SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of the Application of
HOWARD I. SMITH,

Petitioner,

- against -

THE NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL and FORMER ATTORNEY GENERAL OF THE STATE OF NEW YORK ELIOT SPITZER,

Respondents.

For an Order and Judgment Pursuant to Article 78 of the New York Civil Practice Law and Rules

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Index No. 3670-08

MEMORANDUM OF LAW IN OPPOSITION TO FORMER ATTORNEY GENERAL OF THE STATE OF NEW YORK ELIOT SPITZER'S MOTION TO DISMISS THE AMENDED VERIFIED PETITION

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Petitioner Howard I. Smith ("Petitioner" or "Mr. Smith") respectfully submits this memorandum of law in opposition to Respondent Former Attorney General of the State of New York Eliot Spitzer's ("Mr. Spitzer") motion to dismiss the Amended Verified Petition, dated January 8, 2014 (the "Amended Verified Petition").

PRELIMINARY STATEMENT

For *nearly seven years*, Mr. Smith, a citizen of the State of New York, has sought access to government records relating to communications the New York Attorney General's Office ("NYAG"), under the leadership of former Attorney General Spitzer, had with the press relating to nine specific topics. Mr. Smith's New York Freedom of Information Law ("FOIL") request included a request for responsive government emails sent to or from Mr. Spitzer's private email account. This Court properly applied New York law and ordered NYAG to obtain and disclose responsive agency records, including those sent to or from Mr. Spitzer's personal email account. Morduchowitz Aff.[1], Ex. 12 at 3. After an appeal by NYAG, the Appellate Division, Third Department recognized that this dispute centers around agency records in Mr. Spitzer's personal possession and suggested that joinder of Mr. Spitzer would be appropriate to insure fairness and to provide Mr. Spitzer with an opportunity to protect his personal interest. Morduchowitz Aff., Ex. 14 at 4-5.

Mr. Spitzer could have taken the opportunity to weigh in on this dispute and once and for all affirm under oath the disingenuous statements he has made in the press denying the use of a personal email account. Instead, Mr. Spitzer responded with a thirty-page motion to dismiss rehashing arguments already made by NYAG (and rejected by the courts) and advancing irrelevant legal arguments. *See* Morduchowitz Aff., Exs. 9and 12.

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[1] References to "Morduchowitz Aff." are to the Affirmation of Daphne Morduchowitz, dated March 21, 2014.

First, Mr. Spitzer focuses on irrelevant issues related to *People v. Greenberg, et al*, No. 401720/05 (Sup. Ct. N.Y. Cnty.) (Ramos, J), arguing that Petitioner is seeking "an advantage in a parallel proceeding." Spitzer Br.[2] at 3. This assertion is baseless. Given that Mr. Spitzer was allowed additional time to review and analyze the record in this case, he clearly is aware of the fact that Justice Ramos has already ruled that *People v. Greenberg* is, as a matter of law, an unrelated proceeding. *See* Morduchowitz Aff., Exs. 3and 4. Moreover, Justice Ramos has already determined that the documents requested in this Article 78 action would be inadmissible in *People v. Greenberg* and applauded Petitioner's efforts to obtain through FOIL the documents at issue in this case. *Id.* Further, it is unclear what unfair advantage Petitioner would obtain in *People v. Greenberg* from the official records in Mr. Spitzer's personal email account; unless, of course, Mr. Spitzer has improperly withheld exculpatory evidence that should have been produced in discovery in that case.

