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

PEOPLE OF THE STATE OF NEW YORK, by BARBARA D. UNDERWOOD, Attorney General of the State of New York, Plaintiff, -against- EXXON MOBIL CORPORATION, Defendant.	Index No. 452044/2018 IAS Part 61 Hon. Barry R. Ostrager Motion Sequence No. 1

DEFENDANT EXXON MOBIL CORPORATION'S BRIEF OPPOSING PLAINTIFF'S MOTION REQUESTING JUDICIAL DISQUALIFICATION

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Exxon Mobil Corporation ("ExxonMobil" or the "Company") submits this brief in opposition to the Office of the New York Attorney General's ("NYAG") motion requesting judicial disqualification. While the parties have fully and adequately addressed the relevant factual and legal issues in letters filed with the Court, ExxonMobil considers itself obliged to formally oppose NYAG's recently filed motion. For the Court's convenience, this brief consolidates the arguments ExxonMobil made in its prior submissions.

I. Preliminary Statement

This dispute concerns an objection NYAG waived two years ago. At the parties' initial appearance, the Court disclosed its ownership of ExxonMobil stock, observed that its holdings would not "affect [the Court's] impartiality in this case," but nevertheless offered to recuse itself from the case.[1] After conferring during a recess, the parties waived any objection to this Court's assignment, stating on the record that they had "no objection to your Honor sitting on this case."[2]

Over the two years that followed, this Court presided over seven hearings in proceedings that generated 434 docket entries, as NYAG returned again and again to this Court to obtain relief in connection with this case.[3] Under this Court's supervision, ExxonMobil produced more than 470,000 documents to NYAG and made 18 witnesses available for depositions; and ExxonMobil's auditor produced more than 88,000 documents to NYAG and made five witnesses available for depositions.[4] In the process, the Court reviewed extensive briefing (totaling 485 pages) and heard oral argument (totaling 281 transcript pages) about the core issues of this case—including ExxonMobil's application of both proxy costs of carbon and greenhouse gas ("GHG") costs.[5]

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1 Ahmed Ex. 1 at Ex. B, p. 3:22-24. References to "Ahmed Ex." refer to exhibits to the Affirmation of Nora Ahmed ("Ahmed Aff."), filed herewith. References to "Zweig Ex." refer to exhibits to the Affirmation of Jonathan Zweig ("Zweig Aff.") filed in support of NYAG's Motion Requesting Judicial Disqualification (Dkt. No. 28).

2 Ahmed Ex. 1 at Ex. B, p. 4:10-12.

3 Zweig Ex. 9 at 1.

4 *Id.*

5 *See id.*

After all this, NYAG now raises an objection to this Court's supervision of the case on a ground it expressly and unambiguously waived two years ago—and which it effectively waived anew each and every time it returned to this Court for further relief. The basis for NYAG's request is an enigma. This Court's position in ExxonMobil stock has not changed in the last two years, and NYAG points to nothing in the record that suggests its prior waiver was not knowing and voluntary. Instead, NYAG claims that filing a complaint has changed the landscape and revived previously waived objections. But NYAG's complaint changes nothing. It was entirely expected and foreseeable from the parties' first appearance before this Court that this case might proceed to the enforcement stage and that this Court would preside over that phase of the case. Had NYAG wished to preserve an objection to this Court presiding over the enforcement phase, it could have done so. But after providing an unambiguous and unqualified waiver, NYAG cannot now claim it has preserved an objection.

Having overseen this case for over two years, it is plainly appropriate for the Court to continue presiding over this matter. Throughout the investigative phase, the Court sought to shepherd this case from an investigation to an enforcement action, informing the parties that it intended to "move the investigation from the document phase, into the deposition phase, into the subsequent phase whether that's a trial" or a "consensual resolution."[6] That is how it should be, and what should happen here. ExxonMobil should not be prejudiced by reassignment at this late date, depriving it of this Court's expertise in the subject matter of the case, which has been developed in over two years' worth of briefing and court appearances.

ExxonMobil therefore respectfully requests that the Court decline to permit this case to be reassigned to a judge who will need to learn the extensive and complicated record from scratch.

[6] Ahmed Ex. 3 at 33:19-24.

NYAG has already drawn out the investigative phase of this litigation well beyond the bounds of reason and proportionality. The Court should not permit NYAG to further impede a prompt trial by commencing new proceedings before a judge entirely unacquainted with the underlying dispute.

