SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : CIVIL DIV. : PART 61

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. 452044/18

MOTION

60 Centre Street
New York, New York
June 12, 2019

B E F O R E :

HON. BARRY R. OSTRAGER,
Justice

(Appearances on the following page.)

ROBERT PORTAS, R.P.R., C.R.R.
SENIOR COURT REPORTER

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PROCEEDINGS

COURT OFFICER: Come to order.

THE COURT: Good morning.

We have two discovery issues -- we have two discovery issues that were addressed in letters to the Court and three motions. Why don't we do the two discovery issues first, keeping in mind that we have an October 23rd trial date in this case.

So I think Exxon has raised both of the discovery issues, so let me hear from them.

MR. TOAL: Good morning, Justice Ostrager.

The first issue we wanted to discuss was this issue of the third-party witness list. We have a few slides we'd hand up.

THE COURT: But I should say before you say anything that this is among the most actively litigated cases in this courthouse, and the number of depositions and documents that have taken place in this case may exceed the number of documents produced in depositions taken in any other case. So I'm having a hard time understanding why the Office of the Attorney General can't identify witnesses who they believe may testify four months from now.

MR. TOAL: Your Honor, I think we are having exactly the same issue. We were here before the Court in March, we raised this issue with the Court at that time, because at that time the Attorney General's Office hadn't

identified any third-party witnesses they intended to call at trial, they just purported to reserve the right to identify those witnesses at a future time.

We had a discussion with Your Honor, Your Honor said, "I expect the parties to be transparent," you thought it was in everybody's interest to be transparent about the witnesses they intended to call at trial; we agreed with that. You made clear your expectation at the time that the Attorney General's Office would not give us a kitchen sink list of potential third-party witnesses.

Mr. Wallace assured the Court that he didn't intend to give us a huge list, and then when we got the supplementation of the preliminary witness list, which was due in February, they provided, in addition to the 45 Exxon mobile witnesses they had notified us of previously, 25 potential third-party witnesses and seven entities that collectively employ more than 600,000 employees.

So that's not a good faith witness list. We think that's entirely inconsistent with what Your Honor had in mind. We think it's entirely inconsistent with the preliminary conference order and the whole idea of preliminary witness list. This was supposed to facilitate the efficient resolution of this case and efficient discovery. This, as Your Honor noted, follows

a three-year investigation and production of millions of pages of documents, and it is inconceivable to us that this close to trial, we're now four months out from trial, they don't have a reasonably clear idea of the witnesses they intend to call which would give us the ability to pursue appropriate discovery of those third-parties, including documents and depositions.

That's all we're looking for is to avoid trial by ambush. And whatever third-party witnesses the New York Attorney General proposes to call in an effort to prove its case we should know and we should have full disclosure of the facts in advance of trial. That's what we're looking for, that's what we think the Attorney General's Office is denying us here.

THE COURT: All right, Mr. Wallace, why isn't that reasonable?

MR. WALLACE: Your Honor, we feel a little bit like no good deed is going unpunished in this. We told Exxon Mobil at the outset, they wanted a witness list in February, they wanted updates on the witness list. All of that is beyond what's called for in the CPLR, all of that is beyond what's called for in the Commercial Division, all of that's beyond what's called for in New York practice parts.

We gave them a preliminary witness list, they

claim it didn't have third-party witnesses on it. We were here in March, we gave them a list of 30 individuals, some of them are entities because we don't have necessarily a witness that we need from there, maybe we need a document verified. So these are all people that might come in at trial. It wasn't, I don't think 30 kitchen sink. And some of it we were still parsing down in discovery.

I'll give one examples: One of the entities we listed was Goldman Sacks. There had been an email from the former head of investor relations at Exxon saying they spoke to two people from Goldman Sacks and they really liked what the company was doing on its climate change disclosures and that they were getting a good reaction to the reports they put out. Well, we deposed that person; he said he didn't know who the people were from Goldman Sacks, so we're probably not going to be calling anyone from there.

The issue's just whether we're continually doing iterative witness lists. And the answer is at this point we just don't know exactly who we're going to call. A lot of this is strategic, a lot of this is trying to figure out how we can cut down the number of witnesses. There may be three parties to -- three people that are attending a meeting where Exxon is making

representations, we'd rather only call one. But we don't know exactly which ones we're calling yet.

So that's where we are. We don't have a list that's narrower than 30 at this stage.

THE COURT: You are correct that the normal procedure in a normal case in which there's probably going to be no more than six or eight or ten witnesses obligates the parties to identify potential witnesses a couple of weeks in advance. This is not a normal case. This is a case that's been in discovery and investigation for three years. And it doesn't seem reasonable to me that four months before trial you can't do a better job of identifying potential witnesses with great specificity than you have.

Now, I'm not going to play hall monitor where we have weekly conferences with the lawyers to ascertain the extent to which you're giving Exxon reasonable notice of the witnesses you may potentially call at trial. But you can't give them the name of a company with 600,000 employees and not indicate which of four or five of those 600,000 employees you might call as a witness -- as witnesses in your case.

Now, maybe they can figure it out, but even if they can figure it out, it's only reasonable for you to do a better job than you're doing in focusing on the

identity of the potential witnesses of what bids fair to be a significant trial raising significant issues involving a significant public interest.

MR. WALLACE: I understand, Your Honor. And, especially on the entities, without maybe getting out over my skis, I think for the most part those entities we identified because they had reports that we would put into evidence, that what we can do is go back to Exxon on those and tell them exactly which documents from those entities we are interested in entering into. And we can potentially do those through either some form of affidavit, testing as to whether the report is a business record or something along those lines and narrow the burden.

We're not looking to call 600,000 people, we weren't looking to play games, and, you know, where we had the identity of someone at Goldman Sacks in mind and we were just hiding it from them.

So we can give them information, especially on the entities, to sort of what we're looking for. And we did identify that in our disclosure to them. We identified which paragraphs in the complaint which pertained to those reports. So we can do that, certainly.

MR. TOAL: Your Honor, I want to be clear, this is not an issue that's limited to the seven entities they've

identified. They are not going to call 70 plus witnesses at trial. They have to have a better understanding, they have to have a present intention at this time of what witnesses they intend to call. That was the purpose of the preliminary witness list. When we gave them our preliminary witness list there were eleven witnesses on it. Those are the people we intend to call. And when we recently decided we would were inclined to call another witness we supplemented our witness list. That's how you put parties on notice of what the evidence is that they're going to be confronted with and they need to deal with. And we need the opportunity to know who those people are so we can take discovery in advance of trial. That's just a matter of basic fairness. And, you know, this witness list is an effort to hide the ball.