Next, Mr. Spitzer devotes a substantial portion of his brief to an irrelevant argument that as a private party he is not subject to FOIL's disclosure obligations. This issue, however, is not in dispute. Indeed, as is clear from the Amended Verified Petition, Petitioner has never sought – nor does he seek now – relief directly from Mr. Spitzer. However, as this Court has correctly held, NYAG's obligations under FOIL are not obviated simply because the agency records are not in its physical possession or because they were misappropriated by Mr. Spitzer when he left office. *See* Morduchowitz Aff. Ex. 12. Nor, as this Court has correctly held, is NYAG's obligation under FOIL impacted by the fact that Petitioner's FOIL request was made after Mr. Spitzer left office. *See id.* Mr. Spitzer's suggestion that the date of the FOIL request is determinative is preposterous and clearly inconsistent with FOIL. *See* Spitzer Br. at 5 fn. 2. The

[2] References to "Spitzer Br." are to the Memorandum of Law in Support of Respondent's Motion to Dismiss the Amended Verified Petition, dated March 13, 2014.

documents Petitioner seeks are subject to FOIL because Mr. Spitzer was an agency employee at the time they were created. Here, Mr. Smith seeks records dated January 1, 2005 through December 21, 2006. Mr. Spitzer served as the Attorney General of the state of New York during the entirety of this period.

Mr. Spitzer is an appropriate party to this action under C.P.L.R. § 7802(b) because the agency records at issue here are in his physical possession and because his cooperation would be useful in resolving the dispute. It appears that Mr. Spitzer does not want an opportunity to be heard and does not have an interest to protect. The matter, however, can be resolved without Mr. Spitzer's voluntary cooperation.[3] This Court has the authority to order necessary discovery from Mr. Spitzer and to issue subpoenas for the relevant records. *See* C.P.L.R. § 408. This Court also has the authority to direct NYAG to reclaim its misappropriated property under the Tweed Law. *See* N.Y. Exec. Law § 63-c (1).

Notably absent from Mr. Spitzer's response to the Amended Verified Petition is any affirmation under oath either: (1) denying the use of a personal email account to conduct NYAG business; or (2) acknowledging the use of a personal email account to conduct NYAG business, but affirming that no such personal emails are responsive to Mr. Smith's FOIL request. As a result, the Court must conclude, for purposes of this dispute, that Mr. Spitzer used his personal email to conduct government business and that Mr. Spitzer is in the possession of NYAG records responsive to Mr. Smith's FOIL request.

A government official cannot be permitted to avoid FOIL obligations by misappropriating government records and then arguing that FOIL doesn't apply as a result of this

[3] In fact, at oral argument before the Appellate Division, Third Department, counsel for NYAG and Mr. Smith agreed that Mr. Spitzer was not a necessary party to this action and that the action should proceed without his joinder. In addition, NYAG has never sought the joinder of Mr. Spitzer and refused to stipulate to his joinder.

misconduct. To hold otherwise would reward such wrongful conduct by providing an avenue for public officials to keep embarrassing or incriminating government records from seeing the light of day. Such a result is clearly at odds with FOIL's mandate of "maximum access," *See Matter of Town of Waterford v. New York State Dep't of Envtl. Conservation*, 18 N.Y.3d 652, 656-57, (2012), and this Court should not endorse such an obvious loophole; doing so would turn FOIL into a mere drafting guide for avoiding the disclosure of the very records that the statute was meant to expose to public scrutiny. The Court should reaffirm its prior Order directing NYAG to obtain and produce any responsive records sent to or from personal email accounts used by Mr. Spitzer to conduct official business.

ARGUMENT[4]

I. NYAG IS OBLIGATED UNDER FOIL TO DISCLOSE AGENCY RECORDS HELD BY MR. SPITZER

A. Mr. Spitzer Is An Appropriate Party To This Action

As is clear from the Amended Verified Petition, Petitioner seeks relief from NYAG here. Petitioner brought suit pursuant to Article 78 of the C.P.L.R. to enforce the rights granted to him as a citizen of the State of New York under FOIL.[5] As Petitioner has consistently argued

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[4] Because the Amended Verified Petition contains a full and complete statement of the facts of this case, Petitioner does not repeat them here.

