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

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

EXXON MOBIL CORPORATION'S BRIEF OPPOSING THE ATTORNEY GENERAL'S MOTION TO DISMISS CERTAIN DEFENSES OR FOR A PROTECTIVE ORDER AND SUPPORTING ITS CROSS-MOTION FOR LEAVE TO AMEND

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Exxon Mobil Corporation ("ExxonMobil" or the "Company") submits this brief opposing the motion of the Office of the New York Attorney General (the "Attorney General") to dismiss ExxonMobil's defenses or, in the alternative, for a protective order, and in support of ExxonMobil's cross-motion for leave to amend its answer.

PRELIMINARY STATEMENT

In this action, ExxonMobil asserts defenses of selective enforcement, conflict of interest, and official misconduct. (Answer, Separate Defenses Nos. 29–30, 34–36.) Those defenses are rooted in the Attorney General's three-year campaign against the Company for daring to hold views on climate policy that do not align with those promoted by the Attorney General and its confederates. In innumerable briefs filed in multiple fora, ExxonMobil has laid out the factual allegations that support its defenses against the Attorney General. Apparently, the Attorney General believes more ink must be spilled. In its motion to dismiss those defenses, the Attorney General does not claim to be unaware of ExxonMobil's allegations or that it has suffered any prejudice from the purported pleading deficiencies that form the basis for its motion, and for good reason. ExxonMobil has explained in countless briefs, correspondence, and other disclosures that its defenses arise from the Attorney General's collusion with private, special interests to selectively target ExxonMobil because of disagreements over climate policy.

The Attorney General's efforts to contest the merits of ExxonMobil's defenses provide ample evidence of the Attorney General's understanding of those defenses. They also show why ExxonMobil's defenses should not be dismissed. While the Attorney General would have this Court impose a burden on ExxonMobil to support its defenses with evidence at this stage of the case, New York law imposes no such requirement. Nor is ExxonMobil required to rebut a presumption of good faith. All that is required to withstand dismissal is plausible allegations, and

ExxonMobil's defenses are fully supported by factual allegations—including those based on discovery recently provided by the Attorney General—that shed further light on the Attorney General's misconduct. Indeed, the Attorney General advised the Second Circuit in a related case that this Court was the appropriate venue before which to raise such objections. Should the Court prefer that the Answer contain a recounting of those well-known allegations, ExxonMobil seeks leave to amend its answer.[1]

The Attorney General's alternative request for a protective order should also be rejected. Contrary to well-established New York law, the Attorney General contends it is required to produce only those documents that relate to its allegations against ExxonMobil. That is wrong. In addition to providing discovery on its claims against ExxonMobil, the Attorney General must also produce discovery on ExxonMobil's defenses. There should be no dispute over this simple proposition, but the Attorney General's position betrays a strategy of obstruction. This motion amounts to nothing more than an attempt to prolong pretrial proceedings and delay the production of relevant and material information necessary to the preparation of ExxonMobil's defense. The Attorney General's motion should be denied.

STATEMENT OF FACTS

A. The Attorney General and Special Interests Colluded to Suppress ExxonMobil's Speech.

The Attorney General has colluded for years with private, special interests to use government power to coerce acceptance of their climate policy agenda. (AA ¶ 30.) The architects of this unlawful abuse of power developed their strategy at a June 2012 meeting in La Jolla, California, entitled a "Workshop on Climate Accountability, Public Opinion, and Legal

[1] A proposed amended answer ("Amended Answer" or "AA") is attached as Exhibit A to the Affirmation of Justin Anderson filed in support of this brief. All citations are to ExxonMobil's Separate Defenses.

Strategies." (AA ¶ 31.) Peter Frumhoff, the Director of Science and Policy for the Union of Concerned Scientists, and Naomi Oreskes, a Harvard professor and longtime critic of ExxonMobil, "conceived" of this workshop. (*Id.*) They also recruited Matthew Pawa, a litigator who unsuccessfully sued ExxonMobil in 2009 for allegedly causing global warming, to speak as a panelist. (*Id.*) The attendees discussed strategies for silencing the speech of energy companies considered obstructive to their climate change policy aims. (AA ¶ 32.) In particular, they proposed using law enforcement to "maintain[] pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming." (*Id.*) Recognizing the broad power of state attorneys general, the La Jolla participants observed that even "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light." (*Id.*)

Former Attorney General Eric Schneiderman began covertly working with those special interests after the La Jolla meeting. (AA ¶ 34.) In June 2015, Oreskes met with the Attorney General to discuss the purported history of misinformation she attributed to ExxonMobil. (*Id.*) That same year, the Rockefeller Family Fund contacted Attorney General Schneiderman to express "concern" about ExxonMobil's positions on climate change and was "encouraged by Schneiderman's interest." (*Id.*) The Attorney General and the Rockefeller Family Fund exchanged at least a dozen emails concerning the "activities of specific companies regarding climate change." (AA ¶ 37.)

