SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, Plaintiffs, vs. JOHN C. MOORE, ROBERT HINKLE, MICHAEL LAKOW, DIANA PIKULSKI, HAYWARD R. PRESSMAN, LESLIE PRIGGEN, JOHN S. RAINEY, MARGARET SANTULLI, AND THOROUGHBRED RETIREMENT FOUNDATION, INC., Defendants.	Case No.: 401004-12 Hon. Anil C. Singh Oral Argument Requested **DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR MOTION TO COMPEL DISCLOSURE**

Defendants John C. Moore, Robert Hinkle, Michael Lakow, Diana Pikulski, Hayward R. Pressman, Leslie Priggen, John S. Rainey, Margaret Santulli, and Thoroughbred Retirement Foundation, Inc. ("TRF") (collectively, "Defendants"), by and through their undersigned counsel, Simpson Thacher & Bartlett LLP, respectfully submit this reply memorandum of law in support of their motion pursuant to CPLR § 3124, to compel discovery from Plaintiff People of the State of New York by the Attorney General ("Plaintiffs" or "NYAG" or "Attorney General").

PRELIMINARY STATEMENT

The Attorney General's prosecution of this case is being funded and directed by a private entity with a vested interest in the outcome of the case and a long history of direct and indirect involvement with the TRF and its directors, including throughout the relevant time period during which the Attorney General alleges that the TRF was mismanaged. The Attorney

General does not dispute these extraordinary facts because these facts have been unambiguously established by the document production to date. Instead, the NYAG defensively derides this motion to compel as an "attack" on its office and, more absurdly, as an affront to the separation of powers. But it is the Attorney General who seeks a judgment from this Court, and who therefore must play fairly by the rules of this Court. The Attorney General cannot sue the TRF while withholding facts highly relevant to that suit.

By this motion, Defendants seek to understand the full extent of the role the executors of the Mellon Estate, Frederick "Ted" Terry and Beverly Carter ("the Executors"), play in this litigation. The Executors were intimately involved in creating the conditions at the heart of the complaint. In particular, they played key roles in the pre-2008 decisions that swelled the TRF herd to 1400 horses and burdened the TRF's resources. Ironically, absent the involvement of the Mellon Executors, the TRF's officers and directors have reduced the herd over the last five years to a far more manageable 1000 horses. In short, the NYAG, with funding and direction from the Executors, is prosecuting a case challenging the TRF's efforts to overcome problems that the Executors were complicit in creating. These conflicts raise serious questions about the independence and professionalism of the NYAG's office.

Accordingly, Defendants seek documents and communications related to, *inter alia*, the Executors' role in, understanding of, and expressed opinions regarding the allegations of abuse of the Mellon Endowment; the Executors' and the NYAG's role in and knowledge about the examination of the TRF herd performed by Dr. Stacey Huntington, who was retained by the Executors and whose conclusions are referenced no fewer than a dozen times in the NYAG's Complaint; and any further arrangements between the Executors and the NYAG regarding the funding or prosecution of this case. To that end, Defendants have requested documents and

communications exchanged between Plaintiffs and the Executors, as well as any documents and communications concerning any relationship between Plaintiffs and the Executors. Plaintiffs, clearly recognizing their legal and ethical obligation to produce certain documents and communications of this sort, have produced a handful of responsive documents, including letter agreements by which the Executors agreed to pay thousands of dollars to fund the Attorney General's case. If the NYAG agrees that such letter agreements are relevant—and they undoubtedly are—it simply cannot refuse to turn over all additional documents of this kind requested by Defendants' Notice to Produce.

Since both parties agree that Defendants are entitled to a production from Plaintiffs regarding the Mellon Executors, the question before this court is a very narrow one: has Plaintiffs' production so far been sufficient? The answer, clearly, is no. Defendants are entitled to more documents and this court should compel the production they seek.

