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

OFFICE OF THE ATTORNEY GENERAL'S REPLY BRIEF IN FURTHER SUPPORT OF ITS MOTION TO DISMISS CERTAIN DEFENSES OR FOR A PROTECTIVE ORDER AND IN OPPOSITION TO EXXON MOBIL CORPORATION'S CROSS-MOTION FOR LEAVE TO AMEND ITS ANSWER

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PRELIMINARY STATEMENT

ExxonMobil asks this Court to disregard the substantial body of state and federal case law setting forth the elements that must be pleaded for misconduct claims against law enforcement agencies. Arguing that the pleading requirements for its defenses of selective enforcement, conflict of interest and official misconduct are no different than for its other defenses, such as laches, estoppel and waiver, ExxonMobil seeks a ruling that would allow the subject of almost any civil law enforcement action to put the investigation itself on trial. That implication is especially clear here, given the nature of the activities that ExxonMobil alleges to support its defenses. According to ExxonMobil, factual allegations that would apply to almost any elected law enforcement officer suffice to allow the company to conduct its own inquiry into the motivations of the New York Attorney General in investigating ExxonMobil. In particular, ExxonMobil relies on the following:

- The former Attorney General had a political position on climate change;
- The former Attorney General expressed concerns about ExxonMobil's public statements on climate change;
- The former Attorney General received information from third parties who believed that ExxonMobil's public statements regarding climate change were false; and
- The Office of the Attorney General ("OAG") employs Special Assistant Attorneys General with fellowship funding from a university center that promotes the enforcement of environmental laws.

It is hard to imagine a case brought by the Attorney General or a similarly situated government entity where similar allegations could not be made. The Attorney General is an elected official, and, as expected, has public views on political and social issues. The OAG is a public-facing organization and routinely speaks with various individuals and entities that have information or concerns about many issues that fall under the OAG's jurisdiction. As the state's principal legal department, the OAG works with numerous agencies and universities to provide government service opportunities to talented lawyers.

For precisely this reason, courts require more than just a suggestion of bias when a defendant pleads misconduct in defense to law enforcement actions. To ensure that defendants do not use litigation to impede government officials from carrying out their statutory mandates, courts presume such officials act in good faith. Only if a defendant can allege that a law enforcement action lacked any basis—probable cause in the criminal context or reasonable factual basis in the civil context—may it challenge the legitimacy of the action itself. ExxonMobil comes nowhere close to meeting that exacting test. Indeed, ExxonMobil does not even claim to have made such allegations. To the contrary, ExxonMobil's own allegations and supporting evidence demonstrate that the Attorney General had a reasonable basis for investigating ExxonMobil. Accordingly, ExxonMobil's defenses of selective enforcement, conflict of interest and official misconduct should be dismissed.

The Court should also deny ExxonMobil's request for leave to amend its Answer. As discussed in detail below, ExxonMobil's proposed Amended Answer, in which it appears to abandon defenses based on violations of due process or its First Amendment rights, fails to cure the infirmities of its allegations. ExxonMobil simply rehashes intimations of bias and improper motive that have been found by a federal court to be insufficient to support its claims of misconduct.

Finally, regardless of how it rules on the OAG's motion to dismiss, the Court should grant the OAG's proposed protective order and that protective order should extend to cover the Commercial Division Rule 11-f deposition notice ExxonMobil recently issued covering these same subjects. The OAG's production has been more than sufficient in providing ExxonMobil insight into the OAG's relevant interactions with third parties and, consequently, is all that ExxonMobil would need to evaluate and pursue its defenses, even those that should be dismissed. Allowing

ExxonMobil to demand extensive additional documents and testimony will only result in unnecessary delay and needless expenditure of resources.

ARGUMENT

ExxonMobil's defenses of prosecutorial misconduct – *i.e.*, selective enforcement, conflict of interest, and official misconduct – should be dismissed, and its cross-motion for leave to amend its answer should be denied as futile. In addition, regardless of how this Court decides the motion to dismiss, the Court should grant the OAG's motion for a protective order.

A. ExxonMobil's Defenses of Prosecutorial Misconduct Should Be Dismissed

The Court should dismiss ExxonMobil's inadequately pleaded defenses of prosecutorial misconduct. First, there can be no claim or defense of prosecutorial misconduct without an allegation that, if proven, would overcome the presumption of good faith. Contrary to ExxonMobil's superficial and misleading analysis of binding U.S. Supreme Court and New York Court of Appeals precedent, the precedent makes clear that to overcome the presumption a party must allege that the prosecutor lacked a reasonable basis for the underlying action. More precisely, overcoming the presumption of good faith would require both an allegation that the prosecutor had an improper motive and that the improper motive was the *but-for cause* of the action.