[5] Mr. Spitzer argues that there is no FOIL cause of action against private individuals and that he is therefore not a proper party here. *See* Spitzer Br. at 11-17. Mr. Spitzer's argument either demonstrates a fundamental misunderstanding of the law and issues surrounding this action, or an active attempt to obfuscate them. Petitioner has never argued that there is a FOIL cause of action against private individuals, as FOIL itself does not create an enforceable cause of action against anyone. *See* Public Officers Law, Article 6. Instead, FOIL creates rights that can be enforced by special proceedings brought pursuant to Article 78 of the C.P.L.R. Thus, the appropriate question is not whether a FOIL action can be maintained against Mr. Spitzer, but instead whether Mr. Spitzer is a proper party in this Article 78 proceeding seeking to enforce rights granted by FOIL. As discussed in detail below, C.P.L.R. § 7802(b) specifically authorizes a proceeding against a former government officer.

throughout this action, and as this Court has already held, *see* Morduchowitz Aff., Ex. 12, FOIL demands that NYAG produce agency records that exist in Mr. Spitzer's personal email account. This burden is plainly imposed upon NYAG by the text of FOIL. *See* Public Officers Law § 87.

Mr. Spitzer argues that private individuals are not subject to the disclosure requirements of FOIL. *See* Spitzer Br. at 11-17. This is a straw man argument offered in an attempt to confuse the issues here, and simply does not address Petitioner's argument that *NYAG* is required to obtain and produce records that Mr. Spitzer has misappropriated. *See* Section I.B, *infra*. Petitioner has never, and does not now, argue that private citizens have obligations under FOIL.

Mr. Spitzer was joined in this action to provide him with the opportunity to protect any private interest that would be affected by this Court's April 30, 2012 Decision and Order directing NYAG – not Mr. Spitzer – to disclose agency records in Mr. Spitzer's personal possession. *See* Morduchowitz Aff., Ex. 12. In addition, Mr. Spitzer has been joined in order to obtain his cooperation in returning NYAG's misappropriated property so that Mr. Smith can gain access to the records to which he is entitled. This is entirely appropriate under the C.P.L.R. *See Matter of Rox v. Doherty*, 284 N.Y. 550, 552 (1940) (noting that a former public official was made a party to an Article 78 proceeding that was initiated after the public official had left office); *Matter of Duquette v. Town of Peru Town Bd.*, 18 Misc. 3d 174, 175-76 (Sup. Ct. Clinton Cnty. 2007). In fact, C.P.L.R. § 7802(b) states in no uncertain terms that "[w]henever necessary to accomplish substantial justice, a proceeding under this article may be maintained against a[] . . . member of a body whose term of office has expired."

The proceeding seeking relief from NYAG, however, can be resolved without Mr. Spitzer's voluntary cooperation. This Court has the authority to order necessary discovery from Mr. Spitzer and to issue subpoenas for the relevant records. *See* C.P.L.R. § 408. This Court also

has the authority to direct NYAG to reclaim its misappropriated property under the Tweed Law. *See* N.Y. Exec. Law § 63-c (1) (authorizing NYAG to bring civil charges "[w]here any . . . property[] held or owned by the state . . . has heretofore been, or is hereafter, without right obtained . . . ."); *see also State v. Seventh Regiment Fund, Inc.*, 98 N.Y.2d 249, 259 (2002) (Tweed Law action to recover military artifacts).

B. Emails Relating To Government Business In Government Employees' Personal Email Accounts Are Subject To FOIL

Mr. Spitzer misconstrues this proceeding by asserting the only question presented is "whether FOIL requires and authorizes the agency to obtain records from a private person, where the request for such records is made after that person is no longer an employee of the agency." Spitzer Br. at 22-23. In fact, the question at issue here – which this Court has already decided – is whether emails sent to or from a personal email account used by a government employee to conduct official government business are agency records that must be obtained and disclosed pursuant to FOIL. *See* Morduchowitz Aff., Ex. 12. As this Court previously held, the clear answer to that question is yes, and whether that employee is a current or former employee is entirely irrelevant under FOIL. *Id.*

The documents at issue in this proceeding involve emails relating to government business sent to or from Mr. Spitzer's personal email account(s) during his tenure as Attorney General. As this Court has previously ruled, such documents are plainly subject to disclosure under FOIL. Mr. Spitzer rehashes arguments previously rejected by this Court, *see* Morduchowitz Aff., Ex. 12, and presents no new compelling arguments to the contrary. Mr. Spitzer's arguments fail for a multitude of reasons.

