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 REPLY BRIEF IN FURTHER SUPPORT OF ITS MOTION TO SEAL

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PRELIMINARY STATEMENT

ExxonMobil's opposition to the OAG's motion to seal is based on two flawed premises: (a) that the OAG was obligated to produce the documents in question; and (b) that those documents are necessary for this Court's determination as to whether ExxonMobil pleaded valid defenses of selective enforcement, conflict of interest and official misconduct. The OAG's obligations to produce documents related to ExxonMobil's misconduct defenses were automatically suspended pursuant to C.P.L.R. § 3103(b) upon the filing of the OAG's pending motion to dismiss or, in the alternative, for a protective order. *See* Mot. Sequence No. 2. ExxonMobil's reliance on this Court's February 27, 2019 notice (Dkt. No. 59) is misplaced as that notice did not make any findings with respect to the validity of ExxonMobil's misconduct defenses nor override the provisions of the C.P.L.R. that would subsequently suspend the OAG's discovery obligations related to those defenses. Despite the automatic stay, the OAG voluntarily produced the documents in question to avoid delay in the event of an adverse ruling on its motion. ExxonMobil now seeks to capitalize on the OAG's consideration and use those documents beyond that which is necessary to defend against the enforcement action that has been brought against them. The Court should not allow that.

In addition, ExxonMobil mistakenly assumes that the Court has determined that ExxonMobil's pleadings are sufficient to warrant an examination of evidence in determining the merits of those defenses. As set forth in the OAG's briefing, ExxonMobil's defenses of selective enforcement, conflict of interest and official misconduct fail on the pleadings and the Court need not consider any documents gratuitously filed in support of those invalid defenses.

ExxonMobil's reliance on 22 NYCRR Rule 216.1 and a number of lower court decisions citing that rule is also misplaced. According to ExxonMobil, under Rule 216.1, any documents

filed with the Court, regardless of the circumstances of the filing in question, are entitled to a broad presumption of access. None of the cases cited by ExxonMobil, however, address the unique factual background of the documents that the OAG wishes to seal. Courts have recognized judicial discretion to order documents sealed in such cases and have looked to federal law in support of such decisions. As federal and state courts have recognized, litigants should not be permitted to present invalid claims or defenses as pretext to use the Court's docket as a publicity tool.

ARGUMENT

A. ExxonMobil Should Not Be Allowed to Exploit the OAG's Willingness to Produce Documents Despite the Automatic Stay of Discovery Imposed by C.P.L.R. § 3103(b)

There is no question that the filing of the OAG's pending motion to dismiss certain defenses or, in the alternative, for a protective order, triggered an automatic stay of discovery on matters related to ExxonMobil's challenged defenses, pursuant to C.P.L.R. § 3103(b). *See* C.P.L.R. § 3103(b); *see also Spancrete Northeast, Inc. v. Travelers Indem. Co.*, 99 A.D.2d 623, 624 (3rd Dep't 1984) (noting that C.P.L.R. § 3103(b) "provides that the service of a notice of motion for a protective order has the automatic effect of suspending disclosure"); *Estate of Rosenfeld*, 1999 NYLJ LEXIS 612, at *4 (Surr. Ct., N.Y. Cnty. Mar. 15, 1999) ("Respondent correctly notes that a protective order under CPLR 3103[b]stays disclosure of the particular matter in dispute.").

The Court acknowledged the OAG's position with regard to the stay imposed by the filing of its request for a protective order, stating in its March 19, 2019 notice that the OAG was relying "on the service of its motion for a protective order to relieve it of the obligation to produce" documents related to ExxonMobil's misconduct defenses. Dkt. No. 108. As the OAG subsequently explained to the Court, however, it was proceeding to produce third-party communications related

to ExxonMobil's defenses prior to the Court's decision on the pending motion in effort to avoid any delay to the trial date, notwithstanding the automatic stay imposed under C.P.L.R. § 3103(b). Contrary to ExxonMobil's assertion, the OAG did not interpret the Court's February 27, 2019 notice as a directive intended to override the operation of C.P.L.R. § 3103(b). First, that notice was issued before the OAG filed the March 4, 2019 motion and did not state that the "interim" period in which ExxonMobil was "privileged to pursue discovery on its defenses" would continue upon the filing of the OAG's motion to dismiss or the Court's ultimate resolution of that matter. Dkt. No. 59. In addition, the Court did not express an intent to supersede the operation of C.P.L.R. § 3103(b).

