

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

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

APPENDIX

**DEFENDANT ATTORNEY GENERAL MAURA HEALEY’S OPPOSITION TO
 PLAINTIFF’S MOTION TO EXPEDITE BRIEFING AND CONSIDERATION OF
 PLAINTIFF’S MOTION FOR LEAVE TO AMEND**

<u>Exhibit</u>	<u>Description</u>	<u>Page(s)</u>
n/a	<u>Declaration of Peter C. Mulcahy (Oct. 21, 2016)</u>	-
1	Order to Show Cause, dated October 18, 2016, by the New York Supreme Court for New York County in <i>In the Matter of the Application of the People of the State of New York</i> , Index No. 451962/2016, Document No. 32, accessible at https://iapps.courts.state.ny.us/webcivil/FCASMain .	001-004
2	Memorandum of Law of Respondent Exxon Mobil Corporation in Opposition to the Application for an Order to Show Cause, dated October 17, 2016, filed in the New York Supreme Court for New York County in <i>In the Matter of the Application of the People of the State of New York</i> , Index No. 451962/2016, Document No. 18, accessible at https://iapps.courts.state.ny.us/webcivil/FCASMain .	005-017
3	Affirmation of Katherine C. Milgram in Support of the Office of the Attorney General’s Motion to Compel Compliance	018-025

with an Investigative Subpoena, dated October 14, 2016, filed in the New York Supreme Court for New York County in *In the Matter of the Application of the People of the State of New York*, Index No. 451962/2016, Document No. 1, accessible at <https://iapps.courts.state.ny.us/webcivil/FCASMain>.

- 4 Supplemental Affirmation of Katherine C. Milgram in Support of the Office of the Attorney General’s Motion to Compel Compliance with an Investigative Subpoena, dated October 17, 2016, filed in the New York Supreme Court for New York County in *In the Matter of the Application of the People of the State of New York*, Index No. 451962/2016, Document No. 25, accessible at <https://iapps.courts.state.ny.us/webcivil/FCASMain>. 026-032

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL OF
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(214) 978-4000
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Dated: October 21, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 21, 2016, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system. Any other counsel of record will be served in accordance with the Federal Rules of Civil Procedure.

s/ Douglas A. Cawley
Douglas A. Cawley

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.)
)
)

No. 4:16-CV-469-K

DECLARATION OF PETER C. MULCAHY

I, Peter C. Mulcahy, declare as follows:

1. My name is Peter C. Mulcahy. I am admitted to practice *pro hac vice* in this Court and am an Assistant Attorney General in the Environmental Protection Division of the Office of Massachusetts Attorney General Maura Healey. I am one of the attorneys representing Maura Healey, Attorney General of Massachusetts, in her official capacity, in this case. I am over 18 years of age and am fully competent in all respects to make this Declaration. I have personal knowledge of the facts stated herein, and each of them is true and correct.

2. I submit this declaration in support of Attorney General Healey's Opposition to the Plaintiff Exxon Mobil Corporation's Motion to Expedite Briefing and Consideration of Plaintiff's Motion for Leave to Amend.

3. Attached to this declaration as **Exhibit 1** is a true and accurate copy of an Order to Show Cause, dated October 18, 2016, by the New York Supreme Court for New York County in *In the Matter of the Application of the People of the State of New York*, Index No.

451962/2016, Document No. 32. I obtained a copy of the document from New York's WebCivil Supreme online docketing system, which is accessible at

<https://iapps.courts.state.ny.us/webcivil/FCASMain>, on October 21, 2016.

4. Attached to this declaration as **Exhibit 2** is a true and accurate copy of a Memorandum of Law of Respondent Exxon Mobil Corporation in Opposition to the Application for an Order to Show Cause, dated October 17, 2016, filed in the New York Supreme Court for New York County in *In the Matter of the Application of the People of the State of New York*, Index No. 451962/2016, Document No. 18. I obtained a copy of the document from New York's WebCivil Supreme online docketing system, which is accessible at

<https://iapps.courts.state.ny.us/webcivil/FCASMain>, on October 21, 2016.

5. Attached to this declaration as **Exhibit 3** is a true and accurate copy of a Affirmation of Katherine C. Milgram in Support of the Office of the Attorney General's Motion to Compel Compliance with an Investigative Subpoena, dated October 14, 2016, filed in the New York Supreme Court for New York County in *In the Matter of the Application of the People of the State of New York*, Index No. 451962/2016, Document No. 1, without accompanying exhibits. I obtained a copy of the document from New York's WebCivil Supreme online docketing system, which is accessible at <https://iapps.courts.state.ny.us/webcivil/FCASMain>, on October 21, 2016.

