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. 3

OFFICE OF THE ATTORNEY GENERAL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION ITS MOTION TO SEAL

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The Office of the Attorney General of the State of New York ("OAG") respectfully submits this memorandum of law in support of its motion to seal five exhibits submitted by Exxon Mobil Corporation ("ExxonMobil") in connection with its opposition to the OAG's pending motion to dismiss certain defenses.

PRELIMINARY STATEMENT

The documents at issue are five emails between OAG attorneys and a third-party attorney, which were designated as confidential in the OAG's production to ExxonMobil. ExxonMobil now challenges that designation and seeks to publicly file those documents.

As this Court is aware, the OAG contests ExxonMobil's right to obtain discovery directed to the challenged prosecutorial misconduct defenses. The OAG's objections to those defenses are set forth in its motion to dismiss certain defenses or, in the alternative, for a protective order, which is fully briefed and scheduled for argument on May 22, 2019. (*See* Mot. Seq. No. 2.) In the spirit of comprise, however, and to prevent any impediment to the Court's directive for a 2019 trial date, the OAG agreed to produce third-party communications in which substantive information regarding ExxonMobil was provided to the OAG. The OAG, however, reserved all of its objections and maintains that the majority of such documents, including those that are the subject of this motion, are not relevant to any valid claims or defenses.

As a decision granting the OAG's pending motion to dismiss would render the documents at issue irrelevant, the Court should defer any decision on sealing the documents at issue until after it rules on the OAG's pending motion. Those documents would have no bearing on the sufficiency of ExxonMobil's pleadings and would be irrelevant to any claims or defenses in this case if the Court determines that ExxonMobil failed to adequately plead its misconduct defenses. Because the documents, in that case, would not assist the public in understanding the basis for any decision

by the Court in this litigation, they would not be entitled to the presumption of access that attaches to documents that are material to an adjudication. In addition, the OAG has a legitimate interest in maintaining the privacy of third parties who provide information to the OAG and otherwise assist with investigations. ExxonMobil should not be allowed to undermine that interest by gratuitously filing confidential documents in connection with its invalid misconduct claims.

BACKGROUND

As the Court is aware, the OAG filed a motion to dismiss certain of ExxonMobil's defenses premised on prosecutorial misconduct or, in the alternative, for a protective order halting any further discovery related to such defenses. (Mot. Seq. No. 2.) As the Court is also aware, the OAG, notwithstanding its objections, agreed to produce documents related to ExxonMobil's conspiracy theories. In particular, the OAG agreed to search the records of nine senior attorneys in the ExxonMobil investigation, using broad search terms such as "Exxon", "CO2" and "climate change." (Dkt. No. 66.) At ExxonMobil's request, the OAG further agreed to include certain email domains in its search, including the domain for the law firm whose emails are at issue on this motion. Based on that search and subsequent review, the OAG has been producing all non-privileged third-party communications where substantive information regarding ExxonMobil was provided to the OAG. Recognizing the sensitivity such documents, the OAG designated them as confidential pursuant to the protective order entered in this case. (Dkt. No. 46.)

On March 27, 2019, ExxonMobil filed its opposition to the OAG's motion to dismiss and, in the alternative, cross-moved for leave to amend its Answer. (Dkt. No. 114.) ExxonMobil included in its submission a proposed amended answer and supporting exhibits, including five confidential documents produced by the OAG, which it filed under seal. (Dkt. No. 119, Exs. 8-12.) ExxonMobil also redacted portions of its proposed amended answer that referred to those

documents. (Dkt. Nos. 117, 119.) Nine days later, counsel for ExxonMobil contacted the OAG to clarify the OAG's position with respect to permanently sealing those documents. The OAG suggested holding that matter in abeyance until the Court rules on the OAG's pending motion to dismiss. ExxonMobil refused, and the OAG informed ExxonMobil that it would move to permanently seal the documents. On April 11, 2019, the OAG submitted a Rule 24 letter to the Court, setting forth its intention to file a motion to permanently seal Exhibits 8-12 to ExxonMobil's proposed Amended Answer. On April 19, 2019, the Court approved a briefing schedule for the OAG's planned motion to seal and directed the OAG to file the motion as an order to show cause. The email thread between the Court and the parties discussing the filing of this motion and the OAG's motion for a protective order to a quash a deposition notice (Mot. Seq. 4), which is being filed contemporaneously, is attached as Exhibit A to the accompanying affirmation of Marc Montgomery ("Montgomery Aff.").

ARGUMENT

A motion to seal documents filed with the court requires a finding that "the public's right of access is outweighed by competing interests." *People v. Burton*, 189 A.D.2d 532, 536 (3d Dep't 1993). Recognizing the "dearth of New York cases applying the common-law right of access," New York courts frequently "look to Federal decisional law for instruction on its substantive and procedural requirements." *Id.* at 535; *see also People v. Sullivan*, 640 N.Y.S.2d 714, 718-19 (Sup. Ct., Saratoga Cnty., Jan. 13, 1996) (analyzing federal law for guidance in the application of common-law presumption of access). The Second Circuit has enumerated the steps that a court must take when deciding whether to prevent public access to documents filed with the court. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119-20 (2d Cir. 2006). First, a court must determine whether the documents are "judicial documents." *Id.* at 119. If the documents are not

judicial, then there is no presumption of public access, and the movant need only make a baseline showing of good cause in order to justify the imposition of a protective order. *Id.* If, on the other hand, the court determines that the documents are judicial in nature, it must next determine the weight of the presumption of access by reference to the "continuum" described in the Second Circuit's opinion in *United States v. Amodeo*. *Id.* (citing *United States v. Amodeo,* 71 F.3d 1044 (2d Cir. 1995)). The weight to be given the presumption of access is governed by the role of the material at issue in the exercise of judicial power. Where testimony or documents play only a negligible role in the performance of judicial duties, the weight of the presumption is low and amounts to little more than a prediction of public access absent a countervailing reason. *Amodeo,* 71 F.3d at 1050.