II. Statement of Facts

On October 14, 2016, NYAG initiated judicial proceedings (the "Proceedings") before this Court.[7] Since that time, this Court has, without controversy, presided over the disputing parties, ruled on various discovery-related motions, and grappled with the complex issues presented by this case. In total, over the course of two years, the Proceedings have generated 434 recorded docket entries, 291 exhibits in connection with those filings, and 485 pages of briefs and affidavits.[8]

A. The Court Has Closely Supervised This Case.

NYAG and ExxonMobil first appeared before this Court on October 24, 2016.[9] On that day, NYAG challenged ExxonMobil's assertion of accountant-client privilege over documents in the custody of ExxonMobil's outside auditor.[10] Before diving into the merits, the Court disclosed on the record its financial interest in ExxonMobil's stock, thus placing the parties on notice of any potential conflict of interest.[11] The parties deliberated, and ExxonMobil, speaking on behalf of all parties, stated there was "no objection to your Honor sitting on this case."[12] After acknowledging this waiver, the Court observed that its "Exxon holdings" were "not a material portion" of

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7 Ahmed Ex. 4.
8 Zweig Ex. 9 at 1.
9 *See* Ahmed Ex. 2.
10 *Id.*
11 Ahmed Ex. 2 at 3:12-4:2; *see also* Dan M. Clark, *NY AG Asks Judge to Recuse Himself in Climate-Change Case Because of Exxon Mobil Stock Ownership*, New York Law Journal (Nov. 1, 2018), https://www.law.com/newyorklawjournal/2018/11/01/ny-ag-asks-judge-to-recuse-himself-in-climate-change-case-because-of-exxon-mobil-stock-ownership/.
12 Ahmed Ex. 2 at 4:10-12.

its assets.[13] The Court then heard argument from both sides before granting NYAG's motion to compel and rejecting ExxonMobil's claim of privilege.[14]

NYAG haled ExxonMobil into this Court three more times over the next three months—on November 21, 2016, December 9, 2016, and January 9, 2017—to add custodians, enforce its subpoena, set production deadlines, and generally expand the scope of its investigation.[15] Each time, this Court issued rulings and urged compromise so that NYAG could continue the investigative stage of this litigation.[16]

A little over two months after the January appearance, NYAG again insisted that the parties appear before this Court for a hearing.[17] This time, NYAG baselessly accused ExxonMobil of "hiding the ball" in its document production and failing to preserve documents related to former-CEO Rex Tillerson.[18] After listening to both parties, the Court addressed NYAG's concerns by ordering ExxonMobil to provide "affidavits from custodians" attesting to document collection and preservation procedures.[19]

NYAG soon afterwards issued a follow-on subpoena.[20] ExxonMobil moved to quash the subpoena on May 19, 2017,[21] and the parties appeared before this Court one month later to resolve their discovery dispute.[22] Calling NYAG's latest subpoena "unreasonable on its face," the Court warned NYAG that it could not "start round two of producing documents" in the case and that it should begin gathering information through witness examinations.[23] Even so, the Court paved a

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13 *Id.* at 4:15-18.
14 *See* Ahmed Exhibit 5.
15 *See* Ahmed Ex. 6; Ahmed Ex. 7; Ahmed Ex. 8.
16 *Id.*
17 Ahmed Ex. 9 at 4.
18 *See id.* at 1.
19 Ahmed Ex. 10 at 14:19-24.
20 Ahmed Ex. 11.
21 Ahmed Ex. 12.
22 Ahmed Ex. 3.
23 *Id.* at 9:22-24, 24:14-25:6.

middle ground for the parties to move forward, ordering (i) ExxonMobil to produce an additional year's worth of discovery, and (ii) the parties to meet-and-confer on any remaining discovery issues.[24] NYAG accepted this order, at no point challenging this Court's impartiality.

