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December 2, 2016

By Hand Delivery

Hon. Heidi E. Brieger
Associate Justice
Superior Court
Suffolk County Courthouse, 13th Flr.
Three Pemberton Square
Boston, MA 02108

Re: *In re Civil Investigative Demand No. 2016-EPD-36, Issued by the Office of the Attorney General*
Suffolk Superior Court Civil Action No.: 16-1888F

Dear Associate Justice Brieger:

The Office of Attorney General Healey ("AGO") writes in advance of the scheduled December 7 hearing to apprise the Court of relevant developments in connection with the above-referenced matter that have occurred, or that the AGO has become aware of, since the October 11 submission of the Rule 9A package related to ExxonMobil Corporation's ("Exxon") Emergency Motion to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order and the AGO's Cross-Motion to Compel. Because these developments occurred after the Rule 9A submission, they have not been addressed in the parties' briefing and are likely to be referenced at the December 7 hearing.

Relevant Superior Court Decision

On October 28, Justice Leibensperger issued an order concerning the AGO's civil investigative demand ("CID") authority in the matter of *In re Civil Investigative Demand No. 2016-CPD-50, Issued by the Office of the Attorney General*, Civil Action No. 2016-2098 BLS 1. A copy of the order, denying Glock, Inc.'s motion to set aside the CID issued to it and deferring its motion for a protective order, is attached.

Exxon-Related Events

Here is a chronology of Exxon-related events subsequent to the October 11 submissions:

On October 13, the United States District Court for the Northern District of Texas (Judge Kinkeade), in *Exxon Mobil Corporation v. Maura Tracy Healey*, No. 4:16-cv-469 (N.D. Tex.)

(the "Texas case"), issued a sua sponte order that "jurisdictional discovery by both parties" be permitted on the issue of bad faith to assist the court in its determination whether to abstain from hearing Exxon's case against Attorney General Healey under *Younger v. Harris, 401 U.S. 37 (1971).*

On October 14, New York Attorney General Schneiderman filed an application in New York State Supreme Court to compel compliance with a second subpoena issued by his office on August 19, 2016, to Exxon's auditor, PricewaterhouseCoopers ("PwC"), as part of his office's continuing investigation of Exxon. On October 17, Exxon opposed New York's application to compel Exxon's and PwC's compliance with the second New York subpoena.

On October 17, Exxon filed a motion in the Texas case to amend its complaint against Attorney General Healey to add the New York Attorney General as a defendant, and to "add new claims for federal preemption and for conspiracy to deprive [Exxon] of its constitutional rights." On November 10, the Texas court (Kinkeade, J.) granted Exxon's motion to amend and Exxon filed an amended complaint in the Texas case.

On October 20, Attorney General Healey filed a motion seeking reconsideration of the October 13 jurisdictional discovery order in the Texas case; on the grounds that the court should grant her pending motion to dismiss for lack of personal jurisdiction, which would moot the discovery order.

On October 26, the New York State Supreme Court (Ostrager, J.) granted the New York Attorney General's application to compel full production from PwC,[1] and on October 27 Exxon appealed the order to the Appellate Division of the New York State Supreme Court.

On October 28, Exxon announced a thirty-eight percent drop in earnings as a result of low energy prices, and the New York Times reported that Exxon "acknowledged that it faced what could be the biggest accounting revision of its reserves in its history."[2] And on the same day, the Wall Street Journal reported that Exxon's profits in the last twelve months are the lowest since 1999.[3] In its article, the Wall Street Journal stated that Exxon disclosed that about 4.6 billion barrels of oil in its reserves, primarily in Canada, may be too expensive to tap, noting that "[t]hough Exxon didn't mention climate change or regulators in its disclosure, most of the assets it said may not be economic are among the most scrutinized by climate change activists: Canada's tar sands."[4] The Journal reported that Canada's government has proposed to charge a

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[1] *In the Matter of the Application of the People of the State of New York*, No. 451962/16 (N.Y. Sup. Ct. Oct. 25, 2016).

