UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON MOBIL CORPORATION,	:	
	:	No. 17-CV-2301 (VEC) (SN)
Plaintiff,	:	
	:	
-against-	:	ECF Case
	:	
ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity,	:	
	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ATTORNEY GENERAL HEALEY'S RENEWED MOTION TO DISMISS FIRST AMENDED COMPLAINT

MAURA HEALEY
ATTORNEY GENERAL OF
MASSACHUSETTS

OFFICE OF THE ATTORNEY GENERAL
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200

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I. INTRODUCTION

There are three independent grounds upon which this Court should dismiss Exxon Mobil Corporation's ("Exxon") First Amended Complaint ("FAC"). First, Exxon is precluded from litigating in its federal action the claims and issues—including all those alleged in its FAC—determined in Attorney General Healey's favor by the Massachusetts Superior Court in its January 11, 2017, Order ("Order").[1] Second, the Court should dismiss under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), where the balance of applicable factors overwhelmingly favors abstention and dismissal. Third, Exxon's allegations and requests for relief are not ripe because Exxon has—and is availing itself of—a full and adequate remedy in Massachusetts state courts, it consequently faces no current investigatory deadline to produce documents to the Massachusetts Attorney General's Office, and there is no imminent enforcement action against Exxon under the Massachusetts consumer and investor protection law.

Alternatively, this Court could dismiss Exxon's claims against Attorney General Healey for lack of personal jurisdiction in New York. Attorney General Healey's actions related to her issuance of a civil investigative demand ("CID") in Massachusetts, to investigate whether Exxon violated a Massachusetts law that protects Massachusetts consumers and investors, do not warrant this Court's exercise of personal jurisdiction under the New York long-arm statute. It would, moreover, be manifestly unreasonable to exercise jurisdiction in New York over a Massachusetts law enforcement official engaged in the proper conduct of her duties, as determined by the Massachusetts Superior Court.

[1] Declaration of Christophe G. Courchesne, filed herewith, Exhibit ("Ex.") 1 (slip opinion), *available as In re Civil Investigative Demand No. 2016-EPD-36*, No. SUCV20161888F, 2017 WL 627305 (Mass. Super. Jan. 11, 2017).

II. STATEMENT OF FACTS

The Attorney General's Civil Investigative Demand

Attorney General Healey is the chief law enforcement official of the Commonwealth of Massachusetts. Mass. Gen. Laws ch. 12, § 3. In this capacity, she is authorized to enforce Massachusetts General Laws, chapter 93A ("Chapter 93A"), which proscribes unfair and deceptive practices in the conduct of trade or commerce. Pursuant to Chapter 93A, the Attorney General may seek to protect investors, consumers, and other persons in the state from unfair and deceptive business practices by promulgating regulations, conducting investigations through CIDs, and initiating litigation. *See* Mass. Gen. Laws ch. 93A, §§ 2(c), 4, and 6. CIDs under Chapter 93A are a crucial tool for investigating whether an entity has violated the statute, and they are employed routinely by the Attorney General's Office.

On April 19, 2016, the Attorney General issued a CID to Exxon pursuant to Chapter 93A, § 6, and served it properly, as Exxon acknowledged, on the company's registered agent in Massachusetts. *See* FAC at ¶ 69 (Doc. No. 100). Attorney General Healey issued the CID as part of her investigation of whether Exxon violated Chapter 93A, § 2, and associated regulations, in its marketing and sale of fossil-fuel products and securities to Massachusetts consumers and investors by failing to disclose fully the economic, regulatory, and other risks posed by climate change, including the role of Exxon's products in contributing to climate change and how climate change and actions related to it could adversely affect the value of Exxon's assets and the company's profitability.[2]

[2] A more complete recitation of the facts surrounding Attorney General Healey's investigation is provided in the Attorney General's opposition to Exxon's motion for preliminary injunction (Doc. No. 43). A complete copy of the CID is included as an exhibit to the FAC (Doc. No. 101, Ex. II, App. 285 – App. 314).

Exxon's Filing of Federal and State Lawsuits

On June 15, 2016, Exxon filed this action in the Northern District of Texas against Attorney General Healey, in her official capacity, alleging that the Attorney General's investigation violates its constitutional rights and is an abuse of process. Compl. (Doc. No. 1). That same day, Exxon moved to enjoin Attorney General Healey from enforcing the CID (Doc. No. 8). The following day, June 16, Exxon filed a petition to set aside or modify the CID in Massachusetts Superior Court under Chapter 93A, § 6(7) ("Petition")—the statutorily required process for challenging a CID—along with an emergency motion seeking the same relief, to disqualify Attorney General Healey and her staff from the investigation for alleged bias, and to stay the Massachusetts proceeding pending the outcome of this federal case.[3] The Attorney General subsequently filed a cross-motion to compel Exxon's compliance with the CID in the Massachusetts proceeding.[4]

Proceedings in This Case

Attorney General Healey moved to dismiss this federal action on August 8, 2016 (Doc. No. 41), pursuant to an agreed-upon schedule approved by presiding Judge Kinkeade. Attorney General Healey urged dismissal because, among other reasons, the Texas court lacked personal jurisdiction over her and abstention under *Younger v. Harris*, 401 U.S. 37 (1971) was warranted in view of the nearly identical state court action brought by Exxon in Massachusetts.

Judge Kinkeade did not schedule a hearing on the Attorney General's motion to dismiss.

[3] Ex. 2 (Petition), Ex. 3 (emergency motion), and Ex. 4 (supporting memorandum of law). The first page of the Petition asserts that the CID should be set aside "because it violates ExxonMobil's constitutional, statutory, and common law rights." Petition at 1. *See also* Ex. 5 (consolidated memorandum of law in further support of emergency motion and in opposition to Attorney General's motion to compel).

[4] After its initial "emergency" state court motion on June 16, 2016, Exxon agreed to a briefing schedule on its motion and the Attorney General's cross-motion to compel, providing for briefing to end on October 8. Exxon took no further steps to seek a prompt decision on its motion to stay before discussing it at the Superior Court oral argument on December 7.