First, by clear mandate of the legislature and the Court of Appeals, the purpose of FOIL is to provide "maximum access" to government records, as "the public is vested with an inherent

right to know and that official secrecy is anathematic to our form of government." *Town of Waterford*, 18 N.Y.3d at 656-57 (internal quotations and citations omitted). Allowing government employees to use personal, clandestine email accounts to avoid disclosure would be contrary to this indisputable mandate and must be rejected since it would create an easy means to avoid compliance, "thwart[ing] the entire objective of FOIL." *Matter of Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 254 (1987).

Furthermore, in line with the "maximum access" provided by this mandate, *Town of Waterford*, 18 N.Y.3d at 656-57, the documents at issue here are clearly agency "records" subject to FOIL. FOIL defines the term "record" to include "any information kept, held, filed, produced or reproduced *by, with or for an agency* . . . ." Public Officers Law § 86(4) (emphasis added). As this Court recognized, this definition simply does not turn on possession, *see* Morduchowitz Aff., Ex. 12, despite Mr. Spitzer's claims to the contrary. Indeed, the Court of Appeals has explicitly held that the physical location of records does not exempt them from disclosure. In *Encore College Bookstores*, SUNY claimed that because a third party was in possession of booklists for its classes, it did not have to disclose the booklists under FOIL. *Matter of Encore Coll. Bookstores, Inc. v. Auxiliary Serv. Corp.*, 87 N.Y.2d 410, 417-18 (1995). The Court of Appeals rejected the argument that "disclosure turn[ed] solely on whether the requested information [was] in the physical possession of the agency" – the very argument that Mr. Spitzer makes here – because such a rule would "ignore[] the plain language of FOIL defining 'records' as information kept or held 'by, with or for an agency.'" *Id.* (citing Public Officers Law § 86(4)).

Mr. Spitzer attempts to distinguish this clear holding by arguing that, in *Encore College Bookstores*, the third-party served as a custodian of the documents for SUNY and had a

contractual obligation to hold the documents for or on SUNY's behalf while he has no such obligation. Spitzer Br. at 20. Mr. Spitzer created the documents at issue during his tenure as Attorney General – when the documents were created, he had a legal relationship with NYAG and the documents were created on its behalf. These documents by definition are agency documents held on behalf of NYAG. There can be no clearer example of such a custodial arrangement. The fact that Mr. Spitzer failed to return the records to NYAG when the custodial relationship ended does not change that. There is absolutely no support in *Encore College Bookstores* for the position that this disclosure obligation is somehow extinguished if the relationship between the parties ends.[6] 87 N.Y.2d 410.

Freedom-of-information laws in other states and the federal Freedom of Information Act ("FOIA")[7] similarly recognize that disclosure does not turn on physical location and that the use of personal email accounts by officials does not obviate disclosure requirements. *See, e.g.*, *McLeod v. Parnell*, 286 P.3d 509, 516 (Alaska 2012) (affirming a lower court's order that the emails in the personal email account of former Alaska Governor Sarah Palin relating to official state business had to be obtained and disclosed); *State ex rel. Glasgow v. Jones*, 119 Ohio St. 3d 391, 396 (2008) (emails sent or received in capacity as state representative were subject to disclosure "regardless of whether it was her public or her private e-mail account that received or sent the e-mail messages"); *Burton v. Mann*, 74 Va. Cir. 471, 474, 479 (Va. Cir. Ct. 2008)

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[6] Mr. Spitzer also attempts to twist and distort the holding of *Whalen* into creating a possession requirement for disclosure under FOIL. Spitzer Br. at 18-19. *Whalen* supports no such conclusion. Rather, the Court of Appeals recognized the broad scope of FOIL and held that even *non-agency* documents must be disclosed when they are in an agency's physical possession. 69 N.Y.2d at 248, 251-53. *Whalen* did not disturb the well settled principle that *agency* records are subject to FOIL regardless of their physical location. *See* Public Officers Law § 86(4); *Encore Coll. Bookstores*, 87 N.Y.2d at 417-18.

