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

In the matter of:	**Index No.: 0452044/2018**
PEOPLE OF THE STATE OF NEW YORK	**REPLY MEMORANDUM IN SUPPORT OF PROPOSED INTERVENORS' MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF SEEKING PUBLIC ACCESS TO JUDICIAL DOCUMENTS**
Plaintiff,	
v.	
EXXON MOBIL CORPORATION	
Defendant.	

NOW COME Proposed Intervenors, ENERGY POLICY ADVOCATES and ROBERT SCHILLING, and submit this Reply Memorandum of Law in Support of their Motion to Intervene and in opposition to the Plaintiff's brief filed at Doc. No. 584.

I. Introduction

The Proposed Intervenors, Energy Policy Advocates and Robert Schilling, have moved to intervene in this matter for the limited purpose of seeking to unseal certain judicial documents. These documents are Exxon Mobil's Amended Answer (NYSCEF Doc. No. 241) and briefs with exhibits filed as NYSCEF Doc. Nos. 142, 144, 235 and 236.

The Office of the Attorney General ("OAG") has opposed the Proposed Intervenors' motion, alleging numerous procedural defects. First, OAG alleges that the motion to intervene was untimely. Second, OAG alleges that the Proposed Intervenors do not share a claim arising

out of common law or common facts with those in the underlying dispute. Third, OAG claims CPLR 5015(a) or perhaps Article 78 are the proper avenues for the relief Energy Policy Advocates and Mr. Schilling seek. Lastly, OAG paradoxically argues that because this suit is over, there is nothing to intervene "in", while simultaneously claiming that granting intervenor status to members of the public would lead them to "wield immense power" in litigation.

OAG conspicuously fails to note the Appellate Division's controlling precedent stating that "Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a *bona fide* interest in an issue involved in that action" and that "Distinctions between intervention as of right and discretionary intervention are no longer sharply applied." *Yuppie Puppy Pet Products, Inc. v. St. Smart Realty, LLC*, 906 N.Y.S.2d 231, 235, 77 A.D.3d 197, 201 (1st App. Div. 2010) (Internal citations omitted). Also conspicuously absent from OAG's brief is any mention of the merits of the Proposed Intervenors' argument for unsealing or their likelihood of success on the merits if intervention is granted.

OAG's procedural objections to intervention are meritless, and the Proposed Intervenors have shown a strong likelihood that they will be able to demonstrate entitlement to relief if the Court permits them to intervene.

II. The Proposed Intervenors Timely Filed

CPLR 1013 permits intervention "upon timely motion." OAG spills much ink arguing that Energy Policy Advocates and Robert Schilling did not timely file because they did not seek to intervene until after a trial had been held and a final judgment entered. However, OAG gives only glancing attention to the purposes for which the documents were sealed in the first place: to enable a fair trial on the merits of the active claims in the case, without interference from pretrial publicity ("So now that motions to dismiss three of the defenses have been granted, there's no

need for there to be public disclosure of the material relating to those three defenses."). Doc. No. 240, 45: 15-18.[1]

The Court struck certain of the defenses raised by Exxon in this matter at a hearing on June 12, 2019. The Court stated that "at the end of the day, you're either going to prove a Martin Act violation or you're not. And these affirmative defenses or defenses are irrelevant to the merits of that case." Transcript, Doc. No. 240, 43:15-17. Exxon argued at that time that the public had an interest in seeing how the Attorney General's Office operated and how it was doing its job. The Court nevertheless sealed certain records and held that

> *"Well, it's certainly part of the record for appellate purposes. And there are fifty people in the courtroom listening to your argument, so it's certainly been made public to those fifty people who in turn will transmit it to a much larger number of people. And I haven't dismissed your selective enforcement claim. And, for present purposes, we're going to keep things in abeyance until we resolve the selective enforcement claim." Id.* at 49:1-9.