Judge Kinkeade did, however, hear argument on Exxon's motion for a preliminary injunction on September 19. At the hearing, counsel for Attorney General Healey outlined the arguments set forth in her fully briefed motion to dismiss, as these demonstrate that Exxon could not show a likelihood of success on the merits in order to obtain injunctive relief. In addition, counsel explained that Exxon faced no irreparable harm, since it had already produced hundreds of thousands of pages of documents to the New York Attorney General in response to a similar subpoena issued by him in November 2015. *See* Tr. at 57-64 (Doc. No. 68). Upon learning of Exxon's compliance with the New York subpoena, Judge Kinkeade directed the parties to attempt to resolve Exxon's refusal to produce any documents to Massachusetts and subsequently ordered the parties to participate in mediation. The parties were unable to reach a resolution, and so informed Judge Kinkeade by letter.

On October 13, 2016, Judge Kinkeade, without motion by Exxon, entered an order (Doc. No. 73) authorizing discovery to ascertain whether the bad faith exception to *Younger* abstention applies in this case.

On October 17, 2016, Exxon moved for leave to amend its original complaint in this action to add the New York Attorney General as a defendant, enjoin the New York investigation, and add certain claims against Attorney General Healey (Doc. No. 74). Attorney General Healey opposed that motion because, among other reasons, amendment would be futile, since the court would still lack personal jurisdiction over her. Opp. at 8-12 (Doc. No. 94).[5]

On October 20, 2016, Attorney General Healey filed a motion (Doc. No. 78) seeking reconsideration of the discovery order. On October 24, without any offer to meet and confer on

[5] Attorney General Healey also opposed the motion because the timing of Exxon's motion to amend suggested that Exxon sought to join Attorney General Schneiderman in order to thwart enforcement of New York's subpoenas by the New York state courts. *See* Opp. at 2-3 (Doc. No. 85); Opp. at 13-15 (Doc. No. 94).

parameters for discovery, Exxon served the Attorney General with over 100 discovery requests and, on November 3, served a deposition notice for Attorney General Healey.[6]

On November 10, 2016, Judge Kinkeade granted Exxon's motion to amend its original complaint (Doc. No. 99), and Exxon filed its FAC (Doc. No. 100).

On November 17, 2016, Judge Kinkeade issued another *sua sponte* order (Doc. No. 117), requiring Attorney General Healey to respond to Exxon's discovery by ten days from service (November 3, a date that had already passed), and to appear at a deposition in Dallas at the federal district court on December 13, despite the fact that Exxon had noticed the deposition of Attorney General Healey to occur in Boston, Massachusetts. On November 25, Attorney General Healey served on Exxon her objections to Exxon's discovery requests, and filed a motion to vacate and reconsider the November 17 order and for a stay of discovery and a protective order barring Attorney General Healey's deposition (as corrected, Doc. No. 120).

On November 28, 2016, Attorney General Healey filed a motion to dismiss the FAC (Doc. No. 124), again on personal jurisdiction and other grounds.[7]

On December 5, 2016, Judge Kinkeade denied Attorney General Healey's motion to reconsider the November 17 order (Doc. No. 131). On December 6, Attorney General Healey filed an emergency motion to stay discovery pending appellate review (Doc. No. 140). On December 8, Attorney General Healey filed a petition for a writ of mandamus with the United States Court of Appeals for the Fifth Circuit arguing that the district court lacked jurisdiction over her and that the discovery orders were an abuse of discretion (Doc. No. 151).

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[6] Also on October 24, Exxon's counsel stated during a hearing in New York state court that Exxon intended to use Judge Kinkeade's October 13 discovery order to take the deposition of all participants in the March 29 press conference, including all the state attorneys general in attendance. Tr., App. at App. 056 (Doc. No. 95).

[7] Attorney General Healey further argued for dismissal on ripeness, venue, Eleventh Amendment, and *Younger* abstention grounds, and because the FAC did not satisfy the minimum pleading standards of the Federal Rules of Civil Procedure. *See* Mem. (Doc. No. 125).

After the filing of the mandamus petition, on December 12, 2016, Judge Kinkeade cancelled the deposition of Attorney General Healey in Dallas, scheduled for the next day (Doc. No. 158).[8] Also on December 12, Judge Kinkeade ordered "all parties to submit a brief to the Court regarding whether this Court has personal jurisdiction over Defendants . . ." (Doc. No. 159), and the parties filed briefs on that subject on February 1, 2017. On December 15, Judge Kinkeade stayed discovery pending further order (Doc. No. 163).

On March 29, 2017, Judge Kinkeade transferred this case to this Court (Doc. No. 180).

In response to the Court's initial order of March 31,[9] the parties submitted on April 12 a joint letter on the proceedings to date and their respective proposals for further proceedings, and the Court held a status conference on April 21. On April 24, the Court issued an order maintaining the stay of discovery and providing the defendants an opportunity to renew their motions to dismiss on the following grounds: "(i) personal jurisdiction, (ii) ripeness, (iii) abstention pursuant to *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), and (iv) collateral estoppel and res judicata" (Doc. No. 198).[10]

Recent Events in the Massachusetts Litigation

Following Exxon's filing of its state court Petition on June 16, 2016, Exxon and Attorney General Healey filed with the Massachusetts Superior Court briefs and supporting materials in accord with an agreed briefing schedule, including more than a hundred pages of legal briefing and correspondence and more than a thousand pages of affidavits and exhibits.[11] On December 7, the Massachusetts Superior Court heard two hours of oral argument in Boston on Exxon's

[8] On December 13, after Judge Kinkeade's cancellation of the deposition of Attorney General Healey, the United States Court of Appeals for the Fifth Circuit denied her petition for writ of mandamus as moot (Doc. No. 161).
[9] In this order, the Court also denied without prejudice as moot Exxon's motion for preliminary injunction.
[10] Attorney General Healey respectfully reserves her other arguments for dismissal.
[11] All pertinent Massachusetts state court filings are available at http://www.mass.gov/ago/bureaus/eeb/the-environmental-protection-division/documents-filed-in-the-commonwealth-superior-court.html.

motion to set aside or modify the CID or issue a protective order—on grounds nearly identical to those Exxon raises here—and Attorney General Healey's cross-motion to compel Exxon's compliance with the CID, as well as Exxon's request to stay the Massachusetts action pending resolution of this federal case.[12]

On January 11, 2017, that court denied Exxon's motion and its request for a stay, and granted Attorney General Healey's cross-motion to compel. Order at 14. The court ruled that it has personal jurisdiction over Exxon in Massachusetts, found Exxon's constitutional and other objections to the Attorney General's CID to be without merit, and refused to disqualify Attorney General Healey. Order at 2-13. The court declined to stay the Massachusetts case because it is "more familiar" with the applicable Massachusetts law and Chapter 93A directs parties seeking relief from CIDs to assert objections in state court. Order at 13-14. The court further ordered the parties to confer on Exxon's production and provide a status report to the court. Order at 14.