6. Attached to this declaration as **Exhibit 4** is a true and accurate copy of a Supplemental Affirmation of Katherine C. Milgram in Support of the Office of the Attorney General's Motion to Compel Compliance with an Investigative Subpoena, dated October 17, 2016, filed in the New York Supreme Court for New York County in *In the Matter of the Application of the People of the State of New York*, Index No. 451962/2016, Document No. 25,

without accompanying exhibits. I obtained a copy of the document from New York's WebCivil Supreme online docketing system, which is accessible at

<https://iapps.courts.state.ny.us/webcivil/FCASMain>, on October 21, 2016.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 21, 2016.

s/ Peter C. Mulcahy
Peter C. Mulcahy (admitted *pro hac vice*)
peter.mulcahy@state.ma.us
Assistant Attorney General
Environmental Protection Division
Office of Massachusetts Attorney
General Maura Healey
(617) 727-2200
(617) 727-9665 (fax)

EXHIBIT 1

At IAS Part 61 of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse at 60 Centre Street, New York, New York, on the 18th day of October, 2016

BARRY R. OSTRAGER

PRESENT: The Hon. _____ JSC
Justice of the Supreme Court

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

In the Matter of the Application of the

PEOPLE OF THE STATE OF NEW YORK, by
ERIC T. SCHNEIDERMAN,
Attorney General of the State of New York,

Petitioner,

For an order pursuant to C.P.L.R. § 2308(b) to compel
compliance with a subpoena issued by the Attorney
General

- against -

PRICEWATERHOUSECOOPERS LLP and
EXXON MOBIL CORPORATION,

Respondents.

Index No. 451962/16

ORDER TO SHOW CAUSE

**ORAL ARGUMENT
REQUESTED**

MOTIONSEQUENCE# 001

Upon the Office of the Attorney General's Memorandum of Law in Support of its motion to compel compliance with a *subpoena duces tecum* issued to PricewaterhouseCoopers LLP ("PwC") dated August 19, 2016 in connection with the Attorney General's investigation of Exxon Mobil Corporation ("Exxon") (together with PwC, "Respondents"), the annexed Affirmation of Katherine C. Milgram in Support of such motion to compel dated October 14,

2016, and upon all the other documentation submitted in support of such motion, and sufficient cause having been alleged therefor, it is hereby

ORDERED that the Respondents appear and show cause before IAS Part 61 of the Supreme Court, New York County, at the Courthouse located at 60 Centre Street, Room 341 New York, New York, on the 24th day of October 2016, at 9:30 a.m. ~~per~~ or as soon thereafter as counsel may be heard, why an Order should not be issued pursuant to New York Civil Procedure Law and Rules Sections 403(d) and 2308(b)(1):

1. compelling Respondents, within 10 days of issuance of this Order, to comply with the Attorney General's *Subpoena Duces Tecum* dated August 19, 2016, without applying a purported accountant-client privilege; and
2. granting such other and further relief as the Court deems just and proper.

ORDERED that any opposition papers shall be served on Petitioner by electronic mail to Petitioner's counsel, Katherine C. Milgram, at katherine.milgram@ag.ny.gov, by ~~5:00 p.m. three~~ ^{with working} ~~days prior to the date set forth above for the hearing on Petitioner's motion to compel.~~ copies delivered to Room 341 by October 20 at 11:00 a.m.

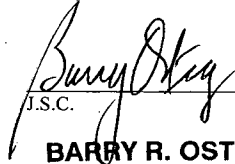
ORDERED that any reply papers shall be served on Respondents by electronic mail to Respondent Exxon's counsel, Theodore Wells Jr., at twells@paulweiss.com and Michele Hirshman, at mhirshman@paulweiss.com, and to Respondent PWC's counsel, David Meister, at david.meister@skadden.com, and Jocelyn Strauber, at jocelyn.strauber@skadden.com, by ^{with} ~~5:00 p.m. one day prior to the date set forth above for the hearing on Petitioner's motion to~~ a working copy delivered to Room 341 by October 21 at 11:00 a.m. ~~compel.~~

ORDERED, that service of a copy of this Order and the papers upon which it is granted by electronic mail to Respondent Exxon's counsel, Theodore Wells Jr. and Michele Hirshman,

and to Respondent PwC's counsel, David Meister and Jocelyn Strauber, on or before

October 19, shall be deemed sufficient service, assuming counsel
has consented to accept service or jurisdiction
has otherwise been obtained.

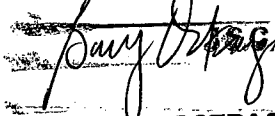
ENTER:



J.S.C.

BARRY R. OSTRAGER
JSC

**ORAL ARGUMENT
DIRECTED**



J.S.C.

BARRY R. OSTRAGER
JSC

EXHIBIT 2

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

In the Matter of the Application of the

PEOPLE OF THE STATE OF NEW YORK, by
ERIC T. SCHNEIDERMAN,
Attorney General of the State of New York,

Petitioner,

For an order pursuant to C.P.L.R. § 2308(b) to
compel compliance with a subpoena issued by the
Attorney General

-against-

PRICEWATERHOUSECOOPERS LLP and
EXXON MOBIL CORPORATION,

Respondents.

Index No. 451962/2016

**MEMORANDUM OF LAW OF
RESPONDENT EXXON MOBIL
CORPORATION IN OPPOSITION
TO THE APPLICATION FOR AN
ORDER TO SHOW CAUSE**

**PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP**
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

*Attorneys for Respondent Exxon
Mobil Corporation*

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Respondent Exxon Mobil Corporation (“ExxonMobil”) submits this memorandum of law in opposition to the application of Petitioner New York Attorney General Eric Schneiderman (“Attorney General”) for an Order to Show Cause on the grounds that (1) the issuance of an order to show cause pursuant to C.P.L.R. § 2214 is not proper because the Attorney General has failed to make a showing that would justify such an order; (2) the Attorney General has failed to meet-and-confer in good faith in accordance with 22 N.Y.C.R.R. § 202.70. The Attorney General’s filing presents no exigency to this Court. As such, ExxonMobil respectfully submits that the Attorney General should have presented its motion to this Court in the ordinary course; that is, via a notice of petition pursuant to C.P.L.R. § 403(a). ExxonMobil would not object to this Court’s treatment of the Attorney General’s filing as if it were a notice of petition—as it should have been filed—and the subsequent setting of a briefing schedule convenient to the parties to address the merits of the Attorney General’s claims. ExxonMobil does, however, object to the Attorney General’s groundless presentation of his claims to this Court as requiring emergency relief, and requests that the Court therefore decline to issue an Order To Show Cause in this matter.¹

¹ In this Memorandum, ExxonMobil solely addresses why the Attorney General’s Application for an Order to Show Cause should be denied. ExxonMobil does not address (1) whether the Attorney General has, in presenting a hypothetical dispute to this Court, filed relief for a justiciable controversy; or (2) the merits of whether the Texas accountant-client privilege, codified at Texas Occupations Code § 901.457, applies to documents sought by the Attorney General’s subpoena. ExxonMobil respectfully reserves the right to raise substantive and ripeness challenges to the Attorney General’s Motion to Compel at a later date before this Court.

STATEMENT OF FACTS

On November 4, 2015, Attorney General Schneiderman issued a broad subpoena to ExxonMobil seeking nearly 40 years of documents relating to climate change and other topics. ExxonMobil has complied with the Attorney General's subpoena, producing more than 1.2 million pages of documents to the Attorney General since he initiated his investigation. To date, ExxonMobil has not asserted the accountant-client privilege to withhold a single document from its production to the Attorney General.

On August 19, 2016, the Attorney General issued a second subpoena as part of its inquiry (the "PwC Subpoena"), this time to ExxonMobil's independent auditor, PricewaterhouseCoopers LLP ("PwC"). The PwC Subpoena seeks documents related to PwC's audit of ExxonMobil, among other topics. This subpoena had an original return date of September 2, 2016. (Milgram Aff. ¶ 14.)² Some of the documents in PwC's possession that are potentially responsive to the PwC Subpoena may be privileged under Texas state law, specifically Texas Occupations Code § 901.457, the accountant-client privilege.

On September 7, 2016, counsel for ExxonMobil informed the Attorney General that some of the documents in PwC's possession that are potentially responsive to the PwC Subpoena may be privileged under Texas Occupations Code § 901.457. (Milgram Aff. ¶ 16.) Separately, the Attorney General agreed to PwC's request to extend the return date of the PwC Subpoena, with an agreement by PwC that it would begin to

² Citations in the form "Milgram Aff. ___" are references to the Affirmation of Katherine C. Milgram in Support of the Office of the Attorney General's Motion to Compel Compliance with an Investigative Subpoena, dated October 14, 2016.

provide certain categories of documents to the Attorney General on September 23, 2016. (*Id.* ¶ 17.)

On September 23, 2016, counsel for ExxonMobil informed the Attorney General that it intended to review “certain categories of responsive documents that may be subject to the accountant-client privilege, prior to production of those documents by PwC.” (Milgram Aff. Ex. H.) Counsel for ExxonMobil informed the Attorney General that if it determined that any responsive document was privileged under Texas law, it would assert the privilege and provide a privilege log. (*See id.*)

PwC has made three productions to the Attorney General. (Milgram Aff. ¶ 19.) To date, ExxonMobil has not asserted the accountant-client privilege to withhold a single responsive document from the PwC productions to the Attorney General.

On October 14, 2016, at approximately 10:31 a.m., Katherine Milgram, Chief of the Investor Protection Bureau of the New York Attorney General’s Office, left a voicemail for counsel for ExxonMobil, stating the Attorney General’s view that the “Texas Occupation Code provision that Exxon . . . cited . . . hasn’t been construed as a privilege but as a rule of confidentiality” and indicating that the Attorney General had previously assured ExxonMobil and PwC of its intent to treat the documents provided pursuant to the subpoena as confidential. (Hirshman Aff. ¶ 3 & Ex. A.)³ Ms. Milgram asked that counsel let the Attorney General know, “as soon as possible, if [ExxonMobil] intend[s] to withdraw the accountant-client privilege claim, and allow PwC to produce documents in response to our subpoena without a document-by-document review for this

³ Citations in the form “Hirshman Aff. ___” are references to the Affirmation of Michele Hirshman in Support of ExxonMobil’s Opposition to the Application for an Order to Show Cause, dated October 17, 2016.

privilege by Exxon.” (*Id.*) This voicemail said nothing about the Attorney General’s intention to file a motion with the Court. (*See id.*) That same afternoon, at approximately 2:41 p.m., counsel for ExxonMobil contacted Ms. Milgram via email to confirm the receipt of her voicemail message and “arrange a call next week to discuss the accountant privilege”, indicating that counsel would “coordinate schedules and get back to [Ms. Milgram] on Monday with some times.” (Hirshman Aff. Ex. B.) However, at 2:25 pm—approximately twenty minutes *before* counsel for ExxonMobil’s counsel sent the above response to the Attorney General’s voicemail message, and less than four hours after making its demand—the Attorney General filed the instant Application. At approximately 4:26pm, Ms. Milgram left another voicemail for ExxonMobil’s counsel, acknowledging receipt of counsel’s email and indicating that the Attorney General’s Office was happy to discuss the matter further, but also informing counsel that the Attorney General “went ahead and filed a motion today, in New York Supreme” and would serve a copy of the papers on counsel. (Hirshman Aff. ¶ 7 & Ex. C.) Ms. Milgram also indicated that, notwithstanding the filing of the Attorney General’s request, it was “still obviously happy to meet next week, whether by phone or in person to discuss this issue and try and resolve it” and offering to withdraw the motion if ExxonMobil decided to permit PwC to produce documents without “withholding on the basis of this purported privilege.” (Hirshman Aff. ¶ 7 & Ex. C.) Copies of the Attorney General’s papers were provided by email to counsel for ExxonMobil at approximately 5:18pm on October 14, 2016. (*See* Hirshman Aff. Ex. D.)

The Attorney General’s Application was premised not on any assertion of privilege or refusal to provide responsive documents—nor could it be because no such

assertion or refusal has taken place—but upon ExxonMobil’s request and PwC’s agreement that ExxonMobil review certain responsive documents to determine *if* ExxonMobil should assert privilege with respect to those documents.

ARGUMENT

I. This Is Not a Proper Case for the Issuance of an Order to Show Cause Because the Attorney General Failed to Plead the Requisite Exigency.

The Civil Practice Law and Rules (“CPLR”) provide that the Court “*in a proper case* may grant an order to show cause, to be served in lieu of notice of motion, at a time and in a manner specified therein.” CPLR § 2214(d) (emphasis added); CPLR § 403(d). “There is no specific definition of a proper case, and it is obvious that the legislative intent was to leave that question entirely within the court’s discretion.” *City of N.Y. v. West Winds Convertibles Int’l, Inc.*, 16 Misc. 3d 646, 653 (Sup. Ct. Kings Cnty. 2007) (quoting *Mallory v. Mallory*, 113 Misc. 2d 912, 913–14 (Sup. Ct. Nassau Cnty. 1982)). It is well settled that “[i]f a judge finds that there is no reason why an order to show cause is required, he may refuse to sign such an order.” *Mallory*, 113 Misc. 2d at 914; *see also Cottone v. Cottone*, 197 A.D.2d 938, 938–39 (4th Dep’t. 1993) (“declin[ing] to grant the *ex parte* order that a justice of the Supreme Court refused to sign” because the dispute was “not a ‘proper case’ for the grant of such an order”).

While the practice commentaries state that “[a]n order to show cause is merely an alternative way of bringing on a contested motion,” Patrick M. Connors, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR 2214 at 2214:24; *see also* Siegel, N.Y. Prac. § 248 (5th ed.), the relevant statutes, case law and commentary make clear that an order to show cause may be used *only* where there is some exigency which would necessitate an expedited resolution of the underlying

motion. *See* 22 N.Y.C.R.R. 202.70, Rule 19 (“Motions shall be brought on by order to show cause only when there is genuine urgency (e.g., applications for provisional relief), a stay is required or a statute mandates so proceeding.”); *West Winds Convertibles Int’l.*, 16 Misc. 3d at 655 (denying City of New York’s application for an order to show cause where the city sought temporary relief pending a hearing on its motion for a preliminary injunction based, in part, on failure to show required exigency); 2PT1 West’s McKinney’s Forms Civil Practice Law and Rules § 5:16 (“an order to show cause may *only* be used to bring on a motion ‘in a proper case’—that is: (1) When required by statute or rule . . . ; (2) When a return date is needed that is earlier than the return date that would be required if the motion were brought on by a notice of motion . . . ; or (3) When some immediate relief is needed, such as a temporary restraining order (TRO) or a stay of the proceedings pending hearing and determination of the motion.” (citation omitted)); Patrick M. Conners, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR 2214 at C2214:24-C2214:26A (an order to show cause may be utilized at the petitioner’s option for such purposes as the obtaining of a stay or some other provisional remedy, to facilitate a judicially sanctioned method of service or to accelerate the return date).

Here, the Attorney General entirely failed to plead the requisite exigency. The papers the Attorney General submitted to this Court discuss only the purported basis for its so-called underlying “motion to compel.” It appears that the Attorney General is seeking to require PwC to comply with its subpoena without regard to ExxonMobil’s privilege and “compel” ExxonMobil to give blanket consent to PwC to produce documents without allowing ExxonMobil to review and make a claim of privilege.

Critically—and tellingly—the Attorney General made no attempt whatsoever to demonstrate the necessity of proceeding by an order to show cause rather than by the usual notice of motion, or the need for any immediate relief. Failure to do so warrants denial of the Application.

Not only has the Attorney General failed to plead the requisite exigency, but none is conceivable here. The Attorney General does not seek provisional or temporary relief during the pendency of a motion for a preliminary injunction, but rather seeks compliance with a subpoena issued to PwC not even two months ago, pursuant to which ExxonMobil understands PwC has provided documents to the Attorney General as agreed upon by PwC and the Attorney General, and will presumably continue to provide documents into the future based on the breadth of the subpoena.” (*See* Milgram Aff. Ex. A). The present motion is plainly not suited to an expedited resolution provided by an order to show cause.

For the reasons stated above, this is not a proper case for the issuance of an order to show cause because the Attorney General failed to plead exigency.

II. The Attorney General Failed to Make a Good Faith Effort to Resolve the Issues Raised in His Application.

In addition to wholly failing to demonstrate the requisite exigency for an order to show cause, the Attorney General failed to make a good faith effort to resolve the issues raised in his application prior to its filing. This failure provides an additional reason to deny the Application.

22 N.Y.C.R.R. § 202.7 requires, “with respect to a motion relating to disclosure or to a bill of particulars, an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised in the

motion.” 22 N.Y.C.R.R. § 202.7(a)(2). Section 202.7(c) provides that “[t]he affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held.” *Id.* § 202.7(c). Section 202.7(d) further states that “[a]n order to show cause of an application for ex parte relief . . . shall contain the affirmation of good faith set forth in this section if such affirmation is otherwise required by this section.” *Id.* § 202.7(d). There is nothing in that would excuse the requirement of a good faith effort here.

The Attorney General has not shown a good faith effort to resolve the present dispute prior to burdening the Court with its Application. While Ms. Milgram did leave a voicemail message for ExxonMobil’s counsel four hours before the Application was filed and a voicemail *after* the Application was filed, these voicemails are insufficient to show a “good faith effort” to resolve the dispute. There is not even a suggestion in Ms. Milgram’s initial voice message that the Attorney General would file the application for an order to show cause within mere hours of the call. (*See* Hirshman Aff. Ex. A.)

CONCLUSION

For the reasons set forth above, Respondent ExxonMobil respectfully requests that the Court deny Plaintiff’s Application for an Order to Show Cause and set a briefing schedule consonant with one applicable to a notice of petition and at a time agreeable to all parties. We are prepared, at the Court’s direction, to obtain such scheduling information for the Court.⁴

⁴ Should the Court issue the proposed order, ExxonMobil respectfully reserves the right to be heard on the justiciability and the merits of a motion by the Attorney General.

Dated: October 17, 2016

Respectfully submitted,

**PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP**

/s/ Michele Hirshman

Theodore V. Wells, Jr.

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Attorneys for Exxon Mobil Corporation

EXHIBIT 3

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

In the Matter of the Application of the

PEOPLE OF THE STATE OF NEW YORK, by
ERIC T. SCHNEIDERMAN,
Attorney General of the State of New York,

Petitioner,

For an order pursuant to C.P.L.R. § 2308(b) to compel
compliance with a subpoena issued by the Attorney
General

Index No. _____

- against -

PRICEWATERHOUSECOOPERS LLP and
EXXON MOBIL CORPORATION,

Respondents.

**AFFIRMATION OF KATHERINE C. MILGRAM IN SUPPORT OF THE OFFICE OF
THE ATTORNEY GENERAL’S MOTION TO COMPEL COMPLIANCE WITH AN
INVESTIGATIVE SUBPOENA**

KATHERINE C. MILGRAM, under penalty of perjury, affirms:

1. I am Chief of the Investor Protection Bureau of the Office of the Attorney General of the State of New York (“Attorney General”), counsel for Petitioner.

2. I make this affirmation in support of Petitioner’s motion to compel compliance with a *subpoena duces tecum* issued by the Attorney General to Respondent PricewaterhouseCoopers LLP (“PwC”) on August 19, 2016 (the “Subpoena”) in connection with the Attorney General’s investigation of Exxon Mobil Corporation (“Exxon”) (together with PwC, “Respondents”). Attached as Exhibit A is a true and correct copy of the Subpoena.

3. PwC has refused to fully comply with the Subpoena, deferring to Exxon's assertion of a purported accountant-client privilege that is not recognized under New York or Texas law.

4. Since November 2015, the Attorney General has been conducting an investigation, pursuant to New York General Business Law ("G.B.L.") § 352 (the "Martin Act"), New York Executive Law § 63(12), and G.B.L. § 349 into whether Exxon's representations to investors and to the public about risks related to climate change, including the degree of risk that climate change poses to Exxon's business, were materially misleading.

The Attorney General's Investigation of Exxon

5. The Attorney General has reason to believe that Exxon has had longstanding knowledge of the risks associated with climate change, including the risks posed to its business by climate change-related policies and regulations.

6. Notwithstanding its apparent knowledge of climate change-related risks, Exxon appears to have downplayed those risks in public statements. For example, Exxon asserted to the investing public in a 2014 report entitled "Energy and Carbon – Managing the Risks" ("Managing the Risks Report") that it is "confident that none of [its] hydrocarbon reserves are now or will become 'stranded'" (Ex. B, at 1) and that "the company does not believe that current investments in new reserves are exposed to the risk of stranded assets" (Ex. B, at 19). Attached as Exhibit B is a true and correct copy of the Managing the Risks Report.

7. Exxon has also made public statements about how it incorporates the likely effects of carbon regulation into its investment decision-making using a "proxy cost of carbon." For example, Exxon made such a statement in its Managing the Risks Report. (Ex. B, at 17-18.) The Managing the Risks Report also asserts that Exxon accounts for climate change-related risks

in managing its operations. (Ex. B, at 7, 14.) However, in an article published on May 25, 2016, the Wall Street Journal reported that Exxon's CEO said "most Exxon projects are either too short-term or too large for the theoretical cost of carbon they use in planning purposes to affect their decision-making." Attached as Exhibit C is a true and correct copy of the Wall Street Journal article.¹

8. Since 2014, oil and gas producers around the world have written down the value of their assets by approximately \$200 billion, according to a study cited by the Wall Street Journal in a September 16, 2016 article. That analysis also indicates that Exxon is the only major producer that has declined to take impairment charges or write-downs, despite a severe decline in oil and gas prices. Attached as Exhibit D is a true and correct copy of the Wall Street Journal article.²

9. In a 2015 interview with the trade publication Energy Intelligence, Exxon Chief Executive Officer Rex Tillerson stated: "We don't do write-downs. . . . We are not going to bail you out by writing it down. That is the message to our organization." (Ex. D, at 2.)

10. Exxon's public filings, such as its 2015 Financial Statements and Supplemental Information, discuss at length the circumstances in which it performs impairment assessments and takes impairment charges or write-downs. Attached as Exhibit E is a true and correct copy of Exxon's 2015 Form 10-K, filed with the United States Securities and Exchange Commission ("SEC") on February 24, 2016. In that filing, Exxon sets out principles that it purports to follow in conducting impairment testing. (Ex. E, at 57.) However, Mr. Tillerson's statement (cited in

¹ The Wall Street Journal article is available at <http://www.wsj.com/articles/exxon-chevron-shareholders-narrowly-reject-climate-change-stress-tests-1464206192>.

² The Wall Street Journal article is available at <http://www.wsj.com/articles/exxons-accounting-practices-are-investigated-1474018381>.

paragraph 9 above) that Exxon does not “do write-downs” appears to be inconsistent with Exxon’s public filings.

PwC’s Role

11. According to Exxon’s publicly-filed reports, PwC is Exxon’s independent auditor. (Ex. E, at 62.) PwC appears to have served in that role since before January 1, 2010, the beginning of the time period covered by the Subpoena. Exxon’s publicly-filed reports state that in the course of its audits of Exxon, PwC examines whether the disclosures in Exxon’s financial statements are supported by evidence and issues opinions as to whether Exxon’s financial statements fairly and accurately represent its financial position and whether Exxon maintains effective internal control over its financial reporting. (Ex. E, at 62.) According to Exxon’s public filings, the “Supplemental Information on Oil and Gas Exploration and Production Activities” portion of Exxon’s financial statements are not independently audited, but PwC’s audits encompassed Exxon’s “internal control over financial reporting” and “overall financial statement presentation,” including “assessing the risk that a material weakness exists,” among other things. (Ex. E, at 62, 99.)

12. [REDACTED]

13. According to public reports, PwC served from at least 2008 through 2013 as a global advisor and report writer for the Carbon Disclosure Project (“CDP”), a non-profit organization that functions as a global disclosure system for environmental information,

including greenhouse gas emissions data and other climate change-related information, from companies including Exxon. Attached as Exhibit G is a true and correct copy of a printout from the PwC website, retrieved October 4, 2016, which sets out PwC's role with respect to CDP.³

The New York Attorney General's Subpoena to PwC

14. As part of Attorney General's ongoing investigation into Exxon's representations about the impact of climate change on its business, including on its assets, reserves, and operations, the Attorney General served the Subpoena on PwC on August 19, 2016. PwC and Exxon have not communicated to the Attorney General that they have any dispute as to the Attorney General's authority to issue the Subpoena. The original return date of the Subpoena was September 2, 2016. The Subpoena calls for documents related to PwC's audits of Exxon, including documents concerning Exxon's accounting and reporting of oil and gas reserves, evaluation of assets for potential impairment charges or write-downs, projections of oil and gas prices, estimates of projected carbon costs, application of such estimated carbon costs to Exxon's capital allocation decisions, and information concerning the individuals who were involved in PwC's audits of Exxon. The Subpoena also seeks documents provided to Exxon by PwC concerning PwC's role in compiling and reviewing Exxon's submissions concerning greenhouse gas emissions for CDP.

15. In an August 31, 2016 telephone conversation, counsel for PwC informed the Attorney General that PwC likely possesses documents that are responsive to the Subpoena and would be developing a plan to produce such documents. Counsel for PwC did not mention any

³ This website is available at <http://www.pwc.com/gx/en/services/sustainability/publications/carbon-disclosure-project/downloads.html>.

purported accountant-client privilege in this conversation. The Attorney General agreed to PwC's request to extend the return date of the Subpoena to September 9, 2016.

16. In a September 7, 2016 telephone conversation, counsel for Exxon informed the Attorney General that it would be asserting a purported accountant-client privilege under Texas Occupations Code § 901.457 with respect to documents covered by the Subpoena.

17. In a September 8, 2016 telephone conversation, counsel for PwC confirmed to the Attorney General that it possesses documents that are responsive to the Subpoena, but also confirmed that Exxon was asserting a purported accountant-client privilege under Texas Occupations Code § 901.457. Counsel for PwC further stated that, pursuant to Exxon's instructions, all PwC documents that are responsive to the Subpoena would be reviewed by Exxon to determine whether the purported accountant-client privilege applies before any such documents are produced to the Attorney General. Counsel for PwC represented that the collection and review of responsive documents was underway and requested an extension of the return date of the Subpoena. Without agreeing that any such privilege existed, the Attorney General agreed to PwC's request to extend the return date of the Subpoena to September 23, 2016, on which date PwC agreed it would begin to make weekly rolling productions to the Attorney General.

18. On September 23, 2016, counsel for Exxon sent a letter to the Attorney General confirming its intention to assert a purported accountant-client privilege under Texas Occupations Code § 901.457 with respect to PwC's production, on a "document-by-document basis." Attached as Exhibit H is a true and correct copy of the September 23, 2016 letter.

19. To date, PwC has produced to the Attorney General only a limited number of documents responsive to certain of the document requests in the Subpoena. For example, on

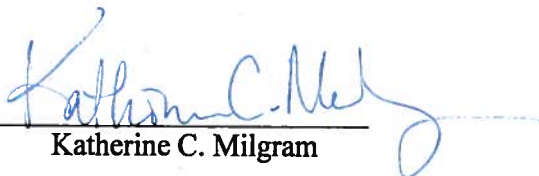
September 23, 2016, PwC produced to the Attorney General its engagement letters with Exxon and a list of certain PwC employees that worked on audits of Exxon. On September 30, 2016, PwC produced to the Attorney General certain management representation letters from Exxon, working paper indices, and CDP-related documents. On October 7, 2016, PwC made a duplicate production to the Attorney General of certain color documents that had been produced previously in black and white. Not counting this duplicate production, to date, PwC has produced only 97 documents.

20. On October 14, 2016, the Attorney General contacted counsel for PwC and Exxon to inform them that Exxon's assertion of a so-called accountant-client privilege was legally unsupported, and requested that Exxon withdraw its claim of such a privilege and allow PwC to produce responsive documents without Exxon conducting a document-by-document privilege review. As of the filing of this motion, Exxon has not agreed to do so.

21. Attached as Exhibit I is a true and correct copy of a printout from the website of PwC, retrieved October 4, 2016, stating that PwC's U.S. Chairman's Office is located in New York, New York.⁴

22. No previous application has been made to this Court or any other court for the relief requested herein.

Dated: New York, New York
October 14, 2016


Katherine C. Milgram

⁴ This website is available at <http://www.pwc.com/gx/en/about/office-locations/usa-by-state.html>.

EXHIBIT 4

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

<p>In the Matter of the Application of the</p> <p>PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,</p> <p style="text-align: right;">Petitioner,</p> <p>For an order pursuant to C.P.L.R. § 2308(b) to compel compliance with a subpoena issued by the Attorney General</p> <p style="text-align: center;">- against -</p> <p>PRICEWATERHOUSECOOPERS LLP and EXXON MOBIL CORPORATION,</p> <p style="text-align: right;">Respondents.</p>
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Index No. 451962/2016

**SUPPLEMENTAL AFFIRMATION OF KATHERINE C. MILGRAM IN SUPPORT OF
THE OFFICE OF THE ATTORNEY GENERAL’S MOTION TO COMPEL
COMPLIANCE WITH AN INVESTIGATIVE SUBPOENA**

KATHERINE C. MILGRAM, under penalty of perjury, affirms:

1. I am the Chief of the Investor Protection Bureau of the Office of the Attorney General of the State of New York (“OAG”), counsel for Petitioner.

2. On Friday, October 14, 2016, the OAG filed an application, brought by order to show cause, to compel compliance with a *subpoena duces tecum* issued by the OAG to Respondent PricewaterhouseCoopers LLP (“PwC”) on August 19, 2016 (the “Subpoena”) in connection with the OAG’s ongoing investigation of Respondent Exxon Mobil Corporation (“Exxon”) (the “Application”).

3. I make this supplemental affirmation in further support of the OAG’s Application, and to inform the Court that very shortly after telephoning this Court this morning, Exxon filed a

motion in an ongoing proceeding in federal district court in Texas – a proceeding in which the Attorney General is not a party – in an apparent effort to forum-shop and evade the jurisdiction of this Court.

4. On Friday, October 14, 2016, the OAG provided a courtesy copy of the papers in support of its Application to counsel for PwC and Exxon.

5. On Friday, October 14, 2016, the Application was assigned to the Honorable Barry R. Ostrager of the Commercial Division, New York Supreme Court.

6. On Sunday, October 16, 2016, at 6:55 p.m., counsel for Exxon informed the OAG that they intended to call Justice Ostrager’s chambers at 9 a.m. on Monday, October 17, 2016, to request that Exxon be heard prior to the entry of the proposed Order to Show Cause. A true and correct copy of the email from Michele Hirshman to the OAG and to counsel for PwC is attached as Exhibit 1.

7. On Sunday, October 16, 2016, at 10:17 p.m., the OAG informed Exxon’s counsel that Justice Ostrager’s Practice Rules expressly state that “[n]o calls to Chambers shall be placed, nor emails sent, unless authorized in advance by the judge or a member of the staff or as permitted by the rules.” The OAG also informed Exxon’s counsel that to the extent counsel had obtained such permission, the OAG would make itself available for a 9 a.m. call, and requested that, in advance of the call, Exxon’s counsel identify “all issues you plan to raise” with the Court. A true and correct copy of this email is included in Exhibit 1.

8. On Sunday, October 16, 2016, at 10:49 p.m., counsel for Exxon informed the OAG that the parties would “call chambers together as the rules allow [and] also send a letter to the Court and will copy you and your colleagues.” A true and correct copy of this email is included in Exhibit 1.

9. On Monday, October 17, 2016 at 2:24 a.m., counsel for Exxon sent a letter to the Court by *NYSCEF* and Facsimile advising Justice Ostrager that they would call the Court at 9 a.m. Attached as Exhibit 2 is a true and correct copy of the letter to the Court (Docket No. 17).

10. On Monday, October 17, 2016, counsel for Exxon initiated a call with Justice Ostrager's chambers, with the OAG and counsel for PwC on the line. During that call, counsel for Exxon informed the Court's staff that Exxon wished to submit papers regarding the propriety of the proposed Order to Show Cause before such Order is issued by the Court. The OAG argued that the submission of such papers would be improper, and that Exxon would have an opportunity to respond to the Application after the Court signs the proposed Order to Show Cause. The Court's staff informed all counsel that Justice Ostrager was not available today, and that any papers should be submitted to Room 341.

11. On June 15, 2016, Exxon filed a complaint against the Massachusetts Attorney General, Maura Healy, in the United States District Court for the Northern District of Texas, Fort Worth Division, seeking to enjoin the Massachusetts Attorney General from enforcing a Massachusetts Civil Investigative Demand ("CID") served on Exxon and seeking a declaratory judgment that the issuance of the CID violates Exxon's rights under state and federal law. *Exxon Mobil Corporation v. Maura Tracy Healy, Attorney General of Massachusetts, in her official capacity*, No. 4:16-CV-469-K (N.D. Tex.) (the "Texas Action"). A true and correct copy of the complaint against the Massachusetts Attorney General is attached as Exhibit 3. Like the OAG's investigation, the Massachusetts Attorney General's investigation is focused on the accuracy of Exxon's disclosures regarding the impact of climate change on Exxon's business.

12. Although the OAG had issued an investigative subpoena to Exxon on November 4, 2015, Exxon did not include the New York Attorney General as a defendant in the Texas Action, nor did it seek to enjoin the OAG's investigation of Exxon in the Texas Action.

13. Instead, from January 12, 2016, to present, Exxon has produced 1,244,026 pages of documents in response to the OAG's November 4, 2015 subpoena to Exxon. In fact, Exxon most recently produced documents on October 3, 2016, and October 11, 2016, including documents concerning Exxon's oil and gas reserves.

14. As set forth more fully in the Affirmation of Katherine C. Milgram in Support of The Office of the Attorney General's Motion to Compel Compliance with an Investigative Subpoena (Docket No. 1), PwC – Exxon's independent auditor – has also produced only 97 documents to the Attorney General in response to the Subpoena. The OAG has had a number of telephonic meet-and-confers with PwC. PwC has admitted that it has responsive documents and at no time has contested the OAG's authority to issue the PwC Subpoena. It was only after Exxon asserted a purported accountant-client privilege with respect to PwC's productions to the Attorney General, that PwC, notwithstanding a lack of any authority to support such a privilege assertion, permitted Exxon's counsel to review PwC's responsive documents for a privilege that is not available under New York or Texas law. Even in its opposition papers to the OAG's Application, Exxon still has not represented that it will cease reviewing PwC's responsive documents for a purported accountant-client privilege and that it will not withhold any documents from production pursuant to such a purported privilege.

15. This morning at 9:25 a.m., immediately after the call with this Court's staff, Exxon's internal and external counsel called counsel for the Massachusetts Attorney General to inform it that Exxon would be filing a motion for leave to file a first amended complaint in the

Texas Action seeking leave to add the New York Attorney General as a defendant and add claims for conspiracy to deprive Exxon of its constitutional rights and federal preemption of New York law. Exxon's counsel inquired whether the Massachusetts Attorney General would consent to the motion, and the Office of the Massachusetts Attorney General informed Exxon's counsel that it did not consent to Exxon's motion to amend.

16. At approximately 10:30 a.m. this morning, Exxon filed a motion for leave to file a first amended complaint in the Texas Action. Attached as Exhibit 4 are true and correct copies of Exxon's motion, memorandum of law, and proposed first amended complaint. The proposed first amended complaint seeks to add the New York Attorney General as a defendant and requests that the federal district court grant Exxon declaratory relief and issue a preliminary and a permanent injunction prohibiting enforcement of the OAG's November 4, 2015 subpoena to Exxon, relief which effectively would foreclose the OAG's investigation of Exxon, including enforcement of its subpoena to PwC.

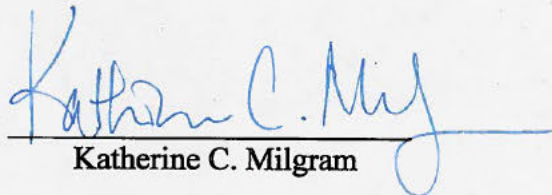
17. This afternoon, Monday, October 17, 2016, at 3:41 p.m., counsel for Exxon filed its opposition papers to the Application (Docket Nos. 18-23). Remarkably, Exxon's papers fail to inform this Court of Exxon's filings in the Texas Action earlier this morning which seek to invalidate the OAG's November 4, 2015 subpoena and effectively shut down the OAG's investigation.

18. Exxon's course of conduct demonstrates that it intends to use the Texas federal forum to evade this Court's clear jurisdiction and effectively terminate the OAG's investigation into whether Exxon's disclosures relating to the risks of climate change, and the impact of such risks on Exxon's business, violate New York law. Indeed, Exxon issued a press release this morning at 10:51 a.m., entitled "ExxonMobil Asks Federal Court to Invalidate New York

Attorney General's Subpoena." A true and correct copy of the press release is attached as Exhibit 5.

19. In light of Exxon's direct challenge to this Court's authority to oversee compliance with subpoenas issued by the OAG in the course of its investigation of Exxon undertaken pursuant to New York law, immediate judicial review of the OAG's Application concerning enforcement of the Subpoena to PwC is warranted.

Dated: New York, New York
October 17, 2016


Katherine C. Milgram