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

CORRECTED MEMORANDUM OF LAW OF RESPONDENT EXXON MOBIL CORPORATION IN OPPOSITION TO THE OFFICE OF THE ATTORNEY GENERAL'S MOTION TO COMPEL COMPLIANCE WITH AN INVESTIGATIVE SUBPOENA

**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

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Respondent Exxon Mobil Corporation ("ExxonMobil") submits this memorandum of law in opposition to the request of Petitioner New York Attorney General Eric Schneiderman ("Attorney General") to compel compliance with an investigative subpoena issued by the Attorney General to PricewaterhouseCoopers LLC ("PwC"), ExxonMobil's independent auditor. Before ExxonMobil has even asserted a claim of privilege over a single responsive PwC document, the Attorney General asks this Court to decide an issue of first impression under Texas law: whether Texas Occupations Code section 901.457 creates an evidentiary accountant-client privilege. The small handful of cases that cite section 901.457 only mention the statute in a conclusory fashion and in dicta, and none of those cases contain a detailed analysis of the statutory text, the title of the statute, the history of the statute, the existence of similar statutes creating evidentiary privileges applicable to other professions, or the legislative history of the statute. The record upon which Attorney General seeks this Court's intervention is virtually nonexistent, and at this juncture, any decision on this issue would be premature. Because this issue is one of first impression and necessarily will be the subject of an appeal by the loser and is an issue of importance to the practice of accountants in Texas, this Court should await a more concrete record.

The Attorney General's motion should be denied for four reasons. *First*, the text and structure of section 901.457, which is entitled "Accountant-Client Privilege" and directs that certain documents and communications between an accountant and its client should not be disclosed, make clear that an accountant-client privilege exists under Texas law. While section 901.457 includes certain limited enumerated exceptions to the application of the privilege, those exceptions do not encompass a subpoena by the New

York Attorney General. *Second*, the Attorney General's argument that, even if there is a privilege under Texas law, two of the exceptions under section 901.457 justify disclosure pursuant to the subpoena, is incorrect. Despite the Attorney General's arguments to the contrary, the Attorney General's subpoena falls neither within the limited exception for subpoenas issued pursuant to certain laws and regulations—none of which include New York law—nor within the exception for court orders by virtue of the fact that it is subject to judicial enforcement. And while ExxonMobil acknowledges that section 901.457 does create an exception for court orders, a ruling that no accountant-client privilege exists under Texas law, as the Attorney General asks for here, cannot be the "court order" that the exceptions contemplate. Because there is no claim of privilege over any document, there is no record on which this Court could issue an order that would fall within the Texas statute. *Third*, the Attorney General argues in the alternative that regardless of whether the Texas statute creates an evidentiary privilege, Texas law should not apply and instead New York law, which does not have an accountant-client privilege, governs under choice of law principles. The Attorney General is incorrect. Under well-established New York choice of law principles, Texas law controls the potential applicability of the privilege because of Texas' far greater interest in the treatment of communications between PwC and ExxonMobil. *Fourth*, the Attorney General's request for an order in this case is premature and seeks an abstract ruling on a novel issue in Texas law.

If the Court decides to consider the applicability of the privilege, as the Attorney General requests, in a vacuum, the Court should deny the request because the section 901.457 clearly creates an evidentiary privilege on its face. In the alternative, the

Court should deny the Attorney General's request for an order until after such time that ExxonMobil has actually asserted the privilege to withhold specific documents and the Attorney General has articulated a need for those documents sufficient to overcome the privilege, should that time ever come.

STATEMENT OF FACTS

On August 19, 2016, the Attorney General issued a *subpoena duces tecum* to PwC pertaining to its client ExxonMobil (the "PwC Subpoena"). The PwC Subpoena seeks documents related to PwC's audit of ExxonMobil, among other topics. This PwC Subpoena had an original return date of September 2, 2016. (Milgram Aff. ¶ 14.) [1] 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 section 901.457, titled 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 section 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 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

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[1] 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.

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.*) The Attorney General raised no objection at that time.

