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 _____

PLAINTIFF UNITED STATES VIRGIN ISLANDS OFFICE OF THE ATTORNEY GENERAL'S OPPOSITION TO: NONPARTY COMPETITIVE ENTERPRISE INSTITUTE'S (1) SPECIAL MOTION TO DISMISS UNDER D.C. ANTI-SLAPP ACT AND MOTION FOR SANCTIONS AND (2) MOTION FOR COSTS AND ATTORNEY'S FEES UNDER D.C. ANTI-SLAPP ACT

COMES NOW Plaintiff United States Virgin Islands Office of the Attorney General ("VIDOJ"), by and through undersigned counsel, to submit its consolidated opposition to Nonparty Competitive Enterprise Institute's ("CEI"): (1) Special Motion to Dismiss Under D.C. Anti-SLAPP Act and Motion for Sanctions (filed May 16, 2016); and (2) Motion for Costs and Attorney's Fees Under D.C. Anti-SLAPP Act (filed May 27, 2016). VIDOJ respectfully requests this Honorable Court to deny CEI's Special Motion to Dismiss Under D.C. Anti-SLAPP Act and Motion for Sanctions; deny CEI's Motion for Costs and Attorney's Fees Under D.C. Anti-SLAPP Act; and find that CEI's Anti-SLAPP motion is frivolous and award attorney fees and costs to VIDOJ under D.C. Code § 16-5504(b). The Court should also deny CEI's request for an expedited hearing under the Anti-SLAPP Act because the Anti-SLAPP Act does not apply, and CEI has wasted enough of VIDOJ's and the Court's limited time and resources with its frivolous Anti-SLAPP motion. In support, VIDOJ submits the accompanying Memorandum of Points and Authorities. A Proposed Order is also attached hereto.

June 2, 2016

Respectfully submitted,

/s/ Linda Singer

LINDA SINGER (#502462)
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave NW Suite 500
Washington, DC 20005
(202) 408-4600
lsinger@cohenmilstein.com

Counsel for United States Virgin Islands
Office of the Attorney General

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF UNITED STATES VIRGIN ISLANDS OFFICE OF THE ATTORNEY GENERAL'S OPPOSITION TO: NONPARTY COMPETITIVE ENTERPRISE INSTITUTE'S (1) SPECIAL MOTION TO DISMISS UNDER D.C. ANTI-SLAPP ACT AND MOTION FOR SANCTIONS AND (2) MOTION FOR COSTS AND ATTORNEY'S FEES UNDER D.C. ANTI-SLAPP ACT

The Virgin Islands Office of the Attorney General ("VIDOJ"), alongside a number of other State Attorneys General, is conducting a law enforcement investigation to determine whether Exxon Mobil Corporation ("Exxon") defrauded consumers and investors in violation of state and territorial laws. The investigation stems from internal and other Exxon documents uncovered by investigative journalists that demonstrate that Exxon may have misrepresented its knowledge of the risks of climate change to investors and consumers, including those in the Virgin Islands.[1] The Competitive Enterprise Institute ("CEI") is not a target of VIDOJ's

[1] *See, e.g.*, Sara Jerving et al., *What Exxon knew about the Earth's melting Arctic*, L.A. Times (Oct. 9, 2015), http://graphics.latimes.com/exxon-arctic/; Neela Banerjee et al., *Exxon's Own Research Confirmed Fossil Fuels' Role in Global Warming Decades Ago*, InsideClimate News (Sept. 16, 2015), http://insideclimatenews.org/news/15092015/Exxons-own-research-confirmed-fossil-fuels-role-in-global-warming; David Hasemyer & John H. Cushman Jr., *Exxon Sowed Doubt About Climate Science for Decades by Stressing Uncertainty*, InsideClimate News (Oct. 22, 2015), http://insideclimatenews.org/news/22102015/Exxon-Sowed-Doubt-about-Climate-Science-for-Decades-by-Stressing-Uncertainty; Jason M. Breslow, *Steve Coll: How*

investigation; it is a third-party organization working on climate change issues that was closely tied to Exxon, received millions of dollars in funding from Exxon, and VIDOJ reasonably believes has information relevant to VIDOJ's investigation of Exxon. Thus, VIDOJ, pursuant to its statutory authority, 14 V.I.C. § 612(a), issued a third-party investigative subpoena to CEI for documents.

