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

Motion Sequence No. 1

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO COMPEL COMPLIANCE WITH INVESTIGATIVE SUBPOENA ISSUED BY THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

PRELIMINARY STATEMENT

Exxon's[1] Memorandum of Law ("Exxon Opp."),[2] and its filings in the federal district court in Texas seeking to invalidate the OAG's investigation on the heels of this Application specifically relating to the PwC Subpoena, confirm the need for an order by this Court compelling PwC to comply with the Subpoena, and compelling Exxon to allow PwC to produce responsive documents without reviewing and withholding any documents under a purported accountant-client privilege. Despite producing documents responsive to the OAG's subpoena to Exxon for almost a year, Exxon has engaged in recent unprecedented efforts to evade this Court's jurisdiction by secretly filing in Texas federal court papers challenging the propriety of the OAG's investigation. However, Exxon has not contested in *this* Court the OAG's authority to investigate potential fraud. Nor has PwC challenged the OAG's authority to issue a subpoena to PwC. Further, the OAG's authority to investigate potential fraud is well-established, and there is a presumption in New York that the OAG's investigation is conducted in good faith. See Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d 327, 332 (1988). This Court is the appropriate forum for any such challenge by Exxon or PwC, and the appropriate mechanism for any such challenge is a motion to quash or limit. Instead, Exxon – a company that opted to have its business relationship with its accountant governed by New York law – has engaged in forum-shopping. This New York Court should not countenance a sophisticated company using thinly-veiled gamesmanship in an apparent effort to allow a Texas court to undermine this Court and thereby stymie a New York law enforcement investigation.

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[1] Capitalized terms have the same meaning as defined in the Memorandum of Law in Support of Motion to Compel Compliance with an Investigative Subpoena Issued by the Office of the Attorney General of the State of New York, October 14, 2016, Docket No. 10 ("Opening Memo.").

[2] Citations to "Exxon Opp." are to Exxon's Corrected Memorandum of Law, October 20, 2016, Docket No. 36.

Exxon's reliance on a non-existent Texas privilege is also baseless. *First*, Exxon has doubled down on a purported Texas accountant-client privilege that even its accounting firm, PwC, cannot bring itself to defend. (See PwC Memorandum of Law ("PwC Opp.").) Exxon has not cited a single authority that supports its position that Texas Occupations Code § 901.457 creates an evidentiary privilege. Every authority that the OAG, and apparently Exxon, has located confirms that there is no accountant-client evidentiary privilege under Texas law. Moreover, the statute's exception for "court orders" is inconsistent with the basic concept of an evidentiary privilege, and the order that the OAG seeks would fall squarely into that exception. Further, the Texas statute, by its terms, prohibits only disclosures that are "voluntarily" made, but Exxon would read the word "voluntarily" out of the statute entirely by applying the statute to compulsory productions.

Second, under choice of law rules, New York (not Texas) privilege law applies here. Exxon does not dispute that there is no accountant-client privilege under New York law. In numerous cases cited in the opening memorandum, New York courts have held that it is the law of the forum state and the law where evidence will ultimately be introduced at any trial that governs privilege issues. In addition, New York has a strong interest in this matter, as this is an investigation by the *New York* OAG into potential violations of *New York* law by a company that does business in *New York*. New York's interest is particularly salient because engagement letters between Exxon and PwC designated New York law as governing any dispute between them, undermining any argument that the parties were counting on the application of Texas law and communicated with each other on that basis. Further, in its two-page treatment of the choice of law issue, Exxon completely ignores Restatement 2d of Conflict of Laws § 139(2), which has been applied in New York, and which provides that when state privilege laws conflict, the law

favoring admission of the evidence should generally be given effect, even if the other state has a stronger interest.

