SUPERIOR COURT FOR 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 002469 JUDGE JENNIFER A. DI TORO

UNITED STATES VIRGIN ISLANDS OFFICE OF THE ATTORNEY GENERAL'S CONSENT MOTION FOR LEAVE TO FILE RESPONSE TO NONPARTY COMPETITIVE ENTERPRISE INSTITUTE'S NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF ITS SPECIAL MOTION TO DISMISS, MOTION FOR SANCTIONS, AND MOTION FOR COSTS AND ATTORNEY'S FEES

COMES NOW United States Virgin Islands Office of the Attorney General, by and through undersigned counsel, to seek leave to submit the accompanying response to Nonparty Competitive Enterprise Institute's Notice of Supplemental Authority ("CEI Notice"). CEI does not oppose VIDOJ's motion for leave. VIDOJ respectfully requests that the Court grant this motion and direct the Clerk of the Court to file the accompanying response.

Rule 12-I Certification

CEI does not oppose VIDOJ's motion for leave to file a response to its Notice.

Conclusion

For the reasons previously stated by VIDOJ and stated in the accompanying response, the Court should deny CEI's motions and grant VIDOJ fees and costs under the Anti-SLAPP Act.

July 5, 2016

Respectfully submitted,

/s/ Linda Singer

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CEI seeks under the guise of a "Notice of Supplemental Authority" improperly to advance pages of more argument. Given that CEI and its counsel have consistently ignored the Court's rules in these proceedings—including (i) filing a false Rule 12-I certification; (ii) filing a motion after VIDOJ consented to the relief sought by CEI pre-filing; (iii) failing to meet and confer with VIDOJ regarding CEI's Anti-SLAPP motion and request for dismissal with prejudice; and (iv) filing an improper opposition to a so-called "cross-motion" that VIDOJ did not file and a 16-page reply brief without leave of court—this comes as no surprise. Further, VIDOJ's withdrawal of the March 15 subpoena to Exxon and related April 4 subpoena to CEI are not relevant to and do not support the motions under consideration.

CEI's argument that the withdrawal of the subpoenas proves that VIDOJ's investigation is pretextual and thus in bad faith is baseless. Even if Rule 45 or the Court's "inherent authority"

to order sanctions were applicable here, which they are not,[1] there is no bad faith. VIDOJ—in addition to many other state attorneys general—is investigating Exxon for fraud and deception, as the attorneys general made clear in statements at the March 29 press conference, which CEI selectively ignores.[2] VIDOJ has not dropped its investigation, as explained in VIDOJ's statements to the public and to CEI—in a letter that was being finalized and sent to CEI's counsel when VIDOJ received his request for consent to CEI's Notice, although CEI's counsel misleadingly omits this from its Notice. *See* E-mail and Letter from M. Liu to A. Grossman (June 30, 2016), Ex. A (attached hereto). VIDOJ has simply made a strategic decision not to pursue one tool it was using to conduct that investigation—its March 15 subpoena against Exxon. VIDOJ agreed to withdraw the Exxon subpoena (and thus its related CEI subpoena) because Exxon refused to produce documents and filed a frivolous lawsuit against the VIDOJ in Texas state court—all of which meant that VIDOJ would have to spend significant time and resources in litigation before ever receiving a single responsive document to the subpoena. VIDOJ's decision to withdraw the subpoenas will allow it to focus its resources on other ways of

[1] Rule 45 applies to subpoenas in civil cases, not statutorily authorized investigative subpoenas issued where there is no lawsuit filed. *See, e.g.*, *State ex rel. Suthers v. Tulip Invs., LLC*, 343 P.3d 977, 982 ("[W]e necessarily reject, as misplaced, Tulips' attempt to equate the State's statutorily authorized investigative subpoena with [Rule 45] subpoenas in civil cases."). The Court's "inherent authority" to impose sanctions "in narrowly defined circumstances" is an exception to "the so-called American Rule" which prohibits fee-shifting in most cases "for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991). The CEI subpoena is a statutorily authorized investigatory subpoena issued outside the context of any civil case; and CEI has utterly failed to show how the Court's narrow inherent authority applies here.

