SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

UNITED STATES VIRGIN ISLANDS OFFICE OF THE ATTORNEY GENERAL, Plaintiff, v. EXXONMOBIL OIL CORP., Defendant.	Case No. 2016 CA 2469 Judge Jennifer A. Di Toro

Nonparty Competitive Enterprise Institute's Memorandum of Points and Authorities In Opposition to Cross-Motion for Costs and Attorney's Fees and Reply in Support of Its Special Motion To Dismiss, Motion for Sanctions, and Motion for Costs and Attorney's Fees

Attorney General Walker's cross-motion for costs and fees should be denied for the same reason that the Competitive Enterprise Institute's anti-SLAPP motion, motion for costs and fees, and sanctions motion should be granted: Attorney General Walker abused the power of the Court for the purpose of "muzzling of opposing points of view" on climate change and energy policy—the precise evil that the D.C. Anti-SLAPP Act was enacted to address. *See* Ex. C at 1.[1] What makes this case unusual is that *he has admitted to that improper purpose*, in public remarks that he refuses to even acknowledge in his Opposition. *See* Ex. A at 16. Moreover, the Attorney General's Opposition effectively concedes that his subpoena action was defective and had no chance of success, but argues that its voluntary dismissal cuts off CEI's rights under the Anti-SLAPP Act. Not so: the Act entitles CEI to dismissal *with prejudice* to block the Attorney General from undertaking the further abuses he has already threatened and to compensation for the costs and attorney's fees CEI was forced to incur to respond to the Attorney General's abusive subpoena. That relief, and sanctions, are necessary and appropriate to protect CEI's advocacy rights, remove the chill on its speech and its associations with donors and allies, deter future abuses, and vindicate society's interest in free and unfettered debate on controversial policy issues.

[1] Exhibits referenced herein are exhibits to the Declaration of Andrew M. Grossman in Support of CEI's Special Motion To Dismiss Under D.C. Anti-SLAPP Act and Motion for Sanctions.

Argument

I. Attorney General Walker's Voluntary Dismissal Does Not Allow Him To Evade the Anti-SLAPP Act's Provisions for Dismissal With Prejudice and Award of Costs and Attorney's Fees

Attorney General Walker's assertion that he can evade the D.C. Anti-SLAPP Act by voluntarily withdrawing an abusive action that has already inflicted substantial injuries, while threatening more to come, is incompatible with the text and purpose of the Act.

CEI filed its anti-SLAPP motion because it needs and is entitled to relief under the Act. After it received a letter from Attorney General Walker's counsel threatening to take further actions against CEI, CEI moved to obtain meaningful relief—in particular, dismissal *with prejudice*—and not just an empty voluntary dismissal that would allow Attorney General Walker to continue to threaten it with enforcement of the subpoena, as he has. *See* Ex. O. In addition, CEI had already incurred significant expenses in responding to the subpoena that it has a right to recoup under the Act and that Attorney General Walker refused to compensate. *Id*. That includes drafting its Special Motion To Dismiss after Attorney General Walker and his counsel refused to respond to its earlier objections to the subpoena. Attorney General Walker's position seems to be that CEI should have sat on its hands, taken no action to relieve the chill on its advocacy and associations caused by his harassment and threats, and absorbed the costs he unlawfully imposed on it. But that is the view the D.C. Council rejected when it enacted the Anti-SLAPP Act to "ensure[] that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." Ex. C at 1.

Because CEI has not obtained its full measure of relief under the Act, its motion is not moot. The Act provides for dismissal *with prejudice* of an offending claim. D.C. Code § 16-5502(d). That relief is crucial to achieving the Act's purpose in cases like this one where a SLAPP perpetrator threatens future abuses. Attorney General Walker continues to hold the subpoena he issued on his own authority over CEI's head and has threatened to act to enforce it against CEI at any time. *See* Ex. O (letter by Attorney General Walker's counsel stating that he

would not withdraw USVI subpoena and threatening that he "will reissue the subpoena" and "move to compel your client's compliance"). If CEI prevails on its motion, the Attorney General's action will be permanently dismissed, and CEI will no longer be subject to that threat, because the dismissal will have a *res judicata* effect barring Attorney General Walker from enforcing the subpoena against CEI in the future. CEI's continuing interest in that statutory remedy makes this a live controversy.

