CAUSE NO. 096-297222-18

EXXON MOBIL CORPORATION,	§	IN THE DISTRICT COURT OF
	§	
	§	TARRANT COUNTY, TEXAS
Petitioner.	§	
	§	96th JUDICIAL DISTRICT

PETITIONER'S OBJECTIONS AND RESPONSE TO RESPONDENTS' SPECIAL APPEARANCES

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Petitioner Exxon Mobil Corporation ("ExxonMobil") responds to the Special Appearances by (i) Potential Defendants Barbara J. Parker, Matthew F. Pawa, Dennis J. Herrera, the County of San Mateo, the County of Marin, the City of Imperial Beach, the City of Santa Cruz, the County of Santa Cruz, John Beiers, Serge Dedina, Jennifer Lyon, Brian Washington, Dana McRae, Anthony Condotti, and (ii) Potential Witnesses Sabrina B. Landreth, Edward Reiskin, John Maltbie, Andy Hall, Matthew Hymel, Carlos Palacios, and Martín Bernal (collectively "Respondents"). The special appearances filed by the Potential Defendants and the Potential Witnesses are meritless and should be denied.[1]

I. SUMMARY OF ARGUMENT

ExxonMobil seeks discovery to evaluate possible claims of constitutional violations, abuse of process, and civil conspiracy that, if brought, would be firmly rooted in Texas. Information in the public record suggests that California municipalities may have filed abusive litigation against the Texas energy sector in a deliberate effort to stifle First Amendment-protected speech occurring in Texas. If ExxonMobil files suit challenging that conduct, the Potential Defendants would be subject to this Court's jurisdiction because they committed intentional torts in Texas. Personal jurisdiction premised on carrying out an intentional tort within the state is well established under Texas's long-arm statute and the Constitution's Due Process Clause. That makes this Court the "proper court" under Rule 202 to grant ExxonMobil's Petition for pre-suit discovery.

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[1] While the Petition seeks to depose all Respondents, it only identifies adverse interests to Respondents Pawa, Parker, Herrera, Beiers, Dedina, Lyon, Brian Washington, McRae, Condotti, the County of San Mateo, the County of Marin, the City of Imperial Beach, the City of Santa Cruz, and the County of Santa Cruz (collectively "Potential Defendants"), as well as the City of San Francisco and the City of Oakland. Pet. ¶ 137.

As a threshold matter, it is irrelevant that the Potential Witnesses have contested this Court's jurisdiction over them. The only jurisdictional issue that is properly presented relates to the Potential Defendants. This Court is not being asked to—and need not—assert personal jurisdiction over the Potential Witnesses. It would simply authorize ExxonMobil to take testimony from those witnesses, and ExxonMobil would then rely on the procedures of the relevant jurisdiction where the witnesses reside to obtain appropriate testimony. That is the time-tested process for obtaining discovery from witnesses outside the jurisdiction of the court. The special appearances of the Potential Witnesses should therefore be disregarded.

Further, this Court's authority over two of the Potential Defendants—San Francisco and Oakland—in an anticipated suit has not even been challenged by the entry of a special appearance. In the absence of such a challenge, none of the special appearances filed to date constrain the Court from ordering depositions of witnesses with evidence relevant to potential claims against San Francisco and Oakland.

Moreover, with respect to all of the Potential Defendants, this Court could exercise personal jurisdiction over them in any resulting litigation because the potential claims contemplate an express plan to violate ExxonMobil's constitutional rights in Texas. The long-arm statute grants Texas courts jurisdiction over nonresidents who commit torts in whole or in part in Texas, independent of whether those nonresidents are municipalities or municipal employees. And, as the Potential Defendants concede, jurisdiction is proper under the Due Process Clause where a defendant "purposefully *directed*" its activities at

the forum (San Mateo Br. 7),[2] for instance by reaching out to Texas and intentionally causing a tort in that state.

This well-settled precedent boils down to a simple rule of thumb: "[I]f you are going to pick a fight in Texas, it is reasonable to expect that it be settled there." *McVea* v. *Crisp*, No. SA-07-CA-353-XR, 2007 WL 4205648, at *2 (W.D. Tex. Nov. 5, 2007) (quotation marks omitted), *aff'd*, 291 F. App'x 601 (5th Cir. 2008). Because Texas courts would have jurisdiction over the Potential Defendants in the contemplated suit, this Court may adjudicate ExxonMobil's Petition for pre-suit discovery.

II. FACTUAL BACKGROUND

ExxonMobil, a Texas-based oil and gas company with significant operations in Fort Worth, seeks to depose individuals likely to have information concerning the possible abuse of power in Texas by California municipalities. It appears that these municipalities may have brought pretextual, politically motivated lawsuits against members of the Texas energy sector to prevent Texas residents from exercising their First Amendment rights within their home state. These municipalities, aided by Matthew Pawa, an outspoken advocate of abusing government power to limit free speech, appear to be pursuing an agenda similar to the one undertaken by certain state attorneys general, against whom ExxonMobil filed civil rights litigation that remains pending in federal court. Discovery is needed to determine whether the Potential Defendants have engaged in intentional torts

[2] "San Mateo Br." refers to the brief filed by The County of San Mateo, the County of Marin, the City of Imperial Beach, the City of Santa Cruz, the County of Santa Cruz, John Beiers, Serge Dedina, Jennifer Lyon, Brian Washington, Dana McRae, Anthony Condotti John Maltbie, Andy Hall, Matthew Hymel, Carlos Palacios, and Martín Bernal. "SFO Br." refers to the brief of Potential Defendant Dennis J. Herrera and Potential Witness Edward Reiskin in support of their special appearance. "Oak Br." refers to the brief of Potential Defendants Barbara J. Parker and Matthew F. Pawa and Potential Witness Sabrina B. Landreth in support of their special appearance.

targeting the exercise of free speech in Texas and whether ExxonMobil should challenge that conduct in a lawsuit.

A. The Playbook to Suppress Free Speech.

At a June 2012 workshop in La Jolla, California, Pawa and a coterie of special interests met to discuss potential legal strategies that could impose "pressure" on the oil and gas industry to provide "support for legislative and regulatory responses to global warming."[3] At the workshop, Pawa and the other attendees heaped scorn on energy companies, including ExxonMobil, for allegedly manufacturing uncertainty about climate change through their statements and activities in Texas.[4] Naomi Oreskes, a key organizer of the event, had long been maligning the speech of Texas's energy sector as deceptive[5] and has published a so-called study of ExxonMobil's Texas-based speech that purports to confirm its misleading nature. That "study" was later unmasked as a biased, results-driven endeavor to provide the patina of academic legitimacy to a corrupt enterprise.[6]

By their own report, participants at the La Jolla Conference hoped to use litigation to "[w]in [a]ccess to [i]nternal [d]ocuments" of energy companies and thereby gain leverage over them.[7] "[L]awyers at the workshop" intended to enlist "sympathetic state attorney[s] general" who could launch sweeping investigations that might unearth

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3 Hernandez Aff. Ex. 1 at 27. "Hernandez Aff." refers to the Affidavit of Allen Hernandez in Support of ExxonMobil's Opposition to the Potential Defendants' Special Appearances.

4 Hernandez Aff. Ex. 1 at 5-6.

5 Naomi Oreskes & Erik M. Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* (2010).

6 *See* Attachment A. The 2017 study published by Oreskes and Supran accuses ExxonMobil of misleading the public about climate science and its implications, purportedly based on a content analysis of ExxonMobil's publications, internal documents, and advertisements. *Id.* However, as explained in the report of Professor Kimberly A. Neuendorf—whose textbook Oreskes cites as an authority on content analysis methodology, *id.* at 2—Oreskes and Supran's spurious conclusions are premised on fundamental design flaws that make the study unsound and unreliable. *Id*. at 2-4.

7 Hernandez Aff. Ex. 1 at 12.

documents that could be used to coerce the companies to change their positions on climate change.[8]

In January 2016, Pawa met with special interests at the Rockefeller Family Fund offices to discuss the "[g]oals of an Exxon campaign."[9] The agenda from that meeting revealed that the attendees' goals included: (i) "[t]o establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm"; (ii) "[t]o delegitimize [ExxonMobil] as a political actor"; (iii) "[t]o drive divestment from Exxon"; and (iv) "[t]o force officials to disassociate themselves from Exxon, . . . for example by refusing campaign donations, refusing to take meetings, calling for a price on carbon, etc."[10] The agenda also makes plain that these special interests—who appear to have been led by Pawa—would use any available "legal actions" or "related campaigns," including through "AGs" and "Torts," that had the "best prospects" for "getting discovery" and "creating scandal."[11]

B. State Attorneys General Carry Out the Playbook.

The Attorneys General of New York, Massachusetts, and the U.S. Virgin Islands adopted this corrupt agenda as their own. On March 29, 2016, the so-called "Green 20" coalition of attorneys general held a press conference after a secret briefing conducted by Pawa on "climate change litigation."[12] At the press conference, New York Attorney General Schneiderman declared that there could be "no dispute" about climate change policy, only "confusion" attributed to those "with an interest in profiting from the

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8 Hernandez Aff. Ex. 1 at 11.
9 Hernandez Aff. Ex. 6 at 1; Hernandez Aff. Ex. 7 at 1.
10 Hernandez Aff. Ex. 6 at 1; *see also* Hernandez Aff. Ex. 7 at 1.
11 Hernandez Aff. Ex. 7 at 1-2.
12 Hernandez Aff. Ex. 10 at 3.

confusion."[13] Lamenting "misperceptions in the eyes of the American public that really need to be cleared up," Attorney General Schneiderman denounced the "morally vacant forces" he blamed for discouraging the "federal government to take meaningful action" on climate change.[14] As part of his effort to "step into this [legislative] breach" and "battle" political opponents, Attorney General Schneiderman then announced his subpoena of ExxonMobil.[15]

Massachusetts Attorney General Healey likewise considered the public's failure to embrace her views on climate change to be the result of speech by "[f]ossil fuel companies" that caused "many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts."[16] After pledging to hold these energy companies "accountable,"[17] Attorney General Healey declared that she too had "joined in investigating the practices of ExxonMobil."[18]

Following her meeting with Pawa and appearance at the press conference, Attorney General Healey issued a civil investigative demand ("CID") to ExxonMobil expressly targeting specific statements the company and its executives made in Texas. For example, the CID requested a "press release" that was issued from ExxonMobil's offices in Texas, and it sought information about political opinions expressed in former "Chairman Tillerson's statements regarding Climate Change and Global Warming . . . at an Exxon shareholder meeting in Dallas, Texas."[19] Other requests sought internal corporate

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13 *Id.* at 2.
14 *Id.* at 2, 4.
15 *Id.* at 3, 4.
16 *Id.* at 12.
17 *Id.*
18 *Id.*
19 Conlon Aff. Ex. 20 at 15-17. "Conlon Aff." refers to the Affidavit of Patrick Conlon in Support of ExxonMobil's Opposition to the Potential Defendants' Special Appearances.

documents and communications concerning regulatory filings that are generally addressed at ExxonMobil's corporate offices in Texas.[20]

ExxonMobil responded to these blatant abuses of law enforcement authority by filing court challenges. ExxonMobil's suit against the Virgin Islands Attorney General garnered the support of the Texas and Alabama Attorneys General, who intervened in that action to protect the constitutional rights of their citizens and to criticize an investigation "driven by ideology, and not law."[21] Just a few months later, the Virgin Islands and ExxonMobil entered into a joint stipulation of dismissal, under which the Virgin Islands' subpoena was withdrawn and ExxonMobil complaint was voluntarily dismissed.[22]

ExxonMobil also filed suit against Attorneys General Schneiderman and Healey in the Northern District of Texas seeking a preliminary injunction that would bar the attorneys general from enforcing their constitutionally infirm investigative instruments.[23] This time, eleven state attorneys general, including the Texas Attorney General, filed an amicus brief in support of ExxonMobil's preliminary injunction, arguing the state official's power "does not include the right to engage in unrestrained, investigative excursions to promulgate a social ideology, or chill the expression of points of view, in international policy debates."[24]

While Attorneys General Schneiderman and Healey repeatedly sought to dismiss ExxonMobil's complaint for want of personal jurisdiction, none of those motions have

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20 *Id.* at 17.