[2] *See, e.g.*, CEI Mot. 1 Ex. A at 15 (Attorney General Walker: "We have launched an investigation into a company that we believe must provide us with information about what they knew about climate change and when they knew it."); *id.* at 19 (Attorney General Schneiderman: "If there are companies . . . committing fraud in an effort to maximize their short-term profits at the expense of the people we represent, we want to find out about it. We want to expose it, and we want to pursue them to the fullest extent of the law.").

pursuing its investigation against Exxon, which it is doing, while waiting for the federal district court in Texas to resolve similar litigation Exxon filed against the Massachusetts Attorney General for her subpoena. Indeed, the legitimacy of the investigation, and illegitimacy of Exxon's (and CEI's) claims to the contrary, are supported by the fact the Exxon is cooperating with, and has already produced thousands of documents in response to, the New York Attorney General's subpoena, which is similar to VIDOJ's now-withdrawn Exxon subpoena.

CEI's counsel also admitted at the June 28 hearing that CEI agrees many of the documents requested by VIDOJ—including e-mails and other "internal" documents and communications, *see* VIDOJ Subpoena to CEI, CEI Mot. 1 Ex. B at 12-13—show that the investigation against Exxon is legitimate. Mr. Grossman said: "If this investigation is really about what Exxon knew . . . then all [VIDOJ] had to do, all [VIDOJ] reasonably could have demanded of CEI, was documents that actually speak to that question. In other words, CEI's communications with Exxon. Perhaps any documents that are internal that may be linked to CEI's communications with Exxon . . . ." Mot. Hr'g Tr. 16, July 28, 2016. CEI's failure even to respond to these admittedly "reasonabl[e]" demands also demonstrates that *CEI* is the entity acting in bad faith.

CEI also argues that there is no lawful basis for the investigation because the Virgin Islands' CICO law has a 5-year statute of limitations. But, even if it were appropriate to litigate potential affirmative defenses in the context of an investigatory subpoena, the Virgin Islands, like many other jurisdictions, applies the discovery rule. *See In re Equivest St. Thomas, Inc.*, No. 07-30011 JKF, 2010 WL 4343616, at *5 (Bankr. D.V.I. Nov. 1, 2010) ("Under the law of the Virgin Islands, 'application of the equitable 'discovery rule' tolls the statute of limitation[s] when the injury or its cause is not immediately evident to the victim.'") (quoting *Joseph v. Hess*

Oil, 867 F.2d 179, 182 (3d Cir. 1989)). VIDOJ could not have discovered Exxon's potential fraud until after it was exposed by investigative journalists late last year, making it well within the applicable statute of limitations to seek older documents from Exxon and CEI. Further, only the last (not all) the predicate acts has to have occurred in the last five years. 14 V.I.C. § 604(j)(2)(b).

CEI also argues that VIDOJ does not have jurisdiction over Exxon and CEI. VIDOJ's authority to issue the subpoena stems from the statute, 14 V.I.C. § 612(a) and (b), and the statute expressly authorizes VIDOJ to seek to enforce its investigatory subpoena in "the court of the judicial subdivision where the witness resides," 14 V.I.C. § 612(k), or, for the CEI subpoena, the District of Columbia. Further, this objection did not even make CEI's laundry list of general objections, *see* CEI Mot. 1 Ex. M, and is thus waived. Finally, even if VIDOJ were unsuccessful on any of these legal arguments, CEI's own cited case makes clear that this is not the test for "bad faith." *Goldberg v. Amgen, Inc.*, 123 F. Supp. 3d 9, 29 (D.D.C. 2015) ("Rule 45(d)(1) does not require the court to impose sanctions merely because a party is unsuccessful in its subpoena"); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 624 (1950) (law enforcement investigative subpoena "is more analogous to Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not").

CEI's remaining arguments rest on the false premise that VIDOJ has dropped its investigation and that VIDOJ had no legitimate basis or need to subpoena documents of Exxon or CEI in the first place.[3] That CEI does not know how VIDOJ is pursuing its law enforcement

[3] CEI suggests that the Court should go ahead and rule on its Anti-SLAPP motion even though the subpoena has been withdrawn. CEI Notice at 3 n.3. This framework is wrong. The

investigation against Exxon does not mean the investigation is not still in full force. It is. Further, VIDOJ has previously explained at length the legitimacy of its request for documents. That both Exxon and CEI have improperly refused to respond to the Virgin Islands—even to requests that CEI admits were "reasonably . . . demanded"—leading VIDOJ to await the resolution of other pending litigation and pursue alternative investigative paths, does not render the requests any less valid.