The Attorney General's coordination with special interests is further supported by documents produced by the Attorney General just two weeks ago and nearly five months after ExxonMobil served its document requests. [redacted]

[redacted] (AA ¶ 35.) [redacted] (*Id.*) [redacted] (*Id.*) [redacted] (AA ¶ 36.) [redacted] (*Id.*) Given the Attorney General's reluctance in producing these documents, these emails, which are attached to the Amended Answer as Exhibits 8 through 12, might be the first of many documents the Attorney General possesses and has failed to produce pertaining to its coordination with special interests.

In January 2016, the Rockefeller Family Fund hosted a sequel to the La Jolla conference. (AA ¶ 38.) During that meeting, the coalition's objectives came into sharper focus with ExxonMobil directly in its crosshairs. (*Id.*) The meeting's agenda declared the following goals for its "Exxon campaign":

- "drive divestment from Exxon";
- "delegitimize [ExxonMobil] as a political actor"; and
- "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."

(*Id.*) Those expressly political goals are not legitimate objectives of any bona fide law enforcement action. Nevertheless, the attendees considered "AGs" as one of the "the main avenues for legal actions & related campaigns" for "creating scandal" and "getting discovery." (*Id.*)

[redacted]

(AA ¶ 39.) [redacted]

[redacted]

(*Id.*) [redacted] (*Id.*) [redacted]

[redacted] (*Id.*)

B. The Attorney General Used State Power Against ExxonMobil for Allegedly Being a "Climate Change Denier."

The Attorney General's participation and coordination with special interests in this campaign against ExxonMobil was not publicly revealed until March 29, 2016, when Attorney General Schneiderman hosted a press conference with a collection of state attorneys general, self-styled the "AGs United for Clean Power." (AA ¶ 40.) At the press conference, Attorney General Schneiderman promoted "clean power" from renewable sources as the only legitimate response to climate change. (AA ¶ 41.) He insisted: "We have to change conduct" to "mov[e] more rapidly towards renewables." (*Id.*) Vowing "to step into th[e] [legislative] breach" and unleash his law enforcement powers against perceived enemies, Attorney General Schneiderman declared there could be "no dispute" about his climate policy proposals, only "confusion" and "misperceptions in the eyes of the American public that really need to be cleared up." (*Id.*) He further denounced the "morally vacant forces" that disagreed with him and boasted that his office already "had served a subpoena on ExxonMobil." (*Id.* ¶¶ 41–42.)

After the press conference, the Attorney General endeavored to conceal the involvement

of the La Jolla architects who were lurking in the background. (AA ¶ 43.) Mere hours before the press conference, Pawa and Frumhoff led secret workshops for the attorneys general and their staffs. (*Id.*) Recognizing the need to conceal the Attorney General's connections to these activists, when a *Wall Street Journal* reporter contacted Pawa shortly after the press conference to inquire about Pawa's role, the chief of the Attorney General's Environmental Protection Bureau advised Pawa to dissemble, writing: "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event." (*Id.*) The contents of the activists' presentations also remain shielded from public scrutiny. (*Id.*)

Following the March press conference, the Attorney General signed a "Climate Change Coalition Common Interest Agreement" designed to shield information relating to the conference. (AA ¶ 44.) That agreement memorialized the coalition's intent to promote one side of the climate policy debate, and it described its "common interest" as "limiting climate change" and "ensuring the dissemination of accurate information about climate change." (*Id.*)

The Attorney General's subpoena likewise demonstrated an intent to cleanse the climate policy debate of disfavored viewpoints. (AA ¶ 46.) The subpoena demanded ExxonMobil's communications with industry groups that promote oil and gas, such as the American Petroleum Institute, but not groups that support alternative fuels or advocate for policies favored by the Attorney General. (*Id.*) In the movie *An Inconvenient Sequel*, Attorney General Schneiderman repeatedly targeted these same industry groups for their "propaganda," which purportedly had "cripple[d]" "mankind's ability to respond" to climate change. (AA ¶ 46.) These sentiments echoed those made by Attorney General Schneiderman within a week of issuing the subpoena, when he appeared on a *PBS NewsHour* segment entitled "Has Exxon Mobil misled the public about its climate change research?" (*Id.*) Attorney General Schneiderman said his investigation

extended to ExxonMobil's "funding [of] organizations" including the American Petroleum Institute. (*Id.*) He explained that he had targeted such groups based on their positions on climate change, deriding them as "climate change deniers" and "climate denial organizations." (*Id.*)