Second, ExxonMobil fails to make any allegation that the OAG lacked a reasonable basis. ExxonMobil's own allegations are that third parties brought to the OAG allegations of false statements by ExxonMobil. That is an appropriate subject for the OAG to investigate. Of course, leads provided by third parties were only one source of information contributing to the OAG's decision to investigate ExxonMobil. The OAG also independently evaluated ExxonMobil's own public statements to its shareholders, including its statements in two reports, *Energy and Climate* and *Energy and Carbon – Managing the Risks*, issued by ExxonMobil in March 2014 in response

to inquiries from several shareholders as to how ExxonMobil was managing risks posed to its business by increasingly stringent regulations related to climate change. The OAG investigated the accuracy of the statements in those reports because it had a factual basis for believing they may be misleading, and the OAG ultimately made corresponding allegations in the Complaint, which ExxonMobil did not move to dismiss.

The propriety of the OAG's investigation was expressly acknowledged last year by the U.S. District Court for the Southern District of New York in dismissing virtually the same allegations that ExxonMobil makes now, holding that the allegations did not permit the court to infer either (1) that the third-party activists had an improper purpose – "that is, that they know state investigations of Exxon will be frivolous, but they see such investigations as politically useful" – or (2) that the OAG shared any improper purpose with such activists. *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679 (S.D.N.Y. 2018).

Third, the examples of validly asserted defenses of prosecutorial misconduct cited by ExxonMobil are inapposite and provide no support for the argument that the OAG committed misconduct simply by investigating the company or by employing Special Assistant Attorneys General with fellowship funding from a university.

1. To Rebut the Presumption of Good Faith, ExxonMobil Must Allege that the OAG Lacked a Reasonable Basis for the Investigation

The Attorney General is presumed to act in "good faith" in commencing an investigation, which must be grounded in "some factual basis." *Am. Dental Coop., Inc. v. Attorney Gen. of New York*, 127 A.D.2d 274, 280 (1st Dep't 1987). To rebut the presumption of good faith, ExxonMobil must allege facts showing that the Attorney General lacked a reasonable basis to investigate or to bring this action but did so nonetheless, for improper purposes. *See Hartman v. Moore*, 547 U.S.

250, 263 (2006) (requiring an allegation of the "absence of probable cause" "to bridge the gap" between the alleged improper motive and the prosecutor's action).

As set forth in the OAG's opening brief, even if ExxonMobil's allegations are accepted as true, they do not come close to satisfying the requirements for pleading the defenses at issue. That is even more apparent in light of ExxonMobil's opposition to the OAG's motion to dismiss. ExxonMobil argues that "[t]he Attorney General's attempt to heighten ExxonMobil's burden in pleading a defense is contradicted by its own authorities," claiming that *Hartman* requires only "[s]ome sort of allegation . . . to address the presumption of prosecutorial regularity." (ExxonMobil's Brief ("Br."), Dkt. No. 114, at 12 (quoting *Hartman*, 547 U.S. at 263).) This out-of-context quotation misrepresents *Hartman*'s holding. Contrary to ExxonMobil's insinuation that *any* sort of allegation is sufficient to rebut the presumption, the U.S. Supreme Court – in the same paragraph, explaining the very sentence quoted by ExxonMobil – squarely held that the *precise* sort of allegation required to rebut the presumption of regularity is an allegation about "absence of probable cause." *Hartman*, 547 U.S. at 263. And because neither ExxonMobil's Answer nor proposed Amended Answer contains such an allegation, *Hartman* bars its prosecutorial-misconduct defenses.

ExxonMobil further attempts to avoid the obvious implications of the U.S. Supreme Court's decisions in *Hartman*, as well as *United States v. Armstrong*, 517 U.S. 456 (1996), by arguing, without any legal or logical basis, that their holdings are limited to criminal prosecutions.[1]

[1] ExxonMobil draws attention to the fact that the federal district court in *United States v. American Electric Power Service Corp.*, 258 F. Supp. 2d 804 (S.D. Ohio 2003), "distinguish[ed] *Armstrong* because [*Armstrong*] is a 'criminal case' and therefore subject to 'limited' discovery." (Br. 12 n.7.) But while *American Electric Power* did distinguish *Armstrong* and other criminal cases, it did so in a way that is not helpful to ExxonMobil. First, the court questioned whether selective enforcement was even available as a defense in a civil case. 258 F. Supp. 2d at 807. If such a defense is unavailable, then ExxonMobil's prosecutorial-misconduct defenses would fail at the

A plain reading of either case makes clear that the considerations at issue apply with equal force to civil enforcement actions. For example, in *Hartman* the U.S. Supreme Court explained that improper motive must be the "but-for" cause of *any* "constitutional tort" against the government – even when the claimed retaliation is *not* a criminal charge. 547 U.S. at 260.