Rather than engage with VIDOJ, CEI took the subpoena as an opportunity to engage in an ongoing publicity stunt. Immediately upon receiving VIDOJ's subpoena, CEI took to the press.[2] CEI announced that it intended to seek to quash the subpoena, asserting that the subpoena infringes its First Amendment rights and complaining that the subpoena is unduly burdensome—all the while ignoring VIDOJ's good faith invitation to meet and confer to discuss its alleged concerns about the subpoena.[3] The "immense time and money" CEI suggests it has spent since receiving the subpoena have not been on any efforts to comply with the subpoena, CEI Mem. No. 1 at 1;[4] indeed, CEI has not produced a single responsive document. To the contrary, the

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Exxon Shaped the Climate Debate, PBS: Frontline (Oct. 23, 2012), http://www.pbs.org/wgbh/frontline/article/steve-coll-how-exxon-shaped-the-climate-debate/ (interview describing multimillion dollar, multi-year effort by ExxonMobil to fund "campaigns to attack the science that were carried out by nonscientific groups").

[2] *See CEI Fights Subpoena to Silence Debate on Climate Change* (Apr. 7, 2016), https://cei.org/content/cei-fights-subpoena-silence-debate-climate-change.

[3] *See* Letter from Renee Gumbs Carty, Deputy Att'y Gen., VIDOJ, to Sam Kazman, Gen. Counsel, CEI 2 (Apr. 12, 2016), *available at* https://cei.org/sites/default/files/April%2012%20-%20Letter%20to%20Kazman%20from%20VIAG.pdf.

[4] This memorandum uses short-form references for the following documents in this docket: Nonparty CEI's Special Motion to Dismiss Under D.C. Anti-SLAPP Act and Motion for Sanctions (filed May 16, 2016) is "CEI Mot. No. 1"; CEI's Memorandum of Points and Authorities in Support of CEI Mot. No. 1 is "CEI Mem. No. 1"; Nonparty CEI's Motion for Costs and Attorney's Fees Under D.C. Anti-SLAPP Act, D.C. Code § 16-5504(a) (filed May 27, 2016) is "CEI Mot. No. 2"; the memorandum corresponding to CEI Mot. No. 2 is "CEI Mem. No. 2"; the Notice of Termination of Action and Consent to Revoke Issuance of Subpoena (filed

money has been spent on generating publicity for itself, including through a full-page ad in the *New York Times*.[5]

CEI's latest effort—the instant special motion to dismiss ("Anti-SLAPP motion")—violates this Court's rules and is frivolous. The subpoena does not violate CEI's First Amendment rights, which do not shield either CEI or Exxon from cooperating with this lawful investigation. VIDOJ—not CEI—is entitled to its costs and fees associated with CEI's frivolous motion. CEI's motion for sanctions fails to demonstrate any undue burden and thus is baseless as well.

ARGUMENT

I. CEI'S ANTI-SLAPP MOTION SHOULD BE DENIED BECAUSE CEI MADE A FALSE CERTIFICATION TO THE COURT AND FAILED TO FOLLOW COURT RULES

In CEI's desire to file, and release to the press, its Anti-SLAPP motion, CEI deliberately flouted this Court's rules. Rule 12-I of the D.C. Superior Court Rules of Civil Procedure required CEI to consult with VIDOJ before filing its motion to determine whether VIDOJ would "consent to the relief sought." D.C. R. Civ. P. 12-I(a). "Only when the movant certifies in writing that despite diligent efforts consent could not be obtained . . . will the Court consider the motion as a contested matter." *Id.*

CEI's Anti-SLAPP motion seeks only the following relief: that this Court "enter judgment in CEI's favor dismissing this action and thereby invalidating the subpoena issued by

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May 20, 2016) is "Notice of Termination"; and this Court's Order (filed May 26, 2016) is "Order."