On February 8, 2017, Exxon filed a notice of appeal from the Order. In a joint status letter to the Massachusetts Superior Court dated February 14, the parties advised the court that, pursuant to a tolling agreement between Exxon and Attorney General Healey's Office, Exxon would not be obligated to produce any materials in response to the CID until the resolution of the state court litigation and this federal action, including appeals.[13] To date, Attorney General Healey has not received from Exxon any documents or testimony pursuant to the CID.

The Massachusetts Appeals Court docketed Exxon's appeal from the Order on March 22, 2017 (No. 2017-P-0366). Exxon filed its opening brief on May 1, 2017, and Attorney General Healey's brief is due May 31, 2017. Oral argument has not yet been scheduled.

[12] Ex. 6 (transcript).
[13] Ex. 7.

III. ARGUMENT

A. THIS COURT MUST AFFORD PRECLUSIVE EFFECT TO THE MASSACHUSETTS SUPERIOR COURT DECISION.

This Court must afford preclusive effect to the Massachusetts Superior Court decision rendered in the state court action and bar Exxon from each claim brought in its federal court action here because each of the issues and cognizable claims in this case were determined in that state court decision. Pursuant to 28 U.S.C. § 1738, Congress has "specifically required all federal courts to give preclusive effect to state-court judgements whenever the courts of the State from which the judgements emerged would do so." *Allen v. McCurry*, 449 U.S. 90, 96 (1980); *see also Temple of the Lost Sheep Inc. v. Abrams*, 930 F.2d 178, 183 (2d Cir. 1991) (affirming district court's dismissal of plaintiffs' claims under 42 U.S.C. § 1983 on collateral estoppel grounds where plaintiffs alleged New York Attorney General's fraud investigation and related subpoenas amounted to conspiracy to violate and did violate their constitutional rights, and, in prior ruling, state court had granted Attorney General's motion to compel, and denied plaintiffs' motions to quash, finding no bad faith and rejecting conspiracy claims).[14] Federal courts "consistently accord preclusive effect" to issues decided by state courts, and preclusion doctrines "reduce unnecessary litigation," "foster reliance on adjudication," and "promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen*, 449 U.S. at 95-96. When analyzing the effect of a state court judgment, federal courts "are required to apply the preclusion law of the rendering state." *Wang v. Palmisano*, 157 F. Supp. 3d 306, 334 (S.D.N.Y. 2016) (quoting *Giannone v. York Tape & Label, Inc.*, 548 F.3d 191, 192-93 (2d Cir. 2008)) (applying Massachusetts law of issue preclusion and finding plaintiff's Fair Labor

[14] Under New York law, "a subpoena will be quashed if compliance will unduly infringe upon fundamental rights such as those guaranteed by the First Amendment." *Temple of the Lost Sheep*, 930 F.2d at 184.

Standards Act and Massachusetts Wage Act refusal-to-rehire claims barred). *See also Jacobs v. Law Offices of Leonard N. Flamm*, No. 04-Civ.-7607, 2005 WL 1844642 at *3–6 (S.D.N.Y. July 29, 2005) (dismissing legal malpractice claims because prior decision of Massachusetts court estopped plaintiff from alleging attorney-client relationship with defendants).

Res judicata (claim preclusion) bars relitigation of claims where there is: (1) identity of parties in both actions; (2) identity of a cause of action; and (3) a prior final judgment on the merits. *Kobrin v. Bd. of Registration in Med.*, 832 N.E.2d 628, 634 (Mass. 2005). Claim preclusion "makes a valid final judgment conclusive on the parties" and "bars further litigation of all matters that were *or should have been* litigated in the action." *Jarosz v. Palmer*, 766 N.E.2d 482, 487 n.3 (Mass. 2002) (emphasis added). Collateral estoppel (issue preclusion) bars relitigation of an issue in a later action between the parties on the same or different claim where that issue has been "actually litigated and determined by a valid and final judgment," and the determination is "essential to the judgment." *Id.* at 487-88 (quoting *Cousineau v. Laramee*, 448 N.E.2d 756, 758 n.4 (Mass. 1983)). Massachusetts courts treat trial court judgments as final judgments with "preclusive effect regardless of the fact that [the judgment] is on appeal." *O'Brien v. Hanover Ins. Co.*, 692 N.E.2d 29, 44 (Mass. 1998); *see also Jacobs*, 2005 WL 1844642, at *5.

Exxon has alleged in both state court and this federal action that statements made by Attorney General Healey at a press conference and her decision to issue the CID evince bias against Exxon.[15] Exxon's bias assertions form the basis for its claim that it has been subject to a

[15] Exxon admits that the Texas state and federal claims alleged in its FAC "derive from the same nucleus of operative facts." FAC at ¶ 18. Exxon also admits that "each of [its] state law claims—like its federal claims—is premised on statements by Attorney General[ ] Healey at the press conference and during the course of [her] investigation[ ], [her] issuance of the[ ] CID, the demands made therein, and [her] intention to muzzle ExxonMobil's speech in Texas." *Id.* Therefore, because Exxon's federal claims are precluded by the Massachusetts Superior Court judgment, so are its pendent state claims in this federal court action. Exxon's state law claims are in any event barred by the Eleventh Amendment. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (contrary

violation of its Fourteenth Amendment due process right to a disinterested prosecutor. *See* FAC at ¶ 115-117. Exxon raised this same claim in its state-court Petition. *See* Petition at ¶ 62 (right to disinterested prosecutor under Mass. Const. art. XII).[16] Similarly, Exxon asserted in both actions its common law claim that the Attorney General had abused her discretion in issuing the CID. *Compare* Petition at ¶ 66 *with* FAC at ¶¶ 127-128. Indeed, Exxon's Petition sought disqualification of Attorney General Healey on these grounds. *See* Petition at ¶¶ 56-59.

After considering more than a thousand of pages of briefing and exhibits from the parties, and after a two-hour oral argument, the Massachusetts Superior Court issued a decision rejecting Exxon's claims of bias. *See* Order at 12-13. Specifically, that Court found that: (1) the Attorney General's remarks "do not evidence any actionable bias;" (2) the Attorney General has a statutory duty to investigate Exxon if she believes it has violated Chapter 93A; (3) the Attorney General has "assayed sufficient grounds—her concerns about Exxon's possible misrepresentations to Massachusetts consumers—upon which to issue the CID;" and (4) "Exxon has not met its burden of showing that the Attorney General is acting arbitrarily or capriciously toward it." *Id*. at 9-13.