In accordance with this Court's order, the parties met and conferred over the next year. NYAG examined 18 witnesses during this time who collectively testified for nearly 200 hours (or 25 days).[25] ExxonMobil, in turn, produced to NYAG more than one million additional pages of documents, bringing its total production count to more than four million pages from 143 custodians and 15 shared drives.[26]

Nevertheless, on June 19, 2018, NYAG once again filed in this Court a motion to compel production—this time for additional cash flow spreadsheets concerning more than 20 ExxonMobil assets and for all documents ExxonMobil produced to the Securities and Exchange Commission ("SEC").[27] At the seventh hearing in two years, the Court made clear its expectations that NYAG should decide soon whether to file a complaint, that the Court would preside over any ensuing trial, and that the trial would take place in 2019.[28] In response to the Court's expressed intention to sit as the trial judge for the enforcement phase and to require a trial in 2019, NYAG did not raise any concern about the Court's ability to oversee the enforcement phase and trial. The Court then instructed ExxonMobil to (i) produce cash flow spreadsheets concerning 14 ExxonMobil assets identified by NYAG, (ii) supplement its production to include 140,000 additional pages of documents produced to the SEC, and (iii) provide detailed responses to interrogatories propounded by NYAG.[29]

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[24] *Id.* at 76:14-20, 77:14-23.
[25] Ahmed Ex. 2 at Ex. C, pp. 1, 7.
[26] *Id.* at 7-8.
[27] Ahmed Ex. 13 at 1.
[28] Ahmed Ex. 14 at 16:11-15, 20:4-6.
[29] *Id.* at 14:25-15:9, 17:8-16, 19:25-20:6.

B. NYAG Moves to Disqualify the Court on Grounds NYAG Previously Waived.

On October 24, 2018, nearly two months after the parties' last appearance, NYAG heeded this Court's guidance by filing a complaint against ExxonMobil (the "Complaint"). The Complaint alleges fraud arising from ExxonMobil's application of its proxy costs of carbon and its GHG costs—*i.e.*, the same allegations NYAG advanced in its June 2017 and August 2018 appearances before this Court.[30] NYAG then related this enforcement action to the Proceedings by filing a Request for Judicial Intervention.[31]

That same day, however, NYAG sent a letter to the Court requesting its recusal. In support of this request, NYAG cited the Court's "ownership of [ExxonMobil] stock as recently as 2017,"[32] which NYAG, for the first time, contended "may give rise to an appearance of partiality to an outside observer."[33] Notably, NYAG's letter made no mention of its 2016 waiver.

ExxonMobil opposed the recusal request as entirely improper. To begin, ExxonMobil reminded the Court that NYAG expressly waived its objection in October 2016.[34] The Company also noted that, over the past two years, NYAG had passed on numerous opportunities to raise any concerns about the Court's personal holdings.[35] Ultimately, ExxonMobil explained, reassigning this case "to a judge unfamiliar with the past proceedings would risk unnecessarily delaying expeditious disposition of this case, thereby compounding the prejudice to ExxonMobil resulting from NYAG's unnecessarily lengthy investigation and penchant for trying this case in the press."[36]

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30 Zweig Ex. 1 ¶ 1-3.
31 Zweig Ex. 2.
32 Zweig Ex. 3 at 1.
33 Zweig Ex. 6 at 3.
34 Ahmed Ex. 1 at 1.
35 *Id.* at 2; Ahmed Ex. 2 at 4.
36 Ahmed Ex. 2 at 4.

In response to NYAG's recusal request, the Court issued a notice stating that it was "disinclined to recuse itself" because the parties appeared to have "waived any conflict that might inhere" from its financial interests.[37] The Court further disclosed that it had neither "added to nor subtracted from its ownership" of shares since the commencement of the Proceedings and those shares "represent[ed] a fraction of 1%" of the Court's net worth.[38] Finally, the Court also reiterated its belief "that its ownership of the Exxon Mobil shares would [not], in any way, affect the Court's impartiality in dealing with the issues raised by the recently filed case."[39]

NYAG responded to these objections by filing a formal motion requesting the return of its Complaint to the Clerk of the New York Supreme Court Commercial Division for reassignment.[40] This Court then ordered the parties to appear for a conference on November 7, 2018.[41]

III. Legal Standards

"Absent a legal disqualification under Judiciary Law § 14," a judge "is the sole arbiter of recusal." *People* v. *Moreno*, 70 N.Y.2d 403, 405 (1987). "[J]udges should consider the overall situation and, if they see no bias or prejudice that would result from their continuing to preside over the matter, they may sit on the matter." *People* v. *Page*, 702 N.Y.S.2d 552, 554 (N.Y. Cty. Ct. Nassau Cty. 2000). A court's decision on recusal "may not be overturned unless it was an abuse of discretion." *Moreno*, 70 N.Y.2d at 406.