[2] Clifford Krauss, *Exxon Concedes It May Need to Declare Lower Value for Oil in Ground*, N.Y. TIMES, Oct. 28, 2016, http://www.nytimes.com/2016/10/29/business/energy-environment/exxon-concedes-it-may-need-to-declare-lower-value-for-oil-in-ground.html.

[3] Bradley Olson & Lynn Cook, *Exxon Warns on Reserves As It Posts Lower Profit: Oil producer to examine whether assets in an area devastated by low price and environmental concerns should be written down*, WALL ST. J., Oct. 28, 2016, http://www.wsj.com/articles/exxon-mobil-profit-revenue-slide-again-1477657202.

[4] *Id.*

price for carbon emissions, and observed that "[l]onger term, Exxon faces headwinds from regulators aimed at reducing carbon dioxide and other greenhouse gas emissions, measures that are widely expected to fall most heavily on its industry."[5]

On November 4, Exxon issued notices of deposition in the Texas case to Attorney General Schneiderman and assistant attorneys general Lemuel Srolovic and Monica Wagner of the New York Attorney General's Office, and to Attorney General Healey and assistant attorneys general Christophe Courchesne and I. Andrew Goldberg of the AGO. (On November 18, Exxon withdrew the deposition notices and subpoenas to AAsG Courchesne and Goldberg without prejudice to re-serving them.) Exxon has served on Attorney General Healey over one hundred discovery requests in the Texas case, including 33 requests for production, 24 interrogatories, and 74 requests for admission.

On November 7, Exxon shareholders commenced a lawsuit in the United States District Court for the Northern District of Texas against Exxon, alleging violations of federal securities laws by Exxon in connection with its representations made regarding climate change. The complaint alleges, among other things, that "[t]hroughout the Class Period, Exxon repeatedly highlighted the strength of its business model and its transparency and reporting integrity, particularly with regard to its oil and gas reserves and the value of those reserves. Exxon's public statements were materially false and misleading when made as they failed to disclose: (a) that Exxon's own internally generated reports concerning climate change recognized the environmental risks caused by global warming and climate change; (b) that, given the risks associated with global warming and climate change, the Company would not be able to extract the existing hydrocarbon reserves Exxon claimed to have and, therefore, a material portion of Exxon's reserves were stranded and should have been written down; and (c) that Exxon had employed an inaccurate 'price of carbon' – the cost of regulations such as a carbon tax or a cap-and-trade system to push down emissions – in evaluating the value of certain of its future oil and gas prospects in order to keep the value of its reserves materially overstated."[6]

On November 9, Exxon issued subpoenas in the Texas case to 11 individuals and organizations, including the Union of Concerned Scientists, the Rockefeller Brothers Fund, and 350.org.

On November 14, the New York Attorney General's Office moved the New York State Supreme Court to compel Exxon's compliance with the initial subpoena the New York Attorney General issued as part of its Exxon investigation to Exxon on November 4, 2015.

On November 17, the court in the Texas case issued a second sua sponte discovery order (Kinkeade, J.), directing Attorney General Healey to appear for her deposition at the United States District Court for the Northern District of Texas courthouse in Dallas on December 13.

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[5] *Id.*

[6] *Pedro Ramirez Jr. et al. v. Exxon Mobil Corporation, Rex Tillerson, Andrew Siger, and Jeffrey Woodbury*, Case No. 3:16-cv-3111.

On November 21, 2016, the New York State Supreme Court heard the motion of the New York Attorney General's Office to compel Exxon's compliance with its November 4, 2015 subpoena. The court (Ostrager, J.) directed the parties to reach agreement for production, failing which the court said it would set a date for production.

On November 26, Attorney General Healey filed a motion in the Texas case to vacate Judge Kinkeade's second discovery order, stay discovery, and enter a protective order. On November 29, Exxon filed its response to the motion to vacate, and on December 1, Attorney General Healey filed a reply.

On November 28, Attorney General Healey filed a motion to dismiss Exxon's first amended complaint in the Texas case.