[5] CEI, Advertisement, *Abuse of Power*, N.Y. Times, May 18, 2016, at A5, *available at* https://cei.org/sites/default/files/NYT%20-%20CEI%20Open%20Letter%20Ad%20-%20FINAL%20-%20May%2017%202016.pdf (misstating that Attorneys General are investigating third-parties, including CEI, and describing the investigation as an "abuse of power" and "un-American").

this Court . . . ." CEI Mot. No. 1 at 2; CEI Mem. No. 1 at 20. Less than a week before filing this motion, counsel for CEI sent VIDOJ a letter asking whether VIDOJ consents to this relief (without mentioning its planned motion under the Anti-SLAPP Act). Three days later, on Friday, May 13, VIDOJ *consented in writing to the relief sought in CEI's Anti-SLAPP motion*: "Your client also has asked VIDOJ to revoke the issuance of the subpoena by the District of Columbia Superior Court and terminate the Superior Court action. Those are steps that [VIDOJ] agrees to take within the next 5 court days." Letter from Linda Singer, Counsel, VIDOJ, to Andrew M. Grossman, Counsel, CEI 2 (May 13, 2016), *available at* https://cei.org/sites/default/files/May%2013%20-%20Letter%20of%20plan%20to%20withdraw.pdf. As promised, VIDOJ filed a Notice of Termination of Action and Consent to Revoke Issuance of Subpoena with the Court the following week, which the Court subsequently ordered. *See* Notice of Termination; Order.[6]

Rather than "memorialize [VIDOJ's] consent in a letter . . . or in a praecipe" as Rule 12 requires, D.C. R. Civ. P. 12-I(a), and without further consultation with VIDOJ, CEI filed its Anti-SLAPP motion the business day after receiving VIDOJ's letter**,** together with a false Rule 12-I Certification. *See* CEI Mot. No. 1 at 2. CEI's Rule 12 Certification misleadingly fails to state that VIDOJ agreed to precisely the relief sought by CEI in its Anti-SLAPP motion—termination of the action and revocation of this Court's issuance of the subpoena by a date certain. In fact, the Certification in CEI's Anti-SLAPP motion directly contradicts CEI's later

[6] CEI's letter also asked "[does VIDOJ] consent to compensating CEI's costs and attorney's fees incurred in responding to the subpoena," CEI Mot. No. 1 Ex. N at 1—to which VIDOJ responded no, CEI Mot. No. 1 Ex. O at 1. To the extent that request was tied to the relief it seeks in its motion for fees and costs under the Anti-SLAPP Act, it is relief that CEI had to break court rules to seek: Had CEI not violated Rule 12 and ignored VIDOJ's consent to terminate the action and revoke issuance of the Superior Court subpoena, there would be no Anti-SLAPP motion and, hence, no Anti-SLAPP motion for fees and costs.

argument that it has prevailed because VIDOJ "consented to the principal relief sought by CEI in its anti-SLAPP motion." CEI Mem. No. 2 at 4. CEI's Certification also misleadingly attests to the Court that VIDOJ "does not agree to withdraw the underlying Virgin Islands subpoena"—relief CEI did not seek here (and which is not the same as revoking or invalidating the subpoena issued by the D.C. Superior Court). Thus, CEI's motion should be denied because it failed to follow this Court's rules. *See Sibley v. St. Albans Sch.*, No. 14-CV-434, 2016 WL 1175283, at *22 (D.C. Mar. 24, 2016) (noting that the D.C. Superior Court "regularly denied motions for failing to comply with the rule's requirement of advance consultation with the opposing party"). VIDOJ has been prejudiced in the process by having to expend time and resources to respond to CEI's frivolous and otherwise improper Anti-SLAPP motion, as described below—something it would not have had to do but for CEI's misconduct.

II. CEI'S ANTI-SLAPP SPECIAL MOTION TO DISMISS IS FRIVOLOUS

A. CEI's Anti-SLAPP Motion Was Moot Before It Was Filed

VIDOJ consented in writing to the relief sought by CEI before CEI filed its Anti-SLAPP motion. *See supra* Part I. Thus, there was never a contested matter for the Court to resolve.

