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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL TERM : PART 61 Mot Seq 001

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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,
Index No.
451962/16

for an Order pursuant to CPLR § 2308(b) to
compel compliance with a Subpoena issued by the
Attorney General,

-against-

PRICEWATERHOUSECOOPERS LLP and EXXON MOBIL
CORPORATION,

Respondents.
-----x
October 24, 2016
60 Centre Street
New York, NY 10007

B e f o r e :

HON. BARRY R. OSTRAGER, Justice.

A p p e a r a n c e s :

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(Appearances continue on next page.)

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EDWARD C. ROBINSON, JR., ESQ.

MINUTES OF PROCEEDINGS

Reported By:
William L. Kutsch
Senior Court Reporter

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Proceedings

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2 THE COURT: All right. I'm prepared to offer
3 everyone an apology here.

4 There are two significant items of disclosure.

5 The first item of disclosure is that an envelope
6 was delivered to me from the New York Attorney General,
7 which was not e-filed, and the respondents, to the best of
8 my knowledge, are not aware that this was delivered to my
9 Chambers. I have not looked at this material, so I'm going
10 to return it to the Attorney General.

11 (Handing.)

12 THE COURT: The second item of disclosure, which is
13 more significant, or potentially more significant, is that
14 as I was reading the papers in this case over the weekend, I
15 realized that I am an Exxon shareholder. I own 1,050 shares
16 of Exxon stock in an account, and I own an additional 2,000
17 shares of Exxon stock in an IRA account.

18 According to the Canons of Judicial Ethics, I will
19 be disqualified from hearing this case unless the parties,
20 pursuant to Section 100.3(F), were satisfied to allow me to
21 continue on the case.

22 The circumstance that I have shares in Exxon would
23 not in any way, in my opinion, affect my impartiality in the
24 case, but the rules are the rules.

25 So I'm prepared to disqualify myself if that's the
26 desire of the parties. I'm prepared to continue on the case

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Proceedings

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2 if the parties are comfortable that I can be impartial.

3 MR. WELLS: Your Honor, could I just check with my
4 client, who is here?

5 THE COURT: By all means.

6 And if you want to take a ten-minute recess, that
7 would be an appropriate thing to do.

8 (At this time a brief recess was taken.)

9 MR. WELLS: Your Honor, we are ready to resume.

10 I have been authorized to say on behalf of all
11 three parties that we have no objection to your Honor
12 sitting on this case.

13 THE COURT: All right. Then I will sit on the
14 case.

15 I should tell you, Mr. Wells knows this, I was a
16 partner at Simpson, Thacher & Bartlett for 35 years, and my
17 Exxon holdings, I'm happy to say, are not a material portion
18 of my life savings.

19 So, I have a couple of questions which I'll direct
20 to counsel.

21 First, let me ask counsel for Exxon when Exxon
22 might decide that it has an objection to the production of
23 any material document that it believes production of which
24 would violate the alleged evidentiary accountant-client
25 privilege under the Texas Occupations Code Section 901.457.

26 MR. WELLS: Your Honor, the way the protocol works

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1 Proceedings

2 is that Pricewaterhouse identifies documents that they
3 believe are responsive to the subpoena. They then give us
4 on a rolling basis the documents. We then review the
5 documents to determine if we are going to assert the
6 privilege.

7 To date, we have not asserted the privilege. To
8 date, we have only received two batches of documents. The
9 first batch was 126 documents, and Miss Parikh, who is
10 counsel to Paul Weiss, she is in charge of that project.

11 Please correct me if I misspeak in terms of
12 numbers.

13 The first batch involved 126 documents. Of the 126
14 documents, we have pulled three documents that we're trying
15 to research to understand if there's -- if there are
16 confidential communications embedded. The rest of those, we
17 have signed off on and have not asserted any privilege.

18 There's a second batch of documents that we just
19 got access to in terms of being able to view them, I think
20 on Friday.

21 (Pause in the proceedings.)

22 MR. WELLS: Okay. They're not -- there's another
23 batch of 900 documents Miss Parikh tells me we had access to
24 but then we lost access to because of computer problems in
25 terms of interfacing with Mr. Meister's firm. Of that 900,
26 we have not started that review because we just got back up

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Proceedings

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2 online, but on that, I can only tell you where we are in the
3 protocol.

4 We have not identified to date any document that we
5 are asserting a privilege to, but there are three that we're
6 trying to research and understand if they may contain
7 confidential information.

8 THE COURT: The reason that I asked the question is
9 that you argue in your brief that it's premature for the
10 court to consider these issues because you haven't raised
11 any specific objections to the production of any of the
12 documents. The compliance subpoena was served some time
13 ago. You've had an opportunity for some period of time to
14 review the documents.

15 And it does seem strange for a New York court to
16 interpret Section 901.457 of the Texas Occupations Code
17 section, which both parties tell me hasn't been construed by
18 any Texas courts, if you're not expeditiously reviewing the
19 documents that you may or may not assert in an
20 accountant-client privilege with respect to that.

21 MR. WELLS: Your Honor, we are, and I have no
22 hesitation in saying we are reviewing what we have been
23 given by Pricewaterhouse expeditiously. Pricewaterhouse is
24 still engaged, to my understanding, in the great -- with
25 respect to the vast majority of documents, they haven't even
26 pulled them yet.

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So we have only gotten two of the tranches. The first tranche was 126, of which we signed off on 123. We've got three documents now, and we are trying to understand in discussions with our client and Pricewaterhouse whether it contains confidential information on those three documents.

The other 900, we got access to. That's the universe. There are probably thousands of documents that are coming but we have not gotten access to.

THE COURT: Respectfully, Exxon and its outside counsel have the resources to review these documents with considerable expedition, and Pricewaterhouse has the resources to produce the documents to Exxon with considerable expedition. So it seems to me that we could deal with this in a much more concrete way if Exxon and PricewaterhouseCoopers moved a little quicker than they are moving.

MR. WELLS: And what I will say to you, your Honor, and perhaps Mr. Meister should speak for PricewaterhouseCoopers, we had moved expeditiously, and we will, I make that representation, and we are willing to talk in Chambers or whatever, whatever would satisfy your Honor or the State, even to agree, you know, to an order that says we're going to do it expeditiously.

But in terms of the documents we have been given, okay, what is in the queue --

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THE COURT: I get it that you have turned over 123 of the 126 documents that you have been provided by PricewaterhouseCoopers, and you are contemplating whether or not to assert an objection with respect to three. I get that.

MR. WELLS: Okay.

THE COURT: The issue here is, if we're going to have a dispute about 5,000 documents, I would like to know that sooner rather than later. If we're going to have a dispute about 14 documents, I would also like to know that sooner rather than later, rather than deal with this in a factual vacuum.

MR. WELLS: Certainly. And I'll make the last representation, and then I will turn it over to Mr. Meister.

I represent that Paul Weiss is devoting resources to do this on an expeditious fashion.

THE COURT: Can you commit to a specific time in the month of October at which the review of these documents would be complete?

MR. WELLS: In terms of the 900 --

THE COURT: Yes.

MR. WELLS: -- and the three? That's all we have right now.

THE COURT: No. In terms of all of the documents.

MR. WELLS: I don't even have any idea what he's

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going to give me. I'll sit down and let Mr. Meister speak, because to the extent there's a production issue, I'm at the mercy of what Pricewaterhouse gives me when they give me what they do. I represent, whatever he gives me, we will put in the resources --

THE COURT: Look, the State is essentially claiming that you are unreasonably delaying and, for lack of a better term, flimflamming them because PricewaterhouseCoopers isn't producing the documents to you expeditiously, and you're not reviewing them expeditiously, and so the matter is more complicated than it has to be.

So let me hear from PricewaterhouseCoopers as to why it would take a month to produce these documents.

MR. MEISTER: Good morning, your Honor.

I'm David Meister from Skadden Arps for PwC, PricewaterhouseCoopers.

Just on the issue of how long it's taking us, to be a little bit more concrete, on October the 10th, we shared with Paul Weiss what I would consider core documents here. I guess -- let me take you a little bit back.

The subpoena is quite broad. After we got the subpoena, we engaged in some dialogues with the Attorney General's office to talk about where we would prioritize the production as we uploaded a vast quantity of documents onto a server. We agreed upon to start with five categories of

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2 documents. That's the small set that we've spoken about.

3 The second set, Judge, are sets of work papers.
4 And the subpoena seeks work papers which each -- for each
5 year going back to 2010. The work papers are vast. Some,
6 not all of those work papers are responsive to the subpoena,
7 but a lot of them are. And so what we proposed to the
8 Attorney General is to start with the most recent stuff of
9 work papers and then go backwards from there. They didn't
10 commit to anything, but they say that's a good way to
11 proceed, at least for now.

12 We provided the 2015 work papers, the first half of
13 the select version, to Paul Weiss on October the 10th.
14 After that, there was some computer glitch. When we put
15 them onto a website, kind of a shared website, there was a
16 computer glitch, so they lost access for some period of time
17 between October 10th and the 18th of October.

18 In addition, on October 10th, we also shared the
19 2014 work papers with Paul Weiss. These are large
20 quantities of documents, Judge. I don't have the exact
21 number at hand, but it's a large quantity of documents.