ARGUMENT

Plaintiffs have produced letter agreements that document the substantial financial involvement of the Executors in bankrolling this litigation. *See* Ex. A[1] (November 29, 2012 Letter Agreement of Dr. N. White); Ex. B (November 29, 2012 Letter Agreement of Dr. H. Werner); Ex. C (December 13, 2012 Letter Agreement of Dr. R. Dwyer). They have also produced documents demonstrating that the Executors are periodically contacting the NYAG to critique and make suggestions about litigation strategy. *See* Ex. D (June 4, 2012 fax from B. Carter to C. Evans and D. Nachman); Ex. E (October 3, 2012 fax from B. Carter to D. Nachman, with copies to C. Evans, S. Wilson and F. Terry). Plaintiffs, in their opposition to Defendants' motion to compel, barely even mention these unorthodox arrangements, perhaps

[1] All citations to "Ex. __" refer to exhibits attached to the May 1, 2013 Affirmation of Jonathan S. Zelig ("Zelig Reply Aff.").

because they recognize how indefensible they are.

Defendants only discovered this evidence of financial support and litigation direction as a result of their requests for production, to which Plaintiffs vigorously objected in countless ways—via formal responses and objections, via email, via phone, via letter, and now via their opposition to this motion. *See* Ex. F (Defendants' February 6, 2013 Notice to Produce). Plaintiffs have objected that such requests were not relevant, material, or necessary to this litigation (Ex. G, Plaintiffs' February 26, 2013 Responses & Objections at 5, 6); that the requests are "groundless" (Ex. H, Plaintiffs' April 5, 2013 Letter to J. Zelig, at 3); and that the documents sought are shielded by a litany of irrelevant privileges (Ex. I, Plaintiffs' April 25, 2013 Opposition to Defendants' Motion to Compel, at 7-8). Recognizing that their position is unsustainable, Plaintiffs simultaneously claim they are *complying* with the requests by producing a handful of documents—so far, about 400—some of which clearly indicate that the Executors are funding and directing litigation against the TRF via the Attorney General's office. Zelig Reply Aff. ¶ 11.[2]

Among the 400 documents produced over the last three months by Plaintiffs are the expert retainer agreements and directive e-mails discussed above. Like the tip of an iceberg, these agreements and communications hint at a large and dangerous hazard below the surface: that there is much more to be learned about Plaintiffs' highly unorthodox and possibly unethical arrangement with the Executors. In order to properly defend itself in this action, Defendants must know the full scope of that relationship. Defendants are also entitled to communications

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2 Plaintiffs take issue with the pace of Defendants' production and are quite proud of their own celerity. Indeed, Plaintiffs delivered documents seven weeks after receiving Defendants' requests, but only delivered 267 pages. Zelig Reply Aff. ¶ 11. Over a similar time span—the 45 days Defendants had to review the tens of thousands of emails potentially responsive to Plaintiffs' requests—Defendants reviewed and produced 8,500 pages of documents. Zelig Reply Aff. ¶ 12. While Defendants regret Plaintiffs' displeasure, they welcome a reduction in Plaintiffs' expansive requests that have rendered the pace of production slower than anyone would like.

and documents regarding the Mellon Endowment—the alleged violation of which forms one pillar of the NYAG's complaint—as well as all inspections of the TRF herd funded by the Mellon Endowment, including by Dr. Stacey Huntington, whose conclusions form the other pillar of the NYAG's complaint. Such documents and communications are highly relevant to the Defendants' efforts to rebut the Attorney General's baseless allegations at trial.

I. Defendants Seek Relevant Documents, Not an Examination of the Attorney General's Prosecutorial Decision Making

Defendants have no interest in gaining access to the Attorney General's legal analyses and conclusions. What Defendants seek is the scope of involvement of a private party with a vested interest in this suit and substantial involvement in the actions under scrutiny.

