

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

In the Matter of the Application of the

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

Petitioner,

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

Index No. _____

- against -

PRICEWATERHOUSECOOPERS LLP and
EXXON MOBIL CORPORATION,

Respondents.

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

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

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

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

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

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

The Attorney General's Investigation of Exxon

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

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

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

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

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

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

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

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

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

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

PwC’s Role

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

12. [REDACTED]

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

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

The New York Attorney General's Subpoena to PwC

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

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

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

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

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

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

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

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

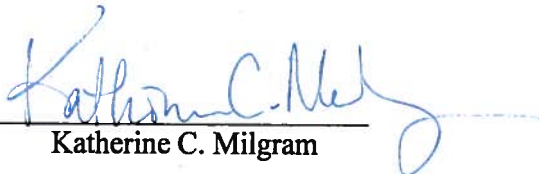
September 23, 2016, PwC produced to the Attorney General its engagement letters with Exxon and a list of certain PwC employees that worked on audits of Exxon. On September 30, 2016, PwC produced to the Attorney General certain management representation letters from Exxon, working paper indices, and CDP-related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

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

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

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

Dated: New York, New York
October 14, 2016


Katherine C. Milgram

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