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December 6, 2016

By Hand

Honorable Heidi Brieger
Massachusetts Superior Court
Suffolk County Courthouse – 13th Floor
Three Pemberton Square
Boston, Massachusetts 02108

In re Civil Investigative Demand No. 2016-EPD-36,
Suffolk Superior Court Civil Action No.: 16-1888F

Dear Justice Brieger:

We write on behalf of Exxon Mobil Corporation ('ExxonMobil") in response to the letter submitted by the Office of the Massachusetts Attorney General (the "AGO") on December 2, 2016 (the "Letter"). The Letter is procedurally improper and substantively unpersuasive. If it is considered at all, the Letter's principal value lies in its implicit recognition that a stay is warranted in light of the earlier filed and actively litigated action in federal court.

The AGO filed the Letter on Friday afternoon without authorization of the Court or prior notice to opposing counsel, and in contravention of Superior Court Rule 9A(a)(3). As authorized by the applicable rules, the AGO already had the last word in

briefing before the Court, and there is no good reason to permit the AGO to expand the record at the eleventh hour and supply new purported justifications for the civil investigative demand ("CID"). Even if there were good reason for further submissions, the proper course was for the AGO to alert the Court and opposing counsel so that a proper briefing schedule could be set. The AGO's failure to seek leave of Court or provide prior notice to its adversary is reason enough to disregard the Letter. Nevertheless, ExxonMobil is constrained to respond to the Letter's misleading factual assertions and irrelevant post-hoc rationalizations for the issuance of the CID.

To begin, the Letter contains one implicit assertion with which ExxonMobil agrees: the proceedings in the first-filed action before Judge Kinkeade of the U.S. District Court for the Northern District of Texas have advanced swiftly over the last three months. In the federal action there have been multiple rounds of briefing, oral argument, court conferences, three discovery orders, court-ordered mediation, and an amended complaint. In light of this record, ExxonMobil respectfully submits that the Court should stay this case to permit resolution of the proceedings in federal court, where all of its claims against multiple parties are pending. The chronology set forth by the AGO in the Letter—reflecting the advanced state of the litigation in federal court—only underscores the propriety of staying this action and permitting the federal action to proceed.

The Letter Omits Critical Details Regarding The Proceedings in Federal Court and New York State Court.

Although the Letter reflects, at a high level, the extensive proceedings that have already occurred in federal court, the AGO's chronology omits critical detail regarding both Judge Kinkeade's findings and Attorney General Healey's conduct in the federal action. The Letter notes in anodyne fashion that Judge Kinkeade's October 13, 2016 order (attached as Exhibit 1) directed discovery on the "issue of bad faith to assist the court in its determination whether to abstain." (Ltr. 1–2.) The AGO omits to mention, however, that Judge Kinkeade made specific findings in deeming discovery necessary:

> 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. . . . 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.

Ex. 1 at 3–4, 5–6.

The Letter also paints a misleading picture by leaving out important developments since the October 13, 2016 discovery order. The Letter claims that Judge Kinkeade "sua sponte" issued an order on November 17, 2016 directing Attorney General Healey to appear for a deposition. What is left out, however, is that, during a telephonic conference with the Court the day prior (a transcript of which is attached as Exhibit 2), Attorney General Healey informed Judge Kinkeade that she would not comply with the discovery order or the discovery requests (including a deposition notice) ExxonMobil had propounded pursuant to the discovery order. This context is critical. It was against this backdrop of the AGO's defiance that Judge Kinkeade ordered Attorney General Healey to appear for a deposition, which she was lawfully obligated to do.

The Letter also neglects to mention that Attorney General Healey has now stated that she will refuse to comply with the November 17, 2016 deposition order as well. The Attorney General did not make this intention clear to Judge Kinkeade directly, or to opposing counsel, but rather to the media: When asked by a member of the press whether she intended to appear for her deposition as ordered, she responded: "No, I don't and we will take it up on appeal."[1] Following submission of the Letter, on December 5, 2016, Judge Kinkeade denied the Attorney General's motions for reconsideration of the discovery order and the order compelling her deposition. (A copy of Judge Kinkeade's order is annexed as Exhibit 3.)