C. The Attorney General Solicited and Received Financial Benefits from Pursuing Perceived Opponents of "Clean Energy."

Public records indicate that special interests have influenced (or at least attempted to influence) the Attorney General through financial donations. (AA ¶ 49.) For example, earlier in the same month as his March 2016 press conference, Attorney General Schneiderman allegedly tried to arrange a meeting with Tom Steyer, a California billionaire and environmental activist who has encouraged government investigations of ExxonMobil. (*Id.*) According to an email obtained by the *New York Post*, "Eric Schneiderman would like to have a call with Tom regarding support for his race for governor . . . regarding Exxon case." (*Id.*) This was not the first time Attorney General Schneiderman and Steyer exchanged emails. (*Id.*) Days after Attorney General Schneiderman issued a subpoena to ExxonMobil, Steyer's scheduler emailed him to "[f]ollow[] up on conversation re: company specific climate change information." (*Id.*)

The Attorney General's improper use of state power did not end with Attorney General Schneiderman's resignation. (AA ¶ 50.) To this day, the Attorney General continues to allow special interests to provide financial benefits to the office to support a climate agenda. (*Id.*) In August 2017, New York University launched the State Energy and Environmental Impact Center (the "Center"), after receiving a $6 million donation from Bloomberg Philanthropies. (*Id.*) The Center seeks to influence state attorneys general to "defend[] and promot[e] clean energy, climate and environmental laws and policies" and to assist them in pursuing this agenda. (*Id.*) The Center recruits and funds lawyer "fellows," who are staffed in the offices of attorneys general. (AA ¶ 63.)

The Attorney General has accepted two Center fellows in January 2018. (AA ¶ 51.) At

least one of these two fellows has worked on the Attorney General's enforcement action against ExxonMobil. (*Id.*) The other fellow signed an amicus brief opposing ExxonMobil in an action filed by New York City against various energy companies. (*Id.*) Under the agreement between the Attorney General and the Center, (i) the fellows must be assigned to work "on matters relating to clean energy, climate change, and environmental matters of regional and national importance," (ii) the Attorney General must report to the Center regarding the fellows and their work, and (iii) the Center may terminate its agreement if the Attorney General does not provide the required reports to the Center or does not assign the fellows to work on matters consistent with the Center's agenda. (*Id.*)[2]

D. The Attorney General's Civil Action Against ExxonMobil Is the Fruit of an Unlawful and Improper Investigation.

In August 2018, nearly three years after the Attorney General issued its first subpoena to ExxonMobil, this Court cautioned that the investigation "cannot go on interminably" and stated that, if there is a trial, it should occur in 2019.[3] In response, the Attorney General filed a civil action against ExxonMobil on October 24, 2018. (AA ¶ 48.) That same day, the Attorney General tweeted that it had "uncovered 97 pages worth of wrongdoing" at the Company and that, contrary to public statements, "Exxon often did no[t]" "factor[] in the risk of increasing climate change regulation into its business decisions." (AA ¶ 68.)

Consistent with proceeding to trial in 2019, ExxonMobil did not file a motion to dismiss. Instead, the Company has acceded to a number of the Attorney General's requests for materials on the same subjects the Attorney General had already extensively probed during its lengthy

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[2] The Government Justice Center filed an ethics complaint against the Attorney General related to its hiring of Center fellows. *See* Complaint, *Gov't Justice Ctr., Inc.* v. *Underwood*, (N.Y.S. Joint Comm'n on Pub. Ethics Dec. 7, 2018).

[3] Tr 2:2–9, 20:4–6, *New York* v. *PricewaterhouseCoopers LLP*, Index No. 451962/2016 (Sup. Ct., N.Y. Cty. Aug. 29, 2018), NYSCEF 433.

investigation. The Attorney General, by contrast, has sought to delay trial and obstruct expeditious discovery, including by filing a frivolous recusal motion.

Meanwhile, the Attorney General has categorically refused to produce materials responsive to many of ExxonMobil's discovery requests. For example, ExxonMobil has sought documents relevant to its conflict of interest, selective enforcement, and official misconduct defenses.[4] However, the Attorney General has refused to produce several categories of documents, including (i) communications with the press concerning the Attorney General's investigation of ExxonMobil, (ii) documents related to public statements the Attorney General has made about its investigation, (iii) documents sufficient to identify those who attended the March 2016 press conference, (iv) documents related to the common interest agreement, and (v) documents concerning the employment of two Center fellows. (First Request for Production ("RFP") Nos. 42–43; Third RFP Nos. 1–3, 6, 9, 20, 22–27.) The Attorney General has also sought to limit more than a dozen other document requests, including the Attorney General's communications with third parties, such as Pawa. (First RFP Nos. 39–40; Third RFP Nos. 4–5, 7–8, 12–14, 18, and 28.)

ARGUMENT

I. The Attorney General's Motion to Dismiss Should Be Denied.

ExxonMobil's defenses are properly stated in its Answer. "[T]he CPLR directs [courts] to construe a defendant's answer liberally and disregard defects unless a substantial right of the plaintiff would be prejudiced." *Scholastic, Inc.* v. *Pace Plumbing Corp.*, 129 A.D.3d 75, 80 (1st Dep't 2015) (citing CPLR § 3026). Consistent with that directive, "the plaintiff bears the *heavy* burden of showing that [a] defense is without merit as a matter of law" when it seeks dismissal pursuant to CPLR § 3211(b). *Granite State Ins. Co.* v. *Transatlantic Reinsurance Co.*, 132 A.D.3d

[4] The Attorney General incorrectly claims ExxonMobil is asserting a malicious prosecution defense. (Br. 14.)