21 Plea in Intervention of the States of Texas and Alabama at 2, *Exxon Mobil Corp.* v. *Walker*, No. 017-284890-16 (Tex. Dist.—Tarrant Cnty. May 16, 2016).

22 Joint Stipulation of Dismissal, *Exxon Mobil Corp.* v. *Walker*, No. 4:16-cv-00364-K (N.D. Tex. June 29, 2016), ECF No. 40.

23 *Exxon Mobil Corp.* v. *Healey*, 4:16-cv-00469-A (N.D. Tex. June 15, 2016).

24 Hernandez Aff. Ex. 33 at 12.

been granted. Rather, after initially ordering Attorney General Healey to appear for a deposition concerning whether she issued her CID in bad faith,[25] Judge Ed Kinkeade of the United States District Court for the Northern District of Texas transferred the action to the Southern District of New York—the venue of the Green 20 press conference.[26] In his order transferring venue, Judge Kinkeade noted that "[t]he merits of each of Exxon's claims involve important issues that should be determined by a court," including whether the investigations conducted by the attorneys general may be means "to further their personal agendas by using the vast power of government to silence the voices of all those who disagree with them."[27] The attorneys general have filed multiple motions to dismiss, but as of the filing of this Response, the court has not ruled.[28]

C. California Municipalities Appear to Likewise Follow the Playbook.

Following the press conference by the attorneys general, Pawa continued to identify speech in Texas that he deemed unacceptable. At a 2016 conference, Pawa criticized multiple speeches former CEO Rex Tillerson delivered in Texas for, among other things, purportedly "impl[ying] the planet was not even warming."[29] Pawa also singled out the company's internal memos from the 1980s where company scientists evaluated the potential impact of climate change and accused ExxonMobil of "undert[aking] a campaign of deception and denial."[30] At another conference, Pawa labeled ExxonMobil "the ringleader of a conspiracy to put its profits ahead of the

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25 Stewart Aff. Ex. 35 at 5, 6. "Stewart Aff." refers to the Affidavit of Katherine Stewart in Support of ExxonMobil's Opposition to the Potential Defendants' Special Appearances.

26 Stewart Aff. Ex. 36 at 2.

27 *Id.* at 5.

28 *Exxon Mobil Corp* v. *Schneiderman & Healey*, No. 1:17-cv-02301-VEC (S.D.N.Y. Mar. 30, 2017).

29 Stewart Aff. Ex. 65 at 3.

30 *Id.*

wellbeing of the entire planet."[31]

To suppress this speech, Pawa hoped to enlist other governmental bodies to target the Texas energy sector. In a memorandum he sent to NextGen America, the political action group funded by California billionaire Tom Steyer, Pawa claimed that "certain fossil fuel companies (most notoriously ExxonMobil), have engaged in a campaign and conspiracy of deception and denial on global warming."[32] Pawa then solicited Steyer's support for California lawsuits "against fossil fuel producers," explaining that "California is uniquely situated to bring a global warming case" because of its "particularly robust" public nuisance law.[33] In what seems to be a solicitation of business through Steyer's political connections in California, Pawa stated that "Pawa Law Group stands ready to assist the State in any manner."[34] Pawa reiterated the point that, even if litigation reached only the discovery phase, it would still be a "remarkable achievement" that would "advance the case and the cause."[35]

Pawa then enlisted the cities of Oakland and San Francisco to file tort lawsuits against Texas energy companies. Lawsuits filed on September 19, 2017, name ExxonMobil and four other energy companies, including Texas-based ConocoPhillips. These complaints were served on ExxonMobil's registered agent in California,[36] whose role is to transmit legal process to ExxonMobil in Texas. Five other municipalities—the City of Imperial Beach, Marin County, San Mateo County, the City of Santa Cruz, and the

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31 *See* Stewart Aff. Ex. 67 at 1.
32 Hernandez Aff. Ex. 18 at 5.
33 *Id.* at 19.
34 *Id.* at 19.
35 *Id.* at 17.
36 *People of the State of California* v. *BP, p.l.c.*, No. RG17875899 (Alameda Sup. Ct. Oct. 4, 2017) (Oakland proof of service); *People of the State of California* v. *BP, p.l.c.*, No. CGC-17-561370 (San Francisco Sup. Ct. September 21, 2017) (San Francisco proof of service).

County of Santa Cruz—likewise filed complaints against ExxonMobil and 16 other Texas-based energy companies.[37] These municipalities served ExxonMobil's registered agent in Austin, Texas, with these complaints.[38] All of these lawsuits claim that Texas energy companies, including ExxonMobil, have deceived the public as to the seriousness of climate change risks about which they have long known, continued to promote oil and gas rather than renewable energy, and worked to stymie legislation to combat climate change.[39] They claim that these alleged actions make the energy company defendants liable for contributing to global warming and its alleged impacts, like sea-level rise, which they claim pose a public nuisance to their communities.[40]

Although the complaints facially purport to pursue tort claims for environmental harm, public documents indicate that ulterior motives may have prompted their filing. Indeed, it appears that these lawsuits could share much in common with the pretextual investigations pursued by the state attorneys general. The most egregious indication that these lawsuits were not brought for a proper purpose lies in the stark disconnect between what the municipalities allege in their complaints and what they have disclosed to their investors. Critically, in their own bond offerings, *none* of the Potential Defendants

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[37] BP America, Inc., Shell Oil Products Company LLC, Citgo Petroleum Corp., ConocoPhillips, ConocoPhillips Company, Phillips 66, Total E&P USA Inc., Total Specialties USA Inc., Eni Oil & Gas Inc., Anadarko Petroleum Corp., Occidental Petroleum Corp., Occidental Chemical Corp., Repsol Energy North America Corp., Repsol Trading USA Corp., Marathon Oil Company, Marathon Oil Corporation, Apache Corp.

[38] Conlon Aff. Ex. 28 at 1 (Imperial Beach); Conlon Aff. Ex. 29 at 1 (Marin County); Conlon Aff. Ex. 30 at 1 (San Mateo County); Conlon Aff. Ex. 32 at 1 (City of Santa Cruz); Conlon Aff. Ex. 31 at 1 (County of Santa Cruz).

[39] Conlon Aff. Ex. 21 ¶¶ 1, 5-6, 9; Conlon Aff. Ex. 22 ¶¶ 1, 5-6, 9; Conlon Aff. Ex. 23 ¶¶ 1, 5-6, 9; Conlon Aff. Ex. 24 ¶¶ 2-7; Conlon Aff. Ex. 25 ¶¶ 2-7; Conlon Aff. Ex. 26 ¶¶ 1-2, 5-7, 10; Conlon Aff. Ex. 27 ¶¶ 1-2, 5-7, 10.

[40] Conlon Aff. Ex. 21 ¶¶ 1, 5-9; Conlon Aff. Ex. 22 ¶¶ 1, 5-9; Conlon Aff. Ex. 23 ¶¶ 1, 5-9; Conlon Aff. Ex. 24 ¶¶ 1, 8-9; Conlon Aff. Ex. 25 ¶¶ 1, 8-9; Conlon Aff. Ex. 26 ¶ 8; Conlon Aff. Ex. 27 ¶ 8.

disclosed to prospective investors the allegedly grievous climate change-related risks that animate their claims against ExxonMobil.

For instance, Oakland and San Francisco's complaints claim that "global warming" purportedly caused by "massive fossil fuel production" poses a "gravely dangerous" risk of harm to the city, due to "ongoing and increasingly severe sea level rise."[41] Yet, the municipal bonds issued by Oakland and San Francisco disclaimed knowledge of any such impending catastrophe, stating the Cities are "unable to predict when . . . sea rise or other impacts of climate change . . . could occur," and "*if* any such events occur, *whether they will have a material adverse effect* on the business operations or financial condition of the City or local economy."[42] The irreconcilable differences between what was alleged in the complaints and what was disclosed to investors suggests the allegations in the complaint against ExxonMobil could not possibly be honestly held.

The complaints also suggest an intent to suppress speech in Texas since they focus on constitutionally protected speech that ExxonMobil formulated and issued from Texas, where the company resides. For example, San Francisco's and Oakland's complaints repeat Pawa's accusations concerning a speech given "at Exxon's annual shareholder meeting" in Texas, where they claim "then-CEO Rex Tillerson" allegedly "misleadingly downplayed global warming's risks."[43] Other corporate statements issued from Texas, such as its "annual 'Outlook for Energy' reports," "Exxon's website," and "Exxon's 'Lights Across America' website advertisements," are likewise singled out in the

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41 Conlon Aff. Ex. 24 ¶ 55; Conlon Aff. Ex. 25 ¶ 56.

42 Stewart Aff. Ex. 62 at 1; Stewart Aff. Ex. 55 at A-48; *see also* Stewart Aff. Ex. 53 at 74 (San Mateo County is "unable to predict" risks associated with climate change); Stewart Aff. Ex. 60 at 27 (Santa Cruz County may experience "unpredictable climatic conditions" including floods).

43 Conlon Aff. Ex. 24 ¶ 75; Conlon Aff. Ex. 25 ¶ 76.

complaints as evidence that the company has "continued to emphasize the 'uncertainty' of global warming science and impacts" and has "promot[ed] fossil fuels" while "undercutting non-dangerous renewable energy and clean technologies."[44]

The Marin County, San Mateo County, Imperial Beach, Santa Cruz County, and City of Santa Cruz complaints similarly attack statements made by ExxonMobil employees in Texas, including a 1988 memo that proposes "[r]esist[ing] the overstatement and sensationalization [sic] of potential greenhouse effect"[45] and a "publication" that "Exxon released" in "1996" with a preface by former "Exxon CEO Lee Raymond."[46] The Respondents concede those statements acknowledge that the greenhouse effect is "unquestionably real," but they nevertheless criticize ExxonMobil for expressing the political opinion that "taking drastic action immediately is unnecessary."[47] In addition, the complaints filed by each of the California municipalities focus on other corporate decisions to exercise the company's associational freedoms, such as decisions to fund various non-profit groups that perform climate change-related research, which the complaints disparage as "front groups" and "denialist groups."[48]

Official statements made to the public by employees of municipalities named as Potential Defendants likewise suggest that their true objective might be to use their suits to censor speech in the Texas energy sector. For instance, on September 20, 2017, Oakland City Attorney Parker issued a press release announcing that she was "join[ing] San

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44 Conlon Aff. Ex. 24 ¶¶ 76, 78(a), 81; Conlon Aff. Ex. 25 ¶¶ 77, 79(a), 82.

45 Conlon Aff. Ex. 21 ¶ 117; Conlon Aff. Ex. 22 ¶ 117; Conlon Aff. Ex. 23 ¶ 117; Conlon Aff. Ex. 26 ¶ 162; Conlon Aff. Ex. 27 ¶ 161.

46 Conlon Aff. Ex. 21 ¶ 121; Conlon Aff. Ex. 22 ¶ 121; Conlon Aff. Ex. 23 ¶ 121; Conlon Aff. Ex. 26 ¶ 166; Conlon Aff. Ex. 27 ¶ 165.

47 *Id.*

48 Conlon Aff. Ex. 24 ¶¶ 62-71; Conlon Aff. Ex. 25 ¶¶ 63-72; *see also* Conlon Aff. Ex. 21 ¶¶ 133, 137-38; Conlon Aff. Ex. 22 ¶¶ 133, 137-38; Ex. 23 ¶¶ 133, 137-38; Conlon Aff. Ex. 26 ¶¶ 177, 179; Conlon Aff. Ex. 27 ¶¶ 176, 178.