The Letter also notes that on November 28, 2016, Attorney General Healey filed a motion to dismiss ExxonMobil's first amended complaint. What the Letter omits, however, is that this latest motion contains the same request for abstention contained in her prior motion to dismiss, making clear that discovery will continue to be necessary to resolve the Attorney General's objection to the federal court's jurisdiction.

In sum, the Letter does not tell the Court the complete story about the proceedings in federal court, notably declining to mention Judge Kinkeade's findings of "concerning" AGO conduct and failing to disclose that Attorney General Healey has now unapologetically vowed to defy two orders of a federal judge, which that judge has now declined to reconsider after full briefing from both sides.

The Letter likewise fails to note material facts about the litigation initiated by the New York Attorney General ("NYAG") in New York State Court. The Letter states that, on October 14, 2016, the NYAG filed a motion to compel production of documents from PricewaterhouseCoopers, a motion that was granted on October 26. What the Letter does not say is that this motion had to do with the assertion of a privilege under Texas law—a narrow issue that has nothing to do with the AGO's inquiry, or with the ongoing proceedings in this Court or federal court.

---

[1] *See* Chris Villani, *AG Healey Vows to Fight Judge's Deposition Order in Exxon Case* – Boston Herald, (Nov. 21, 2016), http://www.bostonherald.com/news/local_coverage/2016/11/ag_healey_vows_to_fight_judge_s_deposition_order_in_exxon_case.

The Letter also states that, on November 14, 2016, the NYAG moved to compel compliance with a subpoena issued to ExxonMobil over a year ago. The Letter advises the Court that the New York State Court heard the motion on November 21, 2016, but conspicuously omits that *the NYAG's motion was denied* and ExxonMobil was not compelled to produce the documents the NYAG sought via the motion. (The Court order denying NYAG's motion is attached as Exhibit 4.) Instead, the court advised the parties to meet and confer regarding the schedule for producing *other* documents *not* sought by the NYAG's motion, so that compliance with the subpoena could be brought to a close. A court appearance has been scheduled for December 9 to address issues arising from that meet and confer.

Attorney General Healey's New Post-Hoc Rationalization for the CID Is Both Irrelevant and Misleading.

The Letter also offers an irrelevant and misleading post-hoc justification for the CID. Seeking to backfill a justification for issuing the CID, the Letter observes that in late October (six months after the AGO issued the CID), ExxonMobil cautioned that it might "de-book" a volume of oil and gas reserves at year-end. Although the AGO's Letter insinuates that this development has something to do with climate change, that is simply false. As ExxonMobil has explained in prior briefing in the Texas litigation, where the AGO unsuccessfully advanced the same baseless argument, regulations issued by the Securities and Exchange Commission ("SEC") require ExxonMobil to estimate, under *existing* economic conditions, whether its oil and gas reserves are economic to extract. The price of oil and gas used for this purpose is required to be the average of the first-day-of-the-month price for each month in the prior year. 17 C.F.R. § 210.4-10(22)(v).

Applying those regulations, ExxonMobil announced that, if the low prices seen during the first nine months of the year continued, 4.6 billion barrels of its proved reserves might not qualify as proved reserves under SEC definitions at year-end 2016. This so-called "de-booking" of proved reserves is thus the product of a specific SEC-required methodology incorporating *current* oil and gas prices. Climate change and the possibility of *future* regulations addressing climate change—the purported focus of Attorney General Healey's investigation—have nothing to do with it, as the AGO well knows. ExxonMobil's compliance with SEC regulations cannot justify the CID.[2]

The *Glock* Case Cited in the Letter Bears No Relation to This Matter.

The Letter also seeks to draw parallels between this matter and the *Glock* case recently addressed by another Justice of this Court. But the AGO's attempt to

[2] It is similarly irrelevant that, as the Letter notes, plaintiffs' lawyers filed a "me too" class action complaint parroting the legally untenable and counterfactual theories presented by Attorney General Healey and Attorney General Eric Schneiderman of New York.

compare Justice Leibensperger's October 28 order regarding the Glock subpoena misses the mark in at least three ways.