In addition, both *Armstrong* and *Hartman* raise separation-of-powers concerns that are not limited to the criminal context. In *Armstrong*, the Court observed that a selective prosecution claim "asks a court to exercise judicial power over a 'special province' of the Executive" and that prosecutors "retain broad discretion" to enforce the law "because they are designated by statute" to assist the executive in discharging its constitutional responsibility to ensure that laws are faithfully executed. 517 U.S. at 464 (internal quotation marks omitted); *see also Hartman*, 547 U.S. at 263 ("[The] presumption that a prosecutor has legitimate grounds for the action he takes is one we do not lightly discard, given our position that judicial intrusion into executive discretion of such high order should be minimal."). Like the prosecutorial agencies discussed by the Supreme Court in *Hartman* and *Armstrong*, the OAG is vested with executive discretion by statute. General Business Law § 352 *et seq.* (the "Martin Act") and Executive Law § 63(12) provide the OAG with the authority and duty to investigate and act against the type of activity alleged in the Complaint. A selective enforcement claim or defense in the civil context thus raises identical concerns about separation of powers and "judicial intrusion into executive discretion." *Hartman*, 547 U.S. at 263.

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threshold, regardless of the allegations it pleads in support. Second, the court observed that in civil cases where the defense had been raised and considered, *Armstrong*'s pleading requirements applied. *Am. Elec. Power*, 258 F. Supp. 2d at 807. Finding that the defendant coal company had failed to make such a showing through its allegation that it was "singled out" by the EPA, the court granted the government's motion to strike the defendant's affirmative defenses. *Id.* at 808-09. ExxonMobil's affirmative defenses here are likewise deficient.

Indeed, the Court of Appeals has acknowledged that the very same concerns about "impugn[ing] legitimate law enforcement methods" apply to selective enforcement claims in the civil context, as well. *303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 694-96 (1979).[2] Tellingly, ExxonMobil offers no analysis as to why the U.S. Supreme Court's concerns as to unfettered misconduct claims would be any less applicable to an agency, such as the OAG, in the context of its enforcement of civil laws. Ultimately, the courts in *Armstrong*, *Hartman* and *Klein* all addressed the need to prevent defendants from impeding law enforcement functions with misconduct claims based on the sort of hollow allegations that ExxonMobil now offers.

2. ExxonMobil's Proposed Amended Answer Does Not Cure the Pleading Defects Present in Its Original Answer

ExxonMobil's proposed Amended Answer fails to present specific allegations or evidentiary support that would satisfy the pleading standard for its misconduct defenses. In addition to repeating the allegations rejected last year by the district court, the Amended Answer includes new, incoherent allegations concerning "conflict of interest" in connection with the OAG's employment of NYU fellows. But ExxonMobil still fails to allege that the OAG lacked a reasonable basis for this action, or to make allegations that the investigation was driven solely by improper motives. Thus, even if ExxonMobil's allegations were true, they would not support its

[2] While *Klein* involved the threshold showing needed to make a colorable claim of selective enforcement for purposes of an Article 78 hearing, the same concerns about separation of powers and the presumption of good faith apply here. In *Klein*, the petitioner claimed that the Mayor's anti-vice task force targeted his adult-book store and theater for destruction on the pretext of a fire code violation, alleging: (a) at the time petitioner was targeted, the Mayor's assistant in charge of the anti-vice task force had stated that "[despite] all the constitutional limitations, we stop at nothing when we try to put one these places out of business"; (b) the building had been under scrutiny for years, but "no action was taken until the antipornography drive was undertaken"; (c) identical applications from the building had been approved before the anti-vice task force was assembled; and (d) the city could not produce a list of buildings in which "similar action had been taken." *Klein*, 46 N.Y.2d 686, 696-97. On those pleadings, the Court held that the appellate division had erred in dismissing the selective enforcement claim without an evidentiary hearing.

