

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

Consent Motion by Competitive Enterprise Institute for Leave To File Notice of Supplemental Authority in Support of Its Special Motion To Dismiss, Motion for Sanctions, and Motion for Costs and Attorney's Fees

The Competitive Enterprise Institute (“CEI”) hereby moves for leave to file a Notice of Supplemental Authority, which is attached to this Motion. As the Notice describes, one day after the hearing on CEI’s motions in this case, Attorney General Claude Walker withdrew his subpoena to the prime target of his “fraud” investigation, ExxonMobil, prior to receiving any of the materials he demanded from it. In response to CEI’s request for consent to notify the Court of this fact, counsel for the Attorney General announced that the subpoena targeting CEI has now also been withdrawn. These actions are relevant to the Motions under consideration by this Court because they: (1) provide further confirmation of the pretextual nature of the Attorney General’s purported “fraud” investigation; (2) raise serious questions about the veracity of the Attorney General’s representations at hearing regarding the basis, status, and ongoing nature of the Attorney General’s investigation; and (3) support CEI’s argument that the Attorney General’s demands on CEI were unsupported by need.

Accordingly, CEI respectfully requests that the Court grant this Motion and direct the Clerk of Court to file the attached Notice.

Rule 12-I(a) Certification

Pursuant to Rule 12-I(a), counsel for Attorney General Walker consents to this filing and stated that the Attorney General may seek leave to file a response, which CEI does not oppose.

Dated: June 30, 2016

Respectfully submitted,

/s/ Andrew M. Grossman

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Certificate of Service

I hereby certify that on June 30, 2016, I caused a copy of the foregoing to be served by CaseFileXpress on the following:

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Counsel for the U.S. Virgin Islands Office of the Attorney General

By: /s/ Andrew M. Grossman
Andrew M. Grossman

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Judge Jennifer A. Di Toro

**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**

One day after his counsel represented to this Court that Attorney General Claude Walker’s sweeping and intrusive demands on the Competitive Enterprise Institute (“CEI”) were justified by his investigation into purported “fraud” by ExxonMobil, the Attorney General appears to have abandoned that investigation. The attached Joint Stipulation of Dismissal, filed yesterday by the Attorney General and ExxonMobil, provides that, rather than defend his investigation against the serious civil rights claims made by ExxonMobil, Attorney General Walker “agrees to withdraw the subpoena” in exchange for ExxonMobil dismissing its case. *See* Att. A. Although the Attorney General’s counsel asserts that the investigation is continuing in some unspecified form, *see* Att. B, every investigatory action of which CEI was aware has now been withdrawn—including the subpoena targeting CEI.

Attorney General Walker’s actions to withdraw the ExxonMobil and CEI subpoenas are relevant to the Motions under consideration by this Court in three respects:

First, withdrawal of the subpoenas before ExxonMobil or CEI had turned over a single responsive document confirms the pretextual nature of the Attorney General’s investigation and thereby his bad faith in using this Court’s power to make sweeping demands on CEI. It is unusual, to say the least, for a prosecutor to publicly announce and launch a major fraud and racketeering investigation under a criminal statute and then, when challenged to justify the basis for his investigative actions, simply walk away. As CEI demonstrated in its briefing, that investigation

has no lawful basis because, among other reasons, the statute that the Attorney General claimed to be enforcing has a five-year limitations period, and the Attorney General could not identify any predicate act of actionable fraud within that period—a point confirmed when he failed to identify any such act in his briefing in this case.¹ Nor has Attorney General Walker ever identified any basis for exercising jurisdiction over ExxonMobil or CEI. *See, e.g., Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316–19 (1945); *Tulips Invs., LLC v. State ex rel. Suthers*, 340 P.3d 1126, 1136 (Co. 2015) (“[I]ssuing and enforcing administrative subpoenas against nonresidents is a due process concern and is limited to requiring the attendance of those who have purposefully availed themselves of entering the State’s commercial market.”).

Launching an investigation without any realistic prospect of bringing charges is evidence of bad faith. *Cf. Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975). The pretextual nature of the Attorney General’s investigation is particularly apparent when considered in light of his press-conference statements that the true purpose of his investigation was to influence the public debate over climate policy—which he sought to achieve by, among other things, targeting the policy organization most strongly associated with opposition to his policy views. The Attorney General’s bad faith, in turn, supports CEI’s requests for relief under Rule 45, for sanctions under the Court’s inherent authority, and for relief under the Anti-SLAPP Act.²

Second, the Attorney General’s actions raise serious questions regarding the representations of his counsel to this Court at its hearing this week and in its briefing. His counsel represented that the Attorney General’s investigation was ongoing; that the Attorney General continues to believe that ExxonMobil was engaged in fraud actionable under the Virgin Islands’ RICO

¹ Indeed, the Attorney General’s counsel at the hearing stated that the acts he considers to be fraudulent occurred “decades ago.”