[7] Federal case law interpreting FOIA is instructive because FOIA served as the framework for FOIL. *See, e.g., Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 572 n. * (1979).

(ordering disclosure of emails sent to or from officials' personal email accounts); *Bradford v. Director, Emp't Sec. Dep't*, 128 S.W.3d 20, 27-28 (Ark. Ct. App. 2003) (email communications between former Arkansas Governor Mike Huckabee and his staff using personal email accounts were subject to disclosure); *Landmark Legal Found. v. EPA*, 959 F. Supp. 2d 175, 182-84 (D.D.C. 2013) (emails sent by EPA officials on their personal email accounts subject to disclosure); *Democratic Nat'l Comm. v. U.S. Dep't of Justice*, 539 F. Supp. 2d 363, 367 (D.D.C. 2008) (emails sent by White House officials to or from email accounts provided by the Republican National Committee are subject to FOIA); *Wilderness Soc'y v. U.S. Dep't of Interior*, 344 F. Supp. 2d 1, 21 n. 20 (D.D.C. 2004) (stating that emails sent to or from personal accounts of employees of the Office of the Solicitor should be searched in response to a FOIA request).

Mr. Spitzer concedes that documents in a current employee's personal email account may be subject to disclosure, but attempts to create a distinction between current and former employees. Spitzer Br. 21. Mr. Spitzer provides no authority for this flawed distinction.[8] *See id.* at 21-22. Indeed, New York law is clear that no such distinction exists under FOIL and that records remain subject to disclosure even after an employee has left the agency. *See Whalen*, 69 N.Y.2d at 248-49, 252-54 (records belonging to the late Erastus Corning, II were properly within the scope of a FOIL request even after his death); *cf. Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 109 A.D.2d 92, 94-95 (3d Dep't 1985) (holding an agency's obligation to

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[8] Rather than provide support for this proposition, Mr. Spitzer claims that the holding of each of the cases ordering the disclosure of emails from personal accounts is somehow limited to current employees. Spitzer Br. at 21-22. Contrary to Mr. Spitzer's claim, none of the cases are so limited and none of them turned on the issue of whether the personal email account was that of a current or former employee. While Mr. Spitzer attempts to make much of the fact that the documents in *McLeod* were requested when Sarah Palin was still Governor of Alaska, *see id.* at 21, he ignores that fact that the emails were reviewed and disclosed by Governor Sean Parnell nearly two years after Governor Palin resigned from office. *See* Morduchowitz Aff., Ex. 16.

disclose employment information extends to former employees); *Matter of Gannett Co., Inc. v. Cnty. of Monroe*, 59 A.D.2d 309, 311 (4th Dep't 1977) ("[I]t is the nature, content and existence of the records which is controlling, not the date that employment ceased.").

In any event, requiring disclosure of emails relating to government business from personal email accounts of current employees, but not former employees, would be illogical and unworkable. Under Mr. Spitzer's reasoning, emails in his personal account would have been subject to disclosure on December 31, 2006 – his last day as Attorney General – but no longer subject to disclosure on January 1, 2007. Such a result would be absurd and contrary to FOIL. Indeed, Mr. Spitzer would surely concede that emails from his official government email account would be subject to disclosure both before and after he left office, and that his leaving office had no effect on disclosure obligations with respect to those documents. If emails in a former employee's official government account must be disclosed then so too must emails in his personal account. As this Court previously held, disclosure requirements under FOIL simply do not and cannot turn on which account an official used to send a government business email. *See* Morduchowitz Aff., Ex. 12 ("the determination as to whether a document is a public record subject to disclosure under FOIL must focus on the content and purpose of the document, *not its location or the means by which it was transmitted*") (emphasis added), citing *Matter of Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 113 A.D.2d 217, 221-22 (3d Dep't 1985), *rev'd in part on other grounds*, 69 N.Y.2d 246 (1987).