misconduct defenses if, in addition to the alleged improper motives, the OAG had a reasonable basis for the exercise of its investigative authority. That is particularly apparent here, where ExxonMobil fails to address the detailed factual allegations in the Complaint or its decision not to move to dismiss any of the charges, aside from its peculiar assertion that moving to dismiss would not be "[c]onsistent with proceeding to trial in 2019." (Br. 8.) Those failures are fatal to its claims of misconduct. As explained below, ExxonMobil's allegations rely on unsupported speculation and do not reach the threshold required to rebut the presumption of good faith.

a. Communications with Third Parties

Starting from the beginning, the allegations in the Amended Answer concerning meetings with various climate change activists do not permit an inference of bad faith – *i.e.*, that the OAG investigated or sued ExxonMobil without believing it had a reasonable basis to do so. (*See* ExxonMobil's Proposed Amended Answer ("AA"), Dkt. No. 116, ¶¶ 31-37, 39, 43.)[3] By devoting the first three paragraphs of its prosecutorial-misconduct allegations to a conference in June 2012 in La Jolla, California – which no one from the OAG attended (*id.* ¶¶ 31-33) – ExxonMobil only underscores the emptiness of its defenses. Making no effort to account for the three years following the conference, or to draw any causal connection to the conference, ExxonMobil alleges that the OAG "began covertly working with . . . special interests shortly after the La Jolla meeting," citing as evidence that "[i]n or around June 2015" the OAG allegedly had a meeting with someone who did attend that conference: a Harvard professor who was purportedly concerned about ExxonMobil's "history of misinformation." (*Id.* ¶ 34.) Even according to ExxonMobil's own narrative, there is nothing unreasonable about the OAG, which is responsible for investigating fraud, taking a meeting with someone who is concerned about misinformation. The Amended

[3] All citations are to the section on ExxonMobil's Separate Defenses.

Answer proceeds to rehash other allegations from the federal lawsuit concerning other communications with various third parties (*id.* ¶¶ 35-37, 39, 43),[4] a second meeting among climate change activists that the OAG did not attend (*id.* ¶ 38), and communications about the possibility of a phone call between former Attorney General Schneiderman and "a California billionaire and environmental activist," which, according to ExxonMobil's own sources, never materialized (*id.* ¶ 49).[5]

At root, ExxonMobil would like the Court to believe that a prosecutor must work alone at her desk, sequestered from the outside world. But a prosecutor cannot reasonably stay abreast of potential violations of law in a state of isolation. When members of the public contact the OAG to report suspected fraud based on the dissemination of "misinformation" (*id.* ¶ 34), it is proper for the OAG to pursue the matter, and to investigate any credible leads. Recognizing this reality, the district court dismissed virtually identical allegations in the federal lawsuit on the grounds that they did not permit the court to infer either (1) that the activists had an improper purpose – "that is, that they know state investigations of Exxon will be frivolous, but they see such investigations

[4] As purported evidence of the OAG's alleged improper motives, ExxonMobil also alleges that a third party "encouraged" the office to issue a subpoena to the George C. Marshall Institute – which the OAG did not do. (AA ¶ 36.) In ExxonMobil's implausible narrative, the OAG's decision not to take an action encouraged by a third party somehow demonstrates that third party's improper influence.

[5] ExxonMobil's allegation that then-Attorney General Schneiderman pursued the ExxonMobil investigation in exchange for campaign contributions relies on a cryptic quotation from an unidentified email about a potential phone call between the former Attorney General and a potential donor in an article in the *New York Post*. (AA ¶ 49.) The same article suggests the call never happened. However, even if the former Attorney General was motivated to any degree by political gain, it would be immaterial as long as there was a reasonable basis for the investigation. *See Hartman*, 547 U.S. at 264 (no claim of prosecutorial misconduct even where the prosecutor admitted that he was "not galvanized by the merits of the case, but sought the indictment against Moore because he wanted to attract the interest of a law firm looking for a tough trial lawyer").

as politically useful" – or (2) that the OAG shared any improper purpose with such activists. *Exxon Mobil Corp.*, 316 F. Supp. 3d at 708. The district court further held that:

> [ExxonMobil's Complaint] does not include any factual allegations to suggest that [the activists] do not believe that Exxon has committed fraud. At best (for Exxon) the meetings are evidence that the activists recognize that the discovery process could reveal documents that would benefit their public relations campaign by showing that Exxon has made public statements about climate change that are inconsistent with its internal documents on the subject. This evidence falls short of an inference that the activists—to say nothing of the AGs—do not believe that there is a reasonable basis to investigate Exxon for fraud.

