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 MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AFFIRMATIVE DEFENSES PURSUANT TO CPLR § 3211(b) OR, IN THE ALTERNATIVE, FOR A PROTECTIVE ORDER PURSUANT TO CPLR § 3103(a)

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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 dismiss certain defenses asserted by Exxon Mobil Corporation ("ExxonMobil") pursuant to CPLR § 3211(b), or, in the alternative, for a protective order pursuant to CPLR § 3103(a).

PRELIMINARY STATEMENT

In its Answer (Docket No. 44), ExxonMobil pleads five defenses—Twenty-Nine, Thirty, Thirty-Four, Thirty-Five, and Thirty-Six—that allege that the OAG committed prosecutorial misconduct in commencing and conducting the underlying investigation of ExxonMobil. The defenses read in full as follows:

> Twenty-Ninth Defense: "The claims purportedly asserted by Plaintiff, 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."
>
> Thirtieth Defense: "The claims purportedly asserted by Plaintiff, are barred, in whole or in part, due to selective enforcement of the law in violation of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and other clauses of the United States and New York State Constitutions."
>
> Thirty-Fourth Defense: "The claims purportedly asserted by Plaintiff are barred, in whole or in part, by the Due Process Clause of the Fourteenth Amendment of the United States Constitution."
>
> Thirty-Fifth Defense: "The claims purportedly asserted by Plaintiff are barred, in whole or in part, by the Due Process Clause of the Constitution of the State of New York."
>
> Thirty-Sixth Defense: "The claims purportedly asserted by Plaintiff are barred, in whole or in part, by the First Amendment of the United States Constitution, as incorporated by the Fourteenth Amendment of the United States Constitution."

These defenses, unadorned by any factual allegations, are conclusory and should be dismissed for that reason alone. And even if those assertions are paired with the other unfounded

allegations made by ExxonMobil in other proceedings, they are still without merit and fail to state a defense to the claims asserted by the OAG. The crux of ExxonMobil's defense theory – which we can only infer from assertions made outside of this forum – seems to be that former Attorney General Eric Schneiderman decided to investigate ExxonMobil because of his activist agenda on climate-change. But as the U.S. District Court for the Southern District of New York has already persuasively explained, that assertion, even if true, would not support the theory of prosecutorial misconduct underpinning the challenged defenses here.

To be sure, the OAG has previously asserted in federal court—in response to ExxonMobil's collateral attack on the OAG's investigation—that this Court is the appropriate forum to decide all issues related to the case, including any defenses that ExxonMobil might wish to raise. But the OAG did not concede that ExxonMobil's prosecutorial-misconduct defenses have any merit; it instead explained that New York State courts are the appropriate forum for resolving such issues in the first instance. And while ExxonMobil has now asserted its defenses in the proper forum, those defenses fail on the merits. Dismissal by this Court should therefore follow.

The OAG will endure significant and undue burdens if the Court entertains ExxonMobil's efforts to use those infirm defenses as a platform for a fishing expedition into communications with a long list of third parties that are unrelated to proving or disproving the claims in the Complaint or to any other valid defense. ExxonMobil has rejected the OAG's offer to produce all factual non-privileged material relevant to the allegations in the OAG's Complaint that can be located after a reasonable search. Instead, ExxonMobil requests broad discovery into a wide range of extraneous topics related only to the five infirm defenses. That discovery includes demands that the OAG search the files of dozens of current and former employees who worked on the

investigation for any period of time for documents concerning the OAG's enforcement priorities and communications with the press and other third parties.

Alternatively, if the Court is disinclined to dismiss the defenses as a matter of law, it should issue a protective order restricting discovery to matters that bear on the merits of the OAG's claims against ExxonMobil or other valid defenses. The OAG has already produced nearly 800,000 pages of documents to ExxonMobil, including documents cited in the Complaint, documents produced by third parties, and examination transcripts, among others. Further, it has also agreed to produce all non-privileged communications with third parties (including, to the extent they exist, communications with so-called climate change activists) that can be located after a reasonable search from the files of the key OAG custodians that concern the factual basis of the allegations in the Complaint. Such material should provide ample information to assess the threshold standard for ExxonMobil's defenses: whether the OAG had a reasonable basis for the investigation. Thus, the burdens of the extraneous discovery sought by ExxonMobil in support of the challenged defenses necessarily outweigh any benefit. Moreover, allowing extensive discovery based on defenses as thin as those asserted by ExxonMobil would be inconsistent with the settled pleading requirements for claims of selective enforcement and malicious prosecution, and would effectively allow any defendant in any investigation to harass the prosecution with abusive discovery requests.