Francisco City Attorney Herrera" in suing "the world's 5 largest publicly owned oil and gas companies," or, as she repeatedly and pejoratively calls the energy industry, "BIG OIL."[49] Echoing the sentiments espoused by Pawa, and the attorneys general he advised, Parker asserted "[i]t is past time to debate or question" issues concerning "global warming."[50] According to Parker, "[j]ust like BIG TOBACCO, BIG OIL knew the truth long ago" but "shamelessly engaged in a campaign of deception and denial to protect their market for fossil fuels."[51] These sentiments parallel Potential Defendant Herrera's public statements, in which he accused "fossil fuel companies" of launching a "disinformation campaign to deny and discredit" that "global warming is real," and pledged to ensure that these companies "are held to account."[52]

The public statements of Potential Defendant Serge Dedina, the mayor of Imperial Beach, likewise suggest that Potential Defendant Imperial Beach might be abusing litigation to limit the participation of ExxonMobil and other Texas-based energy companies in the debate on climate policy. In a July 20, 2017 op-ed in the *San Diego Union-Tribune*, Dedina boasted that he was instrumental in the decision to file the Imperial Beach lawsuit.[53] He also attacked ExxonMobil's speech and funding decisions, saying that ExxonMobil and the energy sector at large, "embarked on a multimillion-dollar campaign . . . to sow uncertainty" about climate change risks and science.[54] Like Pawa and Herrera, Dedina compared ExxonMobil's political speech on climate policy to the tobacco

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49 Stewart Aff. Ex. 68 at 1.
50 *Id.*
51 *Id.*
52 Stewart Aff. Ex. 70 at 2, 4.
53 Stewart Aff. Ex. 40 at 2, 4.
54 *Id.*

industry's deception of consumers.[55] In a July 26, 2017 appearance at a local radio station, Dedina went on to accuse ExxonMobil of acting as a "merchant[ ] of doubt" (a phrase likely borrowed from La Jolla-organizer Naomi Oreskes' book).[56] In support of this allegation, Dedina referenced purported "smoking gun" documents, originating in Texas, and concerning ExxonMobil's speech and activities in that forum.[57]

III. ARGUMENT

A. Legal Standard

Under Rule 202 of the Texas Rules of Civil Procedure, a proper court may allow "discovery of a potential claim" if the court would have personal jurisdiction over the potential defendants to the anticipated suit. *See eBay Inc.* v. *Mary Kay Inc.*, No. 05-14-00782-CV, 2015 WL 3898240, at *2 (Tex. App.—Dallas June 25, 2015, pet. denied) (citing *In re Doe*, 444 S.W.3d 603, 608 (Tex. 2014)). In considering special appearances, courts "begin with the presumption that the court has jurisdiction over the parties." *EMI Music Mex., S.A. de C.V.* v. *Rodriguez*, 97 S.W.3d 847, 853 (Tex. App.—Corpus Christi 2003, no pet.). While the petitioner must initially plead "sufficient allegations to invoke jurisdiction," it is the "defendant who contests the trial court's exercise of personal jurisdiction" that "bears the burden of negating all bases of jurisdiction alleged." *Alencar* v. *Shaw*, 323 S.W.3d 548, 551 (Tex. App.—Dallas 2010, no pet.). To succeed, the party contesting jurisdiction must present "a compelling case that the presence of some consideration would render jurisdiction unreasonable." *Horizon Shipbuilding, Inc.* v. *BLyn*

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55 *Id.*
56 Stewart Aff. Ex. 69 at 3.
57 *Id.*

II Holding, LLC, 324 S.W.3d 840, 851 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citations omitted).

Texas courts may exercise personal jurisdiction over a nonresident if the Texas long-arm statute "permits such jurisdiction and the exercise of jurisdiction is consistent with federal and state due-process guarantees." *TV Azteca* v. *Ruiz,* 490 S.W.3d 29, 36 (Tex. 2016). The Texas long-arm statute "broadly allows courts to exercise personal jurisdiction over a nonresident who 'commits a tort in whole or in part in this state.'" *Id.* (quoting Tex. Civ. Prac. & Rem. Code § 17.042(2)). Because the statute "reaches as far as the federal constitutional requirements for due process will allow," Texas courts may exercise jurisdiction over a nonresident so long as doing so "comports with federal due process limitations." *Spir Star AG* v. *Kimich*, 310 S.W.3d 868, 872 (Tex. 2010) (internal quotation marks omitted). Consistent with due process, a Texas court can exercise jurisdiction over a nonresident defendant where "(1) the defendant has established minimum contacts with the forum state, and (2) the exercise of jurisdiction comports with traditional notions of fair play and substantial justice." *Id.* (citations omitted).

B. The Court Need Not Assess Personal Jurisdiction over Potential Non-Defendant Witnesses.

As an initial matter, this court should dismiss as irrelevant the special appearances filed by Potential Witnesses Reiskin, Landreth, Maltbie, Hall, Hymel, Palacios, and Bernal because they are not Potential Defendants against whom the Rule 202 Petition "anticipate[s] the institution of a suit," but instead prospective *witnesses* to that anticipated suit. *See In re Doe*, 444 S.W.3d at 608 (noting a trial court granting a Rule 202 petition must have personal jurisdiction over the prospective *defendant*). The Petition identifies sixteen Potential Defendants "against whom suit is anticipated." *See* Pet. ¶ 137. That list

does not include the Potential Witnesses, whom the Petition identifies solely as prospective deponents. *Id.* ¶¶ 11, 87, 94, 126, 128.

Personal jurisdiction over an individual whose deposition is sought in connection with the investigation of a claim against another party is neither required for nor relevant to the Rule 202 Petition because the Potential Witnesses would not be named as parties and hence would not be "subject to the binding judgments of [the] forum." *See Fox Lake Animal Hosp. PSP* v. *Wound Mgmt. Tech., Inc.*, No. 02-13-00289-CV, 2014 WL 1389751, at *2 (Tex. App.—Fort Worth Apr. 10, 2014, pet. denied). As Potential Defendants San Mateo, Marin, Imperial Beach, and Santa Cruz acknowledge (San Mateo Br. 3), while "a Rule 202 court must have personal jurisdiction over a potential defendant," there is no requirement that the court would have jurisdiction over a mere "witness" where a suit is anticipated. *See In re Doe*, 444 S.W.3d at 608, 610; *see also* Tex. R. Civ. P. 202.2(b) (defining the "proper court" for a Rule 202 Petition). For example, in *eBay*, the Fifth Court of Appeals denied a Rule 202 petition because it failed to allege forum contacts by the potential defendants, instead solely alleging that the witness respondent from whom discovery was sought was "available" in Texas. 2015 WL 3898240, at *3. Here, by contrast, if ExxonMobil ultimately files the contemplated claims, the Potential Defendants would be subject to this Court's personal jurisdiction by virtue of having committed intentional torts in the State of Texas.

Discovery from a Potential Witness need not occur in the same venue as the suit. The Potential Witnesses mistakenly claim that granting ExxonMobil's request to depose them would entail dragging the Potential Witnesses "seventeen-hundred miles" to attend depositions. *See* SFO Br. 13. To the contrary, as with discovery in any civil suit,

ExxonMobil's deposition of those individuals would ultimately be guided by California's—not Texas's—procedures for conducting that nonparty discovery. *See, e.g.*, *Quinn* v. *Eighth Judicial Dist. Court in & for Cty. of Clark*, No. 74519, 2018 WL 774513, at *4 (Nev. Feb. 8, 2018) (finding the California court "in the county in which discovery is to be conducted" bears responsibility for enforcing a subpoena issued by a Nevada court directing nonparties to appear in California for deposition); *Yelp, Inc.* v. *Hadeed Carpet Cleaning, Inc.*, 770 S.E.2d 440, 444 (Va. 2015) (noting that enforcement of a nonparty subpoena "seeking out-of-state discovery is generally governed by the courts and the law of the state in which the witness resides or where the documents are located").

California permits such out-of-state discovery requests through its adoption of the Uniform Interstate Depositions and Discovery Act ("UIDDA"). *See* Cal. Civ. Proc. Code § 2029.300 (outlining the procedures for enforcing a foreign subpoena to conduct discovery in California). Applying the UIDDA, states have enforced subpoenas issued pursuant to Rule 202. *See, e.g.*, *Ewin* v. *Burnham*, 728 N.W.2d 463, 466–67 (Mich. Ct. App. 2006) (affirming court-mandated attendance at Rule 202 deposition). Because this Court need not have jurisdiction over the Potential Witnesses to issue process that would be transmitted to the proper authorities in California for execution according to the rules of courts in that state, this Court need not address their special appearances.

C. Potential Defendants Oakland and San Francisco Have Not Contested This Court's Jurisdiction.

The Cities of San Francisco and Oakland have not entered special appearances or otherwise contested that the anticipated claims could be brought against them in this

Court.[58] In the absence of such a challenge, the Court should allow ExxonMobil to depose witnesses, including Potential Defendants Pawa, Parker, and Herrera, with information concerning those two municipalities. It is irrelevant that Landreth and Reiskin, who are merely Potential Witnesses for Oakland and San Francisco (and not Potential Defendants), have filed special appearances. Independent of whether a suit could be brought against them, they may be deposed in California, where they reside, as nonparty witnesses to contemplated suits against the municipalities by whom they are employed.

D. The Court Would Have Personal Jurisdiction over the Potential Defendants to the Anticipated Claims.

For this Court to allow discovery pursuant to ExxonMobil's Rule 202 Petition, it need only determine whether it would have personal jurisdiction over the Potential Defendants to any resulting litigation. Because the contemplated claims arise from intentional torts in the State of Texas—in which Texas was the deliberate focus of activities to suppress ExxonMobil's protected speech—the Court would have personal jurisdiction over the Potential Defendants to such anticipated claims.

1. The Texas Long-Arm Statute Reaches the Potential Defendants, with No Exemption for Municipalities or Municipal Employees.

The long-arm statute provides the Court may exercise personal jurisdiction over "nonresidents" who are "doing business" in the state. *See Retamco Operating, Inc.* v. *Republic Drilling Co.*, 278 S.W.3d 333, 337 (Tex. 2009). Texas law defines

[58] A court may exercise personal jurisdiction over a defendant where "[n]o special appearance was ever filed" or where the defendant "did not strictly comply with the provisions of Rule 120a" governing special appearances. *Griffin's Estate* v. *Sumner*, 604 S.W.2d 221, 227 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.); *see also Boyd* v. *Kobierowski*, 283 S.W.3d 19, 23 (Tex. App.—San Antonio 2009, no pet.) (holding court acquired personal jurisdiction over nonresident defendant who failed to properly file special appearance). Municipalities must (and routinely do) enter special appearances challenging personal jurisdiction on their own behalf. *See, e.g.*, *City of Riverview*, v. *Am. Factors, Inc.*, 77 S.W.3d 855, 857 (Tex. App.—Dallas 2002, no pet.) ("The City filed a special appearance contesting the trial court's jurisdiction over it.").

"nonresidents" to include "an individual who is not a resident of this state." Tex. Civ. Prac. & Rem. Code § 17.041(1). The Potential Defendants qualify as nonresidents because they are not residents or citizens of Texas.

The statutory definition of "doing business" in Texas includes "commit[ting] a tort in whole or in part in this state." *Id.* § 17.042(2). Here, the claims ExxonMobil anticipates are based on the Potential Defendants having committed a tort in Texas by engaging in conspiracy and commencing pretextual lawsuits against Texas energy companies with the primary objectives of "obtain[ing] industry documents" located in Texas,[59] coercing the Texas energy sector to cease any "debate" concerning "global warming,"[60] and "delegitimize [ExxonMobil] as a political actor."[61]

If these torts were committed, they were committed in Texas because that is where "[t]he alleged injuries occurred and are felt." *Francis* v. *API Tech. Servs., LLC*, No. 4:13-CV-627, 2014 WL 11462447, at *6 (E.D. Tex. Apr. 29, 2014) (finding personal jurisdiction over defendant alleged to have "access[ed] or directed others to access" a resident's email account to obtain his "private information"). Numerous courts have agreed that a "plaintiff suing because his freedom of expression has been unjustifiably restricted . . . suffers harm only where the speech would have taken place, as opposed to the district in which . . . the decision to restrict this plaintiff's speech was made." *Kalman* v. *Cortes*, 646 F. Supp. 2d 738, 742 (E.D. Pa. 2009); *see also Asgeirsson* v. *Abbott*, 773 F. Supp. 2d 684, 693 (W.D. Tex. 2011), *aff'd*, 696 F.3d 454 (5th Cir. 2012) (First

[59] *See* Hernandez Aff. Ex. 18 at 6.
[60] Stewart Aff. Ex. 68 at 1.
[61] Hernandez Aff. Ex. 6 at 1; *see also* Hernandez Aff. Ex. 7 at 2.