Such things remained in abeyance to the conclusion of the trial pursuant to this Court's oral order from June 12, 2019. The Court expressly noted in a written order served with Notice of Entry on June 18, 2019 that the documents were sealed "in accordance with the decision on the record" and "for good cause shown." Doc. No. 284.[2] It is easy to imagine why this Court might seek to prevent material from leaking out to the media in advance of trial, as Rule 3.6 of the New York Rules of Professional Conduct warns against the impact of publicity once statements or documents are leaked outside the courtroom.

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[1] Proposed Intervenors respectfully submit that although there may have been "no need" for the Court to address the claims at issue, because they were dismissed, the public's "need" to see the documents is implicit in the First Amendment and the Common Law, and is a separate issue.

[2] CPLR 5501(a)(1) would have allowed for this non-final order to be appealed as part of an appeal from final judgment, had any party elected to take such an appeal. The Proposed Intervenors were not parties and therefore could take no appeal.

Final Judgment in this matter was not served with Notice of Entry until December 11, 2019.[3] Doc. No. 571. Because plaintiffs were mindful not to create a situation in which publicizing the records might impact the fairness of any retrial, the Proposed Intervenors intervened in this Court only after it became clear no retrial would be necessary, and after obtaining similar "recruiting" correspondence with Mr. Pawa from another Office of Attorney General, which had raised similar claims against their release.[4] In the present case, OAG once argued that a party should not be penalized for actions it took to promote the fair and efficient administration of justice: "We do not think it's fair to be penalized for the actions we took to try to be cooperative and ensure that we reached a trial date and not exercising our right…" *Transcript*, Doc. No. 240 45:7 *et seq*. It is thus ironic that OAG now claims the Proposed Intervenors should be penalized because they did not immediately seek to intervene, pre-trial or during argument, to publish the information in dispute which would have possibly impacted the trial.

Moreover, the inherent authority of the Court, rather than mere statutory dictates, applies in this matter, as the numerous authorities Proposed Intervenors cited in their Motion and Memorandum attest. The Court of Appeals has previously held that "the inherent power of courts

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[3] OAG asserts that the time for appeal in this matter ran on January 10, 2020. See Doc. No. 584 at 3. OAG's assertion fails to account for CPLR 5513 which states that "an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry." (emphasis added).

[4] However, as the date approached for answering specific factual allegations about that Office's relationship with Mr. Pawa and his influence on its investigation in *Energy Policy Advocates v. Energy Policy Advocates v. Healey, et al*. Suffolk County, Civil Action 19-17530, Massachusetts Superior Court, the Massachusetts OAG released its correspondence to Proposed Intervenor Energy Policy Advocates on September 11, 2019. While the release may have been to avoid answering those factual allegations, this release clearly acknowledges that this correspondence could not be justifiably withheld on the claimed law enforcement or other grounds, as they merely represent a private attorney enlisting an attorney general to pursue the same party, Exxon, that he also had targeted. That matter offers an instructive example of an attorney general releasing these records, in that the facts are very nearly identical. Emails available at https://climatelitigationwatch.org/wp-content/uploads/2020/01/Pawa-Email-Release.pdf.

to control the records of their own proceedings has long been recognized in New York and this power does not depend on statutory grant but exists independently and inheres in the very constitution of the court." *Dorothy D. v. New York City Probation Dept.*, 424 N.Y.S.2d 890, 891 (N.Y. 1980). OAG suggests no basis for limiting this Court's inherent authority over its own records to 30 days after a final judgment was entered or served.[5]

III. There are Common Questions of Law and Fact Justifying Intervention and Intervention is the Most Efficient Means of Proceeding in This Matter

The Proposed Intervenors have acknowledged that there are other avenues of relief available to them. In their opening brief, the Proposed Intervenors acknowledged Article 78 as an alternative method of proceeding. Doc. No. 575 at 3. OAG now suggests CPLR 5015(a) in its brief.[6] Doc. No. 584 at 4. Nevertheless, intervention remains the most efficient way to resolve the dispute and this Court has the discretion to grant the relief Proposed Intervenors seek. There is a long history of intervention by media entities and others for the purpose of seeking access to judicial records in both the state[7] and federal[8] courts of New York. None of the horrors OAG suggests in its brief, including intervenors derailing litigation or settlements, have come to pass.