BACKGROUND

A. The OAG's Investigation

The Court is familiar with the investigation's history: on November 4, 2015, the OAG issued a subpoena to ExxonMobil as part of an investigation into possible violations of New York's laws prohibiting securities, consumer, and business fraud. That subpoena requested documents that would enable the OAG to assess whether ExxonMobil had made false or misleading

statements to investors and consumers about the impact of governmental efforts to address climate change on ExxonMobil's business—including ExxonMobil's operations, financial reporting, and accounting—and ExxonMobil's response to those efforts.

In August 2016, the OAG issued a separate subpoena to PricewaterhouseCoopers LLP ("PwC"), ExxonMobil's outside auditor. The PwC subpoena sought documents relating to the accuracy of ExxonMobil's public statements about the impact of climate change and related policies on ExxonMobil's reserves, impairments, and capital expenditures.

Various deficiencies in ExxonMobil's responses to the November 2015 subpoena and the PwC subpoena led the OAG to seek the Court's intervention to ensure ExxonMobil's compliance. In October 2016, the OAG moved to enforce the PwC subpoena in full. ExxonMobil did not cross-move to quash the PwC subpoena or in any way challenge the OAG's investigative authority in this Court.[1] Instead, the next business day after the subpoena enforcement proceeding began, ExxonMobil commenced a collateral attack on the OAG's investigation in the U.S. District Court for the Northern District of Texas.

In the federal lawsuit, ExxonMobil alleged that the OAG's November 2015 subpoena was impermissibly motivated, constituted an abuse of process under state law, violated ExxonMobil's rights under the U.S. Constitution's First, Fourth, and Fourteenth Amendments and the Commerce Clause, and was preempted by federal law. ExxonMobil also alleged, among other things, that the OAG and others conspired "to deprive ExxonMobil of rights." ExxonMobil's First Amended Complaint ¶ 106, *Exxon Mobil Corp. v. Schneiderman*, 16-CV-469-K, ECF No. 100 (S.D.N.Y.

[1] This Court granted the Attorney General's motion to compel compliance with the PwC subpoena, and the New York Appellate Division affirmed that decision. *See Matter of People v. PricewaterhouseCoopers, LLP*, 150 A.D.3d 578, 578-79 (1st Dep't 2017). The New York Court of Appeals then declined discretionary review. 29 N.Y.3d 1117 (2017).

Nov. 10, 2016). According to ExxonMobil's complaint, the OAG and others revealed these improper motives during a press conference in New York City in March 2016. ExxonMobil requested declaratory and injunctive relief invalidating the OAG's 2015 investigative subpoena. *Id.* ¶ 14.

In March 2017, the Texas district court transferred the federal lawsuit to the Southern District of New York pursuant to 28 U.S.C. § 1406(a). The U.S. District Court for the Southern District of New York thereupon requested briefing on various issues, including whether ExxonMobil's first amended complaint states a claim for relief. While the parties were briefing these issues, ExxonMobil moved to amend its complaint once again, which the OAG opposed as futile, unduly prejudicial, and untimely.

In March 2018, the U.S. District Court for the Southern District of New York dismissed the complaint and denied leave to amend, concluding that ExxonMobil failed to state any viable claims for relief through its existing allegations or its proposed additional allegations. The district court observed that ExxonMobil's constitutional claims were based on "extremely thin allegations and speculative inferences." *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 686 (S.D.N.Y. 2018).