22 So that's where we are right now as far as
23 production.

24 And I do think, your Honor, this is the -- these
25 are core, this is the core stuff.

26 What is coming potentially are e-mail

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2 communications within Paul Weiss, between Paul Weiss and
3 Exxon, and that is going to be a massive undertaking.

4 MR. WELLS: Pricewaterhouse. You said Paul Weiss.

5 MR. MEISTER: 'Oh, I'm sorry. Between Exxon and
6 Pricewaterhouse. E-mails. And that will be a massive
7 undertaking. That will take some time.

8 There were a huge number of people from
9 Pricewaterhouse who have worked on this audit, and I think
10 that there's a huge number of Exxon people who interfaced
11 with Pricewaterhouse as well. So the communication part of
12 this is going to take awhile, your Honor. I couldn't
13 responsively say how long it's going to take, but it's going
14 to take awhile.

15 MS. SHETH: Your Honor, let me introduce myself.

16 I'm Manisha Sheth. I'm the Executive Deputy AG of
17 the Economic Justice Division at the Attorney General's
18 office.

19 Let me first begin by addressing the issue of
20 ripeness, which your Honor has raised.

21 There has been no question in this case that Exxon
22 has asserted clearly and unequivocally that they believe a
23 privilege, an accountant-client privilege, not some rule of
24 confidentiality, but a privilege applies to these documents.

25 So the harm that we are talking about, the harm
26 that the AG's offices is facing, is happening right now as

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we speak.

As we have heard from both sets of counsel, 900 documents are responsive documents. So these 900 documents that counsel for PwC has found to be responsive to our subpoena are presently being withheld on grounds of this purported privilege.

So, and the defendants, or Exxon and PwC, want this court to have the burden of reviewing each of those documents or the contested documents to determine whether the privilege applies. And we respectfully submit that that is not the issue before the court.

The narrow legal issue before the court is twofold:

One, which forum jurisdiction choice of law applies. Is it New York or is it Texas. And we submit, your Honor, that clearly New York law applies and your Honor need not even get to the secondary question of whether there is a privilege under Texas law.

Second, that even if Texas law applies, the Texas Occupations Code does not create any accountant-client privilege. And contrary to Exxon's representation that there has not been a single Texas court case that has decided the issue, your Honor, there have been four cases in the courts of Texas where they have uniformly held --

THE COURT: I read them over the weekend.

MS. SHETH: -- that there is no accountant-client

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2 privilege, and Exxon has not identified a single case that
3 identifies, that holds that there is such a privilege. In
4 fact, what they are referring to is a rule of
5 confidentiality, nothing more.

6 And what they're asking you to do is basically do a
7 document-by-document review, which would be appropriate if
8 we were talking about an existing recognized privilege such
9 as the attorney-client privilege. That's not what we have
10 here. The question before your Honor is whether or not
11 there actually exists a privilege in this case.

12 And we submit that if you apply New York's choice
13 of law rules: The place that the trial will be conducted
14 will certainly be in New York; the place of discovery will
15 be in New York; and New York, it's uncontested amongst PwC,
16 Exxon and the AG's office that New York does not recognize
17 an accountant-client privilege. And if your Honor would
18 like, we can articulate why even under Texas law there was
19 not a privilege either.

20 THE COURT: I understand that there is no
21 accountant's privilege in New York. There may or may not be
22 an accountant's privilege in Texas.

23 There is a choice of law issue I have to deal with.

24 For purposes of this morning, because I'm not going
25 to decide this this morning, what I'm interested in having
26 the parties come to some understanding with before we leave

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2 today, is that PwC expedite its production of all responsive
3 documents to Exxon, that Exxon review these documents with
4 some expedition. Both PwC and Exxon have the resources to
5 deal with collecting the potentially responsive documents to
6 which Exxon may or may not have a legitimate claim of
7 privilege to in a very short period of time. And while
8 that's going on, in a telescoped period of time, we'll find
9 out what the Texas court does with respect to the Texas
10 action. And I'm not going to wait for the Texas court to
11 rule on what's before me. I have your fully submitted set
12 of papers, and I will revolve the issue expeditiously.

13 But in the interim, there is no reason that I can
14 see why the process of collecting the documents that are
15 responsive to the subpoena and Exxon's evaluating which of
16 those documents, if any, it's going to assert a privilege
17 with respect to the documents that it's not going to assert
18 the privilege, and they claim they haven't asserted the
19 privilege with respect to any documents, all of the other
20 documents should be turned over to the New York AG
21 forthwith.

22 MS. SHETH: Thank you, your Honor. We appreciate
23 that.

24 The concern we have is that PwC has repeatedly
25 stated that the subpoena is overbroad and that there is an
26 enormous volume of responsive documents.

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2 THE COURT: I don't have anything before me which
3 would enable me to assess the extent to which the subpoena
4 is or isn't overbroad. So, because nobody has asserted in
5 any court filing that the subpoena is overbroad, at least
6 for purposes of today, I'm assuming that the subpoena is a
7 reasonable and appropriate subpoena.

8 MS. SHETH: Thank you, your Honor.

9 THE COURT: If anything changes on that score, I'll
10 deal with it.

11 But in the meantime, until and unless there is a
12 ruling that the subpoena is overbroad, anything that Exxon
13 isn't asserting a privilege with respect thereto should be
14 produced forthwith.

15 And to the extent that PwC and/or Exxon is dragging
16 their feet in terms of moving this process forward, the New
17 York AG has a legitimate grievance which will be
18 appropriately addressed at an appropriate time.

19 MS. SHETH: Thank you, your Honor. I mean, that
20 seems to be a reasonable solution. Our concern is that we
21 have a very set timeframe for when PwC completes its
22 production.

23 THE COURT: We're not going to leave here today
24 without having an agreement on a timeframe.

25 MS. SHETH: Thank you, your Honor.

26 THE COURT: So can PwC and Exxon confer and agree

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2 on a timetable? It can't be Christmas.

3 MR. WELLS: May I talk to PwC's counsel for one
4 second, your Honor?

5 MR. MEISTER: May we just confer one moment, your
6 Honor?

7 THE COURT: Sure.

8 (Pause in the proceedings.)

9 THE COURT: Counsel.

10 MR. MEISTER: Thank you, your Honor.

11 Your Honor, I have two just items to discuss here.

12 The first is, Judge, you say this shouldn't be
13 Christmas, and I hear you, your Honor. I don't even know
14 the exact number of documents that we have to review in
15 order to determine their responsiveness and whether or not
16 they're covered by, say, for example, the attorney-client
17 privilege, but it's enormous, is my understanding. And we
18 will absolutely put to work whatever resources we can put to
19 work, and PwC will, as well. But these are -- this will be
20 a very large undertaking for us, and I don't know how long
21 it will take us to go through all of the documents.

22 THE COURT: Okay, look. I don't find this
23 credible, to be perfectly candid.

24 It seems to me that you can produce all of the
25 documents that are responsive to the subpoena within 30 days
26 of the date that the subpoena was issued to counsel for

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2 Exxon.

3 While that process is going on, any documents that
4 are privileged attorney-client communications can be the
5 subject of a privilege log. Any documents that are not
6 potentially the subject of the assertion of an accountant's
7 privilege, pending the ruling that I'm going to make on that
8 issue, should be turned over to the Attorney General's
9 office.

10 If there are claims that the subpoena is overbroad,
11 an application can be made by order to show cause to narrow
12 the scope of the subpoena. That could have been done at an
13 earlier point in time. It wasn't done. It can still be
14 done.

15 So November 10th should be the outside cutoff date
16 for the turnover of documents to Exxon. That's going to be
17 done on a rolling basis. And Exxon is going to be producing
18 on a rolling basis the documents as to which Exxon doesn't
19 assert any accountant's privilege to it.

20 So that's just the ministerial portion of what
21 we're doing this morning.

22 Substantively, I assume that you are now going to
23 argue the issue of whether Texas law or New York law
24 applies, and you are going to argue whether or not, assuming
25 Texas law applies, Texas Occupations Code Section 901.457
26 creates an evidentiary accountant-client privilege.

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2 MR. MEISTER: Your Honor, I actually was not going
3 to argue the latter.

4 And just on the scheduling, would it be all right
5 with your Honor if we worked with the Attorney General?

6 THE COURT: If the Attorney General agrees to some
7 other and different arrangement, whatever you stipulate to
8 is fine with me.

9 MR. MEISTER: All right.

10 MS. SHETH: Your Honor, just to clarify the
11 schedule, what we would ask respectfully is that the three
12 documents that Mr. Wells referred to this morning, that
13 those be produced with or without the privilege log by the
14 end of this week, and the remainder of the documents, as
15 your Honor alluded to, can be produced by November 10th.
16 But we would ask that rolling privilege logs be submitted,
17 as well.

18 THE COURT: Okay. Well, I just said that the
19 documents are going to be produced on a rolling basis.

20 And as to documents as to which attorney-client
21 privilege are being asserted, a privilege log will be
22 produced on a rolling basis.

23 And now we have to get to the substantive issue
24 which is the reason that we are here this morning.

25 MS. SHETH: Thank you, your Honor. Appreciate
26 that.

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2 MR. MEISTER: Your Honor, may we speak to the
3 Attorney General's office about the schedule of production?