Amendment injury occurred at the location of "the alleged suppression of First Amendment rights.").

The Potential Defendants' "general statement[s]" denying that they have committed a tort in Texas are "conclusory and not sufficient to shift the burden to [Petitioner] to produce evidence supporting its specific allegations" that the potential conspiracy it seeks to investigate was a "conspiracy aimed at . . . Texas." *Hoskins* v. *Ricco Family Partners, Ltd.*, Nos. 02–15–00249–CV, 02–15–00253–CV, 2016 WL 2772164, at *8 (Tex. App.—Fort Worth May 12, 2016, no pet.). Under the express terms of the long-arm statute, the Potential Defendants will be subject to the jurisdiction of Texas courts if they committed a tort in the forum.

Certain Potential Defendants argue they are excluded from the long-arm statute's definition of "nonresident" on the basis that they are not "individuals" but municipalities (San Mateo Br. 5-6) or municipal employees (*id.*; SFO Br. 8 n.17, 10). But the Potential Defendants have identified no Texas state court authority for this proposition, and ExxonMobil is aware of none. Instead, the entirety of the municipal Respondents' argument is premised on dicta in the federal decision *Stroman Realty, Inc.* v. *Wercinski*, which involved state (not municipal) officials sued in their official capacity and made no definitive statement about the scope of the Texas long-arm statute. 513 F.3d 476 (5th Cir. 2008). Far from supporting Respondents' position, the majority in *Stroman* simply raised a "question" about the application of the long-arm statute to state officials sued in their official capacity and observed that "[w]hether the long-arm statute's definition of nonresidents ignores or subsumes the *Ex Parte Young* fiction *is uncertain*." *Id.* at 483 (emphasis added). The actual holding of *Stroman* did not adjudicate that question or any

aspect of the long-arm statute because the case was decided on constitutional, not statutory, grounds. *Id.* at 483–89. The majority unambiguously acknowledged that fact, observing that the defendant state official had conceded that he fell within the reach of the long-arm statute and thereby "relieve[d] [the court] of an obligation to pursue these interpretive questions," which were "preserve[d] . . . for posterity." *Id.* at 483.[62]

Even if the *Stroman* majority had reached a conclusion about the construction of the long-arm statute, it would not affect the special appearances at issue here for three separate and independently sufficient reasons. First, any such conclusion would amount to non-binding dicta, which "settles nothing, even in the court that utters it." *Jama* v. *Immigration & Customs Enf't,* 543 U.S. 335, 351 n.12 (2005). Explicitly emphasizing the majority's concession that the reach of the long-arm statute was not presented for appellate review, the third member of the *Stroman* panel wrote that he did "not concur in the opinion's extensive dicta, including parts about: whether the Texas long-arm statute applies (part A), the parties having conceded it does." 513 F.3d at 489–90 (Barksdale, J., concurring in part).

Second, had *Stroman* held that state officials are outside the reach of the long-arm statute (which it did not), it would have construed the statute in a manner inconsistent with the precedents of Texas state courts, which are authoritative in interpreting Texas law. Texas state courts have expressly held that the long-arm statute allows Texas courts to assert jurisdiction over sister states and out-of-state municipalities. *See, e.g.*, *Bd. of Cty.*

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[62] Moreover, the Potential Defendants cite no authority—and ExxonMobil is aware of none—that even questions the application of Texas's long-arm statute to municipalities or municipal employees. To the contrary, in *Monell* v. *Department of Social Services*, 436 U.S. 658, 690 (1978), the United States Supreme Court clearly held that both municipalities and their officers qualify as "persons" that can be sued directly under 42 U.S.C. § 1983.

Comm'rs v. *Amarillo Hosp. Dist.*, 835 S.W.2d 115, 119–21 (Tex. App.—Amarillo 1992, no writ) (finding that Texas long-arm statute applied to subdivision of Oklahoma state government); *see also 21 Turtle Creek Square, Ltd.* v. *N.Y. State Teachers' Ret. Sys.*, 425 F.2d 1366, 1368 (5th Cir. 1970) (asserting personal jurisdiction over New York state entity under Texas long-arm statute). Further, Texas courts of appeals have evaluated the sufficiency of an out-of-state official or entity's contacts with Texas. *See, e.g., Perez Bustillo* v. *Louisiana*, 718 S.W.2d 844, 846 (Tex. App.—Corpus Christi 1986, no writ); *Gulf Coast Int'l, LLC* v. *Research Corp. of Univ. of Haw.*, 490 S.W.3d 577, 583–84 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). That analysis, which is required by the Due Process Clause of the Constitution, could occur only if the court considered the out-of-state official to be within the reach of the long-arm statute in the first place.

Third, *Stroman* involved state officials sued in their official capacity as proxies for sovereign states, and said nothing of municipalities or their officials. In assessing personal jurisdiction over foreign municipalities, Texas courts have evaluated the sufficiency of the defendants' forum contacts, without raising any qualms about the application of the long-arm statute to such entities. *See, e.g.*, *Infanti* v. *Castle,* No. 05-92-00061-CV, 1993 WL 493673, at *6 (Tex. App.—Dallas Oct. 28, 1993, no writ) (finding the assertion of jurisdiction over the City of Phoenix, Arizona to be reasonable); *City of Riverview*, 77 S.W.3d at 857.

2. Due Process Authorizes Jurisdiction over the Potential Defendants.

Because the claim under consideration is an intentional tort deliberately aimed at and occurring in the State of Texas, the Court would be able to exercise personal jurisdiction over the Potential Defendants. For personal jurisdiction over a nonresident to

comport with due process, three elements must be satisfied. First, a defendant must have "purposefully avail[ed] itself of the privilege of conducting activities within the forum state," for instance, by "purposefully direct[ing]" its activities at the state. *TV Azteca*, 490 S.W.3d at 37. Second, the cause of action must "arise from" those contacts or activities. *Retamco Operating, Inc.*, 278 S.W.3d at 338. Third, the exercise of jurisdiction must "comport[ ] with 'traditional notions of fair play and substantial justice.'" *Id.* at 36. Each of these elements would be satisfied if the contemplated claims are brought against the Potential Defendants.

(a) **Intentional Torts Committed in Texas Constitute Purposeful Availment.**

The Potential Defendants would have purposefully availed themselves of the forum by committing the contemplated intentional torts in Texas. The torts that ExxonMobil seeks to evaluate arise from intentionally suppressing speech in Texas of ExxonMobil and other Texas-based energy companies. Jurisdiction would be proper in such case because "the forum state was 'the focus of the activities'" of the Potential Defendants. *TV Azteca*, 490 S.W.3d at 43 (quoting *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984)). Jurisdiction would rest not merely on the forum "effects" of the conspiracy, but also on the Potential Defendants' "intentional, and allegedly tortious, actions" that "were expressly aimed at" the forum. *Id.* at 40 (quoting *Calder* v. *Jones*, 465 U.S. 783, 789-90 (1984)); *see also Elec. Frontier Found.* v. *Global Equity Mgmt. (SA) Pty Ltd.*, No. 17-cv-02053-JST, 2017 WL 5525835, at *8 (N.D. Cal. Nov. 17, 2017) (finding jurisdiction under the effects test where plaintiff alleged First Amendment violations in connection with defendant's conduct, via litigation in another forum, to prevent plaintiff from writing about defendant and to limit plaintiff "from fulfilling its purpose as an advocate for U.S. patent reform")

(citing *Yahoo! Inc.* v. *La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1211 (9th Cir. 2006)).[63]

Pawa, Parker, Herrera, Beiers, Lyon, Washington, McRae, and Condotti each signed complaints naming ExxonMobil and other Texas-based energy companies as defendants. The Potential Defendants then either delivered their complaints to ExxonMobil's registered agent in Texas, or delivered them to its registered agent in California so it would be transmitted to its corporate offices in Texas.[64] *See* Tex. Bus. Orgs. Code § 5.206; *see also Elec. Frontier Found.*, 2017 WL 5525835, at *6 (defendant's conduct was intentional where it brought "a complaint and actively ligat[ed] that complaint in the Supreme Court of South Australia," sent a demand letter by email, and a copy of the lawsuit to plaintiff via mail). By initiating these suits, the Potential Defendants intentionally created a continuing relationship with the Texas energy sector.

Furthermore, the complaints all expressly rely on ExxonMobil's speech, research, and funding decisions in Texas. ExxonMobil seeks to investigate whether, through these baseless suits, the Potential Defendants sought to silence "debate" by ExxonMobil and the Texas energy companies they have labeled as "Big Oil," to politically delegitimize ExxonMobil, and to shrink the "market for fossil fuels."[65] *See Elec. Frontier Found.*, 2017 WL 5525835, at *7 (defendant's acts intended to silence speech and impose financial penalty would be imposed at plaintiff's corporate headquarters and, thus, were "expressly

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63 *See also Francis*, 2014 WL 11462447, at *6 (extending the effects test beyond defamation to other intentional torts) (citing *Yahoo!*, 433 F.3d 1199).

64 A defendant may be subject to personal jurisdiction because of the activities of its agent within the forum state. *See, e.g.*, *Olympia Capital Assocs., L.P.* v. *Jackson*, 247 S.W.3d 399, 412 (Tex. App.—Dallas 2008, no pet.) ("Contacts of an agent may be sufficient to confer jurisdiction upon the principal."); *Trois* v. *Apple Tree Auction Ctr., Inc.*, No. 16-51414, 2018 WL 706517, at *4 (5th Cir. Feb. 5, 2018); *Aviva Life & Annuity Co.* v. *Goldstein*, 722 F. Supp. 2d 1067, 1075 (S.D. Iowa 2010) (contacts established "despite the use of an agent as an intermediary").

65 Hernandez Aff. Ex 68.

aimed" at the forum). ExxonMobil also seeks to discover whether the Potential Defendants have, as Pawa suggested, attempted to achieve this objective by "obtain[ing] industry documents" located in Texas.[66] If discovery supports these claims, jurisdiction would be proper because "the object of the alleged conspiracy" is to gain access to materials located in Texas. *Hoskins*, 2016 WL 2772164, at *7. That is especially true where "allegations as to the purpose of the conspiracy have potentially more far-reaching effects that extend not only to [the plaintiff's] individual financial interest but also to the state's interest in maintaining stability and certainty." *Id.*

In cases alleging an intentional tort, no more is required to establish purposeful availment under Texas law. *See Trois* v. *Apple Tree Auction Ctr., Inc.*, No. 16-51414, 2018 WL 706517, at *5 (5th Cir. Feb. 5, 2018) (noting "the considerations for personal jurisdiction" over intentional tort claims, such as fraud, "are different from those we apply in a straight contract claim"). For instance, in *Smith* v. *Cattier*, the Fifth Court of Appeals reversed the grant of the special appearance of a defendant to a suit for malicious prosecution and civil conspiracy when the defendant failed to negate allegations that he "made statements to criminal investigators and 'initiated, procured, and caused' the commencement of the criminal investigation into [plaintiff's] actions," No. 05-99-01643, 2000 WL 893243, at *4 (Tex. App.—Dallas July 6, 2000, no pet.).[67]

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66 *See* Hernandez Aff. Ex. 18 at 6.

