

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

- against -

PRICEWATERHOUSECOOPERS LLP and
EXXON MOBIL CORPORATION,

Respondents.

Index No. 451962/2016

**SUPPLEMENTAL 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 the Chief of the Investor Protection Bureau of the Office of the Attorney General of the State of New York (“OAG”), counsel for Petitioner.

2. On Friday, October 14, 2016, the OAG filed an application, brought by order to show cause, to compel compliance with a *subpoena duces tecum* issued by the OAG to Respondent PricewaterhouseCoopers LLP (“PwC”) on August 19, 2016 (the “Subpoena”) in connection with the OAG’s ongoing investigation of Respondent Exxon Mobil Corporation (“Exxon”) (the “Application”).

3. I make this supplemental affirmation in further support of the OAG’s Application, and to inform the Court that very shortly after telephoning this Court this morning, Exxon filed a

motion in an ongoing proceeding in federal district court in Texas – a proceeding in which the Attorney General is not a party – in an apparent effort to forum-shop and evade the jurisdiction of this Court.

4. On Friday, October 14, 2016, the OAG provided a courtesy copy of the papers in support of its Application to counsel for PwC and Exxon.

5. On Friday, October 14, 2016, the Application was assigned to the Honorable Barry R. Ostrager of the Commercial Division, New York Supreme Court.

6. On Sunday, October 16, 2016, at 6:55 p.m., counsel for Exxon informed the OAG that they intended to call Justice Ostrager’s chambers at 9 a.m. on Monday, October 17, 2016, to request that Exxon be heard prior to the entry of the proposed Order to Show Cause. A true and correct copy of the email from Michele Hirshman to the OAG and to counsel for PwC is attached as Exhibit 1.

7. On Sunday, October 16, 2016, at 10:17 p.m., the OAG informed Exxon’s counsel that Justice Ostrager’s Practice Rules expressly state that “[n]o calls to Chambers shall be placed, nor emails sent, unless authorized in advance by the judge or a member of the staff or as permitted by the rules.” The OAG also informed Exxon’s counsel that to the extent counsel had obtained such permission, the OAG would make itself available for a 9 a.m. call, and requested that, in advance of the call, Exxon’s counsel identify “all issues you plan to raise” with the Court. A true and correct copy of this email is included in Exhibit 1.

8. On Sunday, October 16, 2016, at 10:49 p.m., counsel for Exxon informed the OAG that the parties would “call chambers together as the rules allow [and] also send a letter to the Court and will copy you and your colleagues.” A true and correct copy of this email is included in Exhibit 1.

9. On Monday, October 17, 2016 at 2:24 a.m., counsel for Exxon sent a letter to the Court by *NYSCEF* and Facsimile advising Justice Ostrager that they would call the Court at 9 a.m. Attached as Exhibit 2 is a true and correct copy of the letter to the Court (Docket No. 17).

10. On Monday, October 17, 2016, counsel for Exxon initiated a call with Justice Ostrager's chambers, with the OAG and counsel for PwC on the line. During that call, counsel for Exxon informed the Court's staff that Exxon wished to submit papers regarding the propriety of the proposed Order to Show Cause before such Order is issued by the Court. The OAG argued that the submission of such papers would be improper, and that Exxon would have an opportunity to respond to the Application after the Court signs the proposed Order to Show Cause. The Court's staff informed all counsel that Justice Ostrager was not available today, and that any papers should be submitted to Room 341.

11. On June 15, 2016, Exxon filed a complaint against the Massachusetts Attorney General, Maura Healy, in the United States District Court for the Northern District of Texas, Fort Worth Division, seeking to enjoin the Massachusetts Attorney General from enforcing a Massachusetts Civil Investigative Demand ("CID") served on Exxon and seeking a declaratory judgment that the issuance of the CID violates Exxon's rights under state and federal law. *Exxon Mobil Corporation v. Maura Tracy Healy, Attorney General of Massachusetts, in her official capacity*, No. 4:16-CV-469-K (N.D. Tex.) (the "Texas Action"). A true and correct copy of the complaint against the Massachusetts Attorney General is attached as Exhibit 3. Like the OAG's investigation, the Massachusetts Attorney General's investigation is focused on the accuracy of Exxon's disclosures regarding the impact of climate change on Exxon's business.