THE COURT: All right, I'm not going to make any ruling this morning. But we're going to have another conference two weeks from today, and in between now and then I'm asking the Office of the Attorney General to be mindful of the, what I consider to be reasonable objections that Exxon Mobil is raising to the manner in which the Office of Attorney General is identifying potential witnesses.

MR. WALLACE: Your Honor, I completely understand your request and we will -- we will be back in front of you

in two weeks and we will have thought about it and taken some steps.

I do want to say this is not obfuscation. The bulk of the witnesses they're complaining about we identified in February and we told them we still weren't sure and that we didn't know what our case was going to look like, and that's why we didn't think a preliminary witness list at that stage made sense. Most of those people are internal Exxon employees, and we've been going through and doing our depositions to try and narrow it down.

So we will understand your suggestion and we will be back here in two weeks.

THE COURT: All right. I appreciate that.

And in two weeks you'll be exactly four months from trial, so for your own purposes you'll need to have a better handle on who it is that you're likely to call as witnesses.

MR. WALLACE: Understood, Your Honor.

And the issue last time was in fact the third-party witnesses, and we gave them the folks that we thought that were potential witnesses. But I -- I understand the comments about where we are, and we will be back here in two weeks.

THE COURT: All right.

PROCEEDINGS

The next issue on discovery.

MR. ANDERSON: Judge, it would be helpful if we handed up some materials that we prepared to review, both in connection with the motions and the requests for the discovery that's in dispute.

THE COURT: Okay. Have you given a copy to the other side?

MR. ANDERSON: We can -- We will distribute them now.

THE COURT: All right.

(Brief pause.)

THE COURT: We're just dealing with your second discovery issue at the moment.

MR. ANDERSON: Which relates to the custodians, Judge.

Your Honor, we're prepared to address the issue about the two custodians that the parties don't agree on. We are pursuing, which is the subject of the motion to dismiss certain defenses that relate to the misconduct allegations that we've made against the Attorney General's Office, the selective enforcement, the official misconduct and the conflict of interest.

There are two custodians that we believe contain -- whose documents are likely to contain relevant information, relevant evidence related to those defenses.

One is the former spokesperson for the office who issued a number of press statements during her tenure, including one of them which is in this packet accused Exxon of having made 97 pages worth of false statements. And that's on Slide 8 of the packet, from her personal Twitter account she says, allegedly, that "The three-year investigation that the New York Attorney General conducted uncovered 97 pages worth of wrongdoing." What she's referring to is the 97-page complaint that they filed. At least one of those pages is just the signatures of all the people who work at the Attorney General's Office who brought the complaint against this.

So it's this type of inflammatory rhetoric that the Office for the last three years has issued, both publicly through official channels and also through numerous press leaks, including to New York Times, about the existence of the investigation before we even knew about it, including, we believe, on information and belief, but we want discovery on this, that they leaked the existence of the investigation -- the confidential investigation that the SEC was conducting of the company to the great detriment of the company's reputation when that came out in the press.

And we believe that this custodian is the most likely point of contact between members of the Attorney

General's Office and the press where this campaign of defamation was conducted against the company. And so we would...

(To Mr. Wallace) Allow me to finish, please.

And so we would ask that the Court direct the Attorney General to conduct a reasonable search of this former employee's emails pursuant to the search terms that we've already agreed on that are reasonable.

And the only objection that we've heard from the Attorney General's Office to this request has nothing to do with burden, they've never told us that this was burdensome, they've never presented a hit report showing how many documents they would have to review, all we've ever heard is that they don't want to do it because they think it's unreasonable or it's irrelevant. But the information that is in this custodian's files are directly relevant to the allegations that we've made about the official misconduct and about the selective enforcement.

MR. WALLACE: I'm just going to profess, I'm a bit surprised we're starting here, because this was the issue Your Honor issued the notice about at the last scheduled hearing we had and you told the parties that if we came in you were likely to just grant relief to both sides. They had asked for three additional witnesses.

We negotiated with them on the issues and issued a series of requests to narrow down what we were asking for. We agreed to produce one of the three witnesses they were looking for and expand our search terms. They just decided not to -- they'd said they'd take it under advisement, and so here we are.

So we feel we've compromised, we feel that going after the press office and the other person they requested, and I don't know what their position is on it today, is another fellow that works -- that never worked on the case. So these are two people that didn't manage the case, they weren't part of the case team.

Mr. Montgomery will talk about, I think this is largely covered by the rest of the discovery disputes and the motion to dismiss and the other motion practice, so I don't know that it makes sense to take this as the first issue.

But our point is: We've compromised a lot with Exxon. We've asked for a lot of things we know and they've come back and pushed back. And so that's what we did before the last conference. And we left it a little bit open, so I'm a bit surprised that it's actually now the answer is "We're not willing to take a compromise."

So that's the context that we see this in. I think it makes more sense to talk about the motions, and

this gets covered up within that. Because if the motions are granted this all becomes a little bit moot. So that was just the context.

MR. ANDERSON: That's not entirely correct, Judge. If the motion is granted to dismiss the defenses that we want to raise, there's still likely to be discoverable and relevant evidence in the spokesperson's custodian files related to the basis for the claims and related to the way that the AG's office has communicated its understanding of those claims to the press and how those statements that they've made previously are at odds with the current position that they've taken in the litigation and what we expect that they're going to present to the Court in October.

So, even if that is the case that some of the requests are wrapped up in the motion to dismiss, there's independent relevance outside of the defenses. But we'll proceed in whatever order the Court prefers. The Court indicated that discovery was up first and then the motion to dismiss was second. If the Court prefers to go in the other direction that's fine, but we think that we're entitled to this discovery, it's directly relevant to the misconduct defenses that we intend to raise that we have good -- that we have pleaded with abundant allegations that fully support those defenses. And we don't see any

reason to wait longer. The close of fact discovery was last month. It's high time they did the review which they hadn't said would be burdensome and produce the documents.

MR. WALLACE: I would just note that I think there's been active press activity on both sides of the table, that Exxon Mobil's been communicating to the press, we've been communicating with the press. I don't think any of that relates to the merits of this case, which, as Your Honor said, we're very close to going to trial. And I don't think we are here to litigate the press strategy of either side, we certainly haven't been pursuing that as an area of discovery. But, again, I think that if there is not--as we believe legally there is not--there is not a misconduct defense, then there is no even pretense of needing the discovery of the press officer of the New York Attorney General's Office.

THE COURT: I'm inclined to agree with the Office of the Attorney General on the discovery of press-related communications. Let's get to the motions to dismiss.

MR. MONTGOMERY: Good morning, Your Honor.