67 Texas federal courts have similarly found purposeful availment satisfied where "[t]he injurious effect of the intentional tort, if committed, occurred in Texas." *Long* v. *Grafton Exec. Search, LLC*, 263 F. Supp. 2d 1085, 1089-90 (N.D. Tex. 2003); *see also Elton* v. *McClain*, No. SA-11-CV-00559-XR, 2011 WL 6934812, at *3 (W.D. Tex. Dec. 29, 2011) (holding defendant "purposefully avail[ed] himself of the privilege of causing a consequence in Texas" when he solicited business in Texas by making fraudulent misrepresentations (quotation marks omitted)); *Middlebrook* v. *Anderson*, No. 3:04-CV-2294, 2005 WL 350578, at *3 (N.D. Tex. Feb. 11, 2005) ("A defendant's transmission of a communication into the forum state is sufficient to be considered purposeful availment if the content of that communication gives rise to an intentional tort cause of action."); *Bear Stearns Cos.* v. *Lavalle*, No. 3:00 Civ. 1900-D,

While Potential Defendant Herrera contests jurisdiction on the grounds that he never "set foot in Texas" and asserts "city officials cannot . . . reach into Texas" (SFO Br. 9–10), neither of those arguments have any basis in jurisdictional jurisprudence. To the contrary, the Texas Supreme Court recognizes that personal jurisdiction can be satisfied without "physical ties to Texas . . . when it is clear the [nonresident] purposefully directed its activities towards Texas." *Retamco Operating, Inc.*, 278 S.W.3d at 340. For example, in *Paul Gillrie Institute, Inc.* v. *Universal Computer Consulting, Ltd.*, the First Court of Appeals affirmed the denial of a Florida trade publication's special appearance in a libel suit, even though it was uncontested that the publication did not "maintain an office in Texas," "have a registered agent" in Texas, "have any employees or operations located in Texas," or "routinely sen[d] employees to Texas," and the publication also conceded that the journal in question was "written, compiled, and published in Florida." 183 S.W.3d 755, 758, 764 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Personal jurisdiction was nevertheless justified on the basis that the journal that the defendant published contained allegedly libelous statements concerning the Texas plaintiff and was "sent to Texas through the United States mail." *Id.* at 758.

The Potential Defendants repeatedly invoke the holding in *Michiana Easy Livin' Country, Inc.* v. *Holten*, 168 S.W.3d 777, 786 (Tex. 2005), that a nonresident's "mere awareness" that its actions will affect a Texas resident is insufficient to establish purposeful availment. *See Searcy* v. *Parex Resources, Inc.*, 496 S.W.3d 58, 69 (Tex., 2016). But ExxonMobil does not premise jurisdiction over the Potential Defendants on a

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2001 WL 406217, at *3-4 (N.D. Tex. Apr. 18, 2001) (holding defendant "knowingly aimed his intentional actions at Texas and kn[ew] that the plaintiff will feel the brunt of the injury in Texas" when it sent "harassing e-mails" and "harassing telephone calls" to Texas recipients).

nonresident's "mere awareness" of effects in Texas. Rather, jurisdiction is supported by the *continuing* contacts the *nonresident initiated* with Texas. While Respondents rely on language in *Searcy* that *Michiana* "expressly rejected the 'directed-a-tort' theory" of personal jurisdiction, that same case described *Michiana* as merely holding that jurisdiction is not satisfied solely on the basis that a nonresident "communicat[ed] on the phone with a Texas resident," who initiated the call. *Id.* at 68; *see also Glencoe Capital Partners II, L.P.* v. *Gernsbacher*, 269 S.W.3d 157, 165 (Tex. App.—Fort Worth 2008, no pet.) (distinguishing *Michiana* on the basis that it involved a "one-time, unsolicited, fortuitous" telephone call); *Trois*, 2018 WL 706517, at *4 (distinguishing between nonresidents who are the "passive participant[s]" on a call and those who place a call to a forum or act as a "key negotiating party").

In contrast to the continuing conduct ExxonMobil seeks to investigate, the nonresident in *Michiana* did not initiate contact with the forum resident and did not purposefully create a "continuing relationship" with the forum resident, much less multiple residents or the forum itself. *See Retamco Operating, Inc.*, 278 S.W.3d at 340. Following *Michiana*, the Texas Supreme Court continues to recognize that personal jurisdiction can be satisfied without "physical ties to Texas . . . when it is clear the [nonresident] purposefully directed its activities towards Texas." *Id.* Moreover, "[u]nder . . . *Calder*, *Walden*, and *Michiana*, the fact that the plaintiff lives and was injured in the forum state is *not* irrelevant to the jurisdictional inquiry." *TV Azteca*, 490 S.W.3d at 43 (emphasis added). To the contrary, this factor supports jurisdiction "to the extent that it shows that the forum state was 'the focus of the activities of the defendant.'" *Id.* Thus, nothing in *Michiana* or its successors undermines this Court's power to exercise jurisdiction over a

nonresident who initiated continuing contacts with Texas by commencing suits intentionally targeting Texas speech, residents, and documents, thereby causing an intentional tort in the state.

(b) **The Anticipated Suit Would Arise from the Potential Defendants' Contacts with Texas.**

The second element of the due process inquiry would also be satisfied because ExxonMobil's anticipated claims would directly arise from the Potential Defendants' contacts with Texas. The contemplated claims concern a potential tort that would be the direct result of forum contacts the Potential Defendants initiated when they commenced suits, which appear to have been mere pretext to obtain ExxonMobil's documents in Texas and silence its speech there. The effect of that potential tort would be the violation of ExxonMobil's First Amendments rights, which, if it occurred, occurred in Texas where such rights are exercised. Because the contemplated torts "arise from" the Potential Defendants' contacts with the forum, the second element would be satisfied. *Retamco Operating, Inc.*, 278 S.W.3d at 338.

(c) **Exercising Jurisdiction over the Potential Defendants Would Comport with Fair Play and Substantial Justice.**

Exercising jurisdiction over the Potential Defendants for the anticipated claims would also comport with traditional notions of fair play and substantial justice. It would "not [be] unreasonable to require" the Potential Defendants to "defend in this state a tort action which is an outgrowth of [their] contact with [the] Texas resident[s]" that they intentionally targeted. *See Infanti*, 1993 WL 493673, at *5. For the same reason, it would not violate traditional notions of fair play for the Court to order pre-suit discovery concerning that potential tort action.

Where a nonresident defendant has purposefully established minimum contacts with the forum state, it bears a heavy burden to negate jurisdiction because "[o]nly in rare cases . . . will the exercise of jurisdiction not comport with fair play and substantial justice." *Retamco Operating*, 278 S.W.3d at 341. Courts consider the following five factors when conducting analyzing the reasonableness of exercising jurisdiction: (i) "the burden on the defendant"; (ii) "the interests of the forum in adjudicating the dispute"; (iii) the petitioner's "interest in obtaining convenient and effective relief"; (iv) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and (v) "the shared interest of the several States in furthering fundamental substantive social policies." *Id.* at 342. Here, each factor would support the Court's exercise of jurisdiction.

While Respondents argue that they would be burdened by litigating "in an unfamiliar jurisdiction seventeen-hundred miles away" (SFO Br. 13; Oak. Br. 14; San Mateo Br. 16), the depositions and document collection sought by the Petition would not occur in Texas, but in California and Massachusetts where the Potential Defendants and Witnesses reside. In any event, "[d]istance alone cannot ordinarily defeat jurisdiction," since "the same can be said of all nonresidents." *Moncrief Oil Int'l Inc.* v. *OAO Gazprom*, 414 S.W.3d 142, 155 (Tex. 2013). That most of the Potential Defendants are municipalities and municipal employees does not alter this principle. Texas courts do not hesitate to exercise personal jurisdiction over municipalities or their officials. *See, e.g.*, *Infanti*, 1993 WL 493673, at *6 (affirming denial of special appearance filed by the City of Phoenix, Arizona). Regardless, "once minimum contacts are established, the interests of the forum and the plaintiff justify even large burdens on the defendant." *McFadin* v. *Gerber*, 587 F.3d 753, 764 (5th Cir. 2009) (citation and internal quotation marks omitted).

Second, Texas courts have expressly noted that they have a "serious state interest in adjudicating" cases alleging a tort in Texas against a Texas resident. *Moncrief Oil,* 414 S.W.3d at 155. Indeed, no other state has "as significant an interest as Texas does in resolving a claim for a tort committed in Texas against a Texas resident." *Id.* That is particularly true where—in the words of United States District Judge Kinkeade—a Texas energy company has been "singled out" by a non-energy producing state because "there's no drilling out there."[68] Respondents' assertions that Texas has little interest in protecting the First Amendment activities of its citizens in the state are off base. The Texas Attorney General—at the risk of curtailing his own enforcement authority—filed an amicus brief in support of ExxonMobil's motion for preliminary injunction against the Attorneys General because the abuse of government power "to resolve a public policy debate undermines the truth invested in our offices and threatens free speech."[69]

Third, Respondents' arguments that ExxonMobil has little interest in obtaining relief in Texas cannot be taken seriously. ExxonMobil, as a Texas resident, "has an inherent interest in pursuing the lawsuit locally, rather than being required to travel to [another state] to pursue [its] interests." *Motor Car Classics, LLC* v. *Abbott*, 316 S.W.3d 223, 233 (Tex. App.—Texarkana 2010, no pet.).

Finally, permitting ExxonMobil to litigate the contemplated claims would comport with the interests of the interstate judicial system and the states because the anticipated action would encompass additional claims and parties that are not currently part of Respondents' nuisance suits. Unlike the California nuisance actions, which seek abatement measures to protect California cities and counties from sea level rise (Oak. Br.

[68] Stewart Aff. Ex. 71, Tr. 12:20 -13:2.
[69] Stewart Aff. Ex. 33 at 12.

4), ExxonMobil's potential abuse of process and conspiracy claims concern a possible multi-year conspiracy, which may involve Pawa and other private interests, to obtain documents and abridge ExxonMobil's First Amendment rights. Even if these differences could be overcome, Respondents' arguments concerning compulsory counterclaims are premature. ExxonMobil contests the exercise of personal jurisdiction over it in California, and it is not required to bring counterclaims in a court that lacks personal jurisdiction.

IV. CONCLUSION AND PRAYER FOR RELIEF

The claims ExxonMobil seeks discovery to investigate are intentional torts, deliberately calculated to suppress speech in Texas, shrink Texas's energy sector, and obtain documents stored in Texas. If these claims are brought, this Court would have personal jurisdiction over the Potential Defendants who purposefully initiated continuing contacts with multiple Texas residents to violate constitutional rights in the State. Both the long-arm statute and the Due Process Clause authorize personal jurisdiction over nonresidents who commit intentional torts in the state, without exception for municipalities or their employees. Furthermore, the Court need not address the special appearances filed by the Potential Witnesses, since it is not necessary for the Court to have personal jurisdiction over nonresident witnesses to authorize discovery that will be effectuated by courts in the jurisdiction where the witnesses reside. ExxonMobil therefore requests that the Court deny the Potential Defendants' special appearances and proceed to the merits of its Petition.

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CERTIFICATE OF SERVICE

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/s/ Ralph H. Duggins
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Attachment A

Evaluation of the Study, "Assessing ExxonMobil's climate change communications (1977–2014)" by Geoffrey Supran and Naomi Oreskes, published in *Environmental Research Letters*, 2017

Kimberly A. Neuendorf, Ph.D.

February 22, 2018

Kimberly A. Neuendorf was retained by Exxon Mobil Corporation to provide an evaluation of the Supran and Oreskes (2017) study, relying on her research expertise, especially with regard to the methods of content analysis. She was compensated for this review.

Kimberly A. Neuendorf, Ph.D., is Professor of Communication at Cleveland State University. She has more than 40 years of experience with quantitative content analysis research, and is the author of the widely cited methods book, *The Content Analysis Guidebook* (2nd ed., 2017, Sage Publications).