Third, Exxon's effort to delay this Court's consideration of this issue should be rejected. Exxon has made abundantly clear that it intends to assert such a privilege under Texas Occupations Code § 901.457. (See, e.g., Affirmation of Katherine C. Milgram, October 14, 2016, Docket No. 1 ("Milgram Orig. Aff."), ¶ 18, Ex. H. (Letter by Exxon to OAG dated September 23, 2016).) The issue raised in the OAG's motion is not whether a well-established privilege applies to particular documents that must be reviewed and considered one at a time, but rather whether any Texas accountant-client privilege even exists, or applies at all to this New York investigation. There is no reason to delay decision on this straightforward legal question while Exxon deliberates at length over every responsive document that PwC possesses.

Fourth, Exxon's blatant forum shopping further justifies the timing of the OAG's filing of this Application. On October 17, 2016, the business day immediately following the commencement of this proceeding, Exxon attempted to undermine this Court's jurisdiction over matters arising in this law enforcement investigation, including this Application, by moving in Texas federal court to amend its existing complaint against the Attorney General of Massachusetts to add the OAG. (Supplemental Affirmation of Katherine C. Milgram ("Milgram Supp. Aff."), Docket No. 25, ¶ 16.) That complaint is completely unwarranted and effectively seeks to shut down this investigation. (Id. ¶¶ 17-18.) Then, immediately after this Court signed the Order to Show Cause in this proceeding setting the schedule on this Application, Exxon moved to expedite its motion to amend its complaint in Texas federal court. (Second Supplemental Affirmation of Katherine C. Milgram ("Milgram Sec. Supp. Aff."), ¶ 6.) In short,

Exxon is attempting to slow these proceedings in the hope that it can convince the Texas federal court to enter a preliminary injunction before this Court can enforce the PwC Subpoena.

Notwithstanding Exxon's gamesmanship, the accountant-client privilege issue is ripe for adjudication by this Court. Because there is no accountant-client privilege law under Texas law, and because New York privilege law applies in any event, the OAG respectfully requests that the Court grant the motion and order compliance with the PwC Subpoena.[3]

ARGUMENT

I. Texas Occupations Code § 901.457 Does Not Create an Evidentiary Privilege And Is Inapplicable On Its Face

Every court that has considered the issue has concluded that Texas Occupations Code § 901.457 does not create an evidentiary privilege. See Opening Memo. at 8-9; see also Harlandale Indep. Sch. Dist. v. Cornyn, 25 S.W.3d 328, 332 (Tex. App. Austin 2000) (noting that attorney-client privilege does not apply under Texas law when attorney is acting as an accountant; not discussing Texas Occupations Code § 901.457). By contrast, Exxon does not and cannot cite any authority to support its claim that Texas Occupations Code § 901.457 creates such a privilege.

[3] Exxon's assertion that the OAG's motion is defective because it did not file a petition is unfounded. C.P.L.R. § 2308(b) allows the issuer of a subpoena to commence an enforcement action simply by "mov[ing] in the supreme court to compel compliance," without requiring a petition. See also Patrick M. Connors, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, C2308:7 (initiatory papers, "which should be the usual motion papers with supporting proof, can merely be captioned 'Application . . . for an order under CPLR 2308(b) against . . .' etc."); CPLR § 402, Advisory Committee Note (noting that some statutes "vary the nature of pleadings in a particular special proceeding or abolish them altogether"). The specific claims for relief requested in the draft order to show cause that Your Honor modified and signed (Docket No. 32) and the factual allegations set out in numbered paragraphs in the OAG's supporting affirmation (Docket No. 1) were more than adequate to put Exxon and PwC on notice of the nature of this proceeding. Further, even if C.P.L.R. § 2308(b) required a petition to be filed, which it does not, courts have treated applications as petitions for purposes of C.P.L.R. § 402. See, e.g., Jordan v. City of N.Y., 38 A.D.3d 336, 338 (1st Dep't 2007) (holding that "affirmation and proposed notice of claim [when filing a show cause order] are properly viewed as the petition (CPLR 402) required to commence a special proceeding"); Page v. Ceresia, 265 A.D.2d 730, 731 (3d Dep't 1999) (holding that "absent any claim that a substantial right of a party was prejudiced, Supreme Court properly treated the verified affirmation as a petition for purposes of commencing this special proceeding").