Specifically, the court found that the statements made by Attorney General Schneiderman and others at the March 2016 press conference—"[t]he centerpiece of Exxon's allegations"—in fact demonstrated that the OAG could have a legitimate basis for its investigation. *Id.* at 706. The court observed that the OAG was concerned about the veracity of ExxonMobil's statements to consumers and investors about its efforts to account for the risks that climate change and government responses to climate change might pose to its business. *Id.* at 705-12. And it recognized that this concern was sufficient grounds to commence a fraud investigation. *Id.* The

court also noted ExxonMobil's failure to allege that the OAG did not actually believe ExxonMobil might have committed fraud. *Id.* The failure to plead bad faith, the court ruled, was similarly "fatal" to ExxonMobil's conspiracy and state-law claims. *Id.* at 712.

ExxonMobil appealed the district court's decision to the Second Circuit. After the OAG's Complaint was filed in this Court, the OAG moved to dismiss ExxonMobil's appeal as moot because the investigation had concluded with the filing of a civil enforcement action. ExxonMobil's appeal and the OAG's motion to dismiss as moot are pending before the Second Circuit. Throughout the federal litigation, the OAG has repeatedly argued that New York State courts are the proper venue to decide all issues related to the case, including ExxonMobil's allegations of prosecutorial misconduct. At no time did the OAG concede or suggest in any way that these various claims of prosecutorial misconduct were adequately pleaded or had any merit.

B. ExxonMobil's Defenses and Discovery

On October 24, 2018, the OAG, under the leadership of a new Attorney General, filed a Complaint commencing a civil enforcement action against ExxonMobil alleging fraud under the Martin Act, Executive Law § 63(12), and the common law. (Docket No. 1.) ExxonMobil did not move to dismiss and instead filed an Answer on November 13, 2018, which included 37 defenses. (Docket No. 44.) At least five of these defenses assert boilerplate allegations of official misconduct, conflict of interests, official improprieties, selective enforcement, and violations of Equal Protection, Due Process, and the First Amendment by the OAG.

ExxonMobil has propounded numerous discovery demands in support of these defenses. The relevant discovery demands and correspondence between the parties concerning those demands are attached as exhibits to the accompanying affirmation of Marc Montgomery ("Montgomery Aff."). In particular, ExxonMobil's Document Request Nos. 42-43 in its First

Request for the Production of Documents ("First RFP") (Montgomery Aff., Ex. A) and Nos. 1-3, 6, 9, 20, and 22-27 in its Third Request for the Production of Documents ("Third RFP") (Montgomery Aff., Ex. B) are directed solely at discovery in support of ExxonMobil's misconduct defenses, not whether or not ExxonMobil misled its investors, or any other valid defenses. For example, Document Request No. 2 in the Third RFP seeks "All Documents, including press releases, talking points, and any drafts thereof, Concerning Any of [the OAG's] public statements Concerning the Investigation or the allegations in the Complaint," broken down into 11 subparts. Draft press releases and talking points have no bearing on whether or not ExxonMobil misled its investors or any other valid defense.

In addition, ExxonMobil's Document Request Nos. 39-40 in its First RFP and Nos. 4-5, 7-8, 10, 12-14, 18, and 28 in its Third RFP encompass some information relevant to whether or not ExxonMobil misled investors, but also call for information unrelated to that determination, which could only be relevant to ExxonMobil's prosecutorial misconduct defenses. For example, Document Request No. 40 in the First RFP seeks "All Communications between [the OAG] and Any employee or agency of the United States government or the government of Any state or municipality Concerning ExxonMobil, Imperial Oil, or Any allegations in the Complaint." In effect, this request calls not only for communications concerning the allegations in the Complaint, but for all inter-governmental communications concerning Exxon, whether or not they are related to the allegations in the Complaint. Likewise, Document Request No. 12 in the Third RFP seeks "All Communications Concerning ExxonMobil between [the OAG] and Any email addresses that include Any of the following [26] domain names," including, among others, "@nytimes.com," "@nyu.edu," and the domain names of various law firms. This request is not limited to documents concerning the allegations in the Complaint or even to the investigation. The OAG served its

Responses and Objections on January 14, 2019 and stated that it would not search for such material.