NOTE: Content analysis is a set of methods for message analysis that enjoys a long history, dating to the early 20th century (Berelson, 1952; Neuendorf, 2002; Smith, 2000), and is one of the fastest-growing methods in the social and behavioral sciences, while also having extended its reach into business, the sciences, and other disciplines (Neuendorf, 2017). Content analysis, in its most common, quantitative form, may be defined as a "summarizing, quantitative analysis of messages that follows the standards of the scientific method (including attention to objectivity/intersubjectivity, a priori design, reliability, validity, generalizability, replicability, and hypothesis testing based on theory) and is not limited as to the types of variables that may be measured or the context in which the messages are created or presented" (Neuendorf, 2017, p. 17).

INTRODUCTION

In a recent study, Geoffrey Supran and Naomi Oreskes (hereafter "S&O"; 2017) claim to have found (1) "a discrepancy between what ExxonMobil's scientists and executives discussed about climate change privately and in academic circles and what it presented to the general public" and (2) "that ExxonMobil's AGW [climate change] communications were misleading" (p. 15). In the course of their study, S&O cite my methods textbook (Neuendorf, 2002) as a source for their content analysis methods. After a detailed review of the study, its supplementary information ("SI"), and the documents S&O analyzed for their study, I have concluded that S&O's content analysis does not support the study's conclusions because of a variety of fundamental errors in their analysis. S&O's content analysis lacks reliability, validity, objectivity, generalizability, and replicability. These basic standards of scientific inquiry are vital for a proper content analysis, but they are not satisfied by the S&O study.

As described in greater detail in this report, seven fundamental flaws undermine the S&O research and are fatal to its principal findings:

I. Non-representative, confounded sampling. S&O have selected a non-representative sample of climate communications. The selection process was not objective or consistent across document types. The authors have also improperly grouped together communications that vary across time and by author and audience. Of even greater concern, the selection process groups together statements as though they were issued by a single corporate entity during times when Exxon Corporation and Mobil Oil Corporation were separate companies and misleadingly presents them as though they were issued by a unitary entity throughout the time period. As a result, S&O improperly classify statements from two separate companies (Exxon and Mobil) as though they were issued from one company.

II. Inappropriate coders. To maintain objectivity, content analysis coding ought to be conducted by coders who are at arm's-length with regard to the research. S&O's selection of themselves as coders is inappropriate because they are not blind to the purpose of the research or independent of each other. In fact, they were as non-blind as one could imagine. Moreover, their prior statements about climate change and Exxon Mobil Corporation (including Oreskes' (2015b) tweet, "Did Exxon deliberately mislead the public on climate change? Hello. Of course they did!") reveal biases against

ExxonMobil. The use of highly involved, heavily interrelated, non-blind coders renders the study non-replicable.

III. Flawed coding scheme. As described in the S&O article and the SI, the coding scheme deviates from standards of content analysis in a variety of ways. Specifically, the coding scheme shows bias against ExxonMobil, is quite complex and difficult for coders other than the co-authors to apply, instructs coders to skim articles for material to code, allows context outside the documents to guide coding, and calls for resolving coding ambiguities through discussion. None of these are appropriate in a content analysis.

IV. Lack of research questions. The study lacks theory-backed hypotheses or more general research questions, undermining any claim to objectivity. The SI purports to create research questions, but these prove to be presuppositions based on the co-authors' assumptions rather than questions that are rigorously examined.

V. Lack of disclosure. S&O fail to disclose their rationale for selecting some of the documents in their sample, including the set of advertorials that S&O assert "misled the public" (S&O, 2017, p. 1). S&O also omit essential details about their coding scheme for the content analysis. These omissions render the study non-replicable.

VI. Unwarranted inference. S&O improperly infer from content analysis that "ExxonMobil misled the public" (S&O, 2017, p. 1). Content analysis cannot legitimately be used to reach conclusions about the effect particular statements have on the public. Additional information is needed about how those who read the climate change communications in question responded to them, but S&O provide no data documenting public reception. Further, any inference to the intentions of ExxonMobil personnel who authored the various communications is also unwarranted from the content analysis.

VII. Consensus measurement. S&O note that they rely on a technique known as consensus measurement, used in prior work of one of the co-authors. Unlike content analysis, which is well established, consensus measurement does not appear to be a general, scientific method, but instead, a conclusion regarding consensus about climate change opinions in search of a method. Accordingly, the application of consensus measurement lacks reliability, objectivity, and validity.

In light of these significant errors and omissions, the conclusions reached by S&O are not sound, and should not be relied upon.

BACKGROUND

The S&O study, published in *Environmental Research Letters* (with online SI), examines climate change related communications of four different types: peer-reviewed documents, non-peer-reviewed documents, internal corporate documents, and advertorials. S&O indicate that they have used quantitative content analysis to examine these documents, and have cited my methods textbook (Neuendorf, 2002) as a source of information for the methods of content analysis. S&O also claim to be undertaking what they call a "challenge" (p. 2) posed in a blog post by ExxonMobil asking the public to read a set of documents to determine whether the company suppressed its climate change research (Cohen, 2015). S&O alter the nature of the challenge by (1) shifting from the question of suppressed research to a different claim that ExxonMobil made misleading communications to the public and (2) adding documents to their sample that were not referenced in the original blog post (S&O, pp. 2–3).

Disseminating the results of their study to the general public, the authors describe their conclusions in an op-ed piece published in the *Los Angeles Times*. "The result: a systematic discrepancy between what ExxonMobil scientists communicated in their scientific articles and internal reports, and what the company told the public in 'advertorials'—advertisements in *The New York Times* masquerading as editorials. In other words, our study showed that ExxonMobil misled the public about climate science and its implications for decades" (Oreskes & Supran, 2017).

S&O have a documented history of offering opinions about climate change generally and the conduct of ExxonMobil specifically. Since claiming nearly 15 years ago that a scientific consensus on climate change exists (Oreskes, 2004), Oreskes has equated expressions of disagreement with this consensus by scientists and by ExxonMobil to the tobacco industry's suppression of information regarding tobacco's negative health effects (Oreskes & Conway, 2010; Oreskes, 2015a).

Further, on the same day that ExxonMobil published its blog post asking the public to read its selection of documents, Oreskes issued the tweet: "Did Exxon deliberately mislead the public on climate change? Hello. Of course they did!" (Oreskes, 2015b).

Also, Supran has supported the fossil fuel divestment movement. For example, well before the S&O study was published, Supran, in a tweet, endorsed the view that "Exxon's actions may have imperiled all of humanity. It's time to divest" (Supran, 2016).

ANALYSIS

Each of the seven areas of concern about the S&O methods listed above will be elaborated upon in the sections below.

I. The S&O sample is non-representative, and the four stratified subsamples ignore important differences in time period, corporate affiliation, specific authorship, and intended audience.

I. A. The sampling is not representative. The sampling strategy of S&O is stratified. The sample is stratified on the characteristic of document type: peer-reviewed documents, non-peer-reviewed documents, internal documents, and advertorials. Each of these four types is represented by a separate sample.

In order for each of the four samples to be representative of (and therefore generalizable to) the relevant type of document, either all documents of that type need to be collected (constituting a *census* of that group of documents) or the documents need to be collected in a *probability sample* that is statistically a good representation of that type. Neither of these techniques was used by S&O, as described in the S&O journal article and SI.

Referring to the 2015 ExxonMobil blog post (Cohen, 2015) that urges readers to examine both internal and research documents produced by ExxonMobil, S&O indicate that they have taken "up that challenge by analyzing the materials highlighted by the company, and comparing them with

other publicly available ExxonMobil communications on AGW" (S&O, p. 2). Yet S&O have strayed from the collections that ExxonMobil provided in that challenge, as indicated in their Table 1:

> a. The peer-reviewed documents (*n*=72) are mostly from the ExxonMobil list, but three documents are added from "other" sources;
>
> b. The non-peer-reviewed documents (*n*=47) are also mostly from the ExxonMobil list (*n*=32), but 15 additional documents are from "other" sources;
>
> c. The internal documents (*n*=32) are a mixture of documents provided by ExxonMobil as linked from its 2015 blog post (*n*=22), documents collected by *InsideClimate News* (an environmental news organization) (*n*=12, 9 unique to *ICN* and 3 overlapping with ExxonMobil's list), and one document from an "other" source;
>
> d. The advertorials (*n*=36) are all from a collection by PolluterWatch, a Greenpeace project.

None of these four seem to have been produced by a rigorous, well-documented sampling procedure that would result in a representative sample. S&O give some statements indicating their strategies, but these are not replicable (i.e., repeatable by others). For example, they indicate that the sample of internal documents was "the relevant, publicly available internal documents that have led to recent allegations against ExxonMobil" (p. 1, SI). There is no explanation of how "relevant" was operationalized in the selection of documents.

And the advertorials were taken only from *The New York Times*, a publication that is acknowledged as having an "elite" readership (Brown & Waltzer, 2005), from a list by PolluterWatch, a project of Greenpeace dedicated to "holding polluters accountable." This limitation and potential bias of the advertorial sample has not been discussed or taken into account by S&O.

Since a main argument of S&O's conclusion is that the content differed across the types of documents and that this indicates some type of biased communication on the part of ExxonMobil, then it is important that the four document types were collected in a matched and representative fashion. In general, there is no explanation of how documents were collected objectively via comparable techniques across document types, and, upon inspection, it is clear that numerous documents were hand-picked and not part of a comprehensive sampling strategy. Indeed, S&O

admit that there are "countless additional climate change communications from ExxonMobil that could be included in future work" (p. 2), thus undercutting the integrity of their own sampling.

I. B. Further, the separation of the four "type of document" sub-samples is confounded with several other important variables. First, there is a confounding of type of document and *time period* in the presentation of findings. That is, all pre-1980 documents are internal documents, only one post-1995 document is internal, and all post-2004 documents are research pieces. So, when S&O conclude that "there is a discrepancy between what different document categories say, and particularly what they emphasize" (p. 12), they have not disentangled the variable "document category" (i.e., sample stratum) from time period. Thus, it is not really known how much of the difference is attributable to document type/category and how much is attributable to time period. While the SI does present figures reworked to include only "overlapping publication periods" (1989–2004), all pre-1989 internal documents are still included. And, the Fisher's exact test statistic, which S&O applied to the full set of four samples over the 1977–2014, was not repeated for this set of documents from the overlapping time periods.

The S&O study analyzes 187 communications they attribute to ExxonMobil originating over a 38-year period. This time span included many changes in society, science, business, and the corporate identity and operation of ExxonMobil in particular. In 1999, the separate oil entities Exxon and Mobil merged to form ExxonMobil, prompting many changes in corporate structure for the Fortune 500 oil and gas corporation.

Thus, in the S&O study, there is also a further confounding of type of document, time period, and *corporate affiliation* (i.e., Exxon vs. Mobil vs. ExxonMobil). S&O wish to compare the content of document types, ostensibly from a single corporate source (ExxonMobil). However, S&O improperly classify pre-merger documents from two separate corporations (Exxon Corporation and Mobil Oil Corporation) as though they were issued from one company. For documents with identifiable corporate sources:

a. Documents in the peer-reviewed sample are essentially all Exxon or ExxonMobil (never Mobil), with an even split pre- and post-merger;

b. Documents in the non-peer-reviewed sample are nearly all Exxon or ExxonMobil (only one originates from Mobil), with far more post-merger than pre-merger (65% vs. 35%);

c. Documents in the internal documents sample are nearly all from Exxon during the pre-merger period; and

d. The advertorial sample is wholly from Mobil or ExxonMobil (never from Exxon), with far more pre-merger than post-merger documents (69% vs. 31%)[1].

So, in comparing the four document types, any analysis is also comparing time period and corporate source. For example, comparing advertorials with non-peer-reviewed documents would in essence be a comparison of (notably unique) Mobil pre-merger advertorials with ExxonMobil post-merger non-peer-reviewed documents. Comparing internal documents with advertorials in the pre-merger period would in essence be a comparison of Exxon Corporation documents with Mobil Oil Corporation documents.