In the event this Court grants the OAG's motion to dismiss ExxonMobil's defenses, all of ExxonMobil's document requests in support of its misconduct defenses will be rendered moot, and the OAG's position that it was not obligated to produce any documents in response to these infirm defenses will be confirmed. In light of those circumstances, the Court should not allow ExxonMobil to abuse the OAG's willingness to make a voluntary production of the documents at issue for public purposes beyond that necessary to defend the enforcement action against them.

B. The Documents at Issue Should Not Be Given a Presumption of Access if They Have No Bearing on the Court's Determination that ExxonMobil's Misconduct Defenses Are Invalid

ExxonMobil cites no controlling authority for its assertion that New York courts "depart from their federal counterparts on the presumption of access." *See* Dkt. No. 206 ("ExxonMobil Br.") at 5. In any case, Rule 216.1(a) provides no reason not to grant the OAG's motion. As the First Department has explained, Rule 216.1(a) "was enacted largely in response to a concern that, in cases in which the parties were in *agreement* to seal the records, courts were not paying sufficient attention to the public interest and were not exercising their discretion to override the

parties' wishes," and that such concerns are absent in cases where one party objects to a proposed sealing order. *Gryphon Dom. VI, LLC v. APP Int'l Fin. Co., B.V.*, 28 A.D.3d 322, 325-26 (1st Dep't 2006) (emphasis added). In other words, it was enacted in response to a concern of opposing parties agreeing, despite the underlying dispute, to seal documents in order to keep certain information about a particular industry or practice from the public. While Rule 216.1 does not define what constitutes "good cause" to order the sealing of documents, courts have recognized that the determination of whether good cause exists to seal documents pursuant to Rule 216.1 "boils down to . . . the prudent exercise of the court's discretion." *Applehead Pictures, LLC v. Perelman*, 80 A.D. 3d 181, 192 (1st Dep't, 2010) (quoting *Mancheski v. Gabelli Group Capital Partners*, 39 A.D.3d 499, 502 (2d Dep't 2007)); *see also Crain Commc'ns., Inc. v. Hughes*, 135 A.D.2d 351, 351 (1st Dep't 1987) (noting that "the determination of whether access to such records is appropriate is best left to the sound discretion of the trial court, *a discretion to be exercised in light of the relevant facts and circumstances of the particular case*") (emphasis added).

Federal authority can offer helpful guidance to New York courts in exercising that discretion, particularly where the underlying facts are not squarely addressed by any existing state cases. *See People v. Burton*, 189 A.D.2d 532, 535 (3d Dep't 1993). Here, the Southern District of New York's decision in *Standard Inv. Chartered, Inc. v. NASD* is particularly instructive. 621 F. Supp. 2d 55, 69 (S.D.N.Y. 2007). In that case, the court began its analysis by determining whether the documents at issue would be of "value to someone wishing to evaluate the court's decision." *Id.* at 66. Because the court does not ordinarily rely on documents submitted in defense of a motion to dismiss absent of a conversion to a motion for summary judgment, such documents would not aid the public in understanding the court's adjudicative process. Consequently, the court determined that such documents were not entitled to a presumption of access. *Id.* The court also

noted the potential for abuse if documents submitted in connection with invalid arguments are given a presumption of access:

> There is a difference, however, between an unreached but nonetheless viable argument and an argument that, by definition, *cannot* properly be presented in the given motion. In other words, the question is not whether an argument is persuasive, but whether the court can even entertain the argument in the first place. Although a court should assume that each validly presented, alternative ground has the potential to be dispositive . . . no such assumption applies to arguments the court is jurisdictionally barred from considering. 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.

Id. at 70 (internal citation omitted) (emphasis in original).

New York state courts have similarly found that, despite the call in Rule 216.1 for a "presumption of openness," "litigants ought not be required to wash their dirty linen in public and subjected to public revelation of embarrassing material where no substantial public interest is shown and where the material may have been inserted into court documents" for an improper purpose. *Feffer v. Goodkind, Wechsler, Labaton & Rudoff*, 152 Misc. 2d 812, 815 (Sup. Ct., N.Y. Cnty. 1991). In *Feffer*, the court found that the documents at issue did not belong in the court but in arbitration proceedings and thus expressed "no hesitancy in sealing the file inasmuch as the material filed with the court belongs not in the court, but in the files of the arbitrating body before whom the arbitration is to be held." *Id.*

The reasoning in *Standard Inv. Chartered* and *Feffer* is directly applicable here. The core premise of the OAG's motion to dismiss is ExxonMobil's failure to properly plead defenses of selective enforcement, conflict of interest and official misconduct. If the OAG is correct that the defenses are not properly pleaded, then ExxonMobil is not entitled to the Court's consideration of these defenses on their merits. Making these documents available to the public in that scenario

would serve no legitimate purpose and would erroneously suggest that ExxonMobil had stated valid claims which required the fact finder to weigh evidence.