So does CEI's entitlement under the Act to costs and attorney's fees, which are also necessary to achieve the Act's purposes of compensating victims, protecting speech rights, and deterring abuse. *See* Ex. C at 1, 4. Attorney General Walker concedes that "[a] moving party who prevails under the Anti-SLAPP Act is entitled to fees and costs." Opp. at 11 (quotation marks omitted). *See also Doe v. Burke*, 133 A.3d 569, 571 (D.C. 2016). Nonetheless, he argues (at 11) that his voluntary dismissal of his action, undertaken in a one-sentence praecipe filed four days after he was served with CEI's motion, did not have "anything to do with CEI's motion" and so relieves him from having to compensate CEI's expenses. That argument is unavailing, for three reasons.

First, Attorney General Walker does not contend that this case involves any of the "special circumstances" that would justify denial of an award—the only exception to that statutory obligation recognized by the Court of Appeals in *Burke*. *See* 133 A.3d at 578. That concession should be the end of the matter.

Second, the Act entitles CEI to an award of fees irrespective of voluntary dismissal—particularly one that does not provide it complete relief. As the Court of Appeals explained in *Burke*, a party's decision to abandon at an early stage an action that offends the Act is relevant to "her potential exposure to a fee award," not to the availability of an award in the first place, which is subject only to the "special circumstances" limitation that is not invoked here. *Id*. at 578–79. Any other approach would conflict with the purpose and policies of the Act, by authorizing a SLAPP perpetrator like Attorney General Walker to abuse judicial process to impose un-

warranted burdens on parties for the purpose of chilling their advocacy and then escape the consequences.

That is why courts in jurisdictions with similar anti-SLAPP statutes have consistently held that cost and fee awards are available in these circumstances. "Persons who threaten the exercise of another's constitutional rights to speak freely and petition for the redress of grievances should be adjudicated to have done so, not permitted to avoid the consequences of their actions by dismissal of the SLAPP suit when a defendant challenges it." *Liu v. Moore*, 69 Cal. App. 4th 745, 752, 81 Cal. Rptr. 2d 807 (1999). Adjudication of fee requests in those circumstances "provides both financial relief in the form of fees and costs, as well as a vindication of society's constitutional interests." *Id*. CEI raised this point in support of its Motion for Costs and Attorney's Fees, *see* CEI Anti-SLAPP Costs Mot. Mem. at 4–7, and the Attorney General does not dispute it or the relevance of the case law under similar statutes.

Third, irrespective of whether the Attorney General's voluntary dismissal automatically entitles CEI to a costs and fees award—on the basis that it rendered CEI a prevailing party under Section 16-5504(a)—CEI is entitled to such an award if it prevails on its pending special motion to dismiss. While the Attorney General disputes the merits of that motion, he concedes that, if CEI does prevail on it, CEI "is entitled to fees and costs." Opp. at 11.

In sum, allowing a SLAPP perpetrator to cut off his victim's right of relief under an anti-SLAPP statute "works a nullification" of the substantive rights and important protections it provides. *Liu*, 69 Cal. App. 4th at 751. That approach is inconsistent with the Act's text and contrary to its purpose.[2]

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[2] Attorney General Walker's claim (at 3–5) that CEI filed a false or misleading Rule 12-I certification is baseless. CEI attached the relevant correspondence between counsel to its anti-SLAPP motion so that there could be no confusion or reasonable dispute about the parties' communications. *See* Exs. N, O. As CEI stated in its Rule 12-I(a) certification, "Attorney General Walker's counsel represented that he does not agree to withdraw the underlying Virgin Islands subpoena, does not consent to sanctions, and will take future action to terminate this action, while threatening to commence a new action at any time to compel CEI's compliance with the Virgin Islands subpoena." That is, in fact, what the letter by Attorney General Walker's counsel represents. *See* Ex. O.