4 THE COURT: You will do that outside of my
5 presence. I've given you a timeframe. If the Attorney
6 General is amenable to another and different timeframe, or
7 in a more convenient timeframe for the parties, and you come
8 to a stipulation, that's fine with me.

9 But for you to produce to your client, Exxon,
10 within 30 days of the date of the subpoena the documents
11 that are responsive to the subpoena, I don't think that's an
12 unreasonable deadline.

13 MR. MEISTER: Your Honor, the other issue that I
14 wanted to put on the table here, Judge, is that the protocol
15 that we had worked out, that PwC has worked out with Exxon
16 that PwC has asked for, is that only Paul Weiss review the
17 materials, that Exxon people not review the materials.

18 And I understand, Judge, having consulted with Paul
19 Weiss, that that makes it more difficult as a matter of
20 timing for Paul Weiss to make the decision as to whether or
21 not the privilege, the Texas privilege, should be asserted.
22 I wanted your Honor to be aware of that.

23 THE COURT: Well, what I am aware of is that there
24 are well in excess of a thousand attorneys at the Paul Weiss
25 firm, and that Mr. Wells has almost limitless resources in
26 his litigation department to assist in this process.

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MS. SHETH: Your Honor, to clarify --

THE COURT: One moment.

Mr. Wells.

MR. WELLS: Thank you, your Honor.

I asked Mr. Meister to raise that last issue with you because -- so the record is clear.

In terms of the protocol, there is a disagreement between Pricewaterhouse and Paul Weiss in terms of whether or not Paul Weiss, once we get the documents, is permitted to talk to our client about the documents in order to figure out if they involve privileged conversations.

Pricewaterhouse is taking the position that we cannot talk to our client about the documents; that after we review the documents at Paul Weiss, which we are doing expeditiously, we then have to come back to Pricewaterhouse to have Pricewaterhouse then tell us, based on their involvement in creating the documents, if the material was based on confidential communications between Exxon people and Pricewaterhouse people.

We have told them we disagree with that because that's -- that's why there are three documents I have. I haven't been able to pass on them because I have to go back to Skadden Arps, then they go back to their client to find out if something was based on a confidential communication.

We have a disagreement, but I want that on the

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2 record, because that's my problem.

3 I do have significant resources. I can get through
4 these documents if I can talk to my client about the
5 documents to find out if Document A involves confidential
6 communications. But they have decided, in total good faith,
7 but they have decided that I can't do that.

8 So I want that -- that has to be worked out,
9 because the only way I can do this quickly, and I want to do
10 it quickly, and I make that representation, is if I'm able
11 to talk to my client. And that's just kind of the basis
12 right now to a protocol.

13 THE COURT: Look, this isn't that complicated.
14 We're going to decide in a very short period of time whether
15 or not there's any evidentiary accountant-client privilege
16 under Texas Occupations Code Section 901.457, and we're
17 going to decide in a very short period of time whether Texas
18 law even applies to this proceeding.

19 As respects whether documents are privileged
20 attorney-client documents, I am sure that PwC can give you a
21 list of every lawyer at Exxon that's communicated with PwC.
22 If it's a communication from a lawyer to PwC, then it's a
23 privileged communication, and you will log it as a
24 privileged communication. If it's a communication from a
25 businessperson at Exxon to PwC, then it's not privileged
26 communication unless it contains some advice of counsel, and

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2 that should be evident from the document itself once you
3 have a list of all the lawyers involved.

4 So we are just making this much more complicated
5 than it needs to be. The parties around this table are all
6 very sophisticated. None of these issues are novel nor new
7 to any of you.

8 And let's get to the merits of why we are here this
9 morning.

10 MS. SHETH: Thank you, your Honor.

11 Let me begin by addressing the choice of law issue
12 first. Hopefully that will result in us not getting to
13 resolve the issue of the Texas Occupations Code.

14 So as a threshold matter, two recent First
15 Department decisions confirm that the law that should be
16 applied is the law of the place where the evidence in
17 question will be introduced at trial or the location of the
18 discovery proceeding. And that -- those two cases are the
19 JP Morgan case and the People v. Greenberg case, both recent
20 First Department decisions.

21 And there is no question that under that legal
22 standard, the appropriate choice of law in this matter would
23 be New York. And it's undisputed among all three parties
24 here that New York does not provide for an accountant-client
25 privilege.

26 Now, even if this court were to apply the center of

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2 gravity test that is advocated by Exxon, New York still has
3 the greatest interest in this proceeding and, therefore, New
4 York law would apply.

5 First, this is a law enforcement proceeding brought
6 by the New York Attorney General's Office of potential
7 violations of New York State law, including the Martin act,
8 by Exxon, a company that does business in the State of New
9 York. Exxon's independent auditor, PwC, also does business
10 in New York, and its U.S. chairman's office is also in New
11 York.

12 Moreover, neither Exxon nor PwC could have
13 reasonably expected that anything other than New York choice
14 of law would govern their communications, because in their
15 representation letters between -- excuse me, in their
16 engagement letters between Exxon and PwC, they actually
17 agreed that New York was the appropriate choice of law.

18 And it's further telling that in this matter, PwC
19 does not take a position on the choice of law analysis or
20 whether the Texas Occupations Code creates a privilege.

21 So, your Honor, we submit that New York is the
22 appropriate choice of law to apply, and there is no dispute
23 that under that law, there is no accountant-client
24 privilege.

25 Now, Exxon, unable to contest this black-letter
26 law, attempts to manufacture an accountant-client privilege

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2 based on the Texas Occupations Code Section 901.457. We
3 respectfully submit that even if this court were to consider
4 Texas law, it should not interpret Section 901.457 as a
5 privilege but rather construe it to be a rule of
6 confidentiality.

7 Now, first, contrary to Exxon's claim that not a
8 single court, or that this is a case of first impression,
9 every court that has considered this issue has concluded
10 that 901.457 does not create an evidentiary privilege. And
11 your Honor has read and is familiar with the cases, the four
12 cases we have cited in our papers.

13 Second, Exxon, despite bearing the burden of
14 establishing this privilege, has not cited the court to a
15 single case, Texas or anywhere else, that interprets Section
16 901.457 to create an accountant-client privilege.

17 Now, third, let me talk about the text of Section
18 901.457. And if it's helpful for your Honor, we have a copy
19 of the language of the text, if your Honor would like it.

20 THE COURT: You can give it to the Court Officer
21 and I will review. It's obviously part of your papers.

22 MS. SHETH: Yes. So, your Honor, if you look at
23 Section 901.457, you will see that although the term
24 "Accountant-Client Privilege" is used in the title, nowhere
25 does it appear, nowhere does the word "privilege" appear in
26 the body of the section. And, in fact, if you look at the

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2 language of Subsection (a), it clearly states that: "A
3 license holder...may not voluntarily disclose information
4 communicated to the license holder...by a client in
5 connection with services provided to the client by the
6 license holder...except with the permission of the
7 client..."

8 Now, the plain language here is phrased as a rule
9 or a restriction against voluntary disclosure of information
10 absent client consent. It is not phrased in any way as a
11 privilege.

12 And, in fact, there are three characteristics about
13 this particular section that suggest to you that it is a
14 rule of confidentiality.

15 First, the fact that it is limited to voluntary
16 disclosures. In evidence, rules of privileges, privileges
17 apply regardless of whether the disclosure is voluntary or
18 required. The fact that this section is limited to
19 voluntary disclosures further supports the OAG's argument
20 that this is a rule of confidentiality as opposed to an
21 evidentiary privilege.

22 Second, if you look at Subsection (b), which
23 contains the exceptions, there is a broad exception under
24 (b) (3) for "a court order that is signed by a judge if the
25 order is addressed to the license holder," in this case,
26 that would be PwC; "mentions the client by name," in this

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2 case, that would be Exxon; "and (C), requests specific
3 information concerning the client."

4 So, the fact that this exception (b)(3) is broadly
5 written supports the interpretation that 901.457 is a
6 confidentiality rule rather than a privilege.

7 In fact, had the Texas legislature intended to
8 actually create an accountant-client privilege, then these
9 broad exemptions, particularly "for a court order," would
10 vitiate the privilege and render it nonexistent.

11 In both the In Re Patel case as well as the In Re
12 Arnold case, the Texas court found, noted that its order on
13 a motion to quash was the requisite order pursuant to (b)(3)
14 that allowed disclosure of otherwise confidential
15 information.

16 Now, your Honor, we have also prepared a chart for
17 your Honor which compares this section with the prior Texas
18 accountant-client privilege which was in existence before
19 from the time period from 1979 to 1983. It also compares it
20 with other Texas privileges which are cited by Exxon in its
21 motion papers, and other states' accountant-client
22 privileges. And if your Honor will permit, we will hand up
23 a copy of this chart, as well.

24 So if your Honor looks at this court, we have the
25 three characteristics on the left-hand side of the chart.
26 Does "privilege," the word "privilege" appear in the text,

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2 is the disclosure limited to voluntary disclosures, and is
3 there is a broad exception for court orders.

4 In the first column, we have this particular
5 statute in question, 901.457, and you see that the word
6 "privilege" does not appear in the text, the statute is
7 limited to voluntary disclosures, and there is a broad
8 exemption. All three characteristics suggest that this is a
9 rule of confidentiality.