ExxonMobil wrote a letter on January 25, 2019, challenging the OAG's responses. (Montgomery Aff., Ex. C.) The OAG responded on February 1 by amending its Responses and Objections in certain respects and offering to search the files of 9 custodians who had significant oversight or involvement in the investigation, including former Attorney General Eric Schneiderman, for external communications concerning the factual bases of the Complaint. (Montgomery Aff., Ex. D.) The OAG also proposed using a list of nearly a dozen broad search terms that were based on the terms we had originally proposed that ExxonMobil use to locate materials responsive to the OAG's discovery requests. Finally, the OAG proposed a telephonic meet-and-confer for the following week to discuss our proposal. ExxonMobil, however, did not accept the offer to meet and confer.

On February 13, ExxonMobil responded by letter demanding discovery in support of its defenses of prosecutorial misconduct. (Montgomery Aff., Ex. E.) In that letter, ExxonMobil demanded that the OAG expand the list of custodians and terms to obtain materials in aid of its defenses. It proposed a list of custodians that included 19 named individuals plus "[a]ll other Assistant Attorneys General who worked on this matter," and "[a]ll individuals in OAG's press office." ExxonMobil's request would require the OAG to search the records of dozens of current and former employees who worked on the matter for any period of time over the course of the investigation. ExxonMobil also proposed over 48 additional search terms, bringing the total

number to 59. A preliminary count indicates that the OAG would be required to review over one million documents from preserved email files alone if it were to agree to ExxonMobil's demands.[2]

After the parties' failure to reach a compromise, the OAG rejected ExxonMobil's demand (*see* Montgomery Aff., Ex. F) and explained that it would seek relief from the Court for discovery related to the defenses and would proceed with document collection and review based on the terms and custodians proposed in its February 1 letter. That letter expressed an intent to produce non-privileged responsive documents located after a reasonable search "that could reasonably lead to evidence material to the fact finder's determination of whether or not ExxonMobil misled its investors." On March 1, ExxonMobil wrote a letter restating its demands for discovery in support of the five challenged defenses and requesting a meet-and-confer on those demands as well as six other issues. (Montgomery Aff., Ex. G.) The OAG responded the next business day, on March 4, informing ExxonMobil of its decision to file a motion for relief as to the five defenses, and offering to meet and confer concerning the remaining issues. (Montgomery Aff., Ex. H.) In that letter, the OAG also noted that "CPLR § 3103(b) suspends [the OAG's] obligations to respond to the challenged discovery during the pendency of the motion." *Id.*

STANDARD OF REVIEW

The standard on a motion to dismiss a defense is whether, construing the pleadings in favor of the defendant, a defense is adequately stated or has merit. *See* CPLR § 3211(b); *534 East 11th Street Housing Development Fund Corp. v. Hendrick*, 90 A.D.3d 541, 541-42 (1st Dep't 2011). Defenses that "merely plead conclusions of law without any supporting facts . . . should be dismissed pursuant to CPLR 3211(b)." *Bank of Am., N.A. v. 414 Midland Ave. Assocs., LLC*, 78

[2] The burden of collecting and reviewing the electronic and paper files from the custodians would also be significant.

A.D.3d 746, 750 (2d Dep't 2010) (rejecting defendants' argument 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," and dismissing defendants' conclusory affirmative defenses).

In the alternative, CPLR § 3103(a) provides that a court may, in its discretion, issue a protective order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." In assessing whether a protective order should issue, a court must weigh the need for discovery against the detrimental effects of disclosure "in light of the facts of the particular case before it." *Cynthia B. v. New Rochelle Hosp. Med. Ctr.*, 60 N.Y.2d 452, 461 (1983). In addition, "[w]hen the disclosure process is used to harass or unduly burden a party, 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 citations and quotation marks omitted). During the pendency of a motion for a protective order, disclosure obligations related to the challenged discovery are suspended. CPLR § 3103(b) ("Service of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute.").[3]

ARGUMENT

For more than two years, ExxonMobil has waged a collateral attack in federal court against the OAG's now-concluded investigation. The OAG has consistently argued in response that New York State court is the appropriate forum to decide all issues related to the OAG's investigation, including any defenses that ExxonMobil might wish to raise. For example, in a recent brief in the U.S. Court of Appeals for the Second Circuit, the OAG argued:

> Basic principles of federalism bar Exxon's strategy [of attacking a state investigation in federal court]. Federal courts have a longstanding public policy against federal court interference with state court proceedings, including civil

[3] For avoidance of doubt, we note that the OAG will not produce materials that are the subject of the proposed protective order pending the resolution of this motion pursuant to CPLR § 3103(b).