Relevant here, Judiciary Law § 14 provides that "[n]o judge shall be deemed disqualified" on the grounds that he owns stock in a corporate litigant if the parties "in open court upon the record, waive any claim as to disqualification of the judge." N.Y. C.L.S. Judiciary Law § 14.

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37 Zweig Ex. 5 at 1.
38 *Id.*
39 *Id.*
40 NYSCEF Dkt. 28.
41 NYSCEF Dkt. 39.

Furthermore, it is "well-settled" that a party must raise its claims of disqualification "at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim." *Apple* v. *Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 333 (2d Cir. 1987); *see also Glatzer* v. *Bear, Stearns & Co.*, 945 N.Y.S.2d 243, 244 (1st Dep't 2012) (holding plaintiff's request for disqualification was "undermined by his continued participation in the court proceedings for nearly a year after the disputed comments were made, without complaint"); *People* v. *Hines*, 690 N.Y.S.2d 63, 64 (2nd Dep't 1999) ("The defendant consented to the Judge's continuing participation and accordingly has waived this claim.").

Were the rule otherwise, parties might improperly "withhold recusal motions, pending a resolution of their dispute," and then seek disqualification "to get a second bite at the apple." *E. & J. Gallo Winery* v. *Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992). Indeed, once the party challenging the propriety of a court hearing a matter "proceed[s] without objection," any review of that decision will be precluded. *Shepard* v. *Roll*, 717 N.Y.S.2d 783, 786 (3d Dep't 2000). Courts have established these rules to discourage the "obnoxious practice" of "[j]udge shopping." *See People* v. *Wallace*, 378 N.Y.S.2d 290, 297 (N.Y. Sup. Ct. Suffolk Cty. 1975).

IV. Argument

After two years of litigation, NYAG asserts that this Court must recuse itself because of its ownership of ExxonMobil stock, even though that was fully disclosed at the outset of the case and has remained unchanged in the years since. The Court should deny NYAG's motion. *First*, the Commercial Division's principles of judicial efficiency counsel against switching judges at the eleventh hour of proceedings. *Second*, NYAG expressly waived its right to object to this Court's financial interest in ExxonMobil. *Third*, NYAG repeatedly manifested consent to the assignment of this case over the two years that this Court has presided over the action. *Finally*, granting

NYAG's motion would gravely prejudice ExxonMobil by depriving it of this Court's substantial knowledge and expertise.

A. Recusal Would Compromise Judicial Efficiency and the Values Promoted by the Individual Assignment System and the Commercial Division.

NYAG's eleventh-hour recusal motion disregards core tenets of both the Court's Individual Assignment System and the Commercial Division's administration of cases. Recusal at this late stage in the proceedings would undermine "the philosophy of the Individual Assignment System that justice can be best and most efficiently done if, to the maximum extent possible, a case remains with a single Justice throughout its life."[42] The Commercial Division as well has long recognized "the importance of having a judicial officer involved as early in the case as possible" to "help[] the Justices process cases more efficiently."[43] For this reason, "[t]he Commercial Division will not tolerate" parties "who engage in dilatory tactics" or "otherwise cause the other parties in a case to incur unnecessary costs."[44]

Contrary to these principles, NYAG asks this Court to switch judges at this late stage in the proceedings. But doing so would waste judicial time and resources, and impede the expeditious resolution of this case. In the two years spent litigating before this Court, the parties have generated 434 recorded docket entries, 281 transcript pages, 485 pages of briefs and affidavits, and 291 exhibits in support of their respective positions. Many of the parties' exhibits, such as ExxonMobil's *Managing the Risks* report and *Outlook for Energy* reports, underlie the core

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42 *General Overview of the Court*, NYCourts.gov (May 2015), https://nycourts.gov/courts/1jd/supctmanh/General_Overview_of_the_Court.shtml/.

43 The Chief Judge's Task Force on Commercial Litigation in the 21st Century, *Report and Recommendations to the Chief Judge of the State of New York* (June 2012), http://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf/.