As you noted at the outset, this case has been litigated far beyond the norm. And the discovery disputes you're seeing right now are an illustration of the reason why courts are very cautious about allowing

defendants to proceed with these kinds of defenses.

And there's two reasons, two primary reasons why these defenses do not belong in this case, and the first is they fail as a matter of law. The Court of Appeals in this state, the Supreme Court, has made very clear that there is -- is and needs to be a high bar for a party making a misconduct claim like this against a law enforcement agency. And that bar is that there is no reasonable basis for the government action at issue. In other words, that the bias or animus was the but for cause of the challenged government action.

Exxon has failed to make that type of allegation. Given -- taking their allegations as true, at best we have inferences that there may have been additional contributing causes, but certainly no evidence that would -- or no allegation that would support that the supposed animus or bias on the part of the former Attorney General was the but for cause.

The second reason these claims don't belong in this case is because Exxon has provided no linkage to their claims to the litigation at issue. All of their claims are directed towards the investigation and the theory that it was brought for an improper purpose, ignoring the fact that the current litigation was brought not by former Attorney General, Eric Schneiderman, who is

the subject of most of the misconduct claims, but by Barbara Underwood. Exxon has made no allegation to suggest that she proceeded to bring this case to trial despite -- without any sort of basis or that the current Attorney General, Letitia James, continues to support the Office's action despite the fact that it was sprung from a baseless investigation.

There's two -- excuse me. So there are a number of reasons why these allegations are insufficient, but the first question that the Court has to ask is has Exxon plausibly alleged that there was no reasonable basis for bringing the investigation. And I submit to the Court that they have not and cannot. Because, as this Court is aware, the Office of the Attorney General, as far back as October of 2016, in this room, set forth the basis for its investigation when they submitted a motion to compel, which Exxon did not challenge, did not raise -- did not challenge the subpoena at that time saying it was improperly based, despite the fact that they had already raised these misconduct claims in a federal court in Texas.

They continued to dispute certain aspects about whether certain documents were subject to an accounting privilege under the Texas law, but at no time did they tell this Court or otherwise say "We should not respond

to this subpoena, we should not produce these documents because it is based on an investigation that is the product of animus or bias."

If that wasn't enough, at the conclusion of the investigation the basis was supported and laid out in painstaking detail in a 90-page complaint, validating the theories that had been presented earlier in the motion to compel. In other words, there was a basis for Exxon -- for the Attorney General's belief that Exxon misled its investors.

And, as I said, in the motion to compel the supporting affidavit laid out those bases. Exxon's financial disclosures, their 2014 Managing the Risks report, interviews given by the CEO of Exxon at the time who said that Exxon did not take write-downs or impairment costs, the Wall Street Journal article stating that Exxon was the only major producer that didn't take these impairment charges or write-downs.

In view of that clear basis that's been laid out under the supervision of the Court, Exxon's allegations fall short. At best what we have is allegations that the former Attorney General had a political viewpoint that was in opposition to certain viewpoints of Exxon, that there were certain activists who supported the Attorney General's actions against Exxon and may have offered

encouragement, otherwise provided information. None of these get close to providing the causal link that these allegations would require to proceed past the pleadings stage.

And, to give you an example, you may be aware that yesterday the Attorney General brought an action, an antitrust action related to Sprint and T-Mobile. And on the stage announcing that action were a union of workers in that industry, a nonprofit representing people in the community, and the World Wireless Association, a trade association.

My point being, Your Honor, is that the allegations that Exxon's making are commonplace, they're not extraordinary events. They're trying to use the typical operations of the Attorney General to cast a wide net of possible reasons that the investigation in Exxon was improperly motivated.

And, as illustrated this morning, the dangers associated with allowing that kind of defense are playing out here, with multiple discovery disputes, extensive -- extensive resources being dedicated to providing the documents that Exxon thinks will somehow prove that this -- prove their conspiracy theories, turning over the files of multiple custodians, scouring through all our files. As you see, they now want to -- they're

interested in what we were saying to the press. This is the kind of intrusion into the discretion of the Attorney General that the Courts in the U.S. v. Armstrong, in Hartman v. Moore and the Court of Appeals in 303 West 42nd Street v. Klein warned against.

And, as Judge Caproni found, after being fully briefed on this same allegations, "There's no direct evidence here of an improper motive and the circumstantial evidence is thin and it would require a speculative inference to find in Exxon's favor." And that's why she found, Judge Caproni found, that Exxon had failed to state a claim.

I would further submit that the maturity of the litigation at this stage where we've provided -- we've filed our complaint, we've answered their contention interrogatories, pointed to documents that support our allegations, we've now provided expert report setting forth the details of our damage theories that negates any inference that there was no basis for bringing this investigation.

I would submit that it's simply too late to be entertaining these kind of claims. The issue before the Court should be the primary issue, did Exxon mislead its investors. We have four months to get ready for a trial to litigate and try that issue. These claims are a

distraction and there should not -- and they are not supported by any precedent.

And I would submit to the Court that Exxon has provided no case or no precedent for showing how these claims, even if they were allowed to stay in this case, would operate to negate a finding by this Court that Exxon misled its investors and violated the Martin Act. This Court would be in unchartered waters if it decided to go down that path.

Exxon continually tries to assert that allowing these kind of defenses is allowed as a matter of course. "This is commonplace. We're just two civil litigants; we should be able to bring up any defense we want." I submit that the case law does not support that! And I would point to the Court of Appeals opinion in 303 West 42nd Street v. Klein which has been cited numerous times in this jurisdiction and continues to be cited for providing the standard that must be pled before this sort of intrusion -- intrusive -- intrusive claim is allowed to proceed and for discussing how these kind of claims can operate when they're allowed.

If we look to the Supreme Court precedent, we can start with Hartman v Moore where the Supreme Court was looking at this in the criminal context, but a reading of that opinion makes clear the policy

considerations would apply here saying that "There must be an allegation, a plausible supported allegation of no probable cause, otherwise the Court would have to second guess the discretionary power of the prosecutor, and Court should not be doing that."

And Exxon's attempt to mischaracterize Hartman to say that it only requires any sort of allegation does not -- is not consistent with the reading of the case and was incidentally rejected two weeks ago by the Supreme Court in a case involving misconduct -- challenges to an arrest. And that was in Nieves v Bartlett that the Supreme Court issued on May 28th, and they affirmed that the holding of Hartman requires that the defendant plead and prove lack of probable cause to proceed with the selective enforcement defense like Exxon is attempting to do here.