479, 481 (1st Dep't 2015) (emphasis added). When a court reviews "a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of the pleading," and "[a] defense should not be stricken where there are questions of fact requiring trial." *534 E. 11th Street Housing Dev. Fund Corp.* v. *Hendrick*, 90 A.D.3d 541, 542 (1st Dep't 2011). Under this standard, the Attorney General's motion should be denied.

A. The Answer Provided the Attorney General with Sufficient Notice of ExxonMobil's Defenses.

ExxonMobil has properly asserted defenses of selective enforcement, official misconduct, and conflict of interest. Those defenses were sufficiently pleaded to provide adequate notice to the Attorney General. *See Hendrick*, 90 A.D.3d at 542 (denying motion to dismiss defenses where "answer [was] sufficient to give notice of what [defendant] intends to prove under his defenses"); *Youssef* v. *Triborough Bridge & Tunnel Auth.*, 24 A.D.3d 661, 661 (2d Dep't 2005) (holding the "mere statement 'statute of limitations' was sufficient to raise the defense"). The Attorney General's motion to dismiss for insufficient detail is thus nothing more than precisely the sort of "time-consuming pleading attack[]" that the CPLR's liberal pleading standards "sought to discourage" for being "unlikely to result in a final disposition of the action on the merits." *Foley* v. *D'Agostino*, 21 A.D.2d 60, 65–66 (1st Dep't 1964).

In its answer, ExxonMobil properly "plead[ed] all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading." CPLR § 3018. Because "the test of prejudice [is] of primary importance," *Scholastic*, 129 A.D.3d at 80, courts "invariably disregard pleading irregularities, defects or omissions which are not such as to reasonably mislead one" as to the nature of the defense, *Foley*, 21 A.D.2d at 66.

While the Attorney General asserts that the challenged defenses are "inadequately pleaded"

(Br.[5] 11), it does not claim it lacks sufficient "notice" of the defenses or suffered any "prejudice." *Youssef*, 24 A.D.3d at 662. Nor could it. The Attorney General acknowledges that the Answer asserted defenses of "official misconduct, conflict of interest, official improprieties, [and] selective enforcement." (Br. 6.) And the Attorney General concededly understands that "the crux of ExxonMobil's defense theory" relates to the Attorney General's "activist agenda on climate change." (Br. 2.) The Attorney General cannot claim ignorance of the allegations supporting the challenged defenses, given that its brief attacks them on the merits.

Nevertheless, any confusion regarding the nature of the defenses ExxonMobil intended to pursue would have been alleviated through ExxonMobil's disclosures, which "amplif[ied] the pleading." *Schmidt's Wholesale, Inc.* v. *Miller & Lehman Constr., Inc*., 173 A.D.2d 1004, 1004 (3d Dep't 1991); *see also LoPinto* v. *Roldos*, 235 A.D.2d 233, 233 (1st Dep't 1997) (reinstating defenses, and noting "[i]f needed, further elucidation of the defenses should be sought through a demand for a bill of particulars"). For instance, ExxonMobil's Preliminary Exhibit List identified over 50 exhibits substantiating the challenged defenses. The Attorney General concedes that certain document requests sought information "which could only be relevant to ExxonMobil's prosecutorial misconduct defenses." (Br. 7.) The Attorney General cannot claim to be unaware of ExxonMobil's defenses or the underlying factual allegations.

B. The Presumption of Prosecutorial Good Faith Does Not Bar ExxonMobil's Defenses.

The Attorney General claims the so-called presumption of prosecutorial good faith requires dismissal. In the Attorney General's telling, ExxonMobil can defeat that presumption only if it "show[s] that the [Attorney General] lacked a reasonable basis to bring this action." (Br. 12.) Such an evidentiary burden is not required to overcome a motion to dismiss, and the cases the

[5] "Br." refers to the Attorney General's brief, dated March 4, 2019.