But if—even in the face of VIDOJ's written consent—CEI had genuine concerns about the 45-day limitations period in the Anti-SLAPP Act, the "diligent efforts" required by Rule 12, D.C. R. Civ. P. 12-I(a), would have involved communicating that concern with VIDOJ, which did not (and had no reason to) know that CEI was contemplating filing an Anti-SLAPP motion. Instead, and without further consultation with VIDOJ, CEI filed its Anti-SLAPP motion the

business day after receiving VIDOJ's letter consenting to this relief, making abundantly clear this was about publicity,[7] not any legitimate legal dispute.[8]

B. The Anti-SLAPP Act Does Not Apply to the Subpoena to Nonparty CEI

By its express terms, the D.C. Anti-SLAPP Act does not apply to VIDOJ's third-party subpoena to CEI and does not provide a basis for CEI's motion. As its title makes clear, the Anti-SLAPP Act applies to "Strategic *Lawsuits* Against Public Participation," and is intended to protect defendants of frivolous defamation suits or counterclaims. D.C. Code tit. 16 ch. 55 (emphasis added). The legislative history appended by CEI shows that the Act was created to protect "a defendant's ability to fend off lawsuits." CEI Mot. No. 1 Ex. C at 1; *see also* CEI Mem. No. 1 at 9 (Act protects from "abusive lawsuits"); CEI Mem. No. 2 at 3 ("The protections of the Act . . . apply to lawsuits") (quoting *Doe v. Burke*, 133 A.3d 569, 573 (D.C. 2016)). Accordingly, the Act only permits a "party" to bring a special motion to dismiss. D.C. Code § 16-5502; *see also Doe No. 1 v. Burke*, 91 A.3d 1031, 1036 (D.C. 2014) (special motion to

[7] Upon filing its Anti-SLAPP motion, CEI immediately issued a news release and provided statements to the press. *See* CEI, *CEI Asks Court To Fine AG Walker Based On Bad Faith And DC Anti-SLAPP Law* (May 16, 2016), https://cei.org/content/cei-asks-court-fine-ag-walker-based-bad-faith-and-dc-anti-slapp-law; Valerie Richardson, *Think Tank Asks Court to Fine Virgin Islands A.G. After He Agrees to Pull Climate Subpoena*, Wash. Times (May 16, 2016), http://www.washingtontimes.com/news/2016/may/16/think-tank-asks-court-fine-virgin-islands-g-after-/ (interviewing CEI President and General Counsel).

[8] CEI's allegation that VIDOJ attempted to run out the clock on CEI's Anti-SLAPP motion is a lie. CEI Mem. No. 1 at 7–8. CEI never raised its planned Anti-SLAPP motion with VIDOJ, and it was not contemplated by VIDOJ given that the Anti-SLAPP Act plainly does not apply here. *See infra* Part II.B. Further, the limitations period runs from the date of service, D.C. Code § 16-5502(a), and the only thing that was or could be served here was the subpoena. The subpoena was served on April 7, CEI Mot. No. 1 Ex. M at 1, making the deadline for CEI's motion May 23—which was *after* the deadline by which VIDOJ promised to terminate the action and revoke issuance of the subpoena.

dismiss may be brought by a "named defendant").[9] VIDOJ has filed no lawsuit against CEI for this Court to dismiss, and CEI by its own admission is a "Nonparty" here. CEI Mot. No. 1 at 1.

Moreover, the Anti-SLAPP Act only allows a special motion to dismiss a "claim." A "claim" is defined as "any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other civil judicial pleading or filing requesting relief." D.C. Code § 16-5501(2). Conceding a subpoena is not a "claim,"[10] CEI argues that the "*request that this Court issue* a subpoena" is a "filing requesting relief" and thus a "claim" for purposes of the Anti-SLAPP Act. CEI Mem. No. 1 at 10–11. This makes no sense. If the request for the subpoena were a "claim" subject to the Act, then it has already "succeed[ed] on the merits" since the Court granted the request and issued the subpoena, leaving nothing to be dismissed by a special motion.[11] D.C. Code § 16-5502(b) (motion must be denied if "responding party demonstrates that the claim is likely to succeed on the merits"). However, CEI takes the opposite position in arguing that VIDOJ cannot demonstrate that the claim is likely to succeed on the merits. There, CEI alleges that the subpoena, not the request for the issuance of the subpoena, is the "claim," arguing various reasons why it believes the subpoena itself is improper. *See* CEI Mem. No. 1 at

[9] The Act's use of "party" is intentional; the Act's special motion to quash may be brought by a "person," making clear that "party" is more limited. D.C. Code § 16-5503.

