IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re MAURA T. HEALEY, Attorney General for the Commonwealth of Massachusetts, *Petitioner*. ********** EXXON MOBIL CORPORATION *Plaintiff*, v. ERIC T. SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA T. HEALEY, Attorney General of Massachusetts in her official capacity, *Defendant*.	No. 16-_____ No. 4:16-CV-469-K (N.D. Tex.)

PETITIONER'S EMERGENCY
MOTION FOR STAY PENDING MANDAMUS

The Massachusetts Attorney General seeks an emergency stay, pending this Court's disposition of a petition for a writ of mandamus filed concurrently with this motion, of the district court's extraordinary October 13 and November 17, 2016 discovery orders. Among other things, the district court has *sua sponte* ordered the Attorney General to appear personally on December 13, 2016, in a Dallas, Texas courtroom to be deposed about her reasons for initiating an investigation of Exxon Mobil Corporation (Exxon) for potential violations of the Massachusetts consumer and investor protection law. That action is completely

without precedent, turns basic law enforcement practice on its head, and constitutes a clear abuse of discretion. Compounding its error, the district court has issued that extraordinary and invasive discovery order while refusing to rule on three grounds—lack of personal jurisdiction, lack of ripeness, and improper venue—for which dismissal of Exxon's lawsuit is mandated by controlling precedent. Pursuant to Fifth Circuit Rule 27.3, the Attorney General seeks this stay by **December 12, 2016**, in the event that the district court has not stayed its discovery orders before then.

The Attorney General moved in the district court for a stay pending review by this Court on December 6, 2016. If the district court has not stayed its discovery orders by noon Central Time on December 12, the Attorney General respectfully asks that this Court stay the district court's discovery orders on that date to prevent irreparable harm to the Attorney General, including the possibility of incurring sanctions (including contempt) for failing to appear for her December 13 Dallas courtroom deposition. The Attorney General files this motion now to provide this Court with a sufficient opportunity to review the motion in the event that action from this Court is needed on December 12. At a minimum, the Attorney General asks that, if this Court does not rule on the full stay motion by December 12, it grant a temporary administrative stay on that date to prevent irreparable harm while the Court continues to consider the Attorney General's

request for a full stay of the district court's discovery orders.

Counsel for the Attorney General notified counsel for Exxon Mobil Corporation (Exxon) by phone of the filing of this motion. Exxon intends to oppose this motion.

STATEMENT OF RELEVANT FACTS

Pursuant to Fifth Circuit Rule 27.3, counsel for the Attorney General certifies that the following relevant facts supporting emergency consideration of the motion are true and complete.

1. The Massachusetts Consumer Protection Act authorizes the Attorney General to conduct investigations "to ascertain whether in fact" a person "has engaged in or is engaging in" any "method, act or practice declared unlawful" by the Act whenever she "believes" such conduct has occurred or is occurring. Mass. Gen. Laws ch. 93A, § 6(1). Acting pursuant to that authority, in April 2016, the Attorney General served Exxon's Massachusetts registered agent with a civil investigative demand (CID) asking for documents related to Exxon's marketing and sale of fossil fuel products and securities to Massachusetts consumers and investors, and how Exxon values its assets based on economic and regulatory risk tied to climate change. The Attorney General's CID was preceded by a similar New York Attorney General investigation and followed by a similar investigation of the United States Securities and Exchange Commission.

2. On June 15, 2016, Exxon sued the Attorney General in the U.S. District Court for the Northern District of Texas, seeking to enjoin the enforcement of the Attorney General's CID. ECF Doc. No. 1.[1] A day later, Exxon filed a petition in the Massachusetts Superior Court, pursuant to Mass. Gen. Laws ch. 93A, § 6(7), seeking to set aside or modify the CID or for a protective order. Exxon makes similar allegations in both its federal and state court pleadings, complaining (based on the U.S. and Texas Constitutions in its federal complaint and the Massachusetts Constitution in its state petition) that, *inter alia*, the CID violates its rights to free speech, freedom from unreasonable searches and seizures, and due process and otherwise constitutes an abuse of power. *See id.* Its first amended complaint adds civil conspiracy and preemption to its grievance list. ECF Doc. No. 100. Exxon moved for a preliminary injunction in the district court, and the Attorney General moved to compel compliance with the CID in the Massachusetts state court proceeding.

3. On August 8, 2016, the Attorney General moved to dismiss Exxon's federal complaint based on lack of personal jurisdiction, lack of ripeness, improper venue, and abstention. In particular, the Attorney General pointed to two decisions

[1] The district court pleadings are cited in this motion by reference to their ECF docket numbers and are set out in full in the addendum to the Attorney General's petition for a writ of mandamus. The district court's discovery orders are attached to this motion, as well, as attachments 1 and 2.

of this Court that show beyond reasonable dispute that the district court lacks personal jurisdiction over the Attorney General, *Stroman Realty Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008), and that the CID is unripe for federal court review, *Google, Inc. v. Hood*, 822 F.3d 212 (5th Cir. 2016). ECF Doc. No. 42, at 4-20. The Attorney General also opposed Exxon's preliminary injunction motion, arguing that Exxon cannot demonstrate irreparable harm because it (i) has an adequate remedy in the pending Massachusetts state court proceeding, (ii) does not have to comply with the CID until its Massachusetts state court petition is adjudicated, and (iii) had already voluntarily produced at least 700,000 pages of the requested documents to New York. ECF Doc. No. 43, at 13-16. The Attorney General further pointed out that Exxon enjoys no hope of succeeding on the merits of its claims. *E.g.*, ECF Doc. No. 43, at 16.