Attorney General cites do not say otherwise. For example, the Attorney General relies on *303 W. 42nd Street Corp.* v. *Klein*, 46 N.Y.2d 686 (1979), to argue ExxonMobil must make an evidentiary showing.[6] (Br. 12–15.) *Klein* stated no such thing, and it did not even evaluate the pleading standard for a defense. Instead, *Klein* examined an Article 78 proceeding challenging an administrative agency decision. The Court of Appeals considered "the measure of proof" a defendant must provide to obtain an evidentiary hearing challenging the agency's decision, and it held the defendant had made the requisite showing. *Klein*, 46 N.Y.2d at 690, 695–98. *Gaynor* v. *Rockefeller* is equally inapplicable because in that case, unlike here, the plaintiffs failed to allege public officials were "a party to the denial" of their constitutional rights. 15 N.Y.2d 120, 131 (1965). The Attorney General's citation to criminal cases, such as *United States* v. *Armstrong*, 517 U.S. 456 (1996), are equally inapposite since they do not mention civil pleading standards.[7]

The Attorney General's attempt to heighten ExxonMobil's burden in pleading a defense is contradicted by its own authorities. In *Hartman* v. *Moore*, the U.S. Supreme Court stated that, under federal pleading standards, a defendant need only provide "[s]ome sort of allegation . . . to address the presumption of prosecutorial regularity." 547 U.S. 250, 263 (2006).

At best, any presumption of prosecutorial regularity would operate akin to the business judgment rule, which does not warrant "pre-discovery dismissal" where the defendant has alleged that the directors "did not act in good faith." *Hendrick*, 90 A.D.3d at 542. Insofar as a presumption applies here, all ExxonMobil needs to do is allege that the Attorney General has not acted in good faith. That is exactly what ExxonMobil has done.

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[6] The Attorney General correctly does not rely on *Klein*'s dicta that selective enforcement is not an available defense, as selective enforcement is routinely raised in civil proceedings. *See Adirondack Park Agency* v. *Vilardo*, 290 A.D.2d 616, 618 (3d Dep't 2002).

[7] The Attorney General's own authorities distinguish *Armstrong* because it is a "criminal case" and therefore subject to "limited" discovery. *United States* v. *Am. Elec. Power Serv. Corp*, 258 F. Supp. 2d 804, 806–07 (S.D. Ohio 2003).

C. ExxonMobil Has Stated a Defense of Selective Enforcement.

ExxonMobil's selective enforcement defense is supported by allegations that the Attorney General targeted ExxonMobil because of its speech on climate policy. To state a selective enforcement defense, a defendant must allege that (i) it "is selectively treated differently from others who are similarly situated," and (ii) "such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Kreamer* v. *Town of Oxford*, 96 A.D.3d 1130, 1133 (3d Dep't 2012) (citing *Bower Assocs.* v. *Town of Pleasant Valley*, 2 N.Y.3d 617, 631 (2004)). Singling out a party based on its disfavored speech can provide a basis for a selective enforcement claim. For example, in *Kreamer*, the Third Department agreed that a party stated a selective enforcement claim where it alleged that the opposing party "retaliated against [it] for exercising [its] constitutional rights to express [its] opinions." *Id.* Similarly, in *Birmingham* v. *Ogden*, the court denied the defendants' motion for summary judgment on plaintiff's selective enforcement claim because of disputed facts concerning whether the plaintiff "was singled out for discipline because of his criticizing political cronyism in the Middletown Police Department." 70 F. Supp. 2d 353, 372 (S.D.N.Y. 1999).

The Attorney General has singled out ExxonMobil because it expresses views on climate policy the Attorney General disfavors. The Attorney General has repeatedly stated its intention to target ExxonMobil for expressing these views. For example, at a public press conference, after describing the need to "mov[e] more rapidly towards renewables," Attorney General Schneiderman denounced the "morally vacant forces" that disagreed with his position on climate change. (AA ¶ 41.) He decried "misperceptions in the eyes of the American public" about climate change created by those "with an interest in profiting from the [so-called] confusion." (*Id.*) He then pledged to use his law enforcement power to "clear[] up" the "confusion" and

"misperceptions" and boasted about his investigation of ExxonMobil. (AA ¶¶ 41–42.) That improper selectivity is also reflected in the Attorney General's subpoena seeking communications with industry groups that promote oil and gas, rather than renewable energy. (AA ¶ 46.)

Public documents demonstrating the Attorney General's coordination with special interests further expose the Attorney General's efforts to single out ExxonMobil to limit the climate change policy debate. Special interests who attended the La Jolla conference and Rockefeller meeting have long plotted to use state power to "pressure" the energy industry to support "legislative and regulatory responses to global warming." (AA ¶¶ 32, 38.) They identified "sympathetic state attorney[s] general" as the likely source of that pressure at both meetings and strategized ways to use "AGs" to "delegitimize [ExxonMobil] as a political actor." (AA ¶¶ 33, 37.) [redacted] (AA ¶ 35.)

The Attorney General's reliance on decisions from courts outside of New York does not compel a contrary decision. (Br. 15.) In *United States* v. *American Electric Power Service Corp.*, the court found the defendants' allegation that it had been targeted for "just plain bad reasons" failed to state a selective enforcement claim because, unlike here, they did not allege that they were targeted based on "membership in a constitutionally protected class or intent to punish for exercise of constitutionally protected rights." 258 F. Supp. 2d 804, 807–08 (S.D. Ohio 2003). Any dicta in *United States* v. *Fleetwood Enterprises, Inc.* is equally unavailing because, contrary to New York precedent, the court questioned the availability of a selective enforcement defense under federal law. 702 F. Supp. 1082, 1092 (D. Del. 1988).