A. Defendants Are Entitled to Know the Full Extent of the Mellon Executors' Involvement

In their opposition to Defendants' motion to compel, Plaintiffs make no effort to defend or explain their unorthodox financial arrangement with the Executors. Ex. I (Plaintiffs' April 25, 2013 Opposition to Defendants' Motion to Compel). It is generally accepted that a prosecutor "is not disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant, as distinguished from the appropriate interest that members of society have in bringing a defendant to justice with respect to the crime with which he is charged." *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984). Finding that a prosecutor is not disinterested may even warrant recusal: courts in New York will act "to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence." *Schumer v. Holtzman*, 60 N.Y.2d 46, 55 (1983). In at least one case, for example, a state high court found that a prosecutor was rightly disqualified where he accepted reimbursement from the complainant for the costs of investigation. *See People v.*

Eubanks, 14 Cal. 4th 580, 584, 593 (1996). In *Eubanks*, the California Supreme Court affirmed a lower court in finding that "the victim's financial assistance created a conflict of interest for the prosecutor" because such a practice "raise[s] an obvious question as to whether the wealth of the victim has an impermissible influence on the administration of justice. A system in which affluent victims, including prosperous corporations, were assured of prompt attention from the district attorney's office, while crimes against the poor went unprosecuted, would neither deserve nor receive the confidence of the public."[3] *Id.* The court went on to note that, "A public prosecutor must not be in a position of 'attempting at once to serve two masters,' the People at large and a private person or entity with its own particular interests in the prosecution." *Id.* at 596 (*citing Ganger v. Peyton* 379 F.2d 709, 714 (4th Cir. 1967)).

When the government has relationships like Plaintiffs have with the Executors, judges take notice. In *Lefkowitz v. Raymond Lee Org.*, one opinion suggested the court would have authorized a disclosure request regarding the prosecution's alleged collusion with a bar association, if only the defendants had offered more than "conclusory affidavits." 411 N.Y.S.2d 191, 192 (1st Dep't 1978). Here, the TRF and other Defendants have done far more than make conclusory allegations. The revelation of Plaintiffs' financial arrangement with the Executors is clearly sufficient to warrant further inquiry.[4]

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[3] The court's words in *Eubanks* ring particularly true here, where the Attorney General's Charities Bureau is spending taxpayer money pursuing litigation at the direction of the exorbitantly wealthy Mellon Executors regarding the care of thoroughbred racehorses, all while charitable crimes defrauding average New York citizens of their hard-earned dollars are left to continue unabated. If the Mellon Executors have uncovered actionable wrongs, then surely they are capable of pursuing action against the TRF and its Directors without the aegis of the Attorney General's Office.

[4] Plaintiffs are correct that *Raymond Lee* involved a much more modest request: the names of the complainants. Ex. I (Plaintiffs' April 25, 2013 Opposition to Defendants' Motion to Compel) at 6, 8. Yet the principle is sound: that evidence of an improper relationship and potential conflict of interest between prosecutors and complainants, given a demonstration of plausibility, justifies disclosure from the government plaintiff. The extent of the disclosure is a matter for the Court's discretion and should be informed by the gravity of the conflict and the presence of available evidence regarding the conflict.

Defendants are not, at this time, seeking recusal; but the documents produced by Plaintiffs so far show that such a motion is plausible—certainly plausible enough to justify further disclosure. Plaintiffs have entered into at least three letter agreements, according to which the Executors have agreed to pay all expenses associated with Plaintiffs' sending veterinary inspectors to TRF farms. *See* Ex. A (November 29, 2012 Letter Agreement of Dr. N. White); Ex. B (November 29, 2012 Letter Agreement of Dr. H. Werner); Ex. C (December 13, 2012 Letter Agreement of Dr. R. Dwyer). In several faxes addressed to the NYAG, the Executors are directing litigation strategy. *See* Ex. D (June 4, 2012 fax from B. Carter to C. Evans and D. Nachman) at 2 ("Since the following issues were not included in the recent Complaint, Ted and I wanted to bring them to your attention with the expressed hope that they will be addressed as the litigation moves forward."); Ex. E (October 3, 2012 fax from B. Carter to D. Nachman, with copies to C. Evans, S. Wilson and F. Terry) at 2 ("While I understand that you have already filed your paperwork with the Court relating to the Appeal and the Motion to Delay Discovery, Ted and I . . .would be most grateful if you could place this Report in the records of the Court."). Attorneys in the NYAG's office are also routinely sending case updates to the Executors, along with Robert Giuffra, a colleague of Mr. Terry's at Sullivan & Cromwell LLP. *See* Ex. J (May 22, 2012 e-mail from D. Nachman to R. Giuffra regarding court filings); Ex. K (July 26, 2012 e-mail from S. Wilson to R. Giuffra regarding oral argument); Ex. L (September 17, 2012 e-mail from S. Wilson to R. Giuffra regarding the motion to dismiss); Ex. M (October 4, 2012 e-mail from F. Terry to C. Evans with CC to B. Carter asking for copies of Plaintiffs' filings); Ex. N (July 18, 2012 e-mail from R. Giuffra's assistant to D. Nachman, R. Giuffra and F. Terry to schedule a conference call).

