

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

In the Matter of the Application of the

PEOPLE OF THE STATE OF NEW YORK, by
ERIC T. SCHNEIDERMAN,
Attorney General of the State of New York,

Petitioner,

For an order pursuant to C.P.L.R. § 2308(b) to compel
compliance with a subpoena issued by the Attorney
General

- against -

PRICEWATERHOUSECOOPERS LLP and
EXXON MOBIL CORPORATION,

Respondents.

Index No. 451962/2016

**ORAL ARGUMENT
REQUESTED**

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL COMPLIANCE
WITH AN INVESTIGATIVE SUBPOENA ISSUED
BY THE ATTORNEY GENERAL OF THE STATE OF NEW YORK**

PRELIMINARY STATEMENT

The Office of the Attorney General (“OAG”) issued a subpoena to ExxonMobil Corporation (“Exxon”) over one year ago seeking documents relating to Exxon’s potential violations of New York anti-fraud laws.¹ Almost five months ago, OAG specifically requested that Exxon prioritize the production of documents concerning the company’s valuation, accounting, and reporting of its assets and liabilities, and the impact of climate change on those processes. Exxon has failed to cooperate with this request, and thus, the OAG respectfully requests this Court to compel Exxon’s compliance by November 23, 2016.

The Court’s intervention is made more urgent by Exxon’s tactics. In correspondence with OAG, Exxon ignored this specific request for two and a half months, and then more recently claimed that it intends to comply, while at the same time refusing to commit to specific production dates or to appropriately update its search protocols, and purporting to unilaterally restrict the scope of the request. In statements made to this Court, Exxon acknowledged that the subpoena is valid and (inaccurately) boasted of the company’s compliance record. But at the very same time, in a federal district court in Texas, Exxon is effectively moving to quash the subpoena on constitutional grounds it has pointedly avoided raising in this Court. Exxon’s transparent purpose is to delay the production of these key documents to OAG and forestall judicial intervention in this jurisdiction long enough for Exxon’s forum-shopping exercise to culminate in a federal injunction barring New York courts from enforcing the OAG’s subpoena to Exxon before the relevant issues can even be joined.

¹ A true and correct copy of the subpoena is annexed to the accompanying Affirmation of John Oleske, dated November 14, 2016 (“Oleske Aff.”), as Exhibit A.

The appropriate place and time for Exxon to make arguments for evading compliance with the subpoena is here and now. This Court is fully capable of giving Exxon a full and fair opportunity to be heard on any such arguments.

The Court should order Exxon to produce the specific documents at issue here by the extended return date of November 23, 2016. The Court should also assert jurisdiction over Exxon's continuing compliance with the subpoena, and order such other and further relief as may be just and proper in implementing a schedule for the prompt production of all other responsive documents.

FACTUAL BACKGROUND

Exxon is the world's largest publicly traded oil and gas company and one of the world's largest refiners and marketers of petroleum products. (Oleske Aff. ¶ 4.) Many Exxon shareholders and customers reside in New York State (*id.*), and Exxon is therefore subject to New York Executive Law 63(12), General Business Law § 352 (the Martin Act), and General Business Law § 349(a).

OAG is investigating whether Exxon's representations to investors and the public about the impact of climate change on its business, including statements made in filings with the U.S. Securities and Exchange Commission ("SEC") and other public reports, were or are fraudulent or deceptive. (*Id.*, ¶ 5.)

One such subject of the investigation is a report Exxon issued in 2014 entitled *Energy and Carbon – Managing the Risks*. (*Id.*, ¶ 6, Ex. B.) In *Managing the Risks*, Exxon assured investors and others that in making business decisions, Exxon takes into account potential government action to limit greenhouse gas emissions "through the use of a proxy cost of carbon." (*Id.*, Ex. B, p. 17.) Exxon indicated that its use of proxy-cost analysis allowed it to

predict that the valuation and recoverability of its reserves would not be affected by economic impacts of climate change. (*Id.*, Ex. B, p. 18.)