[10] The definition of "claim" does not include "subpoena," and the Act's text is clear that a subpoena is not a claim. In addition to the special motion to dismiss, the Act allows a special motion to quash "a discovery order, request, or *subpoena*, *in connection with a claim*" seeking "personal identifying information." D.C. Code § 16-5503(a) (emphasis added). The inclusion of "subpoena" in this phrase highlights its exclusion from the definition of a "claim."

[11] Furthermore, the D.C. Council chose to limit the Act's special motions to quash to subpoenas seeking personal identifying information, which the subpoena here does not. D.C. Code § 16-5503(a). The D.C. Council clearly did not intend to allow the use of special motion to dismiss to effectively resist subpoenas outside the specified bounds of the special motion to quash, which would be the result if the special motion to dismiss applied to a request for issuance of a subpoena.

12–17. CEI cannot have it both ways: either it cannot bring a special motion to dismiss because a subpoena is not a claim, or it cannot prevail because the request for a subpoena has already succeeded on the merits because it was granted by the Court. Regardless, the motion must fail.

CEI has also failed to show that the supposed claim "aris[es] from an act in furtherance of the right of advocacy on issues of public interest," as required to file a special motion to dismiss under the Anti-SLAPP Act. D.C. Code § 16-5502(b). CEI claims that this subpoena arises from *CEI*'s advocacy on climate change and climate policy. *See* CEI Mem. No. 1 at 11. However, as stated in VIDOJ's subpoena and correspondence to CEI, this investigation does not target CEI, and VIDOJ is demonstrably uninterested in any acts CEI may have undertaken independent of Exxon. *See* CEI Mot. No. 1 Ex. O at 2. Rather, the subpoena arises from CEI's close ties to Exxon up until the mid-2000s,[12] which give VIDOJ reason to believe CEI may have information related to its investigation of Exxon. CEI selectively quotes from the subpoena to support its erroneous claim that the subpoena requests "all of its documents and communications concerning climate change." CEI Mem. No. 1 at 11. This is false. Rather, the subpoena requests documents produced on Exxon's behalf or with Exxon's cooperation or funding, and communications with Exxon about such documents. *See* CEI Mot. No. 1 Ex. B at 15–17. The subpoena does not request a single document unrelated to Exxon. *See id.* In fact, it is VIDOJ's investigation of Exxon's potential fraud regarding its knowledge of climate change (like the USDOJ's investigation of tobacco companies for their fraudulent scheme to hide the risks of smoking) that is grounded in the public interest.

[12] *See, e.g.*, CEI Mot. No. 1 Ex. E at 2 ("CEI's major underwriter: ExxonMobil, which contributed more than $2 million between 1998 and 2005"); *id.* ("CEI was becoming a parody of itself and a liability for Exxon").

III. THE SUBPOENA DOES NOT VIOLATE CEI'S FIRST AMENDMENT RIGHTS

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, and it is well established that "the First Amendment does not shield fraud." *Illinois, ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 612 (2003) (citing *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948) (the government's power "to protect people against fraud" has "always been recognized in this country and is firmly established"). Similar arguments for First Amendment protection were decisively rejected in the United States' case against tobacco companies, which held cigarette manufacturers financially responsible for and imposed sweeping injunctive relief to address a decades-long scheme by those defendants to misrepresent the scientific facts regarding smoking cigarettes. *See U.S. v. Philip Morris USA Inc.*, 386 U.S. App. D.C. 49, 77–78, 566 F.3d 1095, 1123–24 (D.C. Cir. 2009) (First Amendment does not protect deliberately false and misleading statements); *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 886–87 (D.D.C. 2006) (First Amendment doctrine protecting right to petition the legislature does not protect statements made with the purpose of influencing existing customers, potential customers, or the general public).