4. On September 19, 2016, the district court heard argument on Exxon's preliminary injunction motion. At that hearing, the district court recognized that it had relied on *Stroman* in a previous case to dismiss an action against a non-resident state government official, *see* ECF No. 68, at 59-60 (referring to *Saxton v. Faust*, No. 3:09-CV-2458-K, 2010 WL 3446921 (N.D. Tex. Aug. 31, 2010) (Kinkeade, J.)),[2] and it questioned how it could exercise personal jurisdiction over

[2] The district court's *Saxton v. Faust* decision is included as Attachment 3.

the Attorney General now, asking counsel for Exxon: "How the heck do I have jurisdiction?" ECF No. 68, at 87. Late in the argument, Exxon argued that the court should invoke the "bad faith" exception to abstention (and dismissal) under *Younger v. Harris*, 401 U.S. 37 (1971), *see* ECF Doc. No. 68, at 96—one of the four grounds for dismissal cited by the Attorney General in her motion to dismiss. At no point, however, did Exxon specifically move in the district court for authority to conduct discovery on that issue.[3]

5. After court ordered mediation failed to result in Exxon's agreement to produce to Massachusetts the documents that it had already produced to New York, the district court issued on October 13, 2016 an order authorizing discovery on whether the Attorney General issued the CID in bad faith. The district court issued that order *sua sponte*, purportedly so that it could decide whether to dismiss the case under *Younger*. Attachment (Attach.) 1 (Discovery Order (ECF Doc. No. 73)). While the Attorney General moved for reconsideration of this Discovery Order, ECF Doc. No. 79, Exxon served the Attorney General with over 100 requests for written discovery and documents, noticed depositions of her and two

[3] While Exxon asked in a footnote in its opposition to the motion to dismiss to conduct discovery on personal jurisdiction, ECF Doc. No. 60, at 17 n.29, in regard to "bad faith," it stated only that it stood "ready to conduct discovery . . . to probe the . . . Attorney General's politically motivated investigation" if the court deemed further record development necessary. *Id.* at 20 n.38.

of her staff in Boston,[4] noticed the depositions of New York Attorney General Schneiderman and two of his staff in New York, and subpoenaed eleven third parties. *See* ECF Doc. No. 121, at 5. On December 5, 2016, the district court denied, without a statement of reasons, the Attorney General's motion for reconsideration. ECF Doc. No. 131.

6. On November 16, 2016, the district court held a telephonic status conference that Exxon had requested to discuss its discovery requests. ECF Doc. No. 114 (Hr'g Tr.); *see also* ECF Doc. No. 78 (Exxon letter request for status conference). During the status conference, the district court stated that, with the parties' permission, it wanted to redesignate the previously used mediator as a special master to oversee resolution of any discovery disputes. ECF Doc. No. 114. at 17. The court further stated that it would consider motions to stay the discovery *only if* the Attorneys General agreed to the appointment of this special master and to pay his hourly fee of $725.00. *Id.* at 17, 23. Based on a number of concerns, including litigation costs, both Attorneys General declined to agree to this arrangement, but stated that, in the alternative, they would be willing to have a magistrate judge resolve any discovery disputes. ECF Doc. Nos. 113 & 116.

[4] Exxon has since agreed to withdraw its notices to depose and subpoenas to the two assistant attorneys general.

7. The next day, the district court responded by issuing another *sua sponte* discovery order against the Attorney General. This order commanded the Massachusetts Attorney General to appear for a deposition in the judge's Dallas, Texas courtroom on December 13, 2016, and advised the New York Attorney General that he, too, should be available in Dallas, Texas that day pending further order of the court. Attach. 2 (Deposition Order (ECF Doc. No. 117)). On November 26, 2016, the Attorney General moved in the district court to vacate the Deposition Order; stay discovery until the district court ruled on the Attorney General's then-forthcoming renewed motion to dismiss Exxon's First Amended Complaint (ECF Doc. No. 124 (filed November 28, 2016)) and any other motion to dismiss that may be filed; and issue a protective order prohibiting the deposition of the Attorney General. ECF Doc. No. 120. On December 5, 2016, the district court denied the Attorney General's motion, again without any statement of reasons. ECF Doc. No. 131.

8. On December 6, 2016, the Attorney General asked the district court to stay all discovery pending review by this Court of the Attorney General's petition for a writ of mandamus. ECF Doc. No. 140. That same day, the district court entered a minute order requiring any responses by 5:00 PM on December 7 and any replies by 5:00 PM on December 8. ECF Doc. No. 141. Exxon filed a timely

opposition, and the Attorney General filed a reply. ECF Doc. Nos. 142 & 146. The district court has not yet ruled on the Attorney General's motion to stay.

ARGUMENT

This Court considers four factors when it evaluates a request for a stay: whether (i) the movant is likely to succeed on the merits; (ii) the movant will suffer irreparable harm absent a stay; (iii) a stay will substantially harm the other parties; and (iv) a stay serves the public interest. *Nken v. Holder*, 556 U.S. 418, 425-26 (2009); *see also Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbot*, 734 F.3d 406, 410 (5th Cir. 2013). Where the government is a party, its interest and the public interest overlap in the balancing of harms. *Nken*, 556 U.S. at 420. Here, the district court committed extraordinary errors of law, and clearly abused its discretion, when it entered the highly intrusive discovery orders despite its clear lack of personal jurisdiction over the Attorney General, the absence of a ripe dispute, and the fact that venue is improper. A stay of the discovery orders pending mandamus is warranted.