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result would "conflict[] directly with the principles of federalism that underlie the Eleventh Amendment"); *Allen v. Cuomo*, 100 F.3d 253, 260 (2d Cir. 1996) (applying *Pennhurst* to affirm dismissal of state-law claim against state officials).

[16] Massachusetts courts usually construe Massachusetts constitutional provisions consistently with federal courts' construction of analogous federal constitutional provisions. *See, e.g.*, *Commonwealth v. Franklin Fruit Co.*, 446 N.E.2d 63, 67 (Mass.1983) ("Our standard of review is the same under the Fourteenth Amendment to the Federal Constitution as under the cognate provisions of the Massachusetts Declaration of Rights."); *see also Roman v. Trs. of Tufts Coll.*, 964 N.E.2d 331, 338 (Mass. 2012) (cited for this proposition by Exxon in a brief to the Massachusetts Superior Court (Ex. 5 at 13), in support of citation to federal case law under the U.S. Constitution) ("[W]e have interpreted the rights guaranteed by art. 16 [of the Massachusetts Constitution] as being coextensive with the First Amendment."); *Opinions of the Justices*, 440 N.E.2d 1159, 1160 (Mass. 1982) ("criteria which have been established by the United States Supreme Court for judging claims arising under the First Amendment . . . are equally appropriate to claims brought under cognate provisions of the Massachusetts Constitution" (citation omitted)). The variation arises, when, in certain circumstances, Massachusetts courts "have found the rights of our citizens . . . to be *more expansive* than those guaranteed by the Federal Constitution," meaning that a violation of federal constitutional rights also necessarily constitutes a violation of the Massachusetts Constitution. *Commonwealth v. Gonzalez*, 892 N.E.2d 255, 264 (Mass. 2008) (emphasis added).

Exxon is now collaterally estopped from litigating in this forum issues related to Attorney General Healey's alleged bad faith and bias arising from the issuance of the CID, her press conference statements, and her Office's entry into a common interest agreement with the offices of other state attorneys general. Similarly, *res judicata* bars Exxon from pursuing its Fourteenth Amendment due process and common law abuse of process claims in this federal action.

Exxon also alleged that the CID constitutes viewpoint discrimination that burdens its political speech. *Compare* Petition at ¶ 63 (right of free speech under Mass. Const. art. XVI) *with* FAC at ¶¶ 109-111 (First Amendment). The Massachusetts Superior Court determined that "[t]he Attorney General is investigating whether Exxon's statements to consumers, or lack thereof, were misleading or deceptive. If the Attorney General's investigation reveals that Exxon's statements were misleading or deceptive, Exxon is not entitled to any free speech protection." Order at 9 n.2. The court declined to address Exxon's speech claims in greater detail and denied Exxon's motion to set aside the CID on this and all grounds—a decision that reflects the court's determination that issuance of the CID to investigate potentially misleading and deceptive speech would not implicate the First Amendment.[17] Exxon's claim in this federal action that the CID violates the First Amendment is therefore barred by both claim and issue preclusion.

Relatedly, Exxon alleged that the CID violates its rights under the Dormant Commerce Clause. *See* FAC at ¶¶ 118-121. Exxon's novel—and incorrect—theory is that the CID impermissibly regulates its out-of-state speech. First, *res judicata* bars Exxon's Dormant Commerce Clause claim in this federal action since it grows out of the "same transaction, act, or agreement, and seeks redress for the same wrong," *Mackintosh v. Chambers*, 190 N.E. 38, 39

[17] In its Massachusetts Appeals Court brief filed on May 1, 2017, Exxon failed to appeal this aspect of the Order, lending total finality to the court's rejection of Exxon's speech claims. *See Abate v. Fremont Inv. & Loan*, 26 N.E.3d 695, 707 (Mass. 2015) ("failure to address . . . issue . . . waives . . . right to appellate review").

(Mass. 1934), and Exxon should have raised it in the state action. *Jarosz*, 766 N.E.2d at 487 n.3; *see also Temple of Lost Sheep*, 930 F.2d at 183 (reservation of federal claims in state action for later determination by federal court does not prevent estoppel). Second, Exxon's Dormant Commerce Clause and speech claims are essentially identical, and barred by collateral estoppel, since they are based on an assertion that the CID regulates speech—an assertion that the Massachusetts Superior Court rejected in denying Exxon's Petition, and granting Attorney General Healey's motion to compel compliance.

Exxon further alleged that the CID violates its rights to be free from unreasonable searches, and that the CID constitutes "an unreasonable fishing expedition." *Compare* Petition at ¶ 64 (right to freedom from unreasonable searches under Mass. Const. art. XIV) *with* FAC at ¶¶ 112-114 (Fourth Amendment). Similarly, Exxon alleged in both its state and federal court actions that the CID is overbroad, seeks documents outside the relevant statute of limitations period, is unduly burdensome and impermissibly unspecific. *See* Petition at ¶¶ 64, 65; FAC at ¶ 114. The Massachusetts Superior Court, the statutorily-prescribed forum for challenges to CIDs, rejected all of those claims. *See* Order at 10-11. Specifically, the Massachusetts Superior Court reviewed the CID and "disagree[d] that it lacks the requisite specificity." *Id*. at 10. The Court also determined that the CID was not unreasonably burdensome, in part because, at the time of oral argument, Exxon had already complied in large part with its obligations under the New York subpoena, producing over 1.4 million pages of documents to the New York Attorney General. The Court found it "would not be overly burdensome for Exxon to produce these documents to the Massachusetts Attorney General." *Id*. at 11. *Res judicata* applies to bar litigation in this Court of Exxon's Fourth Amendment claims, and collateral estoppel applies to bar litigation of issues related to the CID's alleged burdensomeness, lack of specificity, and

temporal scope.