This Court is familiar with the records at issue in this case. These parties are familiar with the records in this case. The Proposed Intervenors respectfully assert that the records of this

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[5] *In re New York State Temporary Com'n of Investigation*, 590 N.Y.S.2d 169, 155 Misc.2d 822 (Westchester Cty. Ct. 1992), while not binding upon this Court, contains a lengthy discussion contrasting statutory and inherent powers of unsealing. In that matter, the New York State Temporary Commission of Investigation moved to unseal criminal records after an acquittal on July 7, 1992. The unsealing was not granted until five months later, on December 7, 1992.

[6] The Proposed Intervenors must respectfully disagree with CPLR 5015 as an alternate means of proceeding. CPLR 5015(a) provides that a Court which has rendered a judgment "may relieve a party from it." The rule says nothing about relieving non-parties from judgment or vindicating their rights.

[7] See, e.g., *People v. Macedonio*, 2016 NY Slip Op 50718(U) (Suffolk Cty. Sup. Ct. 2016).

[8] See, e.g., *Doe v. United States*, No. 17-1841 (2d Cir.), *Dawson v. Merck et al.,* Case No.: 1:12-cv-01876, E.D.N.Y., *United States v. Erie County*, Docket No. 13-cv-3653 (2d. Cir.).

Court in this case are themselves the factual and legal nexus between the Common Law and Constitutional claims of the Proposed Intervenors and the underlying claims of OAG and Exxon. No other Court could rule upon any claim the Proposed Intervenors might wish to bring without considering what records were filed in this matter, why such records were sealed, and whether the legal arguments used to justify sealing were adequate. To make that argument in another proceeding instead of in this proceeding would be a needless duplication of effort for both the parties and the Court.

CPLR 1013 makes clear that in deciding whether to permit intervention, a Court should consider whether intervention "will unduly delay the determination of the action or prejudice the substantial rights of any party." In this matter, while intervention will not delay the matter or prejudice any party, the alternative means of proceeding will inarguably cause such delay and prejudice. A new Article 78 proceeding would serve only to increase private and public litigation costs and tie up the time of this Court's Appellate Division. CPLR 506(b)(1). Moreover, the same parties would all have to be joined to an Article 78 proceeding as necessary parties, in order to ensure they are not "inequitably affected by a judgment." CPLR 1001. Lastly, the Proposed Intervenors are statutorily prohibited from filing an Article 78 decision until this Court first issues a ruling which is "final and binding upon [the] petitioner." CPLR 217. It would be extraordinarily inefficient for the Proposed Intervenors to file an action seeking to collaterally attack this Court's orders instead of simply moving this Court to revisit such orders.

OAG cites *Matter of Astor*, 13 Misc. 3d 1203(A), 824 N.Y.S.2d 755, at *2 (Sup. Ct. N.Y. Cnty. Aug. 29, 2006) for the proposition that a party which "will not be bound by any judgment in [the] action" should not be permitted to intervene, positing a reading of the law that ignores past rulings allowing intervention by the press or public. Intervention is exactly the mechanism

for the Proposed Intervenors to come before this Court and seek a ruling which binds them. If the Proposed Intervenors do not prevail, they will have rights to appeal or to seek relief under Article 78 because a "final and binding" decision will have been made. Keeping the Proposed Intervenors from intervening only serves to elongate the litigation process.

IV. To the Extent OAG Raises Substantive Issues, they Weigh in Favor of Intervention

Although OAG's brief almost exclusively raises procedural objections, to the extent it addresses the substance of the dispute, OAG has made clear that the interests of the intervenors differ from those of the parties and that the Proposed Intervenors participation is necessary in order for their rights to be protected.

