STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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February 22, 2019

VIA NYSECF AND HAND DELIVERY

The Honorable Barry R. Ostrager,
Supreme Court, New York County

Re: *People v. Exxon Mobil Corporation*, Index No. 452044/2018

Dear Justice Ostrager:

As directed by Commercial Division Rule 24, the Office of the Attorney General ("OAG") submits this pre-motion letter in connection with its forthcoming CPLR 3211(b) motion to dismiss certain defenses asserted by Exxon Mobil Corporation ("Exxon") or, in the alternative, to seek a protective order limiting discovery in connection with these infirm defenses.

In its Answer (Exhibit A), Exxon pleads five defenses—Twenty-Nine, Thirty, Thirty-Four, Thirty-Five, and Thirty-Six—that are based on allegations that OAG committed prosecutorial misconduct in deciding to bring this enforcement action. Exxon has admitted during the meet-and-confer process that it intends to use these defenses to seek discovery of matters that are unrelated to the claims in the Complaint. Specifically, Exxon has rejected OAG's offer to produce all factual material supporting the basis for OAG's claims that can be located after a reasonable search and privilege review, and instead is demanding broad discovery into a wide range of extraneous topics related only to those five defenses.

We intend to move for this Court to dismiss those five defenses as inadequately pleaded and irrelevant. Alternatively, we request that the Court issue a protective order halting discovery into matters that have no bearing on the merits of the securities-fraud claims against Exxon, because the burdens of such discovery necessarily outweigh any benefit.

The five defenses fail at the threshold because they merely "plead conclusions of law without any supporting facts." *Bank of America, N.A. v. 414 Midland Ave. Assocs., LLC*, 78 A.D.3d 746, 750 (2d Dep't 2010). For instance, Exxon alleges that the complaint's claims "are barred, in whole or in part, due to official misconduct, conflict of interests, and other official improprieties in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and other clauses of the United States and New York State Constitutions." (Twenty-Ninth Defense.) Exxon cannot simply lob conclusory assertions in the hope that "discovery may reveal facts now unknown to them which would allow them to plead new facts in support of the legal conclusions they assert." *Bank of America*, 78 A.D.3d at 750. The Court should therefore dismiss these defenses under CPLR 3211(b).

Moreover, even if Exxon's Answer contained any factual allegations, the challenged defenses would fail as a matter of law. Exxon must plead plausible facts defeating the presumption that "the enforcement of laws is undertaken in good faith and without discrimination." *303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 694-95 (1979). And to do that, Exxon needs to show that OAG lacked a reasonable basis to bring this action. *See, e.g.*, *Hartman v. Moore*, 547 U.S. 250, 263 (2006); *United States v. Armstrong*, 517 U.S. 456, 463-64 (1996). Indeed, courts will not even consider a prosecutor's subjective motivations until the party claiming selective or discriminatory enforcement shows that the prosecutor lacked reasonable grounds. *Hartman*, 547 U.S. at 263. Here, Exxon has not even attempted to make that showing, having decided not to move to dismiss.

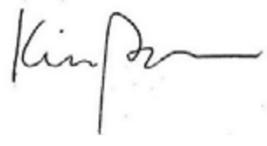
In fact, the U.S. District Court for the Southern District of New York has already rejected the precise theory on which Exxon grounds its selective-enforcement claims here. The district court observed that Exxon's theory rested on "extremely thin allegations and speculative inferences." *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 686 (S.D.N.Y. 2018). The court explained that "[i]t is *not possible* to infer an improper purpose" from the facts at the center of Exxon's complaint, "none of which supports Exxon's allegation that the NYAG is pursuing an investigation even though the NYAG does not believe that Exxon may have committed a fraud." *Id.* at 708 (emphasis added); *see also id.* at 712.

Thus, Exxon also cannot demonstrate the "clear violation" of its constitutional rights necessary to challenge OAG's exercise of discretion in bringing this action. *Gaynor v. Rockefeller*, 15 N.Y.2d 120, 131 (1965). Where, as here, a defendant challenges "the exercise of discretion by public officials in the enforcement of State statutes," *id.*, there is no basis to challenge that exercise of discretion without a threshold showing that the enforcement action lacks a reasonable basis, *see Hartman*, 547 U.S. at 252, 263; *Armstrong*, 517 U.S. at 463-64.

In any event, Exxon's attempt to attack OAG's motivations is irrelevant to proving or disproving the allegations in the Complaint. It is instead an attempt to muddy the issues and waste OAG resources. Accordingly, because Exxon's requests for discovery to support these patently defective defenses would simply "harass or unduly burden" OAG, "a protective order eliminating that abuse is necessary and proper." *Jones v. Maples*, 257 A.D.2d 53, 56-57 (1st Dep't 1999) (internal quotation marks omitted). Allowing Exxon to pursue discovery that has no discernible basis in law would set a precedent for virtually any defendant in an enforcement action to initiate an onerous investigation of the investigator and risk disrupting law enforcement. *See Wayte v. United States*, 470 U.S. 598, 607-08 (1985) (courts should be "properly hesitant to examine the decision whether to prosecute"); *see also Yaselli v. Goff*, 12 F.2d 396, 407 (2d Cir. 1926) (prosecutors must "be free and fearless to act in the discharge of [their] official duties").

We have requested that Exxon withdraw the challenged defenses or withdraw its demands for discovery of materials in aid of those defenses, but it has declined to do so. We are available for a conference at the Court's convenience.

Respectfully submitted,



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