The determination by both federal and state courts in Texas that Texas Occupations Code § 901.457 does not create an evidentiary privilege is strongly supported by the text and structure of the statute. Exxon cannot dispute the fact that compliance with the Subpoena is compulsory (see Opening Memo. at 12), and by arguing that Texas Occupations Code § 901.457 applies here, Exxon attempts to read the term "voluntarily" out of the statute.[4] Because Texas Occupations Code § 901.457 is limited to disclosures that are "voluntarily" made, the statute is inapplicable here.

Moreover, Exxon's argument that a subpoena from a jurisdiction not explicitly identified in the exceptions to Texas Occupations Code § 901.457 is not covered by the statute fails because the exceptions in Texas Occupations Code § 901.457(b)(2) for federal and Texas securities law subpoenas merely make it easier for federal and Texas issuing agencies to demand voluntary compliance with their subpoenas without judicial intervention. In contrast, the Texas Legislature may well have determined that other investigating agencies should go to court to compel subpoena compliance, as the OAG has done here.

Further, the order that the OAG seeks would qualify for the "court order" exception contained in Texas Occupations Code § 901.457(b)(3). On its face, the "court order" exception demonstrates that Texas Occupations Code § 901.457 does not, and was never intended to, create any privilege enforceable in litigation. In general, privileges restrain courts from ordering production,[5] so one that gives way to "a court order" without limitation is fairly characterized as no privilege at all. Exxon's argument that "a ruling that there is no privilege under Texas law"

[4] Exxon makes the unsupported assertion that "the plain meaning of section 901.457 severely restricts the possibilities for involuntary disclosure." (Exxon Opp. at 8 n.4, emphasis added.) Reading a prohibition on "voluntarily" made disclosures to severely restrict "involuntary" disclosures is far removed from the "plain meaning" approach that Exxon purports to apply in its memorandum.

[5] See, e.g., Martin I. Kaminsky, State Evidentiary Privileges in Federal Civil Litigation, 43 Fordham L. Rev. 923, 924 (1975) (discussing the history of evidentiary privileges stemming from "the right of citizens, in certain circumstances, to refuse to answer questions in court").

cannot "create[ ] the 'court order' contemplated by the statute" (Exxon Opp. at 16) is unavailing; it is the portion of the court order compelling the production of otherwise confidential documents or overruling defenses on a motion to quash that is the very "court order" that dissolves the confidentiality restriction in Texas Occupations Code § 901.457. See In re Arnold, 2012 Tex. App. LEXIS 9957, at *10-11 (holding that an order denying a motion to quash a deposition notice functioned as a court order, thus vitiating any confidentiality obligation under the statute).

The other Texas Occupations Code provisions Exxon cites (Exxon Opp. at 8) bolster this point. Those other statutes, like the privileges in the Texas Rules of Evidence, restrict disclosure even in court proceedings, with limited exceptions (such as for fee-collection or malpractice suits). See, e.g., Tex. Occ. Code § 160.007(e) (providing that medical peer review materials are subject to "evidentiary privileges" and are "not subject to subpoena or discovery and [are] not admissible as evidence in any civil judicial or administrative proceeding"). Similar to the medical peer review privilege in Texas, and separate and apart from Texas Occupations Code § 901.457, Texas law provides a privilege for materials prepared in the peer review process for accountants, demonstrating that the Texas Legislature knows how to create an accounting-related privilege when that is its intent. Tex. Occ. Code § 901.161 (providing that certain accountant peer review materials are "privileged" and not "subject to discovery, subpoena, or other means of legal compulsion for release" or "admissible as evidence in a judicial or administrative proceeding"). These statutes limit courts' discretion to order production of confidential material in the ordinary case. By contrast, Texas Occupations Code § 901.457 allows for disclosure when required by any court order meeting basic specificity requirements, signaling that this provision places no other constraint on a court's ability to order production. That is not an evidentiary privilege.