Respectfully submitted,

I. Andrew Goldberg
Assistant Attorney General
Environmental Protection Division

Enclosure

cc: Fish & Richardson P.C. (by hand)
Paul, Weiss, Rifkind, Wharton & Garrison, LLP (by electronic mail)
Patrick J. Conlon, Esq. (by electronic mail)

notice sent 10/28/16
C6 CR JR MAG (sm)
PH GK
PD DK

NOTIFY

V10/28

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2016-2098 BLS 1

IN RE CIVIL INVESTIGATIVE DEMAND NO. 2016-CPD-50, ISSUED BY THE OFFICE OF THE ATTORNEY GENERAL

ORDER ON MOTION OF GLOCK, INC. TO SET ASIDE OR MODIFY THE CIVIL INVESTIGATIVE DEMAND OR ISSUE A PROTECTIVE ORDER

Glock, Inc., a manufacturer of pistols, commenced this action to set aside a Civil Investigative Demand ("CID") issued by the Attorney General to Glock on May 26, 2016. In the alternative to a complete quashing of the CID, Glock requests that a protective order issue limiting the information that must be produced pursuant to the CID. As described below, Glock's motion to set aside the CID is denied. Action on the motion for a protective order is deferred, as the parties are ordered to meet and confer regarding the scope of discovery guided by the general principles governing CID discovery, discussed herein.

BACKGROUND

The CID was issued to Glock pursuant to G.L. c. 93A, § 6. The CID recites that it is issued as "part of a pending investigation by the Office of the Attorney General into compliance with G.L. c. 93A, as well as related Massachusetts laws, regulations and common law requirements that impact gun safety and product warranties." The CID requires production of documents from Glock pursuant to G.L. c. 93A, § 6 (1). The requests for documents are detailed

in twelve separate paragraphs. The general nature of the documents requested include customer complaints about safety, the company's responses, product recalls, warranties, testing, specifications, authorized dealers and legal actions and settlements. There is no geographic limitation to the scope of documents that must be produced. The relevant time period for documents that must be produced is four years prior to the date of the CID.

Upon receipt of the CID, Glock, through counsel, began communications with the Office of the Attorney General. According to Glock's complaint (styled as a "petition"), the Attorney General agreed to an extension of the twenty-one day period allowed by statute for a recipient of a CID to move or object to the CID, to July 1, 2016. On July 1, 2016, having failed to reach an agreement with the Attorney General regarding the validity and scope of the CID, Glock filed its complaint along with an emergency motion to set aside or modify the CID. The emergency motion was denied, without prejudice to re-filing pursuant to Rule 9A of the Superior Court. On August 11, 2016, Glock served its renewed motion to set aside or modify the CID on the Attorney General. On September 15, 2016, the parties' Rule 9A package was filed in this action. Oral argument was heard on October 19, 2016.[1]

In its motion, Glock asserts that it does not sell its pistols directly to consumers in Massachusetts as that term is used in 940 Code of Massachusetts Regulations ("CMR") §§ 16.00, *et seq.* Glock says it made the determination to forego the consumer market in Massachusetts after October 1998, when the Attorney General promulgated regulations stating it to be an unfair

[1] The Attorney General in her opposition to Glock's motion does not dispute the agreement to extend the time to July 1, 2016, for Glock to move in opposition to the CID. The Attorney General makes no argument that Glock failed to comply with the requirements of G.L. c. 93A, § 6 (7) for asserting a timely motion to quash or modify the CID. Accordingly, the timing issue is waived.

and deceptive practice for a "handgun-purveyor" to "transfer" a handgun to a consumer that, among other things, is non-compliant with the Attorney General's regulations (940 CMR § 16.05 (3)) requiring a "load indicator" or a "magazine disconnect" as a safety feature. Glock's handguns, to this date, do not comply with the regulations requiring a "load indicator" or a "magazine disconnect."