II. The Subpoena Was Defective and Unenforceable Under UIDDA, the First Amendment, and Rule 45

Attorney General Walker does not dispute CEI's argument that the subpoena is defective and unenforceable under the the Uniform Interstate Depositions and Discovery Act, D.C. Code § 13-441 *et seq.* ("UIDDA"), thereby conceding that his likelihood of success on the merits is zero. *See* CEI Anti-SLAPP Mot. Mem. at 12; Opp. at 13 n.13. The Court need go no further than that to grant CEI's Special Motion To Dismiss Under D.C. Anti-SLAPP Act and to find that it is entitled to an award of costs and fees.[3]

That is not to say, however, that Attorney General Walker has adequately responded to the other defects in his legal action identified in CEI's Objections and Anti-SLAPP Motion (at 12–17). In fact, he did not respond at all to CEI's point that his subpoena action constitutes an unlawful attempt in violation of the First Amendment to retaliate against and chill CEI's speech and its expressive associations. *See* Opp. at 9–10 (responding only to First Amendment privilege argument). This failure is a consequence of the Attorney General's refusal to acknowledge or discuss his public statements admitting that the purpose of his investigation and the subpoena is to retaliate against and chill speech that stands opposed to his policy view that a "transformational" adoption of renewable energy sources is "the only solution." Ex. A at 16. His unwillingness is understandable: those remarks would be awfully difficult to explain away. Nonetheless, his refusal to even attempt that task constitutes a concession; it is therefore a second, independent basis for finding that he is not likely to succeed on the merits.

Bad faith and First Amendment privilege constitute third and fourth independent grounds, respectively. The entirety of Attorney General Walker's response to CEI's arguments that his subpoena action is marred by bad faith and violates the First Amendment is that he claims to be

[3] Attorney General Walker's claim (at 13 n.13) that the subpoena "need not have been issued through the UIDDA" is both legally irrelevant (he did, after all, launch a UIDDA action) and false. CEI is not subject to Virgin Islands jurisdiction, and the only way that a Virgin Islands subpoena could be properly served on CEI is for it to be reissued pursuant to UIDDA. The problem for the Attorney General is that, as he concedes, *id.*, UIDDA applies only to judicial subpoenas, not ones issued on his own authority.

investigating ExxonMobil for "fraud." *See* Opp. at 9–10 ("CEI is wrong that the First Amendment shields CEI or Exxon from cooperating with this lawful investigation. This is an investigation into whether Exxon committed fraud…."). But, as the Attorney General's chief authority on this point explains, when First Amendment rights are at stake, "[s]imply labeling an action one for 'fraud,' of course, will not carry the day." *Illinois ex rel Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 617 (2003). Instead, in such cases, the result must be "swift dismissal," because "[a] State's Attorney General surely cannot gain case-by-case ground this Court has declared off limits to legislators." *Id*.

In this instance, the Supreme Court, Court of Appeals, and other courts have declared off limits viewpoint discrimination, retaliation based on protected speech, and government intrusion on associational activities. *See* CEI Anti-SLAPP Mot. Mem. at 13–16 (discussing cases). Accordingly, under *Telemarketing Associates*, it was Attorney General Walker's burden, at a minimum, to identify "misrepresentations [that judicial] precedent does not place under the First Amendment's cover." 538 U.S. at 618. He identified only two statements by ExxonMobil that he says justify this racketeering and fraud investigation under a criminal statute:

1. "International accords and underlying regional and national regulations for greenhouse gas reduction are evolving with uncertain timing and outcome, making it difficult to predict their business impact."