Id. at 709. The same is equally true of the Amended Answer.

b. Statements at a March 2016 Press Conference and Subsequent Interaction with Other Attorneys General

ExxonMobil's allegations concerning a March 2016 press conference also do not permit any inference that the OAG lacked a reasonable basis for the investigation. (AA ¶¶ 40-43.) Here, as in the federal complaint, ExxonMobil cites snippets from then-Attorney General Schneiderman's statements at a March 2016 press conference as proof that he prejudged the outcome of the investigation. Specifically, ExxonMobil alleges that he "declared presumptively that ExxonMobil has engaged in unlawful conduct, even though he had not yet completed his fact gathering." (AA ¶ 42.) Of course, the OAG agrees with the proposition that prosecutors must respect the "presumption of innocence." (*See* Br. 17 (citing *United States* v. *Bowen*, 799 F.3d 336, 354 (5th Cir. 2015)).) Yet, as the full transcript shows, then-Attorney General Schneiderman repeatedly stated at that conference that it was "too early to say" what the investigation would find. *Exxon Mobil Corp.*, 316 F. Supp. 3d at 707; *id.* at 706 ("Read in context, the NYAG's comments suggest only that he believes that an investigation is justified in light of news reports regarding Exxon's internal understanding of the science of climate change."). Further, the OAG disagrees with ExxonMobil's suggestion that it is improper to update its constituents on matters of public importance, including investigations, where appropriate. (*See* Br. 17.) Case law supports the

OAG's view. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 278 (1993) ("Statements to the press may be an integral part of a prosecutor's job . . . and they may serve a vital public function.").

Likewise, ExxonMobil's allegations concerning the common interest agreement among the states following that press conference do not suggest a lack of reasonable basis. (AA ¶¶ 43-45.) Here, as in the federal lawsuit, ExxonMobil highlights a passage in the preamble reciting a common interest in "limiting climate change" and "ensuring the dissemination of accurate information about climate change." (*Id.* ¶¶ 44.) However, "[e]nsuring that 'accurate information' reaches the market and the public is consistent with a *bona fide* investigation – not retaliation." *Exxon Mobil Corp.*, 316 F. Supp. 3d at 710. And "false statements to the market or the public are not protected speech." *Id.* In other words, "[e]nforcement of [a statute]," like New York's antifraud laws, "for its expressed purposes does not infringe on the exercise of constitutional rights." *United States v. Fleetwood Enters.*, 702 F. Supp. 1082, 1092 (D. Del. 1988).[6]

[6] ExxonMobil argues that *Fleetwood* is "unavailing because, contrary to New York precedent, the court *questioned* the availability of a selective enforcement defense under federal law." (Br. 12 (emphasis added).) This argument is both superficial and misleading. In *Fleetwood*, the court analyzed in detail whether the defense would be available under the facts of the case, "assuming, *arguendo*, that selective enforcement *is* an available defense to a civil penalty action." 702 F. Supp. at 1092 (emphasis added). In denying defendant's motion to add a defense alleging selective enforcement, the court explained that the defendant's "own argument establishes a permissible basis for selection of [the defendant] for this civil penalty proceeding," noting that the purpose of the underlying law was to promote safety, and the defendant's purported exercise of its constitutional rights threatened safety. *Id.* ExxonMobil's own allegations likewise establish a permissible basis for the OAG's investigation here. According to ExxonMobil, the OAG began its investigation shortly after meeting with someone in June 2015 "to discuss the purported history of misinformation she attributed to ExxonMobil." (Br. 3.) The investigation and civil action that followed were based in substantial part on the Martin Act, which is designed to prevent companies from spreading misleading information that provides an inaccurate picture of the company's financial prospects to investors.

c. NYU Fellowship Program

ExxonMobil also alleges a "conflict of interests" in connection with hiring Special Assistant Attorneys General with fellowship funding from the State Impact Center at New York University School of Law ("NYU" or "State Impact Center"). These allegations are palpably insufficient: they are directly contradicted by the sources that ExxonMobil cites and based on a blatant mischaracterization of those sources.

First, ExxonMobil argues that NYU "has improper influence over the fellows' cases and decision-making." (Br. 15.) ExxonMobil's own sources say otherwise. In particular, the secondment agreement between the OAG and NYU, which ExxonMobil has attached to its Amended Answer as Exhibit 17 (the "Agreement"), makes clear that the "OAG retains *sole discretion* to determine whether to undertake any action[.]" (AA, Ex. 17, Agreement at 3 (emphasis added).) In addition, the Agreement expressly disclaims any intention "to induce OAG to undertake or refrain from undertaking any action within the purview of OAG." (*Id.*) The Agreement also provides various safeguards to prevent conflicts of interest on the part of the fellows themselves, including that "the Legal Fellow will be under the direction of, and owe a duty of loyalty to, the OAG" (*id.* at 1); that "[t]he Legal Fellow's work as Special Assistant Attorney General will be supervised exclusively by the OAG" (*id.* at 2-3); and that fellows are prohibited from working on matters that involve NYU (*id.* at 3).