July 5, 2016

Respectfully submitted,

/s/ Linda Singer

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Court should not rule on CEI's motion because there was never a contested matter for the Court to resolve. In VIDOJ's May 13, 2016 letter, VIDOJ agreed to precisely the relief that CEI sought in CEI's May 10, 2016 letter. CEI's May 10 letter requesting consent did not mention that CEI or was planning to file an Anti-SLAPP motion seek dismissal "with prejudice" (which does not even make sense outside the context of a lawsuit or as applied to an investigatory subpoena). Contrary to CEI's reading, Rule 12-I requires "diligent"—not deceptive—efforts.

Exhibit A

Mimi Liu

From: Mimi Liu
Sent: Thursday, June 30, 2016 10:54 AM
To: 'Grossman, Andrew M'; Linda Singer
Subject: RE: United States Virgin Islands Office of the Attorney General v. ExxonMobil Corp., No. 2016 CA 002469
Attachments: Letter to Andrew Grossman CEI 6.30.16.pdf

Mr. Grossman,

Please see attached, which we were in the process of finalizing when I saw your email. I did not have a message if you tried to reach me.

While we don't necessarily agree that VIDOJ's action yesterday has any bearing on the merit of your motions before the Court, we do not oppose your submitting this information to the Court provided that you also include our letter to you.

Thank you.

Mimi

From: Grossman, Andrew M [mailto:agrossman@bakerlaw.com]
Sent: Thursday, June 30, 2016 10:39 AM
To: Linda Singer; Mimi Liu
Subject: United States Virgin Islands Office of the Attorney General v. ExxonMobil Corp., No. 2016 CA 002469

Dear Ms. Singer and Ms. Liu,

I represent the Competitive Enterprise Institute in the above-captioned matter, and write to request your consent for CEI's filing of a notice of supplemental authority to the Court regarding your client's action yesterday to withdraw its subpoena on ExxonMobil. I did try calling your office, but was unable to reach either of your on the phone.

Please let me know whether you consent to our filing this notice. I ask, given the coming holiday weekend (our office is closed tomorrow and I suspect that support staff will be leaving early today), that you let me know by 1:30 pm today whether you consent.

Let me also ask whether the Attorney General has withdrawn the subpoena that he issued to CEI.

Thank you for your attention to this matter.

Best,

Andrew

Andrew Grossman
Partner

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COHEN MILSTEIN

Mimi Liu
(202) 408-4613
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June 30, 2016

Via E-Mail

Andrew M. Grossman, Esq.
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1050 Connecticut Avenue, NW
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Dear Mr. Grossman:

This letter is to inform you that Exxon agreed to dismiss its lawsuit against the Virgin Islands and the Department of Justice agreed to withdraw its March 15 subpoena to Exxon. A stipulation of dismissal was filed with the federal court in Texas late yesterday. The Virgin Islands' agreement to withdraw its March 15 subpoena does not mean that the Virgin Islands has ended its investigation against Exxon; to the contrary, this agreement will allow the Department of Justice to focus on its ongoing investigation and to continue to work with our state partners in our common investigation against Exxon without having to divert limited resources to fighting what VIDOJ believes to be a meritless lawsuit by Exxon and improper refusal to respond to a legitimate investigatory subpoena. Indeed, as you are aware, Exxon is cooperating with, and has produced thousands of pages of documents in response to, the New York Attorney General's similar investigatory subpoena.

In our letter to you on May 13, we stated that we had not made a decision on whether to move to compel or to withdraw our subpoena to CEI, but that we would let you know when a decision has been made. In light of our decision to withdraw the March 15 subpoena against Exxon, we have also decided to withdraw the related April 4 third-party subpoena against CEI.

COHEN MILSTEIN

Mimi Liu
(202) 408-4613
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Please do not hesitate to reach out to me at any time if you would like to discuss.

Sincerely,

Mimi Liu

Certificate of Service

I hereby certify that on July 5, 2016, I caused a copy of the foregoing United States Virgin Islands Office of the Attorney General's Consent Motion for Leave to File Response To Nonparty Competitive Enterprise Institute's Notice of Supplemental Authority to be served by CaseFileXpress on the following:

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By: /s/ Linda Singer
Linda Singer