2. "Current scientific understanding provides limited guidance on the likelihood, magnitude, and timeframe of physical risks such as sea level rise, extreme weather events, temperature extremes, and precipitation."

Opp. at 14 n.15.

If such statements of uncertainty regarding climate change and climate policy constitute fraud, then the Environmental Protection Agency ("EPA"), the United Nations Intergovernmental Panel on Climate Change ("IPCC"), and other government agencies are in on the fraud, too:[4]

[4] The Court may take judicial notice of such government reports and records. *Drake v. McNair*, 993 A.2d 607, 616 (D.C. 2010).

- IPPC: "There are multiple scenarios with a range of technological and behavioral options, with different characteristics and implications for sustainable development, that are consistent with different levels of mitigation."[5]

- IPPC: "Future risks related to climate change vary substantially across plausible alternative development pathways."[6]

- IPPC: "The models used to calculate the IPCC's temperature projections agree on the direction of future global change, but the projected size of those changes cannot be precisely predicted. Future greenhouse gas (GHG) emission rates could take any one of many possible trajectories, and some underlying physical processes are not yet completely understood, making them difficult to model."[7]

- EPA: "Scientists are still researching a number of important questions, including exactly how much Earth will warm, how quickly it will warm, and what the consequences of the warming will be in specific regions of the world. Scientists continue to research these questions so society can be better informed about how to plan for a changing climate."[8]

- NASA: "How much climate change? That will be determined by how our emissions continue and also exactly how our climate system responds to those emissions."[9]

- U.S. Global Change Research Program: "The amount of future climate change will largely be determined by choices society makes about emissions."[10]

In short, Attorney General Walker's identification of innocuous statements reflecting the "consensus" view of climate change as the purported basis of his "fraud" and racketeering inves-

[5] IPCC: Climate Change 2014: Mitigation of Climate Change, Summary for Policy Makers and Technical Summary 10 (2015), available at http://www.ipcc.ch/pdf/assessment-report/ar5/wg3/WGIIIAR5_SPM_TS_Volume.pdf.

[6] IPCC, Climate Change 2014: Impacts, Adaptation, and Vulnerability, Summary for Policymakers 11 (2014), available at http://ipcc-wg2.gov/AR5/images/uploads/WG2AR5_SPM_FINAL.pdf.

[7] IPCC, Climate Change 2013: The Physical Science Basis 140 (2013), available at http://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_Chapter01_FINAL.pdf.

[8] EPA, Climate Change Facts: Answers to Common Questions, available at https://www3.epa.gov/climatechange/basics/facts.html.

[9] NASA, Responding to Climate Change, available at http://climate.nasa.gov/solutions/adaptation-mitigation/.

[10] U.S. Global Change Research Program, 2014 National Climate Assessment, available at http://nca2014.globalchange.gov/report/response-strategies/mitigation.

tigation only confirms his bad faith and speech-chilling purpose, providing additional independent grounds for finding that he is not likely to succeed on the merits of his subpoena action.

Finally, CEI stands by its argument that the subpoena is exceptionally overbroad. *See* CEI Anti-SLAPP Mot. Mem. at 16–17. By demanding "[a]ll documents and communications concerning the extent to which" fossil fuels or the production of fossil fuels might impact climate change (*i.e.*, ExxonMobil's principal products and activities), as well as the impacts of climate change on an energy company, the subpoena demands production of anything and everything that relates to climate change over a ten-year period. Ex. B, Att. A, at 12–13, ¶¶ 2, 5. That enormous breadth and burden are unjustified by any conceivable need, particularly given Attorney General Walker's inability to identify any potentially unlawful act within the applicable limitations period. *See* CEI Anti-SLAPP Mot. Mem. at 14, 17; Opp. at 13–14 (acknowledging limitations period but failing to identify any unlawful conduct falling within it).