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

ExxonMobil's conflict of interest defense is supported by the Attorney General's decision to accept Center fellows and to allow them to work on this matter, and to otherwise solicit financial

benefits from third parties in connection with these proceedings. A public official should not "inject[] a personal interest," political or financial into her "prosecutorial decision[s]." *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 249–50 (1980). A public officer therefore may not pursue a case "influenced by improper motives." *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987). For example, in *People* v. *Zimmer*, the Court of Appeals held that an indictment should have been dismissed because of a public official's conflict of interest where the district attorney who presented the case to the grand jury was also counsel to and a stockholder of the corporation that was a victim of the defendant's alleged crime. 51 N.Y.2d 390, 395 (1980).

Multiple aspects of the Attorney General's acceptance of fellows create a conflict that violates state and federal law. The fellows program creates a financial incentive for the Attorney General to pursue and prioritize investigations and enforcement actions supported by the Center. (AA ¶ 50.) The Attorney General has agreed that the fellows will work "on matters relating to clean energy, climate change, and environmental matters of regional and national importance." (AA ¶ 51.) If the Center is dissatisfied with the Attorney General's performance in that regard, the Center can withdraw its fellows. (*Id*.) Conversely, if the Center is pleased with the Attorney General's performance, it can renew or expand the Attorney General's participation in the fellows program. (AA ¶ 52.) The Attorney General therefore has a financial interest in receiving funded fellows and using those fellows to pursue litigation favored by the Center. In fact, the Attorney General has allowed at least one fellow to participate in this action. (AA ¶ 51.)

Moreover, the Center has improper influence over the fellows' cases and decision-making. The Attorney General must provide periodic reports to the Center demonstrating how the fellows' work has contributed to the Center's goals and must coordinate with the Center on public announcements concerning the environmental matters on which the fellows work. (AA ¶ 51.)

This conduct creates the appearance that the Attorney General is accountable to the Center, rather than the public, for its prosecutorial decisions.

The Attorney General's continued participation in the fellows program is not the only time it may have accepted improper financial benefits from a private party in exchange for pursuing a "clean energy" agenda. In March 2016, Attorney General Schneiderman arranged a meeting with a California billionaire who has long encouraged government investigations of ExxonMobil, hoping to discuss "support for his race for governor" and the "Exxon case." (AA ¶ 49.) Any "pay-to-play" arrangement resulting from that meeting would constitute an egregious and unconscionable conflict of interest.

E. ExxonMobil Has Stated a Defense of Official Misconduct.

ExxonMobil's official misconduct defense is fully supported by the Attorney General's conduct over the past three years. "[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). The Attorney General has violated this standard in at least two ways.

First, the Attorney General's motives for pursuing its investigation are improper. Conduct demonstrating that a prosecutor has "an axe to grind against" the subject of an investigation is misconduct of constitutional dimensions. *Wright* v. *United States*, 732 F.2d 1048, 1056 (2d Cir. 1984). Here, the Attorney General has colluded with special interests singularly focused on "delegitimiz[ing] [ExxonMobil] as a political actor." (AA ¶¶ 30, 38.) [redacted] (AA ¶ 35.)

The Attorney General has recognized the impropriety of its conduct and sought to conceal its relationship with these special interests and other similarly motivated attorneys general. (AA ¶ 66.) Mere hours before the March 2016 press conference, Pawa and Frumhoff briefed the Attorney General behind closed doors. (AA ¶ 43.) The Attorney General knew this was improper. Indeed, the chief of the Attorney General's Environmental Protection Bureau encouraged Pawa "to not confirm" to a reporter that Pawa attended the event. (*Id.*) The Attorney General also entered into a "Climate Change Coalition Common Interest Agreement" to conceal "information shared at and after" the press conference. (AA ¶ 44.) This conduct has continued, as the Attorney General recently asserted the common interest privilege to withhold documents in this action. (*Id.*)

Second, the Attorney General has made—and continues to make—unfairly prejudicial public statements about ExxonMobil. Prosecutors must "respect the presumption of innocence" and "refrain[] from speaking in public about pending and impending cases except in very limited circumstances." *United States* v. *Bowen*, 799 F.3d 336, 354 (5th Cir. 2015). The ultimate merit of the prosecution is beside the point because even the "appearance of impropriety" on behalf of a prosecutor "diminishes faith in the fairness" of our judicial system. *Young*, 481 U.S. at 811; *see also SEC* v. *Gulf & W. Indus., Inc.*, 502 F. Supp. 343, 347 (D.D.C. 1980) (declining to strike, and allowing discovery on, defense alleging the SEC offended due process by leaking information about the defendant to *The New York Times*).