10 Now, if you look at the other columns starting with
11 the second column, there is a prior Texas accountant
12 privilege which was repealed in 1983. And in that case, in
13 that statute, the word "privilege" expressly appeared in the
14 text of the statute, the statute was not limited to
15 voluntary disclosures, and there was no broad exception for
16 court orders.

17 And similarly, the other Texas privileges which
18 Exxon cites in its papers had the same three
19 characteristics.

20 And then finally, if we look at other states'
21 accountant-client privileges, we have found 16 states that
22 recognize an accountant-client privilege, and in 13 of those
23 states, the word "privilege" appears in the text of the
24 statute, the disclosures are not limited to voluntary
25 disclosures, and there is no broad exemption for court
26 orders.

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2 And then fourth, if we look at the legislative
3 history behind 901.457, that also confirms that this is not
4 an evidentiary privilege.

5 As I mentioned earlier, there was a prior statute
6 in place from the period of 1979 to 1983. And in that
7 statute, the 1979 statute, the word "privilege" was used in
8 the text, it was not restricted to voluntary disclosures,
9 and there was no broad exception for court orders.

10 That provision was repealed in 1983, and in 1989,
11 the Texas court had -- excuse me, the Texas legislature
12 enacted the predecessor to the statute in question today.
13 And that statute was enacted in 1989, and that statute did
14 not use the word "privilege" in the text, that statute was
15 restricted like the statute to voluntary disclosures, and it
16 also contained a broad exemption for court orders.

17 THE COURT: Did the legislative history
18 specifically say in words or substantial: We're changing
19 the statute in order to make it clear that there is no
20 privilege?

21 MS. SHETH: The statute did not say that, but, your
22 Honor --

23 THE COURT: I'm talking about the legislative
24 history.

25 MS. SHETH: Excuse me. The legislative history did
26 not expressly say that.

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THE COURT: What did it say?

MS. SHETH: There is a statement, a sponsor's statement that was made in 2013 when there was an amendment to the statute. And if I can hand that up to your Honor, we can read to you from that statement.

So if your Honor looks at the bottom of page 1, there is a statement made there which clarifies that this is a rule of confidentiality. So it reads: "S.B. 228 clarifies client confidentiality or what some refer to as the accountant-client privilege. Section 901.457 (Accountant-Client Privilege) Occupations Code, outlines the requirements for a certified public accountant to maintain client information confidentiality."

So the changes being proposed by this bill will make it clear that CPA's may disclose client information when required to do so by state or federal law, or when a court order is signed by a judge.

Now, Exxon makes several arguments in response to our papers that -- to our argument that this is a rule of confidentiality.

The first argument they make is that Subsection (b), which contains a list of the required disclosures, is a limited list of required disclosures. We argue that reading Section (b) in this fashion is inconsistent with the plain language in Subsection (a), which suggests that the rule

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2 only applies to voluntary disclosures. So if we read the
3 statute in the way Exxon suggests, we would essentially be
4 reading the word "voluntary" right out of the statute. And
5 rather, we think the better interpretation is that the Texas
6 legislature wanted state enforcement agencies to go through
7 the additional hurdle of coming to a court, getting a court
8 order, before allowing the disclosure of otherwise
9 confidential communications between an accountant and their
10 client.

11 And then Exxon also makes an argument that this
12 court's order on the office of the Attorney General's
13 application or motion should not be the order that would
14 take us into Subsection (b) (3), and we strongly disagree
15 with that.

16 Subsection (b) (3) expressly provides that if a
17 court issues an order that meets the requirements of (A),
18 (B) and (C), and that is addressed to PwC, it mentions
19 Exxon, and it requests specific information concerning
20 Exxon, that that order would satisfy the exception outlined
21 in (b) (3) and would allow PwC to produce the documents
22 directly to the OAG without any review or need for review by
23 Exxon.

24 And, in fact, there are two court cases that we
25 have cited in our papers, In Re Arnold as well as In Re
26 Patel, where the court relied on that order on a motion to

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2 quash to allow information -- this was in the context of a
3 motion to quash the deposition notice, a deposition
4 information as opposed to a document subpoena, but relied on
5 that order to allow production pursuant -- despite the
6 existence of 901.457.

7 So, your Honor, we respectfully request a finding
8 by this court that there is no accountant-client privilege,
9 certainly not under New York law. And even if this court
10 were to consider Texas law, not even under Texas law.

11 And we would ask that your Honor ask PwC or require
12 PwC to produce responsive documents that it has collected
13 and is now -- that are now pending review by Exxon to the
14 OAG's office immediately, certainly by the end of this week,
15 and that would include a certain category of documents which
16 was identified in our papers that are not even subject to
17 any accountant privilege because PwC was not acting in the
18 role of accountant. And that category is the documents
19 relating to the Carbon Disclosure Project. So that is a
20 separate bucket of documents where it's uncontested that PwC
21 was not acting as Exxon's independent auditor. Those
22 documents should be produced right away, and they should be
23 completed -- production of those documents should be
24 completed forthwith.

25 As to the other documents that are being reviewed
26 by Exxon, if your Honor finds that either New York law

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2 applies or that there is no Texas privilege, those documents
3 should also be produced forthwith.

4 And we respectfully ask that, given that there is
5 no privilege, Exxon should not be permitted to delay the
6 production of responsive documents to the OAG based on the
7 assertion of some purported accountant-client privilege.

8 Thank you, your Honor.

9 THE COURT: Mr. Wells.

10 MR. WELLS: Thank you, your Honor.

11 First, with respect to the Carbon Study that she
12 referred to, to my understanding, that document has been
13 produced.

14 Is that correct?

15 MR. MEISTER: Your Honor, we have produced the CDP-
16 related documents to the Attorney General September 30th,
17 and then a corrected production on October the 7th. The
18 first was black and white, the second was color.

19 MR. WELLS: So that is off the table. It was
20 produced.

21 Your Honor, I am going to address the choice of law
22 issue, then I am going to turn to the text of the statute
23 and walk through the history of the statute, and then I'm
24 going to talk about the case law, because it is our position
25 that at no point has a Texas state court ruled that there is
26 no accountant-client privilege. In those opinions, there is

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2 language where they assume for purposes of analysis that
3 there is a privilege, but at no point has there been a
4 ruling.

5 But before I turn to a discussion of the cases, I
6 want to start with the choice of law issue.

7 It is our position that the choice of law issue is
8 governed by a balancing test, and that's based on the Court
9 of Appeals decision in Babcock, that this court must look at
10 the respective interests of both sides in deciding on the
11 choice of law. We submit that in this case, ExxonMobil's
12 documents are in Texas, ExxonMobil is based in Texas, the
13 auditing team that audits ExxonMobil is based in Texas, the
14 communications between ExxonMobil and the Pricewaterhouse
15 accountants occur in Texas. In this situation, the court
16 has to balance where the communications took place, where
17 are the parties, what parties have the greatest interest.

18 This is not a case where the New York Attorney
19 General has brought an enforcement action. They talk about
20 what are going to be the rules when they get to trial.
21 There has not been any return of a charge. There is no
22 reality at the moment that there's going to be a trial of
23 anything. This at the moment is a mere investigation. They
24 have the right to conduct the investigation, but that is
25 what it is. This is not a case, as in many situations,
26 where it is clear there's going to be a trial and what rules

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2 should govern in the course of the trial. And I submit that
3 the interests in New York is far different when they have
4 brought a case, when they have alleged some particularized
5 harm to the citizens of New York. This case in contrast is
6 purely in the investigative stage.

7 Furthermore, in order to do a balancing test, one
8 of the issues is always the materiality of the evidence. To
9 engage in a materiality of the evidence review, you must
10 know what evidence, what documents, we are talking about.
11 That is why, we submit, it is not appropriate to do this in
12 the abstract.

13 It's similar to a work product privilege. There
14 are situations where a court has the power to override the
15 work product privilege based on a particular document that
16 discloses certain evidence that is important to the truth-
17 finding process. But in that situation, you have to look at
18 the document. You cannot do a balancing test because
19 materiality is a big part of that in the abstract. You need
20 actual documents. So it is our position that Texas law
21 should apply. And, furthermore, to do the balancing test,
22 you cannot do it in the abstract. The court may need to
23 engage in an in Camera review of certain documents in order
24 to ask what is the materiality of the documents that the
25 court is being asked to give over to the New York Attorney
26 General. So we believe Texas law applies.

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2 Now, with that said, I want to turn at this time to
3 a discussion of the Texas statute and how it has evolved
4 over the years, and I would like to hand up to the court an
5 exhibit that sets forth the language of the statute as it
6 was in 1989 when it was drafted, then how it was amended in
7 1999, how it was then amended in 2001, and then how it was
8 amended in 2013.

9 We have some charts. So, your Honor, we just start
10 with page 1. That is the actual bill that the Texas
11 legislature voted on.

12 Now, the title on page 1 of the exhibit is that it
13 regards an Act relating to the regulation of public
14 accountants. That is the title of the Act.