Elsewhere, I (Neuendorf, 2002; 2017) propose that when engaging in content analysis, the researcher ought to attempt to identify "critical variables," i.e., those that are vital to a comprehensive understanding of (1) the message pool (2) in the specific medium under investigation (2017, p. 97). In this case, the examination of documents produced over time by a corporation that has experienced significant organizational change over that time demands a look at what critical characteristics of the organization may have had a differential impact on the content of the documents over time and across types of document. The documents included in the S&O set of four samples were authored by a wide range of individuals affiliated with Exxon, with Mobil, and with ExxonMobil over a four-decade period. Both *corporate affiliation*, as noted above, and *specific authorship* seem to be critical variables related to the nature of the four types of documents over time.

In examining solely the 72 peer-reviewed documents, one finds a mixture of ExxonMobil and academic (non-ExxonMobil) co-authors for most documents. The pre-merger peer-reviewed

[1] In the early portion of the study period (i.e., in the 1980s), Mobil became known for its involvement in the development of the advertorial, a newspaper or magazine advertisement that takes the form of a news or editorial journalistic piece. The advertorial has become a widely used and integral part of corporate communications across industries (Brown & Waltzer, 2006). The unique public relations voice of Mobil, prior to its merger with Exxon, has been the focus of scholarly analysis, as noted by S&O (e.g., they cite: Brown & Waltzer, 2005; Crable & Vibbert, 1983; St. John, 2014a; 2014b; see also Murphree & Aucoin, 2010; Smith & Heath, 1990).

documents are all authored or co-authored by Exxon personnel (i.e., none are by Mobil). Prior to the merger, there are 11 Exxon authors noted, with 23 of the 30 pieces including Haroon S. Kheshgi as an author.

In the post-merger period, the collection of peer-reviewed documents becomes more diverse in terms of authorship. Obviously, the documents produced after the 1999 merger are all authored or co-authored by ExxonMobil personnel, but various divisions of the Exxon Mobil Corporation now begin to be represented. While nearly all the Exxon Corporation authors prior to the merger are credited as affiliated with the Exxon Research and Engineering Company, after the merger, in addition to the newly minted ExxonMobil Research and Engineering Company, six additional corporate affiliations appear: ExxonMobil Upstream Research Company, ExxonMobil Development Company, ExxonMobil Production Company, ExxonMobil Exploration Company, Exxon Mobil Corporation, and ExxonMobil Gas and Power Marketing Company.

Similarly, the number of engaged Exxon or ExxonMobil authors expands dramatically over time. Prior to 1999, 11 different Exxon authors are identified. After 1999, there are 27 different ExxonMobil personnel identified as authors/co-authors of peer-reviewed documents. Thus, there is increasing variability in authorship over time, which might relate to a greater variety of viewpoints represented in the peer-reviewed documents post-merger.

Another critical variable when considering the four different sample types seems to be *intended audience*. The four document samples were aimed at a range of audiences. Authors across the four document types include public relations specialists, climate scientists, engineers, and economists. It is unlikely that the same content would be produced by these different types of authors for different audiences with different purposes in mind. For example, there seems little reason for an advertorial aimed at the general public to talk about stranded fossil fuel assets, a complex and speculative economic issue. And economic issues are not likely to be addressed in the purely scientific peer-reviewed articles.

I. C. There are additional discrepancies in the samples. As noted above, the S&O journal article and SI do not provide full details as to how the four samples were collected. Some discrepancies emerge when examining the 187 documents.

The "peer-reviewed" and "non-peer-reviewed" distinction is not made by ExxonMobil in its 2015 blog post (Cohen, 2015). The two lists of research reports presented by ExxonMobil are "peer-reviewed publications" and "additional publications." While this distinction is not clear-cut, in that multiple "additional publications" are peer-reviewed, no comparison is made between these two types by ExxonMobil in its presentation. S&O do make explicit comparisons between peer-reviewed and non-peer-reviewed documents, and their allocation of documents into these two bins is not always correct. That is, there are some peer-reviewed documents listed in their non-peer-reviewed sample, and some non-peer-reviewed documents listed in their peer-reviewed sample. And, there are several documents within the non-peer-reviewed collection for which Exxon/ExxonMobil personnel are reviewers or panelists, not authors.

These and other discrepancies concerning how the four samples were constituted further call into question the rigor of the S&O study.

In sum, the four stratified samples utilized for the S&O content analysis are not clearly representative of the four types of documents the researchers wished to analyze, and the four types are confounded with time period and corporate affiliation. Further, specific authorship, variety of authorship, corporate division affiliation, and intended audience all seem to be critical variables that have not been taken into account when comparing the four sample types and examining potential trends over time. And, additional discrepancies with regard to the documents call into question the validity of the processes of sampling and document collection.

II. The coders for the S&O content analysis are highly involved in the topic area, biased, heavily interrelated, and not blind to the purpose of the research, rendering them inappropriate for the task.

As indicated in my methods text on content analysis, a coding scheme should be created so that once trained, coders "from varied backgrounds and orientations will generally agree on its application" (Neuendorf, 2002, p. 9). And, "any a priori requirement in coder qualifications may limit the validity of a coding scheme, particularly with regard to external validity, as well as limit the replicability of the study" (Neuendorf, 2017, p. 157). While some content analyses, including the S&O one, may require intensive coder training or even some type of past knowledge or education, "coding should still not be dependent on particular individuals, but rather on a certain classification

of individuals (e.g., experienced video gamers, Spanish speakers, or individuals with a type of medical qualification) so that coders are still interchangeable within this classification" (p. 157). In the case of S&O, the coding procedure as presented does seem to be dependent on the particular individuals who were the coders, i.e., the investigators themselves.

Content analysis coding ought to be conducted with coders who are at arm's-length with regard to the research, in order to maximize objectivity. Optimally, coders should be blind to the research questions or goals. In the S&O study, the coders were not blind. In fact, they were as non-blind as could be imagined. They were the investigators themselves, as well as an affiliated graduate student. In this particular case, the problematic nature of informed coders is magnified by the coders' long-time and intensive involvement in the popular communication of climate change. Further, two of the coders have publicly demonstrated particular biases that existed before the execution of the S&O study (Oreskes, 2004; Oreskes, 2015a, 2015b; Oreskes & Conway, 2010; Supran, 2016). As noted in the Background section above, Oreskes has a long history of negative commentary about ExxonMobil's activities, including the tweet: "Did Exxon deliberately mislead the public on climate change? Hello. Of course they did!" (Oreskes, 2015b). And Supran also tweeted: "Exxon's actions may have imperiled all of humanity. It's time to divest" (Supran, 2016).

It is also important that at least two content analysis coders are employed, in order to provide reliability assessment. The use of two or more coders in reliability assessment assumes that the codings of the coders are produced independently of one another. In the case of S&O, the coders are interdependent in their broader work, and it seems likely that they would approach the coding task with similar orientations, i.e., that they would not achieve the independence that is expected of coders.

The use of highly involved, heavily interrelated, non-blind coders renders the study non-replicable. That is, it is likely that blind coders not involved in climate change research or advocacy would not be readily trainable on this coding scheme, would not produce such reliable codings, nor would they obtain results highly comparable to those presented by S&O.

III. S&O employ a coding scheme that includes bias, is complex and requires specialized expertise beyond the scheme, and instructs coders to engage in activities that are

unacceptable for content analysis, including skimming, looking beyond the documents for context, and resolving coding ambiguities through discussion.

III. A. The coding scheme shows bias. In the section of the SI that seems to be the closest thing available to a full codebook, this passage is found: "Moreover, some of the analyzed documents demonstrate that ExxonMobil's use of tentative wording to emphasize uncertainty was, at least sometimes, intentional" (p. 2). This statement seems to be a conclusion, not an unbiased instruction to coders, and is not indicative of an objective coding scheme.

III. B. The coding scheme seems to be quite complex and difficult to apply. In particular, the coding of the scientific articles (peer-reviewed and non-peer-reviewed) clearly requires expertise beyond that provided by the coding scheme as presented in the SI. Additional coder training or education is necessary, but this training is not specified. It is doubtful that unaffiliated coders blind to the intent of the study would do a very good job using it. This study's execution is dependent on very specialized knowledge, and dependent on the background of the particular individuals executing the research. Thus, the study's objectivity and reliability, and therefore also its validity, are called into question.

III. C. The coding instructions deviate from standard, recommended practice. Unless specific processes are proscribed in the coding scheme, using *context* for determining coding decisions is not standard practice. In the S&O research, coders seem to be encouraged to use contextual information. Coder notes in the SI include the following: "Context is key to this paper." Given that different coders are likely to have different contextual knowledge approaching the coding task, this precludes objectivity and reliability of the content analysis.

Further, coders were allowed to "skim" articles (S&O, p. 3) to locate codable material, that is, to identify coding units. This type of *incomplete review* by coders does not match any currently recommended methods for unitizing (identifying codable units) or for coding in content analysis.

"Coding ambiguities" were *resolved through discussion*, which is not a recommended procedure for a final coding process in content analysis. Although certainly part of the development process for a coding scheme, and for training as well, such discussion should not be part of the final analysis. In fact, the SI indicates that "through 'negotiated agreement' of discrepancies between coders,

intercoder agreement was then calculated" (p. 6). So, the difference between S&O's "intercoder reliability" and "intercoder agreement" is pre-negotiated reliability vs. post-negotiated agreement, it seems. This is not commonly accepted practice for content analysis. Given that the pre-negotiated reliabilities are all acceptable, there seems no reason to engage in the additional, questionable and potentially biased process of negotiated agreement.

The SI presents "secondary codes," seemingly for the four sets of "document position" variables. It is unclear how these more specific codes were used (they have no code numbers assigned). And it is unclear whether reliability assessment was conducted on these secondary codes, or only on the primary codes.

These limitations in the coding scheme, and its presentation, prevent the study from being replicable. As one of the goals of science, replicability is an important aspect of content analysis. It removes the analysis from the realm of being executable only by certain individuals. One basic motivation for content analysis is to measure characteristics of messages that might be influential to audience members receiving those messages. And one core assumption is that if extreme technical expertise is needed to detect certain characteristics of messages, these characteristics are unlikely to be discerned by the general public.

IV. The S&O study lacks guiding research questions, limiting its objectivity.

Content analysis is optimally conducted within the framework of the scientific method. It is therefore important that the research be guided by specific hypotheses derived from broadly generalizable theory, or more general research questions optimally derived from theory or past scholarship. In this way, the relative objectivity of the research endeavor is supported. The S&O journal article does not present hypotheses or research questions.

The S&O SI does indicate that "research questions" were created (but not actually presented in the article or the SI) "in order to determine whether the corporation misled consumers and/or shareholders by making public statements that cast doubt on climate science and its implications, and which were at odds with available scientific information and with what the company knew" (p.

1). This phrasing is more consistent with presuppositions than queries, revealing assumptions made by the researchers, and indicating a bias that precludes the study's objectivity.[2]

Even more definitive, a public *statement* of the study's major conclusion was made by one of the authors *prior* to the execution of the study. As noted above, Oreskes issued the following statement on social media on October 21, 2015: "Did Exxon deliberately mislead the public on climate change? Hello. Of course they did!" (Oreskes, 2015b). This pre-study conclusion violates basic tenets of scientific research.

V. S&O fail to disclose important aspects of their document sampling and their coding scheme, making the study non-replicable.

While S&O have provided a good quantity of information in their journal article and SI, they have failed to provide essential material for the study to be repeatable by others. The S&O research lacks full disclosure of all details regarding sampling and content analysis coding processes, such that even if the known flaws were able to be rectified, there are additional possible important limitations to the design of the research.

The coding scheme for the S&O content analysis is (necessarily) only briefly described in the journal article, while the SI provides greater detail. Still, the reader cannot be certain of the full scope of the coding scheme. There is no standalone codebook with full instructions, as one would expect to have been provided to the coders, or an outline or notes regarding coder training.