In this action, Exxon also alleged a federal conspiracy to deprive Exxon of rights secured by the First, Fourth, and Fourteenth Amendments. *See* FAC at ¶¶ 105-108. In support of this allegation, Exxon makes the same factual assertions on which it relied to allege its bias, abuse of process, and related constitutional claims, *e.g.*, issuance of the CID and entry into the common interest agreement. *See id*. at ¶ 107. Because the Massachusetts Superior Court found that the CID was not issued in bad faith or for an improper purpose, and that the CID did not violate Exxon's constitutional rights—issues central to Exxon's conspiracy claim—collateral estoppel bars litigation of those issues in this federal court action. *See Temple of Lost Sheep*, 930 F.2d at 184 (finding by state court judge that there was no basis for concluding that Attorney General was acting in bad faith in pursuing investigation at issue and that issuance of subpoena by him did not violate constitutional rights barred federal conspiracy claim based on those allegations since "it is the wrongful act, not the conspiracy, which is actionable"). *Res judicata* also applies to bar Exxon's conspiracy claim, because it grows out of the same transactions, *see Mackintosh*, 190 N.E. at 39, and Exxon should have raised it in the state action.

Lastly, Exxon alleged that the CID violates the Supremacy Clause by imposing disclosure requirements inconsistent with and preempted by federal securities law. *See* FAC at ¶¶ 122-126. *Res judicata* applies to bar Exxon's preemption claim, because it grows out of the same transactions, *see Mackintosh*, 190 N.E. at 39, and Exxon should have raised it in the state action. Further, the preemption claim should be dismissed because this Court has held that state law fraud and negligent misrepresentation claims involving securities "are not created by the [Securities and Exchange Act of 1934] and thus are not subject to exclusive federal jurisdiction, nor are [such] claims in any way preempted by federal securities law." *Fin. & Trading, Ltd. v.*

Rhodia S.A., No. 04-Civ.-6083(MBM), 2004 WL 2754862, *5 (S.D.N.Y. Nov. 30, 2004).

B. THIS COURT SHOULD ABSTAIN FROM THE EXERCISE OF JURISDICTION PURUSANT TO *COLORADO RIVER* AND DISMISS EXXON'S COMPLAINT.

This Court has discretion to abstain from exercising jurisdiction and to dismiss Exxon's case based upon "considerations of '(wise) judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)). As this Court has observed, federal courts "frequently follow *Colorado River* by abstaining from exercising jurisdiction in deference to parallel state actions." *Wiggin & Co. v. Ampton Invs., Inc.*, 66 F. Supp. 2d 549, 552 (S.D.N.Y. 1999). The threshold inquiry when determining whether to apply *Colorado River* abstention is whether the "state action and the instant federal action are concurrent or parallel such as to render the consideration of possible abstention appropriate." *Amnex, Inc., v. Rowland*, 25 F. Supp. 2d 238, 243 (S.D.N.Y. 1998). State and federal actions are "'concurrent' or 'parallel' for purposes of abstention when the two proceedings are essentially the same; that is, there is identity of the parties, and the issues and relief sought are the same." *Nat'l Union Fire Ins. Co. of Pittsburgh v. Karp*, 108 F.3d 17, 22 (2d Cir. 1997). The state and federal cases need not be exactly the same; actions will be deemed parallel "when the main issue in the case is the subject of pending litigation." *Amnex*, 25 F. Supp. 2d at 243-44; *see also Inn Chu Trading Co. v. Sara Lee Corp*., 810 F. Supp. 501, 508 (S.D.N.Y. 1992) (applying *Colorado River* abstention where "linchpin" of claims in federal suit was the same issue central to state court suit). The presence of different causes of action or legal theories in the state and federal actions does not defeat a finding that actions are parallel, where the causes of action "are comprised of the same essential issues." *Great South Bay Med. Care, P.C. v. Allstate Ins. Co.*, 204 F. Supp. 2d 492, 497

(E.D.N.Y. 2002) (citing *Garcia v. Tamir*, No. 99 Civ. 0298(LAP), 1999 WL 587902 at *3 (S.D.N.Y. Aug. 4, 1999)).

Here, there is no question that the state and federal actions are parallel. Indeed, as set forth above, because the claims in both of Exxon's suits derive from precisely the same acts (*e.g.*, the issuance of the CID, Attorney General Healey's statements at a press conference, the existence of a routine common interest agreement), the issues are the same, and the Massachusetts Superior Court has issued a final decision on the merits finding that Attorney General Healey acted reasonably in issuing the CID, the standards for preclusion are satisfied, and Exxon should be barred from litigating those claims and issues before this Court.

To determine whether dismissal of a federal court action is warranted under *Colorado River* because of a parallel state-court litigation, the relevant standard is the six-factor exceptional circumstances test. *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.* 460 U.S. 1, 19 (1983). The six factors are: (1) assumption of jurisdiction over a property; (2) inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the actions were filed; (5) whether state or federal law provides the rule of decision; and (6) whether the state court proceeding adequately protects the rights of the party seeking federal jurisdiction. *See Colo. River*, 424 U.S. at 818; *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-26; *see also De Cisneros v. Younger*, 871 F.2d 305, 307 (2d Cir. 1989). The six factors do not "rest on a mechanical checklist," *Arkwright-Boston Mfrs. Mutual Ins. Co. v. City of New York*, 762 F.2d 205, 210 (2d Cir. 1985), and "the decision to abstain is in the sound discretion of the district court." *Id.*

All applicable factors overwhelmingly favor abstention and dismissal of the FAC.[18]

[18] Absence of state court jurisdiction over property, which is not at issue here, "point[s] toward" exercise of federal jurisdiction. *De Cisneros*, 871 F.2d at 307.

Abstention Will Avoid Piecemeal Litigation. The most important factor supporting dismissal of the *Colorado River* action was the avoidance of piecemeal litigation, *Moses H. Cone Memorial Hosp.*, 460 U.S. at 16, and the Second Circuit has recognized the need to avoid piecemeal litigation as a "paramount consideration" in the *Colorado River* analysis. *Arkwright-Boston*, 762 F.2d at 210-11. There, the Second Circuit underscored the importance of that factor:

> As the suits all arise out of the [same set of facts], they should be tried in one forum. Maintaining virtually identical suits in two forums under these circumstances would waste judicial resources and invite duplicative effort. Plainly, avoidance of piecemeal litigation is best served by leaving these suits in state court.

Id. at 211. *See also Bull & Bear Group, Inc. v. Fuller*, 786 F. Supp. 388, 392 (S.D.N.Y. 1992) (applying *Colorado River* abstention where "avoidance of piecemeal litigation [was] strongly implicated."); *Amnex*, 25 F. Supp. 2d at 245 ("As in many *Colorado River* cases, the most important factor weighing in favor of abstention in this case is the 'desirability of avoiding piecemeal litigation.'"). Indeed, Exxon itself, seeking a stay of the Massachusetts Superior Court's adjudication of its Petition, recognized the paramount importance of avoiding piecemeal litigation, arguing that a stay "would avoid the possibility of duplicative or inconsistent rulings on [its] constitutional challenges to the CID, and will serve the interests of judicial economy and efficiency and the principles of comity." Petition at ¶ 71.