PwC has made three productions to the Attorney General. (Milgram Aff. ¶ 19.) As part of its production of documents, PwC had, as of October 14, shared with ExxonMobil 126 documents, of which ExxonMobil is still deliberating as to the application of a privilege with respect to nine. 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 the morning of October 14, 2016, 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 section 901.457 did not constitute a rule of evidentiary privilege and indicating that the Attorney General had previously assured ExxonMobil and PwC of its intent to treat the documents provided pursuant to the subpoena confidentially. (*See* Hirshman Aff. ¶ 3 & Ex. A.)[2] Ms. Milgram asked that counsel let the Attorney General know if ExxonMobil intended to withdraw its accountant-client privilege claim and to allow PwC to produce documents without a document-by-document privilege review by Exxon. (*See id.*) This voicemail said nothing about the Attorney General's intention to file a motion with the Court. (*See id.*) That same afternoon, counsel for ExxonMobil contacted Ms. Milgram via email to

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[2] 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.

confirm the receipt of her voicemail message and "arrange a call next week to discuss the accountant privilege." (Hirshman Aff. Ex. B.) However, approximately twenty minutes *before* counsel for ExxonMobil sent the above response to the Attorney General's voicemail message, and less than four hours after making its demand, the Attorney General filed its Application for an Order to Show Cause. Approximately two hours after commencing this action, 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.) Copies of the Attorney General's papers were provided by email to counsel for ExxonMobil at approximately 5:18pm on October 14, 2016.[3] (*See* Hirshman Aff. Ex. D.)

On October 17, 2016, ExxonMobil submitted a letter to the Court requesting an opportunity to be heard regarding the Attorney General's Application. (Dkt. No. 17.) That morning, counsel for all parties had a telephone conference with the Court's staff regarding the Attorney General's Application. (*See* Dkt. No. 24 at 1.) Later that day, ExxonMobil submitted a memorandum of law in opposition to the Attorney General's Application, arguing that it was improper under New York law to proceed by way of an order to show cause because there were no emergent circumstances and a motion could have been filed. (Dkt. No. 18.) The Attorney General responded with a letter later that evening alleging that ExxonMobil was seeking to "evade" this Court's

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[3] ExxonMobil notes that the Attorney General failed to even file a petition in this action, which arguably renders the Attorney General's Application defective. *See* CPLR § 402. The Attorney General's surprising oversight only serves to highlight the Attorney General's rush to the courthouse in this case.

consideration of the issue. (Dkt. No. 24 at 2.) ExxonMobil responded and reiterated its prior assent for this Court to consider the issue raised by the Attorney General's papers. (Dkt. No. 31 at 1.) The next day, the Court set a briefing schedule and ordered the parties to appear on October 24, 2016. (Dkt. 32 No. at 2-3.)

The Attorney General does not seek to compel production of any specific documents. The Attorney General's motion is premised not on an assertion of privilege or a refusal to provide responsive documents, but rather 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. The relief sought by the Attorney General should not be granted.

ARGUMENT

I. TEXAS OCCUPATIONS CODE SECTION 901.457 CREATES AN EVIDENTIARY PRIVILEGE.

The plain language of Texas Occupations Code section 901.457 clearly creates an accountant-client evidentiary privilege. No Texas case holds to the contrary. The issue of whether section 901.457 creates an evidentiary privilege is one of first impression. No court has confronted this issue directly or issued an opinion that analyzes comprehensively whether such an evidentiary privilege exists. The Attorney General's refusal to acknowledge the privilege is grounded in a strained reading of the statutory text and a collection of cases which we address and distinguish in Part I.B, *infra*. We begin with an analysis of the text of section 901.457.

A. The Text and Structure of Section 901.457 Reveal that Texas' Accountant-Client Privilege Is an Evidentiary Privilege.

The plain language of Texas Occupations Code section 901.457—titled "Accountant-Client Privilege"—creates an evidentiary privilege. When interpreting a

Texas statute, a court must "begin with its language." *In re Smith*, 333 S.W.3d 582, 586 (Tex. 2011); *accord* 1-4 William V. Dorsaneo III, *Texas Litigation Guide* § 4.03(3)(a). At the outset, section 901.457's title, the "Accountant-Client Privilege," makes clear that the statute creates an evidentiary privilege. While "a heading cannot limit or expand the statute's meaning, the heading gives some indication of the Legislature's intent." *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 307 (Tex. 2010) (internal quotation marks and citation omitted)); *see also* 1-4 Dorsaneo, *Texas Litigation Guide* § 4.03(2) (title of a statute "may be of assistance in ascertaining legislative intent"); Tex. Gov't Code § 311.023(7) (allowing Texas courts to use the title to construe a statute). The text of section 901.457 expressly prohibits an accountant from "voluntarily disclos[ing] information" received from its client "in connection with services provided to the client . . . except with the permission of the client or the client's representative." Tex. Occ. Code § 901.457(a).