1. ***The Attorney General Is Likely to Prevail on Mandamus***: As explained in detail in the Attorney General's contemporaneously filed petition for a writ of mandamus, the district court's orders are as extraordinary as they are erroneous.

a. *First*, this Court has repeatedly made clear that it is inappropriate to probe the mental processes of a government official absent extraordinary

circumstances (none of which are present here) and that parties like Exxon are not entitled to counter-discovery to find grounds to resist an administrative subpoena. *E.g.*, *In re Office of Inspector General*, 933 F.2d 276, 278 (5th Cir. 1991) (granting mandamus petition to stay pre-enforcement challenge to administrative subpoena and related discovery, pending resolution of action by government for enforcement of administrative subpoena). Far from respecting those precedents, the Deposition Order mandates that the Attorney General appear personally for a courtroom deposition—a mandate that would be highly unusual even in private party litigation and is completely without precedent in a case involving the investigative authority of a state law enforcement official. Moreover, the Deposition Order appears designed to maximize the burden on the Attorney General, requiring her to leave behind her work as the chief law officer of Massachusetts and travel from Boston to attend a public deposition in a Dallas courtroom on December 13, 2016.

b. *Second*, the district court entered the extraordinary discovery orders even though controlling decisions of this Court—identified in the Attorney General's unresolved August 8, 2016, motion to dismiss and her renewed November 28, 2016, motion to dismiss Exxon's amended complaint—compel dismissal of this case. First, this Court's decision in *Stroman*, 513 F.3d 476, and the U.S. Supreme Court's decision in *Walden v. Fiore*, 134 S. Ct. 1115, 1121-26 (2014), make clear that the district court lacks personal jurisdiction over the

Attorney General. In fact, this case is nearly identical to *Stroman*, where this Court dismissed for lack of personal jurisdiction a suit in Texas by a Texas real estate broker against an Arizona state official challenging her enforcement of Arizona licensing requirements against the plaintiff. *Stroman*, 513 F.3d at 481-89. Second, this Court's decision in *Google*, 822 F.3d 212, makes clear that Exxon's pre-enforcement federal court challenge is unripe. Again, this case is on all fours to *Google*, where this Court dismissed as unripe a pre-enforcement challenge to the Mississippi Attorney General's administrative subpoena, where the target had an adequate and unexhausted state court remedy. *Id.* at 224-26. Third, the venue statute (28 U.S.C. § 1391(b)) makes clear that venue in the Northern District of Texas is improper. *Bigham v. Envirocare of Utah, Inc.*, 123 F. Supp. 2d 1046, 1048 (S.D. Tex. 2000) (citing *Woodke v. Dahm*, 70 F.3d 983, 985-86 (8th Cir. 1995)). The fact that Exxon may claim to feel the *effects* of the Attorney General's *unenforced* CID in Texas cannot form the basis for venue in Texas, since the Attorney General's actions all occurred in Massachusetts and New York and concern only potential harm to Massachusetts consumers and investors. *See id.*

c. *Third*, the district court's discovery orders and refusal to rule on the Attorney General's dispositive motion to dismiss are made all the more extraordinary by the fact that they are based on a narrow and "parsimoniously" granted "bad faith" exception to the *Younger* abstention doctrine, which directs the

district court to abstain from exercising jurisdiction where, as here, there is an ongoing state court proceeding that affords Exxon an adequate forum for relief. *See Wightman v Texas Supreme Court*, 84 F.3d 188, 190 (5th Cir. 1986). In effect, the district court has turned *Younger*—a case founded on respect and deference to state interests and the ability of state courts to fully and fairly resolve federal constitutional claims—into a weapon against those state interests. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*., 457 U.S. 423, 431 (1982) (stating that "[m]inimal respect for the state processes . . . precludes any *presumption* that the state courts will not safeguard federal constitutional rights.").[5] And the district court has taken this extraordinary action based solely on its purported "concern" that the Attorney General's cooperatiion with other Attorneys General, speaking publicly about her investigation and other matters of environment-related public interest, consulting with scientific and legal experts, and requesting business records—*i.e.*, actions that Attorneys General and other law enforcement officials across the nation engage in *every day*—might somehow suggest "bias or prejudgment about what the investigation of Exxon would discover." Discovery Order at 3-4 (emphasis added).

[5] *See also Family Division Trial Lawyers' v. Moultrie*, 725 F.2d 695, 701 (D.C. Cir. 1984) ("The only justification for federal court interference during a state proceeding would be a premise that the state courts cannot be trusted to adequately protect federal constitutional rights, a premise unequivocally rejected by the *Younger* Court.").

