D.2d 493 (2d Dep't 1965).

In New York, courts routinely deny discontinuances when the plaintiff's claims overlap with those in parallel suits. *See, e.g.*, *Oneida*, 43 A.D.3d at 581. The decision in *N.Y.C. Housing Authority Queensbridge South Houses* v. *Foote* is illustrative. 58 Misc.3d 494 (N.Y. Civ. Ct., Queens Cty. 2017). There, the court denied a discontinuance that would have precluded adjudication of defenses that were similar to those in a related administrative proceeding. *Id.* at 496. It would be "prejudicial," the court underscored, to "deny [the defendant] the opportunity to assert" defenses that could affect parallel litigation. *Id.*

As in *Foote*, ExxonMobil is entitled to more than a mere discontinuance of NYAG's common law and equitable fraud claims. ExxonMobil has been involved in "similar proceedings

in federal and state court" regarding "similar issues for several years." *Oneida*, 43 A.D.3d at 580. These litigations "remain uncertain" and "are likely to recur." *Id.* At present, ExxonMobil faces "copycat cases" in Texas, Massachusetts, and other jurisdictions involving fraud allegations nearly identical to NYAG's. Trial Tr. 2120:25-2021:4.

Take for example *Ramirez* v. *Exxon Mobil Corp.*, a securities class action that was filed in the Northern District of Texas three years ago. The plaintiffs in *Ramirez* are pursuing claims under SEC Rule 10b-5,[6] which requires proof of both intent and reliance. *See Aaron* v. *SEC*, 446 U.S. 680, 701 (1980) (intent); *Basic Inc.* v. *Levinson*, 485 U.S. 224, 243 (1988) (reliance). In the *Ramirez* plaintiffs' original complaint, they expressly cited to NYAG's investigation. *See, e.g.*, Ex. K ¶ 25. Then, weeks after NYAG filed new allegations in this case, the *Ramirez* plaintiffs amended their complaint in kind. *See, e.g.*, Ex. I ¶¶ 138-40, *Ramirez* v. *Exxon Mobil Corp.*, No. 16-031110-K (N.D. Tex. July 26, 2017), Dkt. 36. Quoting liberally from NYAG's June 2, 2017 filings with this Court, *Ramirez* plaintiffs alleged that ExxonMobil's "internal policies actually prescribed the use of a separate, undisclosed set of carbon proxy costs that were significantly lower than those described by the Company's" disclosures. *Id.* ¶ 138.[7]

Likewise, the Massachusetts Attorney General's ("MAAG") suit, filed just last month, alleges violations of the Massachusetts Consumer Protection Law,[8] which authorizes civil

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[6] *See* Ex. I.

[7] The factual findings in this case will be particularly relevant to the *Ramirez* litigation because of the Private Securities and Litigation Reform Act of 1995 (PSLRA), 15 U.S.C. § 78u–4(c)(1). In passing the PSLRA, Congress acknowledged that "[u]nwarranted fraud claims can lead to serious injury to reputation for which our legal system effectively offers no redress." H.R. Rep. No. 104-369, at 41 (Conf. Rep.). The PSLRA thus **(i)** "heightened the pleading requirements" for private securities fraud claims, and **(ii)** mandated that courts, upon dismissing such claims with prejudice, "include in the record specific findings" on whether the plaintiffs had offered "evidentiary support" for each of their "factual contentions." *ATSI Commc'ns, Inc*. v. *Shaar Fund, Ltd.*, 579 F.3d 143, 148, 150, 153 n.10 (2d Cir. 2009) (citing § 78u–4(c)(1); Fed. R. Civ. P. 11(b)(3)). Accordingly, findings of fact on NYAG's fraud claims will affect the *Ramirez* court's mandatory analysis under the PSLRA.