CEI's claim to blanket First Amendment privileges against disclosing the documents requested by VIDOJ's subpoena also fails. "[T]he First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. . . . [O]therwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed." *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972) (emphasis added). The Supreme Court has repeatedly rejected First Amendment privileges for even the press—which CEI does

not claim to be—and academics against disclosing information in response to subpoenas by both government officials and private plaintiffs, in both criminal and civil investigations, and as parties or third parties. *See Univ. of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 201 (1990) (rejecting First Amendment privilege of university not to produce confidential peer review materials requested by government in civil investigation); *Herbert v. Lando*, 441 U.S. 153, 169–70 (1979) (rejecting First Amendment privilege of press not to produce documents about its internal editorial process when defending private defamation claim); *Branzburg*, 408 U.S. at 685 (rejecting First Amendment privilege of third-party reporter not to provide confidential information to grand jury).

CEI ignores these cases compelling the production of documents despite First Amendment claims, instead relying on an inapposite case protecting against compelled public disclosure of political activities. CEI Mem. No. 1 at 15–16 (citing *AFL-CIO v. FEC*, 357 U.S. App. D.C. 47, 333 F.3d 168 (D.C. Cir. 2003)). CEI's own case recognized this important distinction: "even where requiring disclosure of political or speech activities to a government agency may be necessary to facilitate law enforcement functions, we have held that compelled public disclosure presents a separate first amendment issue . . . ." *AFL-CIO*, 357 U.S. App. D.C. at 55, 333 F.3d at 176 (internal quotation marks and alteration omitted). *AFL-CIO* involved a regulation requiring the Federal Election Commission to publish its investigatory files from closed cases, which would have included detailed election strategy memos by the Democratic National Committee, a political party. 357 U.S. App. D.C. at 50, 333 F.3d at 171. In this case, there is no compelled public disclosure, only disclosure to a law enforcement agency conducting an investigation into potential fraud. Further, any concern by CEI could be addressed through a confidentiality agreement, routinely entered into to protect legitimately confidential information

gathered in law enforcement investigations—another issue that CEI could have pursued through the meet and confer process in which it declined to engage.

IV. VIDOJ—NOT CEI—IS ENTITLED TO COSTS AND FEES UNDER THE ANTI-SLAPP ACT

"A moving party who prevails" under the Anti-SLAPP Act is entitled to costs and fees. Because CEI's Anti-SLAPP motion is frivolous and should not prevail, as explained in detail above, *see supra* Part II, CEI's motion for fees and costs, CEI Mot. No. 2, must be denied. 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. D.C. Code § 16-5504(b).

CEI argues that because VIDOJ filed its notice of termination *after* CEI challenged the subpoena under the Anti-SLAPP Act, CEI prevailed and is entitled to fees. *See* CEI Mem. No. 2 at 2, 4. CEI's argument is based on a false premise: that VIDOJ's notice of termination had anything to do with CEI's motion. To reiterate: VIDOJ, at CEI's request, gave written consent to the relief sought in CEI's Anti-SLAPP motion *before* CEI filed the motion. *See supra* Parts I, II.A. VIDOJ had no knowledge of CEI's planned Anti-SLAPP motion and its consent was wholly unrelated to the Anti-SLAPP motion. CEI nonetheless chose to file its motion the next business day after VIDOJ gave its consent, without waiting for the deadline by which VIDOJ said it would terminate the action or consulting with VIDOJ. VIDOJ then—as it consented to do in its letter and despite CEI having taken action against it—filed the notice of termination. In fact, it is impossible for CEI to be a prevailing party without having violated Rule 12-I(a): if the VIDOJ's fulfillment of its promise constituted "consent[] to the principal relief sought in its anti-SLAPP motion," as CEI admits, CEI Mem. No. 2 at 4, then VIDOJ's May 13 letter consented to

that relief before CEI filed its Anti-SLAPP motion, rendering its Rule 12-I(a) Certification false and meriting dismissal of its first motion, *see supra* Part I.