2. *The Balance of Harms and Public Interest Favor a Stay*:

a. The Attorney General will suffer irreparable harm if she is forced to set aside her job as chief law officer of Massachusetts to prepare for and travel to Texas to take part in an extraordinary fishing expedition into the origins of her investigation (all protected by various privileges) or face potential sanctions from the district court for failing to appear for that courtroom deposition at all. As this Court has made clear, the Attorney General should not have to "incur a contempt sanction" prior to seeking a writ of mandamus, and only a stay of the district court's discovery orders will prevent the Attorney General from being placed in that untenable position. *See In re FDIC*, 58 F.3d 1055, 1060 n.7 (5th Cir. 1995). Moreover, effectively turning the Attorney General into a defendant subject to public inquisition, as is the case here, would impose harm of immeasurable consequences, including chilling law enforcement efforts "by subjecting the [Attorney General's] motives and decisionmaking to outside inquiry" and "undermin[ing] prosecutorial effectiveness by revealing the [Attorney General's] enforcement policy." *See Wayte v. United States*, 470 U.S. 598, 607-08 (1985).[6] Indeed, virtually every subject of an ongoing civil or criminal investigation would

[6] *See also United States v. Morgan*, 313 U.S. 409, 422 (1941); *cf. Village of Arlington Heights v. Metropolitan Hous. Dev.*, 429 U.S. 252, 268 n.18 (1977) ("judicial inquiries into . . . executive motivation represent a substantial intrusion into the workings of other branches of government.").

be able to follow Exxon's lead, initiate an onerous "investigation of the investigator" before a single document has been produced, and obstruct and weaken states' abilities to enforce the laws passed by their own legislatures.

b. A stay will not harm Exxon. First, Exxon has—and is availing itself of—the same relief it has sought in the district court in the Massachusetts state court pursuant to the state-law procedure for challenging the CID, Mass. Gen. Laws ch. 93A, § 6(7), and the Massachusetts court is fully capable of adjudicating Exxon's claims. *See Attorney Gen. v. Colleton*, 444 N.E.2d 915, 921 (Mass. 1982) (affirming trial court's denial, on state constitutional grounds, of Attorney General motion to compel compliance with CID); *see also Google*, 822 F.3d at 225-28 (finding no irreparable harm where plaintiff challenging state attorney general investigatory subpoena had "adequate remedy at law" in state court). Second, Exxon faces "no current consequence" for "resisting" compliance with the Attorney General's CID. *See Google*, 822 F.3d at 226 (dismissing pre-enforcement CID challenge as unripe). Third, Exxon has already produced well over one million pages of documents in response to a similar subpoena issued by the New York Attorney General and has, as recently as December 5, contended that it "is fully complying with its obligations with regard to the [New York Attorney General's] Subpoena" despite Exxon's recent decision to amend its Texas

federal court complaint to add the New York Attorney General. ECF Doc. No. 94, at 1.[7]

c. Finally, a stay will serve the public interest by, among other things, promoting judicial economy, preserving the parties' resources, and maintaining the status quo pending resolution of the Attorney General's petition. Moreover, there is a significant public interest in protecting the integrity of state law enforcement investigations by precluding unjustified and unnecessary judicial invasion of the underlying investigatory decision-making process.

3. ***This Court Should Exercise Discretion to Order a Stay***: Based on the foregoing, the Attorney General requests that this Court exercise its authority to stay all discovery in the district court pending resolution of the Attorney General's petition for a writ of mandamus. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes of its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). The resolution of the Attorney General's petition may determine whether the case will proceed at all or, at a

[7] Ltr. from Daniel J. Toal, Esq. Paul, Weiss, Rifkind, Wharton & Garrison LLP (counsel for Exxon), to the Honorable Barry R. Ostrager, Supreme Court of the State of New York, re: *In re Application of the People of the State of New York, by Eric T. Scheiderman*, Index No. 451962/2016 (Dec. 5, 2016), https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=2FaesxJlrCNjivZ2fjnM8A==&system=prod.

minimum, whether the discovery orders should be vacated. *See In re Ramu Corp*., 903 F.2d 312, 313, 318, 321 n.11 (5th Cir. 1990) (granting mandamus and directing district court to rule on motion to dismiss). The district court and the parties will thus benefit from the resolution of the petition before discovery proceeds any further. Accordingly, the stay should also issue to preserve the status quo and thereby promote judicial economy and prevent the unnecessary expenditure of time and resources by the parties until it is clear what further district court proceedings will be necessary, if any.

CONCLUSION

For the foregoing reasons, this Court should stay the district court's October 13, 2016 Discovery Order and its November 14, 2016 Deposition Order pending this Court's disposition of the Attorney General's petition for a writ of mandamus, and should do so by December 12, 2016 if the district court has not granted the Attorney General's December 6, 2016 district court motion to stay.

Respectfully submitted,

MAURA T. HEALEY, as Attorney General of the Commonwealth of Massachusetts,

By her attorneys,

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December 8, 2016

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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/s/ Robert E. Toone
Attorney of Record for the Massachusetts Attorney General

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 27(D)

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 27(d)(2), because this brief contains 3,675 words; and.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point, Times New Roman-style font.

Dated: December 8, 2016

/s/ Robert E. Toone
Robert E. Toone
Attorney of Record for the Massachusetts Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on December 8, 2016.