The enumeration of specific exceptions to the confidentiality mandate for accountant-client communications set forth within the statute further supports the view that section 901.457 prohibits disclosure for any other reasons. "When specific exclusions or exceptions to a statute are stated by the Legislature, the intent is usually clear that no others shall apply." *Unigard Sec. Ins. Co.* v. *Schaefer*, 572 S.W.2d 303, 307 (Tex. 1978); *accord* 1-4 Dorsaneo, *supra*, § 4.03(6). The accountant-client privilege is not absolute; seven carefully delineated exceptions allow disclosure to certain parties in certain circumstances. *See* Tex. Occ. Code § 901.457(b). There is in fact a specific carve-out for subpoenas. The only subpoenas in response to which an accountant may disclose client information are those issued under (i) the federal securities laws, (ii) the

Internal Revenue Code, or (iii) the Texas Securities Act. Disclosure may also be made "in the course of a peer review under Section 901.159 or in accordance with the requirements of the Public Company Accounting Oversight Board." *Id.* at § 901.457(b)(2), (6). However, section 901.457(b) ***does not*** authorize disclosure to law enforcement in sister states pursuant to a subpoena. Under Texas law, "every word excluded from a statute must . . . be presumed to have been excluded for a purpose." *In re Bell*, 91 S.W.3d 784, 790 (Tex. 2002) (internal quotation marks omitted). Because section 901.457 prohibits an accountant from disclosing client materials without client permission and the Texas legislature chose to exclude subpoenas—except those issued pursuant to the specific statutes listed above—PwC may not provide documents to the Attorney General without ExxonMobil's consent.[4]

The Attorney General's attempts to deny that the Texas statute establishes an accountant-client privilege are unavailing. *First*, it is of no moment that the accountant-client privilege does not appear in the Texas Rules of Evidence. The Rules themselves state quite clearly that evidentiary privileges may be created by "a Constitution, ***a statute***, these rules or ***other rules prescribed under statutory authority***." Tex. R. Evid. 501 (emphasis added). Indeed, a number of established privileges under Texas law are not found in the Rules of Evidence. The Texas Occupations Code itself creates several privileges in addition to the accountant-client privilege, including the medical peer review privilege, Tex. Occ. Code § 160.007(a), the dentist-patient privilege, *id.* § 258.102, and the podiatrist-patient privilege, *id.* § 202.402.

[4] The Attorney General notes that the title of section 901.457 is a section heading that "does not limit or expand the meaning of a statute," Tex. Gov't Code § 311.024. As explained above, the plain meaning of section 901.457 severely restricts the possibilities for involuntary disclosure. Accordingly, the statute describes a privilege, and its title does not "expand" its meaning.

Courts have interpreted these sections to establish evidentiary privileges. *See, e.g.*, *In re Higgins*, 246 S.W.3d 744, 745 (Tex. App. 2007) (holding dental records to be privileged based on a "plain reading of" Tex. Occ. Code § 258.102); *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d 686, 715 (Tex. 2015) (deciding that certain documents retained protection under the privilege); *In re Living Centers of Texas, Inc.*, 175 S.W.3d 253, 257 (Tex. 2005) (observing that the privilege extends to communications to a medical peer review committee); *In re Univ. of Texas Health Ctr. at Tyler*, 33 S.W.3d 822, 827-28 (Tex. 2000) (vacating order to produce documents based on privilege). The Attorney General's observation that the accountant-client privilege does not appear in the Texas Rules of Evidence is irrelevant.

Second, the Attorney General argues that the Texas accountant-client privilege is analogous to the "confidentiality" provisions of New Jersey and other states that contain exceptions for disclosure in court proceedings. (*See* AG Mem. at 10-11 (citing N.J. Stat. § 45:2B-65).)[5] But this comparison is inapt. For one thing, New Jersey's statute does not describe itself as a privilege; instead it merely provides that specified materials "shall be deemed confidential." *Compare* N.J. Stat. § 45:2B-65 ("Disclosure of information") *with* Tex. Occ. Code § 901.457 ("Accountant-Client Privilege"). Moreover, the New Jersey statute broadly allows "disclosures in court proceedings [and] investigations," N.J. Stat. Ann. § 45:2B-65, in addition to disclosures in other circumstances. Section 901.457 contains no such language.