Glock does, nevertheless, sell its pistols to Massachusetts law enforcement agencies and military personnel. Such sales are outside the definition of "handgun-purveyor" that invokes the requirements of § 16.05. Glock also sells its pistols to business entities in Massachusetts that are primarily firearm wholesalers, so long as any sale, by its terms, prohibits the purchaser from reselling to a handgun retailer or consumer in Massachusetts. Such sales are allowed under the definition of "transfer" in 940 CMR §16.01.

The Attorney General submits an affidavit of one of its investigators who has reviewed and analyzed data for all gun sales transactions in the Commonwealth. By law, a database is maintained of all firearm sales by gun dealers as well as private transfers. The analysis indicated that there were approximately 10,800 Glock handgun sales in Massachusetts between January 1, 2014 and August 13, 2015. Approximately 8,000 of those transactions were sales to individuals with an occupation other than law enforcement, or to persons who had no occupation listed. The investigator also described his knowledge of safety issues reported regarding Glock handguns including the risk of accidental discharge as a result of a short trigger pull, lack of a load indicator and lack of an external safety.

ANALYSIS

General Laws c. 93A, § 6 (1) authorizes the Attorney General to obtain and examine

documents "whenever he believes a person has engaged in or is engaging in any method, act or practice declared to be unlawful by this chapter." Among the things declared to be unlawful by c. 93A are unfair and deceptive acts or practices in the conduct of any trade or commerce. G.L. c. 93A, § 2 (a). It is well established that putting a product into the stream of commerce to ultimately reach a user may be an unfair and deceptive act under c. 93A if the product is defective, unsafe or not as warranted. *Vassallo* v. *Baxter Healthcare Corporation*, 428 Mass. 1, 23 (1998); *Aspinall* v. *Philip Morris Companies, Inc.*, 442 Mass. 381, 397 (2004). Specifically with respect to firearms, the Supreme Judicial Court has held that the Attorney General has authority under c. 93A "to prevent the deceptive or unfair sale or transfer of defective products which do not perform as warranted." *American Shooting Sports Council, Inc.* v. *Attorney General*, 429 Mass. 871, 875 (1999).

As a result, the Attorney General may issue a CID in connection with an investigation of the safety of a product that is purchased in Massachusetts. Section 6 of c. 93A grants the Attorney General broad investigatory powers. "There is no requirement that the Attorney General have probable cause to believe that a violation of G.L. c. 93A has occurred. He need only have a belief that a person has engaged or is engaging in conduct declared to be unlawful by G.L. c. 93A." *CUNA Mutual Insurance Society* v. *Attorney General*, 380 Mass. 539, 542 n. 5 (1980). There is no requirement to disclose the name of the person being investigated and the CID may be issued to a person who is not the target of the investigation. *Id.* at 542 - 543. The statute, § 6 (1) of c. 93A, "should be construed liberally in favor of the government." *In the Matter of a Civil Investigative Demand Addressed to Yankee Milk, Inc.*, 372 Mass. 353, 364 (1977).

Glock, as the party moving to set aside the CID, bears a heavy burden to show good cause

why it should not be compelled to respond. G. L. C. 93A, § 6 (7); *CUNA Mutual*, 380 Mass. at 544. "[T]he recipient who challenges the CID bears the burden of showing that the Attorney General acted arbitrarily or capriciously in issuing the demand."*Attorney General* v. *Bodimetric Profiles*, 404 Mass. 152, 157 (1989).

Glock's Motion to Set Aside the CID

Glock contends that the Attorney General has no authority to issue the CID because Glock does not sell its pistols directly to consumers in Massachusetts. Even Glock recognizes, however, that its contention is overstated. Glock concedes that the Attorney General has the authority to investigate whether there have been improper sales by Glock, or others, of Glock pistols directly to consumers in the Commonwealth, in violation of 940 CMR §16.05.[2]

Glock's contention is even more fundamentally flawed. Glock does not dispute that there were eight to ten thousand sales of its pistols in Massachusetts in a twenty month period ending in August 2015. It may be concluded that there are thousands of Glock pistols throughout the Commonwealth, some of which are owned by law enforcement and many of which are owned by civilian consumers. Regardless of who owns the pistols, if the pistols are unsafe, defective, or breach a warranty of merchantability, there may be a c.93A violation by Glock, the manufacturer who put the product into the stream of commerce.[3] Because the Attorney General has authority to investigate such potential violations of c. 93A, the CID is authorized.

