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

MEMORANDUM OF LAW OF RESPONDENT EXXON MOBIL CORPORATION IN OPPOSITION TO THE APPLICATION FOR AN ORDER TO SHOW CAUSE

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

Attorneys for Respondent Exxon Mobil Corporation

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

Respondent Exxon Mobil Corporation ("ExxonMobil") submits this memorandum of law in opposition to the application of Petitioner New York Attorney General Eric Schneiderman ("Attorney General") for an Order to Show Cause on the grounds that (1) the issuance of an order to show cause pursuant to C.P.L.R. § 2214 is not proper because the Attorney General has failed to make a showing that would justify such an order; (2) the Attorney General has failed to meet-and-confer in good faith in accordance with 22 N.Y.C.R.R. § 202.70. The Attorney General's filing presents no exigency to this Court. As such, ExxonMobil respectfully submits that the Attorney General should have presented its motion to this Court in the ordinary course; that is, via a notice of petition pursuant to C.P.L.R. § 403(a). ExxonMobil would not object to this Court's treatment of the Attorney General's filing as if it were a notice of petition—as it should have been filed—and the subsequent setting of a briefing schedule convenient to the parties to address the merits of the Attorney General's claims. ExxonMobil does, however, object to the Attorney General's groundless presentation of his claims to this Court as requiring emergency relief, and requests that the Court therefore decline to issue an Order To Show Cause in this matter.[1]

[1] In this Memorandum, ExxonMobil solely addresses why the Attorney General's Application for an Order to Show Cause should be denied. ExxonMobil does not address (1) whether the Attorney General has, in presenting a hypothetical dispute to this Court, filed relief for a justiciable controversy; or (2) the merits of whether the Texas accountant-client privilege, codified at Texas Occupations Code § 901.457, applies to documents sought by the Attorney General's subpoena. ExxonMobil respectfully reserves the right to raise substantive and ripeness challenges to the Attorney General's Motion to Compel at a later date before this Court.

STATEMENT OF FACTS

On November 4, 2015, Attorney General Schneiderman issued a broad subpoena to ExxonMobil seeking nearly 40 years of documents relating to climate change and other topics. ExxonMobil has complied with the Attorney General's subpoena, producing more than 1.2 million pages of documents to the Attorney General since he initiated his investigation. To date, ExxonMobil has not asserted the accountant-client privilege to withhold a single document from its production to the Attorney General.

On August 19, 2016, the Attorney General issued a second subpoena as part of its inquiry (the "PwC Subpoena"), this time to ExxonMobil's independent auditor, PricewaterhouseCoopers LLP ("PwC"). The PwC Subpoena seeks documents related to PwC's audit of ExxonMobil, among other topics. This subpoena had an original return date of September 2, 2016. (Milgram Aff. ¶ 14.)[2] Some of the documents in PwC's possession that are potentially responsive to the PwC Subpoena may be privileged under Texas state law, specifically Texas Occupations Code § 901.457, the accountant-client privilege.

On September 7, 2016, counsel for ExxonMobil informed the Attorney General that some of the documents in PwC's possession that are potentially responsive to the PwC Subpoena may be privileged under Texas Occupations Code § 901.457. (Milgram Aff. ¶ 16.) Separately, the Attorney General agreed to PwC's request to extend the return date of the PwC Subpoena, with an agreement by PwC that it would begin to

[2] Citations in the form "Milgram Aff. __" are references to the Affirmation of Katherine C. Milgram in Support of the Office of the Attorney General's Motion to Compel Compliance with an Investigative Subpoena, dated October 14, 2016.

provide certain categories of documents to the Attorney General on September 23, 2016. (*Id.* ¶ 17.)

On September 23, 2016, counsel for ExxonMobil informed the Attorney General that it intended to review "certain categories of responsive documents that may be subject to the accountant-client privilege, prior to production of those documents by PwC." (Milgram Aff. Ex. H.) Counsel for ExxonMobil informed the Attorney General that if it determined that any responsive document was privileged under Texas law, it would assert the privilege and provide a privilege log. (*See id.*)

PwC has made three productions to the Attorney General. (Milgram Aff. ¶ 19.) To date, ExxonMobil has not asserted the accountant-client privilege to withhold a single responsive document from the PwC productions to the Attorney General.