First, Glock conceded personal jurisdiction in Massachusetts and the only question was whether it should be compelled to produce documents. (Order at 5 n.3.) This alone distinguishes the *Glock* case from the situation here, where ExxonMobil contests jurisdiction and the AGO has failed to carry its burden of establishing it. And nothing in the *Glock* decision sheds light on this jurisdictional inquiry. For example, the opinion observes that products that reach Massachusetts in the stream of interstate commerce can fall within the scope of Chapter 93A (Order at 4), but such attenuated contacts are insufficient to establish personal jurisdiction. *See Zuraitis* v. *Kimberden*, Inc., No. 071238, 2008 WL 142773, at *3 (Mass. Super. Jan. 2, 2008) ("Merely placing a product into the stream of commerce . . . even when a seller is aware that the product will enter a forum state" is inadequate to establish personal jurisdiction.).

Second, in *Glock* it was not even clear whether Glock was the target of the AGO's investigation, and the court found "no evidence" that Glock was being improperly singled out for investigation. (Order at 4, 6.) Here, by contrast, there is ample evidence in the record—much of it in the form of Attorney General Healey's own statements—that ExxonMobil both *is* the target of the AGO's inquiry and *is* being singled out by Attorney General Healey for improper, political purposes. And while *Glock* might shed some light on the AGO's general authority under Chapter 93A to issue a CID, ExxonMobil does not contest that authority in the abstract. The issue before this Court is whether the AGO has legitimately exercised its authority in connection with the specific CID it served on ExxonMobil, which a federal judge has already found to be "concerning." The decision in *Glock* has nothing to say about that issue.

Third, the CID at issue in *Glock* was substantially narrower than the CID issued to ExxonMobil, leading Justice Leibensperger to overrule Glock's objections to the scope of the CID. Indeed, unlike the ExxonMobil CID, the Glock CID was limited to production of documents within the **four year** limitations period of Chapter 93A. The CID issued to ExxonMobil, by contrast, seeks **40 years' worth** of documents, and raises serious questions about the propriety of the AGO's attempted fishing expedition into ExxonMobil's documents, as well as the circumstances surrounding the CID's issuance.

For the foregoing reasons, the Letter should be disregarded but is, in any event, misleading in its description of the proceedings in Texas and ineffective in its post-hoc attempt to justify the issuance of the CID. If anything, it provides further grounds for issuing a stay.

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For the foregoing reasons, the Letter should be disregarded but is, in any event, misleading in its description of the proceedings in Texas and ineffective in its post-hoc attempt to justify the issuance of the CID. If anything, it provides further grounds for issuing a stay.

Respectfully submitted,

Justin Anderson

cc: I. Andrew Goldberg, Esq. (AGO)
Patrick J. Conlon, Esq. (ExxonMobil)
Thomas C. Frongillo, Esq. (Fish & Richardson)

Exhibit 1

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

Exhibit 2

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff,	)	4:16-CV-469-K
VS.	)	DALLAS, TEXAS
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.	)	November 16, 2016

TRANSCRIPT OF TELEPHONE CONFERENCE

BEFORE THE HONORABLE ED KINKEADE

UNITED STATES DISTRICT JUDGE

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ALSO PRESENT: **MR. JASON BROWN**

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Proceedings reported by mechanical stenography and transcript produced by computer.

TELEPHONE CONFERENCE - NOVEMBER 16, 2016

P R O C E E D I N G S

THE COURT: Good morning. Let me make sure who I have got.

Mr. Anderson?

Hello?

Mr. Anderson?

MR. ANDERSON: Good morning, Judge.

THE COURT: Ms. Cortell?

MS. CORTELL: Yes, Your Honor. I've got a full list if that would help.

THE COURT: Is it Richard Johnston?

MR. JOHNSTON: Yes, Your Honor.

THE COURT: And then Mr. Arz?

MR. ARZ: Yes, Your Honor. Good morning.

THE COURT: Good morning.

How is the weather in New York?

MR. ARZ: Good.

MR. BROWN: And, Your Honor, this is Jason Brown. I'm the chief deputy for the New York Attorney General's Office. I'm on the line as well.

And the weather up here is actually not so bad.

THE COURT: What does that mean?

Is it raining -- raining and cold?

MR. BROWN: Yesterday it was raining and cold.