To obtain information relevant to these representations, among others, OAG propounded Subpoena Request Nos. 3 and 4. (*Id.*, Ex. A.) Request No. 3 calls for documents reflecting Exxon's general practices concerning the valuation, accounting, and reporting of its assets and liabilities, and its specific practices in integrating climate-change-related impacts in those processes as well as its business decisions more broadly. The documents OAG seeks through this request would explain Exxon's procedures for: (1) valuing its oil and gas reserves; (2) assessing the need for impairment charges or write-downs with respect to those valuations; and (3) calculating and implementing the "proxy" cost of carbon that Exxon claims it uses to evaluate the expected impact of greenhouse gas regulation on its business. Request No. 4 is addressed specifically to how the above processes were described or incorporated in various public statements by Exxon, including in *Managing the Risks*. The specific documents that are the subject of this motion are all responsive to one or both of these requests.

In a June 24, 2016 letter to Exxon's counsel, OAG specifically requested that Exxon produce documents related to OAG's "immediate investigative priorities," which were identified as:

- (i) Exxon's valuation, accounting, and reporting of its assets and liabilities, including reserves, operational assets, extraction costs, and any impairment charges; and (ii) the impact of climate change and related government action on such valuation, accounting, and reporting.

(Oleske Aff. Ex. C.) OAG indicated that many of those documents were likely to be held by custodians that OAG had identified in prior requests, but asked that Exxon identify additional custodians and search terms. (*Id.*) OAG provided a list of non-exclusive exemplar categories of

responsive documents, including those relating to reserves valuation and Exxon's implementation of the proxy cost of carbon. (*Id.*)

For the next eleven weeks, Exxon failed to inform the OAG whether it would produce these categories of responsive documents. (*Id.* ¶ 9.) In July 2016, Exxon's counsel stated that Exxon was evaluating the June 24, 2016 request and would respond more fully at an unspecified time in the future. (*Id.*, Ex. D.) OAG wrote Exxon later in July to request that Exxon immediately identify any additional custodians and search terms necessary to collect the documents described in the June 24 letter. (*Id.*, Ex. E.) In early August 2016, Exxon's counsel stated that it was continuing to review OAG's June 24 request. (*Id.*, Ex. F.) In a September 6 letter, OAG informed Exxon that OAG was increasingly concerned with the pace of Exxon's document production and its continued failure to address the issues raised in the June 24 letter. (*Id.*, Ex. G.) OAG also raised its ongoing concern that, even though it had requested and prioritized documents from the authors and contributors to *Managing the Risks* starting in December 2015, Exxon had still not completed its production of these documents. (*Id.*) On September 8 and 13, Exxon stated that it had identified additional potential document custodians in response to OAG's June 24 request and that that it would begin producing documents from those custodians. (*Id.*, Exs. H, I.)

In an October 14 letter, OAG requested that Exxon expand its list of search terms because—based on OAG's review of certain documents in Exxon's production—it appeared that Exxon employees had used words and phrases to reference proxy cost that might not be captured by the existing search terms. (*Id.*, Ex. J.) OAG also identified additional custodians that were likely to have documents concerning proxy cost. (*Id.*)

In a November 1, 2016 letter to Exxon, OAG noted that Exxon had not yet completed its production of the general categories of documents prioritized in OAG's June 24 letter or responded to OAG's October 14 letter specifically regarding proxy cost documents. (*Id.*, Ex. K.) OAG asked these documents be produced by November 23, 2016 and that Exxon's counsel confirm by November 4 that Exxon would do so.

Those documents are the documents that OAG now seeks to compel, consisting of:

Documents concerning (i) Exxon's valuation, accounting, and reporting of its assets and liabilities, including reserves, operational assets, extraction costs, and any impairment charges; and (ii) the impact of climate change and related government action on such valuation, accounting, and reporting, including documents held by additional custodians and documents found using appropriately-targeted search terms, *including, but not limited to*, documents relating to the disclosure, calculation, use and application of the proxy cost of carbon/greenhouse gases (also known as the carbon price).

(*Id.*, ¶ 17.) Exxon did not confirm by November 4, 2016 that it would produce those documents by November 23, 2016. (*Id.* ¶ 18.)

In a November 11, 2016 letter to OAG, Exxon stated that it would produce the requested documents, but refused to confirm that production would be completed by November 23, 2016, or any other date. (*Id.*, Ex. L.) Exxon also refused to expand its search terms to address obvious deficiencies in its prior methodology. (*Id.*) Finally, Exxon unilaterally declared that it would not produce documents revealing how it values, accounts for and reports its assets and liabilities generally, but only documents that specifically discuss how those processes are affected by climate change, which would leave OAG understanding only one half of the relevant equation. (*Id.*) Exxon's unilateral limitation would deprive the OAG of documents reflecting Exxon's procedures for assessing the impact, for example, of declining oil and gas prices on reserves, impairments, and capital expenditures.