On October 14, 2016, at approximately 10:31 a.m., Katherine Milgram, Chief of the Investor Protection Bureau of the New York Attorney General's Office, left a voicemail for counsel for ExxonMobil, stating the Attorney General's view that the "Texas Occupation Code provision that Exxon . . . cited . . . hasn't been construed as a privilege but as a rule of confidentiality" and indicating that the Attorney General had previously assured ExxonMobil and PwC of its intent to treat the documents provided pursuant to the subpoena as confidential. (Hirshman Aff. ¶ 3 & Ex. A.)[3] Ms. Milgram asked that counsel let the Attorney General know, "as soon as possible, if [ExxonMobil] intend[s] to withdraw the accountant-client privilege claim, and allow PwC to produce documents in response to our subpoena without a document-by-document review for this

[3] Citations in the form "Hirshman Aff. __" are references to the Affirmation of Michele Hirshman in Support of ExxonMobil's Opposition to the Application for an Order to Show Cause, dated October 17, 2016.

privilege by Exxon." (*Id.*) This voicemail said nothing about the Attorney General's intention to file a motion with the Court. (*See id.*) That same afternoon, at approximately 2:41 p.m., counsel for ExxonMobil contacted Ms. Milgram via email to confirm the receipt of her voicemail message and "arrange a call next week to discuss the accountant privilege", indicating that counsel would "coordinate schedules and get back to [Ms. Milgram] on Monday with some times." (Hirshman Aff. Ex. B.) However, at 2:25 pm—approximately twenty minutes *before* counsel for ExxonMobil's counsel sent the above response to the Attorney General's voicemail message, and less than four hours after making its demand—the Attorney General filed the instant Application. At approximately 4:26pm, Ms. Milgram left another voicemail for ExxonMobil's counsel, acknowledging receipt of counsel's email and indicating that the Attorney General's Office was happy to discuss the matter further, but also informing counsel that the Attorney General "went ahead and filed a motion today, in New York Supreme" and would serve a copy of the papers on counsel. (Hirshman Aff. ¶ 7 & Ex. C.) Ms. Milgram also indicated that, notwithstanding the filing of the Attorney General's request, it was "still obviously happy to meet next week, whether by phone or in person to discuss this issue and try and resolve it" and offering to withdraw the motion if ExxonMobil decided to permit PwC to produce documents without "withholding on the basis of this purported privilege." (Hirshman Aff. ¶ 7 & Ex. C.) Copies of the Attorney General's papers were provided by email to counsel for ExxonMobil at approximately 5:18pm on October 14, 2016. (*See* Hirshman Aff. Ex. D.)

The Attorney General's Application was premised not on any assertion of privilege or refusal to provide responsive documents—nor could it be because no such

assertion or refusal has taken place—but upon ExxonMobil's request and PwC's agreement that ExxonMobil review certain responsive documents to determine *if* ExxonMobil should assert privilege with respect to those documents.

ARGUMENT

I. This Is Not a Proper Case for the Issuance of an Order to Show Cause Because the Attorney General Failed to Plead the Requisite Exigency.

The Civil Practice Law and Rules ("CPLR") provide that the Court "*in a proper case* may grant an order to show cause, to be served in lieu of notice of motion, at a time and in a manner specified therein." CPLR § 2214(d) (emphasis added); CPLR § 403(d). "There is no specific definition of a proper case, and it is obvious that the legislative intent was to leave that question entirely within the court's discretion." *City of N.Y.* v. *West Winds Convertibles Int'l, Inc.*, 16 Misc. 3d 646, 653 (Sup. Ct. Kings Cnty. 2007) (quoting *Mallory* v. *Mallory*, 113 Misc. 2d 912, 913–14 (Sup. Ct. Nassau Cnty. 1982)). It is well settled that "[i]f a judge finds that there is no reason why an order to show cause is required, he may refuse to sign such an order." *Mallory*, 113 Misc. 2d at 914; s*ee also Cottone* v. *Cottone*, 197 A.D.2d 938, 938–39 (4th Dep't. 1993) ("declin[ing] to grant the *ex parte* order that a justice of the Supreme Court refused to sign" because the dispute was "not a 'proper case' for the grant of such an order").