[8] *See.* Ex. J ¶ 2.

penalties if the defendant "knew or should have known" its conduct was unfair or deceptive. Mass. Gen. L. ch. 93A, § 4. The Massachusetts complaint invokes that provision, alleging that "ExxonMobil knew that its proxy cost misrepresentations were deceptive, and those misrepresentations were willful." Ex. J ¶ 801. Moreover, MAAG supports that claim by lifting wholesale NYAG's allegations about ExxonMobil's purported fraud. In fact, Paragraph 532 of MAAG's complaint copies NYAG's complaint verbatim. The paragraph alleges that "[t]he proxy cost figures in ExxonMobil's Corporate Plan were inconsistent with, and significantly lower than, the Company's publicly represented proxy costs until June 2014 for OECD countries, and until June 2016 for non-OECD countries." *Compare* Ex. J ¶ 532 *with* Dkt. No. 1 ¶ 123.

Ultimately, this case will be a bellwether for lawsuits all across the country. Yet, as NYAG now effectively concedes, it could not find sufficient evidence that ExxonMobil intentionally misled investors or that investors relied on any alleged misrepresentation. Without acknowledgment in this Court's dismissal order that the evidence did not show intent or reliance, plaintiffs in other jurisdictions will be able to continue to bolster their claims by pointing to NYAG's fraud allegations. ExxonMobil deserves the opportunity to tell courts in parallel litigations that NYAG's fraud claims were meritless, without facing the rejoinder that NYAG withdrew the claims for purely strategic reasons. *Foote*, 58 Misc.3d at 496. Accordingly, the Court should issue an order that dismisses with prejudice the two fraud counts and states that the evidence did not establish the requisite intent or reliance elements for fraud.

### C. Discontinuance Is Not Warranted Where, As Here, the Plaintiff Merely Seeks to Avoid an Adverse Determination

Finally, the Court should not grant NYAG a summary discontinuance because its "evident motive for" requesting one is "simply to avoid an adverse decision on the merits." *Lui*, 300 A.D.2d at 80; *see also Bank of Am., N.A.* v. *Douglas*, 110 A.D.3d 452, 452 (1st Dep't 2013). A plaintiff

may not avoid an adverse determination in an action "by jettisoning it altogether." *Treuhold*, 2010 WL 5692110, at *19. Where the requested discontinuance is nothing "more than a tactical maneuver," it should be denied. *Id.* at *2.

The Second Department's decision in *Turco* v. *Turco* bears directly on this case. 117 A.D.3d 719 (2d Dep't 2014). There, the trial court had denied the plaintiff's motion to voluntarily discontinue the action on the first day of trial. *Id.* at 721. The Second Department affirmed the decision, observing that the trial court had "providently exercised its discretion" since "the record support[ed] a finding that [the plaintiff] was merely attempting to avoid an adverse order of the court." *Id.* at 720-21.

As in *Turco*, the Court should carefully scrutinize NYAG's motives for requesting a discontinuance at this extremely late stage of litigation. *Id.*; *see also Kane*, 163 A.D.2d at 570. After a three-year investigation and a full trial, NYAG surely knew it had failed to demonstrate that ExxonMobil committed fraud. The only plausible explanation for its last-second discontinuance, then, was that it sought to avoid an adverse factual finding. A voluntary discontinuance of the claims—even if dismissed with prejudice—unquestionably looks better than a judicial finding that NYAG failed to establish any wrongdoing. NYAG should not be allowed to "avoid an adverse decision on the merits." *Lui*, 300 A.D.2d at 80. The Court can prevent that outcome by dismissing with prejudice the two fraud counts, and stating that the evidence at trial did not demonstrate fraudulent intent and reliance.