In an abundance of caution, the OAG requested an informal opinion regarding the fellowship program from the Joint Commission on Public Ethics ("JCOPE") last fall. The opinion from JCOPE, dated December 18, 2018, is attached as an exhibit to the accompanying affirmation of Marc Montgomery ("Second Montgomery Aff."). Citing the "significant safeguards to protect

the interests of the OAG and the state" set forth in the Agreement, JCOPE concluded that the fellowship program does not violate any ethical rules pertaining to conflicts of interest or gifts:

> There is no reasonable basis to infer that the Legal Fellows program was offered to the OAG to influence official action by the OAG, or to reward an official action already taken. Therefore, Commission staff conclude that the OAG's participation in the Impact Center's Legal Fellowship program does not violate the ethics rules in the Public Officers Law.

(Second Montgomery Aff., Ex. A at 5.) JCOPE further concluded that "[t]here is no reasonable basis to infer that the grant [from Bloomberg Philanthropies] to the Impact Center was an attempt to influence official action by the OAG, or to reward an official action already taken." (*Id.* at 5 n.17.)

Second, ExxonMobil alleges that, "[a]ccording to its website, 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 with this political mission." (AA ¶ 50 (emphasis added).) The website says no such thing. In fact, the website says that the State Impact Center at NYU "*supports* state attorneys general in defending and promoting clean energy, climate and environmental laws and policies."[7] The critical distinction is that the fellowship program supports the OAG's existing and longstanding efforts to enforce environmental laws. JCOPE has explicitly recognized this point, noting that "the OAG applied to participate in the Legal Fellows program *after determining that the program compl[e]mented the OAG's already-established environmental protection agenda*." (Second Montgomery Aff., Ex. A at 5 (emphasis added).) JCOPE likewise recognized that "the OAG's established commitment to environmental law pre-dates Bloomberg Philanthropies' grant to the Impact Center." (*Id.*)

[7] State Energy & Environmental Impact Center, NYU School of Law, "About the Center," https://www.law.nyu.edu/centers/state-impact/about (last accessed April 9, 2019).

Third, university fellowships are commonplace in government agencies and an important path to public service, especially for junior lawyers. If ExxonMobil were permitted to maintain an affirmative defense of "conflict of interests" here, where the fellowship program was carefully structured to avoid any conflicts, then any defendant facing a government enforcement action could assert a conflict of interest whenever a university fellow was involved. This would open the door to endless discovery on baseless claims and defenses.

3. The Examples of Valid Misconduct Claims Cited by ExxonMobil Are Not Germane to Its Allegations of an Unlawful Investigation

The cases that ExxonMobil relies upon for its defenses are inapposite to its allegations. For its defense of "selective enforcement," ExxonMobil relies on cases involving adverse administrative decisions and textbook retaliation.[8] Here, by contrast, ExxonMobil has alleged that the OAG has violated the equal protection clause of the federal and state constitutions by merely *investigating* the company. Similarly, for its defense of "official misconduct," ExxonMobil relies on cases involving lying in court,[9] leaking privileged materials,[10] and posting anonymous online comments about ongoing cases,[11] among others.[12] Whereas here, ExxonMobil alleges that the OAG has committed official misconduct by commenting publicly on the investigation. Finally, for its defense of "conflict of interest," ExxonMobil relies on cases involving personal enrichment[13]

[8] *Birmingham v. Ogden*, 70 F. Supp. 2d 353, 358 (S.D.N.Y. 1999) (termination of police officer); *Kreamer v. Town of Oxford*, 96 A.D.3d 1130, 1133 (3d Dep't 2012) (retaliation against resident who complained of denial of permit by "digging a trench to prevent access to nearby roadway"). ExxonMobil cites an additional case *dismissing* a selective enforcement claim. *Bower v. Town of Pleasant Valley*, 2 N.Y.3d 617, 632 (2004) (denial of construction permits).

[9] *Berger v. United States*, 295 U.S. 78, 84, 88 (1935).

[10] *SEC v. Gulf & W. Indus., Inc.*, 502 F. Supp. 343, 347 (D.D.C. 1980).

[11] *United States v. Bowen*, 799 F.3d 336, 354 (5th Cir. 2015).

