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October 30, 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:

I write on behalf of Exxon Mobil Corporation ("ExxonMobil") in response to the Office of the New York Attorney General's ("NYAG") letter of yesterday evening, in purported support of its untimely and unjustified request for recusal. (*See* NYSCEF No. 446 ("Ltr.").)

Recusal Would Compromise Judicial Efficiency and the Values Promoted by the Individual Assignment System and the Commercial Division

NYAG's eleventh-hour recusal motion disregards core tenants of both the Court's Individual Assignment System and the Commercial Division's administration of cases. Recusal at this late stage in the proceedings would undermine "the philosophy of the Individual Assignment System that justice can be best and most efficiently done if, to the maximum extent possible, a case remains with a single Justice throughout its life."[1] The Commercial Division as well has long recognized "the importance of having a judicial officer involved as early in the case as possible" to "help Justices process cases more efficiently."[2] For that reason, "[t]he Commercial Division

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1 *General Overview of the Court*, NYCourts.gov, at 8 (May 2015), https://www.nycourts.gov/courts/1jd/supctmanh/General_Overview_of_the_Court.shtml.

2 The Chief Judge's Task Force on Commercial Litigation in the 21st Century, *Report and Recommendations to the Chief Judge of the State of New York* at 14 (June 2012),

will not tolerate" parties "who engage in dilatory tactics" or "otherwise cause the other parties in a case to incur unnecessary costs."[3]

Contrary to these principles, NYAG asks this Court to switch judges at this late stage in the proceedings. But doing so would waste judicial time and resources, and impede the expeditious resolution of this case. In the two years spent litigating before this Court, the parties have filed over 200 exhibits in support of their respective positions. Many of those exhibits, such as ExxonMobil's *Managing the Risks* report and *Outlook for Energy* reports, underlie the core allegations in NYAG's complaint (the "Complaint").[4] Indeed, passages in the Complaint are taken nearly verbatim from other memoranda NYAG filed before Your Honor in support of its investigative demands. For instance, the Complaint alleges "Exxon has repeatedly and falsely assured investors that it has taken active and consistent steps to protect the company's value from the risk that climate change regulation poses to its business." (Compl. ¶ 76.) That is almost precisely what NYAG argued in its most recent motion to compel. (*See* NYSCEF No. 335 at 1 ("Exxon has repeatedly assured investors that it is taking active steps to protect the company's value from the risk that climate change regulation poses to its business.").) Both the Complaint and NYAG's recent brief also argue, in nearly identical language, that "Exxon publicly represented that its proxy cost" used one figure for estimating the regulations on "emissions in 2030," while its "undisclosed Corporate Plan" used a different figure for estimating the GHG costs to specific projects in particular regions during that period. (*Compare* Compl. ¶ 124, *with* NYSCEF No. 335 at 15.)

Reassigning this case at this final stage of the proceedings would lay to waste the substantial time and resources the Court has already invested in developing expertise in the subject matter of this dispute. Ultimately, reassignment would thwart the goal of the Commercial Division: "efficiency in the resolution of complex business disputes."[5]

NYAG Knowingly and Expressly Waived the Right to Seek Recusal

Despite the Court's invitation, NYAG has not identified any basis to disregard its "knowing and express waiver" of its present objection to the assignment of this case. (NYSCEF No. 11.)

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http://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf.

3 Daniel L. Brown & Thomas M. Monahan, *New Commercial Division Rules Reflect Court's Efficiency Goals*, N.Y.L.J. (Jul. 13, 2015), https://www.law.com/newyorklawjournal/almID/1202731708903/new-commercial-division-rules-reflect-courts-efficiency-goals/.

4 NYAG has filed ExxonMobil's *Managing the Risks* report four times in support of its various motions to compel compliance with its investigative subpoenas. (NYSCEF Nos. 3, 53, 170, 282.) It has also filed three *Outlook for Energy* reports in support of its most recent motion to compel. (NYSCEF Nos. 296, 298, 302). In a similar fashion, NYAG's Complaint is suffused with allegations concerning each of these reports. (Compl. ¶ 77, 81–85, 90–93, 103, 112, 128, 131, 196, 199, 238, 260, 271, 273, 286, 288, 293–97.)