V. CEI'S RULE 45 MOTION FOR SANCTIONS IS MERITLESS

Rule 45(c)(1) requires that a party issuing a subpoena "must take reasonable steps to avoid imposing undue burden or expense on a person subject to a subpoena." D.C. R. Civ. P. 45(c)(1). Assuming for sake of argument that Rule 45 even applies to a pre-litigation investigatory subpoena, for which CEI has offered no support, VIDOJ went above and beyond Rule 45's requirement. First, the subpoena was not unduly burdensome. As the main case on which CEI relies acknowledges, courts have interpreted "undue burden" as "limited to harms inflicted by complying with the subpoena and not to the adjudication of related follow-on [legal] issues." *Goldberg v. Amgen, Inc.*, 123 F. Supp. 3d 9, 23 (D.D.C. 2015) (internal quotation marks omitted). In efforts to qualify the subpoena as "absurdly overbroad," CEI Mem. No. 1 at 19, CEI resorts to mischaracterizing VIDOJ's requests as calling for all documents "relating to climate change" or that "refer, even obliquely, to the 'climate'" *or* that relate to Exxon, CEI Mot. No. 1 Ex. at 4–5; CEI Mem. No. 1 at 16. The requests are, in fact, narrower and seek only documents for a defined period of time relating to climate change *and that are directly related to Exxon, were sent to and from Exxon, or in which Exxon otherwise had a hand*. Particularly given CEI's claim that it only received "some" funding from Exxon until 2006, CEI Mem. No. 1 at 3, and its repeated efforts to distance itself from Exxon, *id.* at 3, Ex. E, Ex. F, responding to the requests would not be unduly burdensome.

Second, CEI musters no credible evidence that the subpoena was issued in bad faith or to harass CEI.[13] As VIDOJ's subpoena and its later communications to CEI make clear, CEI is *not* a target of VIDOJ's investigation of Exxon. CEI Mem. No. 1 Ex. B at 1; Ex. O at 2. VIDOJ's investigation—like those of a number of other State Attorneys General—stems from internal and other Exxon documents that demonstrate it may have misrepresented its knowledge of the risks of climate change to consumers and investors, including those in the U.S. Virgin Islands.[14] *See supra* n.1. This investigation is solely intended to determine whether Exxon violated the Territory's Criminally Influenced and Corrupt Organizations Act ("CICO"), which the Attorney General of the United States Virgin Islands is statutorily authorized to do, including by issuing subpoenas to third parties like CEI that may have documents relevant to the investigation. *See* 14 V.I.C. § 612(a). CEI argues that VIDOJ's subpoena, which seeks documents that are a decade old, was not issued in good faith because CICO's statute of limitations is five years. CEI Mem. No. 1 at 14. CEI conspicuously omits that only the "*last* of the occasions of conduct [must have] occurred within five years." 14 V.I.C. § 604(j)(2)(b) (emphasis added). The statute includes no hard limit for when the earliest conduct might have occurred. To this day, Exxon has continued to publicly deny its ability to assess the physical risks of climate change or the

[13] CEI also argues the subpoena ordered by the Superior Court is defective under the UIDDA. But even though that is how this subpoena was issued, CEI's own case explains that it need not have been issued through the UIDDA: "the UIDDA applies only to 'discovery' in pending judicial actions; it does not apply to regulatory agency pre-litigation investigations." *State ex rel. Suthers v. Tulips Investments, LLC*, 343 P.3d 977, 982-83 (Colo. App. 2012), *aff'd*, 340 P.3d 1126 (Colo. 2015), *cited in* CEI Mem. No. 1 at 12. CEI can hardly complain that it was afforded *more* process than it was entitled to by law. *See* CEI Mem. No. 1 at 12.

[14] Citizens of the Virgin Islands deserve the same honest marketplace as other U.S. citizens, especially given that the Virgin Islands is particularly vulnerable to climate change due to its low elevation and extensive coastline. EPA, *Climate Impacts in the U.S. Islands* (Feb. 23, 2016), https://www3.epa.gov/climatechange/impacts/islands.html.

financial risks of climate change-related regulation.[15] If, as public reports claim, Exxon's recent statements do not accurately reflect its knowledge and are part of a continuous campaign to sow uncertainty regarding climate change ongoing since at least the 1990s, *see supra* note 1, then Exxon's relationship with CEI during the subpoena period would be highly probative of whether and to what extent Exxon violated the law.