In sum, Mr. Spitzer created the requested documents, which relate to official agency business, while he was serving as Attorney General of the State of New York and therefore, by definition, they were created and held on behalf of NYAG and are NYAG's property. The fact that Mr. Spitzer misappropriated these documents and did not return them at end of his term as

Attorney General of the State of New York does not insulate them from FOIL. To hold otherwise would create an easy loophole to FOIL: an official could simply abscond with any embarrassing records after leaving an agency to prevent those records from becoming public.

That is precisely what Mr. Spitzer has done here. Tellingly, despite being provided with an opportunity to affirm that he did not use personal email accounts to conduct official state business while he was Attorney General, he has chosen not to do so. The only logical conclusion is that Mr. Spitzer is in the possession of agency records responsive to Mr. Smith's FOIL request. NYAG must reclaim this property from Mr. Spitzer including through use of the Tweed Law, N.Y. Exec. Law § 63-c (1), and to the extent necessary, this Court should order discovery and subpoena records from Mr. Spitzer.[9]

II. THE AMENDED VERIFIED PETITION SHOULD NOT BE DISMISSED BASED ON MR. SPITZER'S STATUTE OF LIMITATIONS OR LACHES ARGUMENTS

Mr. Spitzer's lengthy arguments about the expiration of the statute of limitations and laches, *see* Spitzer Br. at 23-29, are irrelevant as Petitioner does not seek relief directly from Mr.

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[9] Indeed, federal courts have granted discovery in FOIA cases to determine the extent agency officials used personal email accounts. *Landmark Legal Found.*, 959 F. Supp. 2d at 183-84 (allowing interrogatories and depositions to determine the extent EPA officials used personal email accounts to conduct official agency business). Similar evidence of personal account usage in *Landmark Legal* exists here, including actual emails indicating NYAG officials used personal email accounts, media reports, and NYAG's and Mr. Spitzer's refusals to deny that Mr. Spitzer used personal email accounts to conduct official agency business. *Compare* Morduchowitz Aff., Ex. 2 (Mr. Spitzer's testimony before the New York State Commission on Public Integrity acknowledging use of a personal email account to conduct official State business), Ex. 7 (letter from Petitioner with accompanying chart noting instances of NYAG officials in Mr. Spitzer's administration using personal email accounts to conduct State business), Ex. 11 (media reports of Mr. Spitzer's and other officials' use of personal email accounts to conduct State business), *with Landmark Legal Found.*, 959 F. Supp. 2d at 182. If the Court deems it appropriate, Petitioner can formally move for discovery after a decision on Mr. Spitzer's motion to dismiss.

Spitzer.[10] As the Appellate Division, Third Department has noted, "[a] statute of limitations does not deprive a court of jurisdiction nor even a litigant of a substantive right, but is merely a defense which may, if properly asserted, deprive a plaintiff of any *remedy* from a defendant." *Matter of Romeo v. N.Y.S. Dep't of Educ.*, 41 A.D.3d 1102, 1104-05 (3d Dep't 2007) (emphasis added) (citations omitted). Thus, parties remain subject to the jurisdiction of the Court even after the statute of limitations has run. *Id.* at 1104 (finding that "[t]he district was subject to Supreme Court's jurisdiction, despite the lapse of the statute of limitations."); *see also Matter of Alexy v. Otte*, 58 A.D.3d 967, 968 (3d Dep't 2009). In fact, New York courts have explicitly held that the courts have discretion to join parties after the expiration of the statute of limitations. *See Matter of Greco v. Trincellito*, 188 A.D.2d 963, 964 (3d Dep't 1992) (ordering party joined and the proceeding to continue despite expiration of statute of limitations as to that party); *Marshall v. Quinones*, 43 A.D.2d 436, 438-39 (4th Dep't 1974); *Matter of Fellner v. McMurray*, 41 A.D.2d 853, 854 (2d Dep't 1973).

Petitioner seeks no remedy directly from Mr. Spitzer and the Court can maintain jurisdiction over Mr. Spitzer regardless of statute of limitations or laches.