III. The Anti-SLAPP Act Protects Against Abusive UIDDA Actions

The Attorney General's argument (at 7–8) that the Anti-SLAPP Act does not reach its UIDDA subpoena action conflicts with the Act's text. A UIDDA filing under Section § 13-443(a) to "request issuance of a subpoena" is a "filing requesting relief" and therefore constitutes a "claim" under the Anti-SLAPP Act. *See* D.C. Code § 16-5501(2) (defining the term "claim" to reach "any…filing requesting relief"). The Attorney General does not dispute that the Anti-SLAPP Act, according to its terms, literally applies to a UIDDA request—how could he dispute that, given that both statutes concern "request[s]" on the Court?

Instead, he argues that UIDAA requests should be exempted from the Act because, once the subpoena has been issued, the request has already succeeded on the merits and thereby satisfied the burden of the party responding to the anti-SLAPP motion. But that cannot be reconciled with the Act's broad definition of "claim" and purpose of comprehensively preventing abuse of legal process to chill protected advocacy—as opposed to the kind of piecemeal, statute-by-statute approach advocated by the Attorney General. Moreover, under his view, no *ex parte* request—

for example, a motion for a temporary restraining order—could ever be subject to an anti-SLAPP motion once granted. Perversely, exempting such *ex parte* requests from the Act's coverage would mean that the Act's substantive and procedural protections would not apply in the precise circumstances where SLAPP victims are otherwise unable to defend their rights, because they are not present for the initial stages of those proceedings.

The Attorney General's position also conflicts with UIDDA specifically. A UIDDA action is not complete upon the Court's issuance of a subpoena, but instead imposes prospective obligations on subpoena recipients and is subject to procedures "to enforce, quash, or modify a subpoena." D.C. Code §§ 13-445, 13-446. By the statute's own terms, whether or not a UIDDA action succeeds depends on whether the recipient complies, or can be made to comply, with it. Attorney General Walker effectively conceded this point when he filed a praecipe to terminate his UIDDA action and withdraw the subpoena he obtained through it. Where, as here, the subpoena was unlawfully obtained and cannot be lawfully enforced against the recipient, the UIDDA action has no likelihood of success.

The Attorney General's argument to exempt UIDDA actions from the Anti-SLAPP Act should also be rejected because it would open up a loophole big enough for a freight train. The Act was enacted to address the abuse of legal process with the "intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights." Ex. C at 1. Its purpose is to "ensure[] that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates" and thereby "prevent the attempted muzzling of opposing points of view." *Id*. But, in the Attorney General's view, the Act imposes no bar on legal intimidation, harassment, and abuse so long as it is carried out via a subpoena action targeting a third party like CEI—even though such subpoenas, as here, can impose substantial burdens and costs on their recipients and result in the same chill of protected advocacy as any other abuse of the Court's power. The D.C. Council, however, by defining the term "claim" in the act to reach any "filing requesting relief," expressly rejected such an irrational approach.

The Attorney General's argument (at 6–7) that CEI is not a proper "party" to bring a special motion to dismiss pursuant to the Anti-SLAPP Act also conflicts with the Act's policies, as well as Rule 45, which applies to UIDDA subpoenas, D.C. Code §§ 13-444, 445. That Rule recognizes that a subpoena recipient is a "responding party" with respect to the subpoena. Rule 45(a)(1)(D). Similarly, his argument (at 6) that the Act's protections are available only to "defendants" conflicts with the statutory purpose and text, which contains no such limitation. Indeed, if the D.C. Council had wanted to exclude third-party subpoena recipients from the Act's protections—although it is difficult to imagine why it would have wanted to do so—it could have done that easily by using terms like "plaintiff" and "defendant." But it didn't. *Cf. Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176–77 (1994) ("Congress knew how to impose aiding and abetting liability when it chose to do so….").[11]

The Attorney General's assertion that the subpoena served on CEI does not "arise[] from an act in furtherance of the right of advocacy on issues of public interest" is astonishing. For one, Attorney General already admitted that it does, in his press conference remarks—which his brief simply ignores. *See* CEI Anti-SLAPP Mot. Mem. at 4–5 (reciting Walker's remarks at the "AGs United for Clean Power" press conference). For another, the Attorney General's own brief (at 2) states that he targeted CEI because it was "tied to Exxon" and is an "organization working on climate change"—work that constitutes protected advocacy under the Act.