15 If you turn to the second page, you see what is
16 denominated as Section 26, which is the accountant-client
17 privilege. And it is important that the word "privilege" is
18 used as part of what the Texas legislature -- if you had
19 been voting from a particular county, and you were the
20 legislature voting on this bill, this is what was before
21 you, and it was denominated Privilege. So this is not a
22 term that was put into effect after people had voted on it,
23 and then somebody at WestLaw used it as some organizing
24 term. This is actually part of what was in front of the
25 legislators who voted.

26 Now, in 1989, when it was enacted, it did not refer

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2 to a court order. That language does not come until much
3 later. It referred to an order "in a court proceeding."
4 That was the language used. It says "in a court
5 proceeding."

6 There also was no exception with respect to
7 investigative agencies like the SEC or the Internal Revenue
8 Service. That all comes later.

9 But the point I want to make right now is that the
10 word "privilege" is part of the act, this is what the
11 legislature voted on, and it does not refer to "court
12 order." It refers to "court proceeding."

13 Now, the thing that happened next, if we go to the
14 third page, is, there is an amendment in 1999. That
15 amendment involves nonsubstantive changes. They changed the
16 word "license" to "licensee." It is -- both sides agree the
17 1999 amendments were of a nonsubstantive nature, and nothing
18 changes, but they add some commas and a few words. So,
19 that's the next change in 1999. It still involves "court
20 proceeding," not "court order." It's still entitled as a
21 section Accountant-Client Privilege.

22 The next change then comes in 2001. That's the
23 fourth page of the document I handed you. At that point in
24 time, that is the first time that we have a carveout for
25 certain governmental agencies that do not need to seek any
26 type of judicial approval. The word "privilege" remains,

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2 but it says for the first time in a section entitled (b)(2),
3 that, "under a summons under the provisions of the Internal
4 Revenue Code...and the Securities Act of 1933...or the
5 Securities Act of 1934," that you do not need to get any
6 type of court order. And the words "court order" appear for
7 the first time instead of "court proceeding."

8 And so what we have in the 2001 statute as amended
9 is a carveout for certain agencies, and I submit this
10 language about summonses from the Internal Revenue Service
11 and the SEC, that refers to those governmental agencies.
12 There's a carveout for the SEC and the IRS. And then in the
13 same section, "court proceeding" is deleted and "court
14 order" is inserted. And that relates to instances where you
15 need a court order. And we contend what that relates to are
16 situations other than people who have been left out of the
17 exceptions. And we think the government exceptions does not
18 pick up New York -- the New York Attorney General's office,
19 nor do we believe that they're covered by this court order
20 section.

21 But there is another amendment in 2013.

22 But before I go there, I want to say that the
23 decisions in Patel and the decisions in Arnold all were done
24 under this 2001 amendment. Arnold is I think a 2012 case.
25 Patel is 2007.

26 This is very important, your Honor, because what

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2 those courts passed on was the 2001 structure of the
3 statute. The statute changes in 2013.

4 Now, in 2013, there is another amendment, and it
5 changes the structure of the statute. And what happens in
6 2013, they put in separate sections. There is now a section
7 (2) that is purely a carveout section. They add the word
8 for the first time "subpoena." "Subpoena" has now been
9 added to "summons." They add as part of the carved-out
10 agencies the Securities Act for Texas. So they've added the
11 Texas AG. So at this point in time, the carveout section
12 has taken on an independent role. It's no longer tied to
13 the court order section, and it covers the IRS, it covers
14 the U.S. Securities and Exchange Commission, and now it
15 covers the Texas Attorney General. That is now a separate
16 section.

17 They then take the court order provision that used
18 to be part of (2) and they drop it into a separate section.
19 It is now an independent item denominated as (b)(3), which
20 says, "under a court order signed by a judge" if it has
21 these three items.

22 This structure in 2013 is different, as I said,
23 than that that existed during the Patel case or during the
24 Arnold case.

25 It is the position of Exxon that not only is there
26 an accountant-client privilege, those are the words that the

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2 legislature passed on under the laws of Texas, but that
3 Section (2) states what agencies have the carveout. And
4 it's limited to the IRS, the U.S. Securities and Exchange
5 Commission, and the Texas AG. And that under laws of
6 statutory construction, the New York AG is not part of the
7 carveout section. And it is our position that the New York
8 AG, had they not been named in this section that deals with
9 investigative agencies, they do not now drop down into
10 Section (3) as a catchall.

11 THE COURT: So your position is that the exceptions
12 that are allowed to be of an otherwise privileged nature of
13 accountant-client communication all relate to the IRS and
14 the SEC and the Texas Attorney General?

15 MR. WELLS: Yes, sir, with respect to investigative
16 subpoenas. And it is exhaustive, it does not include the
17 New York AG, and it is our position that the New York AG
18 does not now get to drop down into Section (3) and get
19 exempted by way of a court order.

20 THE COURT: How do you get from a specific
21 exception identified as item (2) being related to item (3)
22 when there's also items (4), (5), (6) and (7) under Section
23 (b)?

24 MR. WELLS: Because Section (2) deals with specific
25 situations involving investigative agencies. The other
26 agencies listed are different. And the New York AG is akin

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to those --

THE COURT: No, I get it. The New York AG doesn't fit within exception (b)(2).

Now, but what about (b)(4), (b)(5), (b)(6) and (b)(7)? Those are also exceptions.

MR. WELLS: That is correct. And they are of a different type of entity. And they also are exceptions.

But what we're saying in terms of an investigative agency like the New York AG, that the exceptions here are exhaustive. They do not come within this section. This section is exhaustive with respect to investigative subpoenas, and they do not get to drop down and pick up the court order exemption like it's a catchall.

And the fact that there are other entities identified in (4), (5) and (6), they do not relate -- (4) and (5), they do not relate to investigative subpoenas but rather they relate to a particular accounting investigation by the board, an accounting entity, and an ethical investigation involving a professional organization of accountants in the course of a peer review. (3), (4) and (5) are different than (2). That is what we are saying.

And what we're saying also --

THE COURT: So you're saying that (b)(2) and (3) aren't, but (b)(4), (5), (6) and (7) are separate exceptions that have no relationship to (b)(2)?

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2 MR. WELLS: That's right. (3) is an independent
3 exception, but (3) does not permit the New York AG to get an
4 exemption under (3) because the New York AG is excluded
5 under (2). Under the rules of statutory construction, if
6 the legislature has identified with specificity a particular
7 type of entity, it is to be assumed that other entities were
8 not covered. They could have written this differently.
9 They could have said "or any law enforcement agency" or "any
10 other Attorney General." They did not do so.

11 THE COURT: No. What they said was that the
12 section doesn't prohibit a licensor from disclosing
13 information that is required to be disclosed "under a court
14 order signed by a judge if the order is addressed to the
15 license holder, mentions the client by name, and requests
16 specific information concerning the client."

17 Isn't that a clear reading of the provision?

18 MR. WELLS: No, your Honor. We submit that (2) is
19 an independent section dealing with investigative-type
20 agencies, that this is exhaustive, and that agencies such as
21 would come under (2) do not drop down to item (3).

22 THE COURT: Okay. That's your position. I get it.

23 MR. WELLS: Okay. Now, it is also our position, we
24 want to point out that this structure, where (3) is now
25 separate and (2) is independent, was not passed on by the
26 Patel court or the Arnold court. It didn't even exist at

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2 that time. And I think that also is of significance.

3 Now, what I would like to talk about now are the
4 four cases they talk about, and I want to begin --

5 THE COURT: You just told me that those cases don't
6 apply to the 2013 statute.

7 MR. WELLS: They do not, but what --

8 THE COURT: But they are instructive.

9 MR. WELLS: They are instructive. But the
10 importance of the cases is that in none of the cases do they
11 hold, do they hold that there is not an accountant-client
12 privilege.

13 The New York Attorney General takes the position
14 that these cases hold that no such privilege exists. I
15 submit that if you carefully read the cases, the cases make
16 clear they are not so holding. And we need -- and I would
17 like to walk through the four cases, because what they show
18 is that no court to this date has ever taken the time to
19 look at the statutory history, look at the statutory
20 structure, look at the issue before it, and grapple with all
21 of this. And it's in part because, in many of those cases,
22 the issue never was briefed, and the issue arose in the
23 context of a relatively small tort litigation where somebody
24 was trying to get access to the accountant's records, a
25 claim was made that there was a privilege, people did not
26 fight about it because of what was at stake. No court has

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2 ever grappled with this question in a careful and reasoned
3 way. That is the core point.

4 If we could just start with the first case, in
5 terms of, I want to go through the cases chronologically,
6 and the first case is the Canyon Partners case, and that is
7 in 2005. This is a case that comes right before Patel,
8 which is 2007, but Canyon probably starts a lot of the
9 trouble, I submit, if you want to kind of do an autopsy on
10 how did we get here, and whether people were actually doing
11 research and issuing reasoned decisions, or did it just
12 happen in terms of a throwaway line.

13 In Canyon Partners, a federal case, 2005, the court
14 wrote: "The court initially observes that there is no
15 accountant-client privilege under federal or Texas law."
16 The court cites the Ferko case with the proposition that
17 there's no accountant-client privilege for federal court.