Exxon's argument that "[n]o court has confronted this issue directly" (Exxon Opp. at 6) is simply incorrect. In Cantu v. TitleMax, Inc., No. 5:14-CV-628 RP, 2015 U.S. Dist. LEXIS 139406 (W.D. Tex. Oct. 9, 2015), for example, the court directly held that "in Texas, accountant-client communications are confidential, but not privileged." Id. at *15. The court then went on to hold in the alternative that Texas privilege law did not apply in any event. Id. Likewise, in Canyon Partners, L.P., v. Developers Diversified Realty Corp., No. 3-04-CV-1335-L, 2005 U.S. Dist. LEXIS 26782, at *4 & 4 n.2 (N.D. Tex. Nov. 4, 2005), the court directly rejected a privilege argument based on Texas Occupations Code § 901.457, stating that "there is no accountant-client privilege under federal or Texas law" and that "no court has elevated the professional standard established by this statute to an evidentiary privilege under Texas law." Id. at *3 & 4 n.2. In In re Arnold, No. 13-12-00619-CV, 2012 Tex. App. LEXIS 9957 (Tex. App. Corpus Christi Nov. 30, 2012), the court's determination that "the existence of an accountant-client privilege based on section 901.457 is doubtful" was one of a "variety of reasons" why no accountant-client privilege applied in that case, and contrary to Exxon's argument (Exxon Opp. at 12), none of those reasons was given precedence over any other. Id. at *9-10. Finally, in In re Patel, 218 S.W.3d 911 (Tex. App. Corpus Christi 2007), the court engaged in a detailed analysis and cited decisions that distinguished between confidentiality provisions and evidentiary privileges before concluding that there was no authority to support "the proposition that an accountant-client evidentiary privilege exists in Texas." Id. at 920 n.6.[6]

[6] Exxon's contention that certain of these decisions should be given less weight because they are unpublished is incorrect under Texas law, under which all unpublished decisions in civil cases issued since January 1, 2003 have precedential value. Tex. R. App. P. 47.7(b) & 2008 cmt. ("[W]ith respect to civil cases, only opinions issued prior to the 2003 amendment and affirmatively designated 'do not publish' should be considered 'unpublished' cases lacking precedential value."). When interpreting foreign state law using unpublished decisions of that foreign state, New York courts follow the foreign state's rules on unpublished opinions. Locke v. Aston, 31 A.D.3d 33, 37 n.2 (1st Dep't 2006) (applying California Rules of Court concerning citation of unpublished opinions when addressing California decisions interpreting California law).

Exxon has not cited the law of a single state that provides an evidentiary privilege for accountant-client communications where the text of the statute is limited to voluntary disclosures or contains a broad exception for court orders. Exxon is thus asserting a Texas privilege that every federal and Texas state court has rejected, that no other states have created by means of an analogous statute, and that the U.S. Supreme Court has roundly rejected at the federal level. United States v. Arthur Young & Co., 465 U.S. 805, 817-18 (1984). For all of these reasons, Texas Occupations Code § 901.457 simply does not create an evidentiary privilege.[7]

II. New York Law Applies And It Does Not Recognize An Accountant-Client Privilege

As set out in the OAG's opening memorandum (at 13-15), New York recognizes no accountant-client privilege, and under New York law, "[t]he law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding is applied when deciding privilege issues[.]" JP Morgan Chase & Co. v. Indian Harbor Ins. Co., 98 A.D.3d 18, 25 (1st Dep't 2012); see also G-I Holdings, Inc. v. Baron & Budd, No. 01 Civ. 0216 (RWS), 2005

Further, the only decision Exxon cites concerning the precedential value of unpublished opinions, Yellow Book of Ny L.P. v. Dimilia, 188 Misc.2d 489, 491 (N.Y. Dist. Ct., First Dist., Nassau Cnty. 2001), specifically states that the issue it was deciding was "unique to the New York State trial courts of limited jurisdiction (e.g., the Nassau and Suffolk County District Courts, the New York City Civil and Criminal Courts, the various City, Village, and Justice Courts, et al.)" because many decisions of those courts "are published only selectively" and "circulate in samizdat form only." Id. at 490. Those considerations are inapposite here.