If we look at the Supreme Court's decision ten years earlier in U.S. v. Armstrong, they lay out a clear policy basis for setting a high bar for -- a high pleading standard for misconduct defenses, that "Allowing defendants on any sort of allegation to proceed poses serious threats to the discretionary power of prosecutors who are vested by statute with carrying out their mandates, and it has the potential to impair the effectiveness of law enforcement." And I would suggest

we're seeing that play out right here.

The Court -- the Court of Appeals in 303 West 42nd Street v. Klein makes clear that the government action at issue has to be the product -- again, "It has to be the cause of an evil eye" is the term that they used. And they further stated that "It should be treated on a standard similar to a preliminary injunction," that Exxon needs to show that they would be more likely than not to prevail on the merits to allow them to proceed to present evidence and have a fact finder make a determination about whether a government official such as the Attorney General abused his discretion. And I would submit that Exxon has not met that burden.

I think it's worth pointing out that in the cases where this type of defense has been allowed has been directed to a very focused theory -- and I would direct the Court to the 303 West 42nd case -- not an instance as we have here, where Exxon has tossed out a scattershot series of allegations, some completely unrelated to the other, all in an attempt to somehow say there were other factors for this array of reasons that the Attorney General decided to pursue Exxon.

In truth, any defendant would be able to make some type of similar allegation, and in fact has. I recently litigated a case against Charter Communications

formerly Time Warner Cable, made similar allegations under the guise of an unclean hands defense, which was -- Judge Sherwood found did not -- did not sound plausible, and Charter Communications voluntarily withdrew those defenses.

THE COURT: Okay. There are four counterclaims that you want dismissed. One of the things that Exxon is seeking are emails from former Attorney General Schneiderman that allegedly were received and transmitted from his personal phone even though they related exclusively to this case. What's your position with respect to the production of those emails?

MR. MONTGOMERY: Your Honor, I think those emails speak for themselves. I would encourage Your Honor to review them. In short, they do not show Mr. Schneiderman conducting Attorney General business from his personal email account. The bulk of them are articles that were forwarded to him that he somehow thought might be useful to distribute to other people at the AG's office so he forwarded them to his work account.

To the extent they are pointing to the emails from an attorney that Exxon labels an activist, there's no communication from Mr. Schneiderman evidenced in those. A full reading of that email thread shows that it was an unsolicited communication from that attorney, for

whatever reason, maybe attempting to secure business as a representative for the Attorney General, but the point being is that in each email that Exxon has identified, Mr. Schneiderman forwarded the thread to his work account within 24 hours.

And if you look at the line of cases they're pointing to, there is federal law that talks about what would give rise to an inference that emails were not being properly preserved or were being -- business being conducted outside the official email channels. And I believe the standard's twenty days.

So, if we were going to follow this federal line of cases, Eric Schneiderman was well within that. And I would suggest that the emails simply don't support the characterization that Exxon is trying to make about them. If anything, they just show a diligent practice where any time Eric Schneiderman got something that even tangentially might be related to the Exxon case he promptly forwarded it to his work email where it was properly preserved and available for dissemination if need be.

THE COURT: All right.

MR. ANDERSON: Your Honor, why don't we begin with the Eric Schneiderman emails.

So, one of the innocuous emails that

Mr. Montgomery was just referring to is on Slide 12. And I use "Innocuous" with quotes around it.

In this email Mat Pawa, who has openly advocated using the coercive power of state officials like the Attorney General, to compel, intimidate Exxon Mobil to change its position on climate change and climate policy, wrote a substantive email to Mr. Schneiderman's Gmail account on February 5, 2016 where he said that -- and this is in the upper right hand side of the slide, Judge, that "We spent a fair amount of time thinking about consumer fraud remedies and believe that a Court could require Exxon to make available in electronic format its decades of documents on what it knew and when it knew it, make corrective statements admitting that its products contribute to global warming and that global warming poses a threat of extraordinary harm to humanity and that fossil fuel usage must be significantly reduced and admit they've deceived the public. These kinds of remedies would be a game changer."

And what he's talking about there, Judge, is the improper use of official coercive power to make Exxon Mobil change the way it speaks about climate policy and about climate change.

Mr. Pawa laid out that agenda years earlier at a conference in La Jolla, California--that's also

reproduced in the slide deck--where he encouraged the use of state power. He describes it on Page 3 of our deck, Judge. He says that, "If we can recruit a single sympathetic state attorney he might have substantial success bringing key internal documents to light."

Now, why do they want key internal documents to be brought to light? Pawa explains. He says, "We want to maintain pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming."

He also writes in this report of what happened at La Jolla, Pawa argued that other defendants distorted the truth, he said that, "Litigation serves as a," quote, "potentially powerful means to change corporate behavior."

The agenda that Pawa is laying out here is one about misusing government power to coerce a political opponent to change its position on a contested public issue and to change the way it discusses climate change and climate policy. That is the issue that we are -- that we have been pursuing through our affirmative defenses. And it's laid out in even more detail, as this -- as this well organized and intentionally concealed from the public conspiracy has evolved.

On Page 4 of the deck where Mat Pawa attends a

meeting at the Rockefeller Foundation where they expressly say in a written document that, "The goal is to establish in the public's mind that Exxon's a corrupt institution, to delegitimize them as a political actor, to drive investment from Exxon." And, in terms of the tools they're going to use to accomplish the goals, they cite "AG," reference to Mr. Schneiderman and others, "and tort suits." And how are they going to get there? They're going to get there by getting discovery, creating scandal.

And then we see on Slide 5, Judge, that Mr. Schneiderman picks up on exactly these themes. He picks up on the belief that there's no dispute about climate policy, there should be no dispute, there's just confusion caused by special interests who profit from that confusion. It's referring to Exxon Mobil. And he says, "That's why we served a subpoena on Exxon Mobil." A subpoena on Exxon Mobil, that's literally what Pawa was hoping a sympathetic state attorney would do. And he says, "We're doing this because in the face of gridlock in Washington, we're prepared to step into this breach."

Gridlock in Washington. Congress doesn't investigate misleading statements to investors, not that that's actually what he said he was looking at in 2015. What congress does in Washington is legislate. They

resolve contested public issues. And that's what Schneiderman is saying he is going do, that his office is going to do, and it's what Pawa said he wanted to recruit a sympathetic state Attorney General to do.

And he then goes on to say that, "We're going to block -- we're going to attack the morally vacant forces and step into this battle with an unprecedented..."

And this addresses Mr. Montgomery's point.

"...unprecedented level of commitment and coordination."

So, to the extent that there's anything unprecedented here, it's the use of government power in this express way to limit the other side of the political debate. This is literally what Justice Jackson warned about in his celebrated essay on the prosecutor where he said, "The greatest danger of a prosecutor is that he identify someone who is disfavored by the majority, either because of political positions or something else, target that person and then try to find the offense, try to find the offense that you could stick on him." And that is literally what's happened here over the last three years.