The key issue in both cases is the propriety of the CID issued by Attorney General Healey to investigate whether Exxon may have made misleading statements to investors and consumers and/or failed to disclose information to investors and consumers with respect to its knowledge of climate change and the impacts of climate change on the valuation of Exxon's fossil fuel reserves and other assets, and the role of Exxon's products in causing climate change. Exxon claims Attorney General Healey is biased and that issuance of the CID was an abuse of

process and violated the U.S. and Massachusetts constitutions. If this Court does not abstain, both it and the Massachusetts state courts will decide those fundamental issues. Indeed, the Massachusetts Superior Court has already issued a final decision, now on appeal, rejecting Exxon's claims and ordering it to comply with the CID.

The rationale for avoiding piecemeal litigation—the potential for "inconsistent and mutually contradictory determinations," *De Cisneros*, 871 F.2d at 308, that exists when state and federal courts adjudicate cases involving the same central issues—is the same rationale that animates doctrines of preclusion that bar relitigation of claims and issues already determined in another forum. *See Arkwright-Boston*, 762 F.2d at 211 (defendants would be forced to defend complex litigation on two fronts if federal court refused to abstain and "inconsistent disposition of these claims between two concurrent forums would breed additional litigation on assertions of claim and issue preclusion"); *see also Gen. Reinsurance Corp. v. Ciba-Geigy Corp*., 853 F.2d 78, 81 (2d Cir. 1988) (affirming S.D.N.Y. court stay on abstention grounds in deference to New Jersey state court action where core issues were "inextricably linked," state court action "embraced" all issues, and risk of piecemeal litigation was "real and should be avoided"). As a result, here where the Massachusetts Superior Court already has rendered a decision that has a preclusive effect on Exxon's pending federal claims, the strong interest in avoiding piecemeal litigation is amplified and should be weighed very heavily in favor of abstention.

This Forum Is Inconvenient. Litigating Exxon's federal case here would be burdensome and expensive for Attorney General Healey and her Office. This Court considers a number of factors when reviewing convenience of the federal forum, including the location of the operative events, convenience of the parties and witnesses, availability of process to compel witness testimony and cost of obtaining witnesses' presence, the court's familiarity with governing law,

trial efficiency, and the interests of justice. *See Amnex*, 25 F. Supp. 2d at 244.

The heart of the case concerns Exxon's objection to the CID, issued by the Attorney General of Massachusetts, from her Boston office, pursuant to the Massachusetts consumer and investor protection law, Chapter 93A. The core event, therefore, occurred in Massachusetts. And, while this Court has skill and experience adjudicating pendent state claims, the Massachusetts Legislature has set forth in Chapter 93A a specific process for obtaining judicial review of objections to Massachusetts CIDs in Massachusetts state courts, and Exxon has availed itself of that procedure. *See* Mass. Gen. Laws ch. 93A, § 6(7).

It would be both time-consuming and expensive (due to travel and lodging) for Attorney General Healey to litigate in this district, located far away from Attorney General Healey's offices. The interest of justice would not be served by requiring Attorney General Healey to litigate the same claims and issues on two fronts, since a decision not to abstain would essentially reward Exxon for its brazen forum shopping in an attempt to secure a favorable federal court decision in its home district before the Massachusetts court ruled on its Petition. *See, e.g.*, *Great South Bay Medical Care*, 204 F. Supp. 2d at 499 (evidence of forum shopping to gain advantageous federal decision "counsels against the exercise of jurisdiction").

The Massachusetts Case Is Far More Advanced. This factor does not focus on who won the race to the federal courthouse; rather, it must be considered "in a common-sense manner by examining how much progress has been made in each forum." *Arkwright-Boston*, 762 F.2d at 211 (*citing Moses H. Cone Memorial Hosp*., 460 U.S. at 21-22). Here, the state court proceedings have advanced well beyond this federal court action. While this federal court action has not yet moved beyond the motion to dismiss phase, the state court has considered thousands of pages of briefing and exhibits submitted by the parties, heard over two hours of oral argument,

and issued a final decision on the merits four months ago rejecting Exxon's claims, and Exxon has already filed its appellate brief in the Massachusetts Appeals Court.

Massachusetts Law Can and Should Provide the Rule of Decision for Exxon's Claims. Exxon has alleged the same essential claims in its two actions, electing to rely on state constitutional provisions in its state action and federal constitutional provisions in its federal action. As set forth above in Section III.A, Exxon has asserted in this federal action common law abuse of process, violations of the First, Fourth, and Fourteenth Amendments to the U.S. Constitution, conspiracy to violate the First, Fourth, and Fourteenth Amendments, and violation of the Supremacy Clause and Dormant Commerce Clause of the U.S. Constitution. In its state action, Exxon alleges common law abuse of process, and violations of analogous provisions of the Massachusetts constitution. There is no cognizable claim or issue present in this federal case that has not been fully adjudicated in the state court action under Massachusetts law.

First, Massachusetts courts construe Massachusetts constitutional provisions consistent with federal courts' construction of analogous federal constitutional provisions. *See supra* n. 16. Therefore, while federal law would control decision of Exxon's federal constitutional claims in this federal action, the Massachusetts Superior Court has already addressed what are essentially the same claims under the Massachusetts constitution in the same manner a federal court would. Second, to determine whether constitutional provisions were violated turns on related state law questions of Attorney General Healey's obligations and legal authority under Chapter 93A, § 6. *See*, *e.g.*, Order at 9-13. For example, because the Massachusetts Superior Court deemed the CID's requests reasonable under state law, Exxon cannot make out a claim for unreasonable search under either the Fourth Amendment or the Massachusetts constitution. Third, Exxon cannot make out a federal conspiracy claim independent of demonstrating an underlying

constitutional violation, *see Temple of Lost Sheep*, 930 F.2d at 184, and the Massachusetts Superior Court has already determined that the CID does not violate any constitutional right. Finally, Exxon has no Supremacy Clause claim, since this Court has correctly recognized that state law fraud claims involving securities, such as those that could potentially arise from Attorney General Healey's Chapter 93A investigation, are neither preempted by federal securities law nor subject to exclusive federal jurisdiction. *See Rhodia*, 2004 WL 2754862, at *5.

