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 2** **Judge Jennifer A. Di Toro**

OMNIBUS ORDER DENYING NON-PARTY CEI'S SPECIAL MOTION TO DISMISS, DENYING MOTION FOR SANCTIONS, AND DENYING MOTION FOR ATTORNEY'S FEES

This matter is before the Court on Non-party Competitive Enterprise Institute's *Special Motion to Dismiss and Motion for Sanctions*, filed on May 16, 2018, and its *Motion for Attorney's Fees* filed on May 27, 2016. Plaintiff United States Virgin Islands Office of the Attorney General filed a consolidated Opposition to the Motions on June 2, 2016. The Court held a hearing on the Motions on June 28, 2016. Upon consideration of the pleadings, the arguments advanced at the motions hearing, and the entire record herein, the Court denies CEI's motions.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Underlying Lawsuit and Subpoena Issued to CEI

The Virgin Islands Office of the Attorney General ("VIDOJ") 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. Non-party Competitive Enterprise Institute

("CEI") is not a target of VIDOJ's investigation; it is a non-profit public policy organization focused on "advancing the principles of limited government, free enterprise, and individual liberty." Mot. to Dismiss at 2. VIDOJ believes that CEI has information relevant to VIDOJ's investigation of Exxon. Thus, VIDOJ, issued a third-party investigative subpoena for documents to CEI, the subpoena that is the subject of these motions.

On May 10, 2016, counsel for CEI sent VIDOJ a letter inquiring as to whether VIDOJ consented to the requested relief, specifically, withdrawal of the subpoena. In that letter, CEI did not inform VIDOJ that it intended to file the instant Anti-SLAPP Special Motion to Dismiss. Three days later, on May 13, 2018, VIDOJ consented in writing to revoking the issuance of the subpoena. CEI then, without further consultation with VIDOJ, filed the instant motion the next business day after receiving VIDOJ's letter indicating it consented to the requested relief. CEI then filed a Motion for Costs and Attorney's Fees on May 27, 2016.

The Court held a hearing on the Motions on June 28, 2018, at which time CEI argued that its Special Motion to Dismiss is not moot because it is still under the threat of the VIDOJ of future criminal prosecution by Attorney General Walker. Reply at 2. Plaintiff VIDOJ filed a consolidated opposition to the Motions on June 2, 2016, arguing that the D.C. Anti-SLAPP statute does not apply to subpoenas and that, in fact, it was entitled to attorney's fees for CEI's alleged disregard of this Court's rules.

ANALYSIS

I. The Special Motion to Dismiss is Denied

A. The District of Columbia Anti-SLAPP Statute

"A 'strategic lawsuit against public participation' or 'SLAPP' is a lawsuit 'filed by one side a political policy debate aimed to punish or prevent the expression of opposing points of view.'"

Doe v. Burke, 91 A.3d 1031, 1033 (D.C. 2014) (quoting D.C. Council, Comm. on Pub. Safety and the Judiciary, Report ("Comm. Report") on Bill 18-893 at 1). "In 2010, the Council of the District of Columbia enacted the D.C. Anti-SLAPP Act to protect the targets of SLAPPs and encourage 'engag[ement] in political or policy debates.'" *Id.* at 1036 (quoting Comm. Report at 4). The D.C. Anti-SLAPP act creates the right of a party to file a "special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest …." D.C. Code § 16-5502(a). The statute defines "claim" to include "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). If the party filing a special motion to dismiss makes a *prima facie* showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied. D.C. Code § 16-5502(b).

In additional to creating the remedy of a special motion to dismiss, the D.C. Anti-SLAPP Act "goes further than … other jurisdictions … in its additional protection for anonymous speech." *Doe*, 91 A.3d at 1036. More specifically, D.C. Code § 16-5503(a) authorizes a person whose "personal identifying information is sought, pursuant to a discovery order, request, or *subpoena*, in connection with a claim arising from an act in furtherance of the right of advocacy on public interest, [to] make a special motion to quash the discovery order, request, or *subpoena*." *Id.* (emphases added).

B. The Anti-SLAPP Statute Does Not Apply to Plaintiff's Subpoena

The Court notes that the subpoena at issue in this action has been withdrawn. CEI nevertheless contends that the special motion to dismiss is not moot because the threat of being

subpoenaed at a later date exists. *See McClain v. United* States, 601 A.2d 80, 81-82 (D.C. 1992) (quoting *Holley v. United* States, 442 A.2d 106, 107 (D.C. 1981)) ("Unless there is a possibility that further penalties or legal disabilities can be imposed as a result of the judgment, this court may not render in the abstract an advisory opinion.").