> enforcement proceedings. If Exxon believes that its federal claims bear on its state case, it should assert them as defenses there, rather than using this federal suit to collaterally attack the state-court proceeding.

OAG's Reply Br. Supp. Mot. Dismiss, Docket No. 207 at 7-8, *Exxon Mobil Corp. v. Healy*, No. 18-1170 (2d Cir. Dec. 24, 2018) (internal citations and quotation marks omitted). While ExxonMobil has now asserted its defenses in the proper forum, five of these defenses fail on the pleadings and merits. Merely bringing a claim or defense in the proper forum does not excuse a party from the requirement that it adequately plead that claim or defense.

ExxonMobil's defenses should be dismissed as inadequately pleaded and without merit as a matter of law. In the alternative, the court should grant a protective order barring any additional discovery on these defenses.

A. ExxonMobil's Twenty-Ninth, Thirtieth, Thirty-Fourth, Thirty-Fifth, and Thirty-Sixth Affirmative Defenses Are Inadequately Pleaded and Should Be Dismissed

Bare defenses that merely plead conclusions of law, without more, are insufficient and should be dismissed. *See 170 W. Vill. Assocs. v. G & E Realty, Inc.*, 56 A.D.3d 372, 372-373 (1st Dep't 2008). There can be no dispute that the challenged defenses simply plead conclusions of law without facts. For instance, the Twenty-Ninth Defense alleges "official misconduct, conflict of interests, and other official improprieties" without any supporting facts or examples. Likewise, the Thirty-Fourth and Thirty-Fifth Defenses allege that the claims in the Complaint are barred by the Due Process clauses of the U.S. and New York State Constitutions, without any supporting facts or explanation.

In pleading as such, ExxonMobil has offered no facts in support of the challenged defenses.[4] The defenses therefore are facially invalid under the settled precedent of the First Department, which has held that affirmative defenses that allege legal conclusions, such as "[u]nclean hands" or "[l]aches," without factual support are "properly stricken as insufficient." *170 W. Vill. Assocs.*, 56 A.D.3d at 372-73; Brief for Plaintiff-Respondent, *170 W. Vill. Assocs..*, 2008 WL 5949107 at *4 (1st Dept. Aug. 26, 2008) (listing the defenses as pleaded). A conclusory defense without factual support is also no basis for discovery. *Bank of Am.*, 78 A.D.3d at 750. ExxonMobil thus cannot 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." *Id.*

B. ExxonMobil's Defenses Based on Prosecutorial Misconduct Fail as a Matter of Law

Even if ExxonMobil had the opportunity to amend its Answer to add factual allegations, the challenged defenses would still fail as a matter of law.

The prosecutorial misconduct defenses appear to be premised on a theory of selective enforcement or malicious prosecution. *See* Twenty-Ninth Defense ("official misconduct, conflict of interests, and other official improprieties"); Thirtieth Defense ("selective enforcement"); Thirty-Fourth Defense (Due Process under U.S. Constitution); Thirty-Fifth Defense (Due Process under New York State Constitution). To assert a selective-enforcement defense, ExxonMobil 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). To do that, ExxonMobil needs to show that the OAG lacked a reasonable basis to bring this action.

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[4] In fact, all of ExxonMobil's affirmative defenses are pleaded in the same conclusory fashion, but the OAG is moving to dismiss at this time only those that call for abusive and unwarranted discovery.

See, e.g., *Hartman v. Moore*, 547 U.S. 250, 263 (2006); *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *cf. Engel v. CBS, Inc.*, 93 N.Y.2d 195, 204 (1999) ("To succeed [on a claim of malicious prosecution] the plaintiff must prove malice, or as the Restatement defines it, a purpose other than the adjudication of a claim, and must further prove an entire lack of probable cause in the prior proceeding."); *People v. Robinson*, 97 N.Y.2d 341, 352 (2001) ("reasonable cause" for traffic stop defeats Equal Protection claim under New York State Constitution). 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 264 (finding no selective enforcement claim even where a prosecutor conceded that "he was not galvanized by the merits of the case, but sought the indictment . . . to attract the interest of a law firm looking for a tough trial lawyer"). Here, ExxonMobil has not even attempted to make that showing by seeking to dismiss the Complaint.