When this investigation began it didn't have to do -- What did Mr. Montgomery say? He said something about impairments and write-downs. You will not find a

reference to impairments and write-downs in 2015, you will not find impairment and write-downs in this press conference. This had nothing to do with impairment and write-downs, what it had to do with was misleading the public about climate policy.

What they did was exactly what Justice Jackson warned about. They then did this three-year investigation, obtained more discovery, as the Court pointed out, than any other case in this courthouse and they found something that they could then piece together into a complaint.

But this goes beyond Attorney General Schneiderman. He might have been the spokesperson at the time for this, but what you'll see, Judge, on Page 7 for example, is that Mr. Srolovic is all over this, too. He's a current employee of the Attorney General's Office, he's a supervisor in the environmental division, one of the officials who signed the complaint against Exxon. Okay? So not former. And what he -- when he was communicating with Mr. Pawa he had a request on Page 7: He said, "My ask is that you speak to the reporter about having met with the Attorney General, that you don't confirm that you attended or otherwise discussed the event."

So, if Mr. Montgomery's right, that this is just

like the press conference they had yesterday where union people were up on the stage and everyone's out there speaking openly about how they support the attempt to block the merger between Sprint and T-Mobile, well, why is Mr. Srolovic saying this to Mr. Pawa? And why are they having conversations later on on this other document, by the way, which is one of the ones that the Attorney General is trying to seal from the public and conceal from the public?

Mr. Srolovic is having a conversation through an intermediary, a private law firm, with the Rockefeller Fund. And what they're saying here is that because there was an investigation in congress at the time about this apparent improper use of government power, the Rockefeller representative says, "This will require us to get on the same page soon re going forward."

Again, this is not something that's being set out on a stage in front of cameras, this is being concealed. And it's still trying to be concealed today.

Judge, that is the -- that is the basis for why we want access to Mr. Schneiderman's Gmail account. We can see that he was communicating with Mr. Pawa through that account and that Mr. Pawa has expressly stated that what he has been trying to do is advocate and encourage State Attorneys General to misuse their powers to limit

First Amendment rights.

All that we've heard so far is that for some of the emails that they have produced to us Mr. Schneiderman forwarded them to his official account. And we have them. We have those emails because they were forwarded to his official account. But we don't -- but we don't know what emails weren't sent to his official account and we don't know what emails he actually sent.

THE COURT: I have an officer of the court here who's representing that all of these emails were forwarded to his official account.

MR. ANDERSON: Well, that's a representation that's not supported by the declaration that Mr. Schneiderman provided. He very carefully wrote that it has been his practice to forward emails. He did not say that he conducted a review and he did not say that he always sent them and he didn't really address the question of when he sent emails. Did he then go into his sent items and forward those to his account?

THE COURT: Well, I'm not going to order a forensic examination of former Attorney General Schneiderman's emails. I will order the Attorney General to provide you with a less carefully worded statement that gives you confidence that anything that was official business or related to this investigation was made

available to you via communications sent by Mr. Schneiderman to his official account.

MR. ANDERSON: Or through a search of the Gmail account. Either forward it or he'll do a search to find -- the Attorney General's office will do a search to find whatever wasn't forwarded.

THE COURT: The Attorney General is going to make a representation to you that anything that referred or related to this investigation that was on Mr. Schneiderman's personal email account has been made available to you.

MR. ANDERSON: That's what we're seeking, Judge. We want confidence that if there's evidence that we have it --

THE COURT: That's what you're entitled to and that's what you're going to get.

MR. MONTGOMERY: May I respond, Your Honor?

THE COURT: Yes.

MR. MONTGOMERY: We are right back where we were in this other district. These are the exact same claims that Exxon made in front of Judge Caproni. And what they're trying to do is use this press conference as the link between a third-party and say, "This third-party's agenda, these communications which may have been unsolicited, we have no evidence that that they were --

there was outgoing communication between these third-parties, but somehow this press conference provides the link." And they give you a slide, as they've done in the past, that takes certain snippets from the press conference.

I would urge this Court to review the entirety of that press conference, and I think you will reach the same conclusion that Judge Caproni did, that read in its entirety, in context, it does not support that link, and it actually shows that Eric Schneiderman expressed a legitimate concern that Exxon may have misled investors. In other words, that he had a basis for investigating Exxon for the very activity that forms the basis of this litigation.

THE COURT: What is the concern here? I said I'm not ordering a forensic review of former Attorney General Schneiderman's emails.

MR. MONTGOMERY: I'm sorry, I was speaking to the merits of the -- the email -- the evidentiary value of the emails and the press conference that that they discussed.

THE COURT: All of these counterclaims with respect to First Amendment, chilling of speech, et cetera, I'm dismissing all of those. The only one that I'm keeping open for the time being is the selective enforcement counterclaim.

MR. MONTGOMERY: Respectfully, Your Honor, the selective enforcement claim is based on this allegation of an attempt to chill speech.

THE COURT: It's not a catchall for everything, it's a separate counterclaim that may go by the wayside. It's not a counterclaim, it's an affirmative defense. But it may go by the wayside once you provide them with the certification with respect to the Schneiderman emails. I think there's just an open issue there that has to be closed.

MR. MONTGOMERY: Understood, Your Honor.

MR. ANDERSON: Judge, with respect to the selective enforcement defense that we wish to raise here: The Court's ruling is that we can proceed on than defense, but you're inclined to dismiss the conflict of interest and official misconduct?

THE COURT: I'm not just inclined to dismiss them; I am dismissing them.

MR. ANDERSON: May I be heard on --

THE COURT: Make your record as you wish.

MR. ANDERSON: -- those two claims?

Judge, first of all, the standard that has been identified by the Attorney General, this idea that we need to negate all bases for their conduct other than the nefarious bases, is not supported by any precedent that

they've identified or that actually exists.

The cases that they reference are taken well out of their context. Like, for instance, Mr. Montgomery kept referring to Hartman against Moore. That's a Bivens suit that was brought against postal inspectors for -- for selective prosecution. The reason the Supreme Court said that there couldn't be -- that there had to be an absence of probable cause is because the agents didn't make the decision to bring the case, the prosecutor did. But the prosecutor has absolute immunity. None of that is relevant here. So Justice Suiter wrote in his decision, that's why, because you don't have the person who made the decision is the defendant in the case. So the idea that that would be the standard that would apply in a civil case where there is no absolute immunity and the people who made the decision are currently employed by the office and were the most senior members of the office, is simply inapplicable, and that decision should be set aside, it's not relevant here.