Far from satisfying Plaintiffs' discovery obligations, these documents produced to

date only raise further questions. For example, Plaintiffs have produced letter agreements containing the terms of the Executors' financial involvement, but have failed to produce any further details about the expert retainer agreements, including, *inter alia*, documents and communications explaining how these arrangements came about, the negotiations delineating their parameters, and estimates of the cost involved. We now know that the Executors direct matters of litigation strategy at the NYAG, but we are unaware of the extent of the direction or the extent to which the Executors instigated this suit and for what purposes. It is evident that the full picture has not yet emerged and that Plaintiffs will not reveal it unless forced to do so by this Court.

B. The Mellon Executors Involvement in the Principal Allegations in the Complaint Justifies Further Disclosure

The discovery Defendants seek is also relevant and material to their defenses at trial because the Executors are intimately involved in the TRF's function, structure and operations. In the past few years, the Executors have repeatedly broached the line between assistance and interference—reinforcing the impression that they are using the NYAG to take over the TRF and rendering relevant any of their expressed thoughts on the propriety of the TRF's actions.

First, the Executors were responsible for hiring Dr. Stacey Huntington, a veterinarian whose inspections and conclusions regarding the TRF's herd formed the exclusive basis of the NYAG's Complaint with respect to the condition of the TRF herd and remain a focus of this case. *See* Ex. O (April 15, 2011 TRF Response to Huntington Report) at 2. The Executors selected Dr. Huntington and presided over her investigations, but Defendants never even received her full credentials. *Id.* Dr. Huntington sent her reports not to the TRF Board but to a part-time TRF employee, Julie Walawender, who was funneling the reports to the Executors.

Id. at 3. Though Defendants promptly and thoroughly rebutted the claims in Dr. Huntington's reports (*id.*), her misrepresentations nonetheless became a cornerstone of the NYAG's Complaint. *See* Ex. P (Plaintiffs' May 3, 2012 Complaint) at ¶¶ 55-66. As a result, the Executors' hand-picked investigator and her reports remain central to this action and the Executors' communications with the NYAG are relevant and material to any defense.

Second, the Executors have routinely micro-managed TRF operations—even though the agreements governing the TRF Endowment give them no powers to do so—leading multiple TRF Board members to resign. Within the span of a year, the Executors demanded the hiring and firing of not one but two TRF CEOs. Ex. Q (February 24, 2011 e-mails from T. Ludt and R. Paulick to G. Grayson, J. Rainey and L. Robbins, with copies to B. Carter and F. Terry). On February 24, 2011, former director Tom Ludt announced his intention to resign because, as he described it, "I feel Julie [Walawender] and the trustees [i.e., the Executors] have taken control of our corporation and have dictated decisions and controls way beyond their responsibilities and authority." *Id.* at 2. Ray Paulick responded with his own intention to step down, explaining, "Because of what I believe are intimidation tactics and interference by the Mellon Trustees, the board of directors of TRF is no longer functioning as an independent board." *Id.* at 1. The Executors' dogged pursuit of this litigation has continued to force TRF volunteer directors to resign.

The Executors' "intimidation tactics and interference" and general involvement in TRF operations have been a documented distraction and disturbance to the TRF and also form the basis for much of the Attorney General's complaint. The TRF must know the full extent of their relationship with the NYAG in order to defend itself.