5 *An Efficient and Cost-Effective Forum for the Resolution of Business Disputes*, The Commercial Division of the Supreme Court of the State of New York at 8, (June 18, 2015), http://www.nycourts.gov/courts/comdiv/NY/PDFs/CDbrochure.pdf; *see also id.* at 5 ("The Division emphasizes close judicial oversight and vigorous case management. Early preliminary conferences enable judges to lay out

Nor could it. The record clearly reflects that, at the outset of the initial conference in this case, Your Honor (i) detailed your financial interests, (ii) informed the parties that you were "prepared to disqualify [your]self if that's the desire of the parties," and (iii) then ordered "a ten-minute recess" to allow the parties to confer. (Ex. A (NYSCEF No. 42, Oct. 24, 2016 Hr'g Tr. 3:22–4:7).) When the proceedings resumed, I stated that I had "been authorized to say *on behalf of all three parties* that we have no objection to your Honor sitting *in this case*." (*Id.* at 4:10–12 (emphasis added).) That affirmative, unanimous, and unequivocal waiver was not restricted to a particular stage in the proceedings; rather, it encompassed "this case" as a whole. (*Id.*) While NYAG now contends that the "case" referred only to its application to enforce the PricewaterhouseCoopers subpoena (Ltr. 2), that contention is fully refuted by the myriad applications NYAG has made to this Court having nothing to do with that subpoena over the two years this Court has presided over the case. NYAG has offered no justification for attempting to rescind its waiver after two years of litigation in this Court.

"It is well-settled that a party must raise its claim of . . . disqualification at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim." *Apple* v. *Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 333–34 (2d Cir. 1987). As a sophisticated litigant experienced in practicing before this Court, NYAG "should have moved for the disqualification of the Justice" as soon as it "kn[ew] of such facts which led [it] to believe" disqualification was needed. *People* v. *Owen*, 128 N.Y.S.2d 602, 604 (Schenectady Cty. Ct. 1954). Here, by contrast, NYAG expressly declined the Court's offer to disqualify itself, and instead "continue[d] with this proceeding without objection." *Shepard* v. *Roll*, 717 N.Y.S.2d 783, 786 (3d Dep't 2000). Its sudden shift in position, after two years of litigation, smacks of "[j]udge shopping," which is "an obnoxious practice" that "courts should resist aiding" through "self-disqualification." *See People* v. *Wallace*, 378 N.Y.S.2d 290, 297 (Suffolk Cty. Ct. 1975). Permitting this untimely recusal motion—made after an express and knowing waiver—would "encourage parties to withhold recusal motions, pending a resolution of their dispute," and then seek disqualification "in order to get a second bite at the apple." *E. & J. Gallo Winery* v. *Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992).

It is no answer for NYAG to present a contrived argument that this Court's financial interests in ExxonMobil (which have not changed in the last two years) take on a new character because this litigation has moved incrementally closer to final resolution. As an initial matter, NYAG has presented no evidence indicating that Your Honor is among the shareholders who invested in ExxonMobil when, according to NYAG, its stock price was artificially inflated. In any event, this fact is irrelevant in light of NYAG's waiver. *First*, 22 NYCRR § 100.3(E)(1)(c) is not structured as NYAG suggests. It does not distinguish between an interest "in a party to the proceeding" and an interest "in the subject matter in controversy." (Ltr. 2–3.) To the contrary, it uniformly provides that a judge with "an economic interest in the subject matter in controversy or in a party to the proceeding," upon disclosure of the interest and waiver by the parties, "may participate in the proceedings." 22 NYCRR § 100.3(E)(1)(c), (f). *Second*, NYAG unconditionally

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a roadmap with timetables for discovery, dispositive motions and trials. Deadlines are set and enforced. Discovery is managed with proportionality in mind, balancing the parties' rights to fair disclosure with minimizing expense and delay.").

waived any conflict arising from Your Honor's ownership of ExxonMobil stock, no matter how characterized. Your Honor detailed your financial interest, and NYAG affirmatively waived the potential conflict. As a party well versed in bringing both investigations and enforcement actions, NYAG cannot credibly deny that, at the time it provided its waiver, it could foresee how Your Honor's stock ownership might bear on both preliminary and advanced stages of the litigation, including in any eventual enforcement proceedings. NYAG's contrived efforts to manufacture new conflicts from a two-year old disclosure should be rejected.

NYAG Repeatedly Waived Any Right to Seek Recusal

If NYAG had any genuine concerns about Your Honor's ability to serve as an impartial adjudicator, it had numerous opportunities to raise them. Time and again, NYAG has affirmatively placed disputes before Your Honor, without ever suggesting that it would seek disqualification.