Indeed, ExxonMobil would be hard-pressed to make that showing. The U.S. District Court for the Southern District of New York, in dismissing ExxonMobil's complaint, rejected the precise theory on which ExxonMobil grounds its selective enforcement affirmative defenses. The court observed that ExxonMobil's theory was based on "extremely thin allegations and speculative inferences." *Exxon Mobil Corp.*, 316 F. Supp. 3d at 686 (dismissing action to enjoin New York and Massachusetts from conducting investigations into potential fraud by ExxonMobil). Specifically, the court held that "[i]t is *not possible* to infer an improper purpose" from the facts at the center of ExxonMobil'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 fraud." *Id.* at 707 (emphasis added); *see also id.* at 712 ("[ExxonMobil] do[es] not allege any direct evidence of an improper motive, and the circumstantial evidence put forth by

Exxon fails to tie the AGs to any improper motive, if it exists, harbored by activists . . . [which] is fatal to Exxon's claims for violations of the First, Fourth, and Fourteenth Amendments[.]"); *Exxon Mobil Corp. v. Attorney Gen.*, 479 Mass. 312, 328 (2018) (statements by Massachusetts Attorney General at March 2016 press conference "contained no 'actionable bias,' and instead were intended only to inform the public of the basis for the investigation into Exxon"), *cert. denied sub nom. Exxon Mobil Corp. v. Healey*, No. 18-311, 2019 WL 113105 (U.S. Jan. 7, 2019).

That conclusion follows from the basic requirements governing the pleading and proof of claims or defenses challenging the exercise of discretion by public officials, including enforcement decisions. To maintain a viable challenge to a discretionary enforcement decision, such as a claim or defense of selective enforcement, a party must demonstrate a "clear violation" of its constitutional rights. *Gaynor v. Rockefeller*, 15 N.Y.2d 120, 131 (1965) (no clear violation where public officials, in their discretion, declined to penalize contractors allegedly following discriminatory employment practices). The allegations ExxonMobil lodged against the OAG in federal court—which we presume form the apparent factual basis for the challenged defenses here—come nowhere near showing such a clear violation. That is because a defendant who challenges "the exercise of discretion by public officials in the enforcement of State statutes," *id.*—as ExxonMobil does here—can establish a clear violation of constitutional rights only by making a threshold showing that the enforcement action lacks a reasonable basis, *see Hartman*, 547 U.S. at 252, 263; *Armstrong*, 517 U.S. at 464.

Indeed, a contrary rule would erode the "latitude" that "must be accorded authorities charged with making decisions related to legitimate law enforcement interests." *303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d at 694.That latitude allows prosecutors to enforce the laws in ways that may appear selective but serve important law-enforcement interests, such as when prosecutors

"test a new regulation or statute," when they are faced with "limited manpower or other resource inadequacies," or when they wish to "deter[] other potential transgressors." *Id.* Law-enforcement interests "should not be hampered by requiring [proceedings on a claim of discriminatory enforcement] every time one subject to a regulatory or criminal penalty feels he has been unfairly singled out." *Id.* at 694-95.

To this end, courts have repeatedly rejected attempts to characterize discretionary enforcement decisions as violations of a corporate defendant's Due Process, Equal Protection, or other constitutional rights. For example, in *United States v. American Electric Power Service Corp.*, 258 F. Supp. 2d 804, 807-08 (S.D. Ohio 2003), the court struck a power company's selective enforcement defense alleging that EPA "impermissibly and discriminatorily singled out coal-fired power" in the South and Midwest for Clean Air Act enforcement. The court held that being "singled out" is insufficient to establish an Equal Protection violation, and explained that it was unaware of any instance in the civil enforcement context in which a defendant had succeeded in showing selective prosecution "without also claiming membership in a constitutionally protected class or intent to punish for exercise of constitutionally protected rights." *Id.* The defendant's status as a coal burning facility or its position on burning coal apparently did not meet that threshold, just as ExxonMobil's flimsy First Amendment defense, discussed *infra*, does not meet that threshold.