18 Then to support the argument that there's no
19 accountant privilege from Texas law, they cite a case called
20 Sims. Sims is a 1988 case. In 1988, there was no Texas
21 accountant privilege. The Act does not come back until
22 1989. It did not exist. And if you go and read the Sims
23 case, all the court says in Sims is that under the Texas
24 rules of evidence, there's no reference to a privilege.
25 That's all that was said.

26 But it's important, your Honor, because that

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2 language in Canyon where they cite Sims keeps getting picked
3 up like somebody thought about it, they cite a case, as I
4 said, that preexisted the passage of the statute, then in
5 Canyon in a footnote they say in a letter to counsel from
6 JDN, it references the accountant-client privilege. And
7 then it says, "However, no court has elevated the
8 professional standard established by this statute to an
9 evidentiary privilege under Texas law." That is an accurate
10 statement. And this is the first case we could find where
11 anybody grappled with it. And to the extent he's saying:
12 "We haven't been able to find a court that has said there is
13 a privilege," that is accurate, but it's not based on any
14 analysis that says the opposite is true, that there is no
15 privilege.

16 And we went and got the briefs in Canyon, and I
17 want to, at the end of the day, move them into the record
18 because the issue was not briefed. It was not briefed other
19 than this letter appearing in the file.

20 But that case is kind of the foundational case that
21 people keep citing for the proposition that there is no
22 privilege. But, again, it came up in the context where it
23 wasn't briefed, and there is no support other than to Sims
24 which just says it's not in the Texas rule of evidence.

25 The next case is 2007. Let's look at the
26 progression. That's the Patel case. And I think there are

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2 only two Texas court cases, Patel and Arnold. The other two
3 cases we talk about, Canyon, and I think it's Cantu, those
4 are federal cases, but I think your Honor in trying to
5 determine what weight to put on what cases, the two Texas
6 court cases have particular importance because that's the
7 Texas court passing on the Texas statute.

8 But in Patel, in that case, at the lower court, the
9 court had quashed a motion with respect to the -- had ruled
10 against the motion to quash the subpoena. The party then
11 took a mandamus to the Texas appeals court, the intermediate
12 court. It's very important because under Texas law, with
13 respect to questions of both law and fact, for mandamus,
14 it's an abuse of discretion standard. So they are not
15 actually even looking at the issues as if it were a regular
16 appeal even on legal questions. But what the court wrote is
17 that, "First, Nautilus does not counter that an
18 accountant-client evidentiary privilege does not exist in
19 Texas." That's critical. The other side did not question
20 whether the privilege existed. It accepted that the
21 privilege existed but then it looked in one of the
22 exceptions. So this is not a case from the beginning where
23 the party is coming in and saying: No privilege exists.
24 That's not the situation.

25 Then the court wrote: "Assuming without
26 determining that an accountant-client evidentiary privilege

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2 exists in Texas, we will address the only issue before this
3 court, that being whether there is a court order requiring
4 the production of the requested documents."

5 So the Patel court assumes for purposes of
6 discussion that a privilege exists, and then they go to
7 whether the exception applies.

8 The Patel court also has relevant language. In
9 footnote 6 in Patel, the court notes: "Other than citing
10 Section 901.457 of the Occupations Code, neither party has
11 provided authority for the proposition that an
12 accountant-client evidentiary privilege exists in Texas." I
13 think that's a true statement, but the point of it is, both
14 sides were accepting that it existed. That wasn't even
15 briefed. It wasn't even an issue.

16 Then the court says, "and we find none." And
17 that's a true statement because at that point, no court has
18 ever ruled on the issue except for that snippet of language
19 in Canyon. And then they cite again to the Canyon case,
20 which I've shown was not based on any analysis, and relied
21 on a case that predated the statute.

22 And then the court ends up saying: "Therefore,
23 because the law is not clear", not clear on the question of
24 whether the privilege exists, "on this issue, to the extent
25 the trial court's denial of the motion to quash in this case
26 was based on no privilege, we cannot conclude it abused its

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2 discretion." And it's really only what the trial court did.
3 They say: "If that's what he was thinking. The law is
4 unclear." So for purposes of mandamus, it's not an abuse of
5 discretion.

6 But the point is, Patel does not issue a ruling
7 that there is no privilege.

8 THE COURT: But what was the exception that the
9 Patel court was concerning itself with?

10 MR. WELLS: There was an ongoing litigation, and in
11 the context of the ongoing litigation, there had been a
12 request to depose and for documents, and then they went to
13 the issue of whether the quashing of that order constituted
14 an order within the exception, and the court said it does.

15 In our case, we have a totally different argument.

16 Our argument is that (b)(2), which deals with
17 investigative agencies, occupies the field, is exhaustive.

18 THE COURT: And (b)(3) is irrelevant.

19 MR. WELLS: That's right. And when you drop down
20 to (b)(3), it is not a catchall. That is a different issue
21 than presented in Patel.

22 THE COURT: Okay.

23 MR. WELLS: Okay?

24 The last case, the last Texas case, is In Re
25 Arnold. That's 2012. And that case, what the Texas appeal
26 courts wrote: "As we have stated, the existence of an

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1, accountant-client privilege based on Section 901.457 is
2 doubtful." They then quote from Patel. They didn't rule on
3 the issue. And they cite the footnote about the law being
4 unclear, from Patel. But this court does not issue a
5 ruling. There's no ruling. There's an observation.

7 THE COURT: But Patel and Arnold, both --

8 MR. WELLS: Texas.

9 THE COURT: Texas court decisions, they are
10 predating the 2013 amendment.

11 MR. WELLS: Yes, sir. But even assuming you want
12 to give them weight, what I want to make clear to your Honor
13 is that it would be incorrect to do what the government has
14 urged you to do, which is say: The Texas Court of Appeals
15 has ruled already that no privilege exists. They never
16 issued such a ruling. And that's contrary to what they
17 briefed, your Honor. If I come away with having made that
18 point, I will have done at least part of my job today.

19 THE COURT: You've done your job.

20 MR. WELLS: Okay. Now, there's a last case, a last
21 federal case that they cite. It is actually after now the
22 2013 amendment. It doesn't do any analysis, but it's the
23 last case that they cite. It's called Cantu. It's a
24 federal case. And what they say, the court writes:
25 "However, in Texas, accountant-client communications are
26 confidential, but not privileged." And the court cites

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2 Patel. But, as I demonstrated, that's not what the Patel
3 court said, but he cites to that. And then the court says:
4 "Anyway, this is a federal question case and, accordingly,
5 federal privilege law governs." That's an accurate
6 statement. So, he cites Patel incorrectly.

7 But the bottom line is, no court has ruled that
8 there is no privilege, and especially the two Texas courts,
9 they don't do it.

10 Now, again, our core position is that Patel and
11 Arnold are not controlling for our case; that we have a
12 totally different argument involving the interaction between
13 (b)(2) and (b)(3) and whether (b)(2) is exhaustive, and
14 whether you can drop down to (b)(3) as they want to to save
15 it. Those are different. That's a point different than is
16 raised in any of these cases.

17 And what we are asking your Honor to do ultimately
18 is not deal on an abstract record, to permit us to develop a
19 record so that you could do the balancing test in the
20 context of concrete documents, and that you will rule as you
21 see fit, but that you not go down the road, as they've asked
22 you, to say that Texas courts have ruled on this issue,
23 because they have not.

24 That completes my argument.

25 Thank you.

26 Your Honor, excuse me. One last thing.

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2 I do not think what is going on in Texas has any
3 relevancy to this motion and dispute about the PwC subpoena
4 and the attorney-client privilege, but the New York Attorney
5 General has made reference to the Texas litigation, and if I
6 could take maybe five or ten minutes just to at least
7 explain what is going on there to your Honor, because I
8 don't think it's been fairly described.,

9 THE COURT: Why don't you tell me what it is that
10 you are seeking vis-à-vis the New York Attorney General in
11 the Texas proceeding.

12 MR. WELLS: Okay. Our original action in Texas was
13 against the Attorney General of the Virgin Islands. I have
14 a timeline that I could give to you as an exhibit that I
15 think would help, your Honor. We can put it up.

16 This is a timeline of what is going on in Texas.

17 I start with the first bullet, which is November 4,
18 2015, when Attorney General Schneiderman issued the subpoena
19 to ExxonMobil.

20 The day after the subpoena was issued, the New York
21 Times had a full-blown story here about the ExxonMobil
22 subpoena and investigation. The New York Times had the
23 story before we even got the subpoena. We didn't get the
24 subpoena until late at night before this full-blown story is
25 in the paper the next day.

26 The next thing that happens is March 15, 2016, the

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2 Virgin Islands Attorney General issues a subpoena to
3 ExxonMobil.

4 March 29, 2016, Attorney General Schneiderman hosts
5 a public press conference entitled: "Attorney Generals
6 United for Clean Power," and they called themselves the
7 "Green 20", with Vice President Al Gore, and they hold a
8 conference, and they get on stage, and it's on the Internet,
9 and what they say is that these attorney generals had banded
10 together because the United States Congress is in gridlock
11 about the issue of climate change, and they are going to
12 step into the void and deal with the fact that Congress has
13 not been able to deal with climate change. And one of the
14 ways they are going to do it is to investigate ExxonMobil.