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[5] References in the form "AG Mem. at __" refer to the Memorandum of Law in Support of Motion to Compel Complaint with an Investigative Subpoena Issued by the Office of the Attorney General of the State of New York, Dkt. No. 10.

The Attorney General's reliance on legislative history is similarly unavailing. Where, as here, a statute's meaning is unambiguous, there is no need to consider legislative history. *See Jones* v. *Bill*, 10 N.Y.3d 550, 554 (2008) ("As a general proposition, we need not look further than the unambiguous language of the statute to discern its meaning."); *Desiderio* v. *Ochs*, 100 N.Y.2d 159, 169 (2003) ("[A]pplication of a statute's clear language should not be ignored in favor of more equivocal evidence of legislative intent."). The Attorney General quotes preambulatory language in the legislation that enacted section 901.457 to argue that the amendment was a "nonsubstantive revision of statutes relating to the licensing and regulations of certain professions and business practices" in an apparent attempt to convince the Court that section 901.457 is of no significance. (AG Mem. at 11 (quoting 1999 Tex. ALS 388 (H.B. 3155)).) What the Attorney General fails to mention, however, is that the prior version of the accountant-client privilege under Texas law that was in effect when section 901.457 was enacted contained a substantially similar privilege for accountant-client communications in a section also titled "Accountant-client privilege."[6] Because an earlier version of the accountant-client privilege with very similar language was in place at the time of the enactment of section 901.457, the language in the preamble cited by the Attorney General sheds little light on the current statute's interpretation. The Attorney General's assertion that "there was no Texas accountant-client privilege in place at th[e] time" that § 901.457 was enacted (AG Mem. at 11 (citing *Sims* v. *Kaneb Servs, Inc.*, No.

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[6] *See* Public Accountants, § 26, 1989 Tex. Sess. Law Serv. 41a-1 (Vernon's) (codified as amended at Tex. Occ. Code § 901.457) ("A licensee or a partner, officer, shareholder, or employee of a licensee may not voluntarily disclose information communicated to the licensee by a client in connection with services rendered to the client by the licensee in the practice of public accountancy, except with the permission of the client or a duly appointed representative of the client."). The prior version of the statute also enumerated a limited set of exceptions to the privilege. *Id.*

B14-87-00608-CV, 1988 Tex. App. LEXIS 2243, at *14 (Tex. App. June 16, 1988),) is entirely disingenuous, as the cited case predates the privilege's original codification in 1989. *See* Public Accountants, § 28, 1989 Tex. Sess. Law Serv. 892 (Vernon's) (codified as amended at Tex. Occ. Code § 901.457). Furthermore, the general statement highlighted by the Attorney General —which applied to a number of statutes, not just section 901.457—is insufficient to overcome the plain text of the specific provision for an accountant-client privilege in section 901.457.

Finally, the Attorney General's policy arguments do not justify contravening the plain meaning of section 901.457 and the policy choices of the Texas legislature. (*See* AG Mem. at 11-12.) Several states have embraced the accountant-client privilege to protect the confidential relationship between client and accountant in order to encourage clients to provide full and frank information to accountants, thereby enabling accountants to better ensure the accuracy of their opinions. *See, e.g.*, *Gearhart* v. *Etheridge*, 208 S.E.2d 460, 461 (Ga. 1974); *Affiliated of Fla., Inc.* v. *U-Need Sundries, Inc.*, 397 So. 2d 764, 765–66 (Fla. Dist. Ct. App. 1981); *Ernst & Ernst* v. *Underwriters Nat. Assur. Co.*, 381 N.E.2d 897, 902 (Ind. App. 1978). While it may be true that the other jurisdictions that have chosen not to create an accountant-client privilege have prioritized "auditors' obligations to investors and the public" over open client-accountant communication, (AG Mem. at 11-12), that is not the choice made by Texas. Our federal system demands that States respect the policy choices of sister jurisdictions.