44 Daniel L. Brown & Thomas M. Monahan, *New Commercial Division Rules Reflect Court's Efficiency Goals,* NYLJ (July 13, 2015), http://nylawyer.nylj.com/adgifs/specials/2015_0713_SSlit/files/basic-html/page6.html.

allegations in NYAG's Complaint.[45] Indeed, passages in the Complaint are taken nearly verbatim from other memoranda NYAG filed before this Court in support of its investigative demands. For instance, the Complaint alleges "Exxon has repeatedly and falsely assured investors that it has taken active and consistent steps to protect the company's value from the risk that climate change regulation poses to its business."[46] That is almost precisely what NYAG argued in its most recent motion to compel.[47] Both the Complaint and NYAG's recent brief also argue, in nearly identical language, that "Exxon publicly represented that its proxy cost" used one figure for estimating the regulations on "emissions in 2030," while its "undisclosed Corporate Plan" used a different figure for estimating the GHG costs imposed on specific projects in particular regions during that period.[48]

Reassigning this case at this final stage of the proceedings would lay to waste the substantial time and resources the Court has already invested in developing expertise in the subject matter of this dispute. Ultimately, reassignment would thwart the goal of the Commercial Division: "efficiency in the resolution of complex business disputes."[49]

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45 NYAG has filed ExxonMobil's *Managing the Risks* report four times in support of its various motions to compel compliance with its investigative subpoenas. Ahmed Ex. 2 at 2 n.4. It has also filed three *Outlook for Energy* reports in support of its most recent motion to compel. *Id.* In a similar fashion, NYAG's Complaint is suffused with allegations concerning each of these reports. Zweig Ex. 1 ¶¶ 77, 81-85, 90-93, 103, 112, 128, 131, 196, 199, 238, 260, 271, 273, 286, 288, 293-97.

46 Zweig Ex. 1 ¶ 76.

47 *See* Ahmed Ex. 13 at 1 ("Exxon has repeatedly assured investors that it is taking active steps to protect the company's value from the risk that climate change regulation poses to its business.").

48 *Compare* Zweig Ex. 1 ¶ 124 *with* Ahmed Ex. 13 at 15.

49 The Commercial Division of the Supreme Court of the State of New York, *An Efficient and Cost-Effective Forum for the Resolution of Business Disputes* 8, (June 18, 2015), http://www.nycourts.gov/courts/comdiv/NY/PDFs/CDbrochure.pdf; *see also id.* at 5 ("The Division emphasizes close judicial oversight and vigorous case management. Early preliminary conferences enable judges to lay out a roadmap with timetables for discovery, dispositive motions and trials. Deadlines are set and enforced. Discovery is managed with proportionality in mind, balancing the parties' rights to fair disclosure with minimizing expense and delay.").

B. NYAG Knowingly and Expressly Waived the Right to Seek Recusal.

Despite the Court's invitation, NYAG has not identified any basis to disregard its "knowing and express waiver" of its present objection to the assignment of this case.[50] Nor could it. The record clearly reflects that, at the outset of the initial conference in this case, this Court (i) detailed its financial interests, (ii) informed the parties that it was "prepared to disqualify [it]self if that's the desire of the parties," and (iii) then ordered "a ten-minute recess" to allow the parties to confer.[51] When the proceedings resumed, ExxonMobil stated that it had "been authorized to say *on behalf of all three parties* that we have no objection to your Honor sitting *on this case*."[52] That affirmative, unanimous, and unequivocal waiver was not restricted to a particular stage in the proceedings; rather, it encompassed "this case" as a whole.[53] NYAG now contends that the "case" referred only to NYAG's application to enforce the subpoena issued to ExxonMobil's auditor.[54] But that contention is fully refuted by NYAG's myriad applications to this Court over the past two years having nothing to do with that subpoena. NYAG has offered no justification for attempting to rescind its waiver after two years of litigation in this Court.

"It is well-settled that a party must raise its claim of . . . disqualification at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim." *Jewish Hosp. & Med. Ctr.*, 829 F.2d at 333-34. As a sophisticated litigant experienced in practicing before this Court, NYAG "should have moved for the disqualification of the Justice" as soon as it "kn[ew] of such facts which led [it] to believe" disqualification was needed. *People* v. *Owen*, 128 N.Y.S.2d 602, 604 (N.Y. Cty. Ct. Schenectady Cty. 1954). Here, by contrast, NYAG

50 Zweig Ex. 5.
51 Ahmed Ex. 2 at Ex. A, p. 3:22-4:7.
52 *Id.* at 4:10-12 (emphasis added).
53 *Id.*
54 Zweig Ex. 6 at 2.

expressly declined the Court's offer to disqualify itself, and instead "continue[d] with this proceeding without objection." *Shepard*, 717 N.Y.S.2d at 786. Its sudden shift in position, after two years of litigation, smacks of "[j]udge shopping," which is "an obnoxious practice" that "courts should resist aiding" through "self-disqualification." *See Wallace*, 378 N.Y.S.2d at 297. Permitting this untimely recusal motion—made after an express and knowing waiver—would "encourage parties to withhold recusal motions, pending a resolution of their dispute," and then seek disqualification "in order to get a second bite at the apple." *E. & J. Gallo Winery*, 967 F.2d at 1295.