[12] ExxonMobil cites an additional case *dismissing* a claim of misconduct where the prosecutor's wife was a political opponent of the defendant. *See Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984).

[13] *People v. Zimmer*, 51 N.Y.2d 390, 395 (1980) (vacating indictment where the district attorney who presented the case to the grand jury was a shareholder and lawyer to the company that

but alleges simply that the OAG has allowed the participation of lawyers with fellowship funding from NYU and that a telephone call between the former Attorney General and a California billionaire regarding campaign contributions may have been contemplated.

B. ExxonMobil's Cross-Motion to Amend Should Be Denied

ExxonMobil's cross-motion for leave to amend its Answer should be denied as futile because the allegations of prosecutorial misconduct in the Amended Answer are patently insufficient. Namely, the allegations in the Amended Answer do not permit the inference that the OAG lacked a reasonable basis to investigate ExxonMobil or to bring this action or that improper motive was the but-for cause of the investigation or ensuing action.

ExxonMobil devotes nearly two pages of its brief to establishing that the OAG "cannot claim to be unaware of ExxonMobil's defenses or the underlying factual allegations." (Br. 10-11.) Of course the OAG is aware of ExxonMobil's conspiracy theories. The only conceivable explanation for devoting so much ink to bolstering an undisputed point is that ExxonMobil would like to leave the impression that surprise is the only proper basis to dismiss a defense or deny leave to amend. That is not so.

According to the New York Court of Appeals, "[w]here a proposed defense plainly lacks merit, . . . amendment of a pleading would serve no purpose but needlessly to complicate discovery and trial, and the motion to amend is therefore properly denied." *Thomas Crimmins Contracting*

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defendant managed); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987) (holding that counsel for the beneficiary of a court order may not also serve as special prosecutor for alleged violations of that order, due to the potential to abuse the appointment to benefit his paying clients). ExxonMobil cites an additional case finding no conflict of interest where "[n]o governmental official stands to profit economically from vigorous enforcement of the [law]." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980).

Co. v. City of New York, 74 N.Y.2d 166, 170 (1989).[14] That is precisely the situation before the Court. As discussed *supra*, the allegations in the Amended Answer do not satisfy the threshold test to establish a misconduct defense against a law enforcement agency carrying out its statutory function. In addition, allowing such defenses to go forward would needlessly complicate discovery and trial. From the beginning of the investigation, ExxonMobil has pursued a strategy of collateral attack with the objective of wearing down the OAG and forcing the OAG to divert resources from its affirmative case. As the district court observed, "The legal jiu-jitsu necessary to pursue this strategy would be impressive had it not raised serious risks of federal meddling in state investigations and led to a sprawling litigation involving four different judges, at least three lawsuits, innumerable motions and a huge waste of the AGs' time and money." *Exxon Mobil Corp.*, 316 F. Supp. 3d at 711 n. 31. That legal jiu-jitsu is ongoing and is the subject of this motion.

C. The OAG's Motion for a Protective Order Should Be Granted

The scope of the OAG's ongoing document production has, by ExxonMobil's own admission, provided ExxonMobil with precisely the type of documents it claims are necessary to support its defenses. ExxonMobil's demands for additional documents should be rejected and the Court should grant the OAG's proposed protective order. As explained to the Court in advance of the March 21st discovery conference, the OAG is producing all of its third-party communications where substantive information regarding ExxonMobil was conveyed to the OAG. (*See* Mar. 20, 2019 Letter to Court, Dkt. No. 109.) ExxonMobil fails to articulate any reason why it requires

[14] *See also Giaimo v. EGA Assocs. Inc.*68 A.D.3d 523 (1st Dep't 2009) (denying leave to amend answer to add an affirmative defense, where the proposed defense was "without merit" and based on a theory that was "unsupported by law"); *Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 118 A.D.3d 581, 581 (1st Dep't 2014) (denying leave to amend answer), *aff'd as modified*, 27 N.Y.3d 1048 (2016); *Rosenshein v. Rosenshein*, 158 A.D.2d 268, 268-69 (1st Dep't 1990) (denying leave to amend answer).

additional discovery to explore its defenses. Indeed, counsel for ExxonMobil initiated the discovery conference by touting the significance of recently produced OAG documents and, in response to questioning by the Court, conceded that the only remaining dispute regarding the OAG's discovery response concerned the numbers of custodians and search terms. (*See, e.g.*, Second Montgomery Aff., Ex. B at 3:23-25 ("We received a production of emails on Friday where that allegation is supported by considerable evidence.").)