B. The Cases Cited by the Attorney General Do Not Establish the Non-Existence of the Privilege.

The Attorney General cites passages from four cases—only two of which are Texas state cases—for the proposition that section 901.457 does not create an

evidentiary privilege. Each quotation cited by the Attorney General is dicta, and each case is inapposite. Moreover, three of the four cases cited by the Attorney General are unpublished opinions, and "[g]enerally, unpublished decisions or opinions have no precedential value other than the persuasiveness of their reasoning." *Yellow Book of NY L.P.* v. *Dimilia*, 188 Misc.2d 489, 491 (N.Y. Sup. Ct. 2001) (citing Binimow, *Precidential Effect of Unpublished Opinions*, 2000 A.L.R. 5th 17 (West Group)). As explained below, these cases have almost no persuasive reasoning, and as such, they do not provide a basis to deny the privilege's existence.

The Attorney General's reliance on *In re Arnold*, No. 13-12-00619-CV, 2012 WL 6085320 (Tex. App., Nov. 30, 2012) is misplaced. While it is true that the court in that case observed that "the existence of an accountant-client privilege based on section 901.457" was "doubtful," it never had to decide whether section 901.457 created an evidentiary privilege because the party asserting the privilege in *In re Arnold* had "produced no evidence to substantiate any claim of an alleged privilege." *Id.* at *3. Not only was there "no evidence in the record that [the purported accountant was] a licensed accountant" but the court made clear that the "accountant was employed in a capacity other than as an accountant." *Id.* at *3-4. *In re Arnold* therefore provides no support for the Attorney General's claim that Texas has refused to recognize the accountant-client privilege.

The Attorney General cites *Cantu* v. *TitleMax, Inc.*, No. 5:14-CV-628 RP, 2015 WL 5944258 (W.D. Tex. Oct. 9, 2016), for the proposition that section 901.457 is a confidentiality provision. Without any discussion whatsoever regarding the applicable law, *Cantu* conclusorily determined that no privilege existed because it was a federal case

and the Federal Rules of Evidence do not recognize an accountant-client privilege. *See id.* at *6 ("[T]his is a federal question case and, accordingly, federal privilege law governs."). We address the choice of law question in section III, *infra*.

In *Canyon Partners, L.P.* v. *Developers Diversified Realty Corp.*, No. 3-04-CV-1335-L, 2005 WL 5653121 (N.D. Tex. Nov. 4, 2005), a federal district court "observe[d]" that neither federal nor Texas law recognizes an accountant-client privilege. But that observation was not a holding of the court, and an observational comment does not constitute a "conclu[sion]," as the Attorney General claims. (AG Mem. at 2.) Moreover, to support its observation, the *Canyon Partners* court cited two cases, neither of which support the conclusion that section 901.457 does not create an evidentiary privilege. The first, *Ferko* v. *National Ass'n for Stock Car Auto Racing, Inc.*, 218 F.R.D. 125 (E.D. Tex. 2003), is a federal case interpreting federal privilege law. *See id.* at 134. The second, *Sims* v. *Kaneb Servs, Inc.*, No. B14-87-00608-CV, 1988 Tex. App. LEXIS 2243 (Tex. App. June 16, 1988), as noted above, was decided ***before*** the accountant-client privilege was adopted in 1989. Significantly, no party in *Canyon Partners* argued that the section 901.457 privilege applied. The issue was raised by a third party subpoena recipient in a letter, but the contested subpoena was actually challenged on the basis of (1) relevance, (2) burden, and (3) the availability of the subpoenaed materials from other sources. *See Canyon Partners*, 2005 WL 5653121, at *1 & n.2. *Canyon Partners'* "observation," based on nonbinding or inapplicable precedent, plainly does not establish that section 901.457 does not create an evidentiary privilege.

Finally, the Attorney General cites *In re Patel*, 218 S.W.3d 911 (Tex. App. 2007). In that case, petitioners filed a motion to quash subpoenas and deposition notices

on various grounds, including overbreadth, relevance, and materiality, as well as the assertion of the Texas accountant-client privilege. The trial court granted the motions and the Texas Court of Appeals considered the ruling on mandamus review. In making its determination, the court considered the documents sought against the objections raised and made a determination as to each argument the petitioner raised. Regarding the accountant-client privilege, the court "assum[ed] without determining that an accountant-client evidentiary privilege exists in Texas." *Id.* at 920. The court did not decide the effect of the privilege, however, because it held that the materials were sought pursuant to a court order, which fell under the exceptions enumerated in section 901.457(b). *See id.* We discuss this exception in section II, *infra*.

The dicta in those cases cited by the Attorney General do not contravene the plain language of section 901.457 clearly establishing an evidentiary privilege, and the dicta from the cases cited by the Attorney General does not change the analysis.