Contemporaneous with this pattern of delay and resistance, and while feigning compliance in this forum, Exxon is improperly seeking to quash the OAG’s subpoena outright in a different forum based on arguments it has not advanced here. Specifically, one business day after OAG moved in this Court to enforce its related third-party subpoena to Exxon’s independent auditor, PricewaterhouseCoopers, Exxon sought to add OAG to its pending federal lawsuit in the Northern District of Texas against the Attorney General of Massachusetts. (*Id.*, Ex. M.) This was so Exxon could ask that court to enjoin enforcement of the subpoena to Exxon on constitutional grounds, without revealing this Court’s role in supervising compliance with OAG’s underlying investigation. (*Id.*) That motion was granted on November 10, 2016. (*Id.*, Ex. N.) The amended complaint in the Texas federal forum that Exxon is now permitted to serve on OAG seeks preliminary and permanent injunctive relief that, if granted, would effectively terminate OAG’s investigation of Exxon in New York and with it, the Court’s supervision of Exxon’s compliance under a New York investigative subpoena. (*Id.*, Ex. O.)

ARGUMENT

THE COURT SHOULD GRANT THE ATTORNEY GENERAL’S MOTION TO COMPEL

C.P.L.R. 2308(b)(1) provides that a court “shall order compliance” with a non-judicial subpoena if it finds “the subpoena was authorized.” To show that an investigatory subpoena issued by OAG is authorized, the Attorney General need only show “his [legal] authority, the relevance of the items sought, and some factual basis for his investigation.” *Am. Dental Coop., Inc. v. Attorney General of N.Y.*, 127 A.D.2d 274, 280 (1st Dep’t 1987).

Exxon has conceded in this Court that OAG has the authority to investigate it and it does not dispute that the Subpoena is valid or that OAG has acted in good faith. (ECF Docket No. 42 at pp. 33, 63-64.) Nor would there be any basis to dispute OAG’s authority, basis for the

Subpoena, or good faith. As discussed below, OAG has legal authority under New York Executive Law § 63(12), General Business Law § 352 (the Martin Act), and General Business Law (G.B.L.) § 349 to investigate whether Exxon’s disclosures to investors and the public are fraudulent, deceptive or misleading. As further discussed, OAG has a factual basis for exercising that authority based Exxon’s public and investor-facing statements concerning the risks posed to its business by climate change. Moreover, the specific documents that OAG seeks to compel here are reasonably related to that investigation because Exxon’s potentially misleading statements include representations regarding the valuation, accounting and reporting of its assets and liabilities, and the impact of climate change-driven risk on those processes.

A. The Attorney General Had Legal Authority to Issue the Subpoena.

It is settled law in New York that the Attorney General has broad authority under Executive Law § 63(12), the Martin Act, and G.B.L. § 349 to issue and compel compliance with subpoenas. Courts have long recognized that these statutes grant the Attorney General “broad” investigative authority to issue subpoenas to “conduct investigations into possible violations of the law.” *See, e.g., Am. Dental Coop.*, 127 A.D.2d at 279. And the Court of Appeals has declared that “[t]he Attorney General has been given broad investigatory responsibilities to carry out his vital role to protect the public safety and welfare.” *LaRossa, Axenfeld & Mitchell v. Abrams*, 62 N.Y.2d 583, 589 (1984).

Executive Law § 63(12). Executive Law § 63(12) empowers the Attorney General to investigate “repeated fraudulent or illegal acts or . . . persistent fraud or illegality in the carrying on, conducting or transaction of business.” Exec. Law § 63(12). In support of this investigatory authority, the statute empowers the Attorney General to “take proof and make a determination of the relevant facts, and to issue subpoenas in accordance with the civil practice law and rules.” *Id.* Fraudulent conduct covered by Executive Law § 63(12) is broadly defined to include any act

that “has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud.” *State of N.Y. v. Gen. Elec. Co., Inc.*, 302 A.D.2d 314, 314 (1st Dep’t 2003); *see also State of N.Y. v. Applied Card Sys., Inc.* 27 A.D.3d 104, 106 (3d Dep’t 2005), *aff’d on other grounds*, 11 N.Y.3d 105 (2008).