² As described in CEI’s briefing, bad faith is not a prerequisite to obtaining relief under the Anti-SLAPP Act but does, in this instance, demonstrate that the Attorney General’s subpoena action is unlikely to succeed on the merits, because it was undertaken in bad faith and constitutes prohibited First Amendment retaliation. *See* Anti-SLAPP Mot. Mem. at 9, 13–14. *See also Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002) (stating “person of ordinary firmness” standard).

analogue, the Criminally Influenced and Corrupt Organizations Act; and that the Attorney General might act, in the future, to enforce the subpoena he issued on CEI. The first two of those things are now in doubt: CEI is not aware of any ongoing attempt by the Attorney General, at this point, to compel production of any investigatory materials. As for the CEI subpoena, it has now been withdrawn—just one or two days after it was the subject of argument before this Court.³ At the very least, it was incumbent upon counsel for the Attorney General to disclose to the Court and opposing counsel that the Attorney General was planning to abandon a substantial portion of his investigation (if not the entirety of it), including the subpoena he issued regarding CEI. Counsel for the Attorney General, as a named defendant in ExxonMobil’s civil-rights action, was necessarily aware of that fact.

Third, the Attorney General’s withdraw of his subpoenas to ExxonMobil, which he identified as the prime target of his investigation, and CEI demonstrates that his sweeping demands on CEI were unjustified by any need. Third-party subpoenas under Rule 45 are subject to careful scrutiny for undue burden, and it is the “duty” of the party obtaining the subpoena “to avoid imposing undue burden or expense on a person subject to the subpoena.” Rule 45(c)(1). *See also Wyoming v. U.S. Dep’t of Agriculture*, 208 F.R.D. 449, 452, 452–53 (D.D.C. 2002). If the Attorney General had no basis to demand documents of ExxonMobil in an investigation into “fraud” purportedly undertaken by it, then he certainly had no basis or need to make demands on CEI. The Attorney General’s lack of need for the materials he demanded from CEI is also relevant to First Amendment privilege. *See N.Y. State Nat’l. Org. for Women v. Terry*, 886 F.2d 1339, 1354–

³ That withdrawal does not moot CEI’s request for dismissal with prejudice. “The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed.” *Knox v. Service Employees*, 132 S.Ct. 2277, 2287 (2012). In such circumstances, a party urging mootness “must establish that there is no reasonable likelihood that the wrong will be repeated.” *Iron Arrow Honor Soc. v. Heckler*, 464 US 67, 72 (1983). *See also Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 US 167, 189 (2000). The withdrawal also does not moot CEI’s request for costs and fees pursuant to the Anti-SLAPP Act, given that the Attorney General has not altered his position that he refuses to compensate the expenses that his now-withdrawn legal process has imposed on CEI.

55 (2d Cir. 1989) (describing burden-shifting framework); *In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470, 488 (10th Cir. 2011) (same).

Conclusion

CEI respectfully requests that the Court grant its Special Motion To Dismiss, Motion for Sanctions, and Motion for Costs and Attorney's Fees.

Dated: June 30, 2016

Respectfully submitted,

/s/ Andrew M. Grossman

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Attachment

A

3. On May 18, 2016, Defendants filed a notice of removal, whereby ExxonMobil's state court action was removed to this Court. (ECF No. 13-6 at App. 237-44.) ExxonMobil filed a motion to remand this action to state court on May 23, 2016, which this Court denied on June 21, 2016. (ECF No. 11 at 1-4; ECF No. 38.)

4. On June 21, 2016, this Court directed the parties to hold a scheduling conference no later than July 11, 2016, and to file a joint report within ten days of that conference. (ECF No. 39.) After conferring on the matter, the parties mutually agreed that Attorney General Walker will withdraw the subpoena and ExxonMobil will stipulate to the dismissal without prejudice of this action.

5. Accordingly, ExxonMobil hereby stipulates to the dismissal of this action without prejudice to its right to assert the same or similar claims against some or all of the Defendants and Attorney General Walker agrees to withdraw the subpoena.

WHEREFORE, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii), each of the parties stipulate to the dismissal of this action without prejudice, with each party to bear its own costs and attorneys' fees.

Dated: June 29, 2016

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Attachment

B



COHEN MILSTEIN

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June 30, 2016

Via E-Mail

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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.



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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

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Judge Jennifer A. Di Toro

(Proposed) Order Granting Consent Motion for Leave To File Notice of Supplemental Authority in Support of Its Special Motion To Dismiss, Motion for Sanctions, and Motion for Costs and Attorney's Fees

Now before the Court for consideration is the Competitive Enterprise Institute's Consent Motion for Leave To File Notice of Supplemental Authority.

ORDERED, that the Competitive Enterprise Institute's Consent Motion for Leave To File Notice of Supplemental Authority is granted, and the clerk is directed to file the Competitive Enterprise Institute's Notice of Supplemental Authority that was lodged with that Motion.

SO ORDERED.

Jennifer A. Di Toro
Associate Judge

Copies to:

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E-served via CaseFileXpress

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Andrew M. Grossman, Esq.

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