Likewise, in *United States v. Fleetwood Enterprises, Inc.*, 702 F. Supp. 1082, 1092 (D. Del. 1988), the court denied a mobile home manufacturer's motion to add a selective enforcement defense claiming that it was targeted for exercising its constitutional right to take "innovative engineering positions" with which the government agency disagreed. The court explained that taking "innovative engineering positions" was not a constitutionally protected right. Moreover, taking such positions "establishe[d] a permissible basis for selection" as it raised questions about

safety, which the government agency was responsible for regulating. Similarly, and as discussed further *infra*, ExxonMobil's statements to investors are not constitutionally protected, particularly to the extent they are misleading, and the OAG is responsible for protecting investors from misleading statements.

ExxonMobil also appears to assert a malicious-prosecution defense in pleading "official misconduct, conflict of interests, and other official improprieties" (*see* Twenty-Ninth Defense), but that defense fails as well. Under settled law, malicious prosecution may be asserted only as a standalone claim, and only after an unsuccessful prosecution against the party asserting the claim. *See Engel v. CBS, Inc.*, 93 N.Y.2d at 206; *People v. Trump Entrepreneur Init.,* No. 451463/13, 2014 WL 5241483, *11-14 (Sup. Ct. N.Y. Cnty. Oct. 8, 2014) ("[T]o the extent respondents seek to assert a claim for malicious prosecution based on any alleged wrongdoing during petitioner's investigation and commencement of the instant proceeding, such claim is premature as they may only do so after the proceeding is terminated in their favor."), *aff'd as modified*,137 A.D.3d 409 (1st Dep't 2016), *appeal withdrawn*, 31 N.Y.3d 1011 (2018). And because any malicious prosecution claim here would be unripe, any discovery in aid of such a claim is premature. *Bd. of Managers of 255 Hudson Condo. v. Hudson St. Assocs., LLC*, 37 Misc. 3d 1223(A), 2012 N.Y. Slip Op. 52136(U), at *5-6 (Sup. Ct. N.Y. Cnty. 2012) (granting plaintiff's motion to dismiss defendant's counterclaim for malicious prosecution as "premature" and "invalid," and rejecting defendant's argument that "discovery is needed to determine whether plaintiff's motives were malicious").

C. ExxonMobil's First Amendment Defense Is Also Deficient

ExxonMobil's First Amendment defense fails for additional reasons besides its failure to plead any supporting facts. (*See* Thirty-Sixth Defense.) First, "the First Amendment does not

shield fraud," *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003), and thus is not a defense to the allegations of fraud in the OAG's Complaint. Second, to the extent ExxonMobil's First Amendment defense relies on a theory of viewpoint discrimination, that defense also fails, because viewpoint discrimination occurs only when the government denies a speaker a forum based on the speaker's viewpoint. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). Unlike the government actions in cases where courts have found viewpoint discrimination, the actions that ExxonMobil has alluded to—investigating ExxonMobil for potential fraud—do not regulate speech at all, let alone protected speech based on a particular viewpoint.

D. A Protective Order Is Required to Shield the OAG from Burdensome Discovery

Alternatively, the Court should issue a protective order halting discovery into matters that have no bearing on the merits of the enforcement action against ExxonMobil, because the burdens of such discovery necessarily outweigh any benefit. The OAG has already agreed to produce all non-privileged communications with third parties (including, to the extent they exist, communications with so-called climate change activists) that can be located after a reasonable search from the files of the key custodians that concern the factual basis of the allegations in the Complaint. Further, the OAG has already produced nearly 800,000 pages of documents to ExxonMobil, including documents cited in the Complaint, documents produced by third parties, and examination transcripts, among others. Such material should amply demonstrate that the OAG had a reasonable basis to file the Complaint, which would be the critical issue at the heart of ExxonMobil's defenses if they proceeded. But ExxonMobil remains unsatisfied, demanding discovery concerning the supposed motivations and press strategies of former prosecutors during the course of the investigation.