Today, it's funny, it's a little bit warmer, so --

THE COURT: Oh, well, good. Good.

MR. BROWN: (Inaudible)

THE COURT: Well, good. So -- all right. Anybody else on the line?

MS. CORTELL: Your Honor, it's Nina Cortell. Let me give you a full list, if that's okay.

THE COURT: Sure.

MS. CORTELL: I think that might expedite it.

THE COURT: Okay.

MS. CORTELL: So for ExxonMobil, in addition to Justin Anderson, you have myself, Nina Cortell, Ted Wells, Pat Conlon, Dan Bolia, and Michele Hirshman.

For the Massachusetts Attorney General, in addition to Richard Johnston, you have Melissa Hoffer and Doug Cawley.

And for the New York Attorney General you have -- in additional to Mr. Arz and Jason Brown, you have Pete Marketos and Jeff Tillotson.

THE COURT: Mr. Tillotson. You haven't been in here since you became an independent lawyer. How are you doing?

MR. TILLOTSON: I'm doing fine, Your Honor. Thanks for asking. I'm -- I'm my own boss, and so I routinely both hire and fire myself every afternoon.

THE COURT: Well, there you go. I wasn't worried that you were going broke. I just wondered what was going on

with you. That's good. Good to have you back.

Okay.

MR. TILLOTSON: Thank you.

THE COURT: You know, I've got Ms. Cortell's letter, and I guess her concern and my concern, too, at this point is whether or not Attorney General Schneiderman -- isn't that the right way to say it, general? Just call him General Schneiderman and General Healey, whether they're going to comply with the order on the discovery or not and/or what's going to happen there. And I just wanted to kind of hear y'all's response from that.

MR. JOHNSTON: Your Honor, this is Richard Johnston. You heard from me in September when we were down there arguing. I will talk for the Attorney General's Office in Massachusetts.

As Your Honor will probably recall when we were before you the last time, we argued quite strenuously that the Court didn't have personal jurisdiction over Attorney General Healey. We argued secondarily that the Court should abstain from taking the case because there was almost equivalent proceeding in a Massachusetts state court.

We also argued there was no real irreparable harm because Exxon had already produced many of the same documents to New York.

And when we left court, or as we were leaving court, you told us -- you told the parties that it seemed strange that

Exxon had produced a lot of documents to New York but wouldn't give them to Massachusetts, and directed the parties to have a discussion, and failing a discussion between us that we would mediate before Judge Stanton.

We had discussions about the subject, and then we had a mediation with Judge Stanton, and we left the process with no documents from Exxon.

To our somewhat surprise we then got almost immediately the discovery order, which seemed to relate primarily the issue of abstention, at which point we filed a motion for reconsideration with Your Honor on the discovery order because we pointed out that the law on personal jurisdiction seemed very clear under the Fifth Circuit, that there was no ability on the part of the Court to exercise jurisdiction over an attorney general from another state, no federal court anywhere in the country had done that over the opposition of an attorney general and Exxon didn't provide any such cases. So that motion for reconsideration is still pending.

In the meantime, we received from Exxon approximately a hundred and so written discovery requests, including interrogatories, document requests, and requests for admission. We also got notices of the deposition for Attorney General Healey herself and -- to assist the attorneys general.

Now, each one of those discovery requests had a

particular time period for responding under the rules, and we do intend to respond to all of them under the rules. And as we have said in at least one other paper, we do intend to object to the discovery, including depositions of Attorney General Healey and her associates and to the other forms of discovery.

But we will be filing those in a timely fashion. I think in direct response to Ms. Cortell's concern, we do not expect that Attorney General Healey or the other assistant attorneys general will show up for depositions. We will be filing motions with respect to those prior to the depositions.

I should note that when we got the notices -- we got the letter from Exxon's counsel, I think on Friday during the holiday about whether we would show up or not, and when by Monday afternoon we had not yet responded, they sent a letter to Your Honor saying there was concern about whether people were going to show up.

So it's not as though there was any long delay in letting people know. I think less than -- there hadn't even been a working day on Friday and we were a few hours into the working day on Monday and we still had several days before our formal responses were due.