OAG argues in the introduction to its brief that the documents the Proposed Intervenors seek were "irrelevant" to OAG's claims against Exxon. Doc. No. 584 at 2, citing Transcript, Doc 240 at 39. A full review of the July 12, 2019 transcript reveals several of Exxon's claims were dismissed at that hearing ("All of these counterclaims with respect to First Amendment, chilling of speech, et cetera, I'm dismissing all of those."). Transcript at 35:21-23. Exxon's arguments relating to sealing at that hearing all centered on the rights of the public to know how OAG was exercising its immense power ("there is a strong public interest in howAttorney General exercises the power that's entrusted to it by the people). *Id*. at 47:9-10. But the Proposed Intervenors are not arguing or attempting to relitigate the claims OAG has made against Exxon. Instead, the Proposed Intervenors are asserting their own rights to access judicial documents.

Moreover, the right to access judicial documents in this matter will shed light on the actions of two branches of government: the Executive and the Judiciary. Although the Defendant previously sought to publicize actions taken by OAG, no party argued at the July 12, 2019 hearing in favor of the public's right to understand, analyze, and even criticize the judiciary as it

conducts its work on behalf of the public. On July 12, 2019, this Court dismissed several counterclaims. It allowed one defense, selective enforcement, to proceed. Even more importantly, the parties agreed without objection that Exxon's Amended Answer, including the selective enforcement defense, was the "operative" answer in this case. *Id*. at 57:12 *et seq*. The Proposed Intervenors are not simply re-hashing arguments previously made about the right to criticize the Executive Branch. Instead, the are arguing about the right to access the records of the Judicial Branch and to evaluate the decisions made in this Court.

Intervention should be granted if it will allow the Proposed Intervenors to vindicate substantive rights under the First Amendment or the Common Law, or to permit the Intervenors to make arguments that are unique to them and not advanced by the parties. Here, the Proposed Intervenors are asserting their First Amendment and other rights to access judicial records and to understand how this Court came to the decisions it made. While the Plaintiff and Defendant previously argued about the extent to which the public had a right to understand and criticize OAG's actions, no party has addressed the parties' rights to understand and criticize the dismissal of claims, or the Court's decision to seal the "operative" answer in this matter, or even the public's ability to evaluate the evidence presented at trial in light of the allegations made in the pleadings. As T.S. Ellis, Senior U.S. District Judge for the Eastern District of Virginia, wrote: "The fact that data may be misinterpreted and judges may be criticized is not a valid reason to withhold information. Criticism of judges, whether valid or invalid, is the very reason judges have independence." *Sealing, Judicial Transparency, and Judicial Independence*, 53 Villanova Law Rev. 939 (2008), fn. 6. Moreover, "such criticism is protected by the First Amendment." *Id*. at fn. 1.

As the Proposed Intervenors pointed out in their opening brief, the Court must make factual findings justifying sealing based on a "compelling" interest, and such sealing must be narrowly tailored. The Proposed Intervenors respectfully submit that such factual findings are absent from the record, and that no party heretofore has urged the Court to make such findings. Because the Court cannot make such findings in a vacuum, intervention is necessary so that the Proposed Intervenors, the Plaintiff, and the Defendant can all be heard regarding the merits of continued sealing.

V. Conclusion

OAG has failed to offer in its papers any reason why the documents at issue are privileged, secret, sensitive, or otherwise exempt from public disclosure. The documents appear to reflect nothing more than communications between OAG and a lobbyist, where the lobbyist urges the use of the OAG's awesome powers and taxpayer funded resources in what has proved a disastrous undertaking. The public has an absolute right to know how this came about, and how this Court has addressed the claims made by the parties. Intervention in this case is an appropriate procedural mechanism to make that happen.

The Court should grant the Motion to Intervene and set a hearing at which all parties can be heard, and factual findings can be made, regarding what, if any, documents ought to remain sealed in this action.

Respectfully submitted this the 28th day of January, 2020.

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Certification of Word Count

Pursuant to Rule 17 of the Rules of Practice for the Commercial Division of the Supreme Court, I certify that this affirmation complies with that rule because it contains 2480 words, exclusive of the caption, table of contents, table of authorities, signature block, and this certification statement. In making this certification, I relied on MacBook Page's "Word Count" tool.

Dated: January 28, 2020
New York, NY

_____/s/___
Francis J. Menton