It is well-settled that the Attorney General has expansive investigatory authority under Executive Law § 63(12). *See Am. Dental Coop.*, 127 A.D.2d at 279 (Attorney General has “broad” authority “to conduct investigations into possible violations of the law” under Executive Law § 63(12)); *see also Lennon v. Cuomo*, 92 A.D.3d 411, 412 (1st Dep’t 2012) (same); *Matter of Hogan v. Cuomo*, 67 A.D.3d 1144, 1146 (3d Dep’t 2009) (upholding “broad” subpoena by Attorney General under Executive Law § 63(12) for decades of records); *Matter of Schneiderman v. Rillen*, 33 Misc. 3d 788, 789 (Sup. Ct., Dutchess County 2011) (“The Attorney General is permitted broad authority to conduct investigations based on the complaints of others or on his own information, with respect to fraudulent or illegal business practices.”).

The Martin Act, G.B.L. § 352. The Martin Act empowers the Attorney General to investigate securities fraud, “either upon complaint or otherwise.” G.B.L. § 352(1). Under the Martin Act, the Attorney General can conduct investigations by examining witnesses and “requir[ing] the production of any books or papers which he deems relevant or material to the inquiry.” *Id.* § 352(2).

Courts have repeatedly recognized the broad investigatory authority of the Attorney General under the Martin Act. *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgt. Inc.*, 18 N.Y.3d 341, 349-50 (2011) (“[T]he Attorney-General [has] broad regulatory and remedial powers to prevent fraudulent securities practices by investigating and intervening at the first indication of possible securities fraud on the public[.]”); *Greenthal v. Lefkowitz*, 342 N.Y.S.2d

415, 417 (1st Dep't 1973), *aff'd*, 32 N.Y.2d 457 (1973) (recognizing that the Martin Act grants the Attorney General “exceedingly broad” power and “wide discretion in determining when an inquiry is warranted”); *Gardner v. Lefkowitz*, 97 Misc. 2d 806, 811-12 (Sup. Ct., N.Y. County 1978) (“[T]he power of the Attorney-General under article 23-A of the General Business Law . . . is exceedingly broad and grants a wide discretion to the Attorney-General in determining whether an inquiry is warranted[.]”).

G.B.L. § 349. New York General Business Law § 349 empowers the Attorney General to investigate “[d]eceptive acts or practices in the conduct of any business, trade or commerce[.]” G.B.L. § 349(a). The Attorney General may issue subpoenas in connection with investigations under this statute. *Id.* § 349(f). The Attorney General’s authority to issue subpoenas under G.B.L. § 349 is construed broadly. *See Lennon*, 92 A.D.3d at 412 (enforcing subpoena under Attorney General’s “broad authority” pursuant to G.B.L. § 349 and Executive Law § 63(12)).

B. There Is A Factual Basis for OAG’s Investigation.

To show the validity of a nonjudicial subpoena, it is sufficient that “the Attorney General has set forth the basis for his investigation in sufficient detail in an attorney affirmation.” *Rillen*, 33 Misc. 3d at 790; *see also Matter of Roemer v. Cuomo*, 67 A.D.3d 1169, 1170 (3d Dep’t 2009) (Attorney General need only show “some factual basis for his investigation”); *Abrams v. Thruway Food Mkt. & Shopping Ctr., Inc.*, 147 A.D.2d 143, 147 (2d Dep’t 1989) (Attorney General “is not required to establish the existence of probable cause” to issue subpoena); *Am. Dental Coop.*, 127 A.D.2d at 280 (requiring “some factual basis for his investigation”); *Wiener v. Abrams*, 119 Misc. 2d 970, 973 (Sup. Ct., Kings County 1983) (“While persistent and repeated fraud or illegality is an essential predicate for the granting of an injunction under [Executive Law § 63(12)] . . . such a showing is not necessary at this investigatory stage for the issuance of subpoenae duces tecum . . . At this time, it is only required that the Attorney-General establish

some relevancy and basis for its investigation[.]” (citations omitted). Further, courts apply a presumption is that the Attorney General is acting in good faith when commencing an investigation and issuing a subpoena. *See, e.g., Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 332 (1988); *Roemer*, 67 A.D.3d at 1171; *Thruway Food Mkt. & Shopping Ctr.*, 147 A.D.2d at 147; *Am. Dental Coop.*, 127 A.D.2d at 280.