II. SECTION 901.457 DOES NOT YIELD TO THE ATTORNEY GENERAL'S SUBPOENA.

The Attorney General advances two contentions in an effort to support its claim that even if the Texas accountant-client privilege does exist, it does not apply here. Both are meritless.

First, the Attorney General argues that compliance with the subpoena would not be a "voluntar[y]" disclosure under section 901.457(a). (AG Mem. at 10.) Such an interpretation, however, eviscerates the exceptions enumerated in section 901.457(b). Had the Texas legislature wanted to carve out all subpoenas that are potentially subject to judicial enforcement from the protections of section 901.457, it could have done so. It did not. Section 901.457(b) creates an exception for a limited set

of summons or subpoenas: those issued under the Internal Revenue Code or the federal and Texas securities laws. However, section 901.457(b) ***does not*** authorize disclosure pursuant to a subpoena issued by law enforcement in another jurisdiction. The Attorney General's subpoena does not fall under any exception and, indeed, his interpretation of "voluntar[y]" would make the enumerated subpoenas in section 901.457(b) superfluous. Because section 901.457 prohibits an accountant from disclosing client materials without client consent and the Texas legislature chose to exclude subpoenas issued by other state law enforcement from its enumerated exceptions, the Attorney General's subpoena does not abrogate the protection of section 901.457(b).

Second, the Attorney General asserts that a judicially enforceable subpoena satisfies the "court order" exception under § 901.457(b)(3). However, none of the cases cited by the Attorney General remotely supports this assertion. *In re Arnold*, 2012 WL 6085320, unlike the situation here, involved a deposition notice that had been subject to a motion to quash. The court denied that motion, thereby effectively elevating the notice to a court order. *Id.* at *4. In *In re Natividad Arriola*, 159 S.W.3d 670 (Tex. App. Ct. Corpus Christi 2004), the court found that the information sought had to be disclosed because the materials at issue fell squarely under the abuse-and-neglect exception to the applicable privilege. *Id.* at 674. *Finally*, in *Rodriguez* v. *State*, 469 S.W.3d 626 (Tex. App. 2015), the court relied on the criminal prosecution exception to the physician-patient confidentiality provision in addition to the court order exception. *See id.* at 632. The cases cited by the Attorney General do not show that merely because a subpoena may be subject to judicial enforcement, it constitutes a court order under section 901.457(b)(3).

The Attorney General next argues that even if the PwC Subpoena itself does not fall within the exceptions to the statute, it will transform into an exception if the Court grants the relief it seeks. But it cannot be that a ruling that there is no privilege under Texas law creates the "court order" contemplated by the statute as an exception. To be clear, such an order could be issued. In response to a concrete claim of privilege as to a specific document, this Court could deny or uphold the privilege claim. And even if it recognized the privilege claim, it could conceivably engage in some balancing that would warrant overcoming the privilege. *See Channel Two Television Co*. v. *Dickerson*, 725 S.W.2d 470,472 (Tex. App. Houston 1987) (when a privilege is asserted, "the party seeking disclosure [of the privileged material] must demonstrate that there is a compelling and overriding need for the information"). "At a minimum," a party seeking to overcome a privilege "must make a clear and specific showing in the trial court that the information sought is: (1) highly material and relevant; (2) necessary or critical to the maintenance of the claim; and (3) not obtainable from other available sources." *Id.* But that record has not been made because ExxonMobil has not asserted the privilege with regard to any document. Thus, while it is certainly possible that the "court order" exception could apply, there is no record here to support its application.

III. UNDER CHOICE OF LAW RULES, NEW YORK PRIVILEGE LAW DOES NOT CONTROL THIS CASE.

The Attorney General appears to argue that in making its determination as to the existence of the accountant-client privilege, this Court should apply New York law. This argument is predicated on the contention that the applicable law is that of the place where evidence will be introduced at trial or where the discovery proceeding occurs. (AG Mem. at 13-15.) But under New York's well-settled choice of law principles, the

governing law is that "of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation." *Babcock* v. *Jackson*, 12 N.Y.2d 473, 481 (1963). There are four facts that militate in favor of applying Texas law: (1) ExxonMobil is based in Texas; (2) the relevant information underlying PwC's audit function is located in Texas; (3) the PwC personnel who audited ExxonMobil are based in Texas and performed their work there; and (4) the bulk of the communications at issue were made in Texas. Texas therefore "has the greatest concern with the specific issue raised in the litigation," *id*., namely, whether the accountant-client privilege applies to certain communications between ExxonMobil and its auditor, PwC.