On November 14, 2016, after this Court disposed of NYAG's initial motion to compel compliance with the subpoena NYAG issued to PricewaterhouseCoopers, NYAG chose to expand the scope of these proceedings by filing a new Order to Show Cause concerning the November 4, 2015 subpoena that NYAG issued to ExxonMobil. (NYSCEF No. 49.) In the months immediately following NYAG's decision to expand this case to encompass its subpoena to ExxonMobil, it wrote Your Honor four times "to seek the Court's intervention" and schedule various conferences. (NYSCEF No. 98 at 5; NYSCEF No. 111 at 1, 8; NYSCEF No. 122 at 4; NYSCEF No. 124, at 6–7.) Then, after NYAG issued new subpoenas to ExxonMobil on May 8, 2017, NYAG filed its third Order to Show Cause before Your Honor—again without reserving the right to seek recusal. (NYSCEF No. 167.) Indeed, NYAG reaffirmed its consent to the assignment of this case as recently as June 19, 2018, when it *sua sponte* filed yet another motion to compel. (NYSCEF No. 244.) At none of those junctures did NYAG ever suggest that it wished to preserve the right to seek recusal. Even at the August 29, 2018 hearing, when Your Honor made clear your expectation that you would preside over any trial, NYAG raised no objection—either at the hearing or in the nearly two months that followed. (Ex. B (NYSCEF No. 433, Aug. 29, 2018 Hr'g Tr. 20:4-6).) Instead, NYAG remained silent. "[W]here, as here, a party inexplicably withholds" a request for disqualification, "denial of the recusal motion is generally warranted." *Glatzer* v. *Bear, Stearns & Co., Inc.*, 945 N.Y.S.2d 243, 244 (1st Dep't 2012) (plaintiff's request for disqualification was "undermined by his continued participation in the court proceedings for nearly a year after the disputed comments were made, without complaint"). It is utterly improper for NYAG to lay in wait until the conclusion of its investigation, and only then attempt to revive a waived objection in a transparent attempt to obtain a new judge.

Reassignment Would Prejudice ExxonMobil

Reassigning the case at this juncture would also prejudice ExxonMobil, which has devoted substantial time and expense to develop the record before this Court about the subject matter of this case. ExxonMobil has already extensively briefed the defective nature of NYAG's investor deception claims, which form the basis of its Complaint. As recently as July 9, 2018, ExxonMobil explained to Your Honor that NYAG's allegations rely on conflating the proxy cost of carbon—which ExxonMobil uses to help model the potential impacts that a broad myriad of climate policies

may have on future global energy demand—and greenhouse gas costs, which ExxonMobil applies, where appropriate to do so, to its own expected emissions of greenhouse gases when evaluating projects for capital investments. (Ex. C at 9 (NYSCEF No. 338 (July 9, 2018)).) ExxonMobil should not now be forced to retrace its steps before another judge because of NYAG's unjustified and unilateral desire to rescind its prior waiver concerning the assignment of this case to Your Honor.

Ceding to NYAG's untimely request for recusal would be particularly prejudicial here because NYAG has repeatedly asked the federal courts presiding over ExxonMobil's civil rights action against NYAG to "remit Exxon to a single, proper, and available state forum from this point onward," on the grounds that the state court proceedings are "comprehensive" and "substantially advanced." (Exs. D, E.)[6] In fact, in arguing to the federal court that the proceedings before Your Honor are "comprehensive," NYAG quoted your "express instruction to the parties to bring 'any further disagreements' to th[is] court for resolution." (Ex. F at 2 n.1.)[7] That instruction was recently reiterated at the August 29, 2018 hearing, where you informed NYAG "if you choose to bring a formal complaint, this is going to be a 2019 trial." (Ex. B at 20:4–6.)

ExxonMobil is entitled to an efficient resolution of this matter in the manner the Commercial Division was designed to provide. And Your Honor is best positioned to expedite these proceedings. Reassigning this case to a judge unfamiliar with the past proceedings would risk unnecessarily delaying expeditious disposition of this case, thereby compounding the prejudice to ExxonMobil resulting from NYAG's unnecessarily lengthy investigation and penchant for trying this case in the press.

Conclusion

ExxonMobil respectfully requests that the Court decline to reassign this case to a judge lacking any familiarity with the underlying facts. NYAG's transparent efforts to judge shop and delay resolution of this case should not be rewarded. NYAG has already drawn out its investigation well beyond the bounds of reason and proportionality. It should not now be permitted to further impede a prompt trial by commencing new proceedings before a judge entirely unacquainted with the underlying dispute.

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6 Memorandum of Law in Support of the New York Attorney General's Motion to Dismiss the Action Based on Certain Threshold Defenses, ECF No. 220 at 12, 15, and 25, *Exxon Mobil Corporation* v. *Schneiderman*, No. 17-CV-2301 (S.D.N.Y 2017); Reply Memorandum of Law in Further Support of the New York Attorney General's Motion to Dismiss the Action Based on Certain Threshold Defenses, ECF No. 234 at 6, *Exxon Mobil Corporation* v. *Schneiderman*, No. 17-CV-2301 (S.D.N.Y 2017).

7 Memorandum of Law in Further Support of the New York Attorney General's Motion to Dismiss the Action, ECF. 247 at 2, *Exxon Mobil Corporation* v. *Schneiderman*, No. 17-CV-2301 (S.D.N.Y 2017) (citing Ex. G (NYSCEF No. 121, Jan. 9, 2017 Hr'g Tr. 19:7–9).)

Respectfully submitted,

/s/ Theodore V. Wells, Jr.
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