So we will be filing those responses, and the responses will, among other things, talk about the fact that it is heavily, heavily disfavored to have top executive officials, including attorneys general, deposed about their thought

processes in bringing particular matters.

And what we seem to have here, as we argue in our motion for reconsideration, is a situation where the normal investigatory process has been turned on its head.

We still in response to our civil investigation demand have not received one document from Exxon, and yet Exxon is going after the Attorney General's entire thought process through a hundred written discovery requests and more and then three depositions of key people who are involved in the decision-making process.

So our motion for reconsideration focuses on that as will our objections to the specific discovery requests which they have made.

THE COURT: Is that no?

MR. JOHNSTON: That is a no.

THE COURT: That's the longest no I have had in two or three weeks, but it's okay. I'm used to that. You're a lawyer.

All right.

MR. JOHNSTON: Also it's been a few -- it's been a couple of months now since we were before you, and I know you have been in a busy trial. And, you know, sometimes it's important to just remind everybody where we -- where we think we are on this.

THE COURT: I appreciate that, and that -- you know,

I was a history minor, and so I always like history, and so not that I always need it, and I kind of like to choose which history I'm -- you know, whatever.

But I kind of do keep up with my docket, what's going on. But I'm glad for you to keep up with it, too. That's always fascinating, and that's -- you know, you talk about things are unusual. I would say that's a little unusual to think that, you know, your comments about we got this unusual thing from the Court. You know, whatever.

You can make whatever comments you want to make. I'm going to make whatever rulings I think are appropriate, and I'll rule on your motion when I -- in due time.

So I'll take that as an answer of no.

All right. Mr. Schneiderman's representative -- excuse me. General Schneiderman's representative, who is going to be -- tell me who's speaking for him.

Mr. Arz?

MR. BROWN: So, Your Honor, again, Chief Deputy Jason Brown speaking.

THE COURT: Oh, I'm sorry. Okay.

MR. BROWN: I'm going to take Your Honor's cue, the answer is no. I'm happy to expand at greater length.

The only thing I would note at this point is we were served as nonparty. We got nonparty discovery requests, you know, basically hours or a day or so before we became a party,

so that's also an issue that needs to be fleshed out.

But -- but for the reasons that Mr. Johnston said and others that are unique to me, you are the -- we'll need to exercise our right to make appropriate objections to that discovery request.

THE COURT: Are you a party now?

MR. BROWN: Now? Yes. I think we were served earlier. We're new to the dance, as the Court knows. Today is Wednesday. I think we became a party either on Monday or yesterday. So this is all very new to us.

MS. CORTELL: Your Honor, it's Nina. It may be new to New York, but the order amending was November 10th, and then they immediately went into court in New York and sought to pursue a subpoena there which they had now set for hearing on this coming Monday. And that's really what prompted our letter, because in their papers they're saying that New York is the appropriate place to litigate this, whereas we're already set here on discovery that was then pending.

And so what we're hoping to do is set up a protocol here to handle our discovery which was issued properly pursuant to this Court 's October 13 order permitting discovery.

We acted promptly, which I think the Court would have expected us to do. The discovery is returnable as early as some of it tomorrow and early next week.

We had asked them for confirmation if they were going

to comply. We had not heard back. And in the meantime they go into court in New York and assert jurisdiction there, and that's what prompted the letter.

So what we're here for today is to ask for a protocol, if you will, for how to handle discovery, discovery disputes, so that we, you know, get the discovery we're entitled to under this Court's order.

THE COURT: Y'all want to respond?

MR. BROWN: Yes, Your Honor. Jason Brown again. I mean, Ms. Cortel has slightly butchered the procedural history here. We had, as I think the Court knows, a prior case pending in New York where actually Justice Ostrager had issued an opinion rejecting one of their arguments, as Mr. Wells knows. He appeared in court on that.

So this is not some new litigation intended to do an end-run around anybody. It was simply pursuing the motion to compel that we had previously begun litigation on for a subpoena that long predated any issues that Exxon raises in the Texon case -- in Exxon case that has been pending now for over a year on the subpoena.

So what we did is when we got the -- when we were added as a party, we -- we wrote to Paul, Weiss and asked whether they would withdraw those subpoenas since we were now a party.