The same thing with Armstrong. Armstrong is a criminal case about what you have to do to get additional discovery beyond what the federal rules of criminal procedure provide for in a case. That could not be further removed. Discovery of the prosecutor in a criminal case is cabined, it's narrow and it's limited to

certain categories of information that are identified in the rule. That is totally opposite of what happens in a civil case where there is discovery on both sides of any information that's material and relevant. Those standards don't apply.

The other case they cited in their brief was Gaynor, which I don't think Mr. Montgomery referenced here, but in that case, that was a suit in the '60s where the -- where African Americans challenged the state's hiring practices because they kept giving -- the state kept giving work to unions that excluded African Americans. And the Court of Appeals denied that claim because they said, "Well, the entity that's doing the discrimination is the unions, not the state, so the state can't be held responsible here."

These are the cases they're relying on.

We cited to you this case, Kramer, from 2012, which is very similar to the case we have here. It's a civil suit where the state took an action related to issuing a permit and it denied the request for a permit. The applicant for the permit said in his allegation that that was selective enforcement, it was discriminatory, because they were retaliating against him for speech that he had made.

The Court in that case said there are basically

two elements of this, disparate impact, disparate treatment and an improper motive, including a motive to suppress speech. Those are the two elements. There was nothing about you need to show the absence of probable cause or there can't be any other -- any other factor that might have gone into that decision. If that were the requirement there would never be a selective enforcement defense because after three years of investigation you find something --

THE COURT: Hold on. We haven't stricken your selective enforcement defense. What we are striking is the assertion that the Attorney General can't bring a Martin Act claim when it particularizes in ninety paragraphs claims against Exxon Mobil, that in the aggregate, they claim, constitute a Martin Act violation.

MR. ANDERSON: Well, Judge, it is in your power to fashion an appropriate remedy. You -- you are the supervisor of this case, you have the authority -- the inherent authority to address improper conduct by officials with the state.

THE COURT: I haven't seen any yet.

MR. ANDERSON: Let me address the conflict of interest, Judge.

There are two employees of private parties who are currently working in the Attorney General's Office.

They were selected and paid for by private interests who were pursuing an agenda of clean energy, environmental policies, anti carbon, anti conventional energy. Under the terms of the agreement they're compensated entirely by this third-party, by the State -- the State Impact Center that's funded by Michael Bloomberg's philanthropy. They are then in bed with the Attorney General's office. They can work only on clean energy, climate change and environmental issues. They have an obligation to report back to the state, to the State Impact Center, on what they're doing. The State Impact Center can then withdraw the funding on seven days' notice if they aren't happy with what is being done by those fellows at the Attorney General's Office.

Judge, this is entirely counter to the advisory opinions that have been issued by the state addressing when an agency can accept gifts. They have made it very clear, and this is the New York State Ethics Commission in at least three separate published advisory opinions, that state agencies can accept gifts from private parties, but only if there are no strings attached. In one of those decisions it had to do with people who were living around Lake George, they wanted to make a contribution to the environmental department and the panel said, "Yeah, you can take that contribution, but

you can't just use that equipment at Lake George, you have to use it wherever -- wherever the agency wants. The donor cannot cabin the discretion of the agency."

The same thing with some computer equipment that was donated to the Tax Appeals Department, the same ruling. You can take the computer equipment, but the donor can't put any preconditions on how it's used.

And a similar issue arose in connection with the Consumer Protection Board when there was a request to subsidize an event that it wanted to put on. The same idea: You can take a contribution that allows you to have a table at the lunch, but the donor can't decide who sits at the table.

That -- those are the rules. The Attorney General is directly violating those rules by allowing a private actor to be embedded within the Attorney General's Office, a private actor who's receiving direction from an organization that is hostile to Exxon Mobil, and then to place that person on the case that the Attorney General has brought knowing full well that we have alleged all of these improprieties, but then to put that person on the case and have him appear in court, have him appear at depositions, raises all the red flags that the State Commission identified in its advisory opinions about why accepting exists from private

interests cannot be accepted with those conditions. It creates all the appearance of impropriety.

Judge, can you imagine if Exxon Mobil were embedding fellows, privately paid individuals in Attorney General's offices, in other parts of the country whose job it was to bring cases against other energy companies, maybe energy companies that do solar or wind, how I am prop their would appear if that -- if Exxon Mobil was doing something like that? This is no different. This is an interested party who's against conventional energy, who's against Exxon Mobil and other companies that have produced oil and gas, and he's embedding his associates in the Attorney General's Office to bring cases against the company. That is a conflict of interest. It creates -- it's a direct conflict of interest, it creates the appearance of impropriety and it suggests strongly that the administration of justice of this case is not being done fairly.

MR. WALLACE: Your Honor, I don't know if you need to hear anymore. I think you've indicated which way you're going to rule. I had some follow-up questions, but I did want -- I am interrupting Mark, but I just wanted to say, I think our papers -- we disagree with the characterization that you've just heard from Exxon Mobil. I think the one thing we just would like to say on the record is -- is that

all of this, all this *mishegas* about the fellows, they're essentially naming and shaming and picking on an individual, a young lawyer who chose this route to go into public service. This is someone who is just serving the state and is now being named in Wall Street Journal editorials, and this is being driven by the same agenda that Exxon Mobil following in this case. We agree with your decision that this is not an appropriate venue for hearing these kinds of complaints.

Putting that aside, I think we had a practical question, if it makes sense to address it now, about how to proceed and what you were looking for on the Schneiderman email. I just want to make sure we understand clearly.

THE COURT: Just so we're clear, at the end of the day you're either going to prove a Martin Act violation or you're not. And these affirmative defenses or defenses are irrelevant to the merits of that case.

Now, you need clarification with respect to the Schneiderman emails.

MR. WALLACE: And I'm just wondering if you're looking for some kind of affirmation from our office or should we go back and get additional clarification from Mr. Schneiderman? Only we --

THE COURT: Whatever means are sufficient to

satisfy the Court and Exxon Mobil that anything that refers or relate to Exxon Mobil that's on Mr. Schneiderman's private email server has been forwarded, as it should have been, to his business address and turned over to Exxon Mobil in the course of the discovery of this case.

MR. WALLACE: Understood.

THE COURT: All right.

Now, there's a motion to seal.

MR. MONTGOMERY: Your Honor, this is very closely related to the motion to dismiss. As you know, we filed a motion to dismiss, and, in the alternative, for a protective order, because we didn't believe these were valid defenses, we did not believe we should have to be producing the types of emails and communications that were relayed to them.