Third, VIDOJ took immediate steps to address CEI's undue burden claims. After learning in the news (not through any meet and confer process) that CEI believed the subpoena to be unduly burdensome, VIDOJ immediately sent a letter inviting CEI to meet and confer "to the extent that you have concerns about the scope, timing, manner, or cost of your obligation to respond to this subpoena." Gumbs Apr. 12, 2016 Letter, *supra* note 3. CEI ignored this invitation. Nonetheless, at no point following did VIDOJ seek to enforce or compel production of any documents; indeed, to date, all CEI has done is serve some general objections; it has not produced a single responsive document to the subpoena or suggested that it has taken any steps to comply with the subpoena. Instead, at CEI's request to revoke the subpoena, VIDOJ not only consented, but made clear that if it decided to reissue the subpoena it would provide notice to CEI. "In the meantime," VIDOJ assured, "[we] [do] not consider [CEI] to be delinquent, out of compliance, or under an obligation to take any further action to preserve its rights." CEI Mot. No. 1 Ex. O at 1. VIDOJ, as promised, revoked the issuance of the subpoena by this Court. "[S]ufficient good faith efforts to negotiate reasonable parameters" prohibit an award of

[15] *See, e.g.*, Exxon Mobil Corp., *Annual Report* (Form 10-K) 42 (Feb. 24, 2016) ("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."); CDP, *Investor CDP 2014 Information Request: Exxon Mobil Corporation* 10 (2014) ("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.").

sanctions, *Goldberg*, 123 F. Supp. 3d at 23, and VIDOJ did that—and more. It is CEI that acted harassingly, in bad faith, and at VIDOJ's and this Court's unwarranted time and expense by filing a motion for sanctions in spite of VIDOJ's more than "reasonable steps" towards CEI.

CONCLUSION

For the foregoing reasons, the Court should deny CEI's Special Motion to Dismiss Under D.C. Anti-SLAPP Act and Motion for Sanctions; deny CEI's Motion for Costs and Fees Under D.C. Anti-SLAPP Act; and find that CEI's Anti-SLAPP motion is frivolous and award attorney fees and costs to VIDOJ under D.C. Code § 16-5504(b).

The Court should also deny CEI's request for an expedited hearing under the Anti-SLAPP Act because the Anti-SLAPP Act does not apply, and CEI has wasted enough of VIDOJ's and the Court's limited time and resources with its frivolous Anti-SLAPP motion.

June 2, 2016

Respectfully submitted,

/s/ Linda Singer

LINDA SINGER (#502462)
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave., NW, Suite 500
Washington, DC 20005
(202) 408-4600
lsinger@cohenmilstein.com

Counsel for United States Virgin Islands Office of the Attorney General

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 002469 JUDGE _____

ORDER

Upon consideration of the papers filed in support of and in opposition to Nonparty Competitive Enterprise Institute's ("CEI"): (1) Special Motion to Dismiss Under D.C. Anti-SLAPP Act and Motion for Sanctions (filed May 16, 2016); and (2) Motion for Costs and Attorney's Fees Under D.C. Anti-SLAPP Act (filed May 27, 2016), it is hereby ORDERED that: CEI's Special Motion to Dismiss Under D.C. Anti-SLAPP Act and Motion for Sanctions and Motion for Costs and Attorney's Fees Under D.C. Anti-SLAPP Act are denied. In addition, the Court finds that CEI's Anti-SLAPP motion is frivolous and awards attorney fees and costs to United States Virgin Islands Office of the Attorney General ("VIDOJ") under D.C. Code § 16-5504(b). VIDOJ shall file its fees and costs report within 14 days of entry of this Order. CEI shall file any objections to VIDOJ's fees and costs report within 14 days of service of VIDOJ's fees and costs report. VIDOJ shall file its reply within 7 days of service of CEI's objections.

SO ORDERED.

_____
Judge _____
Superior Court of the District of Columbia

Certificate of Service

I hereby certify that on June 2, 2016, I caused a copy of the foregoing Opposition To Nonparty Competitive Enterprise Institute's (1) Special Motion To Dismiss Under D.C. Anti-SLAPP Act And Motion For Sanctions And (2) Motion For Costs And Attorney's Fees Under D.C. Anti-SLAPP Act to be served by CaseFileXpress on the following:

Andrew M. Grossman, Esq.
BakerHostetler LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

Counsel for Competitive Enterprise Institute

By: /s/ Linda Singer
Linda Singer