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[10] Moreover, even if Petitioner was seeking relief from Mr. Spitzer – which he is not – the statute of limitations is not a defense here. The Verified Amended Petition relates back to the filing of the initial petition in this matter. Mr. Spitzer and NYAG are plainly "united in interest" as they assert the same defenses (in fact their briefs make the same arguments) and will "stand or fall together" with respect to Petitioner's claim. *Losner v. Cashline, L.P.*, 303 A.D.2d 647, 648 (2d Dep't 2003) (quotations and citations omitted); *Quinones*, 43 A.D.2d at 438 (two parties are united in interest when they were "desirous of reaching the same result.") (quotations and citations omitted). It is also clear that at the time Petitioner commenced this action, he had no reason to believe that Mr. Spitzer had misappropriated NYAG records and that his participation would be appropriate. Indeed, to this day, both NYAG and Mr. Spitzer have refused to either acknowledge or deny whether personal email accounts were used for agency business and, if so, whether Mr. Spitzer is in the possession of agency records responsive to Petitioner's FOIL request.

III. MR. SPITZER'S REQUEST FOR A MORE DEFINITE STATEMENT DOES NOT MERIT THIS COURT'S CONSIDERATION

Mr. Spitzer alleges that internal contradictions in the Amended Verified Petition "create so much ambiguity that they cannot be ignored." Spitzer Br. at 29. This allegation is nothing short of a frivolous delay tactic. Mr. Spitzer highlights the plural versus singular nature of the word "Respondent" in the Amended Verified Petition and Notice of Petition, dramatically overstating that the documents "are therefore hopelessly in conflict." *Id.* at 30.

The answers to Mr. Spitzer's questions can be found directly in the Amended Supplemental Petition. For instance, Paragraph 5 of the Amended Supplemental Petition requests that NYAG release the complete records sought in Petitioner's FOIL request, dated September 11, 2007; no reference is made to Mr. Spitzer. Similarly, the two Causes of Action in the Amended Verified Petition seeking to annul NYAG's denial of Petitioner's FOIL request and requesting an order requiring the production of documents are clearly directed toward NYAG, not Mr. Spitzer. *See* Amended Verified Petition ¶¶ 25-26.[11] And, finally, Paragraph A in Petitioner's Request For Relief, when read as a whole, clearly refers only to NYAG and not to Mr. Spitzer; the singular term "Respondent" in that paragraph plainly refers back to NYAG, the only Respondent previously mentioned therein. *See* Amended Verified Petition at 20, ¶ A. Moreover, Petitioner does not allege anywhere in the Amended Verified Petition that Mr. Spitzer has obligations pursuant to FOIL, or that Mr. Spitzer must directly produce documents to Petitioner. Even a broad perusal of the Amended Verified Petition, makes clear that Petitioner seeks records from NYAG, not directly from Mr. Spitzer.

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[11] The only potential ambiguity in the Amended Verified Petition relates to Petitioner's request for attorneys fees. To make explicit here, Petitioner does not seek attorneys fees directly from Mr. Spitzer.

Further, a common sense understanding of the previous proceedings would indicate to even a casual observer that Petitioner seeks records from NYAG, not directly from Mr. Spitzer. This Court's April 30, 2012 Order directed *NYAG* to access and produce agency records in Mr. Spitzer's personal email account. Morduchowitz Aff., Ex. 12. NYAG appealed that ruling, and the Appellate Division, Third Department determined *that specific relief* would impact Mr. Spitzer's interests and that he therefore should be a party to this action. Morduchowitz Aff., Ex. 14. Accordingly, Petitioner joined Mr. Spitzer, with the intention of receiving records *from NYAG*, as this Court had previously ordered.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that this Court deny Mr. Spitzer's motion to dismiss the Amended Verified Complaint in its entirety and grant any further relief it deems just and proper, including ordering discovery from Mr. Spitzer on the issue of whether and the extent he used personal email accounts to conduct agency business during his tenure as Attorney General.

Dated: New York, New York
March 21, 2014

Respectfully Submitted,

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