Unitizing is not addressed in the documentation provided in the journal article or its SI. While ostensibly the unit of analysis is the individual document (e.g., a peer-reviewed research article, or an advertorial), the SI presents the full collection of text segments that were coded in particular ways, and therefore served as units. As referred to in the SI, the researchers are providing the "coded Endorsement (EP), Impact (EP) [sic], and Solvable (EP) [sic] Points . . . and substantiating quotations (coding units)" (p. 16). So, the units that were coded were not the full documents, and the segmentation of the documents into these coded units has not been explained. No unitizing

[2] An example of a formal research question would be: "RQ1—Do the four types of documents (peer-reviewed, non-peer-reviewed, internal, and advertorials) differ in the extent to which they explicitly endorse, with quantified support, the view that AGW is real and human-caused?" (This would relate to the S&O measurement called EP1.)

reliability was assessed (a process that is recommended but unfortunately not always conducted). Without clear instructions as to a unitizing process, such units are likely to fluctuate across coders.

In sum, these deficiencies in reportage alone render the study non-replicable.

VI. The S&O study makes an unwarranted inference from its content analysis to its claim as to how ExxonMobil's climate change communications were received. Further, any inference to the intentions of ExxonMobil personnel who authored the various communications is also unwarranted from the content analysis.

Content analysis is particularly suited to analyze the "message" component in the classic Source-Message-Receiver model of communication. To infer from content analysis findings to source characteristics or receiver outcomes, the researcher needs to either (1) collate the content analysis data or findings with data from the sources or receivers or (2) have valid information on "well worn pathways" of relationships between sources and messages, or between messages and receivers, from substantial previous research. The S&O study attempts to draw some inferences to sources and receivers, without having done either (1) or (2).

First, the investigators go beyond the boundaries of what one may conclude from content analysis by making assumptions about the *source(s)* of the messages. S&O contend that ExxonMobil misled the public, but the term "misled" implies a potential intention on the part of sources that has not been examined in the S&O research. Importantly, the diversity of the ExxonMobil sources described in section I.B. above runs counter to the S&O assumption of a unified source acting with intentionality.

In particular, documents that predate the 1999 merger come from completely separate organizations, making it impossible to attribute some intention to mislead from any differences found in documents from the two corporations. All the peer-reviewed scientific documents pre-merger were authored/co-authored by Exxon personnel, while all advertorials were from Mobil staff. It does not seem logical to expect that Mobil should have adopted Exxon's scientific position on climate change at that time and presented those views in advertorials in which Exxon's name did not appear.

Most of the research documents, peer-reviewed and non-peer-reviewed, were co-authored by a mixture of ExxonMobil (or Exxon, or Mobil) employees and academic researchers. It is not

appropriate to assume that the academic researchers were presenting an ExxonMobil corporate perspective, as their faculty status would be contingent on conducting independent, peer-reviewed research. This further negates the notion that the documents presented–or should have presented–a unified corporate viewpoint.

Second, with regard to the *receivers* of the messages, S&O maintain that those members of the public who were exposed were "misled," without ascertaining how many consumers may have been exposed to the messages, and whether they actually changed their beliefs as a result of exposure. This unwarranted inference is not supported by the content analysis research.

VII. S&O rely on consensus measurement, a method that does not appear to qualify as an accepted, scientific method.

VII. A. Consensus measurement is not a standard, widely accepted method. Consensus measurement, in comparison to content analysis, is not a standard, time-honored research technique. It does not seem to be a methodology or a set of methods that may be applied to a range of phenomena, i.e., it is specifically the process of quantifying scientific consensus with regard to anthropogenic global warming (AGW). In a sense, it seems to be a conclusion in search of a method, as S&O note it has been used to "quantify the consensus on AGW" (p. 2).

In the S&O research, consensus measurement is not given full explanation; their cited source, Cook et al. (2013), present consensus measurement as an examination of past research (as in a meta-analysis,[3] but lacking the statistical rigor), while allowing comparison and change, with any disagreements resolved by a third party. Further, S&O state that in their study they "adapt and combine the methodologies" of consensus measurement and content analysis (p. 2) without specifying how this was done. S&O have not applied consensus measurement in the usual way, that is, by estimating a numerical "consensus rate." Additional information is needed to fully assess how these decisions affected the coding scheme and other aspects of the study, but, at a minimum, the blended methodology is unreliable and the inherent biases of consensus measurement were introduced into the study.

[3] Meta-analysis is a statistical procedure for combining data or results from multiple studies on the same phenomenon, increasing statistical power and creating a total estimated effect and allowing an overall conclusion.

VII. B. Consensus measurement is practiced by a limited circle of researchers. As referred to in the S&O piece, consensus measurement seems to be located within the purview of a specific group of researchers. The investigators using consensus measurement seem to be a relatively small group, with inter-citation and self-citation notable (e.g., Anderegg & Goldsmith, 2014; Cook, 2016; Cook & Jacobs, 2014; Cook et al., 2013; Cook et al., 2016; Maibach & van der Linden, 2016; Oreskes, 2004). This type of interdependence has the potential to create an "echo chamber" of reinforcing ideas, without critique and correction (see, e.g., Jankó, Vancsó, & Móricz, 2017).

VII. C. Consensus measurement has been criticized in the academic literature. Critiques of consensus measurement as practiced by S&O have been produced by independent critics (e.g., Stirling, 2017), and in peer-reviewed form (Pearce et al., 2017), including in the journal that published the S&O research, *Environmental Research Letters* (e.g., Dean, 2015; Tol, 2016). In particular, Tol (2016) conducted a thorough analysis of the "highly influential" Cook et al. (2013) study of consensus within the scientific literature concerning AGW. Tol identifies a number of limitations of the techniques used by Cook et al., including a failure to take into account systematic interrater differences, possible non-independence of raters, and discrepancies with regard to how the documents sampled were collected. Tol notes that when papers or experts that do not take a position on the human impact on global warming are included in the analysis, the consensus rate drops from 96%–98% to 33%–63%. These factors preclude the technique's reliability, objectivity, and validity.

CONCLUSION

The above analysis documents the numerous fundamental and fatal flaws in the study's content analysis. In short, the content analysis is unreliable, invalid, biased, not generalizable, and not replicable. Accordingly, S&O provide no scientific support for either a discrepancy among ExxonMobil's climate change communications, or a claim that ExxonMobil misled the public.

REFERENCES

Anderegg, W. R. L., & Goldsmith, G. R. (2014). Public interest in climate change over the past decade and the effects of the 'climategate' media event. *Environmental Research Letters*, *9*, 054005. doi:10.1088/1748-9326/9/5/054005

Berelson, B. (1952). *Content analysis in communication research*. New York: Hafner.

Brown, C., & Waltzer, H. (2005). Every Thursday: Advertorials by Mobil Oil on the op-ed page of *The New York Times*. *Public Relations Review*, *31*, 197–208.

Brown, C., & Waltzer, H. (2006). Buying national ink: Advertorials by organized interests in TIME Magazine, 1985–2000. *Journal of Political Marketing*, *5*(4), 19–45.

Cohen, K. (2015, Oct. 21). When it comes to climate change, read the documents. Retrieved from http://www.exxonmobilperspectives.com/2015/10/21/when-it-comes-to-climate-change-read-the-documents/

Cook, J. (2016). *Closing the "consensus gap" by communicating the scientific consensus on climate change and countering information*. Ph.D. thesis, School of Psychology, The University of Western Australia.

Cook, J., & Jacobs, P. (2014). Scientists are from Mars, laypeople are from Venus: An evidence-based rationale for communicating the consensus on climate. *Reports of the National Center for Science Education*, *34*(6), 3.1–3.10.

Cook, J., Nuccitelli, D., Green, S. A., Richardson, M., Painting, R., Way, R., & Jacobs, P. (2013). Quantifying the consensus on anthropogenic global warming in the scientific literature. *Environmental Research Letters*, *8*, 024024. doi:10.1088/1748-9326/8/2/024024

Cook, J., Oreskes, N., Doran, P. T., Anderegg, W. R. L., Verheggen, B., Maibach, E. W., Carlton, J. S., Lewandowsky, S., Skuce, A. G., Green, S. A., Nuccitelli, D., Jacobs, P., Richardson, M., Winkler, B., Painting, R., & Rice, K. (2016). Consensus on consensus: a synthesis of consensus estimates on human-caused global warming. *Environmental Research Letters*, *11*, 048002. doi:10.1088/1748-9326/11/4/048002

Crable, R. E., & Vibbert, S. L. (1983). Mobil's epideictic advocacy: 'Observations' of Prometheus-bound. *Communication Monographs*, *50*, 380–394.

Dean, B. J. F. (2015). Comment on 'Quantifying the consensus on anthropogenic global warming in the scientific literature'. *Environmental Research Letters*, *10*, 039001. doi:10.1088/1748-9326/10/3/039001

Jankó, F., Vancsó, J. P., & Móricz, N. (2017). Is climate change controversy good for science? IPCC and contrarian reports in the light of bibliometrics. *Scientometrics*, *112*, 1745–1759.

Maibach, E. W., & van der Linden, S. L. (2016). The importance of assessing and communicating scientific consensus. *Environmental Research Letters*, *11*, 091003. doi:10.1088/1748-9326/11/9/091003

Murphree, V., & Aucoin, J. (2010). The energy crisis and the media: Mobil Oil Corporation's debate with the media 1973–1983. *American Journalism*, *27*(2), 7–30.

Neuendorf, K. A. (2002). *The content analysis guidebook*. Thousand Oaks, CA: Sage Publications.

Neuendorf, K. A. (2017). *The content analysis guidebook* (2nd ed.). Thousand Oaks, CA: Sage Publications.

Oreskes, N. (2004). The scientific consensus on climate change. *Science*, *306*, 1686.

Oreskes, N. (2015a, Oct. 9). Opinion: Exxon's climate concealment. *The New York Times*, p. A21.

Oreskes, N. (2015b, Oct. 21). Did Exxon deliberately mislead the public on climate change? Hello. Of course they did! [Tweet]. Retrieved from https://twitter.com/NaomiOreskes/status/656817219440087041

Oreskes, N., & Conway, E. M. (2010). *Merchants of doubt: How a handful of scientists obscured the truth on issues from tobacco smoke to global warming*. New York: Bloomsbury Press.

Oreskes, N., & Supran, G. (2017, Sept. 1). Yes, ExxonMobil misled the public. *LA Times*. Retrieved from http://www.latimes.com/opinion/op-ed/la-oe-oreskes-supran-exxonmobil-20170901-story.html

Pearce, W., Grundmann, R., Hulme, M., Raman, S., Kershaw, E. H., & Tsouvalis, J. (2017). Beyond counting climate consensus. *Environmental Communication*, *11*, 723–730.

Smith, C. P. (2000). Content analysis and narrative analysis. In H. T. Reis & C. M. Judd (Eds.), *Handbook of research methods in social and personality psychology* (pp. 313–335). Cambridge: Cambridge University Press.

Smith, G. L., & Heath, R. L. (1990). Moral appeals in Mobil Oil's op-ed campaign. *Public Relations Review*, *16*(4), 48–54.

St. John, B. III. (2014a). Conveying the sense-making corporate persona: The Mobil Oil 'Observations' columns, 1975–1980. *Public Relations Review*, *40*, 692–699.

St. John, B. III. (2014b). The 'creative confrontation' of Herbert Schmertz: Public relations sense making and the corporate persona. *Public Relations Review*, *40*, 772–779.

Stirling, M. (2017, Aug. 31). *Merchants of consensus: A public battle against Exxon*. Retrieved from SSRN: https://ssrn.com/abstract=3029939.

Supran, G. (2016, June 16). "Exxon's actions may have imperiled all of humanity..It's time to divest"- Strong, sane words from DC lawmakers [Tweet]. Retrieved from https://twitter.com/GeoffreySupran/status/743491356635496448

Tol, R. S. J. (2016). Comment on 'Quantifying the consensus on anthropogenic global warming in the scientific literature'. *Environmental Research Letters*, *11*, 048001. doi:10.1088/1748-9326/11/4/048001