I further certify that on December 8, 2016, I caused the foregoing motion to be served, by e-mail on:

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I further certify that on December 8, 2016 I caused foregoing emergency motion for a stay pending mandamus to be hand-delivered to the district court on the morning of Friday, December 9, 2016, the most expeditious means of service available to us. The foregoing will be delivered to:

The Honorable Ed Kinkeade
U.S. District Court for the Northern District of Texas
1100 Commerce Street, Room 1625
Dallas, Texas 75242-1003

Dated: December 8, 2016

/s/ Robert E. Toone
Robert E. Toone
Attorney of Record for the Massachusetts Attorney General

ATTACHMENT 1

Discovery Order

Order Authorizing Discovery into Whether the Massachusetts Attorney General Issued Her Civil Investigative Demand in "Bad Faith" (Oct. 13, 2016) (ECF Doc. No. 73)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. MAURA TRACY HEALEY, Attorney General of Massachusetts in her official capacity, Defendant.	§ § § § § § § § § §	Civil Action No. 4:16-CV-469-K

ORDER

Plaintiff Exxon Mobil Corporation's Motion for a Preliminary Injunction (Doc. No. 8) and Defendant Attorney General Healey's Motion to Dismiss (Doc. No. 41) are under advisement with the Court. Plaintiff Exxon Mobil Corporation ("Exxon") moves to enjoin Defendant Attorney General Maura Tracy Healey of Massachusetts from enforcing the civil investigative demand ("CID") the Commonwealth of Massachusetts issued to Exxon on April 19, 2016. The Attorney General claims that the CID was issued to investigate whether Exxon committed consumer and securities fraud on the citizens of Massachusetts. Exxon contends that the Attorney General issued the CID in an attempt to satisfy a political agenda. Compliance with the CID would require Exxon to disclose documents dating back to January 1, 1976 that relate to what Exxon possibly knew about climate change and global warming.

Additionally, Defendant Attorney General Healey moves to dismiss Plaintiff Exxon's Complaint for (1) lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2), (2) lack of subject matter jurisdiction under Rule 12(b)(1) under *Younger v. Harris*, 401 U.S. 37 (1971), (3) lack of subject matter jurisdiction under Rule 12(b)(1) because the dispute is not yet ripe, and (4) improper venue under Rule 12(b)(3). Before reaching a decision on either Plaintiff Exxon's Motion for a Preliminary Injunction or Defendant Attorney General Healey's Motion to Dismiss, the Court **ORDERS** that jurisdictional discovery be conducted.

I. Applicable Law

The Court has an obligation to examine its subject matter jurisdiction *sua sponte* at any time. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230–31 (1990); *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("[S]ubject-matter delineations must be policed by the courts on their own initiative even at the highest level."). A district court has broad discretion in all discovery matters, including whether to permit jurisdictional discovery. *Wyatt v. Kaplan*, 686 F.2d 276, 283 (5th Cir. 1982). "When subject matter jurisdiction is challenged, a court has authority to resolve factual disputes, and may devise a method to . . . make a determination as to jurisdiction, 'which may include considering affidavits, allowing further discovery, hearing oral testimony, or conducting an evidentiary hearing.'" *Hunter v. Branch Banking and Trust Co.*, No. 3:12-cv-2437-D, 2012 WL 5845426, at *1 (N.D. Tex. Nov. 19, 2012) (quoting *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir.

1994)). If subject matter jurisdiction turns on a disputed fact, parties can conduct jurisdictional discovery so that they can present their arguments and evidence to the Court. *In re Eckstein Marine Serv. L.L.C.*, 672 F.3d 310, 319 (5th Cir. 2012).

II. The Reason for Jurisdictional Discovery

One of the reasons Defendant Attorney General Healey moves to dismiss Plaintiff Exxon's Complaint is for lack of subject matter jurisdiction under Rule 12(b)(1). Fed. R. Civ. P. 12(b)(1). The Court particularly wants to conduct jurisdictional discovery to determine if Plaintiff Exxon's Complaint should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction because of the application of *Younger* abstention. *See Younger*, 401 U.S. at 43–45; *Health Net, Inc. v. Wooley*, 534 F.3d 487, 494 (5th Cir. 2008) (stating that although *Younger* abstention originally applied only to criminal prosecution, it also applies when certain civil proceedings are pending if important state interests are involved in the proceeding). The Supreme Court in *Younger* "espouse[d] a strong federal policy against federal court interference with pending state judicial proceedings." *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982).

Jurisdictional discovery needs to be conducted to consider whether the current proceeding filed by Exxon in Massachusetts Superior Court challenging the CID warrants *Younger* abstention by this Court. If Defendant Attorney General Healey issued the CID in bad faith, then her bad faith precludes *Younger* abstention. *See Bishop v. State Bar of Texas*, 736 F.2d 292, 294 (5th Cir. 1984). Attorney General Healey's

actions leading up to the issuance of the CID causes the Court concern and presents the Court with the question of whether Attorney General Healey issued the CID with bias or prejudgment about what the investigation of Exxon would discover.

Prior to the issuance of the CID, Attorney General Healey and several other attorneys general participated in the AGs United for Clean Power Press Conference on March 29, 2016 in New York, New York. Notably, the morning before the AGs United for Clean Power Press Conference, Attorney General Healey and other attorneys general allegedly attended a closed door meeting. At the meeting, Attorney General Healey and the other attorneys general listened to presentations from a global warming activist and an environmental attorney that has a well-known global warming litigation practice. Both presenters allegedly discussed the importance of taking action in the fight against climate change and engaging in global warming litigation.

One of the presenters, Matthew Pawa of Pawa Law Group, P.C., has allegedly previously sued Exxon for being a cause of global warming. After the closed door meeting, Pawa emailed the New York Attorney General's office to ask how he should respond if asked by a Wall Street Journal reporter whether he attended the meeting with the attorneys general. The New York Attorney General's office responded by instructing Pawa "to not confirm that [he] attended or otherwise discuss" the meeting he had with the attorneys general the morning before the press conference.