On Saturday we received the response no, and then the

next thing we knew we were being scheduled for a status conference here.

So I'm still a little unclear as to what is being requested, but obviously we haven't missed any deadlines yet. We are planning to participate in a way that makes the Court aware of our -- our issues.

Right now, because they are styled as Rule 45 nonparty discovery requests, the only court that would have jurisdiction over that dispute, because the depositions have been noticed here in Manhattan, would be the Southern District of New York.

So right now, without withdrawing their prior subpoenas to us, we have no choice but to go to the Southern District of New York. Again, these are issues that perhaps, know, we would have been better off discussing with Paul, Weiss directly, but they requested a status conference, so here we are.

MR. ANDERSON: Judge, this is Justin Anderson. May I respond to a few of those points?

THE COURT: Yes.

MR. ANDERSON: Well, first, I would just like to say Ms. Cortell did not butcher any -- any history, procedural or otherwise. The matter that was pending before the New York Supreme Court had to do with a subpoena that the New York Attorney General issued to PricewaterhouseCoopers. That was

the subject matter of that litigation, and that is the only litigation that was pending before they rushed into court on Monday morning to raise the subpoena that was at issue before this Court.

So in terms of the procedural history, it is not correct to suggest that this matter was before the Court in New York. It was a separate subpoena issued to ExxonMobil's auditors.

Second, the request on Friday to adjourn the subpoena that had been issued to ExxonMobil to the New York Attorney General, that request had nothing to do with the addition of the New York Attorney General as a party to this action.

You know, the basis in the letter was that there is a motion for reconsideration and a motion to dismiss pending, and the New York Attorney General requested that we adjourn the return date pending this Court's resolution of those motions.

We responded in the letter promptly that that would make no sense because you ordered discovery to determine whether there is jurisdiction. So putting off discovery until jurisdiction has been resolved was nonsensical.

Aside from -- aside from that letter, we had heard nothing from either the Massachusetts Attorney General or the New York Attorney General in response to the discovery request that we made.

And we made our first set of discovery requests at

the end of October.

On October 24th we served Massachusetts.

We then served New York on the 3rd of November.

So this idea that we came rushing to you without giving them any time to respond, that is truly a butchering of the record.

And, finally, Judge, you know, with respect to the subpoenas, if -- if -- it is correct that right now all that is pending is the third-party subpoenas, and they naturally would be -- if there is a motion to quash or a motion to compel, it naturally would -- would begin in the Southern District of New York. But there is a procedure for transferring jurisdiction of -- of any motion to quash in connection with those subpoenas to this Court.

And in light of the fact that those subpoenas now pertain to parties to the litigation before this Court, they would be -- it would be quite likely that if a motion to transfer is made that those objections find their way to you.

THE COURT: Well, here's -- let me -- let me begin by saying, Mr. Brown, you scored some points by being -- with the Court by being frank and to the point. So I'm making you an honorary, as you said, Texon. I don't know what that is. But I'm going to make you -- I look forward to having you here sometimes and I will tease you about that. That's a good name for some future company, I guess.

But, anyway, here's what I would like to do, especially since I'm in this trial that may take the rest of my adult days to finish, and then I have another one starting in January with Facebook and a local company here, another big case.

So what I would like to do is convert Judge Stanton to a special master to deal with y'all on this so you can be talking to somebody regularly. He's my special master on this case. I have complete confidence in him. Obviously, I need y'all's permission to do that. And you're going to -- you're going to have to pay for that among yourselves.

But then we can get something, and you'll have somebody to have my ear when my other part of me is sitting out there and we can get this moving and can consider all of your -- you know, your various concerns.

I get it. And it's -- you know, we're getting pretty close to the point of loggerheads. And okay, that's fine. And try to figure that answer out.

Is that okay with the parties at this point?

I will make sure that he does not overcharge or undercharge you, if that's okay. I think he charges about $725.00 an hour. And, you know, that's what Johnson & Johnson -- I think that's what they're paying him in here.

But, anyway, so that's what I would like to be able to do so we can get something going on it and try to get

something besides us talking on the phone and get some resolution for y'all as quickly as possible.

So what about New York, Mr. Brown?