Exxon's Rights Have Been and Will Be Adequately Protected in Massachusetts. As the Massachusetts proceedings thus far have shown, the Massachusetts courts are more than capable of fairly adjudicating Exxon's claims challenging the CID, pursuant to the framework set forth in Chapter 93A. At no time has Exxon even hinted that the Massachusetts state court is not able to fully and fairly adjudicate its claims. Indeed, Exxon availed itself of that court's protection when it filed—a day after filing this action in Texas federal district court—its state court Petition and litigated the case through judgment, without arguing that its rights would not be adequately protected. That Exxon may prefer a federal forum is irrelevant to the *Colorado River* analysis.

The balance of the *Colorado River* factors undeniably favors abstention and dismissal.[19]

C. EXXON'S ACTION IS UNRIPE.

Even if not precluded or subject to abstention, Exxon's lawsuit is insufficiently ripe to proceed given the adequacy of Exxon's state court remedies and the lack of any investigatory deadline from which it could claim hardship. In assessing whether an action is ripe, the Court "evaluate[s] both the fitness of the issues for judicial decision and the hardship to the parties of

[19] This Court recognizes a further factor that supports abstention here—the "vexatious" and "duplicative" nature of Exxon's filing of this action. *See Abe v. New York Univ.*, No. 14-cv-9323 (RJS), 2016 WL 1275661 at *9 (S.D.N.Y. Mar. 30, 2016) (abstaining under *Colorado River* where federal action was "vexatious" in "merely seeking to pit the state and federal judicial systems against each other, and hoping for a better outcome in the latter"); *Machat v. Sklar*, No. 96-cv-3796 (SS), 1997 WL 599384, at *9 (S.D.N.Y. Sept. 29, 1997) (Sotomayor, J.) (concluding that the "vexatious, reactive, and duplicative" nature of the proceeding "weighs in favor of . . . abstention").

withholding court consideration." *New York Civil Liberties Union v. Grandeau*, 528 F.3d 122, 132 (2d Cir. 2008) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977)). *See also Simmonds v. INS*, 326 F.3d 351, 356–57 (2d Cir. 2003) ("Prudential ripeness is, then, a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial.").

Exxon's allegations and requests for relief are not fit for federal court review at this time. *See Am. Sav. Bank, FSB v. UBS Fin. Servs., Inc.*, 347 F.3d 436, 440 (2d Cir. 2003) (adjudication of subpoenas unripe given failure to exhaust administrative remedies and lack of hardship). As discussed above, Exxon is asserting objections to the CID through the Massachusetts state court process for such challenges, Mass. Gen. Laws. ch. 93A, § 6(7). *Cuomo v. Dreamland Amusements, Inc.*, No. 08-CIV.-6321 JGK, 2008 WL 4369270, at *7 (S.D.N.Y. Sept. 22, 2008) ("A court should refrain from enjoining an administrative action, such as an investigation, where the issue sought to be reviewed is not 'ripe' for review.");[20] *cf. Google, Inc. v. Hood*, 822 F.3d 212, 225-26 (5th Cir. 2016) (challenge to state attorney general subpoena unripe where recipient has adequate legal remedy in state court). While that process has resulted in a preclusive Superior Court judgment binding on Exxon, Exxon is appealing to the Massachusetts Appeals Court and can even seek further appellate review by the Massachusetts Supreme Judicial Court; those appeals could resolve Exxon's objections to the CID in its favor, in whole or in part,

[20] The *Dreamland Amusements* case is particularly on point. There, the plaintiff sought injunctive and declaratory relief from an investigation initiated by the New York Attorney General on preemption grounds. *Dreamland Amusements*, 2008 WL 4369270, at *7–8. The Court (Koeltl, J.) found that "this is a case in which [the plaintiff] has ready access to the state court to raise any issues it chooses to raise" and concluded that the matter was unripe because the plaintiff "failed to demonstrate either the fitness of the issues for judicial review or any hardship that would result from the Court's withholding consideration of the issues." *Id.* at *8.

potentially mooting this case.

Nor will Exxon face any present hardship from dismissal. *See Grandeau*, 528 F.3d at 132 (no hardship without a "a direct and immediate dilemma for the parties"); *Schulz v. IRS*, 395 F.3d 463, 464 (2d Cir. 2005) (no injury from IRS summons where "ample opportunity to seek protection" through statutorily prescribed process for enforcement). While Exxon's state court appeal proceeds, it will face no sanction or consequence for not complying with the CID. Indeed, pursuant to a tolling agreement, Exxon need not comply with the CID until both this case and the Massachusetts case are over.[21]

Fundamentally, here Attorney General Healey has taken only the initial steps of issuing a CID to Exxon and asking the Massachusetts Superior Court to enforce the CID in the face of Exxon's blanket challenges—but she neither has determined to undertake a Chapter 93A enforcement action against Exxon nor asserted any specific litigation claim. Exxon may defend itself and raise its defenses in Massachusetts state court when and if that ultimately occurs. *See Davis v. Kosinsky*, __ F. Supp.3d __, No. 16-CV-1750 (JGK), 2016 WL 6581300, at *5 (S.D.N.Y. Nov. 4, 2016), *aff'd sub nom. Davis v. N.Y. Bd. of Elections*, No. 16-3822-cv, 2017 WL 1735253 (2d Cir. May 3, 2017) (risks to plaintiff in unripe federal action are "contingent on future events or may never occur" (citation omitted)); *Dreamland Amusements*, 2008 WL 4369270, at *8 ("possibility of future litigation does not cause [plaintiff] a direct and immediate dilemma"); *Google*, 822 F.3d at 228 ("we cannot say at this early stage of a state investigation that any suit that could follow would necessarily violate the Constitution"). The dispute is, therefore, not ripe, and the Court should dismiss Exxon's suit.[22]

[21] *Contrast Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 692 (2d Cir. 2013) (hardship present in facial challenge to self-executing regulation).

[22] *See also* Mem. Amici Curiae States at 16 (Doc. No. 54) ("federal courts should not facilitate such friction between the state and federal governments when recipients of state law CIDs have an adequate state court remedy

D. THIS COURT LACKS PERSONAL JURISDICTION OVER ATTORNEY GENERAL HEALEY.

Should the Court decline to dismiss on preclusion, abstention, and/or ripeness grounds, Exxon's FAC should be dismissed for lack of personal jurisdiction over Attorney General Healey.