C. Defendants' Entanglement With the Mellon Executors Is Particularly Troubling In Light of the Demonstrably Untrue Allegations Contained Within the Complaint

Another reason the relationship between the Executors and Plaintiffs is material to this case is that the facts have simply not borne out Plaintiffs' allegations. Most reports from Plaintiffs' own investigations of TRF farms demonstrate that the horses and the farms are in excellent condition. *See, e.g.*, Ex. R (November 8, 2011 report from Wheeler Farm, by Edgefield County Sheriff Deputy Kornaus) ("[T]here is no evidence of neglect of the animals that were present on the farm"); Ex. S (November 9, 2011 report from Blackburn Correctional farm, by Lexington-Fayette Animal Care and Control) ("Overall the program is well managed and the horses are well cared for"); Ex. T (November 7, 2011 report from Tan-Bo Farm, by Lexington-Fayette Animal Care and Control) ("I saw no issues with any of the horse's [sic] weight or conditions"). The results of Plaintiffs' own investigations give Defendants' reason to worry that this case is not, as they claim, about "whether the Defendants committed the unlawful acts alleged in the complaint." Ex. I (Plaintiffs' April 25, 2013 Opposition to Defendants' Motion to Compel), at 2. As the California Supreme Court put it in *Eubanks*, "Arguably, a factually weak case is more subject than a strong case to influence by extraneous financial considerations, since in the absence of financial assistance from the victim the prosecutor is more likely to abandon or plea bargain such a case." 14 Cal. 4th at 600. Given the facts at hand, Defendants and the Court must understand the full scope of the relationship between Plaintiffs and Executors.

II. Plaintiffs' Argument Regarding Separation of Powers is an Unacceptable and Untenable Volley at the Authority of This Court

As a last ditch effort, the Attorney General seeks to tie this court's hands with lofty language about the separation of powers. But this court should not succumb to this effort to

restrain its fair assessment of the facts.

Each of the cases Plaintiffs cite on this point involves facts and procedural postures utterly dissimilar from those at bar. *See* Ex. I (Plaintiffs' April 25, 2013 Opposition to Defendants' Motion to Compel), at 9-10. *Santora v. Silver* is about an attorney general exercising his "quasi-judicial authority" to approve a settlement of a sexual harassment claim against a state official. 20 Misc. 3d 836, 841 (Sup. Ct. N.Y. Cnty., July 14, 2008), *aff'd* 61 A.D.3d 621 (1st Dep't 2009), *leave to appeal denied* 13 N.Y.3d 704 (2009). Plaintiff in *Gerson v. N.Y. State Attorney Gen.* brought an action directly against the NYAG in New York's Court of Claims, which dismissed it for lack of subject matter jurisdiction. 527 N.Y.S.2d 258 (2d Dep't 1988). *Urquia v. Cuomo*, to the Plaintiffs' credit, is at least about a discovery dispute, but it involves an Article 78 proceeding—not an action in a court of general jurisdiction. 856 N.Y.S.2d 503 (Sup. Ct. N.Y. Cnty., Dec. 21, 2007).[5] None of these procedural postures remotely resembles *People v. Moore*.

The Attorney General seeks relief from this Court, and in order to obtain such relief it must play by this Court's rules.

CONCLUSION

For the foregoing reasons, Defendants request that this Court grant this motion to compel, require the Attorney General to respond in full to Requests 3 and 4 in the Defendants' Notice to Produce, and grant such other and further relief as the Court should deem necessary and proper.

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[5] Plaintiffs' citation of *Butironi v. Putnam Cnty. Civil Svc. Comm'n*, 29 A.D.2d 474, 476 (2d Dep't 1968) is likewise misplaced. While that case recognized that the amendment of 3102(f) declined to "extend the disclosure article to treat the State as all others," the only distinctions were two: that the State is only subject to disclosure when properly a party and that the State is not subject to interrogatories or requests for admissions (the latter distinction no longer appears in the statute). Here, the state is properly a party.

Dated: New York, New York
April 30, 2013

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