Nevertheless, ExxonMobil persists in demanding that the OAG expand the scope of its document review and, on March 22nd, served the OAG with an 11-f notice, requesting deposition testimony on broad topics related to its defenses, such as the OAG's communications about ExxonMobil with 17 different individuals and entities. (*See* Second Montgomery Aff., Ex C at 7.) ExxonMobil's actions, however, do not suggest a genuine effort to obtain necessary evidence. Despite the Court's directive to negotiate an acceptable number of custodians and search terms, ExxonMobil, as of the filing of this brief, has yet to respond to the OAG's invitation to meet and confer on the topic, which was first extended over two months ago, on February 1, 2019. (*See* Feb. 1, 2019 Letter to ExxonMobil at 5, Dkt. No. 66 ("Please let us know at your earliest convenience whether you are available for a meet and confer next week"); Second Montgomery Aff., Ex. B at 8:17-20 ("I think we could work this out between ourselves and report back to the court within a week or so of the resolution of this issue. I don't believe that this is an issue.").) It is also notable that the only negotiation ExxonMobil has engaged in with regard to its discovery demands was an email sent to the OAG less than two hours before the March 21st conference with a revised proposal for search terms and custodians. (Second Montgomery Aff., Ex. D.)

In an attempt to exaggerate the materiality of its additional document demands, ExxonMobil states that the OAG "refused to produce non-privileged documents concerning . . .

[the OAG's] coordination with climate activists." (Br. 21.) That is not true. Exhibits included by ExxonMobil in support of its opposition demonstrate that the OAG is producing communications with the parties ExxonMobil contends participated in the alleged conspiracy with the OAG. (*See* AA, Exs. 8-12 (filed under seal).) The four additional categories of documents demanded by ExxonMobil are neither necessary nor relevant to the allegations in the Complaint or the challenged defenses, and ExxonMobil provides no reasoning to the contrary. While ExxonMobil cites certain press statements by former Attorney General Schneiderman to allege bias against ExxonMobil, it provides no explanation as to why the OAG's communications with the press would have any bearing on ExxonMobil's claims that the OAG colluded with special interests in bringing the investigation. ExxonMobil's demands for documents concerning a common interest agreement with other state Attorneys General as well as for documents concerning the State Impact Center fellowship program are also red herrings. The OAG has made clear that it has a common interest agreement with other state Attorneys General and is including communications withheld pursuant to that agreement in its privilege log. ExxonMobil provides no reason why additional information regarding the common interest agreement is required for any of its defenses, which do not involve any allegations of improper cooperation with other state government agencies. ExxonMobil's demand for documents related to the OAG's fellowship program with NYU's State Impact Center is similarly unfounded. As described above, the fellowship agreement makes clear that the attorneys employed under the agreement work at the direction of the OAG, not NYU.

Contrary to ExxonMobil's assertion, the OAG has not argued that "no defendant should ever be allowed discovery on defenses premised on official misconduct." (Br. 21.) Instead, the OAG has argued that ExxonMobil has failed to meet the exacting standard for pleading such defenses. What is more, notwithstanding its position that ExxonMobil's defenses should be

dismissed, the OAG has produced and is continuing to produce documents that are, in ExxonMobil's view, critical to ExxonMobil's misconduct-based defenses. In fact, the OAG anticipates completing production by the time the Court decides this motion. While some of the OAG's document production may be rendered unnecessary if the Court dismisses the challenged defenses, the OAG has proceeded with providing ExxonMobil the sort of third-party communications ExxonMobil has requested in an effort to adhere to the Court's directive that the case proceed to trial in 2019. ExxonMobil's request for additional discovery beyond what the OAG is already producing would only serve to unnecessarily delay the trial. The Court therefore should grant the OAG's proposed protective order.

CONCLUSION

For the foregoing reasons, the OAG respectfully requests that the Court grant its motion to dismiss the Twenty-Ninth, Thirtieth, Thirty-Fourth, Thirty-Fifth, and Thirty-Sixth Defenses, deny ExxonMobil's cross-motion for leave to amend its answer, and grant a protective order barring additional discovery on the defenses at issue, including discovery pursuant to the Rule 11-f deposition notice ExxonMobil recently issued covering these same subjects.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 17 of the Commercial Division of the Supreme Court, Marc Montgomery, Assistant Attorney General for the Office of the Attorney General of the State of New York, hereby certifies that, according to the word count feature of the word processing program used to prepare this brief, this combined opposition brief and reply brief complies with the length limits of Rule 17.

Dated: April 9, 2019
New York, New York

/s Marc Montgomery
Marc Montgomery