[7] Exxon raises the issue of comity, see Exxon Opp. at 20-21, but comity would hardly be served by overriding the decisions of every Texas court that has considered the issue, that no accountant-client privilege exists in that state. Exxon also expresses concern about the impact of a decision by this Court on Texas accounting practice, id. at 21, but in light of the fact that every federal and state court that has considered the question has determined that no accountant-client privilege exists in Texas, it is only by denying this motion that any uncertainty would arise. Legal commentators and practitioners also agree that there is no Texas accountant-client privilege, and a decision to grant the requested order would not alter settled expectations among accountants and their clients. See, e.g., Pilar Mata & Melissa J. Smith, Demystifying Accountant-Client Privileges in State Tax Litigation, State Tax Notes, Apr. 2, 2012, at 41, available at http://www.sutherland.com/portalresource/REPRINT-APinchofSALT(4-2-2012).pdf (listing Texas among "states whose courts, regardless of whether they have statutory confidentiality provisions, have refused to recognize an accountant-client privilege"); J. Wiley George et al., Best Practices for the Transactional Lawyer: Legal Privilege and Confidentiality, available at https://www.acc.com/chapters/houst/upload/20080812.pdf (Aug. 12, 2008) ("Section 901.457 is really a rule of 'confidentiality,' not evidentiary privilege"); Therese LeBlanc, Accountant-Client Privilege: The Effect Of The IRS Restructuring And Reform Act Of 1998, 67 UMKC L. Rev. 583 & n.38 (1999) (not listing Texas among the "only fourteen states [that] have codified an accountant-client privilege which shields advice from discovery in state court cases").

U.S. Dist. LEXIS 14128, at *7 (S.D.N.Y. July 13, 2005); Silverman v. Hidden Villa Ranch (In re Suprema Specialties, Inc.), No. 02-10823 (JMP), 2007 Bankr. LEXIS 2304, at *12 n.4 (Bankr. S.D.N.Y. July 2, 2007); Fine v. Facet Aerospace Products Co., 133 F.R.D. 439, 443 (S.D.N.Y. 1990); People v. Greenberg, 50 A.D.3d 195, 198 (1st Dep't 2008). Exxon's argument that these cases involved existing lawsuits (Exxon Opp. at 17-18) is simply irrelevant to which state's privilege laws apply. Thus, even if Texas Occupations Code § 901.457 did create an evidentiary privilege, which it does not, the Court should apply New York privilege law and grant the OAG's Application.

The cases cited above make clear that the interest of the forum state in applying its disclosure rules is given significant weight, notwithstanding any other state's privilege rules. New York also has a significant interest in this case for other reasons, as a New York law enforcement agency is conducting this investigation into potential violations of New York state law. Additionally, Exxon and PwC have agreed that New York law will govern any disputes between Exxon and PwC that arise from PwC's audits of Exxon. (Milgram Orig. Aff. ¶ 12, Ex. F.) Thus, from both a public law perspective and from the perspective of the parties' expectations as to the applicable law, New York has the stronger interest.

Further, Exxon completely ignores Restatement 2d of Conflict of Laws § 139(2), which provides that when state privilege laws conflict, the law favoring admission of the evidence is generally given effect. This principle has been applied in New York, such as in Warren v. Amchem Prods., Inc., 2016 N.Y. Slip Op. 31393, 2016 N.Y. Misc. LEXIS 2713, at *36 (Sup. Ct. N.Y. Cnty. July 14, 2016) and Bamco 18 v. Reeves, 685 F. Supp. 414, 416 n.2 (S.D.N.Y. 1988). Exxon does not even attempt to articulate any "special reason" under the Restatement provision why a supposed Texas accountant-client privilege should override New York's policy of

disclosure of accountant-client materials, nor could it. Given existing federal and Texas law as to accountant-client privilege, as well as the choice of law provision in the engagement letters, Exxon would have been imprudent in the extreme to assume that a purported Texas accountant-client privilege would apply to its communications with PwC in a hypothetical dispute. Thus, the New York law of privilege, which recognizes no accountant-client privilege, applies here, and Exxon has no accountant-client privilege claim over documents subject to the Subpoena.