In her motions to dismiss preceding transfer to this Court, Attorney General Healey argued that the Texas federal court lacked personal jurisdiction over her based on her lack of any suit-related contacts with Texas and the clear commands of Fifth Circuit decisions, which hold that Texas courts lack personal jurisdiction over out-of-state regulators seeking to enforce their state laws against Texas companies whose business activities affect residents of the foreign state.[23] Here, the exercise of jurisdiction in New York over an out-of-state law enforcement official would be unreasonable because Attorney General Healey's CID was issued in Massachusetts to investigate possible violations of the Massachusetts consumer and investor protection law, and Attorney General Healey's attendance at one event in New York does not satisfy the New York long-arm statute or the requirements of due process. Nevertheless, where this Court's jurisdiction over the New York Attorney General is not disputed, where the Massachusetts Superior Court Order now unequivocally precludes Exxon's claims in this litigation and makes an unassailable case for *Colorado River* abstention, and where ripeness is clearly lacking, Attorney General Healey urges the Court to dismiss on one of those clear grounds and consider personal jurisdiction as an alternative basis, if necessary.

Stripped of innuendo, Exxon asserts that a single meeting and press conference in New

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available"); *Google*, 822 F.3d at 226 ("comity should make us less willing to intervene when there is no current consequence for resisting the subpoena and the same challenges raised in the federal suit could be litigated in state court").

[23] *See, e.g.*, Mem. in Support of Attorney General Healey's Mot. to Dismiss FAC (Doc. No. 125), at 5-14; *Stroman Realty Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008).

York and her participation with the New York Attorney General (and several other state attorneys general) in a routine common interest agreement are "contacts" sufficient to support this Court's exercise of personal jurisdiction over her. Exxon is wrong. Neither act is sufficient to trigger the New York long-arm statute's provisions for transacting business or committing tortious conduct here, N.Y. C.P.L.R. §§ 302(a)(1); 302(a)(2), especially in light of the Massachusetts Superior Court's findings that Attorney General Healey acted lawfully in issuing the CID and explaining her investigation at the press conference.[24]

Indeed, Exxon's lawsuit arises from a CID issued under Massachusetts law by Attorney General Healey's office in Massachusetts and served on Exxon's registered agent in Massachusetts, and the sole focus of Exxon's prayers for relief is Attorney General Healey's future conduct as a Massachusetts law enforcement official. Under these circumstances, Exxon's claims lack a "substantial nexus" to New York. *See Cutting Edge Enters., Inc. v. Nat'l Ass'n of Att'ys Gen.*, 481 F. Supp. 2d 241, 245-49 (S.D.N.Y. 2007) (state attorneys general not subject to personal jurisdiction in case alleging conspiracy and challenging "how each of the Attorneys General are enforcing his or her own state's … [s]tatute"). Moreover, Attorney General Healey's contacts with New York were "attenuated" and far less than the "purposeful availment" of the benefits and protections of New York law that is required for personal jurisdiction under the Due Process clause. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).[25]

Personal jurisdiction over Attorney General Healey in New York would also be

[24] This quantum of contact is in sharp contrast with the exceptional facts that the Second Circuit held supported long-arm jurisdiction over out-of-state attorneys general in the tobacco companies' antitrust case against them: "the various state attorneys general purposefully dedicated five months to negotiating the [Master Settlement Agreement and related model legislation] in New York." *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 167 (2d Cir. 2005). Indeed, the Second Circuit observed that "New York would not ordinarily be the proper forum to challenge another state's … executive actions." *Id.*

[25] *See also Turner v. Abbott*, 53 F. Supp. 3d 61, 67-68 (D.D.C. 2014) (no jurisdiction over Texas attorney general); *B & G Prod. Co. v. Vacco*, No. CIV.98-2436 ADM/RLE, 1999 WL 33592887, at *5 (D. Minn. Feb. 19, 1999) (no jurisdiction over New York attorney general).

unreasonable, an independent ground for dismissal. *See Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567-68 (2d Cir. 1996) (citing *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 113 (1987)). To apply the *Asahi* factors used by the Second Circuit: *first*, defending her CID in New York would pose substantial burdens for Attorney General Healey and her staff; *second*, New York has no interest in adjudicating non-resident Exxon's objections to a CID issued under Massachusetts law; *third*, Exxon would not be harmed by dismissal given its access to and availment of Massachusetts courts; *fourth*, the substantial progress of the Massachusetts case makes further proceedings here inefficient; and *fifth*, jurisdiction over Attorney General Healey here would offend the "shared interests of the several States in furthering fundamental substantive social policies, " such as the efficient and effective enforcement of state investor and consumer protection laws.[26] Especially relevant here, "the final factor invokes concerns of federalism and comity between the states" and warrants this Court's deference to the sovereign interests of Massachusetts. *Adams v. Horton*, No. 2:13–CV–10, 2015 WL 1015339, *7 (D. Vt. Mar. 6, 2015) (no jurisdiction in Vermont over Georgia official with emphasis on final *Asahi* factor).[27]

If the Court does not dismiss the FAC on the other grounds discussed above, the FAC should be dismissed for lack of personal jurisdiction over Attorney General Healey.

IV. CONCLUSION

The Court should dismiss Exxon's FAC as to Attorney General Healey.

[26] Twenty state attorneys general from around the country filed an amicus brief in the Northern District of Texas that underscored the damaging consequences to state law enforcement of that court exercising personal jurisdiction over Attorney General Healey. *See* Mem. Amici Curiae States at 18-20 (Doc. No. 54).

[27] *See also PTI, Inc. v. Philip Morris Inc.*, 100 F. Supp. 2d 1179, 1189, 1189 n.8 (C.D. Cal. 2000) ("state sovereignty is perhaps the most compelling factor [demonstrating unreasonableness of jurisdiction]—requiring the states to submit to California jurisdiction constitutes an extreme impingement on state sovereignty").

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL OF
MASSACHUSETTS

By her attorneys:

/s/ Christophe G. Courchesne
Richard Johnston (*pro hac vice*)
Chief Legal Counsel
richard.johnston@state.ma.us
Melissa A. Hoffer (*pro hac vice)*
Chief, Energy and Environment Bureau
melissa.hoffer@state.ma.us
Christophe G. Courchesne (*pro hac vice*)
Chief, Environmental Protection Division
christophe.courchesne@state.ma.us
I. Andrew Goldberg
andy.goldberg@state.ma.us
Peter C. Mulcahy (*pro hac vice*)
peter.mulcahy@state.ma.us
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200

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