## III. Alternatively, the Court Should Condition Any Discontinuance on a Stipulation by NYAG That the Evidence Did Not Show Intent or Reliance

If the Court is inclined to discontinue NYAG's claims without weighing in on intent and reliance, ExxonMobil asks that the Court condition discontinuance on NYAG's express

acknowledgment that the evidence did not show intent and reliance.[9] By statute, the Court has discretion to grant a discontinuance subject to any "terms and conditions" it "deems proper." CPLR 3217(b); *see also In re Xerox Corp. Consol. S'holder Litig.*, 2019 WL 4400296, at *6 (Ostrager, J.) (setting conditions on grant of discontinuance). It should "take cognizance of all the circumstances and particularly of the effect of the discontinuance upon the defendant, and then . . . impose such terms as may be just and equitable." *Lundin* v. *Mittelman*, 115 N.Y.S.2d 775, 776-77 (N.Y. Sup. Ct. Westchester Cty. 1952).

The decision in *Hempstead Pain and Medical Services., P.C.* v. *Progressive Casualty Insurance Co*. demonstrates how courts can effectively tailor a conditional discontinuance to protect a defendant from prejudice. 2003 WL 22427274 (N.Y. Dist. Ct. Nassau Cty. Aug. 8, 2003). In that case, plaintiff-medical providers sought a discontinuance to avoid a deposition that the defendant-insurer alleged would expose a fraudulent billing scheme. *Id.* at *3. The court held that a discontinuance would unduly prejudice the defendant because: **(i)** the action commenced some eight months prior; **(ii)** defendant consistently sought and compelled discovery; **(iii)** the plaintiffs transparently sought withdrawal on the eve of the deposition at issue; and **(iv)** the expected testimony had the potential to undermine plaintiffs' pending and future claims in both state and federal court. *Id.* at *2-3. The court explained that to "permit the plaintiffs to avoid such depositions and to 'start again' in another forum would prejudice the defendant, who has expended significant time and money in defending this litigation." *Id.* at *3. The court accordingly fashioned a conditional discontinuance that allowed defendant to conduct the deposition. *Id.* at *4.

Here, the prejudice at stake from NYAG's discontinuance spans reputational, legal, and public policy concerns. NYAG's "inordinate delay in seeking discontinuance," *Brenhouse*, 156

[9] *Eurycleia Partners, LP* v. *Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009) (common law fraud); *People* v. *Credit Suisse Sec. (USA) LLC*, 31 N.Y.3d 622, 641 (2018) (Feinman, J., concurring) (equitable fraud).

A.D.2d at 412, coupled with its repeated false allegations of fraud, has substantially harmed ExxonMobil and its employees. Like the plaintiffs in *Hempstead*, NYAG sought to transparently exploit the discontinuance mechanism by withdrawing its claims on the eve of an event it sought to avoid: a judicial determination that ExxonMobil's disclosure of the metrics it uses to assess the potential impact of future climate regulations on its business was not fraudulent. If the Court is not prepared to state on the record that the evidence did not show intent or reliance, the Court should condition discontinuance on NYAG's acknowledgment of that reality. A dismissal with prejudice without more will not "fully protect" ExxonMobil and its employees, whose good names have been tarnished. 1 N.Y. Jur. 2d Actions § 137. Under the circumstances, a clear and unequivocal exoneration is the only "proper" remedy. CPLR 3217(b).

## CONCLUSION

In its fervor to score headlines and political points, NYAG directly and repeatedly impugned the corporate reputation of ExxonMobil and the personal reputations of its employees. NYAG cannot now erase these past four years because its fraud theory was completely debunked at trial. ExxonMobil therefore asks this Court to set the record straight by dismissing with prejudice NYAG's common law and equitable fraud claims, and stating in its order that the evidence at trial did not show fraudulent intent or reliance. Alternatively, it would be appropriate for the Court to condition discontinuance on NYAG's stipulation that the evidence at trial did not establish fraudulent intent or reliance.

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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, DC 20006-1047
(202) 223-7300
Fax: (202) 223-7420

**EXXON MOBIL CORPORATION**

Patrick J. Conlon
patrick.j.conlon@exxonmobil.com
22777 Springwoods Village Parkway
Spring, TX 77389
(832) 624-6336

*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 brief complies with that rule because it contains 5,172 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: November 18, 2019
New York, New York

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