III. This Controversy Is Ripe For Adjudication

Finally, Exxon's argument that the Court should delay decision on the OAG's Application on ripeness grounds is meritless. Exxon has repeatedly confirmed that it is availing itself of this non-existent accountant-client privilege. In a September 7, 2016 telephone conversation (Milgram Orig. Aff. ¶ 16) and by letter on September 23, 2016 (Id. ¶ 16, Ex. H), Exxon unequivocally stated that it intended to assert an accountant-client privilege over documents in PwC's possession. Moreover, PwC has stated, and Exxon has confirmed, that Exxon's counsel is "currently reviewing [PwC] materials to determine whether they are protected from disclosure by the Texas Privilege" and that "PwC is currently ready to make additional productions" pending Exxon's privilege determinations. (PwC Opp. at 3; see also Exxon Opp. at 3-4.). Exxon's clear statements that it intends to assert an accountant-client privilege have had the very real impact of withholding otherwise responsive documents from the OAG so that a pointless "privilege" review can take place.

Exxon's assertion of the purported privilege has resulted in PwC's failure to comply with the Subpoena, and C.P.L.R. § 2308(b)(1) provides that the issuer of a non-judicial subpoena may move to compel upon non-compliance with the subpoena. Exxon justifies PwC's non-compliance by claiming that Texas law allows the assertion of an accountant-client privilege, but

the overwhelming weight of legal authority supports the OAG's Application, as discussed above. This is not a case, like those Exxon cites, in which the exact scope of a privilege or the application of a privilege to particular documents are at issue. (Exxon Opp. at 19.) Rather, Exxon's clear assertion of an accountant-client privilege under Texas Occupations Code § 901.457 has raised a straightforward legal issue—whether Texas Occupations Code § 901.457 creates an accountant-client privilege, or applies at all to this New York investigation—and there is no reason to delay the adjudication of that issue.

There is no need to delay addressing this purely legal issue until PwC provides responsive documents to Exxon's counsel, Exxon's counsel reviews such responsive documents for the purported "privilege," and then logs all instances of withheld documents. Waiting until Exxon produces a privilege log to determine whether any accountant-client privilege exists under the Texas Occupation Code is not necessary and will result in a significant delay in the OAG's investigation. Remarkably, Exxon asserts that it is "still deliberating as to the application of a privilege with respect to nine" PwC documents, out of 126 documents that PwC has provided to Exxon. (Exxon Opp. at 4.) Exxon's continued and indefinite deliberation process, over two months after the issuance of the Subpoena, amply demonstrates the lengthy delays that an unwarranted privilege review will introduce into the investigation.[8] Exxon's insistence on reviewing every document that PwC identifies as responsive for a non-existent privilege before such a privilege can be challenged amounts to nothing more than continued delay tactics.

[8] PwC asserts that "millions of files" are potentially implicated by the Subpoena (Affirmation of David Meister, Docket No. 34, October 20, 2016, ¶ 4), underscoring the unjustified delay that would be caused by Exxon's review for a non-existent privilege.

Given the clear weight of authority on this narrow legal issue and the significant risk of delay to the OAG's ongoing investigation, there is no reason to delay the adjudication of this issue.[9]

IV. The Court's Jurisdiction over New York Fraud Investigations

Exxon's recent filings in Texas seeking to invalidate the OAG's subpoena to Exxon—on the heels of the OAG's Application and nearly a year after producing responsive documents[10]—are a blatant, unprecedented effort to undermine this Court's jurisdiction to determine the validity of the OAG's investigation of Exxon and the PwC Subpoena issued in that investigation. On the business day immediately following the OAG's commencement of this proceeding, Exxon moved in Texas federal court to amend its existing complaint against the Attorney General of Massachusetts to add the OAG. (Supplemental Affirmation of Katherine C. Milgram ("Milgram Supp. Aff."), Docket No. 25, ¶ 16.) Exxon's attempt to avoid the jurisdiction of this Court over matters arising in this investigation, including the instant motion, is without justification.