CPLR § 3103 empowers a court to issue a protective order if the discovery sought is palpably improper. *See 2 Park Ave. Associates v. Cross & Brown Co.*, 60 A.D.2d 566, 566-67 (1st Dep't 1977). Protective orders issued under § 3103 properly shield parties from the burdens associated with discovery requests that are "not necessary to the resolution of issues in the case." *See, e.g.*, *Perez v. Board of Educ.*, 271 A.D.2d 251, 252 (1st Dep't 2000); *see also Martin A. v. Gross*, 171 A.D.2d 491, 491-492 (1st Dep't 1991) (finding that trial court "improvidently exercised its discretion in denying a protective order" where document requests were overbroad and did not seek relevant material).

Here, the need for a protective order is particularly acute given the extraordinary burden presented by ExxonMobil's demands to scour huge volumes of OAG documents in search of evidence of misconduct in the commencement and conduct of the investigation. *See L.K. Comstock & Co. v. New York*, 80 A.D.2d 805, 807 (1st Dep't 1981) (observing that where discovery requests are "repetitious, burdensome, unreasonable and oppressive . . . it is not the duty of the court to prune them, but rather to vacate them in their entirety"); *Jones*, 257 A.D.2d at 56-57 (noting that where discovery requests are intended to "harass or unduly burden," "a protective order eliminating that abuse is necessary and proper").

Indeed, ExxonMobil's proposed search criteria would require the OAG to review more than one million documents in support of frivolous conspiracy theories. And here, ExxonMobil is grasping at straws. For example, ExxonMobil has requested all documents concerning "the appointment, hiring, or contemplated hiring of NYU Fellows" (Third RFP, Request No. 22), as well as documents showing the extent to which NYU Fellows participated in "Any actual or contemplated legal action Concerning ExxonMobil" (Third RFP, No. 24). In addition, ExxonMobil has requested all drafts of any press releases or talking points concerning any public

statements about the investigation or the allegations in the Complaint (Third RFP, No. 2), and is seeking the OAG's *internal* communications between attorneys and the in-house press office in connection with such requests (Montgomery Aff., Ex. E). None of these requests is reasonably calculated to lead to the discovery of admissible evidence.

In addition, allowing a defendant like ExxonMobil to pursue these defenses without any discernible basis in law would permit *any* defendant in an enforcement action to initiate an onerous investigation of the investigator that risks disrupting law enforcement activities. *See Wayte v. United States*, 470 U.S. 598, 607-08 (1985). Such a rule would undermine prosecutors' need to "be free and fearless to act in the discharge of [their] official duties." *Yaselli v. Goff*, 12 F.2d 396, 407 (2d Cir. 1926); *see also Marshall v. Jerrico Inc.*, 446 U.S. 238, 248 (1980) ("Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process, and similar considerations have been found applicable to administrative prosecutors as well[.]" (internal citations omitted)).

Accordingly, the OAG should be relieved of any obligation to review or produce documents in response to Document Request Nos. 42-43 of ExxonMobil's First RFP and Nos. 1-3, 6, 9, 20, and 22-27 of ExxonMobil's Third RFP because those requests are not reasonably calculated to lead to information material to the fact finder's determination of whether or not ExxonMobil misled its investors, or to whether the OAG had a reasonable factual basis for filing the Complaint, or any other valid defenses.[5] In addition, while Document Request Nos. 39-40 of ExxonMobil's First RFP and Nos. 4-5, 7-8, 10, 12-14, 18, and 28 of ExxonMobil's Third RFP may encompass some information relevant to the allegations in the Complaint, these requests are

[5] In its discovery correspondence with the OAG, ExxonMobil acknowledged that these requests hinged entirely on ExxonMobil's misconduct defenses. (*See* Montgomery Aff., Ex. E.)

overbroad, calling for OAG communications unrelated to the claims or defenses. These requests should therefore be limited in the same manner.

CONCLUSION

For the foregoing reasons, OAG's motion to dismiss the Twenty-Ninth, Thirtieth, Thirty-Fourth, Thirty-Fifth, and Thirty-Sixth Defenses should be granted. In the alternative, the Court should grant a protective order barring additional discovery on those defenses.

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: March 4, 2019
New York, New York

/s Marc Montgomery
Marc Montgomery