12. Although the OAG had issued an investigative subpoena to Exxon on November 4, 2015, Exxon did not include the New York Attorney General as a defendant in the Texas Action, nor did it seek to enjoin the OAG's investigation of Exxon in the Texas Action.

13. Instead, from January 12, 2016, to present, Exxon has produced 1,244,026 pages of documents in response to the OAG's November 4, 2015 subpoena to Exxon. In fact, Exxon most recently produced documents on October 3, 2016, and October 11, 2016, including documents concerning Exxon's oil and gas reserves.

14. As set forth more fully in the Affirmation of Katherine C. Milgram in Support of The Office of the Attorney General's Motion to Compel Compliance with an Investigative Subpoena (Docket No. 1), PwC – Exxon's independent auditor – has also produced only 97 documents to the Attorney General in response to the Subpoena. The OAG has had a number of telephonic meet-and-confers with PwC. PwC has admitted that it has responsive documents and at no time has contested the OAG's authority to issue the PwC Subpoena. It was only after Exxon asserted a purported accountant-client privilege with respect to PwC's productions to the Attorney General, that PwC, notwithstanding a lack of any authority to support such a privilege assertion, permitted Exxon's counsel to review PwC's responsive documents for a privilege that is not available under New York or Texas law. Even in its opposition papers to the OAG's Application, Exxon still has not represented that it will cease reviewing PwC's responsive documents for a purported accountant-client privilege and that it will not withhold any documents from production pursuant to such a purported privilege.

15. This morning at 9:25 a.m., immediately after the call with this Court's staff, Exxon's internal and external counsel called counsel for the Massachusetts Attorney General to inform it that Exxon would be filing a motion for leave to file a first amended complaint in the

Texas Action seeking leave to add the New York Attorney General as a defendant and add claims for conspiracy to deprive Exxon of its constitutional rights and federal preemption of New York law. Exxon's counsel inquired whether the Massachusetts Attorney General would consent to the motion, and the Office of the Massachusetts Attorney General informed Exxon's counsel that it did not consent to Exxon's motion to amend.

16. At approximately 10:30 a.m. this morning, Exxon filed a motion for leave to file a first amended complaint in the Texas Action. Attached as Exhibit 4 are true and correct copies of Exxon's motion, memorandum of law, and proposed first amended complaint. The proposed first amended complaint seeks to add the New York Attorney General as a defendant and requests that the federal district court grant Exxon declaratory relief and issue a preliminary and a permanent injunction prohibiting enforcement of the OAG's November 4, 2015 subpoena to Exxon, relief which effectively would foreclose the OAG's investigation of Exxon, including enforcement of its subpoena to PwC.

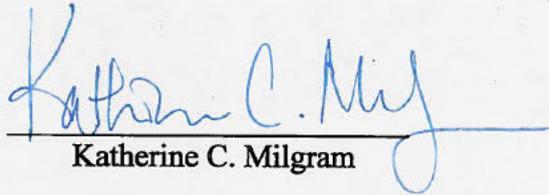
17. This afternoon, Monday, October 17, 2016, at 3:41 p.m., counsel for Exxon filed its opposition papers to the Application (Docket Nos. 18-23). Remarkably, Exxon's papers fail to inform this Court of Exxon's filings in the Texas Action earlier this morning which seek to invalidate the OAG's November 4, 2015 subpoena and effectively shut down the OAG's investigation.

18. Exxon's course of conduct demonstrates that it intends to use the Texas federal forum to evade this Court's clear jurisdiction and effectively terminate the OAG's investigation into whether Exxon's disclosures relating to the risks of climate change, and the impact of such risks on Exxon's business, violate New York law. Indeed, Exxon issued a press release this morning at 10:51 a.m., entitled "ExxonMobil Asks Federal Court to Invalidate New York

Attorney General's Subpoena." A true and correct copy of the press release is attached as Exhibit 5.

19. In light of Exxon's direct challenge to this Court's authority to oversee compliance with subpoenas issued by the OAG in the course of its investigation of Exxon undertaken pursuant to New York law, immediate judicial review of the OAG's Application concerning enforcement of the Subpoena to PwC is warranted.

Dated: New York, New York
October 17, 2016


Katherine C. Milgram