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October 24, 2018

By NYSCEF

The Hon. Barry R. Ostrager
Supreme Court, New York County
60 Centre Street, Room 232
New York, NY 10007

Re: *People of the State of New York* v. *PricewaterhouseCoopers LLP*, No. 451962/2016
People of the State of New York v. *Exxon Mobil Corporation*, No. 452044/2018

Dear Justice Ostrager:

We write on behalf of Exxon Mobil Corporation ("ExxonMobil") in response to the New York Attorney General's ("NYAG") letter of earlier today seeking your recusal. (*See* Ex. A (NYAG's Oct. 24, 2018 Letter).) Having overseen this case for over two years, it is plainly appropriate for Your Honor to continue presiding over this matter. NYAG nevertheless seeks reassignment, relying on a purported conflict the Court disclosed at the first court conference in this matter—a conflict that NYAG and ExxonMobil expressly waived. Following the parties' waiver of that disclosed conflict, this Court devoted substantial judicial resources to developing expertise in this case. ExxonMobil would be prejudiced by reassignment at this late date because it would be deprived of this Court's expertise in the subject matter of the case, which has been developed in over two years' worth of briefing and court appearances. NYAG has no valid basis to withdraw its waiver of the conflict. It therefore may not properly seek reassignment at this final stage of the proceedings.

Two years ago, Your Honor informed NYAG of its ownership of ExxonMobil stock, and offered to recuse yourself from the case. After a recess, at which the parties conferred, all parties accepted the Court's representation that these shares would not in any way "affect [the Court's] impartiality in this case," and unanimously informed the Court they had "no objection to your Honor sitting on this case." (*See* Ex. B (Oct. 24, 2016 Hr'g Tr. 3:22–24; 4:10–12).) That exchange—which NYAG inexplicably does not even

mention in its letter—clearly satisfied the requirements of Rule 100.3 of New York's Rules Governing Judicial Conduct, which provides that a judge who "has an economic interest in the subject matter in controversy" may preside over an action so long as (i) the judge "disclose[s] on the record" the interest, (ii) "the judge believes that he . . will be impartial and is willing to participate," and (iii) "the parties . . . without participation by the judge all agree that that the judge should not be disqualified." 22 NYCRR 100.3(E)(c), (F). That is precisely what occurred here. NYAG was informed of the potential conflict, and voluntarily waived any objection to it on the record. That affirmative waiver conclusively forecloses NYAG's eleventh-hour attempt to reassign this case to a justice lacking the Court's familiarity with these proceedings.

NYAG has also continued to manifest consent to the assignment of this case over the two years that this Court has presided over the action. Indeed, on October 28, 2016—after the Court had detailed its financial interests—the Court disposed of NYAG's initial Order to Show Cause, concerning the August 19, 2016 subpoena that NYAG issued to PricewaterhouseCoopers LLP. (NYSCEF No. 46.) Apparently encouraged by this ruling in its favor, on November 14, 2016, NYAG voluntarily chose to resume the proceedings before your Honor, and expand their scope, by filing a new Order to Show Cause on this same docket—this time concerning the November 4, 2015 subpoena that NYAG issued to ExxonMobil. (NYSCEF No. 49.) In the months that followed, NYAG has continued to request judicial intervention to add custodians, enforce new subpoenas, set production deadlines, and generally expand the scope of its investigation. As recently as June 19, 2018, NYAG filed a new motion to compel. (NYSCEF No. 244.) At no point since its initial court appearance, where NYAG expressly consented to the assignment of the matter, has NYAG ever suggested that the Court's impartiality has been compromised. NYAG may not now disregard this substantial expenditure of judicial resources based on a fact that has been known to it for years. *See Shepard* v. *Roll*, 717 N.Y.S.2d 757, 786 (3d Dep't 2000) (declining "respondent's request that we consider the propriety of Family Court's decision to hear this matter" after "respondent continue[d] with this proceeding without objection"); *People* v. *Owen*, 128 N.Y.S.2d 602, 604–05 (Schenectady Cty. Ct. 1954) (rejecting an "untimely" motion to disqualify).

As NYAG concedes, any proceedings concerning the Complaint NYAG filed against ExxonMobil today are related to the pending proceedings concerning NYAG's investigation of ExxonMobil. *See Cosmos Forms, Ltd.* v. *Furst*, 568 N.Y.S.2d 783, 784 (1st Dep't 1991). NYAG nonetheless asserts that this "new action is materially different from the investigatory subpoena enforcement proceeding," (Ex. A at 1), a proposition for which it offers no support. And NYAG's Complaint itself refutes that claim. Indeed, the parties are familiar to this Court, and the issues raised in the Complaint are precisely those with which the Court is already well-acquainted—ExxonMobil's use of proxy costs and greenhouse gas (GHG) costs, its impairment determinations, and calculations of reserves.

Just two months ago, this Court made clear its expectation that it would preside over "a 2019 trial." (Ex. C (Aug. 29, 2018 Tr. 20:4–6; *see also id.* at 2:2–9).) Throughout the investigative proceedings, the Court has sought to shepherd this case from an investigation to an enforcement action, informing the parties that it intended to "move the

investigation from the document phase, into the deposition phase, into the subsequent phase whether that's a trial" or a "consensual resolution." (June 16, 2017 Tr. 33:19–24.) That is how it should be, and what should happen here.

This is a transparent attempt by NYAG to have this case assigned to a judge with no familiarity with the underlying facts. It should not be rewarded. We believe this case is entirely without merit, and ExxonMobil respectfully requests a prompt trial in order to refute NYAG's baseless claims.

Insofar as further briefing on the matter would aid the Court, we respectfully request the entry of a schedule for the submission of briefs.

Respectfully submitted,

/s/ Theodore V. Wells, Jr.
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