15 And that's really what -- up until then, we met
16 with them, we kind of forgotten, you know, the leak to the
17 New York Times in producing documents, but without question,
18 the world changes the day they get on stage and basically
19 say they have decided that we're guilty, they're coming
20 after us for political reasons, and they're sitting there
21 with the vice president.

22 What happens next, on April 13th -- and the
23 Attorney General of the Virgin Islands is up on stage with
24 him -- April 13th, we then file a petition in the Texas
25 court seeking a declaration that the Virgin Islands subpoena
26 is unconstitutional. We sue based on the First Amendment

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2 and the Fourth Amendment in terms of the suppression of our
3 right to participate in the climate change debate.

4 Six days later, Attorney General Healey issues a
5 subpoena.

6 So what's going on now, we started with Attorney
7 General Schneiderman, they've had the press conference, the
8 Attorney General of the Virgin Islands has jumped on us, now
9 the Attorney General of Massachusetts.

10 We then reach a settlement with the Attorney
11 General of the Virgin Islands where he decides, rather than
12 fighting us in Texas, he's going to withdraw his subpoena.

13 Then in June of 2016, we file a complaint and
14 motion for a preliminary injunction against enforcement of
15 the subpoena by the state of Massachusetts. We're now in
16 Texas.

17 And a quick question: "Mr. Wells, why are you in
18 Texas? Why don't you go to Massachusetts? Why don't you go
19 to the Virgin Islands?" It's our position that there is a
20 group of attorney generals who has decided to use their law
21 enforcement powers for a political purpose, and the only
22 place we can get them all, rather than fight them separately
23 in each court, is in our home state of Texas. That's the
24 only forum.

25 We also actually, when we filed against the state
26 of Massachusetts in Texas, we did also filed against the

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2 state of Massachusetts in Massachusetts, but we asked that
3 court to stay it. It hasn't issued a ruling yet. We argue
4 that I think in December.

5 Now, then there's an article in the New York Times
6 where Attorney General Schneiderman gives an extensive
7 interview, and he states that there may be massive
8 securities fraud at Exxon, so he made this public statement
9 now in August. Then the same day, he makes the public --
10 he's quoted in the New York Times, we get the subpoena for
11 PwC documents. Okay? This all comes: New York Times,
12 massive securities fraud, then he serves a subpoena on PwC.

13 Then on September 19th, this is a critical date,
14 September 19th, we go to Texas and we argue the preliminary
15 injunction against the state of Massachusetts before Judge
16 Kinkeade. During the oral argument, Judge Kinkeade says to
17 us, in essence: "Well, what are you doing about New York?
18 You sue in Massachusetts, but you produce it to New York."
19 At least as we read the court, he's got some concerns that,
20 "Well, why are you suing in Mass. and not New York?" And
21 that's how we read it, that he had those concerns, because
22 he even said: "Doesn't New York have the same motive as
23 Attorney General Healey?"

24 Then what happened, this is what they don't tell
25 you in their papers. They're trying to create the picture
26 in their papers that they filed this action in front of your

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2 Honor to enforce the PwC subpoena on Friday, and we ran down
3 to Texas and filed something on Monday. Nothing could be
4 further from the truth. They don't tell you about what
5 happened on Thursday. They make the story start on Friday
6 like they filed an order to show cause. Nobody cared about,
7 in all due respect, this accountant issue. What happened on
8 Thursday was that Judge Healey -- I'm sorry, Judge Kinkeade
9 on Thursday issued an opinion, and his opinion said that we
10 were going to get discovery against the Mass. AG, as we read
11 it, the other attorney generals, because we had made a
12 sufficient showing of bad faith under the *Younger* doctrine,
13 and that's when we decide to join them on Monday, but it's
14 because of what happened in that opinion.

15 Then on the 14th, they filed their action the next
16 day, then we filed our action against the Attorney General
17 of New York in Texas.

18 In terms of where the Texas case is right now, two
19 things have happened that are not on the chart. Earlier
20 this week -- well, at the end of last week, the state of
21 Massachusetts filed a motion for reconsideration, saying to
22 Judge Kinkeade: We want you to reconsider your order not
23 dismissing the case for jurisdictional purposes and also
24 giving ExxonMobil discovery rights.

25 We filed a motion to expedite the filing of the
26 Amended Complaint so the New York AG can be brought into the

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2 case because the next step is, we're going to have a
3 discovery conference, and there's no question it's going to
4 be heated because right now we have the right, as we read
5 the order, to take the deposition of both the Mass. AG
6 people and really everybody, as we read it, that was at that
7 March 29th conference. And we would like to get the New
8 York AG in the case as we work out these discovery issues.
9 So that is what we have done.

10 In terms of where Texas is going to go, it's months
11 down the road because right now we're going to engage
12 without a question in fairly heated discovery issues. We
13 are going to try to take depositions of the state AG's. I
14 have no doubt that the state AG's are going to contest Judge
15 Kinkeade's order. And I have no doubt that they are going
16 to say "investigative privilege." They have, all the AG's
17 have entered into what they call a common-interest
18 agreement. We believe that is a pretext to keep from the
19 public and from us exactly what they have been doing for
20 political purposes, because there's going to be litigation
21 over that common-interest privilege which we submit is
22 designed to keep people from learning the true facts, but
23 it's going to be months down the road.

24 But when they -- so the order to show cause on
25 Friday and the following Monday were not tied together.
26 What was tied was what happened on Thursday. And we

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2 immediately said in our papers: "We submit to your Honor
3 jurisdiction. We have no problem with your Honor's ruling
4 on this." We said that immediately. And that is our
5 position.

6 But in terms of where Texas is, that's the one
7 place we can get multiple attorney generals who are coming
8 after ExxonMobil with what we believe are pretextual
9 subpoenas designed not really to ferret out any wrongdoing
10 but really for political purposes because we had deigned not
11 to toe the line in terms of what they see as was politically
12 correct with respect to the issue of climate change.

13 One last point.

14 ExxonMobil has been on the record for years now
15 that we recognize the seriousness of climate change. All of
16 these attorney generals operate within a four- to six-year
17 statute of limitations. And we have been, prior to the
18 statutory period, been on the record, we recognize that
19 climate change, the issue is real, it deserves attention.

20 But this is part of a political agenda, and I
21 understand that the New York AG made our complaint in Texas
22 part of the record, and I would invite your Honor to read
23 the complaint because it sets forth in more detail what I've
24 laid out on this timeline.

25 Last point.

26 I just want to read from Judge Kinkeade's order

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2 that was issued on Thursday. I would like to hand to your
3 Honor a copy of the judge's order.

4 THE COURT: Thank you.

5 MR. WELLS: This is what Judge Kinkeade ruled on
6 Thursday, signed October 13th. He said: "The court finds
7 the allegations about Attorney General Healey and the
8 anticipatory nature of Attorney General Healey's remarks
9 about the outcome of the Exxon investigation to be
10 concerning to this court. The foregoing allegations about
11 Attorney General Healey, if true, may constitute bad faith
12 in issuing the CID which would preclude *Younger* abstention.
13 Attorney General Healey's comments and actions before she
14 issued the CID require the court to request further
15 information so that it can make a more thoughtful
16 determination about whether this lawsuit should be dismissed
17 for lack of jurisdiction.

18 "Conclusion.

19 "Accordingly, the court ORDERS that jurisdictional
20 discovery by both parties be permitted to aid the court in
21 deciding whether this lawsuit should be dismissed on
22 jurisdictional grounds."

23 So that is where the case is as it stands.

24 But again, we are in Texas and we are fighting
25 multiple attorney generals, and Texas is the one forum where
26 we can fight them together. We may end up having, as we do

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2 in Mass., we may end up at some point, I don't know, having
3 New York litigation also. Right now, we have given them
4 over one million pages of documents, and that may come to
5 pass. But at this moment, we are in Texas because Texas is
6 the only state, because it's where we're based, where we can
7 bring our constitutional claims against multiple attorney
8 generals rather than fighting state by state by state.

9 Thank you.

10 MS. SHETH: Your Honor, may I be heard?

11 THE COURT: Briefly.

12 MS. SHETH: Thank you, your Honor.

13 Let me briefly just address what Mr. Wells just
14 said.

15 We are not -- the New York AG is not a party to
16 that action in Texas at present, and the order that he just
17 put up in front of your court does not -- is not directed at
18 the New York AG, and the quoted statements were not about
19 statements made by the New York AG.

20 Now, let me turn back to the issue which is before
21 your Honor involving the PwC documents and this purported
22 privilege.

23 Just quickly in response to the CDP documents, to
24 date we have only received 30 such Carbon Disclosure Project
25 documents. If that's the full universe, then we would like
26 a representation that that production is complete. But we

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2 find it surprising that there would only be 30 such
3 documents.

4 Let me now turn to the choice of law.

5 Mr. Wells argues for a balancing test and relies on
6 the Court of Appeals decision in Babcock. That is a case
7 from 1963 involving a car accident that happened in Canada
8 by two New York parties. It does not involve the question
9 of what state's choice of law provisions apply, what state's
10 choice of law provisions apply when dealing with the
11 question of privilege.

12 When you are talking about privileges, the
13 appropriate authority to look at is the two cases we cited
14 to your Honor from the First Department, Greenberg as well
15 as JP Morgan.