The subpoena itself confirms the point. The subpoena's very first demand seeks "[a]ll Documents and Communications sent or received from ExxonMobil" and then specifically focuses on those concerning "strategies to address Climate Change or impact public views on Climate Change." Ex. B, Att. A, at 12. It demands "advertisements, op-eds, letters to the editor, speeches, and publications, concerning Climate Change." *Id*. In fact, it demands all of CEI's

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[11] And the argument that the Attorney General has "filed no lawsuit against CEI for this Court to dismiss" overlooks (1) that the Attorney General already conceded, in his "Notice of Termination of Action and Consent to Revoke Issuance of Subpoena" filed with the Court, that this is a legal action subject to termination; (2) that the Act contains no "lawsuit" limitation, instead applying to a broad class of "claims" as defined in D.C. Code § 16-5501(2).

documents and communications concerning climate change—Attorney General Walker asserts otherwise (at 8), but the subpoena he obtained from this Court demands that CEI hand over "[a]ll documents and communications concerning the likelihood that or extent to which any of the products sold by or activities carried on by ExxonMobil directly or indirectly impact Climate Change," as well as everything concerning the impacts of climate change policy on ExxonMobil's business. Ex. B, Att. A, at 12–13. Given that ExxonMobil's "products" and "activities" directly or indirectly generate carbon dioxide, and that its business interests could be affected by potentially any climate policy, this demand encompasses anything and everything concerning the causes and effects of climate change and climate change policy.

But it wouldn't make a legal difference if the Attorney General's demands were actually limited to any activities CEI allegedly undertook with ExxonMobil's input or advice. CEI is a think tank, and basically all of its activities fall within the Act's definition of "act[s] in furtherance of the right of advocacy on issues of public interest" because they are "[i]n connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." D.C. Code § 16-5501(1). Nowhere does the Act exempt advocacy allegedly undertaken in conjunction with a corporation. Nor, for that matter, does the First Amendment. *See, e.g.*, *Pfizer Inc. v. Giles (In re School Asbestos Litigation)*, 46 F.3d 1284 (3d Cir. 1994).

IV. The Court Should Sanction Attorney General Walker and His Counsel

CEI is eligible for an award of costs, attorney's fees, and other appropriate relief as sanctions under Rule 45 and the Court's inherent authority.[12] As discussed in CEI's sanction motion and above, the subpoena was obtained in bad faith and for the improper purpose of harassing a party who disagrees with Attorney General Walker's policy agenda. And it is, as discussed above, astonishingly overbroad, plainly violating the obligation of Attorney General Walker and his counsel to "take reasonable steps to avoid imposing undue burden or expense on a person

[12] The Attorney General's Opposition does not dispute or even address CEI's request for sanctions under the Court's inherent authority.

subject to the subpoena." D.C. Sup. Ct. R. 45(c)(1). These things are the hallmarks of sanctionable conduct, and sanctions are required to vindicate the policies of Rule 45(c), deter further abuse of legal process, and redress CEI's injuries. *See* CEI Anti-SLAPP Mot. Mem. at 18–20.

