



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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October 29, 2018

The Honorable Barry R. Ostrager
Supreme Court, New York County
60 Centre Street, Room 232
New York, NY 10007

Re: *State of New York v. Exxon Mobil Corporation*, Index No. 452044/2018

Dear Justice Ostrager:

We write at the Court's invitation in its October 25, 2018 Notice to (i) respond to Exxon Mobil Corporation's ("Exxon's") letter of October 24, 2018 concerning the assignment of the above-captioned action, and (ii) address the Court's question as to whether there "was a knowing and express waiver" of judicial disqualification on the basis of the Court's ownership of Exxon stock. Such disqualification is non-discretionary, absent waiver.¹

As a threshold matter, as this Court has recognized, a waiver of judicial disqualification is effective only if it is "knowing and express." Court Notice, Oct. 25, 2018, NYSCEF No. 439, Index No. 451962/2016 and NYSCEF No. 11, Index No. 452044/2018; *see also Silverman v. Silverman*, 304 A.D.2d 41, 46 (1st Dep't 2003) (waiver generally "must be clear, unequivocal and deliberate"); *New York v. United Parcel Serv., Inc.*, 253 F. Supp. 3d 583, 681 (S.D.N.Y. 2017) (waiver generally "must be clear and unequivocal"). Thus, any purported waiver is strictly construed. For example, in *Casita, L.P. v. Glaser*, Index No. 600782/2007, 26 Misc. 3d 1240(A), at *7-8 (Sup. Ct. N.Y. Cnty. Mar. 16, 2010), the court held that a party's waiver of "any claim with respect to the existence of [a] conflict of interest" on the part of an investment fund "[did] not constitute a waiver of wrongful conduct, even insofar as the wrongful conduct may have been occasioned, or rendered more likely to occur, by the conflict of interest." *See also Henry v. Lewis*, 102 A.D.2d 430, 435 (1st Dep't 1984) (waivers of privilege are "strictly construed and limited to their express terms").

Here, the Office of the Attorney General ("OAG") made no knowing and express waiver of judicial disqualification in the present securities fraud action. First, OAG's waiver was

¹ N.Y. Judiciary Law § 14 ("A judge shall not sit as such in . . . an action . . . in which he is interested[.]"); 22 NYCRR § 100.3(E)(1) ("a judge shall disqualify himself or herself" when the judge "has an economic interest in the subject matter in controversy or in a party to the proceeding").

expressly limited to the case that was pending before this Court at the time of the waiver.² The only case pending before the Court at that time was the limited special proceeding under CPLR §§ 403 and 2308(b) to enforce OAG's investigatory subpoena. As such, OAG's waiver in that proceeding did not and could not have operated as a waiver of the Court's disqualification with respect to a *potential* fraud action that was in the process of being investigated, and was non-existent at the time of the waiver. In fact, at the time of OAG's waiver, OAG was in the process of its investigation, and had not reached a determination as to whether Exxon's representations were actionable under New York law. Because the present fraud action is a new case,³ OAG's waiver in the context of the prior subpoena enforcement proceeding does not constitute a knowing and express waiver in the instant case.⁴

Second, the subpoena enforcement proceeding involved an OAG inquiry that was "purely investigatory rather than adjudicative in nature." *Kanterman v. Attorney General*, 76 Misc. 2d 743, 746 (Sup. Ct. N.Y. Cnty. 1973). The Court's involvement was limited to whether OAG was entitled to obtain certain documents and information from Exxon and PricewaterhouseCoopers LLP. The Court's resolution of that inquiry depended on its determination as to whether (i) there was an authorized investigation; (ii) there was an articulable factual basis for the OAG's investigation; and (iii) the requested documents bore a reasonable relationship to the investigation. *Am. Dental Coop., Inc. v. Attorney-General*, 514 N.Y.S.2d 228, 232 (1st Dep't 1987).⁵ In contrast, in the instant fraud action, the Court will have to adjudicate the merits of OAG's several causes of action. When OAG agreed to waive the Court's conflict for purposes of the subpoena enforcement proceeding, it did not knowingly and expressly waive that conflict for purposes of adjudicating the merits of any claims that it might assert in a subsequent fraud action.