Here, the documents at issue are not entitled to a presumption of access, and good cause exists to permanently seal the documents.

A. The Documents at Issue Are Not Entitled to a Presumption of Access

In deciding whether documents are entitled to a presumption of access, the important factor is not whether the court actually relied upon the documents when deciding an issue presented to it, but "whether the documents were 'material' to the court's decision." *Standard Inv. Chartered, Inc v. NASD,* 621 F. Supp. 2d 55, 69 (S.D.N.Y. 2007). Because documents submitted in support of legally infirm claims are not necessary to any judicial disposition, such documents are not "judicial documents" and are thus analyzed in the context of a motion to seal with no presumption of access. *See id.* at 70 ("Were the Court to conclude otherwise, parties could simply manufacture a presumption of access for otherwise confidential documents by using them to support obviously irrelevant or nonviable arguments."). This is particularly true in the context of a motion to dismiss

improperly pleaded claims or defenses as such motions are decided on the pleadings and the court is required "to take all factual allegations of the complaint as true." *Id.* at 66.

Here, the documents in question were gratuitously filed by ExxonMobil in an improper attempt to have the Court weigh evidence on legally deficient claims. Such documentation is completely irrelevant to the Court's determination of the pending motion to dismiss. *Id.* at 70 ("[T]he question is not whether an argument is persuasive, but whether the court can even entertain the argument in the first place."). For the purposes of deciding the motion, ExxonMobil's allegations regarding attorney Matthew Pawa are presumed to be true and, therefore, evidentiary support of those allegations is neither necessary nor material for determining the sufficiency of ExxonMobil's pleadings. Indeed, the OAG's reply made no reference to these documents and presented its arguments under the assumption that ExxonMobil's allegations regarding the communications between Mr. Pawa and the OAG were true. (Dkt. No. 132.) The OAG's position is that, regardless of the truth or falsity of such allegations, they fail to state a claim for selective enforcement, conflict of interest, or official misconduct. ExxonMobil's attempt to publicly file these documents prior to a determination of the OAG's motion to dismiss demonstrates exactly the sort of attempt to "manufacture a presumption of access" that the court in *Standard Investment Chartered* recognized must not be permitted. *See* 621 F. Supp. 2d at 70. Should the Court decide that ExxonMobil failed to state a claim of selective enforcement, conflict of interest, or official misconduct, there is no presumption of access to the documents at issue, and any valid basis for objecting to their public filing would warrant granting the OAG's request for the documents to remain permanently sealed.

B. Good Cause Exists to Seal the Documents

The OAG has a good faith basis for requesting that this Court seal the documents in question. "Officials with law enforcement responsibilities may be heavily reliant upon the voluntary cooperation of persons who may want or need confidentiality. If that confidentiality cannot be assured, cooperation will not be forthcoming." *Amodeo*, 71 F.3d at 1050. "If release is likely to cause persons in the particular or future cases to resist involvement where cooperation is desirable, that effect should be weighed against the presumption of access." *Id.* (citing *United States v. Valenti*, 987 F.2d 708, 714 (11th Cir. 1995)). For that reason, privacy interests of third parties "should weigh heavily in a court's balancing equation." *Id* (quoting *Gardner v. Newsday, Inc.*, 895 F.2d 74, 79-80 (2d Cir. 1990))

Mr. Pawa, like other individuals and entities who provide information to the OAG, has a recognized interest in maintaining privacy and avoiding having his communications posted on a public-facing website. ExxonMobil has already demonstrated its strategy of retaliating against anyone it believes cooperates with law enforcement by naming Mr. Pawa and others as potential defendants in the action it brought in Texas. (*See* Dkt. No. 147, Exhibit B to Anderson Affirmation in Support of ExxonMobil's Reply.) ExxonMobil's insistence on publicly filing Mr. Pawa's documents now is simply another attempt to retaliate. As ExxonMobil is well aware, the publication of such documents will discourage other third parties and potential whistleblowers from communicating information about potential wrongdoing or illegality to the OAG.

Moreover, if the Court grants the OAG's motion to dismiss, then Mr. Pawa's emails will not assist the public's understanding of how the issues were decided in this litigation, as they will be irrelevant to any such decisions, and will only serve as tool for embarrassment and harassment. *See, e.g.*, *United States v. Scrushy*, Case No. CR-03-BE-0530-S, 2005 U.S. Dist. LEXIS 42127, at *39 (N.D. Ala., Nov. 23, 2005) (noting that the disputed "transcripts of discussions of these

allegations would not further the public's understanding of the trial" and would only "further embarrass these witnesses with unsubstantiated allegations of misconduct"). Unsealing these documents therefore would impede the OAG's ability to secure cooperation in future investigations with no corresponding benefit to the public.

CONCLUSION

For the foregoing reasons, the Court should defer any decision on whether to permanently seal Exhibits 8-12 to ExxonMobil's proposed Amended Answer until it rules on the OAG's motion to dismiss. (*See* Mot. Seq. No. 2.) If the Court grants that motion, it should also grant the OAG's request to seal.

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 brief complies with the length limits of Rule 17.

Dated: April 24, 2019
New York, New York

/s Marc Montgomery
Marc Montgomery