The Attorney General's arguments to the contrary are without merit. First, the Attorney General suggests (at 12) that Rule 45 does not apply to a UIDDA subpoena. He should read the statute. It expressly provides that Superior Court subpoena rules—which are found in Rule 45—apply to subpoenas issued under UIDDA. D.C. Code § 13-445 ("The rules of the Superior Court applicable to compliance with subpoenas to…produce designated books, documents, records, electronically stored information,…apply to subpoenas issued under [UIDDA]."); D.C. Code § 13-446 ("[T]he Rules of the Superior Court and the laws of the District" apply to "[a]n application…for a protective order or to enforce, quash, or modify a subpoena" issued under UIDDA.). He should also read the subpoena, which states on its face that it is subject to Rule 45, including specifically its sanctions provision. *See* Ex. B at 2.

Second, Attorney General Walker contends (at 12) that the subpoena was not overbroad because it did not request all of CEI's documents and communications relating to climate change. Again, he should read the subpoena. It demands, from a ten-year period concluding in 2007, "[a]ll documents and communications concerning the likelihood that or extent to which any of the products sold by or activities carried on by ExxonMobil directly or indirectly impact Climate Change" and [a]ll Documents and Communications concerning any potential impacts on ExxonMobil's sales, revenue, or business caused by Climate Change itself, by public policies responding to Climate Change (including any legislation or regulation concerning Climate Change), or by public perceptions of Climate Change." Ex. B, Att. A, at 12–13, ¶¶ 2, 5. As discussed above, this amounts to a demand for all records regarding the causes of climate change, its impacts, and climate policy—in other words, everything regarding climate change.

But even ignoring those particular demands, the subpoena is still unduly burdensome because it is invalid. "When a subpoena should not have been issued, literally everything done in response to it constitutes 'undue burden or expense' within the meaning of Civil Rule 45(c)(1)."

Hallamore Corp. v. Capco Steel Corp., 259 F.R.D. 76, 81 (D. Del. 2009) (quotation marks and alterations omitted). It is "undue" that CEI even had to contend with an invalid subpoena. *See Builders Ass'n of Greater Chicago v. City of Chicago*, No. 96 C 1122, 2002 WL 1008455, at *4 (N.D. Ill. May 13, 2002) (awarding attorney's fees even though no documents were produced in response to invalid subpoena). And, in any instance, Rule 45 sanctions are appropriate to punish bad faith and improper purpose, irrespective of burden. *See, e.g.*, *Legal Voice v. Stormans Inc.*, 738 F.3d 1178, 1185 (9th Cir. 2013).

Third, Attorney General Walker's argument (at 13) that CEI has mustered no evidence of bad faith or improper purpose simply ignores his own public declaration, at a press conference, that the point of his investigation is not to enforce the law but to "make it clear to our residents as well as the American people that we have to do something transformational" on climate change and to encourage the public "to look at renewable energy," which he said was "the only solution." Ex. A at 16. Again, it is understandable why the Attorney General would not want to address this compelling evidence of his bad faith and improper motive—it is a rare First Amendment case where a public official actually admits he is targeting speakers because he disagrees with their policy views, thereby proving his bad faith. And CEI presented additional evidence of bad faith and improper purpose: the subpoena itself, which constitutes a fishing expedition; the statements of the organizer of the "AGs United for Clean Power" coalition and press conference, which make clear the coalition's strategy is to wield official enforcement power against groups like CEI because of their speech; and Attorney General Walker's bad-faith tactic of seeking to voluntarily terminate his D.C. action, in an attempt to avoid sanctions, while still refusing to withdraw the underlying subpoena he issued under his own authority and continuing to threaten CEI with it. *See* CEI Anti-SLAPP Mot. Mem. at 19–20. But for insisting that the subpoena was justified by a purported "fraud" investigation, the Attorney General addresses none of this.