Third, unlike the subpoena enforcement proceeding, the instant fraud action implicates the Court's economic interests in the subject matter in controversy. The Code of Judicial Conduct recognizes two types of economic interest that require the recusal of a judge, absent waiver: (i) interest "in a party to the proceeding," and (ii) interest "in the subject matter in controversy." 22 NYCRR § 100.3(E)(1)(c). The instant fraud action alleges that Exxon misrepresented its climate change risk management practices, and that such misrepresentations artificially inflated the value of its stock. The outcome of the instant action thus has the potential

² Specifically, on October 24, 2016, Mr. Wells informed the Court: "I have been authorized to say on behalf of all three parties that we have no objection to [Y]our Honor sitting on this case." Hearing Transcript, Oct. 24, 2016, NYSCEF No. 42, Index No. 451962/2016, at 4.

³ In an abundance of caution, OAG designated the subpoena enforcement proceeding as a related case on the Request for Judicial Intervention in this securities fraud action, even though the two cases differ in substance, scope, named parties, and requested relief. The present disqualification issue is entirely separate.

⁴ The cases Exxon cites in its October 24 letter are inapposite. Neither *Shepard v. Roll*, 278 A.D.2d 755 (3rd Dep't 2000) nor *People v. Owen*, 128 N.Y.S.2d 602 (Schenectady Cnty. Ct. 1954) involved a waiver in one case that a party argued applied to another case. Rather, those cases involved disqualification arguments that were made for the first time on appeal.

⁵ The Court also addressed issues of burden and proportionality, making rulings on document custodians, search terms, shared drives, and production deadlines.

to directly impact the value of the Court's position in Exxon. As such, the Court has an interest in the subject matter in controversy. By contrast, in the subpoena enforcement proceeding, the Court only had an interest "in a party to the proceeding." Although the Code provides that a judge with an interest in a party need not be disqualified upon divestment of the interest, there is no mechanism for a judge to avoid disqualification based on an economic interest in the subject matter in controversy. *See* 22 NYCRR § 100.3(E)(1)(c) and (g). This distinction reinforces the fact that an interest in the subject matter in controversy is different from, and more significant than, an interest only in a party to the controversy. Accordingly, OAG's waiver in the subpoena enforcement proceeding should not be deemed to be a waiver in the instant action.

Finally, Exxon's assertion that OAG is engaged in judge shopping is plainly false. OAG has benefited from the time and attention that this Court has expended during the subpoena enforcement proceeding. However, in light of specific allegations in OAG's complaint, the Court's ownership of Exxon shares may give rise to an appearance of partiality to an outside observer.⁶ Given Exxon's accusations against OAG throughout the investigation leading up to this action, and its unprecedented effort to enjoin OAG's investigation in federal court, which is presently pending before Second Circuit, the safer course is returning the assignment to the Clerk. Indeed, the Court of Appeals has recognized that "[j]udges should strive to avoid even the appearance of partiality, and the 'better practice' would be to err on the side of recusal in close cases." *Matter of Murphy*, 82 N.Y.2d 491, 495 (1993); *see also People v. Novak*, 30 N.Y.3d 222, 226 (2017) ("Not only must judges actually be neutral, they must appear so as well."); *Corradino v. Corradino*, 48 N.Y.2d 894, 895 (1979) ("[W]e believe it the better practice for the court to have disqualified itself and thus to maintain the appearance of impartiality."). Presiding over this fraud action while maintaining an economic interest in both the party defendant and in the subject matter in controversy would place the Court squarely within the ambit of this protective rule.

Because no waiver of judicial disqualification occurred with respect to this securities fraud action, the Court's disqualification is non-discretionary. OAG requests that the Court return the assignment to the Clerk to avoid any appearance of impropriety. We appreciate Your Honor's consideration of this submission.

⁶ The Code of Judicial Conduct requires disqualification in any case in which the "judge's impartiality might reasonably be questioned, including but not limited to" the circumstances described therein. 22 NYCRR § 100.3(E)(1); *see also* Model Code of Judicial Conduct, Cmt. 3.21 (disqualification is required "regardless whether any of the specific rules in Section 3E(1) apply").

Respectfully submitted,

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