It is no answer for NYAG to present a contrived argument that this Court's financial interests in ExxonMobil (which have remained unaltered over the past two years) take on a new character because this litigation has moved incrementally closer to final resolution. *First*, 22 NYCRR § 100.3(E)(1)(c) is not structured as NYAG suggests. It does not distinguish between an interest "in a party to the proceeding" and an interest "in the subject matter in controversy."[55] To the contrary, it uniformly provides that a judge with "an economic interest in the subject matter in controversy or in a party to the proceeding," upon disclosure of the interest and waiver by the parties, "may participate in the proceedings." 22 NYCRR §§ 100.3(E)(1)(c), (F). *Second*, NYAG unconditionally waived any conflict arising from this Court's ownership of ExxonMobil stock, no matter how characterized. This Court detailed its financial interest, and NYAG affirmatively waived the potential conflict.[56] As a party well versed in civil litigation, NYAG cannot credibly deny that, at the time it provided its waiver, it could foresee how this Court's stock ownership might bear on both preliminary and advanced stages of the litigation, including any eventual enforcement proceeding.

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[55] Zweig Ex. 6 at 2-3.
[56] Ahmed Ex. 2 at Ex. A, pp. 3:12-4:12.

If NYAG had been concerned about the obvious result of its waiver, it could have (i) objected in the first instance, (ii) limited its waiver to just the investigative stage of the proceedings, or (iii) otherwise preserved its objection. But NYAG utterly failed to take any of these actions. The Court should reject NYAG's contrived efforts to manufacture new conflicts from a two-year old disclosure.

C. NYAG Repeatedly Waived Any Right to Seek Recusal.

If NYAG had any genuine concerns about this Court's ability to serve as an impartial adjudicator, it had numerous opportunities to raise them. Time and again, NYAG has affirmatively placed disputes before this Court, without ever suggesting that it would seek disqualification.

On November 14, 2016, after this Court disposed of NYAG's initial motion to compel compliance with the subpoena NYAG had issued to ExxonMobil's auditor, NYAG chose to expand the scope of these proceedings by filing a new motion. This Order to Show Cause concerned the November 4, 2015 subpoena that NYAG had issued to ExxonMobil.[57] In the months immediately following NYAG's decision to expand this case to encompass its subpoena to ExxonMobil, NYAG wrote this Court four times "to seek the Court's intervention" and schedule various conferences.[58] Then, after NYAG issued new subpoenas to ExxonMobil on May 8, 2017, NYAG filed its third Order to Show Cause before this Court—again without reserving the right to seek recusal.[59] Indeed, NYAG reaffirmed its consent to the assignment of this case as recently as June 19, 2018, when it *sua sponte* filed yet another motion to compel.[60]

At none of these junctures did NYAG ever suggest that it wished to preserve the right to seek recusal. Even at the August 29, 2018 hearing, when this Court made clear its expectation that

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57 *Id.* at 4.
58 *See* Ahmed Ex. 9 at 4; Ahmed Ex. 15 at 5; Ahmed Ex. 16 at 1; Ahmed Ex. 17 at 4.
59 *See* Ahmed Ex. 2 at 4.
60 *See* Ahmed Ex. 13.

it would preside over any trial, NYAG raised no objection—either at the hearing or in the nearly two months that followed.[61] Instead, NYAG remained silent. "[W]here, as here, a party inexplicably withholds" a request for disqualification, "denial of the recusal motion is generally warranted." *Glatzer*, 945 N.Y.S.2d at 244. It is utterly improper for NYAG to lay in wait until the conclusion of the investigative phase, and only then attempt to revive a waived objection in a transparent attempt to obtain a new judge.