CEI argues that the Anti-SLAPP Act applies to Plaintiff's subpoena because a subpoena is a "claim" under Section 5501(2) as it constitutes a "civil judicial pleading or filing requesting relief." More specifically, CEI argues that because Attorney General Walker's subpoena was a "filing requesting relief," from the Court," it constitutes a "claim" subject to the Anti-SLAPP Act. The Court disagrees.

Although the issue of whether or not a subpoena constitutes a "filing requesting relief," has not be addressed by the statute or legislative history, it is clear from an examination of the statute as a whole that subpoenas are not "claims" under Section 5502. Indeed, it is apparent that the Council itself specified whether the Act applied to subpoenas, by explicitly authorizing special motions to quash subpoenas for personal identifying information in Section 5503. Under the principles of statutory interpretation, it follows that where the Council has delineated Section 5503 as applicable to subpoenas its failure to do so in Section 5502 must be read to exclude the proposition that a subpoena is a "claim" under the statute.

Moreover, the Court of Appeals has distinguished between the remedies created in Sections 5502 and 5503, noting that Section 5502 applies to motions to dismiss lawsuits and that Section 5503 applies to motions to quash subpoenas. Specifically, the Court has stated that Section 5502 created the remedy of special motions to dismiss to allow a named defendant to "quickly and equitably end a meritless *suit*," while Section 5503 created a remedy for an anonymous would-be defendant to "quash a *subpoena*." *Doe*, 91 A.3d at 1036 (emphases added).

Thus, the structure of the Act as a whole, and the Court of Appeals' interpretation of that structure, demonstrates that Section 5502 does not apply to subpoenas.

The definition of "claim" in Section 5501 demonstrates that "claim" does not include a subpoena. Indeed, the first five examples of a "claim" in Section 5501 involve requests for relief that are quite different from a subpoena. Each of the examples—"any civil lawsuit, complaint, cause of action, cross-claim, [or] counter-claim"—involves a request for relief from the Court, not a request for information from a party or other person. Likewise, the term "claim" is commonly defined in the context of judicial proceedings as being a request for relief from the Court, not information from a party or other person. *See, e.g.*, *Black's Law Dictionary* (9th ed. 2009) (defining "claim" as the assertion of a "right to payment or to an equitable remedy" or as a "demand for money, property, or a legal remedy to which one asserts a right").

In additional, the term "other judicial pleading" does not refer to a subpoena, because the term "pleading" is defined in the Rules of Civil Procedure as being limited to complaints and answers, replies to counterclaims, answers to cross-claims, and third party complaints and answers. *See* Super. Ct. Civ. R. 7(a). Finally, "other judicial … filing requesting relief" also does not apply to subpoenas. Indeed, subpoenas are not a "judicial" filing, but merely a request to the Clerk's Office, which "shall issue a subpoena, signed but otherwise blank, to a party requesting it," Super. Ct. Civ. R. 45(a)(3), without any involvement from a judicial officer. Likewise, a subpoena is not a "filing requesting relief" because it is a document that a party sends to another party or non-party requesting information, and does not seek "relief" as that term is common used in the context of judicial proceeds. *See, e.g. Black's Law Dictionary* (9th ed. 2009) (defining "relief" as the "redress or benefit … that a party asks of a court"). Accordingly, this

Court finds that Plaintiff's subpoena is not a "claim" under the Anti-SLAPP Act, and denies CEI's Motion to dismiss.

C. The Subpoena Does Not Violate CEI's First Amendment Rights

CEI further contends that the subpoena is invalid because it constitutes an unlawful attempt in violation of the First Amendment to retaliate against and chill CEI's speech, as well as its expressive associations. First, the Court notes that the subpoena has been withdrawn, and therefore, there is no controversy at issue here. *See McClain*, 601 at 81-82 (quoting *Holley*, 442 A.2d at 107). However, even if VIDOJ had not withdrawn the subpoena, 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"). VIDOJ's lawsuit against Exxon is an investigation into whether Exxon committed fraud and it is well within the VIDOJ's inherent authority to investigate allegations of fraud. Accordingly, the subpoena does not violate CEI's First Amendment Rights.