So we filed for a motion to dismiss, and, in the alternative, for a protective order and noted in our papers that we were cognizant of the automatic stay of our obligations that would accompany that filing of the protective order. However, as we correctly anticipated, there might have -- there would have been significant time lag between our filing that motion and an actual decision on the motion, so we elected, despite that automatic stay, to produce documents that have no relevance to the claims in the complaint that -- as are

evidenced by the communications at issue, in order to make sure that in the event the Court decided against us we weren't now not going to have a backlog that could impair this October 19 trial date.

So, to the extent that the Court ultimately agrees with us that they have not stated valid defenses, we do not think it's fair to be penalized for the actions we took to try to be cooperative and ensure that we reached a trial date and not exercising our right to stand behind the automatic stay accompanying the protective order.

THE COURT: Okay.

Well, I did direct that during the pendency of these motions discovery would continue because we didn't want to jeopardize the trial date. So now that motions to dismiss three of the defenses have been granted, there's no need for there to be public disclosure of the material relating to those three defenses.

With respect to the one defense that has yet to be dismissed, we will just continue the protective order until that issue gets finally resolved.

MR. MONTGOMERY: Thank you, Your Honor.

THE COURT: Okay.

MR. ANDERSON: Your Honor, the standard is heavy for the Attorney General to seal documents that we've

argued support our claim. We've argued, and these emails are pretty powerful support for the allegations we made about selective enforcement and the other defenses. They appear on -- some of them appear on Page 12 of the document. One of them in particular is from Mr. Pawa to Mr. Srolovic saying, "You should drop a subpoena on the George Marshall Institute, Think Tank, before it closes down so you can get all their documents about climate change advocacy."

There's powerful evidence in here about the misuse of government power to target one side of a political debate. The idea that there's any basis for sealing is absurd. The arguments that they've put forward is that Mat Pawa's a whistle-blower who needs protection from Exxon. Whistles-blowers are employees or other people with access to information who then raise a red flag and want to be -- it's nothing like that. He is out there publicly. He attends conferences where he goes on the rampage against Exxon Mobil. He's filed multiple cases for over a decade against Exxon Mobil. He's not an insider with any particular knowledge, he is -- he is an opponent of the company who's enlisted the Attorney General's office to use its coercive state power against the company to change the way it talks about climate change.

So these emails are -- these emails are not only relevant to the claims that -- the defenses that we've raised, whether or not they're dismissed they would be relevant because they form the basis of whether we've adequately stated claims. So they would be relevant for the judicial purpose of determining whether our allegations are sufficient to withstand a motion to dismiss.

But independent of that there is a strong public interest in knowing how the Attorney General exercises the power that's entrusted to it by the people. And that strong public interest is what needs to be balanced against the purported bases for sealing. And that's what I meant when I referred to absurd, is that in their briefs they've identified two grounds, one is that he's a whistle-blower, that is absurd, and the second ground is that he would be intimidated and chilled if this all came to light.

This has already come to light. We've argued that Mat Pawa is one of the driving forces behind this conspiracy to discredit Exxon for two years, maybe three years. And it's just -- it is part of this desire to conceal, this motion to seal these emails is part of this concealment. When we're in federal court they tell Judge Caproni and they told the Second Circuit in their briefs,

"You don't need to hear these arguments, you don't need to worry about whether there was any misconduct, because we're in front of Justice Ostrager and he's going to get to the bottom of whether there was any misconduct."

Then we walk into this courtroom and they're saying, "Well, this is not the venue to talk about whether there's been any misconduct. Judge Caproni already took care of this."

This is classic bootstrapping. They're trying to prevent any type of forum from getting to the bottom of whether this conduct was appropriate. They're trying to conceal it, they're trying to minimize it, they're trying to act like it all went out the window when Mr. Schneiderman left. But this is an email not with Mr. Schneiderman, this is one with Mr. Srolovic who is still at the office, who's still a supervisor, who's one of the most senior people who signed a complaint against Exxon. And this is -- the public has a strong interest in knowing these facts and making judgments about how the Office is exercising its power. But, even if it didn't, and it does, but even if it didn't this would still be directly relevant to whether or not we had adequately stated these defenses and it should be part of the record that is available to the public when it reviews the Court's decision.

THE COURT: Well, it's certainly part of the record for appellate purposes. And there are fifty people in the courtroom listening to your argument, so it's certainly been made public to those fifty people who in turn will transmit it to a much larger number of people.

And I haven't dismissed your selective enforcement claim. And, for present purposes, we're going to keep things in abeyance until we resolve the selective enforcement claim.

Anything else?

MR. WALLACE: No, Your Honor. That's it from our end.

MR. TOAL: Your Honor, there's the issue of the 11-f deposition which the New York Attorney General moved to quash. The argument on the Rule 11-f deposition is the state is not entitled to any special treatment.

The First Department's decision in Katz makes clear that the state, for purposes of litigation, is to be treated as a private party, particularly, whereas here, the state brought the litigation. That's a well understood precept, it's reflected in the CPLR under 3102.

THE COURT: I don't understand. You want to take a deposition of the Attorney General?

MR. TOAL: Not of the Attorney General. They will

get to designate somebody who will provide binding testimony on behalf of the Attorney General's Office --

THE COURT: I thought we dealt with this before.

MR. TOAL: But, Your Honor, this is --

THE COURT: You've had sixteen different discovery vehicles to find the information that you want to find. You do not need to depose people who are prosecuting this case.

MR. TOAL: But, Your Honor, this has nothing to do with deposing people who are prosecuting the case. They can designate and educate whoever they want. It doesn't have to be an attorney. We're absolutely indifferent. The point is to get binding testimony. And this argument that the Attorney General's Office advances that there's substitute methods for taking discovery has not been accepted. When you look at cases like SEC versus Merkin, each of these arguments that the Attorney General advances were expressly rejected. There's a summary in the case where the Court concluded, "Litigants usually can't prohibit a 30(b)(6) deposition, which is a federal analogue, by arguing in advance that each and every question would trigger the disclosure of attorney-client and work product information. Litigants and their counsel decide -- served with a 30(b)(6) notice decide which witnesses to designate and those witnesses need not be,

generally are not attorneys. The mere fact that attorneys were involved in the preparation of the 30(b)(6) witness does not foreclose all questions of the 30(b)(6) witness. Litigants --"

THE COURT: Give me a for instance of what it is that you would ask this equivalent of a 30(b)(6) witness.

MR. TOAL: So we want to pin the attorney general down on the factual bases underlying the allegations.

THE COURT: You don't know what the factual bases are after all these interrogatories and document productions and contention interrogatories?

MR. TOAL: No, Your Honor. Because the contention interrogatories, first of all, we're limited in number. We had 25 interrogatories overall. I think we got to depose something like nine contention interrogatories. We have serious problems with the answers to those, which are vague, I think evasive. And, obviously --

THE COURT: That's a different issue.