16 And in addition, I would point your Honor to the
17 case called Bamco 18 as well as First Interstate, which are
18 also decisions involving the application of choice of law
19 principles to the privilege question.

20 And what is very telling is a case from the
21 Southern District of New York in 2004 called Condit v.
22 Dunne, 225 FRD 100, and in that case, the court noted, even
23 applying an interest test, as Mr. Wells urges this court to
24 do, that the factors the courts consider in determining
25 which state's privilege logs apply include the following:
26 1, the state where the allegedly privileged communication

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2 was made; 2, the state where the discovery is sought and the
3 evidence will be admitted; 3, the state of the parties'
4 citizenship; 4, the state where the suit was filed; 5, the
5 state whose laws control the substance of the litigation;
6 and 6, the state where the offense giving rise to the
7 litigation took place."

8 If we look at that six-factor test, there are four
9 factors that weigh in favor of New York. And the third
10 factor also weighs in favor of New York given that this is a
11 New York law enforcement investigation of a company that
12 indisputably does business here in New York. And if you
13 apply that standard, we urge you to apply New York law, no
14 privilege applies.

15 Let me now turn to the legislative history that is
16 relied upon by Exxon's counsel.

17 The key document that was not shown to your Honor,
18 which we are happy to provide you with, is a copy of the
19 original 1979 statute. This is the statute that actually
20 did create an accountant-client privilege. And if your
21 Honor looks at that statute, you will see that the word
22 "privilege" shows up in the statute. There is no
23 restriction to just voluntary disclosures, and there is no
24 exception for broad orders. That is entirely consistent
25 with how privileges work.

26 Now, if you then look at every subsequent -- well,

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2 the thing we forgot to mention is that in 1983, that statute
3 was repealed. And starting in 1989 through 2013 there were
4 various predecessors and amendments to the current statute.
5 And if you look at those, each of those contain the three
6 characteristics that suggest that this is, in fact, a rule
7 of confidentiality, not a privilege.

8 Exxon's counsel relies heavily on the fact that the
9 title includes the word "privilege." But, your Honor, if
10 you look at the Texas Government Code Section 311.024, it
11 makes clear that a statute -- that the title of a statute
12 cannot be used to expand its meaning. And that is exactly
13 what Exxon is trying to do here.

14 If you look at every amendment that Mr. Wells has
15 pointed out, it makes clear that what we're talking about is
16 a rule of confidentiality.

17 The fact that we went from "a court proceeding" to
18 "a court order" is further confirmation that they have a
19 broad exception. I mean, "a court proceeding" is even
20 broader than "a court order." So that further suggests that
21 this is, in fact, a rule of confidentiality.

22 And then if we look at the 2013 amendment, the
23 legislature went so far as to have a separate section giving
24 it even more significance for court orders. And to
25 interpret Section (b)(2) as being an exhaustive list that
26 only includes the IRS and the SEC and the Texas Securities

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2 statute, that seems entirely inconsistent with, one, the
3 fundamental principle that this statute is limited to
4 voluntary disclosures, and, from a policy reason, how could
5 it be the case that the Texas legislature wanted to allow
6 accountants to disclose information to ethical boards and
7 licensing boards that are covered in the 4, 5 and 6
8 exceptions listed in the statute, but not to sister state
9 law enforcement agencies.

10 In fact, the better reading would be that the Texas
11 legislature thought that those agencies should get the
12 additional protection of a court order before disclosing
13 confidential information.

14 So, again, we would argue that this structure of
15 the statute conveys that it supports the view that it's
16 better construed as a rule of confidentiality as opposed to
17 an evidentiary privilege.

18 And, in fact, the cases, the four cases that
19 Exxon's counsel put up on the boards, further illustrate,
20 they are instructive to this court, that no Texas court has
21 interpreted this to be a privilege and, rather, have stated
22 that the existence of an accountant-client privilege is
23 doubtful and not supported in the case law.

24 We would also argue that no further record is
25 needed on this legal issue. This is a legal issue at its
26 core. Whether it's an issue of statutory construction,

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2 looking at the legislative history, there's further
3 documents that PwC are going to provide, or the
4 accountant-client privilege log if Exxon is ordered to do
5 so. Those are not going to shed light on whether this
6 privilege even exists under the law.

7 Let me now turn to the Texas action, and I feel
8 compelled to address the allegations against the NYAG which
9 I will reiterate have not -- this is a motion to amend. The
10 AG has not been added as a party to the Texas litigation.
11 And, in fact, the timing of Exxon's motion papers is quite
12 curious.

13 What has happened in this case is, the subpoena to
14 Exxon was issued back in November of 2015. For the past
15 year, Exxon has produced documents to the New York AG, the
16 most recent of which were produced in this month on
17 October 11th. They have produced, as they said, over
18 1.2 million pages of documents. At no point during the last
19 year have they contested the authority of this office to
20 bring this investigation or the good faith of this office in
21 bringing this investigation. And they did not do that until
22 we filed these papers in this court. And there can be no
23 dispute that this investigation is proper. It's a proper
24 exercise of our authority to investigate violations of state
25 securities laws and other state statutes.

26 There is no question that this subpoena to Exxon,

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2 and to PwC for that matter, is valid and is the appropriate
3 forum to decide the validity of our investigation, and the
4 fact that the Attorney General enjoys a presumption of good
5 faith in this court.

6 THE COURT: They don't dispute that.

7 MS. SHETH: And they don't dispute that. You are
8 right, your Honor.

9 And what they have done instead is not raise that
10 issue in this court and instead raise it in the Texas
11 Federal Court, and then try to expedite consideration of
12 their motion as soon as we serve them with a copy of your
13 Honor's order to show cause.

14 And I would note that the facts that are alleged in
15 their proposed First Amended Complaint in adding the New
16 York State Attorney General, those facts were available to
17 them back in June of 2015 when they filed their case against
18 State Attorney General Maura Healey from Massachusetts, and
19 it is only now, where after we have come to this court, that
20 they have filed that motion.

21 And then just briefly, your Honor, on the
22 substantive points, we do -- to the extent the Texas court
23 intends to add us as a party to the Texas litigation, I
24 would note that Attorney General Schneiderman's statements
25 with regard to this investigation have been very balanced.
26 He's repeatedly stated that we are at the early stages of

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2 the investigation, that it is too early to say, he's made no
3 predetermination about the outcome of this investigation.

4 For purposes of our choice of law analysis, all we
5 have said is that if a case is filed, that case will be
6 brought here in New York, and if there is a trial of such a
7 case, that trial will happen here in New York given that
8 it's a case brought by this office involving allegations of
9 violations of state law.

10 And as to the point of multiple attorney generals
11 working together, that happens all the time to conserve
12 resources of taxpayers involving cases and investigations
13 that transcend states. That is a normal course of practice
14 to have states and federal law enforcement coordinate
15 together to investigate and litigate actions, and the
16 Volkswagen matters is a prime example of that.

17 Thank you, your Honor.

18 THE COURT: Okay. So, we have agreed that subject
19 to any agreement that the parties consensually enter into,
20 PwC and Exxon will expedite the production of any documents
21 that are neither attorney-client communications nor
22 allegedly privileged accounting communications on a rolling
23 basis by November 10th. And if that proves to be unworkable
24 and the parties can't consent, you can come back to this
25 court.

26 In the meantime, I will attempt as expeditiously as

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2 possible to resolve that which is before me, which is
3 whether New York law or Texas law applies to the claim of
4 privilege. If New York law applies, there is no claim of
5 privilege. If Texas law applies, I'll have to determine
6 what the 2013 statute means in terms of this case, and I
7 will do that as expeditiously as I can.

8 The last thing that we need to have agreement on is
9 that if there are going to be any submissions to the court,
10 that those submissions are to be shared with opposing
11 counsel. And if they are formal submissions, they have to
12 be e-filed. If they are letters, they have to be cc'd to
13 opposing counsel.

14 I think that concludes everything that we need to
15 discuss today.

16 MS. SHETH: Your Honor, may I address the question
17 you asked earlier this morning about this envelope?

18 THE COURT: Yes.

19 MS. SHETH: Your Honor, we took a look at what was
20 in the envelope. These are the documents that were
21 submitted under seal because they were designated by PwC as
22 confidential. A copy of this exhibit was provided to
23 counsel for both Exxon and PwC but was submitted under seal
24 for your Honor. It was not publicly filed.

25 THE COURT: Okay. Well, it certainly wasn't clear,
26 to me, from receiving an envelope --

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MS. SHETH: I apologize, your Honor.

THE COURT: -- with a note saying: "This is not e-filed," that those are documents that were submitted under seal. So if you want to resubmit them to me for review with an appropriate cover letter, I will review them.

MS. SHETH: Happy to do so.

Thank you, your Honor.

THE COURT: Thank you.

I think you should both order a copy of the transcript because you will both want a copy of the transcript, and to the extent that you can get it expedited, that would be a good idea.

Thank you.

(At this time the proceedings were concluded.)


-oOo-

C E R T I F I C A T I O N

This is to certify the within is a true and accurate transcript of the proceedings as reported by me.



William L. Kutsch, SCR

SO ORDERED

BARRY R. OSTRAGER, J.S.C.
WLK