ExxonMobil's argument that the documents at issue "play a crucial role in this Court's exercise of judicial power" presupposes that the Court has already made a determination on the adequacy of ExxonMobil's pleadings. *See* ExxonMobil Br. at 5. That is not the case. The Court has yet to render a decision on the OAG's motion to dismiss or ExxonMobil's cross-motion for leave to amend its Answer. As the OAG has argued, there is no need to look to any external documents in dismissing ExxonMobil's defenses. Even accepting the pleadings in the Answer as true, ExxonMobil has failed to state valid defenses of misconduct against the OAG, and its proposed Amended Answer will not cure this deficiency.[1] If the Court ultimately reaches the same conclusion, then the documents in question will have had no bearing on any part of this Court's exercise of its judicial function.

C. There Is Good Cause for Sealing the Documents

As set forth in the OAG's opening brief, law enforcement agencies have a recognized interest in nurturing the voluntary cooperation of members of the public who may have information about potential illegal activity. *See* OAG Br. at 6 (quoting *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995)). In response, ExxonMobil argues that "New York courts do not accept conclusory allegations of 'chilling effects' as a valid basis to seal court records." ExxonMobil Br. at 6. All of the cases cited by ExxonMobil, however, address unrelated considerations in the context of private parties, and none support ExxonMobil's broad characterization of New York

[1] ExxonMobil erroneously states that the OAG "conced[ed] through silence that the Amended Answer itself should not remain sealed." ExxonMobil Br. at 5. To the contrary, the OAG's proposed order to show cause lists the "Redacted portions of ExxonMobil's Proposed Amended Answer" as the first item it requests the Court to seal. *See* Dkt. No. 158. All of the OAG's arguments for sealing the communications at issue apply with equal force to quotations and descriptions of those documents in ExxonMobil's proposed Amended Answer.

law. For instance, in *Matter of Hofmann*, the Court stated that "conclusory claims of the need for confidentiality of *settlement agreements* are insufficient to seal a record" and offered no analysis relevant to the OAG's law enforcement concerns. 284 A.D.2d 92, 94 (1st Dep't 2001) (emphasis added). The other two cases cited by ExxonMobil are equally inapposite and offer no relevant analysis to the concerns articulated by the OAG here. *See Doe v. New York Univ.*, 6 Misc. 3d 866, 878 (Super Ct., N.Y. Cnty. 2004) (addressing the applications of Civil Rights Law in the context of a confidentiality request by a private party); *Doe v. Bellmore-Merrick Cent. High Sch. Dist.*, 1 Misc. 3d 697, 700 (Sup. Ct., Nassau Cnty. 2003) (same).

Here, the OAG's basis for requesting that the documents at issue remain sealed is not complicated. Simply put, publishing third-party communications on the Court's docket in connection with allegations of malfeasance is likely to deter parties in the future from communicating with the OAG. That concern is particularly striking here where ExxonMobil is attempting to publish these documents before the Court has even ruled on the legal sufficiency of those defenses. Denying the OAG's request to seal, even if ExxonMobil's misconduct defenses are dismissed, will send a signal that any defendant in a litigation brought by the OAG can secure the publication of all communications with parties that assisted the OAG in its investigation, regardless of whether such documents are relevant to any valid claims or defenses in the case. In this case, the OAG's interest in preventing third-party communications that have no relevance to any valid claims or defenses from being made public on the Court's docket outweighs any public interest in accessing such documents, particularly if they played no role in the Court's determination of any issue in this case.

CONCLUSION

For the foregoing reasons, the OAG respectfully requests that the Court defer its decision on the OAG's motion to seal until it rules on the pending motion to dismiss. In the event the Court grants the OAG's motion, the OAG asks that it also issue an order consistent with the OAG's proposed order to show cause.

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: May15, 2019
New York, New York

/s Marc Montgomery
Marc Montgomery