The Attorney General argues that the applicable law is that of the place where evidence will be evidence will be introduced at trial or where the discovery proceeding occurs should apply. (AG Mem. at 13-15.) But the cases cited by the Attorney General are distinguishable and inapposite. Critically, in each of those cases a lawsuit had commenced, whereas here the matter is still in the investigation phase.

The Attorney General cites *First Interstate Credit All., Inc.* v. *Arthur Andersen & Co.*, 150 A.D.2d 291, 293-94 (1st Dep't 1989) and *Bamco 18* v. *Reeves*, 685 F. Supp. 414, 416 (S.D.N.Y. 1988). Both cases, which involved litigation in New York, held that the Maryland accountant-client privilege should not apply in litigation located in New York. However, in both of those cases, the privilege was held not to apply only after a balancing of each state's interests. By virtue of the fact that both ExxonMobil and PwC's engagement team working on ExxonMobil's audit are based in Texas, and all of the communications occurred in Texas, the state of Texas—a jurisdiction with an express

statutory accountant-client privilege—has a far greater interest in the present dispute than New York. As such, these cases actually support the application of Texas law. Notably, in addition, a lawsuit had commenced in those cases, whereas this matter is still in the investigation phase.

Finally, the Attorney General's reliance on the choice of law provision in the engagement letters between ExxonMobil and PwC is misplaced. The Attorney General argues that New York law applies based on a statement in the engagement letters between ExxonMobil and PwC that "[a]ny Dispute ***between the parties***, including any claims or defenses asserted, and the interpretation of the engagement letter shall be governed by the law of New York State." (Ex. F, at PNYAG0000039, PNYAG0000047 (emphasis added).) This statement is plainly irrelevant because the subpoena is not a "[d]ispute between" ExxonMobil and PwC, and because the demands in the Attorney General's motion do not implicate the interpretation of any aspect of the engagement letters. Because the issue of whether Texas or New York privilege law applies is outside the scope of the choice-of-law provision, PwC and ExxonMobil have not contracted out of standard New York choice-of-law rules, and the principle of *Babcock* still applies.

IV. THIS COURT SHOULD NOT GRANT THE ATTORNEY GENERAL'S REQUEST IN THE ABSENCE OF AN APPROPRIATE RECORD.

Though fashioned as a request to compel compliance, the relief sought by the Attorney General is at this stage more in the nature of a declaration that no accountant-client privilege exists under Texas law. That is not to say that a time may come when a genuine controversy exists between the Attorney General and ExxonMobil regarding the applicability of the Texas accountant-client privilege to documents in PwC's possession with an appropriate record to support a decision by this Court, but that

time is not now. While this Court presumably has authority to issue a declaratory judgment on this subject, disputes regarding a claim of privilege are not ordinarily so resolved. *See Willis* v. *Willis*, 79 A.D.3d 1029, 1030 (2d Dep't 2010) ("The scope of the [attorney-client] privilege is to be determined on a case-by-case basis"); *Pritchard* v. *County of Erie*, No. 04CV534C, 2006 WL 29227852, *3 (W.D.N.Y. 2006) (declining to resolve privilege dispute prior to deposition; noting "normal practice" dictates that deposition should proceed so that parties may "create a record of where questionable inquiries, objections, or assertions of privilege arose and furnish a context for the dispute," thereby enabling the court to resolve the dispute on a "concrete record"); *Victor Stanley, Inc.* v. *Creative Pipe, Inc.*, 250 F.R.D. 251, 266 (D.Md. 2008) ("It should go without saying that the court should never be required to undertake *in camera* review unless the parties have first properly asserted privilege/protection, then provided sufficient factual information to justify the privilege/protection claimed for each document, and, finally, met and conferred in a good faith effort to resolve any disputes without court intervention."); *In re Doe*, 964 F.2d 1325, 1328 (2d Cir. 1992) (noting that the psychotherapist-patient privilege is "highly qualified and requires a case-by-case assessment of whether the evidentiary need for the psychiatric history of a witness outweighs the privacy interests of that witness); *Dep't of Econ. Dev.* v. *Arthur Andersen & Co. (USA)*, 139 F.R.D. 295, 300 (S.D.N.Y. 1991) (noting that a party may not make a "blanket assertion" of attorney client privilege; the "privilege must be determined on a case-by-case analysis of the relevant factors").