Thus, the Attorney General need not show that there “has actually been a repeated and persistent commission of fraudulent or illegal acts” to justify the issuance of a subpoena pursuant to Executive Law § 63(12). *Prestige Sewing Stores of Queens, Inc. v. Lefkowitz*, 54 Misc. 2d 188, 189 (Sup. Ct., N.Y. County 1967) (noting that subpoena power is intended to allow the Attorney General to determine whether or not prohibited acts have been committed). Nor does the Attorney General need to demonstrate probable cause that an illegal act was committed. *Thruway Food Mkt. & Shopping Ctr.*, 147 A.D.2d at 147.

C. The Documents that OAG Seeks to Compel Are Reasonably Related to the Investigation.

An investigatory subpoena is valid if the material sought has “a reasonable relation to the subject matter under investigation and to the public purpose to be achieved.” *Virag v. Hynes*, 54 N.Y.2d 437, 442 (1981) (citation omitted). A court will sustain a subpoena by the Attorney General unless it calls for information that is “utterly irrelevant to any proper inquiry,” or the subpoena’s “futility . . . to uncover anything legitimate is inevitable or obvious.” *La Belle Creole Intl., S. A. v. Attorney General of N.Y.*, 10 N.Y.2d 192, 196-97 (1961) (citations omitted) (holding that, “[w]hatever the ultimate outcome” of the investigation, “there can be no doubt” that the records sought “were material and pertinent in an investigation whose purpose was to ascertain whether or not [a company] was carrying on its affairs in compliance” with State alcohol beverage control laws and Executive Law § 63(12)); *see also Anheuser-Busch*, 71

N.Y.2d at 331-32; *Roemer*, 67 A.D.3d at 1170; *Thruway Food Mkt. & Shopping Ctr.*, 147 A.D.2d at 147. “An investigation would be stymied at the outset if law enforcement officials had to pinpoint exactly what the subpoenaed materials were expected to reveal.” *Am. Dental Coop.*, 127 A.D.2d at 283. Further, “[a] subpoena is not rendered invalid merely because it requires production of a substantial number of documents,” as “relevancy, and not quantity, is the test of the validity of a subpoena.” *Id.* at 282-83 (citation and internal brackets omitted).

Moreover, Exxon cannot use its recalcitrance to use updated search terms or a failure to agree on the same with OAG as a basis to cast doubt on the continuing, reasonable relationship between OAG’s ongoing requests and its investigation. *Shaw Group Inc. v. Zurich Am. Ins. Co.*, No. 12-257-JJB-RLB, 2014 U.S. Dist. LEXIS 122516, at *14 (M.D. La. Sept. 3, 2014) (“Failure to reach an agreement on search terms does not relieve [party that received requests] of its obligation to respond to discovery requests.”); *see also Tyler v. City of San Diego*, 2015 U.S. Dist. LEXIS 56309, at *5 (S.D. Cal. Apr. 29, 2015) (same).

As established above, the information that OAG seeks to compel bears a reasonable relationship to OAG’s investigation of Exxon’s public statements concerning the impact of climate change on its business and the company’s potential violations of New York law in that regard. Indeed, Exxon has never contested the relationship between the requested categories of documents and OAG’s admittedly proper investigative purpose.

CONCLUSION

For the reasons stated above, the Attorney General respectfully requests this Court to issue the proposed Order: (1) compelling Exxon to produce, no later than November 23, 2016:

Documents concerning (i) XOM's valuation, accounting, and reporting of its assets and liabilities, including reserves, operational assets, extraction costs, and any impairment charges; and (ii) the impact of climate change and related government action on such valuation, accounting, and reporting, including documents held by additional custodians and documents found using appropriately-targeted search terms, *including, but not limited to*, documents relating to the disclosure, calculation, use and application of the proxy cost of carbon/greenhouse gases (also known as the carbon price);

and (2) retaining continuing jurisdiction over Exxon's compliance with the subpoena, and mandating such other and further relief as the Court deems just and proper in implementing a schedule for the prompt production of all other responsive documents called for by the subpoena.

Dated: New York, New York
November 14, 2016

Respectfully submitted,

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