While the practice commentaries state that "[a]n order to show cause is merely an alternative way of bringing on a contested motion," Patrick M. Connors, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 2214 at 2214:24; *see also* Siegel, N.Y. Prac. § 248 (5th ed.), the relevant statutes, case law and commentary make clear that an order to show cause may be used *only* where there is some exigency which would necessitate an expedited resolution of the underlying

motion. *See* 22 N.Y.C.R.R. 202.70, Rule 19 ("Motions shall be brought on by order to show cause only when there is genuine urgency (e.g., applications for provisional relief), a stay is required or a statute mandates so proceeding."); *West Winds Convertibles Int'l.*, 16 Misc. 3d at 655 (denying City of New York's application for an order to show cause where the city sought temporary relief pending a hearing on its motion for a preliminary injunction based, in part, on failure to show required exigency); 2PT1 West's McKinney's Forms Civil Practice Law and Rules § 5:16 ("an order to show cause may *only* be used to bring on a motion 'in a proper case'—that is: (1) When required by statute or rule . . . ; (2) When a return date is needed that is earlier than the return date that would be required if the motion were brought on by a notice of motion . . . ; or (3) When some immediate relief is needed, such as a temporary restraining order (TRO) or a stay of the proceedings pending hearing and determination of the motion." (citation omitted)); Patrick M. Conners, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 2214 at C2214:24-C2214:26A (an order to show cause may be utilized at the petitioner's option for such purposes as the obtaining of a stay or some other provisional remedy, to facilitate a judicially sanctioned method of service or to accelerate the return date).

Here, the Attorney General entirely failed to plead the requisite exigency. The papers the Attorney General submitted to this Court discuss only the purported basis for its so-called underlying "motion to compel." It appears that the Attorney General is seeking to require PwC to comply with its subpoena without regard to ExxonMobil's privilege and "compel" ExxonMobil to give blanket consent to PwC to produce documents without allowing ExxonMobil to review and make a claim of privilege.

Critically—and tellingly—the Attorney General made no attempt whatsoever to demonstrate the necessity of proceeding by an order to show cause rather than by the usual notice of motion, or the need for any immediate relief. Failure to do so warrants denial of the Application.

Not only has the Attorney General failed to plead the requisite exigency, but none is conceivable here. The Attorney General does not seek provisional or temporary relief during the pendency of a motion for a preliminary injunction, but rather seeks compliance with a subpoena issued to PwC not even two months ago, pursuant to which ExxonMobil understands PwC has provided documents to the Attorney General as agreed upon by PwC and the Attorney General, and will presumably continue to provide documents into the future based on the breadth of the subpoena." (*See* Milgram Aff. Ex. A). The present motion is plainly not suited to an expedited resolution provided by an order to show cause.

For the reasons stated above, this is not a proper case for the issuance of an order to show cause because the Attorney General failed to plead exigency.

II. The Attorney General Failed to Make a Good Faith Effort to Resolve the Issues Raised in His Application.

In addition to wholly failing to demonstrate the requisite exigency for an order to show cause, the Attorney General failed to make a good faith effort to resolve the issues raised in his application prior to its filing. This failure provides an additional reason to deny the Application.

22 N.Y.C.R.R. § 202.7 requires, "with respect to a motion relating to disclosure or to a bill of particulars, an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised in the

motion." 22 N.Y.C.R.R. § 202.7(a)(2). Section 202.7(c) provides that "[t]he affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held." *Id.* § 202.7(c). Section 202.7(d) further states that "[a]n order to show cause of an application for ex parte relief . . . shall contain the affirmation of good faith set forth in this section if such affirmation is otherwise required by this section." *Id.* § 202.7(d). There is nothing in that would excuse the requirement of a good faith effort here.

The Attorney General has not shown a good faith effort to resolve the present dispute prior to burdening the Court with its Application. While Ms. Milgram did leave a voicemail message for ExxonMobil's counsel four hours before the Application was filed and a voicemail *after* the Application was filed, these voicemails are insufficient to show a "good faith effort" to resolve the dispute. There is not even a suggestion in Ms. Milgram's initial voice message that the Attorney General would file the application for an order to show cause within mere hours of the call. (*See* Hirshman Aff. Ex. A.)

CONCLUSION

For the reasons set forth above, Respondent ExxonMobil respectfully requests that the Court deny Plaintiff's Application for an Order to Show Cause and set a briefing schedule consonant with one applicable to a notice of petition and at a time agreeable to all parties. We are prepared, at the Court's direction, to obtain such scheduling information for the Court.[4]

[4] Should the Court issue the proposed order, ExxonMobil respectfully reserves the right to be heard on the justiciability and the merits of a motion by the Attorney General.

Dated: October 17, 2016

Respectfully submitted,

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP

/s/ Michele Hirshman
Theodore V. Wells, Jr.
twells@paulweiss.com
Michele Hirshman
mhirshman@paulweiss.com

PAUL, WEISS, RIFKIND, WHARTON &
GARRISON, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

Michelle Parikh
mparikh@paulweiss.com
2001 K Street, NW
Washington, D.C. 20006-1047
(202) 223-7300
Fax: (202) 223-7420

Attorneys for Exxon Mobil Corporation