During the hour long AGs United for Clean Power Press Conference, the attorneys general discussed ways to solve issues with legislation pertaining to climate

change. Attorney General Eric Schneiderman of New York and Attorney General Claude Walker of the United States Virgin Islands announced at the press conference that their offices were investigating Exxon for consumer and securities fraud relating to climate change as a way to solve the problem.

Defendant Attorney General Healey also spoke at the AGs United for Clean Power Press Conference. During Attorney General Healey's speech, she stated that "[f]ossil fuel companies that deceived investors and consumers about the dangers of climate change should be, must be, held accountable." Attorney General Healey then went on to state that, "[t]hat's why I, too, have joined in investigating the practices of ExxonMobil. We can all see today the troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public." The speech ended with Attorney General Healey reiterating the Commonwealth of Massachusetts's commitment to combating climate change and that the fight against climate change needs to be taken "[b]y quick, aggressive action, educating the public, holding accountable those who have needed to be held accountable for far too long." Subsequently, on April 19, 2016, Attorney General Healey issued the CID to Exxon to investigate whether Exxon committed consumer and securities fraud on the citizens of Massachusetts.

The Court finds the allegations about Attorney General Healey and the anticipatory nature of Attorney General Healey's remarks about the outcome of the Exxon investigation to be concerning to this Court. The foregoing allegations about

Attorney General Healey, if true, may constitute bad faith in issuing the CID which would preclude *Younger* abstention. Attorney General Healey's comments and actions before she issued the CID require the Court to request further information so that it can make a more thoughtful determination about whether this lawsuit should be dismissed for lack of jurisdiction.

III. Conclusion

Accordingly, the Court **ORDERS** that jurisdictional discovery by both parties be permitted to aid the Court in deciding whether this law suit should be dismissed on jurisdictional grounds.

SO ORDERED.

Signed October 13th, 2016.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE

ATTACHMENT 2

Deposition Order

Order Directing Massachusetts Attorney General to Appear in Dallas, Texas for December 13, 2016 Deposition (Nov. 17, 2016) (ECF Doc. No. 117)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 4:16-CV-469-K
	§	
ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity,	§	
	§	
Defendants.	§	

ORDER

On November 16, 2016, the Court conducted a telephone status conference with the parties. In order to expeditiously conduct the necessary discovery to inform the Court on issues relating to pending and anticipated motions related to jurisdictional matters, the Court orders that Attorney General Healey shall respond to written discovery ten (10) days from the date the discovery is served.

It is further ordered that Attorney General Healey shall appear for her deposition in Courtroom 1627 at 1100 Commerce Street, Dallas, Texas 75242 at 9:00 a.m. on Tuesday, December 13, 2016. Attorney General Schneiderman is also advised to be

available on December 13, 2016 in Dallas, Texas. The Court will enter an Order regarding Attorney General Schneiderman's deposition after he files his answer in this matter. The Court is mindful of the busy schedule of each of the Attorneys General Healey and Schneiderman and will be open to considering a different date for the deposition.

SO ORDERED.

Signed November 17th, 2016.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE

ATTACHMENT 3

Saxton v. Faust, No. 3:09-CV-2458-K,
2010 WL 3446921 (N.D. Tex. Aug. 31, 2010)
(Kinkeade, J.)

2010 WL 3446921
Only the Westlaw citation is currently available.

United States District Court,
N.D. Texas,
Dallas Division.

Jerry SAXTON and Katie Saxton, Plaintiffs,
v.
Robert P. FAUST, Defendant.

Civil Action No. 3:09–CV–2458–K.
|
Aug. 31, 2010.

Attorneys and Law Firms

Raul H. Loya, Loya & Associates, Dallas, TX, for Plaintiffs.

Joni J. Jones, Utah Attorney General's Office, Salt Lake City, UT, Lesli G. Ginn, Office of the Texas Attorney General, Austin, TX, for Defendant.

MEMORANDUM OPINION AND ORDER

ED KINKEADE, District Judge.

***1** Before the Court is Defendant Robert Faust's Motion to Dismiss (Doc. No. 6), filed February 2, 2010. The Court has reviewed and considered the motion, the pleadings on file in this case, and the applicable law. Upon review, this case must be dismissed for the following reasons: (1) this Court lacks subject matter jurisdiction over the case; (2) this Court lacks personal jurisdiction over the Defendant; (3) venue is improper; and (4) the Defendant has absolute immunity from claims in this case. Defendant's Motion to Dismiss is **GRANTED** and Plaintiffs' claims are **DISMISSED** without prejudice.

I. Factual and Procedural Background

Plaintiffs Jerry and Katie Saxtons ("the Saxtons") are defendants in a Utah state court lawsuit over which Defendant Judge Robert Faust ("Judge Faust") was presiding until January 3, 2010 (*See* Def. Mot. to Dismiss at 4). From the Saxtons' complaint and Judge Faust's motion to dismiss, the following facts are undisputed. On February 27, 2007 in Utah state court, a former business partner filed suit against the Saxtons. This former partner alleged that the Saxtons had misappropriated trade secrets, patent rights, and other intellectual property. (*See* Pl. Compl. at 11). In the Utah case, Judge Faust sanctioned the Saxtons for violating Judge Faust's discovery orders and a preliminary injunction order. (*Id.* at 13, 14).