Finally, I address Glock's allegations throughout its papers that the Attorney General is

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[2] Glock also argues that the CID fails to meet the specificity requirements of G.L. c. 93A, § 6 (4). A review of the CID shows otherwise. Glock's argument is rejected.

[3] At oral argument, counsel for Glock conceded that the company could be sued in Massachusetts by a gun owner asserting a product liability claim.

acting based on political motives or animus towards guns, so that the court should find that the CID is invalid for being arbitrary and capricious. Glock wholly fails to satisfy its burden in this regard. As described above, the Attorney General has good and sufficient grounds to issue the CID based on safety and other concerns about Glock pistols owned throughout the Commonwealth. There is no evidence that Glock is being singled out for persecution or harassment.

Glock's motion to set aside the CID is denied.

Glock's Motion to Modify the CID

Glock motion to modify the CID attacks each and every one of the twelve requests as being "unreasonable or improper" under G.L. c. 93A, § 6 (5). That section states that a CID shall not contain any requirement to produce that would be unreasonable or improper if contained in a subpoena duces tecum issued by a court or would require the disclosure of documents that are protected by a recognized privilege. In response, the Attorney General argues that it is premature to delve into relevancy, burdensomeness and privilege objections because the parties have not had a meaningful opportunity (as a result of Glock's position that the CID should be set aside in toto) to "meet and confer" regarding the scope of the requests. The Attorney General expresses a willingness to listen and consider Glock's concerns.

The following are general principles regarding the scope of discovery. General Laws c. 93A, § 6 (1) (b) establishes a relevance test to define the documents the Attorney General may examine pursuant to a valid investigation. *Matter of Yankee Milk*, 372 Mass. at 357. As in all discovery matters, a broad area of discretion resides in the court to determine relevance. *Id.* at 356. "[E]ffective investigation requires broad access to sources of information. . . ." *Id.* at 364. In

Matter of Yankee Milk, the Court reversed a restriction of a CID to only Massachusetts connected documents, holding that documents located and pertaining to other states were within the scope of relevance. *Id.* at 356 -357. With respect to documents that a company has agreed to keep confidential, such as settlement papers and files, the analysis must start with the holding in *Attorney General* v. *Bodimetric Profiles*, 404 Mass. 152 (1989). The Court held that "Bodimetric may have agreed with others to keep certain information confidential but that agreement does not bind the Attorney General." *Id.* at 158. Finally, in order to raise a successful argument that the burden of complying with a CID outweighs the Attorney General's need for the documents, Glock must show that producing the requested documents would "seriously interfere with the functioning of the investigated party by placing excessive burdens on manpower or requiring removal of critical records." *Id.* at 159, quoting *Matter of Yankee Milk*, 372 Mass. at 361 n.8.

I have read and considered Glock's objections to the numbered paragraphs of the CID. I find that Glock's objections based upon relevancy and lack of specificity are baseless. Whether there should be some limitations put on the scope of documents requested based upon geography, burdensomeness or confidentiality should be discussed between the parties in the type of good faith "meet and confer" communication as required by Superior Court Rule 9C for the settlement of discovery disputes. To allow time for such a resolution, I defer action on Glock's motion for a protective order. The parties shall be required to submit a written joint status report to the court by November 21, 2016.

CONCLUSION

Glock's motion to set aside the CID is **DENIED.** Action on Glock's motion for a protective order as to each paragraph of the CID is deferred until after the parties meet and confer to discuss possible agreement on the scope of discovery. The parties are **ORDERED** to submit a joint status report to the court by no later than November 21, 2016.

By the Court,

Edward P. Leibensperger
Justice of the Superior Court

Date: October 28, 2016