Exxon has not disputed (in this jurisdiction), and PwC has not disputed at all, that the OAG's investigation is valid and within the OAG's authority. The OAG's authority to investigate potential fraud is clear. See, e.g., Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc., 18 N.Y.3d 341, 349-50 (2011) ("[T]he Attorney-General [has] broad regulatory and remedial powers to prevent fraudulent securities practices by investigating and intervening at the first indication of possible securities fraud on the public[.]") Anheuser-Busch, Inc. v. Abrams,

[9] PwC asks the Court to establish a schedule for completion of its production. (PwC Opp. at 4.) The OAG is requesting that the documents that PwC has already found to be responsive and provided to Exxon be produced to the OAG within ten days. Other responsive documents that PwC is in the process of collecting and reviewing should be produced on a rolling basis pursuant to a schedule to be worked out between the OAG and PwC.

[10] In fact, over the course of the last year, Exxon has produced more than 1.2 million pages in response to the OAG's subpoena to Exxon.

71 N.Y.2d 327, 332 (1988) ("In defending his inquiry, the Attorney-General enjoys a presumption that he is acting in good faith[.]"); La Belle Creole Intl., S. A. v. Attorney General of N.Y., 10 N.Y.2d 192, 198 (1961) ("As long as [the OAG] has reasonable basis for believing that the [foreign] corporation violated a New York statute, he is not prevented by the due process clause of the Federal Constitution from exercising his power of subpoena and initiating an investigation designed to ascertain the facts."). Indeed, Exxon has produced documents in response to the OAG's subpoena to Exxon for the past year. (Milgram Supp. Aff., ¶ 13.) The appropriate procedure is a motion to quash or limit, and the appropriate forum is this Court.

Yet immediately after this Court signed the order to show cause on the OAG's Application and set a hearing date for October 24, 2016, Exxon moved to expedite consideration of its motion to amend its complaint in Texas federal court. (Milgram Sec. Supp. Aff., ¶ 6.) None of Exxon's filings in this proceeding so much as mentioned the Texas litigation until after the OAG revealed that litigation to this Court. Similarly, Exxon has failed to inform the federal district court in Texas of this proceeding. (Milgram Sec. Supp. Aff., ¶ 7.)

Exxon's surreptitious efforts to slow these proceedings, while speeding up proceedings in Texas, further confirms that it is seeking to avoid litigating the threshold issue of the propriety of the underlying investigation in this Court, and instead, get a ruling from the federal district court in Texas on the propriety of a state law enforcement investigation of potential violations of State law. Rather than adhere to the proper procedure of contesting the OAG's subpoena to Exxon through a motion to quash filed before this Court, Exxon has instead engaged in an unprecedented maneuver entirely at odds with fundamental principles of federalism. See Trainor v. Hernandez, 431 U.S. 434, 444-45 (1977) (holding that "the interests of comity and federalism" prevented federal court from interfering with state civil enforcement action).

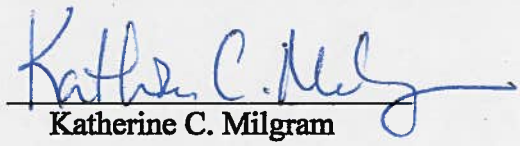
CONCLUSION

For the reasons stated in the OAG's opening memorandum and in this reply memorandum, there is no accountant-client privilege applicable to the materials sought in the PwC Subpoena. The OAG respectfully requests the Court to compel PwC to comply with the Subpoena without applying any such privilege, and compel Exxon to allow PwC to produce responsive documents without subjecting such documents to a document-by-document review for the application of any purported accountant-client privilege.

Dated: New York, New York
October 21, 2016

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York

By: 

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