In response to the sanction order, on December 28, 2009, the Saxtons filed their original complaint in this Court, alleging violations of their First, Fifth, and Fourteenth Amendment civil rights, under 42 U.S.C. § 1983. Specifically, the Saxtons assert that Judge Faust illegally attempted to seize their property through legal writs and garnishment orders. On February 2, 2010, Judge Faust filed a Motion to Dismiss asserting: (1) this Court should abstain from exercising jurisdiction under the *Younger* doctrine; (2) lack of personal jurisdiction; (3) venue is improper; and (4) absolute judicial immunity. The Saxtons did not file a response Judge Faust's Motion to Dismiss.

II. Legal Standard

Judge Faust has asserted four different grounds for dismissal, each with a different legal standard. All four will be addressed in turn.

A. Rule 12(b)(1)-Subject-matter Jurisdiction

Federal courts are courts of limited jurisdiction, and absent jurisdiction conferred by statute they lack the power to adjudicate claims. *Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir.1998). Even when subject-matter jurisdiction is conferred by statute, however, there are times when federal courts should decline jurisdiction in the interests of comity. *See Younger v. Harris*, 401 U.S. 37 (1971). The court must consider: (1) whether there is an ongoing state criminal, civil, or administrative proceeding; (2) whether the state proceedings involve important state interests; and (3) whether the state court provides an adequate forum to hear the claims raised in the federal complaint. *Women's*

Cmty. Health Ctr. of Beaumont, Inc. v. Tex. Health Facilities Comm'n, 685 F.2d 974, 979 (5th Cir.1982) (citing *Middlesex Cnty. Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982)).

B. Rule 12(b)(2)-Personal Jurisdiction

***2** A federal court has jurisdiction over a nonresident defendant if the long-arm statute of the state in which it sits confers personal jurisdiction over that defendant and the exercise of that jurisdiction is consistent with due process under the United States Constitution. *Ruston Gas Turbines, Inc. v. Donaldson Co., Inc.*, 9 F.3d 415, 418 (5th Cir.1993). The Texas long-arm statute has been interpreted to extend to the limits of that allowed by federal due process law. *Schlobohm v. Schapiro*, 784 S.W.2d 355, 357 (Tex.1990). Federal due process requires that a defendant have "minimum contacts" with the forum state and the exercise of jurisdiction not offend "traditional notions of fair play and substantial justice." *Ruston Gas*, 9 F.3d at 418 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 366, 66 S.Ct. 154, 90 L.Ed. 95 (1945)).

C. Rule 12(b)(3)-Venue

Once raised, a Rule 12(b)(3) motion to dismiss due to improper venue places the burden of sustaining venue on the plaintiff. *See Go Figure, Inc. v. Curves, Intern., Inc.*, —— F.Supp.2d ——, 2010 WL 1424411 (S.D.Tex. Apr.8, 2010); 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3826 (1986). When no evidentiary hearing is conducted, a court will accept uncontroverted facts contained in the plaintiff's pleadings as true and resolve any conflicts from the pleadings and any other documents of affidavits in the plaintiff's favor. *Id.*

Venue is proper in the judicial district where the defendant resides or where a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of the property that is the subject of the claim is located. If neither of the preceding apply, wherever the defendant may be found. 28 U.S.C. § 1391(1)-(3).

D. Rule 12(b)(6)

In reviewing a Rule 12(b)(6) motion, which tests the legal sufficiency of the claims stated in the complaint, a court must look solely at the pleadings themselves. *Jackson v. Procunier*, 789 F.2d 307, 309–10 (5th Cir.1986). In looking at whether the complaint states a valid claim upon which relief can be granted, the court must view all facts in a light most favorable to the plaintiff and resolve any doubts in favor of the plaintiff. *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir.1997). The court must assume the truth of all pleaded facts and liberally construe the complaint in favor of the plaintiff. *Oliver v. Scott*, 276 F.3d 736, 740 (5th Cir.2002). To survive a 12(b)(6) motion, a plaintiff must not make mere conclusory allegations, but must plead specific facts. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir.1992). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.' " *Ashcroft v. Iqbal*, —— U.S. ——, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Although Fed.R.Civ.P. 12(b)(6) dismissal is ordinarily determined by whether the facts alleged in the complaint give rise to a cause of action, a claim may also be dismissed if a successful affirmative defense appears clearly on the face of the pleadings. *Clark v. Amoco Prod. Co.*, 794 F.2d 967, 970 (5th Cir.1986).

III. Analysis

***3** The Court will now apply the above legal standards to the facts of this case.

A. Subject–Matter Jurisdiction

Although the Saxtons have asserted claims under 42 U.S.C. § 1983, the presence of all three *Younger* factors indicates that this Court should decline jurisdiction. First, there is an ongoing civil action in the Third Judicial District of Utah. *See* Def.App. at 77. Second, the Utah state proceeding involves contempt orders by Judge Faust. The state court contempt process lies at the very core of a state's judicial system. *Juidice v. Vail*, 430 U.S. 327, 335, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977). Finally, the Saxtons had recourse under Utah law for the wrongs of which they complained. The *Younger* factors are present; therefore, the Court declines jurisdiction.