MR. TOAL: But, Your Honor, a contention interrogatory is not a substitute for a 11-f deposition. That's a proposition the New York Attorney General's Office advanced itself when seeking to take an 11-f deposition of Exxon Mobil. Even though they had three years of investigation and millions of pages of documents they felt it was essential to take 11-f deposition because it

provides binding testimony that binds the entire entity.

Rule 11-f expressly contemplates that government entities are subject to these sorts of depositions. And this is a uniquely appropriate vehicle, in a seven-hour deposition I'll have the opportunity to ask hundreds of questions to pin the Attorney General down on the factual basis for their claims, which have been shifting over time, as Your Honor knows.

MR. MONTGOMERY: May I respond, Your Honor?

THE COURT: Yes.

MR. MONTGOMERY: I would direct Your Honor to the case cited by Exxon, People v. Katz, which was very factually similar, First Department, the defendant in a suit brought by the AG made the same claim, they needed a deposition to learn more about the complaint, the allegations. And they did not get it.

The question that the Court asked is, "Is this necessary," noting the dangers of deposing attorneys, particularly on the legal theories brought in the case. And in that case what the Court said is, "We will go with the bill of particulars. If you can later show some deficiency in this written discovery vehicle --" and, as noted by Your Honor, there are multiple discovery vehicles -- "I would consider it as a last resort." But it is certainly not a matter of course. And, as we've

pointed out in Liberty Petroleum, this is getting dangerously close to work product and is the reason why attorney depositions like this are disfavored. Absolute --

THE COURT: He's saying he'd be satisfied with a witness who's not an attorney.

MR. MONTGOMERY: I submit that that's just an illusory step. How would that work, other than having the attorneys who've drafted the complaint -- it's just providing a straw person who's going to echo the -- the words of an attorney.

THE COURT: Look, I'll take a three-page letter from each of you on that issue and reserve on it today.

Anything else before the Court this morning?

MR. TOAL: No, Your Honor.

MR. WALLACE: Just to clarify, I guess: Are we still talking about an 11-f on the affirmative defenses issues? Because there was -- the 11-f included both requests for affirmative defense issues and issues regarding the support for allegations in the complaint. So should we only draft a letter on the --

THE COURT: I thought we were talking about support for allegations in the complaint. Am I missing the point?

MR. TOAL: There were three areas. One is

document preservation, two is the factual bases for the allegations in the complaint and three was communications that the Attorney Generals had with third-parties, which relates to this issue of needing to get notice of what the AG's case is actually going to look like and what evidence we would need to confront.

MR. WALLACE: Well, the complaint, I believe, disclosed too much information on the third-parties and I think we made full disclosure on that. But we're happy to address in the letter whatever issues Your Honor would like us to address.

THE COURT: Okay.

You'll tell me -- you'll each tell me whatever you want to tell me in three pages and I'll rule.

MR. WALLACE: Understood, Your Honor.

THE COURT: All right? Have a nice day.

MR. WALLACE: Thank you.

MR. ANDERSON: I'm sorry, Judge, there was one unresolved issue we just wanted -- want a ruling from the Court on: There's -- one of the discovery requests related to the reports that have been provided by the fellows back to the State Impact Center and apparently to Bloomberg philanthropists. We would like to have access to those reports. It's minimally burdensome and it speaks directly to the defenses that we would like to raise.

MR. MONTGOMERY: Your Honor, I believe you made it clear that you're dismissing the conflict of interest defense rendering this fellowship issue moot. This goes directly against the statement Your Honor made earlier.

MR. ANDERSON: We suspect those reports would bear directly on the selective enforcement, because it -- the way they describe what the action is against Exxon Mobil, the significance of the action against Exxon Mobil and what steps the AG is taking to accomplish those goals.

THE COURT: Why does the AG oppose this?

MR. MONTGOMERY: Well, just to be clear, this issue of the fellowship is not mentioned in their selective enforcement sections of their briefs, in their first -- in their proposed amended complaint. That issue of the fellowship is used by Exxon exclusively up until today as a supporting factor for their conflict of interest defense, which Your Honor's now saying is being dismissed.

So I don't think it's fair to allow them at the last minute to shift that theory over and say it's somehow evidence of a selective enforcement.

I'd also point out, Your Honor, that the selective enforcement is based on the investigation, saying it was brought for an improper purpose. The fellowship was not in existence at that time, it didn't start till the -- the investigation was at least a year,

possibly two years old. And the fellows in question did not arrive at the AG until early 2018. So to suggest somehow that these fellows who were three years later -- who came to the AG's office three years after the investigation was started are somehow going to provide evidence that the investigation was started for an improper purpose boarders on absurd.

MR. ANDERSON: Judge, first of all, our selective enforcement defense incorporates by reference all of the allegations with respect to the embedding of these special attorneys general within the office. It's laid out in the amended -- all the facts are first and then the claims that flow from those facts come afterwards. So that's just not correct, and the way it's laid out in the answer.

Second, this isn't about the conflict of interest, this is about the way this investigation and the complaint and the decision to file the complaint last fall, why that decision was made and to what extent those facts bear on the bad faith that we've alleged throughout. Which is a continuing -- continuing event.

Judge, we'd be happy for the AG to provide these records to you in the first instance for review before them being produced to us.

THE COURT: Okay. That seems like a fair compromise. I'll look at it in camera.

MR. MONTGOMERY: We have no objection to that.

THE COURT: Now, I think in this large pile there was a cross motion by Exxon Mobil to amend (indicating).

MR. ANDERSON: That's right, Judge.

THE COURT: But if I've dismissed the three claims and reserved on the selective enforcement, do we need to do anything with respect to the cross motion to amend?

MR. ANDERSON: Judge, I think as a formal matter you might -- you might need to grant the motion, the cross motion to amend, dismiss the three defenses that you have decided should be dismissed, but then have the other left open. So I think we would need an operative answer that includes the selective enforcement defense.

THE COURT: Is there any objection to that?

(No response.)

(Continued on the following page.)

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PROCEEDINGS

THE COURT: Okay, so that's how we will proceed.

MR. ANDERSON: Thank you, Judge.

MR. TOAL: Your Honor, as to the three-page letter, when would you like to have that submitted?

THE COURT: Take a week.

MR. TOAL: Thank you, Your Honor.

(Whereupon, the above-captioned proceedings were concluded.)

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(It is hereby certified that the
(foregoing is a true and accurate
(transcript of the proceedings.
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ROBERT PORTAS, RPR, CRR
Senior Court Reporter

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SO ORDERED

BARRY R. OSTRAGER, J.S.C.

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