MR. BROWN: Thank you, Your Honor. And -- and I think we all very much appreciate the spirit of that suggestion.

My only concern -- and I -- you know, I know lawyers always come up with concerns. But we -- we obviously do have a personal jurisdiction defense that we wanted to be careful not to waive.

THE COURT: I'm not trying to get you to waive -- I don't want you to waive anything. I'm not -- you know, yes, you don't know me, but I'm not -- I'm not trying to sneak up on you or anybody else. That's not my style. We're going to fight this thing out, y'all are, one way or the other, and it's not going to be based upon, you know, that sort of thing, okay?

I'm not -- I'm not trying to get you to do that, okay?

This is on the record. This is on the record. I don't know how much clearer I can be than that, okay?

MR. BROWN: Okay. Thank you, Your Honor.

THE COURT: Is that okay?

So it's okay with you?

MR. BROWN: Yeah, I mean, we haven't -- unfortunately we have taxpayer money that we have to account for, but

conceptually I think that's fine.

THE COURT: Okay.

MR. BROWN: I just have to work out the mechanics of how that would -- how we would be able to find funding for our payment. That's all.

THE COURT: Yeah, but don't you do that now in various cases?

MR. BROWN: No. Actually, no.

THE COURT: You don't?

MR. BROWN: I'm not looking to throw -- Your Honor, I'm not looking to throw a roadblock, so let's do this issue and then let the Court know.

THE COURT: Well, who's -- who's paying for Marketos?

MR. BROWN: Marketos, Your Honor.

THE COURT: Yeah, but, I mean, he's -- you're paying for him, right?

MR. BROWN: Yeah. No. And -- we have to get to several levels of authorization to do it. So, again, Your Honor, I don't mean to put a --

THE COURT: And Tillotson doesn't work for free. Tillotson doesn't work for free at all, because I've had him in here. He's the most expensive lawyer in Dallas.

MR. TILLOTSON: I'm going to take that as a compliment.

THE COURT: It is a compliment.

MR. TILLOTSON: Have to go through a big process and approval process that we went through, so I think there's just -- they want to make sure they can -- they can fund this in a way --

THE COURT: Yeah. Okay. Mr. Tillotson, will you just -- just commit to me -- yeah, Mr. Tillotson, will you just commit to me you will do your best to get this done?

MR. TILLOTSON: Of course, Your Honor. Absolutely.

THE COURT: Yeah. Okay. And you know -- you know Judge Stanton well, correct?

MR. TILLOTSON: I do, Your Honor. I just want to make sure -- he needs to clear conflicts, because obviously I have had relationships with him and against him in the past, so he will need to inform everyone obviously of any conflicts he may have with the parties.

THE COURT: Okay.

MR. TILLOTSON: I have no problem with him being special master.

THE COURT: Yeah. Yeah. Okay. Well, yeah. Obviously, everybody has got to do that.

All right. All right. And then I haven't meant to ignore you, Mr. Johnston.

MR. JOHNSTON: I will be short, Your Honor. I echo Mr. Brown's comments. Because it is taxpayer money I don't have the authority to commit to that, so I will have to have

discussions internally here.

THE COURT: Well, you did hire Mr. Cawley, correct? Is that correct?

MR. JOHNSTON: That's correct.

THE COURT: And McKool Smith is known on what I see locally as the most expensive law firm and the most successful -- one of the successful firms, I'm sure that you would agree, wouldn't you, Mr. Cawley?

MR. CAWLEY: Well, I'd agree -- I'd love to agree with the second half, Your Honor. On the first one I'd say maybe we're not the most expensive after getting through negotiating with the State of Massachusetts.

THE COURT: Oh, I'm sorry. But you are a very successful firm and do extremely well, partner by partner, correct?

MR. CAWLEY: Yes, Your Honor.

THE COURT: I know.

Okay. So y'all work on getting that done. Assuming that you can work through whatever layers there are -- there are, you'll work on that?

Yes?

MR. CAWLEY: Absolutely.

THE COURT: Who said that?

UNIDENTIFIED SPEAKER: Absolutely, Your Honor.

THE COURT: Who said that, for the record?

MR. CAWLEY: This is Doug Cawley. I'm one person who said we'll work on it.