D. Reassignment Would Prejudice ExxonMobil.

Reassigning the case at this juncture would also prejudice ExxonMobil, which has devoted substantial time and expense to develop the record before this Court about the subject matter of this case. ExxonMobil has already extensively briefed the defective nature of NYAG's investor deception claims, which form the basis of its Complaint. As recently as July 9, 2018, ExxonMobil explained to this Court that NYAG's allegations rely on conflating proxy costs of carbon—which ExxonMobil uses to help model the potential impacts that a broad myriad of climate policies may have on future global energy demand—and GHG costs, which ExxonMobil applies, where appropriate to do so, to its own expected emissions of GHGs when evaluating projects for capital investments.[62] ExxonMobil should not now be forced to retrace its steps before another judge because of NYAG's unjustified and unilateral desire to rescind its prior waiver concerning the assignment of this case to this Court.

Ceding to NYAG's untimely request for recusal would be particularly prejudicial here because it would deprive ExxonMobil of a prompt opportunity to clear its reputation. Through interviews with members of the press, official public statements, an unprecedented press conference, and other frequent communications with reporters, NYAG has promoted sharply

[61] Ahmed Ex. 14 at 20:4-6.
[62] Ahmed Ex. 2 at Ex. C, pp. 10-11.

negative publicity of ExxonMobil. As NYAG lurched from one discredited theory of wrongdoing to another, it provided the press a steady diet of fresh allegations. This cloud of accusation and innuendo has hung over ExxonMobil for the last three years, imposing significant financial and reputational costs.

It has long been ExxonMobil's objective to obtain a swift resolution of NYAG's baseless allegations. Had NYAG stated at the outset that it intended to provide a narrow waiver applicable only to the investigative phase (rather than the plenary, unqualified waiver it actually provided), ExxonMobil might very well have not agreed to proceed before this Court. ExxonMobil provided its waiver with the expectation that this case would remain with "a single Justice throughout its life,"[63] and NYAG said nothing to dispel ExxonMobil's reasonable expectation. ExxonMobil should not be prejudiced because it relied on NYAG's unambiguous and unqualified waiver. Substitution of a new judge at this late stage of the proceedings would punish ExxonMobil for relying on NYAG's express representation to the Court.

Furthermore, NYAG has repeatedly asked the federal courts presiding over ExxonMobil's civil rights action against NYAG to "remit Exxon to a single, proper, and available state forum from this point onward," on the grounds that the state court proceedings are "comprehensive" and "substantially advanced."[64] In fact, in arguing to the federal court that the proceedings before this Court are "comprehensive," NYAG quoted this Court's "express instruction to the parties to bring 'any further disagreements' to th[is] court for resolution."[65] That instruction was recently reiterated at the August 29, 2018 hearing, where this Court informed NYAG that if it "choose[s]

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63 *General Overview of the Court*, NYCourts.gov (May 2015), https://nycourts.gov/courts/1jd/supctmanh/General_Overview_of_the_Court.shtml/.

64 Ahmed Ex. 2 at Ex. D, pp. 12, 15, 25; *id.* at Ex. E, p. 1.

65 *Id.* at Ex. F, p. 2 n.1 (quoting Ahmed Ex. 8 at 19:7-10).

to bring a formal complaint, this is going to be a 2019 trial."[66] NYAG should be held to its prior representation.

ExxonMobil is entitled to an efficient resolution of this matter in the manner the Commercial Division was designed to provide. And this Court is best positioned to expedite these proceedings. Reassigning this case to a judge unfamiliar with the past proceedings inevitably would delay expeditious disposition of this case, thereby compounding the prejudice to ExxonMobil resulting from NYAG's penchant for dragging out the investigative stage of this litigation and trying its case in the press.

V. Conclusion

NYAG cannot overcome its express waiver of judicial disqualification or its manifest consent to the assignment of this case. Even if it could do so, the risk of prejudice here to ExxonMobil is substantial. For these reasons, the Court should deny NYAG's motion requesting judicial disqualification.

[66] Ahmed Ex. 14 at 20:4-6.

Dated: November 7, 2018
New York, NY

Respectfully submitted,

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Certification of Compliance with Word Count

Pursuant to Rule 17 of the Rules of Practice for the Commercial Division of the Supreme Court, I certify that this brief complies with that rule because it contains 4,856 words, exclusive of the caption, table of contents, table of authorities, and signature block. In making this certification, I relied on Microsoft Word's "Word Count" tool.

By /s/ *Theodore V. Wells, Jr*