Finally, it is not true that the Attorney General reasonably acted "to address CEI's undue burden claims." *See* Opp. at 14. The subpoena is invalid and never should have been issued in the first place, so "literally everything done in response to it constitutes 'undue burden or ex-

pense' within the meaning of Civil Rule 45(c)(1)." *Hallamore Corp.*, 259 F.R.D. at 81; *Builders Ass'n of Greater Chicago*, *supra*. And it was the Attorney General's burden (and his counsel's) to take "reasonable steps to avoid imposing undue burden or expense" *before* undertaking legal process against CEI. Sup. Ct. R. 45(c)(1). *See In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 09-CV-01967 CW NC, 2012 WL 4846522, at *4 (N.D. Cal. Aug. 7, 2012) (irrespective of the possibility of negotiation and compromise, Rule 45 "imposes an affirmative duty on a litigant requesting discovery from a nonparty to take 'reasonable steps' to avoid 'undue burden or expense'"). Neither the Attorney General nor his counsel ever responded to CEI's objections (which were served on them) enumerating the subpoena's defects and demanding it be withdrawn. Only when CEI acted to exercise its rights under the Anti-SLAPP Act did the Attorney General take any responsive action at all, and even then he refused to withdraw the underlying subpoena and threatened that he might seek to enforce it against CEI at any time. *See* Ex. O. These actions evidence bad faith, not reasonable litigation conduct.

And that bad faith merits sanction, both to relieve CEI's injuries and to deter future abuses, including those the Attorney General has already threatened against CEI.

V. Attorney General Walker's Costs and Fees Motion Is Itself Frivolous

By all indications, Attorney General Walker seeks a fee award under the Anti-SLAPP Act not because his request has any merit but with the hope that the Court will simply deny everything and call it a day. His argument in support of that request amounts to all of one sentence, which states: "Further, because, under the Act, the Court may award costs and fees to the responding party if it finds that an anti-SLAPP motion is 'frivolous,' VIDOJ requests that it be awarded its fees and costs." Opp. at 11.[13] The Court should reject that request for lack of supportive argumentation. *See Hensley v. D.C. Dep't of Employment Servs.*, 49 A.3d 1195, 1206 (D.C. 2012).

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[13] The remainder of that section of the Attorney General's Opposition concerns CEI's fee request. *See* Opp. at 11–12.

For the sake of completeness, however, CEI addresses it. The Act provides for an award to the responding party "only if the court finds that a motion brought under [the Act] is frivolous or is solely intended to cause unnecessary delay." D.C. Code § 16-5504(b). The Attorney General asserts that CEI's motion was "frivolous," not that it was brought to delay. Opp. at 11. No court has yet interpreted the Act's "frivolous" standard. Interpreting its own Rules, the Court of Appeals has held that an appeal is frivolous when it is "wholly lacking in substance" and not "based upon even a faint hope of success on the legal merits." *Slater v. Biehl*, 793 A.2d 1268, 1278 (D.C. 2002) (quoting *Pine View Gardens, Inc. v. Jay's Frosted Foods, Inc.*, 299 A.2d 536, 537 (D.C. 1973)). In this instance, CEI filed an anti-SLAPP motion after a government official publicly announced that he would target his policy opponents for their speech and then commenced a civil action in this Court to slap CEI with an abusive and harassing subpoena that not even he contends was properly issued under the statute he invoked, UIDDA, or could ever have been lawfully enforced against CEI. In these circumstances, CEI was well justified in asserting its rights under the Anti-SLAPP Act.

Conclusion

Vindicating the First Amendment rights of District residents, as well as their rights under the Anti-SLAPP Act, is not (as Attorney General Walker opines) a "waste" of the Court's time but essential to protecting the public's ability to participate in public policy debates free from fear of official retaliation, legal harassment, and the burden of abusive litigation. The Court should grant CEI's Special Motion To Dismiss, Motion for Sanctions, and Motion for Costs and Attorney's Fees, and it should deny Attorney General Walker's Cross-Motion for Costs and Fees.

Dated: June 16, 2016

Respectfully submitted,

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Certificate of Service

I hereby certify that on June 16, 2016, I caused a copy of the foregoing Memorandum of Points and Authorities to be served by CaseFileXpress on the following:

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