THE COURT: And also, Mr. Johnston, do you, too?

MR. JOHNSTON: I do. I do, too.

THE COURT: Hey, is the T silent or not in your -- Johnston?

MR. JOHNSTON: Not the way I pronounce it, Your Honor.

THE COURT: Okay. I'm working on trying to get you to be a -- what did we make -- what did I make Mr. Brown? A Texon.

MR. BROWN: Not a very strong --

THE COURT: Texon. A Texon. You're next. We're going to --

MR. BROWN: A Texon.

THE COURT: Okay.

MR. JOHNSTON: Last time you told me I was your thirteenth favorite Yankee.

THE COURT: That's correct. Okay. Well --

MS. CORTELL: And, Your Honor, for the record, ExxonMobil of course is agreeable, and we'll work with the parties to that end.

THE COURT: Oh, you were next.

Okay. So y'all work on that. And get that done in the next day or two so we can get that resolved before

Thanksgiving, and we can kind of get things moving, okay?

And then try to set up --

MR. BROWN: Your Honor?

THE COURT: Yes, sir.

MR. BROWN: Your Honor, this is Mr. Brown here. Implicit in what you're saying, I hope, is because I think our objections -- our court filing might be due as early as tomorrow -- is that the current discovery requests are stayed pending our discussions to work with the special master?

THE COURT: Well, you agree on the special master and then we'll see, okay?

So -- all right. That does kind of put the pressure on y'all to get on it, so let me know.

You know what? I have always found that what we want to do or can -- we can get things done through the process of whatever. I realize there's a lot of lawyers in the attorney generals' offices, but there's one at the top and can make these decisions, and so y'all get that done, okay?

Anything else y'all want to talk to me about?

MS. CORTELL: I'm assuming that there's no implied stay as a result of this conference.

THE COURT: I'm not staying anything. I'm not staying anything. No. If you want to stay, file something and ask me for it, okay?

MS. CORTELL: Okay.

THE COURT: All right.

MS. CORTELL: Thank you, Your Honor.

THE COURT: All right. Y'all --

MR. BROWN: Thank you, Your Honor.

THE COURT: Thank y'all. And we'll look forward to seeing y'all again soon, and have a wonderful Thanksgiving.

MS. CORTELL: You, too, Your Honor. Thank you.

MR. BROWN: Thank you, Your Honor.

THE COURT: Thank y'all. Bye-bye.

(Hearing adjourned)

INDEX

I, TODD ANDERSON, United States Court Reporter for the United States District Court in and for the Northern District of Texas, Dallas Division, hereby certify that the above and foregoing contains a true and correct transcription of the proceedings in the above entitled and numbered cause.

WITNESS MY HAND on this 17th day of November, 2016.

/s/Todd Anderson
TODD ANDERSON, RMR, CRR
United States Court Reporter
1100 Commerce St., Rm. 1625
Dallas, Texas 75242
(214) 753-2170

Exhibit 3

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

EXXON MOBIL CORPORATION, Plaintiff, v. 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.	§ § § § § § § § § § § § § § §	Civil Action No. 4:16-CV-469-K

ORDER

Before the Court is Defendant Massachusetts Attorney General Maura Healey's Motion to Reconsider Jurisdictional Discovery Order (Doc. No. 78) and Attorney General Healey's Motion to Vacate and Reconsider November 17 Order, Stay Discovery, and Enter a Protective Order (Doc. No. 120). After careful consideration, the Court **DENIES** Defendant's Motions.

SO ORDERED.

Signed December 5th, 2016.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE

Exhibit 4

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARRY R. OSTRAGER JSC *Justice* **PART** 61

Index Number : 451962/2016
PEOPLE OF STATE OF NEW YORK
vs.
PRICEWATERHOUSECOOPERS LLP
SEQUENCE NUMBER : 003
COMPEL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | **No(s).** _____

Answering Affidavits — Exhibits _____ | **No(s).** _____

Replying Affidavits _____ | **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is denied in accordance with the decision on the record on November 21, 2016.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: November 21, 2016

Barry Ostrager
_____, J.S.C.
BARRY R. OSTRAGER
JSC

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE