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

OPPOSITION OF ATTORNEY GENERAL HEALEY TO EXXON MOBIL CORPORATION'S MOTION FOR LEAVE TO FILE A FIRST AMENDED COMPLAINT

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I. INTRODUCTION

Defendant Attorney General Maura Healey opposes Plaintiff Exxon Mobil Corporation's ("Exxon") Motion for Leave to File a First Amended Complaint (Doc. No. 74, "Motion to Amend"). Exxon's proposed First Amended Complaint—like its original Complaint—would be subject to immediate dismissal for lack of personal jurisdiction over Attorney General Healey and for other reasons, as discussed in Attorney General Healey's briefs in support of her Motion to Dismiss (Doc. No. 41) and Motion to Reconsider Jurisdictional Discovery Order (Doc. No. 78). Amendment would therefore be futile and should be denied.

The Motion to Amend should be denied on the independent ground that Exxon's apparent objective in bringing the motion now is to evade its obligation to comply with a subpoena issued by the New York Attorney General and to avoid the jurisdiction of the New York state court. Over the past year, Exxon had been complying with a subpoena issued by New York in 2015 ("2015 NY Subpoena"), which is substantially similar to Attorney General Healey's Civil Investigative Demand ("CID"), and had produced over one million pages of documents to New York. But Exxon filed its Motion to Amend in this court—suddenly seeking to stall the New York investigation—*one business day* after the New York Attorney General sought a New York court order to enforce compliance with a subsequent subpoena ("2016 NY Subpoena") that he had issued to Exxon's accountant, PricewaterhouseCoopers LLP ("PwC") last August. On October 26, a New York court granted the New York Attorney General's motion to compel compliance by Exxon and PwC with the 2016 NY Subpoena. Remarkably, Exxon has failed to disclose any of these facts to this Court.

Likewise, in terms very different from its stated reasons for the Motion to Amend, *see* Exxon Mobil Corporation's Memorandum of Law in Support of Motion for Leave to File a First Amended Complaint (Doc. No. 75, "Mem.") at 7 (citing recent "developments" that reveal a

"conspiracy"), Exxon counsel revealed to the New York state court on October 24 that Exxon's Motion to Amend is calculated to initiate no-holds-barred discovery against Attorney General Healey, Attorney General Schneiderman, and other Attorneys General. Plainly, the Motion to Amend is part of Exxon's continuing strategy to use the offices of this Court to undermine the statutory procedures in both state courts that are considering Exxon's objections to the scope and propriety of the state investigations. Exxon should not be permitted to amend its Complaint for that improper purpose.

II. FACTUAL BACKGROUND

Exxon filed its original Complaint in this matter (Doc. No. 1, "Compl.") on June 15, 2016, alleging constitutional violations relating to Attorney General Healey's issuance of a CID pursuant to Massachusetts General Laws ch. 93A ("Chapter 93A"). That same day, Exxon also filed a motion for a preliminary injunction (Doc. No. 8) to enjoin enforcement of the CID. The following day, June 16, Exxon filed a Petition and an Emergency Motion to Set Aside or Modify the CID or Issue a Protective Order in the Massachusetts Superior Court, challenging the CID on largely the same grounds as Exxon asserted in the Complaint it filed in this Court. Attorney General Healey answered Exxon's Massachusetts petition and cross-moved to compel compliance with the CID on August 8, 2016. The Massachusetts Superior Court will hear argument on the merits of Exxon's petition, and the Attorney General's cross-motion, on December 7, 2016.

In this Court, Attorney General Healey opposed Exxon's Motion for Preliminary Injunction (Doc. No. 43) and moved to dismiss Exxon's Complaint on August 8, 2016 (Doc. No. 41), arguing, among other grounds, that this Court lacks personal jurisdiction over the defendant under controlling precedent of the United States Court of Appeals for the Fifth Circuit and the Supreme Court, and that this Court is an improper venue.

On September 19, 2016, this Court heard argument on Exxon's Motion for a Preliminary Injunction. Among the points in opposition, counsel for Attorney General Healey addressed the arguments set forth in her fully briefed Motion to Dismiss, as these demonstrate that Exxon cannot show a likelihood of success on the merits, as necessary to obtain injunctive relief. In particular, counsel argued that the Court lacks personal jurisdiction over the defendant and, even if the Court had personal jurisdiction, it should abstain from hearing the case pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), and allow the Massachusetts Superior Court to consider Exxon's objections to the CID in the pending state court proceeding that Exxon initiated the day after Exxon filed this lawsuit. Counsel also argued, in part, that Exxon could not establish that it would suffer irreparable harm as a result of the CID, since Exxon had already produced over 700,000 pages of documents to the New York Attorney General in response to the 2015 NY Subpoena, issued under New York's Martin Act. Transcript of Preliminary Injunction Hearing (Doc. No. 68, "Tr.") 55:3-8. Exxon confirmed that it had produced those documents and was, at the time of the September 19 hearing, still cooperating with the 2015 NY Subpoena. Tr. at 88:1-90:21.[1] After argument, the Court instructed the parties to confer and attempt to work out a resolution. The Court gave the parties one week, until September 26, to report back, and made clear that if the parties could not resolve the matter, the Court would appoint a mediator.

On September 28, Exxon and representatives from the Attorney General's Office ("AGO") met in Boston but were unable to reach a resolution, and so informed the Court by

[1] Exxon has since confirmed that it has produced more than 1.2 million pages of documents to the New York Attorney General, including a production as recently as October 11. Attorney General Healey's Opposition to Plaintiff's Motion to Expedite Briefing and Consideration of Plaintiff's Motion for Leave to Amend (Doc. No. 85, "Opp. to Mot. to Exp.") Appendix Exhibit ("App. Exh.") 2 at 010; Opp. to Mot. to Exp. App. Exh. 4 at 030.

letter.[2] The Court appointed the Honorable James Stanton as mediator (Doc. No. 69), and the parties met with Judge Stanton in Dallas on October 6, where again no resolution was reached.

On October 13, this Court ordered (Doc. No. 73, the "Order") that "jurisdictional discovery by both parties" be permitted to assist the Court in its determination whether to abstain from hearing this suit under *Younger*. Order at 3. On October 20, Attorney General Healey filed a Motion for Reconsideration of the Order (Doc. No. 78), arguing that, pursuant to *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999) and *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 213 (5th Cir. 2000), the Court should grant Attorney General Healey's Motion to Dismiss for lack of personal jurisdiction and vacate the order for discovery.

On October 14, New York Attorney General Schneiderman filed with the New York Supreme Court an application to compel compliance with the 2016 NY Subpoena, issued on August 19, 2016, to Exxon's auditor, PwC, as part of his office's own investigation of Exxon. *See* Opp. to Mot. to Exp., App. Exh. 3 at 019, ¶ 2. The next business day, on October 17, Exxon filed its Motion to Amend in this Court to add the New York Attorney General as a defendant, and to "add new claims for federal preemption and for conspiracy to deprive [Exxon] of its constitutional rights." Mem. at 1. Exxon made no mention of the New York proceeding in its motion or its proposed First Amended Complaint. Also on October 17, Exxon filed its opposition, on privilege grounds, to the application in the New York proceeding—which, similarly, made no mention of Exxon's Motion to Amend in this Court. *See* Opp. to Mot. to Exp., App. Exh. 4 at 031, ¶ 17.

On October 18, the New York Supreme Court issued a show cause order to PwC and

[2] The letter confirmed that Attorney General Healey's participation in the mediation did not constitute a waiver of her arguments with respect to the Court's jurisdiction, including her argument that the Court lacks personal jurisdiction over her.

Exxon and set an October 24 hearing date. *See* Opp. to Mot. to Exp., App. Exh. 1. On the following day, October 19, Exxon filed a Motion to Expedite Briefing and Consideration of its Motion for Leave to Amend (Doc. No. 77). That filing also failed to mention the New York proceeding or the impending show cause hearing.

At the October 24 hearing in New York Supreme Court, Exxon counsel Theodore Wells stated:

> . . . Judge Kinkeade on Thursday [October 13] issued an opinion, and his opinion said that we were going to get discovery against the Mass. AG, as we read it, the other attorney generals, because we had made a sufficient showing of bad faith under the *Younger* doctrine, and that's when we decide to join them on Monday, but it's because of what happened in that opinion. . . .
>
> We filed a motion to expedite the filing of the Amended Complaint so the New York AG can be brought into the case because the next step is, we're going to have a discovery conference, and there's no question it's going to be heated because ***right now we have the right, as we read the order, to take the deposition of both the Mass. AG people and really everybody, as we read it, that was at that March 29th conference. And we would like to get the New York AG in the case as we work out these discovery issues. . . . We are going to try to take depositions of the state AG's.***

Transcript of Show Cause Hearing at 54-55, App. Exh. 1 at 055-056 (emphasis added). On October 24, Exxon served on Attorney General Healey over one hundred discovery requests, including 33 requests for production, 24 interrogatories, and 74 requests for admission, despite her pending motion for reconsideration of the Court's jurisdictional discovery order.

On October 26, the New York Supreme Court granted the New York Attorney General's application to compel full production from PwC, ruling that Exxon's claims of privilege were erroneous. Decision and Order, *In the Matter of the Application of the People of the State of New York*, No. 451962/16, slip op. at 5 (N.Y. Sup. Ct. Oct. 25, 2016), App. Exh. 2 at 074. On October 27, Exxon appealed the decision to the Appellate Division of the New York Supreme Court.

On Friday, October 28, two days after the New York Supreme Court ordered Exxon and PwC to comply with the New York Attorney General's August subpoena, Exxon announced a thirty-eight percent drop in earnings as a result of low energy prices, and "acknowledged that it faced what could be the biggest accounting revision of its reserves in its history."[3] Exxon's profits in the last twelve months are the lowest since 1999.[4] The Wall Street Journal reported that Exxon, under investigation by the U.S. Securities and Exchange Commission ("SEC") and New York State, disclosed that about 4.6 billion barrels of oil in its reserves, primarily in Canada, may be too expensive to tap, noting that "[t]hough Exxon didn't mention climate change or regulators in its disclosure, most of the assets it said may not be economic are among the most scrutinized by climate change activists: Canada's tar sands."[5] The Journal reported that Canada's government has proposed to charge a price for carbon emissions, and observed that "[l]onger term, Exxon faces headwinds from regulators aimed at reducing carbon dioxide and other greenhouse gas emissions, measures that are widely expected to fall most heavily on its industry."[6]

On November 3, news outlets reported that Exxon had contacted a number of non-governmental organizations, including the Union of Concerned Scientists, reportedly notifying them to place a litigation hold on documents and warning them that Exxon intended to seek

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[3] Clifford Krauss, *Exxon Concedes It May Need to Declare Lower Value for Oil in Ground*, N.Y. TIMES, Oct. 28, 2016, http://www.nytimes.com/2016/10/29/business/energy-environment/exxon-concedes-it-may-need-to-declare-lower-value-for-oil-in-ground.html, App. Exh. 3.

[4] Bradley Olson & Lynn Cook, *Exxon Warns on Reserves As It Posts Lower Profit: Oil producer to examine whether assets in an area devastated by low price and environmental concerns should be written down*, WALL ST. J., Oct. 28, 2016, http://www.wsj.com/articles/exxon-mobil-profit-revenue-slide-again-1477657202, App. Exh. 4.

[5] *Id.*

[6] *Id.*

discovery from them, apparently in connection with this Court's discovery Order.[7] On November 4, Exxon noticed the depositions of Attorney General Schneiderman, Lemuel Srolovic, and Monica Wagner of the New York Attorney General's Office and Attorney General Healey, Christophe Courchesne, and I. Andrew Goldberg of the Massachusetts Attorney General's Office.

III. ARGUMENT

At this stage of the litigation, Exxon may amend its pleading only with the consent of opposing parties or with leave of court. *See* Fed. R. Civ. P. 15(a)(2). Under Rule 15(a), a "court should freely give leave [to file amended pleadings] when justice so requires." Fed. R. Civ. P. 15(a)(2). But the Rule 15 standard "is tempered by the necessary power of a district court to manage a case." *Priester v. JP Morgan Chase Bank, N.A.*, 708 F.3d 667, 678 (5th Cir. 2013) (quoting *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 566 (5th Cir. 2003)). Thus, "[a] district court has the discretion to consider numerous factors in evaluating whether to allow amendment, including the futility of amending, the party's repeated failure to cure deficiencies by previous amendments, undue delay, or bad faith." *U.S. ex rel. Marcy v. Rowan Companies, Inc.*, 520 F.3d 384, 392 (5th Cir. 2008); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962); *Rosenblatt v. United Way of Greater Houston*, 607 F.3d 413, 419 (5th Cir. 2010).

Exxon's proposed amendment should be rejected for at least two reasons. First, amendment would be futile because, among other things, this Court lacks personal jurisdiction over Attorney General Healey. Second, in light of events in New York, Exxon's request reflects bad faith and dilatory motive. Accordingly, this Court should deny the Motion to Amend.

[7] Steven Mufson, *ExxonMobil tells independent groups to preserve records of their climate case communications—including with press*, THE WASHINGTON POST, Nov. 3, 2016, https://www.washingtonpost.com/news/energy-environment/wp/2016/11/03/exxonmobil-tells-independent-groups-to-preserve-records-of-their-climate-case-communications-including-with-the-press, App. Exh. 5.

A. AMENDMENT WOULD BE FUTILE BECAUSE THIS COURT LACKS PERSONAL JURISDICTION OVER ATTORNEY GENERAL HEALEY.

A district court may deny a motion for leave to amend if allowing amendment would be futile because it would "fail to survive" a motion to dismiss. *See Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 378 (5th Cir. 2014). It is well settled that a motion to amend is futile where, as here, a court lacks personal jurisdiction over the defendant, and the allegations of the proposed First Amended Complaint do not cure that fatal flaw. Applying that rule, the Fifth Circuit has consistently affirmed denials of motions to amend where neither the original complaint nor the proposed amendment supported personal jurisdiction over the original defendant. *See, e.g.*, *Bustos v. Lennon*, 538 Fed. App'x 565, 569 (5th Cir. 2013) (per curiam) (affirming denial of motion to amend as futile for lack of jurisdiction); *see also Smith v. HSBC Bank*, No. 15-10790, 2016 WL 5746320, at *1 (5th Cir. Sept. 30, 2016) (per curiam) (same).[8]

Denial of Exxon's Motion to Amend is likewise warranted here. As an initial matter, as Attorney General Healey explained in requesting reconsideration of this Court's discovery Order, this case presents "circumstances in which a district court appropriately accords priority to a personal jurisdiction inquiry." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999);

[8] *See also, e.g., Lemann v. Midwest Recovery Fund LLC*, No. 15-3329, 2016 WL 3033622, at *3 (E.D. La. May 27, 2016) (holding magistrate correctly denied motion to amend because "[t]he proposed amendment would be subject to dismissal for the same reasons as the original complaint," including absence of personal jurisdiction); *Papa Berg, Inc. v. World Wrestling Entm't, Inc.*, No. 3:12-CV-2406-B, 2013 WL 6159296, at *8 (N.D. Tex. Nov. 25, 2013) (unpublished) (denying motion for leave to amend where "Plaintiffs have failed to establish a prima facie case of . . . minimum contacts with Texas" and "[g]ranting Plaintiffs leave to re-plead their claims . . . would, therefore, be futile"); *Weisskopf v. United Jewish Appeal-Fed'n of Jewish Philanthropies of N.Y., Inc.*, 889 F. Supp. 2d 912, 926 (S.D. Tex. 2012) (denying motion for leave to amend complaint on ground that "[p]roposed [a]mendment would be futile because it fails to make out a prima facie case for either specific or general personal jurisdiction"); *Ponder Research Grp., LLP v. Aquatic Navigation, Inc.*, No. 4:09-CV-322-Y, 2010 WL 1817036, at *7 (N.D. Tex. May 4, 2010) (denying motion for leave to amend complaint on ground that "second amended complaint proposed by Plaintiffs would be futile because . . . the amended pleading of one of the claims exposes a lack of personal jurisdiction").

see Memorandum of Law in Support of Motion to Reconsider Jurisdictional Discovery Order (Doc. No. 79, "Mot. to Reconsider Mem.") at 3-7. "[C]oncerns of federalism, and of judicial economy and restraint" counsel this Court's prompt resolution of Attorney General Healey's fully briefed motion to dismiss for lack of personal jurisdiction before it permits wide-ranging discovery on an asserted "bad faith" exception to *Younger* abstention. *See Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 213 (5th Cir. 2000) (stating that *Ruhrgas* "direct[s] lower courts facing multiple grounds for dismissal to consider" such concerns "in determining whether to dismiss claims due to a lack of personal jurisdiction before considering challenges to its subject-matter jurisdiction").

As set forth in Attorney General Healey's filings in support of her Motion to Dismiss, Exxon has failed to establish that the Texas long-arm statute and federal due process permit this Court's exercise of personal jurisdiction over Attorney General Healey.[9] The Texas long-arm statute, by its plain language, does not reach a foreign state official sued in her official capacity and thus cannot extend to Attorney General Healey here. *See Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 482-83 (5th Cir. 2008) ("[T]he Texas statute offers no obvious rationale for including nonresident individuals sued solely in their official capacity under *Ex Parte Young*."). And, this Court's exercise of personal jurisdiction over Attorney General Healey would violate constitutional due process. Attorney General Healey lacks the minimum contacts with Texas necessary to satisfy due process because all material events described in Exxon's original Complaint—the press conference, alleged meetings, and Attorney General Healey's issuance of

[9] *See* Memorandum of Law in Support of Motion to Dismiss (Doc. No. 42) at 4-13; Reply in Support of Motion to Dismiss (Doc. No. 65) at 3-8; *see also* Memorandum of Law for Amici Curiae States of Maryland et al. in Support of Defendant's Motion to Dismiss and in Opposition to Plaintiff's Motion for Preliminary Injunction (Doc. No. 54, "Amicus States' Br.") at 16-20; Mot. to Reconsider Mem. at 3-4.

the CID—occurred in either Massachusetts or New York, and none of Attorney General Healey's conduct targeted the State of Texas. *See, e.g.*, Compl. ¶¶ 1-9, 19-35, 41-54.

Likewise, the allegations and information set forth in Exxon's Motion to Amend and voluminous supporting papers add nothing to demonstrate that Attorney General Healey had contacts with, or directed any activities at, Texas. Indeed, Exxon's Proposed First Amended Complaint focuses on activities alleged to have occurred in New York and Massachusetts, not Texas. *See, e.g.*, Proposed First Amended Complaint ("Proposed Amended Compl.") ¶¶ 1-8, 12, 27-53. Exxon's argument that Attorney General Healey's actions *outside* Texas justify personal jurisdiction ignores the bar of the Texas long-arm statute and fails, as a matter of law, to satisfy due process requirements. *See Walden v. Fiore*, 134 S. Ct. 1115, 1125 (2014) (allegations that a Drug Enforcement Administration agent submitted a false probable cause affidavit in Georgia, with knowledge that it would injure plaintiffs in Nevada, were not sufficient for exercise of personal jurisdiction by a Nevada court); *Stroman*, 513 F.3d at 486 ("We have declined to allow jurisdiction for even an intentional tort where the only jurisdictional basis is the alleged harm to a Texas resident."). Citing *Stroman*, this Court has held that a "nonresident government official" may not be "haled into a Texas court simply because the effects of [his actions] are felt in Texas." *Saxton v. Faust*, No. 3:09-CV-2458-K, 2010 WL 3446921, at *3 (N.D. Tex. Aug. 31, 2010). For the same reason, other federal courts considering similar circumstances have concluded they lacked personal jurisdiction over foreign state attorneys general. *See, e.g.*, *Turner v. Abbott*, 53 F. Supp. 3d 61, 68 (D.D.C. 2014); *Cutting Edge Enter., Inc. v. Nat'l Ass'n of Att'ys Gen.*, 481 F. Supp. 2d 241, 246-49 (S.D.N.Y. 2007); *B & G Prod. Co. v. Vacco*, No. Civ.98-2436 ADM/RLE, 1999 WL 33592887, at *5 (D. Minn. Feb. 19, 1999).

The exercise of this Court's personal jurisdiction over Attorney General Healey would be

just as unreasonable under Exxon's proposed First Amended Complaint as it would be under Exxon's original Complaint: it would significantly burden Attorney General Healey; Texas has little stake in the litigation; Exxon has an adequate remedy in Massachusetts courts, which it is actively pursuing; duplicative litigation in this Court would undermine judicial economy and waste this Court's resources; and, most significantly, this Court's assertion of personal jurisdiction over Attorney General Healey would create a serious risk that state officials will be haled into distant federal courts to defend their efforts to enforce their state laws in their state courts for the benefit of their state residents. Indeed, Exxon's strategy here—to sue in Exxon's home forum any state attorney general investigating Exxon's conduct and to charge attorneys general pursuing similar enforcement strategies with civil conspiracy—could inspire similar responses by companies throughout the Nation under investigation for potential violations of the law, exactly the result that the Fifth Circuit sought to foreclose in *Stroman*. *See* 513 F.3d at 482-83. Accordingly, this Court should dismiss the complaint for lack of personal jurisdiction and reject Exxon's futile attempt to substitute an equally flawed amended complaint.

Finally, Exxon's proposed Amended Complaint is still subject to dismissal for all the additional reasons set forth in Attorney General Healey's Motion to Dismiss and supporting papers. This Court lacks subject matter jurisdiction over this action under either iteration of Exxon's complaint because "there is no current consequence" to Exxon "for resisting the [CID] and the same challenges raised in th[is] federal suit could be litigated in state court." *Google, Inc. v. Hood*, 822 F.3d 212, 226 (5th Cir. 2016). As in *Google*, neither the issuance in Massachusetts of an "administrative subpoena nor the possibility of some future enforcement action created an imminent threat of irreparable injury [to Exxon] ripe for adjudication." *Id.* at 228; *see Spotts v. United States*, 613 F.3d 559, 574 (5th Cir. 2010) (affirming district court's denial of leave to

amend on grounds of futility for lack of subject matter jurisdiction). And, even were dismissal unwarranted on any of the foregoing grounds, the proposed amendment nonetheless would be futile because venue is still improper in this District. *See Total Safety U.S., Inc. v. Rowland*, No. 13-6109, 2014 WL 4693114, at *8 (E.D. La. Sept. 22, 2014) (denying motion to amend complaint where "venue in the Eastern District is futile"); *see also Lihong Xia v. Kerry*, 145 F. Supp. 3d 68, 74 (D.D.C. 2015) (same). Inasmuch as the proposed amendment thus "would be subject to dismissal for the same reasons as the original complaint," it should be rejected as futile. *See Lemann v. Midwest Recovery Fund LLC*, No. 15-3329, 2016 WL 3033622, at *3 (E.D. La. May 27, 2016).[10]

B. EXXON'S MOTION FOR LEAVE TO AMEND REFLECTS BAD FAITH AND DILATORY MOTIVE.

In addition to the motion's futility, this Court should deny Exxon's Motion to Amend given Exxon's timing and tactics in seeking to add additional, unfounded claims and the New York Attorney General as a defendant. The timing of Exxon's Motion to Amend provides strong evidence of its motive to evade the jurisdiction of the New York courts and avoid the New York Attorney General's investigation—much as it has sought to evade the Massachusetts Attorney General's investigation and the exclusive statutory jurisdiction of Massachusetts courts over CIDs issued by the Attorney General—and use this Court's discovery Order as a blank check to depose both the New York and Massachusetts Attorneys General, "the Mass. AG people," and "really everybody" who attended the March 29 press conference. App. Exh. 1 at 055-056. This would include several other sitting attorneys general and staff from the offices of nearly half of the country's state attorneys general. *See* Compl. App. Exh. A at 002. Most troubling, Exxon has

[10] As well, Attorney General Healey maintains that amendment would be futile because *Younger* abstention is warranted here, without need for discovery; however, under *Ruhrgas*, the Court should dismiss the case on personal jurisdiction and other dispositive grounds and reject the amendment as futile before authorizing Exxon to engage in a wide-ranging inquiry.

proceeded here without disclosing to this Court, or the New York state court, key facts that shed light on its actual objectives.

As the Fifth Circuit has held, such bad faith maneuvering provides an independent reason to deny the Motion to Amend. Where a party's "awareness of facts and failure to include them in the complaint might give rise to the inference that the plaintiff was engaging in tactical maneuvers . . . denial of leave to amend on the grounds of bad faith may be appropriate." *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 599 (5th Cir. 1981); *see also Mitsubishi Aircraft Int'l, Inc. v. Brady*, 780 F.2d 1199, 1203 (5th Cir. 1986) (affirming denial of leave to amend on bad faith grounds where claim plaintiff sought to add is "usually apparent at the outset of a case . . . strongly suggest[ing] either a lack of diligence . . . or a lack of sincerity").

The facts here compel such an inference. All of the core facts underlying Exxon's allegations against Attorney General Schneiderman in the proposed First Amended Complaint were known to Exxon at the time it filed its original Complaint. Exxon had been under subpoena from Attorney General Schneiderman for seven months by then, and had known about the March 29 press conference in New York at the center of its allegations for three months. Indeed, Exxon described the alleged meetings and the press conference in detail *in its original Complaint* against Attorney General Healey, and even quoted Attorney General Schneiderman's remarks there. *See* Compl. ¶¶ 1-8; 19-35; 40-53. Likewise, the majority of the alleged facts Exxon proposes to add to the Complaint (and all of the facts with respect to Exxon's claims against Attorney General Healey) were either (1) already available at the time Exxon filed its original Complaint (e.g., the contents and news coverage of and Attorney General Schneiderman's public statements regarding the subpoena, Proposed Amended Compl. at ¶¶ 20-26, 61-68), (2) became available shortly thereafter and are ultimately irrelevant to Exxon's claims (e.g., the reactions of

other attorneys general and members of Congress to the press conference and the Massachusetts and New York investigations, Proposed Amended Compl. at ¶¶ 54-59), or (3) became available months ago (e.g., documents obtained through public records requests by third parties regarding the Green 20, which Exxon then obtained and highlighted in opposing Attorney General Healey's Motion to Dismiss, Motion to Dismiss Opposition (Doc. No. 60) at 3-4, Proposed Amended Compl. at ¶¶ 52-53).

Yet Exxon continued to comply with Attorney General Schneiderman's 2015 subpoena, producing 1.2 million pages of documents in response, including productions made as recently as October 11.[11] Only now, after this Court authorized discovery against the Massachusetts Attorney General and following the New York Attorney General's application to enforce his subpoena in his state's court, does Exxon come forward to amend its Complaint, on the basis of facts available to it previously, without any explanation for the delay.[12] These facts are more than enough to suggest that Exxon is, in bad faith, "engaging in tactical maneuvers," by seeking to amend. *See, e.g., Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 140-42 (5th Cir. 1993) (affirming denial of leave to amend on bad faith grounds). These circumstances plainly support denial of the

[11] *See* Opp. to Mot. to Exp., App. Exh. 4 at 030 and App. Exh. 2 at 010.

[12] In attacking the legitimacy of investigation of its asset valuation, Exxon also fails to mention that it is cooperating with an SEC investigation into similar matters. *See* Motion to Reconsider Mem. at 2. Exxon's October 28 announcement of a thirty-eight percent drop in its profits and "what could be the biggest accounting revision of its reserves in its history," only confirm the importance and urgency of inquiries into its valuation of its fossil fuel reserves. *See supra*, at 6. In any case, Exxon's argument that preemption bars actions to protect investors from misleading statements under Chapter 93A is unfounded. *See, e.g., Firefighters' Ret. Sys. v. Regions Bank*, 598 F. Supp. 2d 785, 795 (M.D. La. 2008) ("federal securities laws generally do not preempt similar state law causes of action" (quoting *Finance and Trading, Ltd. v. Rhodia*, No. 04 Civ. 6083 (MBM), 2004 WL 2754862, at *7 (S.D.N.Y. Nov. 30, 2004)).

Motion to Amend.[13]

Exxon's utter lack of candor about its motivations—before both this Court and the New York state court—removes any doubt that Exxon is seeking to game these judicial proceedings in bad faith. As outlined in Part II, *supra*, Exxon only filed the Motion to Amend here one business day after Attorney General Schneiderman moved to compel compliance with the 2016 NY Subpoena in New York state court—and failed to notify Attorney General Schneiderman or the New York court of its Motion to Amend. *See* Opp. to Mot. to Exp., App. Exh. 4 at 031, ¶ 17. Likewise, Exxon failed to notify this Court of the pending proceeding in New York. Then, only a day after the New York court issued a show cause order and set a hearing date, Exxon moved to expedite briefing on its Motion to Amend—again, without informing this Court of the pending New York proceeding or the imminent show cause hearing. *See* Motion to Expedite (Doc. No. 77). Exxon's actions are little more than a shell game, designed to disguise its attempt to add Attorney General Schneiderman to this case in order to frustrate the New York state proceeding. This Court should not allow Exxon to abuse the amendment process to play courts off of one another to undermine the pending proceedings in New York.

Moreover, this Court should not grant Exxon's Motion to Amend and thereby facilitate an unprecedented federal judicial intervention into state law enforcement prerogatives. Based on this Court's discovery Order, Exxon has announced its intention to seek depositions of several

[13] Contrary to Exxon's contention, Mem. at 7, the bad faith motive exception does apply. The unpublished Fifth Circuit case on which Exxon relies is distinguishable. *See Pub. Health Equip. & Supply Co. v. Clarke Mosquito Control Prod., Inc.*, 410 F. App'x 738 (5th Cir. 2010). That case does not stand for the proposition that a first motion to amend can never be denied on bad faith grounds. There, the court held only that the district court erred in implicitly denying a clearly presented motion to amend because, among other things, it was the plaintiff's "first motion to amend, made before the deadline to amend" under a scheduling order issued by the court and "so [the] bad faith and/or dilatory motive is not an issue here." *Id.* at 740. Here, no such scheduling order governing amendment of the complaint applies, and the strong indicia of bad faith maneuvering inform the inquiry.

state attorneys general and the staff of approximately twenty state attorneys general; indeed, Exxon has already begun to issue notices of deposition to Attorney General Schneiderman, Attorney General Healey, and their staffs, consistent with Mr. Wells's representation to the New York state court. App. Exh. 1 at 055-056. Attorney General Healey objects in the strongest terms to Exxon's improper discovery, *see* Mot. to Recon. Mem. at 8-10, and it is reasonable to anticipate that other states will also vigorously object to such unwarranted intrusion on their traditional law enforcement authority. The inquiry that Exxon seeks is improper and would impose "systemic costs of particular concern." *Wayte v. United States*, 470 U.S. 598, 607-08 (1985) ("Examining the basis of a prosecution delays the . . . proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision-making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy."). The Court should not endorse Exxon's effort by allowing the Motion to Amend.

Exxon's counsel correctly predicted that disputes regarding its discovery requests will consume months of the parties' and the Court's time, App. Exh. 1 at 056, likely achieving Exxon's goal of putting off as long as possible any investigation into the critically important question whether Exxon broke the law and deceived consumers and investors about the role of its products in causing climate change, and the negative effect on Exxon's business, and the value of its assets, of efforts to address climate change.[14] Especially where this Court lacks personal jurisdiction over Attorney General Healey in the first place, *see Stroman*, 513 F.3d at 482-89, it is hard to imagine a more inequitable and prejudicial result for Attorney General Healey or an outcome more ominous for law enforcement by state attorneys general across the country. *See* Amicus States' Br. at 10-11, 15-16, 19-21, 23-24; Brief of Amici Curiae State

[14] *See supra*, at 6.

Attorneys General in Support of Mississippi's Interlocutory Appeal, *Google, Inc. v. Hood*, No. 15-60205, 2015 WL 4094982, at *16-17 (5th Cir. Jun. 29, 2015).

IV. CONCLUSION

For the reasons set forth above, the Court should deny the Motion to Amend.

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL OF
MASSACHUSETTS

By her attorneys:

s/ Douglas A. Cawley

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Dated: November 7, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 7, 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

APPENDIX

OPPOSITION OF ATTORNEY GENERAL HEALEY TO EXXON MOBIL CORPORATION'S MOTION FOR LEAVE TO FILE A FIRST AMENDED COMPLAINT

Exhibit	Description	Page(s)
n/a	Declaration of Peter C. Mulcahy (Nov. 7, 2016)	-
1	Transcript of an October 24, 2016, hearing before 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. 42, accessible at https://iapps.courts.state.ny.us/webcivil/FCASMain.	001-068
2	Decision and Order, dated October 25, 2016, of 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. 46, accessible at https://iapps.courts.state.ny.us/webcivil/FCASMain.	069-075
3	Clifford Krauss, *Exxon Concedes It May Need to Declare Lower Value for Oil in Ground*, N.Y. TIMES, Oct. 28, 2016, http://www.nytimes.com/2016/10/29/business/energy-environment/exxon-concedes-it-may-need-to-declare-lower-	076-080

Dated: November 7, 2016

Respectfully submitted,

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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 the Attorney General's Opposition to the Plaintiff Exxon Mobil Corporation's Motion for Leave to File a First Amended Complaint.

3. Attached to this declaration as **Exhibit 1** is a true and accurate copy of the transcript of an October 24, 2016 hearing before 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. 42. 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 November 3, 2016.

4. Attached to this declaration as **Exhibit 2** is a true and accurate copy of a Decision and Order, dated October 25, 2016, of 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. 46. 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 November 3, 2016.

5. Attached to this declaration as **Exhibit 3** is a true and accurate copy of the article "Exxon Concedes It May Need to Declare Lower Value for Oil in Ground," written by Clifford Krauss, published by The New York Times on October 28, 2016, at http://www.nytimes.com/2016/10/29/business/energy-environment/exxon-concedes-it-may-need-to-declare-lower-value-for-oil-in-ground.html.

6. Attached to this declaration as **Exhibit 4** is a true and accurate copy of the article "Exxon Warns on Reserves As It Posts Lower Profit: Oil producer to examine whether assets in an area devastated by low price and environmental concerns should be written down," written by Bradley Olson and Lynn Cook, published by The Wall Street Journal on October 28, 2016, at http://www.wsj.com/articles/exxon-mobil-profit-revenue-slide-again-1477657202.

7. Attached to this declaration as **Exhibit 5** is a true and accurate copy of the article "ExxonMobil tells independent groups to preserve records of their climate case communications—including with press," written by Steven Mufson, published by The Washington Post on November 3, 2016, at https://www.washingtonpost.com/news/energy-

environment/wp/2016/11/03/exxonmobil-tells-independent-groups-to-preserve-records-of-their-climate-case-communications-including-with-the-press.

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

Executed on November 7, 2016.

s/ Peter C. Mulcahy
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EXHIBIT 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL TERM : PART 61 Mot Seq 001

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,

Index No. 451962/16

for an Order pursuant to CPLR § 2308(b) to compel compliance with a Subpoena issued by the Attorney General,

-against-

PRICEWATERHOUSECOOPERS LLP and EXXON MOBIL CORPORATION,

Respondents.

October 24, 2016
60 Centre Street
New York, NY 10007

B e f o r e:

HON. BARRY R. OSTRAGER, Justice.

A p p e a r a n c e s:

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JOHN OLESKE, ESQ., and
JONATHAN C. ZWEIG, ESQ.,
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(Appearances continue on next page.)

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BY: THEODORE V. WELLS, JR., ESQ., and
MICHELE HIRSHMAN, ESQ., and
MICHELLE K. PARIKH, ESQ., and
EDWARD C. ROBINSON, JR., ESQ.

MINUTES OF PROCEEDINGS

Reported By:
William L. Kutsch
Senior Court Reporter

WLK

Proceedings

THE COURT: All right. I'm prepared to offer everyone an apology here.

There are two significant items of disclosure.

The first item of disclosure is that an envelope was delivered to me from the New York Attorney General, which was not e-filed, and the respondents, to the best of my knowledge, are not aware that this was delivered to my Chambers. I have not looked at this material, so I'm going to return it to the Attorney General.

(Handing.)

THE COURT: The second item of disclosure, which is more significant, or potentially more significant, is that as I was reading the papers in this case over the weekend, I realized that I am an Exxon shareholder. I own 1,050 shares of Exxon stock in an account, and I own an additional 2,000 shares of Exxon stock in an IRA account.

According to the Canons of Judicial Ethics, I will be disqualified from hearing this case unless the parties, pursuant to Section 100.3(F), were satisfied to allow me to continue on the case.

The circumstance that I have shares in Exxon would not in any way, in my opinion, affect my impartiality in the case, but the rules are the rules.

So I'm prepared to disqualify myself if that's the desire of the parties. I'm prepared to continue on the case

if the parties are comfortable that I can be impartial.

MR. WELLS: Your Honor, could I just check with my client, who is here?

THE COURT: By all means.

And if you want to take a ten-minute recess, that would be an appropriate thing to do.

(At this time a brief recess was taken.)

MR. WELLS: Your Honor, we are ready to resume.

I have been authorized to say on behalf of all three parties that we have no objection to your Honor sitting on this case.

THE COURT: All right. Then I will sit on the case.

I should tell you, Mr. Wells knows this, I was a partner at Simpson, Thacher & Bartlett for 35 years, and my Exxon holdings, I'm happy to say, are not a material portion of my life savings.

So, I have a couple of questions which I'll direct to counsel.

First, let me ask counsel for Exxon when Exxon might decide that it has an objection to the production of any material document that it believes production of which would violate the alleged evidentiary accountant-client privilege under the Texas Occupations Code Section 901.457.

MR. WELLS: Your Honor, the way the protocol works

is that Pricewaterhouse identifies documents that they believe are responsive to the subpoena. They then give us on a rolling basis the documents. We then review the documents to determine if we are going to assert the privilege.

To date, we have not asserted the privilege. To date, we have only received two batches of documents. The first batch was 126 documents, and Miss Parikh, who is counsel to Paul Weiss, she is in charge of that project.

Please correct me if I misspeak in terms of numbers.

The first batch involved 126 documents. Of the 126 documents, we have pulled three documents that we're trying to research to understand if there's -- if there are confidential communications embedded. The rest of those, we have signed off on and have not asserted any privilege.

There's a second batch of documents that we just got access to in terms of being able to view them, I think on Friday.

(Pause in the proceedings.)

MR. WELLS: Okay. They're not -- there's another batch of 900 documents Miss Parikh tells me we had access to but then we lost access to because of computer problems in terms of interfacing with Mr. Meister's firm. Of that 900, we have not started that review because we just got back up

online, but on that, I can only tell you where we are in the protocol.

We have not identified to date any document that we are asserting a privilege to, but there are three that we're trying to research and understand if they may contain confidential information.

THE COURT: The reason that I asked the question is that you argue in your brief that it's premature for the court to consider these issues because you haven't raised any specific objections to the production of any of the documents. The compliance subpoena was served some time ago. You've had an opportunity for some period of time to review the documents.

And it does seem strange for a New York court to interpret Section 901.457 of the Texas Occupations Code section, which both parties tell me hasn't been construed by any Texas courts, if you're not expeditiously reviewing the documents that you may or may not assert in an accountant-client privilege with respect to that.

MR. WELLS: Your Honor, we are, and I have no hesitation in saying we are reviewing what we have been given by Pricewaterhouse expeditiously. Pricewaterhouse is still engaged, to my understanding, in the great -- with respect to the vast majority of documents, they haven't even pulled them yet.

So we have only gotten two of the tranches. The first tranche was 126, of which we signed off on 123. We've got three documents now, and we are trying to understand in discussions with our client and Pricewaterhouse whether it contains confidential information on those three documents.

The other 900, we got access to. That's the universe. There are probably thousands of documents that are coming but we have not gotten access to.

THE COURT: Respectfully, Exxon and its outside counsel have the resources to review these documents with considerable expedition, and Pricewaterhouse has the resources to produce the documents to Exxon with considerable expedition. So it seems to me that we could deal with this in a much more concrete way if Exxon and PricewaterhouseCoopers moved a little quicker than they are moving.

MR. WELLS: And what I will say to you, your Honor, and perhaps Mr. Meister should speak for PricewaterhouseCoopers, we had moved expeditiously, and we will, I make that representation, and we are willing to talk in Chambers or whatever, whatever would satisfy your Honor or the State, even to agree, you know, to an order that says we're going to do it expeditiously.

But in terms of the documents we have been given, okay, what is in the queue --

Proceedings

THE COURT: I get it that you have turned over 123 of the 126 documents that you have been provided by PricewaterhouseCoopers, and you are contemplating whether or not to assert an objection with respect to three. I get that.

MR. WELLS: Okay.

THE COURT: The issue here is, if we're going to have a dispute about 5,000 documents, I would like to know that sooner rather than later. If we're going to have a dispute about 14 documents, I would also like to know that sooner rather than later, rather than deal with this in a factual vacuum.

MR. WELLS: Certainly. And I'll make the last representation, and then I will turn it over to Mr. Meister.

I represent that Paul Weiss is devoting resources to do this on an expeditious fashion.

THE COURT: Can you commit to a specific time in the month of October at which the review of these documents would be complete?

MR. WELLS: In terms of the 900 --

THE COURT: Yes.

MR. WELLS: -- and the three? That's all we have right now.

THE COURT: No. In terms of all of the documents.

MR. WELLS: I don't even have any idea what he's

going to give me. I'll sit down and let Mr. Meister speak, because to the extent there's a production issue, I'm at the mercy of what Pricewaterhouse gives me when they give me what they do. I represent, whatever he gives me, we will put in the resources --

THE COURT: Look, the State is essentially claiming that you are unreasonably delaying and, for lack of a better term, flimflamming them because PricewaterhouseCoopers isn't producing the documents to you expeditiously, and you're not reviewing them expeditiously, and so the matter is more complicated than it has to be.

So let me hear from PricewaterhouseCoopers as to why it would take a month to produce these documents.

MR. MEISTER: Good morning, your Honor.

I'm David Meister from Skadden Arps for PwC, PricewaterhouseCoopers.

Just on the issue of how long it's taking us, to be a little bit more concrete, on October the 10th, we shared with Paul Weiss what I would consider core documents here. I guess -- let me take you a little bit back.

The subpoena is quite broad. After we got the subpoena, we engaged in some dialogues with the Attorney General's office to talk about where we would prioritize the production as we uploaded a vast quantity of documents onto a server. We agreed upon to start with five categories of

documents. That's the small set that we've spoken about.

The second set, Judge, are sets of work papers. And the subpoena seeks work papers which each -- for each year going back to 2010. The work papers are vast. Some, not all of those work papers are responsive to the subpoena, but a lot of them are. And so what we proposed to the Attorney General is to start with the most recent stuff of work papers and then go backwards from there. They didn't commit to anything, but they say that's a good way to proceed, at least for now.

We provided the 2015 work papers, the first half of the select version, to Paul Weiss on October the 10th. After that, there was some computer glitch. When we put them onto a website, kind of a shared website, there was a computer glitch, so they lost access for some period of time between October 10th and the 18th of October.

In addition, on October 10th, we also shared the 2014 work papers with Paul Weiss. These are large quantities of documents, Judge. I don't have the exact number at hand, but it's a large quantity of documents.

So that's where we are right now as far as production.

And I do think, your Honor, this is the -- these are core, this is the core stuff.

What is coming potentially are e-mail

communications within Paul Weiss, between Paul Weiss and Exxon, and that is going to be a massive undertaking.

MR. WELLS: Pricewaterhouse. You said Paul Weiss.

MR. MEISTER: Oh, I'm sorry. Between Exxon and Pricewaterhouse. E-mails. And that will be a massive undertaking. That will take some time.

There were a huge number of people from Pricewaterhouse who have worked on this audit, and I think that there's a huge number of Exxon people who interfaced with Pricewaterhouse as well. So the communication part of this is going to take awhile, your Honor. I couldn't responsively say how long it's going to take, but it's going to take awhile.

MS. SHETH: Your Honor, let me introduce myself.

I'm Manisha Sheth. I'm the Executive Deputy AG of the Economic Justice Division at the Attorney General's office.

Let me first begin by addressing the issue of ripeness, which your Honor has raised.

There has been no question in this case that Exxon has asserted clearly and unequivocally that they believe a privilege, an accountant-client privilege, not some rule of confidentiality, but a privilege applies to these documents.

So the harm that we are talking about, the harm that the AG's offices is facing, is happening right now as

we speak.

As we have heard from both sets of counsel, 900 documents are responsive documents. So these 900 documents that counsel for PwC has found to be responsive to our subpoena are presently being withheld on grounds of this purported privilege.

So, and the defendants, or Exxon and PwC, want this court to have the burden of reviewing each of those documents or the contested documents to determine whether the privilege applies. And we respectfully submit that that is not the issue before the court.

The narrow legal issue before the court is twofold:

One, which forum jurisdiction choice of law applies. Is it New York or is it Texas. And we submit, your Honor, that clearly New York law applies and your Honor need not even get to the secondary question of whether there is a privilege under Texas law.

Second, that even if Texas law applies, the Texas Occupations Code does not create any accountant-client privilege. And contrary to Exxon's representation that there has not been a single Texas court case that has decided the issue, your Honor, there have been four cases in the courts of Texas where they have uniformly held --

THE COURT: I read them over the weekend.

MS. SHETH: -- that there is no accountant-client

privilege, and Exxon has not identified a single case that identifies, that holds that there is such a privilege. In fact, what they are referring to is a rule of confidentiality, nothing more.

And what they're asking you to do is basically do a document-by-document review, which would be appropriate if we were talking about an existing recognized privilege such as the attorney-client privilege. That's not what we have here. The question before your Honor is whether or not there actually exists a privilege in this case.

And we submit that if you apply New York's choice of law rules: The place that the trial will be conducted will certainly be in New York; the place of discovery will be in New York; and New York, it's uncontested amongst PwC, Exxon and the AG's office that New York does not recognize an accountant-client privilege. And if your Honor would like, we can articulate why even under Texas law there was not a privilege either.

THE COURT: I understand that there is no accountant's privilege in New York. There may or may not be an accountant's privilege in Texas.

There is a choice of law issue I have to deal with.

For purposes of this morning, because I'm not going to decide this this morning, what I'm interested in having the parties come to some understanding with before we leave

today, is that PwC expedite its production of all responsive documents to Exxon, that Exxon review these documents with some expedition. Both PwC and Exxon have the resources to deal with collecting the potentially responsive documents to which Exxon may or may not have a legitimate claim of privilege to in a very short period of time. And while that's going on, in a telescoped period of time, we'll find out what the Texas court does with respect to the Texas action. And I'm not going to wait for the Texas court to rule on what's before me. I have your fully submitted set of papers, and I will revolve the issue expeditiously.

But in the interim, there is no reason that I can see why the process of collecting the documents that are responsive to the subpoena and Exxon's evaluating which of those documents, if any, it's going to assert a privilege with respect to the documents that it's not going to assert the privilege, and they claim they haven't asserted the privilege with respect to any documents, all of the other documents should be turned over to the New York AG forthwith.

MS. SHETH: Thank you, your Honor. We appreciate that.

The concern we have is that PwC has repeatedly stated that the subpoena is overbroad and that there is an enormous volume of responsive documents.

THE COURT: I don't have anything before me which would enable me to assess the extent to which the subpoena is or isn't overbroad. So, because nobody has asserted in any court filing that the subpoena is overbroad, at least for purposes of today, I'm assuming that the subpoena is a reasonable and appropriate subpoena.

MS. SHETH: Thank you, your Honor.

THE COURT: If anything changes on that score, I'll deal with it.

But in the meantime, until and unless there is a ruling that the subpoena is overbroad, anything that Exxon isn't asserting a privilege with respect thereto should be produced forthwith.

And to the extent that PwC and/or Exxon is dragging their feet in terms of moving this process forward, the New York AG has a legitimate grievance which will be appropriately addressed at an appropriate time.

MS. SHETH: Thank you, your Honor. I mean, that seems to be a reasonable solution. Our concern is that we have a very set timeframe for when PwC completes its production.

THE COURT: We're not going to leave here today without having an agreement on a timeframe.

MS. SHETH: Thank you, your Honor.

THE COURT: So can PwC and Exxon confer and agree

on a timetable? It can't be Christmas.

MR. WELLS: May I talk to PwC's counsel for one second, your Honor?

MR. MEISTER: May we just confer one moment, your Honor?

THE COURT: Sure.

(Pause in the proceedings.)

THE COURT: Counsel.

MR. MEISTER: Thank you, your Honor.

Your Honor, I have two just items to discuss here.

The first is, Judge, you say this shouldn't be Christmas, and I hear you, your Honor. I don't even know the exact number of documents that we have to review in order to determine their responsiveness and whether or not they're covered by, say, for example, the attorney-client privilege, but it's enormous, is my understanding. And we will absolutely put to work whatever resources we can put to work, and PwC will, as well. But these are -- this will be a very large undertaking for us, and I don't know how long it will take us to go through all of the documents.

THE COURT: Okay, look. I don't find this credible, to be perfectly candid.

It seems to me that you can produce all of the documents that are responsive to the subpoena within 30 days of the date that the subpoena was issued to counsel for

Exxon.

While that process is going on, any documents that are privileged attorney-client communications can be the subject of a privilege log. Any documents that are not potentially the subject of the assertion of an accountant's privilege, pending the ruling that I'm going to make on that issue, should be turned over to the Attorney General's office.

If there are claims that the subpoena is overbroad, an application can be made by order to show cause to narrow the scope of the subpoena. That could have been done at an earlier point in time. It wasn't done. It can still be done.

So November 10th should be the outside cutoff date for the turnover of documents to Exxon. That's going to be done on a rolling basis. And Exxon is going to be producing on a rolling basis the documents as to which Exxon doesn't assert any accountant's privilege to it.

So that's just the ministerial portion of what we're doing this morning.

Substantively, I assume that you are now going to argue the issue of whether Texas law or New York law applies, and you are going to argue whether or not, assuming Texas law applies, Texas Occupations Code Section 901.457 creates an evidentiary accountant-client privilege.

MR. MEISTER: Your Honor, I actually was not going to argue the latter.

And just on the scheduling, would it be all right with your Honor if we worked with the Attorney General?

THE COURT: If the Attorney General agrees to some other and different arrangement, whatever you stipulate to is fine with me.

MR. MEISTER: All right.

MS. SHETH: Your Honor, just to clarify the schedule, what we would ask respectfully is that the three documents that Mr. Wells referred to this morning, that those be produced with or without the privilege log by the end of this week, and the remainder of the documents, as your Honor alluded to, can be produced by November 10th. But we would ask that rolling privilege logs be submitted, as well.

THE COURT: Okay. Well, I just said that the documents are going to be produced on a rolling basis.

And as to documents as to which attorney-client privilege are being asserted, a privilege log will be produced on a rolling basis.

And now we have to get to the substantive issue which is the reason that we are here this morning.

MS. SHETH: Thank you, your Honor. Appreciate that.

Proceedings

MR. MEISTER: Your Honor, may we speak to the Attorney General's office about the schedule of production?

THE COURT: You will do that outside of my presence. I've given you a timeframe. If the Attorney General is amenable to another and different timeframe, or in a more convenient timeframe for the parties, and you come to a stipulation, that's fine with me.

But for you to produce to your client, Exxon, within 30 days of the date of the subpoena the documents that are responsive to the subpoena, I don't think that's an unreasonable deadline.

MR. MEISTER: Your Honor, the other issue that I wanted to put on the table here, Judge, is that the protocol that we had worked out, that PwC has worked out with Exxon that PwC has asked for, is that only Paul Weiss review the materials, that Exxon people not review the materials.

And I understand, Judge, having consulted with Paul Weiss, that that makes it more difficult as a matter of timing for Paul Weiss to make the decision as to whether or not the privilege, the Texas privilege, should be asserted. I wanted your Honor to be aware of that.

THE COURT: Well, what I am aware of is that there are well in excess of a thousand attorneys at the Paul Weiss firm, and that Mr. Wells has almost limitless resources in his litigation department to assist in this process.

Proceedings

MS. SHETH: Your Honor, to clarify --

THE COURT: One moment.

Mr. Wells.

MR. WELLS: Thank you, your Honor.

I asked Mr. Meister to raise that last issue with you because -- so the record is clear.

In terms of the protocol, there is a disagreement between Pricewaterhouse and Paul Weiss in terms of whether or not Paul Weiss, once we get the documents, is permitted to talk to our client about the documents in order to figure out if they involve privileged conversations.

Pricewaterhouse is taking the position that we cannot talk to our client about the documents; that after we review the documents at Paul Weiss, which we are doing expeditiously, we then have to come back to Pricewaterhouse to have Pricewaterhouse then tell us, based on their involvement in creating the documents, if the material was based on confidential communications between Exxon people and Pricewaterhouse people.

We have told them we disagree with that because that's -- that's why there are three documents I have. I haven't been able to pass on them because I have to go back to Skadden Arps, then they go back to their client to find out if something was based on a confidential communication.

We have a disagreement, but I want that on the

record, because that's my problem.

I do have significant resources. I can get through these documents if I can talk to my client about the documents to find out if Document A involves confidential communications. But they have decided, in total good faith, but they have decided that I can't do that.

So I want that -- that has to be worked out, because the only way I can do this quickly, and I want to do it quickly, and I make that representation, is if I'm able to talk to my client. And that's just kind of the basis right now to a protocol.

THE COURT: Look, this isn't that complicated. We're going to decide in a very short period of time whether or not there's any evidentiary accountant-client privilege under Texas Occupations Code Section 901.457, and we're going to decide in a very short period of time whether Texas law even applies to this proceeding.

As respects whether documents are privileged attorney-client documents, I am sure that PwC can give you a list of every lawyer at Exxon that's communicated with PwC. If it's a communication from a lawyer to PwC, then it's a privileged communication, and you will log it as a privileged communication. If it's a communication from a businessperson at Exxon to PwC, then it's not privileged communication unless it contains some advice of counsel, and

that should be evident from the document itself once you have a list of all the lawyers involved.

So we are just making this much more complicated than it needs to be. The parties around this table are all very sophisticated. None of these issues are novel nor new to any of you.

And let's get to the merits of why we are here this morning.

MS. SHETH: Thank you, your Honor.

Let me begin by addressing the choice of law issue first. Hopefully that will result in us not getting to resolve the issue of the Texas Occupations Code.

So as a threshold matter, two recent First Department decisions confirm that the law that should be applied is the law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding. And that -- those two cases are the JP Morgan case and the People v. Greenberg case, both recent First Department decisions.

And there is no question that under that legal standard, the appropriate choice of law in this matter would be New York. And it's undisputed among all three parties here that New York does not provide for an accountant-client privilege.

Now, even if this court were to apply the center of

gravity test that is advocated by Exxon, New York still has the greatest interest in this proceeding and, therefore, New York law would apply.

First, this is a law enforcement proceeding brought by the New York Attorney General's Office of potential violations of New York State law, including the Martin act, by Exxon, a company that does business in the State of New York. Exxon's independent auditor, PwC, also does business in New York, and its U.S. chairman's office is also in New York.

Moreover, neither Exxon nor PwC could have reasonably expected that anything other than New York choice of law would govern their communications, because in their representation letters between -- excuse me, in their engagement letters between Exxon and PwC, they actually agreed that New York was the appropriate choice of law.

And it's further telling that in this matter, PwC does not take a position on the choice of law analysis or whether the Texas Occupations Code creates a privilege.

So, your Honor, we submit that New York is the appropriate choice of law to apply, and there is no dispute that under that law, there is no accountant-client privilege.

Now, Exxon, unable to contest this black-letter law, attempts to manufacture an accountant-client privilege

based on the Texas Occupations Code Section 901.457. We respectfully submit that even if this court were to consider Texas law, it should not interpret Section 901.457 as a privilege but rather construe it to be a rule of confidentiality.

Now, first, contrary to Exxon's claim that not a single court, or that this is a case of first impression, every court that has considered this issue has concluded that 901.457 does not create an evidentiary privilege. And your Honor has read and is familiar with the cases, the four cases we have cited in our papers.

Second, Exxon, despite bearing the burden of establishing this privilege, has not cited the court to a single case, Texas or anywhere else, that interprets Section 901.457 to create an accountant-client privilege.

Now, third, let me talk about the text of Section 901.457. And if it's helpful for your Honor, we have a copy of the language of the text, if your Honor would like it.

THE COURT: You can give it to the Court Officer and I will review. It's obviously part of your papers.

MS. SHETH: Yes. So, your Honor, if you look at Section 901.457, you will see that although the term "Accountant-Client Privilege" is used in the title, nowhere does it appear, nowhere does the word "privilege" appear in the body of the section. And, in fact, if you look at the

language of Subsection (a), it clearly states that: "A license holder...may not voluntarily disclose information communicated to the license holder...by a client in connection with services provided to the client by the license holder...except with the permission of the client..."

Now, the plain language here is phrased as a rule or a restriction against voluntary disclosure of information absent client consent. It is not phrased in any way as a privilege.

And, in fact, there are three characteristics about this particular section that suggest to you that it is a rule of confidentiality.

First, the fact that it is limited to voluntary disclosures. In evidence, rules of privileges, privileges apply regardless of whether the disclosure is voluntary or required. The fact that this section is limited to voluntary disclosures further supports the OAG's argument that this is a rule of confidentiality as opposed to an evidentiary privilege.

Second, if you look at Subsection (b), which contains the exceptions, there is a broad exception under (b)(3) for "a court order that is signed by a judge if the order is addressed to the license holder," in this case, that would be PwC; "mentions the client by name," in this

case, that would be Exxon; "and (C), requests specific information concerning the client."

So, the fact that this exception (b)(3) is broadly written supports the interpretation that 901.457 is a confidentiality rule rather than a privilege.

In fact, had the Texas legislature intended to actually create an accountant-client privilege, then these broad exemptions, particularly "for a court order," would vitiate the privilege and render it nonexistent.

In both the In Re Patel case as well as the In Re Arnold case, the Texas court found, noted that its order on a motion to quash was the requisite order pursuant to (b)(3) that allowed disclosure of otherwise confidential information.

Now, your Honor, we have also prepared a chart for your Honor which compares this section with the prior Texas accountant-client privilege which was in existence before from the time period from 1979 to 1983. It also compares it with other Texas privileges which are cited by Exxon in its motion papers, and other states' accountant-client privileges. And if your Honor will permit, we will hand up a copy of this chart, as well.

So if your Honor looks at this court, we have the three characteristics on the left-hand side of the chart. Does "privilege," the word "privilege" appear in the text,

is the disclosure limited to voluntary disclosures, and is there is a broad exception for court orders.

In the first column, we have this particular statute in question, 901.457, and you see that the word "privilege" does not appear in the text, the statute is limited to voluntary disclosures, and there is a broad exemption. All three characteristics suggest that this is a rule of confidentiality.

Now, if you look at the other columns starting with the second column, there is a prior Texas accountant privilege which was repealed in 1983. And in that case, in that statute, the word "privilege" expressly appeared in the text of the statute, the statute was not limited to voluntary disclosures, and there was no broad exception for court orders.

And similarly, the other Texas privileges which Exxon cites in its papers had the same three characteristics.

And then finally, if we look at other states' accountant-client privileges, we have found 16 states that recognize an accountant-client privilege, and in 13 of those states, the word "privilege" appears in the text of the statute, the disclosures are not limited to voluntary disclosures, and there is no broad exemption for court orders.

And then fourth, if we look at the legislative history behind 901.457, that also confirms that this is not an evidentiary privilege.

As I mentioned earlier, there was a prior statute in place from the period of 1979 to 1983. And in that statute, the 1979 statute, the word "privilege" was used in the text, it was not restricted to voluntary disclosures, and there was no broad exception for court orders.

That provision was repealed in 1983, and in 1989, the Texas court had -- excuse me, the Texas legislature enacted the predecessor to the statute in question today. And that statute was enacted in 1989, and that statute did not use the word "privilege" in the text, that statute was restricted like the statute to voluntary disclosures, and it also contained a broad exemption for court orders.

THE COURT: Did the legislative history specifically say in words or substantial: We're changing the statute in order to make it clear that there is no privilege?

MS. SHETH: The statute did not say that, but, your Honor --

THE COURT: I'm talking about the legislative history.

MS. SHETH: Excuse me. The legislative history did not expressly say that.

THE COURT: What did it say?

MS. SHETH: There is a statement, a sponsor's statement that was made in 2013 when there was an amendment to the statute. And if I can hand that up to your Honor, we can read to you from that statement.

So if your Honor looks at the bottom of page 1, there is a statement made there which clarifies that this is a rule of confidentiality. So it reads: "S.B. 228 clarifies client confidentiality or what some refer to as the accountant-client privilege. Section 901.457 (Accountant-Client Privilege) Occupations Code, outlines the requirements for a certified public accountant to maintain client information confidentiality."

So the changes being proposed by this bill will make it clear that CPA's may disclose client information when required to do so by state or federal law, or when a court order is signed by a judge.

Now, Exxon makes several arguments in response to our papers that -- to our argument that this is a rule of confidentiality.

The first argument they make is that Subsection (b), which contains a list of the required disclosures, is a limited list of required disclosures. We argue that reading Section (b) in this fashion is inconsistent with the plain language in Subsection (a), which suggests that the rule

only applies to voluntary disclosures. So if we read the statute in the way Exxon suggests, we would essentially be reading the word "voluntary" right out of the statute. And rather, we think the better interpretation is that the Texas legislature wanted state enforcement agencies to go through the additional hurdle of coming to a court, getting a court order, before allowing the disclosure of otherwise confidential communications between an accountant and their client.

And then Exxon also makes an argument that this court's order on the office of the Attorney General's application or motion should not be the order that would take us into Subsection (b)(3), and we strongly disagree with that.

Subsection (b)(3) expressly provides that if a court issues an order that meets the requirements of (A), (B) and (C), and that is addressed to PwC, it mentions Exxon, and it requests specific information concerning Exxon, that that order would satisfy the exception outlined in (b)(3) and would allow PwC to produce the documents directly to the OAG without any review or need for review by Exxon.

And, in fact, there are two court cases that we have cited in our papers, In Re Arnold as well as In Re Patel, where the court relied on that order on a motion to

quash to allow information -- this was in the context of a motion to quash the deposition notice, a deposition information as opposed to a document subpoena, but relied on that order to allow production pursuant -- despite the existence of 901.457.

So, your Honor, we respectfully request a finding by this court that there is no accountant-client privilege, certainly not under New York law. And even if this court were to consider Texas law, not even under Texas law.

And we would ask that your Honor ask PwC or require PwC to produce responsive documents that it has collected and is now -- that are now pending review by Exxon to the OAG's office immediately, certainly by the end of this week, and that would include a certain category of documents which was identified in our papers that are not even subject to any accountant privilege because PwC was not acting in the role of accountant. And that category is the documents relating to the Carbon Disclosure Project. So that is a separate bucket of documents where it's uncontested that PwC was not acting as Exxon's independent auditor. Those documents should be produced right away, and they should be completed -- production of those documents should be completed forthwith.

As to the other documents that are being reviewed by Exxon, if your Honor finds that either New York law

applies or that there is no Texas privilege, those documents should also be produced forthwith.

And we respectfully ask that, given that there is no privilege, Exxon should not be permitted to delay the production of responsive documents to the OAG based on the assertion of some purported accountant-client privilege.

Thank you, your Honor.

THE COURT: Mr. Wells.

MR. WELLS: Thank you, your Honor.

First, with respect to the Carbon Study that she referred to, to my understanding, that document has been produced.

Is that correct?

MR. MEISTER: Your Honor, we have produced the CDP-related documents to the Attorney General September 30th, and then a corrected production on October the 7th. The first was black and white, the second was color.

MR. WELLS: So that is off the table. It was produced.

Your Honor, I am going to address the choice of law issue, then I am going to turn to the text of the statute and walk through the history of the statute, and then I'm going to talk about the case law, because it is our position that at no point has a Texas state court ruled that there is no accountant-client privilege. In those opinions, there is

language where they assume for purposes of analysis that there is a privilege, but at no point has there been a ruling.

But before I turn to a discussion of the cases, I want to start with the choice of law issue.

It is our position that the choice of law issue is governed by a balancing test, and that's based on the Court of Appeals decision in Babcock, that this court must look at the respective interests of both sides in deciding on the choice of law. We submit that in this case, ExxonMobil's documents are in Texas, ExxonMobil is based in Texas, the auditing team that audits ExxonMobil is based in Texas, the communications between ExxonMobil and the Pricewaterhouse accountants occur in Texas. In this situation, the court has to balance where the communications took place, where are the parties, what parties have the greatest interest.

This is not a case where the New York Attorney General has brought an enforcement action. They talk about what are going to be the rules when they get to trial. There has not been any return of a charge. There is no reality at the moment that there's going to be a trial of anything. This at the moment is a mere investigation. They have the right to conduct the investigation, but that is what it is. This is not a case, as in many situations, where it is clear there's going to be a trial and what rules

should govern in the course of the trial. And I submit that the interests in New York is far different when they have brought a case, when they have alleged some particularized harm to the citizens of New York. This case in contrast is purely in the investigative stage.

Furthermore, in order to do a balancing test, one of the issues is always the materiality of the evidence. To engage in a materiality of the evidence review, you must know what evidence, what documents, we are talking about. That is why, we submit, it is not appropriate to do this in the abstract.

It's similar to a work product privilege. There are situations where a court has the power to override the work product privilege based on a particular document that discloses certain evidence that is important to the truth-finding process. But in that situation, you have to look at the document. You cannot do a balancing test because materiality is a big part of that in the abstract. You need actual documents. So it is our position that Texas law should apply. And, furthermore, to do the balancing test, you cannot do it in the abstract. The court may need to engage in an in Camera review of certain documents in order to ask what is the materiality of the documents that the court is being asked to give over to the New York Attorney General. So we believe Texas law applies.

Now, with that said, I want to turn at this time to a discussion of the Texas statute and how it has evolved over the years, and I would like to hand up to the court an exhibit that sets forth the language of the statute as it was in 1989 when it was drafted, then how it was amended in 1999, how it was then amended in 2001, and then how it was amended in 2013.

We have some charts. So, your Honor, we just start with page 1. That is the actual bill that the Texas legislature voted on.

Now, the title on page 1 of the exhibit is that it regards an Act relating to the regulation of public accountants. That is the title of the Act.

If you turn to the second page, you see what is denominated as Section 26, which is the accountant-client privilege. And it is important that the word "privilege" is used as part of what the Texas legislature -- if you had been voting from a particular county, and you were the legislature voting on this bill, this is what was before you, and it was denominated Privilege. So this is not a term that was put into effect after people had voted on it, and then somebody at WestLaw used it as some organizing term. This is actually part of what was in front of the legislators who voted.

Now, in 1989, when it was enacted, it did not refer

to a court order. That language does not come until much later. It referred to an order "in a court proceeding." That was the language used. It says "in a court proceeding."

There also was no exception with respect to investigative agencies like the SEC or the Internal Revenue Service. That all comes later.

But the point I want to make right now is that the word "privilege" is part of the act, this is what the legislature voted on, and it does not refer to "court order." It refers to "court proceeding."

Now, the thing that happened next, if we go to the third page, is, there is an amendment in 1999. That amendment involves nonsubstantive changes. They changed the word "license" to "licensee." It is -- both sides agree the 1999 amendments were of a nonsubstantive nature, and nothing changes, but they add some commas and a few words. So, that's the next change in 1999. It still involves "court proceeding," not "court order." It's still entitled as a section Accountant-Client Privilege.

The next change then comes in 2001. That's the fourth page of the document I handed you. At that point in time, that is the first time that we have a carveout for certain governmental agencies that do not need to seek any type of judicial approval. The word "privilege" remains,

but it says for the first time in a section entitled (b)(2), that, "under a summons under the provisions of the Internal Revenue Code...and the Securities Act of 1933...or the Securities Act of 1934," that you do not need to get any type of court order. And the words "court order" appear for the first time instead of "court proceeding."

And so what we have in the 2001 statute as amended is a carveout for certain agencies, and I submit this language about summonses from the Internal Revenue Service and the SEC, that refers to those governmental agencies. There's a carveout for the SEC and the IRS. And then in the same section, "court proceeding" is deleted and "court order" is inserted. And that relates to instances where you need a court order. And we contend what that relates to are situations other than people who have been left out of the exceptions. And we think the government exceptions does not pick up New York -- the New York Attorney General's office, nor do we believe that they're covered by this court order section.

But there is another amendment in 2013.

But before I go there, I want to say that the decisions in Patel and the decisions in Arnold all were done under this 2001 amendment. Arnold is I think a 2012 case. Patel is 2007.

This is very important, your Honor, because what

those courts passed on was the 2001 structure of the statute. The statute changes in 2013.

Now, in 2013, there is another amendment, and it changes the structure of the statute. And what happens in 2013, they put in separate sections. There is now a section (2) that is purely a carveout section. They add the word for the first time "subpoena." "Subpoena" has now been added to "summons." They add as part of the carved-out agencies the Securities Act for Texas. So they've added the Texas AG. So at this point in time, the carveout section has taken on an independent role. It's no longer tied to the court order section, and it covers the IRS, it covers the U.S. Securities and Exchange Commission, and now it covers the Texas Attorney General. That is now a separate section.

They then take the court order provision that used to be part of (2) and they drop it into a separate section. It is now an independent item denominated as (b)(3), which says, "under a court order signed by a judge" if it has these three items.

This structure in 2013 is different, as I said, than that that existed during the Patel case or during the Arnold case.

It is the position of Exxon that not only is there an accountant-client privilege, those are the words that the

legislature passed on under the laws of Texas, but that Section (2) states what agencies have the carveout. And it's limited to the IRS, the U.S. Securities and Exchange Commission, and the Texas AG. And that under laws of statutory construction, the New York AG is not part of the carveout section. And it is our position that the New York AG, had they not been named in this section that deals with investigative agencies, they do not now drop down into Section (3) as a catchall.

THE COURT: So your position is that the exceptions that are allowed to be of an otherwise privileged nature of accountant-client communication all relate to the IRS and the SEC and the Texas Attorney General?

MR. WELLS: Yes, sir, with respect to investigative subpoenas. And it is exhaustive, it does not include the New York AG, and it is our position that the New York AG does not now get to drop down into Section (3) and get exempted by way of a court order.

THE COURT: How do you get from a specific exception identified as item (2) being related to item (3) when there's also items (4), (5), (6) and (7) under Section (b)?

MR. WELLS: Because Section (2) deals with specific situations involving investigative agencies. The other agencies listed are different. And the New York AG is akin

to those --

THE COURT: No, I get it. The New York AG doesn't fit within exception (b)(2).

Now, but what about (b)(4), (b)(5), (b)(6) and (b)(7)? Those are also exceptions.

MR. WELLS: That is correct. And they are of a different type of entity. And they also are exceptions.

But what we're saying in terms of an investigative agency like the New York AG, that the exceptions here are exhaustive. They do not come within this section. This section is exhaustive with respect to investigative subpoenas, and they do not get to drop down and pick up the court order exemption like it's a catchall.

And the fact that there are other entities identified in (4), (5) and (6), they do not relate -- (4) and (5), they do not relate to investigative subpoenas but rather they relate to a particular accounting investigation by the board, an accounting entity, and an ethical investigation involving a professional organization of accountants in the course of a peer review. (3), (4) and (5) are different than (2). That is what we are saying.

And what we're saying also --

THE COURT: So you're saying that (b)(2) and (3) aren't, but (b)(4), (5), (6) and (7) are separate exceptions that have no relationship to (b)(2)?

MR. WELLS: That's right. (3) is an independent exception, but (3) does not permit the New York AG to get an exemption under (3) because the New York AG is excluded under (2). Under the rules of statutory construction, if the legislature has identified with specificity a particular type of entity, it is to be assumed that other entities were not covered. They could have written this differently. They could have said "or any law enforcement agency" or "any other Attorney General." They did not do so.

THE COURT: No. What they said was that the section doesn't prohibit a licensor from disclosing information that is required to be disclosed "under a court order signed by a judge if the order is addressed to the license holder, mentions the client by name, and requests specific information concerning the client."

Isn't that a clear reading of the provision?

MR. WELLS: No, your Honor. We submit that (2) is an independent section dealing with investigative-type agencies, that this is exhaustive, and that agencies such as would come under (2) do not drop down to item (3).

THE COURT: Okay. That's your position. I get it.

MR. WELLS: Okay. Now, it is also our position, we want to point out that this structure, where (3) is now separate and (2) is independent, was not passed on by the Patel court or the Arnold court. It didn't even exist at

that time. And I think that also is of significance.

Now, what I would like to talk about now are the four cases they talk about, and I want to begin --

THE COURT: You just told me that those cases don't apply to the 2013 statute.

MR. WELLS: They do not, but what --

THE COURT: But they are instructive.

MR. WELLS: They are instructive. But the importance of the cases is that in none of the cases do they hold, do they hold that there is not an accountant-client privilege.

The New York Attorney General takes the position that these cases hold that no such privilege exists. I submit that if you carefully read the cases, the cases make clear they are not so holding. And we need -- and I would like to walk through the four cases, because what they show is that no court to this date has ever taken the time to look at the statutory history, look at the statutory structure, look at the issue before it, and grapple with all of this. And it's in part because, in many of those cases, the issue never was briefed, and the issue arose in the context of a relatively small tort litigation where somebody was trying to get access to the accountant's records, a claim was made that there was a privilege, people did not fight about it because of what was at stake. No court has

ever grappled with this question in a careful and reasoned way. That is the core point.

If we could just start with the first case, in terms of, I want to go through the cases chronologically, and the first case is the Canyon Partners case, and that is in 2005. This is a case that comes right before Patel, which is 2007, but Canyon probably starts a lot of the trouble, I submit, if you want to kind of do an autopsy on how did we get here, and whether people were actually doing research and issuing reasoned decisions, or did it just happen in terms of a throwaway line.

In Canyon Partners, a federal case, 2005, the court wrote: "The court initially observes that there is no accountant-client privilege under federal or Texas law." The court cites the Ferko case with the proposition that there's no accountant-client privilege for federal court.

Then to support the argument that there's no accountant privilege from Texas law, they cite a case called Sims. Sims is a 1988 case. In 1988, there was no Texas accountant privilege. The Act does not come back until 1989. It did not exist. And if you go and read the Sims case, all the court says in Sims is that under the Texas rules of evidence, there's no reference to a privilege. That's all that was said.

But it's important, your Honor, because that

language in Canyon where they cite Sims keeps getting picked up like somebody thought about it, they cite a case, as I said, that preexisted the passage of the statute, then in Canyon in a footnote they say in a letter to counsel from JDN, it references the accountant-client privilege. And then it says, "However, no court has elevated the professional standard established by this statute to an evidentiary privilege under Texas law." That is an accurate statement. And this is the first case we could find where anybody grappled with it. And to the extent he's saying: "We haven't been able to find a court that has said there is a privilege," that is accurate, but it's not based on any analysis that says the opposite is true, that there is no privilege.

And we went and got the briefs in Canyon, and I want to, at the end of the day, move them into the record because the issue was not briefed. It was not briefed other than this letter appearing in the file.

But that case is kind of the foundational case that people keep citing for the proposition that there is no privilege. But, again, it came up in the context where it wasn't briefed, and there is no support other than to Sims which just says it's not in the Texas rule of evidence.

The next case is 2007. Let's look at the progression. That's the Patel case. And I think there are

only two Texas court cases, Patel and Arnold. The other two cases we talk about, Canyon, and I think it's Cantu, those are federal cases, but I think your Honor in trying to determine what weight to put on what cases, the two Texas court cases have particular importance because that's the Texas court passing on the Texas statute.

But in Patel, in that case, at the lower court, the court had quashed a motion with respect to the -- had ruled against the motion to quash the subpoena. The party then took a mandamus to the Texas appeals court, the intermediate court. It's very important because under Texas law, with respect to questions of both law and fact, for mandamus, it's an abuse of discretion standard. So they are not actually even looking at the issues as if it were a regular appeal even on legal questions. But what the court wrote is that, "First, Nautilus does not counter that an accountant-client evidentiary privilege does not exist in Texas." That's critical. The other side did not question whether the privilege existed. It accepted that the privilege existed but then it looked in one of the exceptions. So this is not a case from the beginning where the party is coming in and saying: No privilege exists. That's not the situation.

Then the court wrote: "Assuming without determining that an accountant-client evidentiary privilege

exists in Texas, we will address the only issue before this court, that being whether there is a court order requiring the production of the requested documents."

So the Patel court assumes for purposes of discussion that a privilege exists, and then they go to whether the exception applies.

The Patel court also has relevant language. In footnote 6 in Patel, the court notes: "Other than citing Section 901.457 of the Occupations Code, neither party has provided authority for the proposition that an accountant-client evidentiary privilege exists in Texas." I think that's a true statement, but the point of it is, both sides were accepting that it existed. That wasn't even briefed. It wasn't even an issue.

Then the court says, "and we find none." And that's a true statement because at that point, no court has ever ruled on the issue except for that snippet of language in Canyon. And then they cite again to the Canyon case, which I've shown was not based on any analysis, and relied on a case that predated the statute.

And then the court ends up saying: "Therefore, because the law is not clear", not clear on the question of whether the privilege exists, "on this issue, to the extent the trial court's denial of the motion to quash in this case was based on no privilege, we cannot conclude it abused its

discretion." And it's really only what the trial court did. They say: "If that's what he was thinking. The law is unclear." So for purposes of mandamus, it's not an abuse of discretion.

But the point is, Patel does not issue a ruling that there is no privilege.

THE COURT: But what was the exception that the Patel court was concerning itself with?

MR. WELLS: There was an ongoing litigation, and in the context of the ongoing litigation, there had been a request to depose and for documents, and then they went to the issue of whether the quashing of that order constituted an order within the exception, and the court said it does.

In our case, we have a totally different argument.

Our argument is that (b)(2), which deals with investigative agencies, occupies the field, is exhaustive.

THE COURT: And (b)(3) is irrelevant.

MR. WELLS: That's right. And when you drop down to (b)(3), it is not a catchall. That is a different issue than presented in Patel.

THE COURT: Okay.

MR. WELLS: Okay?

The last case, the last Texas case, is In Re Arnold. That's 2012. And that case, what the Texas appeal courts wrote: "As we have stated, the existence of an

accountant-client privilege based on Section 901.457 is doubtful." They then quote from Patel. They didn't rule on the issue. And they cite the footnote about the law being unclear, from Patel. But this court does not issue a ruling. There's no ruling. There's an observation.

THE COURT: But Patel and Arnold, both --

MR. WELLS: Texas.

THE COURT: Texas court decisions, they are predating the 2013 amendment.

MR. WELLS: Yes, sir. But even assuming you want to give them weight, what I want to make clear to your Honor is that it would be incorrect to do what the government has urged you to do, which is say: The Texas Court of Appeals has ruled already that no privilege exists. They never issued such a ruling. And that's contrary to what they briefed, your Honor. If I come away with having made that point, I will have done at least part of my job today.

THE COURT: You've done your job.

MR. WELLS: Okay. Now, there's a last case, a last federal case that they cite. It is actually after now the 2013 amendment. It doesn't do any analysis, but it's the last case that they cite. It's called Cantu. It's a federal case. And what they say, the court writes: "However, in Texas, accountant-client communications are confidential, but not privileged." And the court cites

Patel. But, as I demonstrated, that's not what the Patel court said, but he cites to that. And then the court says: "Anyway, this is a federal question case and, accordingly, federal privilege law governs." That's an accurate statement. So, he cites Patel incorrectly.

But the bottom line is, no court has ruled that there is no privilege, and especially the two Texas courts, they don't do it.

Now, again, our core position is that Patel and Arnold are not controlling for our case; that we have a totally different argument involving the interaction between (b)(2) and (b)(3) and whether (b)(2) is exhaustive, and whether you can drop down to (b)(3) as they want to to save it. Those are different. That's a point different than is raised in any of these cases.

And what we are asking your Honor to do ultimately is not deal on an abstract record, to permit us to develop a record so that you could do the balancing test in the context of concrete documents, and that you will rule as you see fit, but that you not go down the road, as they've asked you, to say that Texas courts have ruled on this issue, because they have not.

That completes my argument.

Thank you.

Your Honor, excuse me. One last thing.

I do not think what is going on in Texas has any relevancy to this motion and dispute about the PwC subpoena and the attorney-client privilege, but the New York Attorney General has made reference to the Texas litigation, and if I could take maybe five or ten minutes just to at least explain what is going on there to your Honor, because I don't think it's been fairly described.

THE COURT: Why don't you tell me what it is that you are seeking vis-à-vis the New York Attorney General in the Texas proceeding.

MR. WELLS: Okay. Our original action in Texas was against the Attorney General of the Virgin Islands. I have a timeline that I could give to you as an exhibit that I think would help, your Honor. We can put it up.

This is a timeline of what is going on in Texas.

I start with the first bullet, which is November 4, 2015, when Attorney General Schneiderman issued the subpoena to ExxonMobil.

The day after the subpoena was issued, the New York Times had a full-blown story here about the ExxonMobil subpoena and investigation. The New York Times had the story before we even got the subpoena. We didn't get the subpoena until late at night before this full-blown story is in the paper the next day.

The next thing that happens is March 15, 2016, the

Virgin Islands Attorney General issues a subpoena to ExxonMobil.

March 29, 2016, Attorney General Schneiderman hosts a public press conference entitled: "Attorney Generals United for Clean Power," and they called themselves the "Green 20", with Vice President Al Gore, and they hold a conference, and they get on stage, and it's on the Internet, and what they say is that these attorney generals had banded together because the United States Congress is in gridlock about the issue of climate change, and they are going to step into the void and deal with the fact that Congress has not been able to deal with climate change. And one of the ways they are going to do it is to investigate ExxonMobil.

And that's really what -- up until then, we met with them, we kind of forgotten, you know, the leak to the New York Times in producing documents, but without question, the world changes the day they get on stage and basically say they have decided that we're guilty, they're coming after us for political reasons, and they're sitting there with the vice president.

What happens next, on April 13th -- and the Attorney General of the Virgin Islands is up on stage with him -- April 13th, we then file a petition in the Texas court seeking a declaration that the Virgin Islands subpoena is unconstitutional. We sue based on the First Amendment

and the Fourth Amendment in terms of the suppression of our right to participate in the climate change debate.

Six days later, Attorney General Healey issues a subpoena.

So what's going on now, we started with Attorney General Schneiderman, they've had the press conference, the Attorney General of the Virgin Islands has jumped on us, now the Attorney General of Massachusetts.

We then reach a settlement with the Attorney General of the Virgin Islands where he decides, rather than fighting us in Texas, he's going to withdraw his subpoena.

Then in June of 2016, we file a complaint and motion for a preliminary injunction against enforcement of the subpoena by the state of Massachusetts. We're now in Texas.

And a quick question: "Mr. Wells, why are you in Texas? Why don't you go to Massachusetts? Why don't you go to the Virgin Islands?" It's our position that there is a group of attorney generals who has decided to use their law enforcement powers for a political purpose, and the only place we can get them all, rather than fight them separately in each court, is in our home state of Texas. That's the only forum.

We also actually, when we filed against the state of Massachusetts in Texas, we did also filed against the

state of Massachusetts in Massachusetts, but we asked that court to stay it. It hasn't issued a ruling yet. We argue that I think in December.

Now, then there's an article in the New York Times where Attorney General Schneiderman gives an extensive interview, and he states that there may be massive securities fraud at Exxon, so he made this public statement now in August. Then the same day, he makes the public -- he's quoted in the New York Times, we get the subpoena for PwC documents. Okay? This all comes: New York Times, massive securities fraud, then he serves a subpoena on PwC.

Then on September 19th, this is a critical date, September 19th, we go to Texas and we argue the preliminary injunction against the state of Massachusetts before Judge Kinkeade. During the oral argument, Judge Kinkeade says to us, in essence: "Well, what are you doing about New York? You sue in Massachusetts, but you produce it to New York." At least as we read the court, he's got some concerns that, "Well, why are you suing in Mass. and not New York?" And that's how we read it, that he had those concerns, because he even said: "Doesn't New York have the same motive as Attorney General Healey?"

Then what happened, this is what they don't tell you in their papers. They're trying to create the picture in their papers that they filed this action in front of your

Honor to enforce the PwC subpoena on Friday, and we ran down to Texas and filed something on Monday. Nothing could be further from the truth. They don't tell you about what happened on Thursday. They make the story start on Friday like they filed an order to show cause. Nobody cared about, in all due respect, this accountant issue. What happened on Thursday was that Judge Healey -- I'm sorry, Judge Kinkeade on Thursday issued an opinion, and his opinion said that we were going to get discovery against the Mass. AG, as we read it, the other attorney generals, because we had made a sufficient showing of bad faith under the *Younger* doctrine, and that's when we decide to join them on Monday, but it's because of what happened in that opinion.

Then on the 14th, they filed their action the next day, then we filed our action against the Attorney General of New York in Texas.

In terms of where the Texas case is right now, two things have happened that are not on the chart. Earlier this week -- well, at the end of last week, the state of Massachusetts filed a motion for reconsideration, saying to Judge Kinkeade: We want you to reconsider your order not dismissing the case for jurisdictional purposes and also giving ExxonMobil discovery rights.

We filed a motion to expedite the filing of the Amended Complaint so the New York AG can be brought into the

case because the next step is, we're going to have a discovery conference, and there's no question it's going to be heated because right now we have the right, as we read the order, to take the deposition of both the Mass. AG people and really everybody, as we read it, that was at that March 29th conference. And we would like to get the New York AG in the case as we work out these discovery issues. So that is what we have done.

In terms of where Texas is going to go, it's months down the road because right now we're going to engage without a question in fairly heated discovery issues. We are going to try to take depositions of the state AG's. I have no doubt that the state AG's are going to contest Judge Kinkeade's order. And I have no doubt that they are going to say "investigative privilege." They have, all the AG's have entered into what they call a common-interest agreement. We believe that is a pretext to keep from the public and from us exactly what they have been doing for political purposes, because there's going to be litigation over that common-interest privilege which we submit is designed to keep people from learning the true facts, but it's going to be months down the road.

But when they -- so the order to show cause on Friday and the following Monday were not tied together. What was tied was what happened on Thursday. And we

immediately said in our papers: "We submit to your Honor jurisdiction. We have no problem with your Honor's ruling on this." We said that immediately. And that is our position.

But in terms of where Texas is, that's the one place we can get multiple attorney generals who are coming after ExxonMobil with what we believe are pretextual subpoenas designed not really to ferret out any wrongdoing but really for political purposes because we had deigned not to toe the line in terms of what they see as was politically correct with respect to the issue of climate change.

One last point.

ExxonMobil has been on the record for years now that we recognize the seriousness of climate change. All of these attorney generals operate within a four- to six-year statute of limitations. And we have been, prior to the statutory period, been on the record, we recognize that climate change, the issue is real, it deserves attention.

But this is part of a political agenda, and I understand that the New York AG made our complaint in Texas part of the record, and I would invite your Honor to read the complaint because it sets forth in more detail what I've laid out on this timeline.

Last point.

I just want to read from Judge Kinkeade's order

that was issued on Thursday. I would like to hand to your Honor a copy of the judge's order.

THE COURT: Thank you.

MR. WELLS: This is what Judge Kinkeade ruled on Thursday, signed October 13th. He said: "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.

"Conclusion.

"Accordingly, the court ORDERS that jurisdictional discovery by both parties be permitted to aid the court in deciding whether this lawsuit should be dismissed on jurisdictional grounds."

So that is where the case is as it stands.

But again, we are in Texas and we are fighting multiple attorney generals, and Texas is the one forum where we can fight them together. We may end up having, as we do

in Mass., we may end up at some point, I don't know, having New York litigation also. Right now, we have given them over one million pages of documents, and that may come to pass. But at this moment, we are in Texas because Texas is the only state, because it's where we're based, where we can bring our constitutional claims against multiple attorney generals rather than fighting state by state by state.

Thank you.

MS. SHETH: Your Honor, may I be heard?

THE COURT: Briefly.

MS. SHETH: Thank you, your Honor.

Let me briefly just address what Mr. Wells just said.

We are not -- the New York AG is not a party to that action in Texas at present, and the order that he just put up in front of your court does not -- is not directed at the New York AG, and the quoted statements were not about statements made by the New York AG.

Now, let me turn back to the issue which is before your Honor involving the PwC documents and this purported privilege.

Just quickly in response to the CDP documents, to date we have only received 30 such Carbon Disclosure Project documents. If that's the full universe, then we would like a representation that that production is complete. But we

find it surprising that there would only be 30 such documents.

Let me now turn to the choice of law.

Mr. Wells argues for a balancing test and relies on the Court of Appeals decision in Babcock. That is a case from 1963 involving a car accident that happened in Canada by two New York parties. It does not involve the question of what state's choice of law provisions apply, what state's choice of law provisions apply when dealing with the question of privilege.

When you are talking about privileges, the appropriate authority to look at is the two cases we cited to your Honor from the First Department, Greenberg as well as JP Morgan.

And in addition, I would point your Honor to the case called Bamco 18 as well as First Interstate, which are also decisions involving the application of choice of law principles to the privilege question.

And what is very telling is a case from the Southern District of New York in 2004 called Condit v. Dunne, 225 FRD 100, and in that case, the court noted, even applying an interest test, as Mr. Wells urges this court to do, that the factors the courts consider in determining which state's privilege logs apply include the following: 1, the state where the allegedly privileged communication

was made; 2, the state where the discovery is sought and the evidence will be admitted; 3, the state of the parties' citizenship; 4, the state where the suit was filed; 5, the state whose laws control the substance of the litigation; and 6, the state where the offense giving rise to the litigation took place."

If we look at that six-factor test, there are four factors that weigh in favor of New York. And the third factor also weighs in favor of New York given that this is a New York law enforcement investigation of a company that indisputably does business here in New York. And if you apply that standard, we urge you to apply New York law, no privilege applies.

Let me now turn to the legislative history that is relied upon by Exxon's counsel.

The key document that was not shown to your Honor, which we are happy to provide you with, is a copy of the original 1979 statute. This is the statute that actually did create an accountant-client privilege. And if your Honor looks at that statute, you will see that the word "privilege" shows up in the statute. There is no restriction to just voluntary disclosures, and there is no exception for broad orders. That is entirely consistent with how privileges work.

Now, if you then look at every subsequent -- well,

the thing we forgot to mention is that in 1983, that statute was repealed. And starting in 1989 through 2013 there were various predecessors and amendments to the current statute. And if you look at those, each of those contain the three characteristics that suggest that this is, in fact, a rule of confidentiality, not a privilege.

Exxon's counsel relies heavily on the fact that the title includes the word "privilege." But, your Honor, if you look at the Texas Government Code Section 311.024, it makes clear that a statute -- that the title of a statute cannot be used to expand its meaning. And that is exactly what Exxon is trying to do here.

If you look at every amendment that Mr. Wells has pointed out, it makes clear that what we're talking about is a rule of confidentiality.

The fact that we went from "a court proceeding" to "a court order" is further confirmation that they have a broad exception. I mean, "a court proceeding" is even broader than "a court order." So that further suggests that this is, in fact, a rule of confidentiality.

And then if we look at the 2013 amendment, the legislature went so far as to have a separate section giving it even more significance for court orders. And to interpret Section (b)(2) as being an exhaustive list that only includes the IRS and the SEC and the Texas Securities

statute, that seems entirely inconsistent with, one, the fundamental principle that this statute is limited to voluntary disclosures, and, from a policy reason, how could it be the case that the Texas legislature wanted to allow accountants to disclose information to ethical boards and licensing boards that are covered in the 4, 5 and 6 exceptions listed in the statute, but not to sister state law enforcement agencies.

In fact, the better reading would be that the Texas legislature thought that those agencies should get the additional protection of a court order before disclosing confidential information.

So, again, we would argue that this structure of the statute conveys that it supports the view that it's better construed as a rule of confidentiality as opposed to an evidentiary privilege.

And, in fact, the cases, the four cases that Exxon's counsel put up on the boards, further illustrate, they are instructive to this court, that no Texas court has interpreted this to be a privilege and, rather, have stated that the existence of an accountant-client privilege is doubtful and not supported in the case law.

We would also argue that no further record is needed on this legal issue. This is a legal issue at its core. Whether it's an issue of statutory construction,

looking at the legislative history, there's further documents that PwC are going to provide, or the accountant-client privilege log if Exxon is ordered to do so. Those are not going to shed light on whether this privilege even exists under the law.

Let me now turn to the Texas action, and I feel compelled to address the allegations against the NYAG which I will reiterate have not -- this is a motion to amend. The AG has not been added as a party to the Texas litigation. And, in fact, the timing of Exxon's motion papers is quite curious.

What has happened in this case is, the subpoena to Exxon was issued back in November of 2015. For the past year, Exxon has produced documents to the New York AG, the most recent of which were produced in this month on October 11th. They have produced, as they said, over 1.2 million pages of documents. At no point during the last year have they contested the authority of this office to bring this investigation or the good faith of this office in bringing this investigation. And they did not do that until we filed these papers in this court. And there can be no dispute that this investigation is proper. It's a proper exercise of our authority to investigate violations of state securities laws and other state statutes.

There is no question that this subpoena to Exxon,

and to PwC for that matter, is valid and is the appropriate forum to decide the validity of our investigation, and the fact that the Attorney General enjoys a presumption of good faith in this court.

THE COURT: They don't dispute that.

MS. SHETH: And they don't dispute that. You are right, your Honor.

And what they have done instead is not raise that issue in this court and instead raise it in the Texas Federal Court, and then try to expedite consideration of their motion as soon as we serve them with a copy of your Honor's order to show cause.

And I would note that the facts that are alleged in their proposed First Amended Complaint in adding the New York State Attorney General, those facts were available to them back in June of 2015 when they filed their case against State Attorney General Maura Healey from Massachusetts, and it is only now, where after we have come to this court, that they have filed that motion.

And then just briefly, your Honor, on the substantive points, we do -- to the extent the Texas court intends to add us as a party to the Texas litigation, I would note that Attorney General Schneiderman's statements with regard to this investigation have been very balanced. He's repeatedly stated that we are at the early stages of

the investigation, that it is too early to say, he's made no predetermination about the outcome of this investigation.

For purposes of our choice of law analysis, all we have said is that if a case is filed, that case will be brought here in New York, and if there is a trial of such a case, that trial will happen here in New York given that it's a case brought by this office involving allegations of violations of state law.

And as to the point of multiple attorney generals working together, that happens all the time to conserve resources of taxpayers involving cases and investigations that transcend states. That is a normal course of practice to have states and federal law enforcement coordinate together to investigate and litigate actions, and the Volkswagen matters is a prime example of that.

Thank you, your Honor.

THE COURT: Okay. So, we have agreed that subject to any agreement that the parties consensually enter into, PwC and Exxon will expedite the production of any documents that are neither attorney-client communications nor allegedly privileged accounting communications on a rolling basis by November 10th. And if that proves to be unworkable and the parties can't consent, you can come back to this court.

In the meantime, I will attempt as expeditiously as

possible to resolve that which is before me, which is whether New York law or Texas law applies to the claim of privilege. If New York law applies, there is no claim of privilege. If Texas law applies, I'll have to determine what the 2013 statute means in terms of this case, and I will do that as expeditiously as I can.

The last thing that we need to have agreement on is that if there are going to be any submissions to the court, that those submissions are to be shared with opposing counsel. And if they are formal submissions, they have to be e-filed. If they are letters, they have to be cc'd to opposing counsel.

I think that concludes everything that we need to discuss today.

MS. SHETH: Your Honor, may I address the question you asked earlier this morning about this envelope?

THE COURT: Yes.

MS. SHETH: Your Honor, we took a look at what was in the envelope. These are the documents that were submitted under seal because they were designated by PwC as confidential. A copy of this exhibit was provided to counsel for both Exxon and PwC but was submitted under seal for your Honor. It was not publicly filed.

THE COURT: Okay. Well, it certainly wasn't clear, to me, from receiving an envelope --

Proceedings

MS. SHETH: I apologize, your Honor.

THE COURT: -- with a note saying: "This is not e-filed," that those are documents that were submitted under seal. So if you want to resubmit them to me for review with an appropriate cover letter, I will review them.

MS. SHETH: Happy to do so.

Thank you, your Honor.

THE COURT: Thank you.

I think you should both order a copy of the transcript because you will both want a copy of the transcript, and to the extent that you can get it expedited, that would be a good idea.

Thank you.

(At this time the proceedings were concluded.)

-oOo-

C E R T I F I C A T I O N

This is to certify the within is a true and accurate transcript of the proceedings as reported by me.

William L. Kutsch, SCR

SO ORDERED

WLK BARRY R. OSTRAGER, J.S.C.

EXHIBIT 2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

_____X

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.

_____X

Index No. 451962/16

DECISION & ORDER

Motion Seq. No. 001

OSTRAGER, J:

Presently before the Court is a petition by the Office of the New York Attorney General ("NYAG") seeking an order pursuant to CPLR section 2308(b) compelling respondent PricewaterhouseCoopers LLP ("PWC") to comply with a *subpoena duces tecum* issued by the NYAG on August 19, 2016 (the "Subpoena") and compelling respondent Exxon Mobil Corporation ("Exxon") to allow PWC to produce responsive documents without withholding some based on a purported accountant-client privilege. The Subpoena, attached as Exhibit A to the Affirmation of Katherine C. Milgram, Chief of the Investor Protection Bureau of the Office of the Attorney General, was issued in connection with the Attorney General's investigation of Exxon's representations about the impact of climate change on its business, including on its assets, reserves, and operations.

A highly publicized subpoena was originally issued to Exxon on November 4, 2015. Concurrent with additional publicity, including an interview of Attorney General Schneiderman in the New York Times, the NYAG issued its investigative subpoena to PWC on August 19, 2016. Both subpoenas relate to potential Martin Act violations by Exxon in connection with its allegedly misleading public disclosures relating to climate change. All parties agree that this Court is the proper forum in which to resolve the NYAG's application.

It is undisputed that Exxon has produced at least one million documents to the NYAG pursuant to the subpoena issued to Exxon. The question raised by the instant petition is whether the production of PWC documents would violate Texas Occupations Code Section 901.457, which is captioned "Accountant-Client Privilege." The answer to this question turns, in the first instance, on whether New York law applies to an investigative subpoena issued by the NYAG with respect to a New York investigation involving companies that do business in New York. If, as the NYAG claims, New York law applies, counsel agree that there is no accountant-client privilege as New York law does not recognize any such privilege. If, as Exxon claims, Texas law applies to the Subpoena, there is an issue as to whether Texas Operations Code Section 901.457 would operate to preclude production of non-attorney client communications on the grounds of an accountant-client privilege. Significantly, PWC takes no position on the applicability of the Texas Occupations Code Section 901.457.

The short answer to the latter issue is that Texas Operations Code Section 901.457 does not preclude production of the requested documents. It is therefore unnecessary to resolve the choice of law issue, although as set forth *infra*, New York law is applicable to the NYAG's petition.

The precursor statute to Texas Operations Code Section 901.457 was originally enacted in 1979. As originally enacted, the statute appears to have created a limited accountant-client privilege subject to several carve outs, although no Texas case has specifically recognized an accountant-client privilege. The statute was subsequently amended multiple times, first in 1989 and, thereafter in 1999, 2001, and again in 2013. Each succeeding amendment to the statute modified in some respect the carve outs to any arguable accountant-client privilege.

The case law and legislative history relating to the intent and proper interpretation of Texas Operations Code Section 901.457 and its predecessors is sparse and not dispositive of this case. In all events, all of the limited case law addressing the statute predates the 2013 version of the statute, except for one federal case that mentions the state law but applies federal law. This Court finds that the statute has a plain meaning. Specifically, subdivision (b) of the statute provides in relevant part:

> This section does not prohibit a license holder [PWC] from disclosing information that is required to be disclosed:
>
> (1) by the professional standards for reporting on the examination of a financial statement;
>
> (2) under a summons or subpoena under the provisions of the Internal Revenue Code of 1986 and its subsequent amendments, the Securities Act of 1933 *(15 U.S.C. Section 77a et seq.)* and its subsequent amendments, the Securities Exchange Act of 1934 *(15 U.S.C. Section 78a et seq.)* and its subsequent amendments, or The Securities Act *(Article 581-1 et seq., Vernon's Texas Civil Statutes);*
>
> (3) under a court order signed by a judge if the order:
>
> (A) is addressed to the license holder;
>
> (B) mentions the client by name; and
>
> (C) requests specific information concerning the client;
>
> (4) in an investigation or proceeding conducted by the board;
>
> (5) in an ethical investigation conducted by a professional organization of certified public accountants;

(6) in the course of a peer review under Section 901.159 or in accordance with the requirements of the Public Company Accounting Oversight Board or its successor; or

(7) in the course of a practice review by another certified public accountant or certified public accountancy firm for a potential acquisition or merger of one firm with another, if both firms enter into a nondisclosure agreement with regard to all client information shared between the firms.

This Court rejects Exxon's assertion that subsections (b)(2) and (b)(3) must be read together and that because the Subpoena was not issued pursuant to one of the federal laws specified in (b)(2), the NYAG may not seek a court order compelling production pursuant to (b)(3). As a matter of pure statutory construction, this interpretation of the statute is flawed because there is no textural support for the proposition that the carve out in (b)(3) is tethered to the carve out in (b)(2) while the carve outs in (b)(4), (b)(5), (b)(6), and (b)(7) are not. Consequently, the carve out in (b)(3) would be satisfied by an order from this Court compelling compliance by Exxon and PWC of the investigative subpoenas issued by the NYAG inasmuch as those subpoenas request specific information concerning Exxon. *Cf. In re Arnold*, 2012 WL 6085320 (Tex. App., Nov. 30, 2012) (holding that an order denying a motion to quash a deposition notice functioned as a court order, thus vitiating any confidentiality obligation under the statute).

For the reasons stated above, it is not necessary to resolve the choice of law issue. If there were an applicable accountant-client privilege under Texas law, it would be nevertheless unavailing because New York law applies to the NYAG's application. New York does not recognize an accountant-client privilege, and controlling authority holds that: "The law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding is applied when deciding privilege issues[.]" *JP Morgan Chase & Co. v Indian Harbor Ins. Co.*, 98 A.D.3d 18, 25 (1st Dep't 2012); *see also G-I Holdings, Inc. v Baron & Budd*, No. 01 Civ. 0216 (RWS), 2005 U.S. Dist. LEXIS 14128, at 7 (S.D.N.Y. July 13, 2005) ("With

respect to the law of evidentiary privileges, New York courts generally apply the law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding itself."); *Fine v Facet Aerospace Products Co.*, 133 F.R.D. 439, 443 (S.D.N.Y. 1990 ("New York courts apply the privilege law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding when deciding privilege issues."); *People v Greenberg*, 50 AD3d 195, 198 (1st Dep't 2008) ("New York courts routinely apply the law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding when deciding privilege issues.") (internal quotation marks omitted).

Accordingly, it is hereby

ORDERED that the motion by the Attorney General of the State of New York to compel compliance with the investigative *subpoena duces tecum* issued on August 19, 2016 is, in all respects, granted. As stated in open court, compliance with the Subpoena shall occur in accordance with any schedule to which the parties agree, as long as that schedule is not unnecessarily protracted. Counsel shall appear for a conference on Thursday, December 15, 2016 at 9:30 a.m. in Room 341.

Dated: October 25, 2016

J.S.C.

BARRY R. OSTRAGER
JSC

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 THE STATE OF NEW YORK
vs.
PRICEWATERHOUSECOOPERS LLP ET AL
SEQUENCE NUMBER : 001
ORDER TO COMPEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 01

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 granted in accordance with the accompanying memorandum decision. Counsel shall appear in Room 341 for a conference on December 15, 2016 at 9:30 a.m.

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

Dated: October 25, 2016

Barry R. 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

EXHIBIT 3

The New York Times | http://nyti.ms/2dU7Ztx

ENERGY & ENVIRONMENT

Exxon Concedes It May Need to Declare Lower Value for Oil in Ground

By CLIFFORD KRAUSS OCT. 28, 2016

HOUSTON — Exxon Mobil, in a concession to market and regulatory pressures, said Friday that it might be forced to write down the value of some of its oil and gas assets in Canada and elsewhere if energy prices remain low through the end of the year.

The announcement, which accompanied the company's release of another quarter of lackluster earnings, was an apparent reversal of Exxon Mobil's stance in recent years.

The company has long insisted that it has been adequately accounting for the value of its oil and gas reserves — even as many other petroleum companies have taken big write-offs to reflect a two-year price slump.

On Friday, though, the company acknowledged that it faced what could be the biggest accounting revision of reserves in its history. Exxon Mobil might have to concede that 3.6 billion barrels of oil-sand reserves and one billion barrels of other North American reserves are currently not profitable to produce.

The way Exxon Mobil accounts for the value of assets still in the ground has made the company a target of inquiries by the Securities and Exchange Commission,

as well as the New York attorney general, Eric T. Schneiderman.

Mr. Schneiderman, along with many energy experts, has criticized Exxon Mobil for being slow to take into account the impact of anticipated future government actions to curb climate change, which may force energy companies to leave at least some fossil fuels untapped in the ground.

On Friday, Exxon Mobil seemed ready to acknowledge that the value of its assets might change.

"We anticipate that certain quantities of currently booked reserves such as those associated with our Canadian oil sands will not qualify as proven reserves at year-end 2016," Jeff Woodbury, Exxon Mobil's vice president for investor relations, said during a conference call.

Mr. Woodbury added that if current price levels persist, other oil and gas operations in North America may have to be written down, although he indicated that they could also be put back on the books if prices recovered sufficiently.

In August, the S.E.C. requested company documents and explanations about the value of Exxon Mobil's reserves, but it has not publicly commented on its inquiry. Exxon Mobil has promised to comply fully with the agency's requests and has expressed confidence that it has met its legal and accounting requirements.

The company has resisted Mr. Schneiderman's broader investigation into its accounting and its past public positions on climate change. The New York attorney general contends that Exxon Mobil has misled the public, even as the company's own scientists were warning about the climate impacts of greenhouse-gas emissions from fossil fuels.

Other oil and gas companies, including Exxon Mobil's rivals Chevron and Royal Dutch Shell, have lowered valuations by more than $50 billion since oil prices plunged from over $100 a barrel in 2014 to the current price of around $50 a barrel.

In contrast, Exxon Mobil resisted write-downs, saying that it conservatively valued its assets on a long-term basis and that price volatility was normal in commodity markets.

Exxon Mobil's oil sand reserves in Canada's Alberta province are a prime target for a write-down because they are particularly expensive to mine. Investments in oil sands have been slowing, and several oil companies have given up on the resource. Turning oil sands into a usable form of petroleum requires heavy processing and refining.

Because Exxon Mobil's earnings on oil and gas exploration and production have been in decline, said Brian Youngberg, a senior energy analyst at Edward Jones, "it is increasingly hard for it to demonstrate its reserves as economical in today's world of more moderate oil prices."

"Scrutiny will continue to rise on this issue," Mr. Youngberg said, "especially when it updates its reserves in early 2017."

With the world's oil industry producing over a million barrels a day more than global demand, few analysts expect oil prices to rise much through the end of the year — even though the expectation that the OPEC cartel may freeze or cut production in the coming months has moderately stabilized prices in recent months.

Oil prices were as low as $30 a barrel in February. On Friday, West Texas Intermediate oil, a benchmark, was trading just above $49.

The Exxon Mobil announcement came as the company reported third-quarter earnings of $2.7 billion, a 38 percent drop from the comparable period last year. Exxon Mobil has now reported two full years of quarterly declines as a result of low energy prices and recent drops in production and in profit margins on petroleum refining.

Shares of Exxon Mobil stock were down more than 2 percent in early afternoon trading on Friday.

Exxon Mobil's dividend payments continue to exceed profits, which means the company is borrowing and selling assets to finance its payments to shareholders. At the same time, cuts in capital spending are hurting the company's ability to maintain production.

"Although earnings may have bottomed," said Fadel Gheit, a senior Oppenheimer & Company analyst, "Exxon Mobil is not out of the woods yet and needs a much higher oil price to regain its balance."

Exxon Mobil is far from the only oil company that is suffering from low oil and natural gas prices. ConocoPhillips this week reported a third-quarter loss of $1 billion, as income fell 13 percent.

A version of this article appears in print on October 29, 2016, on page B5 of the New York edition with the headline: Exxon Concedes Drop in Value of Its Reserves.

EXHIBIT 4

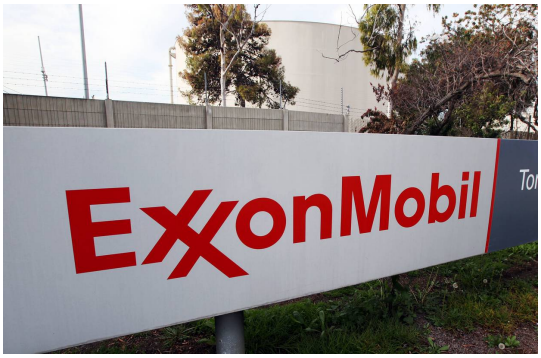
THE WALL STREET JOURNAL.

http://www.wsj.com/articles/exxon-mobil-profit-revenue-slide-again-1477657202

BUSINESS | EARNINGS

Exxon Warns on Reserves as It Posts Lower Profit

Oil producer to examine whether assets in an area devastated by low prices and environmental concerns should be written down



An Exxon Mobil sign in front of a refinery in Torrance, Calif. *PHOTO: ASSOCIATED PRESS*

By **BRADLEY OLSON** and **LYNN COOK**
Updated Oct. 28, 2016 4:43 p.m. ET

Exxon Mobil Corp. warned that it may be forced to eliminate almost 20% of its future oil and gas prospects, yielding to the sharp decline in global energy prices.

Under investigation by the U.S. Securities and Exchange Commission and New York state over its accounting practices—and the impact of future climate change regulations on its business—Exxon on Friday disclosed that some 4.6 billion barrels of oil in its reserves, primarily in Canada, may be too expensive to tap.

Exxon is facing near- and long-term threats as it seeks to exploit the full value of a vast oil and gas portfolio that stretches from Texas to the Caspian Sea, and deliver the handsome dividends that its shareholders have come to expect since it was part of John D. Rockefeller's Standard Oil.

Today, the company is suffering amid a two-year plunge in oil prices that has a barrel trading for around $50, a level Chief Executive Rex Tillerson believes may linger as U.S. shale producers ramp up at the first uptick in prices, prolonging the current glut and putting a ceiling on any price upswing.

EARNINGS FROM THE OIL PATCH

- Chevron Returns to Profit, but Revenue Slides
- Phillips 66 Posts Revenue and Profit Decline
- Total's Profit Jumps as Cost-Cutting Bears Fruit
- ConocoPhillips Revenue Slides
- Statoil Posts Wider Loss, Cuts Capital Spending Further

Earlier this year, Exxon lost the triple-A bond rating it had held from Standard & Poor's Rating Services since 1930, a standing of creditworthiness shared with just two other companies, Microsoft Corp. and Johnson & Johnson. Last year, it failed to find enough new oil and gas to replace what it produced for the first time in 20 years. Its profits in the last 12 months are the lowest since 1999, before it merged with Mobil Corp.

Exxon is alone among major oil companies in not having written down the value of its future wells as prices fell. It has said it follows conservative practices in booking reserves. It now plans to examine its assets to test, under rules governed by accounting standards, whether they are worth less than carried on its books.

The company said the 20% reserves reductions, which are governed separately by SEC rules, may be necessary based on the average 2016 price by the end of the year, though higher prices in November and December could mitigate the extent of the decline. It added that any reserve reductions could be added back if prices recover.

In an investor call on Friday, Exxon declined to discuss potential reserve write-offs or accounting write-downs in detail beyond its statement. The SEC declined to comment on Exxon's disclosure.

"Exxon has long been the best at what they do, but these external constraints are putting them more in line with everyone else, forcing them to the level of their competitors," said Sean Heinroth, a principal in the energy practice at management consultancy A.T. Kearney.

Though Exxon didn't mention climate change or regulators in its disclosure, most of the assets it said may not be economic are among the most scrutinized by climate change activists: Canada's oil sands.

Since 1999, energy companies have invested more than $200 billion in Alberta's oil sands, which has the third largest oil reserves behind Venezuela and Saudi Arabia, says the Canadian Association of Petroleum Producers.

FURTHER READING

- China's Oil Giants Shrink Their Spending (Oct. 28)
- Oil Companies Shift Exploration Tactics, Curb Spending (Oct. 26)
- Exxon, Chevron Shareholders Narrowly Reject Climate-Change Stress Tests (May 25)

Nine of the world's top oil companies, including Exxon, Chevron and Royal Dutch Shell PLC, have been counting on wringing more Canadian crude from the ground in the coming decades. Combined, Canadian crude accounts for 23% of the firms' proven reserves, according to data from investment bank Peters & Co.—up from only 5% in 2006.

New investments in the oil sands may be much harder to come by after Exxon's announcement, said Andrew Logan, director of the oil and gas program at Ceres, a Boston-based nonprofit that has pushed Exxon and other companies for better disclosure on the potential impact of climate change on the energy business.

"Why would any company invest billions of dollars in a new oil sands project now, given the near certainty that the world will be transitioning away from fossil fuels during the decades it will take for that project to pay back?" Mr. Logan said.

The potential loss of reserves has broad ramifications for Canada, which depends on the development of its crude stores to support its economy, but like other western countries has been moving to strengthen regulations to address climate change. Canadian Prime Minister Justin Trudeau earlier this month unveiled a national carbon-pricing proposal,

sparking an immediate clash between the national government and the province of Alberta.

The Liberal government's proposal to charge a price for carbon emissions compounds the headwinds energy companies already face if they want to mine Canada's oil sands for decades to come.

Amy Myers Jaffe, executive director for Energy and Sustainability at University of California, Davis, said Exxon's warning signals that it doesn't believe oil prices will rise significantly in the near future.

"This company had positioned itself for growth and oil sands were a key part of its strategy," she said, adding: "If lots of companies have to do write downs on their Canadian reserves, it sends a gloomy message about the oil sands," she said.

Longer term, Exxon faces headwinds from regulations aimed at reducing carbon dioxide and other greenhouse gas emissions, measures that are widely expected to fall most heavily on its industry.

Exxon's other major obstacle: U.S. competition. Advanced shale drilling techniques have unleashed a new wave of American oil into world markets. Those drilling and fracking techniques have made smaller American companies the industry's new "swing producers," or those most able to ramp up output quickly.

Exxon's Mr. Tillerson acknowledged that prospect in a recent speech at a conference in London where other energy executives were forecasting a sharp supply shortfall in coming years.

"I don't necessarily agree with the premise," he said.

Exxon shares fell 2.5% to $84.78 at 4 p.m. in Friday trading after reporting a quarterly profit that declined 38% compared with a year ago.

Write to Bradley Olson at Bradley.Olson@wsj.com and Lynn Cook at lynn.cook@wsj.com

EXHIBIT 5

The Washington Post

Energy and Environment

ExxonMobil tells independent groups to preserve records of their climate case communications — including with the press

By Steven Mufson November 3 at 4:00 PM

This post has been updated.

Lawyers for ExxonMobil have told a variety of non-governmental organizations to preserve all communications regarding climate change investigations with a sweeping array of other groups and individuals — including members of the press.

The letters from Exxon's lawyers Paul Weiss Rifkind Wharton & Garrison said the groups, including the Union of Concerned Scientists and the Rockefeller Family Fund, should hang onto communications with individuals such as former vice president Al Gore and William McKibben, a Middlebury professor and leader of the environmental group 350.org.

The letters are the latest twist of a legal saga in which Massachusetts attorney general Maura Healey and New York attorney general Eric Schneiderman have publicly announced inquiries into whether ExxonMobil improperly concealed information about climate change from consumers, investors and the public long after

it knew the dangers. As part of those probes, the attorneys general have issued subpoenas for documents going back as far as the 1970s.

If ExxonMobil were found to have concealed such information that could be a violation of the Martin Act, which gives the New York attorney general broad power to pursue fraud cases. Schneiderman and other attorneys general, in an unusual step, held a press conference that included Gore in March vowing to work together to combat climate change, including through the investigation of ExxonMobil.

The company has alleged Healey and Schneiderman were biased and it has fought back in a Texas federal district court, where Judge Ed Kinkeade said there was reason enough to allow Exxon to seek documents from Healey that might show she prejudged the matter.

However, a New York Supreme Court judge recently ordered Exxon and its accounting firm to comply with Schneiderman's subpoena.

Exxon appears to be relying on the Texas ruling to issue the latest letters to non-governmental organizations.

"Our request to preserve documents is focused on groups or individuals directly involved in a campaign to discredit our company using false allegations and mischaracterizations of the company's history of climate research and communications with investors," Alan T. Jeffers, an ExxonMobil spokesman, said in an email. "We have no choice but to defend ourselves against politically motivated investigations that are biased, in bad faith and without legal merit."

"We did not start this, but we will see it through and will vigorously defend ourselves."

Lee Wasserman, director of the Rockefeller Family Fund, set up in large part with money from the Standard Oil fortune, said Exxon sought "to protect a destructive, obsolete business model ushering in the climate catastrophe its scientists long ago predicted, rather than evolving into a corporation for the 21st century."

"How tragic that the management of a once great corporation would permit itself to devolve into a civic bully committed to intimidation of public interest advocates," Wasserman said.

"We're not a party to this litigation," said Kenneth Kimmell, president of the Union of Concerned Scientists. "It raises questions about how an [non-governmental organization] like UCS can be dragged into a legal fight between Exxon and the attorney general."

He added that it would "very burdensome" for the group to comply if a court or prosecutor were to issue an actual subpoena to produce such documents.

"The letter that we received from ExxonMobil's lawyers signals that the company is planning a massive fishing expedition into UCS's internal e-mails and communications with others, including the press," Kimmell said in an email. "We don't see how this relates to the company's current disputes with the New York and Massachusetts Attorneys General, and it appears to be yet another effort to intimidate us from exposing climate science deception."

Steven Mufson covers energy and other financial matters. Since joining The Post, he has covered the White House, China, economic policy and diplomacy. Follow @StevenMufson.
Follow @StevenMufson