At the March 2016 press conference, Attorney General Schneiderman declared presumptively that ExxonMobil has engaged in unlawful conduct, even though he had not completed his fact gathering. (AA ¶ 42.) He faulted ExxonMobil for "know[ing] how fast the ice sheets are receding," while supposedly simultaneously telling "the public for years there were 'no competent models.'" (*Id.*) He later reported to *The New York Times* that there "may be massive

securities fraud" at ExxonMobil. (AA ¶ 42.) This public, prejudicial commentary continued even after Attorney General Schneiderman resigned. (AA ¶ 68.) The day the Attorney General commenced its enforcement action, it tweeted that it had "uncovered 97 pages worth of wrongdoing" at the Company. (*Id*.) These public statements demonstrate the Attorney General's bias and prejudice and "call[] into question [its] objectivity." *Young*, 481 U.S. at 810 (citation omitted).

II. In the Alternative, ExxonMobil Should Be Granted Leave to Amend Its Answer.

If the Court considers the Answer insufficient for not providing more detail about the challenged defenses, ExxonMobil respectfully requests leave to amend the answer. Permitting amendment would be consistent with the "overarching directive that the CPLR 'be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding.'" *Scholastic*, 129 A.D.3d at 80 (quoting CPLR § 104.) While ExxonMobil believes amendment is unnecessary, it has filed a cross-motion for leave to amend in tandem with its opposition to afford the Attorney General "the option to withdraw the motion or pursue the motion as applied to the Amended Answer." *Toikach* v. *Basmanov*, 31 Misc. 3d 615, 620 (Sup. Ct., Kings Cty. Feb. 25, 2011).

Where a defense is defectively pleaded, dismissing the defense "would be an excessively severe result" because any "prejudice can be cured by allowing defendant to amend its pleading." *Scholastic*, 129 A.D.3d at 81. Instead, "leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party." *Kocourek* v. *Booz Allen Hamilton, Inc.*, 85 A.D.3d 502, 504 (1st Dep't 2011); *see also* CPLR § 3025(b). A party seeking leave to amend "need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp.* v. *Greystone & Co.*, 74 A.D.3d 499, 500 (1st Dep't 2010) (citation omitted); *see also Cruz* v. *Brown*,

129 A.D.3d 455, 456 (1st Dep't 2015) (recognizing that a party need not "make an evidentiary showing as to the merits of the proposed amendment").

The party opposing a motion for leave to amend bears the burden to establish prejudice, and neither "[m]ere delay" nor "the need for additional discovery" will satisfy that burden. *Flowers* v. *73rd Townhouse, LLC*, 149 A.D.3d 420, 421 (1st Dep't 2017). Instead, "[p]rejudice requires some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position." *Kocourek*, 85 A.D.3d at 504 (citations omitted).

For the reasons discussed above, the Attorney General cannot argue it will suffer any prejudice by amendment, particularly at this stage of the proceedings. Critically, the Attorney General "can claim neither surprise nor prejudice" from the proposed amendments. *Fermas* v. *Ampco Sys. Parking*, 2016 WL 6330630, at *4 (Sup. Ct., N.Y. Cty. Sept. 29, 2016). The Attorney General is aware of the factual basis of the challenged defenses, since its brief disputes the merits of precisely those factual allegations the proposed amended answer seeks to make express. Accordingly, any deficiencies in the pleadings are readily remedied through amendment without causing any prejudice to the Attorney General.

III. The Attorney General's Request for a Protective Order Should Be Denied.

The Attorney General's alternative request for a protective order finds no support in the applicable law. Under CPLR § 3101(a), "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." "[T]he scope of disclosure provided by CPLR 3101 is generous, broad," and "liberally" construed so "that cases [are] decided on their merits after a full vetting of the facts." *Mann* ex rel. *Akst* v. *Cooper Tire Co.*, 33 A.D.3d 24, 29 (1st Dep't 2006). A court may issue a protective order barring discovery only when doing so would "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other

prejudice." CPLR § 3103. To obtain such an order, the party opposing disclosure "bears the initial burden to show either that the discovery sought is irrelevant or that it is obvious the process will not lead to legitimate discovery." *Liberty Petrol. Realty, LLC* v. *Gulf Oil, L.P.*, 164 A.D.3d 401, 403 (1st Dep't 2018). Once that burden is met, the party seeking discovery "must establish that the discovery sought is material and necessary to the prosecution or defense of an action, i.e., that it is relevant." *Id.* The Attorney General cannot bear its initial burden, but even if it could, ExxonMobil can establish that the discovery is material and necessary to its defenses.

A. The Attorney General Has Failed to Demonstrate that ExxonMobil's Document Requests Are Irrelevant.

The Attorney General asks this Court to take the extraordinary step of "issu[ing] a protective order halting discovery" responsive to ExxonMobil's defenses based on nothing more than its own self-serving interpretation of its discovery obligations. (Br. 17.) The Attorney General claims, without citing authority, that its obligations are limited to information that "demonstrate[s] that [it] had a reasonable basis to file the Complaint." (Br. 17.) But New York law supplies no basis for the Attorney General to cabin its discovery obligations to only those materials it believes support its own claims. ExxonMobil is entitled to "disclosure . . . of any facts bearing on the controversy," including matter material and necessary in the "*defense* of an action." *Kapon* v. *Koch*, 23 N.Y.3d 32, 38 (2014) (emphasis added).