II. Motion for Sanctions

CEI argues that this Court sanction VIDOJ pursuant to Rule 45 because the subpoena was calculated to impose undue burden and expense, and because Attorney General Walker issued the subpoena in bad faith for an improper purpose. Rule 45(c)(1) of the Superior Court Rules of Civil Procedure requires attorneys serving a subpoena to take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. If an attorney fails to comply with this duty, Rule 45(c)(1) authorizes the trial court to impose an appropriate sanction. Super. Ct. Civ. R. 45(c)(1).

CEI presents no credible evidence that the subpoena was issued in bad faith or to harass CEI, nor any evidence that the subpoena was calculated to be unduly burdensome. Even if the subpoena had not been withdrawn, CEI has failed to specifically articulate the potential hardship in producing the requested documents. Broad allegations that a compliance with a subpoena is burdensome are insufficient to show there is a hardship. Moreover, after learning that CEI believed the subpoena to be unduly burdensome, VIDOJ sent a letter inviting CEI to meet and confer "to the extent that [it had] concerns about the scope, timing, manner, or cost of your obligation to respond to this subpoena," Opp. at 7, clearly indicating that VIDOJ was taking reasonable steps to ensure there no undue burden was imposed. Accordingly, the Court cannot find that the subpoena was unduly burdensome.

CEI further argues that Attorney General Walker acted in bad faith and with the improper purpose of interfering with CEI's First Amendment rights. CEI's conclusory allegations and speculative inferences that VIDOJ's investigation is pretextual and retaliatory are unsupported by the facts and submissions made by the parties. In fact, it is clear that VIDOJ acted in good faith to negotiate a satisfactory resolution to CEI's concerns by suggesting a meet and confer and consenting to CEI's request to withdraw the subpoena. Moreover, VIDOJ was acting within its inherent authority to investigate allegations of fraud when it issued the subpoena. In fact, it is CEI that violated Rule 12-I of this Court and filed a motion for sanctions in spite of VIDOJ's consent to the requested relief. For those reasons, the Court concludes the Plaintiff was acting in good faith and sanctions are not appropriate.

III. Motions For Attorney's Fees Under D.C. Anti-SLAPP Act

Pursuant to D.C. Code 16-5504(a), the Court may award a prevailing Anti-SLAPP movant "the costs of litigation, including reasonable attorney fees." CEI contends that because

Attorney General Walker consented to CEI's request and revoked the subpoena, it is prevailing party under the Anti-SLAPP Act and is thus entitled to an award of its costs and attorney's fees. The Court disagrees. VIDOJ withdrew its subpoena, for the reasons discussed above, CEI failed establish the standard for dismissal. Second, the Anti-SLAPP Act does not apply to Plaintiff's subpoena. Thus CEI it is not a prevailing party under the statute and therefore, it is not entitled to costs and attorney's fees and the motion is denied.

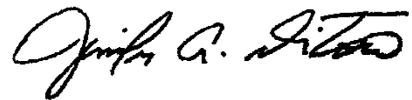
Finally, in its opposition, VIDOJ contends that it, not CEI, is entitled to costs and fees under the Anti-SLAPP Act for CEI's violations of this Court's Rules. VIDOJ, at CEI's request, gave written consent to the relief sought in CEI's Anti-SLAPP motion *before* CEI filed the motion. VIDOJ contends that it had no knowledge of CEI's planned Anti-SLAPP motion and its consent to withdraw the subpoena was wholly unrelated to the Anti-SLAPP motion. Nevertheless, CEI filed its motion the next business day after VIDOJ gave its consent, in violation of Super. Ct. Civ. R. 12-I, without waiting for the deadline by which VIDOJ said it would terminate the action or consulting with VIDOJ. However, in light of CEI's contention that the threat of future litigation did not render the instant motion moot, the Court does not find that the Special Motion to Dismiss was frivolous, and therefore, the Court concludes that each party shall bear its own expenses.

Accordingly, it is this 10th day of August, 2018, hereby,

ORDERED, that the *Special Motion to Dismiss and Motion for Sanctions* is **DENIED**. It is further

ORDERED, that Non-Party CEI's *Motion for Costs and Attorney's Fees* is **DENIED**.

SO ORDERED.



Judge Jennifer A. Di Toro
Associate Judge
Signed in Chambers

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