B. Personal Jurisdiction

"Minimum contacts" means that the defendant has "purposefully availed itself of the privilege of conducting activities in the forum state, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477, 105 S.Ct. 2174, 85

L.Ed.2d 528 (1985). The "minimum contacts" requirement can be met one of two ways: by "specific" personal jurisdiction or by "general" personal jurisdiction. *Marathon Oil Co. v. A.G. Ruhrgas*, 182 F.3d 291, 295 (5th Cir.1999). Specific personal jurisdiction arises when a nonresident defendant's contacts with the forum state arise from, or are directly related to, the cause of action. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n. 8, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). General personal jurisdiction is proper when a nonresident defendant's contacts with the forum state are continuous, systematic, and substantial, even if unrelated to the present lawsuit. *Id.* at 414 n. 9.

To determine if jurisdiction comports with "traditional notions of fair play and substantial justice," the court must consider: (1) the defendant's burden; (2) the forum state's interest; (3) the plaintiff's interest in convenient and effective relief; (4) the judicial system's interest in the efficient resolution of controversies; and (5) the state's shared interest in furthering public policy. *Asahi Metals Indus. Co. v. Superior Court*, 480 U.S. 102, 112, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987).

Specific personal jurisdiction arises when a defendant's contacts with a forum comprise the basis for the present suit. *Marathon Oil*, 182 F.3d at 295. The only contacts with Texas alleged by the Saxtons are the effects they have felt in Texas of Judge Faust's rulings in Utah state court. The Fifth Circuit recently rejected the idea that a nonresident government official may be haled into a Texas court simply because the effects of a ruling are felt in Texas. *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 482–85 (5th Cir.2008). Judge Faust has not "conducted business" in the state of Texas nor has he availed himself of the protections and benefits of our laws, as contemplated by Tex. Civ. Prac. & Rem.Code § 17.042. Furthermore, because the Saxtons have alleged no other contacts with Texas, general personal jurisdiction also fails.

C. Venue

***4** The Saxtons assert venue is proper in this Court under 28 U.S.C. § 1391(a)-(c),(e) and 28 U.S.C. § 1402(b). Section 1391(c) and (e) apply to either a corporation or an officer or employee of the United States. Judge Faust is neither. The Saxtons asserted claims under 42 U.S.C. § 1983 and invoked federal question jurisdiction and jurisdiction under 28 U.S.C. § 1343, not under diversity jurisdiction. Therefore, § 1391(a) is not applicable because jurisdiction here is not founded solely upon diversity of citizenship. 28 U.S.C. § 1402(b) is also inapplicable because this venue provision is only used when the United States is the defendant. Section 1391(b)(2) requires a substantial part of the events or omissions giving rise to the present claim occur in the court's judicial district. However, all of the events the Saxtons complain of occurred in Utah.

D. Absolute Judicial Immunity

Alternatively, Judge Faust moves for dismissal under Rule 12(b) (6) because the Saxtons' claims are barred by absolute judicial immunity. Judges are absolutely immune from money damages for their official actions. *Mireles v. Waco*, 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991). This immunity is not solely from judgment, but from suit as well. *Id.* at 11. Even allegations of acting maliciously or corruptly will not overcome judicial immunity. *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). The passage of the Civil Rights Act did not abolish judicial immunity; thus, suits brought under 42 U.S.C. § 1983 against judicial officers acting in their official capacities for money damages are still barred. *Id.* at 554–55. In addition, Congress amended 42 U.S.C. § 1983 in 1996 to prohibit suits for injunctive relief against judicial officers acting in their official capacities unless a declaratory decree was violated or declaratory relief was unavailable. 42 U.S.C. § 1983 (as amended Oct. 19, 1996 by Pub.L. 104–317, Title III, Sec. 309(c), 110 Stat. 3852). The only exceptions to this immunity are for extra-judicial conduct (i.e. actions not taken in the judge's official capacity); or actions taken in the complete absence of jurisdiction. *Mireles*, 502 U.S. at 11–12.

The actions that form the basis for the Saxtons' complaint all relate to Judge Faust's official duties, including: allowing the Saxtons' opponents in the Utah state court lawsuit to file a *lis pendens* on the Saxtons' Utah home (*see* Pl. Compl. at ¶ 38); contempt orders for failing to appear at a hearing in May of 2009 (*see* Pl. Compl. at ¶ 22) and for violating a pre-judgment writ by encumbering the Saxtons' Utah home (*see* Pl. Compl. at ¶ 25); discovery orders to produce computer files (*see* Pl. Compl. at ¶ 21) and to allow access to a business premises for inspection (*see* Pl. Compl. at ¶ 20); and post-hearing findings of fact and conclusions of law (*see* Pl. Compl. at ¶ 30). In addition, the Saxtons' assertions that Judge Faust had been committing "jurisdiction[al] fraud" are merely conclusory. No facts have been alleged in support of these assertions, as required to defeat a Rule 12(b)(6) motion. *Beavers v. Metro. Life Ins. Co.*, 566 F.3d 436, 439 (5th Cir.2009). Because the Saxtons' claims all arise from Judge Faust's official duties and no exceptions have been met, the claims are barred by absolute judicial immunity.

2010 WL 3446921

IV. Conclusion

***5** For the above reasons, Defendant's Motion to Dismiss is **GRANTED** and Plaintiffs' claims are **DISMISSED** without prejudice by judgment filed in a separate document.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 3446921