Furthermore, the merits of ExxonMobil's defenses is a question for the fact-finder to resolve after discovery. *See In re Ideal Mut. Ins. Co.*, 140 A.D.2d 62, 69 (1st Dep't 1988) (denying motions to dismiss and for a protective order because the defense was sufficiently pleaded and involved "a question to be determined by the trier of fact"); *see also Granite*, 132 A.D.3d at 483 (refusing to dismiss a defense "on this limited prediscovery record"). In contrast to the Attorney General's characterization, one federal judge has opined that ExxonMobil's allegations, if proven,

would establish "bad faith."[8] And a Texas state judge issued findings of fact that the Attorney General "promoted regulating the speech of energy companies, including ExxonMobil, whom [it] perceived as an obstacle to enacting [its] preferred responses to climate change."[9]

B. The Document Requests Are "Material and Necessary" to ExxonMobil's Defenses.

Even if the Attorney General could meet its initial burden, a protective order should not issue because ExxonMobil seeks discovery that is material and necessary to its defenses. For example, the Attorney General has refused to produce non-privileged documents concerning (i) its own communications with the press about the investigation, (ii) its coordination with climate activists, (iii) the March 2016 press conference, (iv) the common interest agreement, and (v) its employment of two privately funded fellows. (Third RFP Nos. 1–3, 6, 20, 23–27.) The Attorney General has not reasonably argued—and cannot argue—that these requests seek information "utterly irrelevant" to ExxonMobil's defenses, which rely on the Attorney General's coordination with private activists both before and after commencing its investigation, its public statements about the investigation, and its conflict of interest from seeking and obtaining financial support from third parties. *Kapon*, 23 N.Y.3d at 38.

Despite the plain relevance of these requests, the Attorney General catastrophizes the implications of allowing "*any* defendant in an enforcement action to initiate an onerous investigation of the investigator." (Br. 19.) According to the Attorney General, no defendant should ever be allowed discovery on defenses premised on official misconduct.[10] That is not the law. For instance, in *Rattner* v. *Planning Commission of the Village of Pleasantville*, the Second

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8 *Exxon Mobil Corp.* v. *Healey*, No. 4:16-CV-469-K, ECF 73 at 5–6 (N.D. Tex. Oct. 13, 2016).

9 *Exxon Mobil Corp.*, No. 096-297222-18, 2018 Tex. Dist. LEXIS 1, at *6 (Tarrant Cty. Apr. 24, 2018).

10 A New York court has already awarded attorney's fees against the Attorney General in another suit for "lack[ing] a reasonable basis" for refusing to produce documents. *Competitive Enter. Inst.* v. *Attorney General*, 53 Misc. 1216(A) (Sup. Ct., Albany Cty. Nov. 21, 2016).

Department affirmed the denial of a protective order, which sought to shield government officials from discovery concerning whether they "selectively enforce[d] the Zoning Laws." 110 A.D.2d 840, 841 (2d Dep't 1985).

The Attorney General's position is also contrary to the one it presented to the Second Circuit, which is considering ExxonMobil's federal constitutional claims. The Attorney General has urged the Second Circuit to affirm dismissal of ExxonMobil's constitutional claims because "New York's civil practice rules provide Exxon with a full opportunity to raise any objections to . . . the civil enforcement action."[11] Having assured the Second Circuit that ExxonMobil could present its defenses before this Court, the Attorney General cannot now argue that the defenses are unavailable as irrelevant to the issues in this case. (Br. 18.)

CONCLUSION

ExxonMobil's defenses of selective enforcement, conflict of interest, and official misconduct are based on the Attorney General's collusion with special interest activists to single out ExxonMobil because of a disagreement about climate policy. The Attorney General's premature attempt to challenge the merits of these defenses should be rejected either outright or by permitting ExxonMobil to amend its answer. Because ExxonMobil is entitled to discovery on its defenses, the Attorney General's motion for a protective order should also be denied.

[11] Attorney General's Motion to Dismiss at 6, *Exxon Mobil Corp.* v. *Healey*, No. 18-1170 (2d. Cir. Dec. 7, 2018), ECF No. 190.

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New York, NY

Respectfully submitted,

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Certification of Compliance with Word Count

Pursuant to Rule 17 of the Rules of Practice for the Commercial Division of the Supreme Court, I certify that this affirmation complies with that rule because it contains 7,000 words, exclusive of the caption, table of contents, table of authorities, and signature block. In making this certification, I relied on Microsoft Word's "Word Count" tool.

Dated: March 27, 2019
New York, New York

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