The "dispute" of which the Attorney General complains between it and ExxonMobil regarding the accountant-client privilege is too indefinite to be resolved at

this time. ExxonMobil has not directed PwC to withhold any document on the basis of the privilege, and as such, its assertion of the accountant-client privilege is a "future event that may or may not come to pass." *Bd. of Educ. for City Sch. Dist. of City of Buffalo* v. *Buffalo Teachers Fed'n, Inc.*, 191 A.D.2d 985, 986 (4th Dep't 1993) (dismissing motion for declaratory judgment as "premature"). The Attorney General asks this Court to opine on the accountant-client privilege before either ExxonMobil has even asserted the privilege or the Attorney General has advanced an argument as to why the privilege should be overcome. This Court should decline the Attorney General's request for relief until a record is developed upon which the issuance of that relief would be warranted and, in addition, to preserve scarce judicial resources that would otherwise be expended on appellate consideration of an issue given its status as one of first impression.

This approach is particularly prudent where this Court is being asked to decide the scope of a Texas statute with virtually no guidance from the Texas state courts. Because no Texas court has decided whether Texas law provides an accountant-client privilege, considerations of comity caution against New York deciding that it does not. In New York, "comity is not a rule of law, but a voluntary decision by one state to defer to the policy of another, especially 'in the face of a strong assertion of interest by the other jurisdiction.'" *Boudreaux* v. *State of La., Dep't of Transp.*, 11 N.Y.3d 321, 326 (2008) (quoting *Ehrlich–Bober & Co.* v. *University of Houston*, 49 N.Y.2d 574, 580 (1980)). In applying the doctrine of comity, New York "defer[s] to . . . the public policy embodied within the statute enacted by [the foreign] *legislature*." *Id.* at 325–26 (emphasis added). New York chooses to "apply the laws of other States where the application of those laws does not conflict with New York's public policy," *Crair* v.

Brookdale Hosp. Med. Ctr., 94 N.Y.2d 524, 528–29, 728 N.E.2d 974, 976 (2000), and "the public policy exception to the doctrine of comity is usually invoked only in the rare instance where the original claim is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought," *Greschler* v. *Greschler*, 51 N.Y.2d 368, 377 (1980) (internal quotation marks omitted).

Here, Texas has statutorily expressed its public policy by creating a privilege provision entitled "Accountant-Client Privilege," Tex. Occ. Code § 901.457, which is consistent with its broader policy of extending privileges to additional professional relationships via the Texas Occupations Code beyond those privileges listed in the Texas Rules of Evidence. New York has no legitimate interest in the issue of whether Texas protects documents located in Texas according to the accountant-client privilege, so the public policy exception to the doctrine is certainly not repugnant to any New York policy. Accordingly, comity considerations call for this Court to defer to the Texas legislature and deny the Attorney General's motion to compel compliance with the subpoena.

CONCLUSION

No court has previously considered head on the question whether section 901.457 creates an evidentiary privilege. Any resolution by this Court will have significant impact on accountants and their clients in the state of Texas, and will without question ultimately be appealed by the losing party. A judicial resolution of such import should be made not in the abstract but on a developed record, which is consistent with how claims of privilege are typically and most appropriately adjudicated. Because this is an issue of first impression, the development of such a record will also economize the

expenditure of judicial resources. It would be a waste of judicial resources if, in the course of an appeal, the First Department were to decide that the Court should have waited for the development of a full record rather than addressing this issue in the abstract. Because ExxonMobil has not yet asserted the accountant-client privilege to withhold a single document from PwC's production pursuant to the Attorney General's subpoena, this Court should not issue a decision until the appropriate record—and in which ExxonMobil has actually designated and withheld specific documents as privileged and the Attorney General has made arguments challenging that designation—exists. Should the Court decide to reach the merits of the scope of section 901.457, the Court should deny the Attorney General's request for an order, as the text of section 901.457 clearly creates an evidentiary privilege and the authorities invoked by the Attorney General do not provide the type of reasoned analysis that would justify disregarding the statute's plain meaning.

For the reasons set forth above, Respondent ExxonMobil respectfully request that the Court deny Petitioner's Motion to Compel Compliance with Its Investigative Subpoena.

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Respectfully submitted,

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP

/s/ Theodore V. Wells, Jr.
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