SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of:

PEOPLE OF THE STATE OF NEW YORK

Plaintiff,

v.

EXXON MOBIL CORPORATION

Defendant.

Index No.: 0452044/2018

MEMORANDUM IN SUPPORT OF PROPOSED INTERVENORS' MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF SEEKING PUBLIC ACCESS TO JUDICIAL DOCUMENTS

NOW COME Proposed Intervenors, ENERGY POLICY ADVOCATES and ROBERT SCHILLING, and submit this Memorandum of Law in Support of their Motion to Intervene and proposed Motion to Unseal.

I. Introduction

The Proposed Intervenors, Energy Policy Advocates and Robert Schilling, have moved to intervene in this matter for the limited purpose of seeking to unseal certain judicial documents. These documents are Exxon Mobil's Amended Answer (NYSCEF Doc. No. 241) and briefs with exhibits filed as NYSCEF Doc. Nos. 142, 144, 235 and 236. Energy Policy Advocates is a tax-exempt nonprofit incorporated in Washington State which conducts and publishes its public policy research using the federal Freedom of Information Act and similar state laws. Its research in New York and among several state offices of attorneys general has led it to a particular interest

in the documents at issue in this case. Robert Schilling is a radio and internet journalist based in Virginia, who serves on the Board of Directors of Energy Policy Advocates but has an independent journalistic interest in the issues raised in this case and their resolution by this Court. Neither party has been previously involved in this litigation or in any substantive matter in dispute in this case.

II. Energy Policy Advocates and Robert Schilling Are Proper Intervenors

The Proposed Intervenors have no connection to the substance of the dispute in this matter, but are merely interested in public policy, transparency, and educating the public and policymakers on same. Nevertheless, they are proper intervenors in this matter.

Every member of the public, as well as the press, have a right to access judicial documents. The New York Court of Appeals held in *Westchester Rockland Newspapers Inc. v. Leggett*, 423 N.Y.S.2d 630, 634 (1979) that

> In this State we have recognized that open court proceedings serve several purposes. First, contemporaneous review in the forum of public opinion serves to protect the accused from secret inquisitional techniques and unjust persecution by public officials and goes far toward insuring him the fair trial to which he is entitled. (internal citations omitted)

The right to access judicial proceedings is a right that may be asserted by the public or by the press in both civil cases (*Lee v. Brooklyn Union Pub. Co.*, 209 N.Y. 245, 248, 249, 103 N.E. 155, 156, 157) and criminal cases (*Matter of Gannett Co. v. De Pasquale*, 43 N.Y.2d 370, 401 N.Y.S.2d 756, 372 N.E.2d 544, *People v. Jones*, 47 N.Y.2d 409, 418 N.Y.S.2d 359, 391 N.E.2d 1335).

Permissive intervention is the most efficient means for this Court to address and vindicate the Proposed Intervenors' right to access the records in this case. CPLR 1013 provides that "any person may be permitted to intervene in any action when a statute of the state confers a right to

intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party."

Courts have vindicated the Common-Law and First Amendment Right of Access to Judicial Documents in various ways. Although Justice Hudson of the Suffolk County Supreme Court suggested that an Article 78 Special Proceeding was perhaps the preferred means for adjudicating the right of a newspaper to view court documents, he nevertheless proceeded on the basis of a simple motion brought by Newsday. *People v. Macedonio*, 2016 NY Slip Op 50718(U) (N.Y. Sup. Ct. 2016). A review of the historical Article 78 proceedings cited by the *Macedonio* Court shows that, prior to beginning Article 78 proceedings, the individuals and institutions seeking access to court records invariably first raised the issue with the relevant trial court. In the *Leggett* case, *supra*, the aggrieved newspaper reporters protested in open court before their counsel filed an Article 78 Special Proceeding. In *Associated Press v. Owens*, 554 N.Y.S.2d 334, 160 A.D.2d 902 (N.Y. App. Div. 1990), the aggrieved journalists first "requested the respondent [Justice] to provide them with an opportunity to be heard, to reconsider his ruling, and to unseal the transcripts of the hearings." Only when that initial opportunity to be heard was summarily denied, did the Associated Press turn to Article 78. In *Daily News, L.P. v. Wiley*, 126 AD3d 511, 512, 6 N.Y.S.3d 19 (1st Dept. 2015), the press turned to Article 78 only after first exhausting "oral and written letter requests" directed at the trial Court.

This Court knows the records at issue in this case, the arguments of the parties, and the reasons various documents were initially sealed, after argument grounded in claims other than the Common Law and First Amendment rights Proposed Intervenors invoke. This Court is

therefore the preferred venue to address arguments related to unsealing. Under CPLR 1013, the Court must consider whether intervention will cause undue delay to the main parties in the action, but this action has now been resolved with a final and appealable judgment. Therefore intervention cannot possibly be a cause for prejudicial delay to the Plaintiff or Defendant.

III. The Records Should be Unsealed

Under New York law, after granting intervention the Court then must turn to the question of whether the Proposed Intervenors are entitled to the relief they seek: unsealing certain records. Energy Policy Advocates and Robert Schilling are entitled to unsealing because unsealing will serve the Constitutional, common-law, and statutory purposes of access to judicial documents. To the extent that the Court declines to unseal any portion of the pleadings in this matter, the Court must make factual findings which justify any narrow redactions that remain. See *Danco Labs. v. Chemical Works*, 274 A.D.2d 1, 8 (N.Y. App. Div. 2000) (holding that a Supreme Court's "failure to target precise areas where redaction should occur" was impermissible).

A) The Purpose of Access Will be Served by Unsealing

There are three distinct foundations for accessing judicial documents: The First Amendment, the common law, and Judiciary Law §4. Under each of these three grounds, the Proposed Intervenors should be granted a right to view the currently sealed pleadings.

The Constitution provides the greatest degree of protection of the public right to access, and courts have strictly scrutinized sealing when Constitutional arguments are implicated. Under First Amendment jurisprudence, when "the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court for Cnty. of Norfolk*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d

248 (1982). "The test for overcoming [the First Amendment] qualified constitutional right is more stringent than its common law counterpart." *In re Gushlak*, No. 11–MC–218, 2012 WL 3683514, at *3 (E.D.N.Y. July 27, 2012). Simply put, the First Amendment requires access unless sealing or closure "is essential to preserve higher values and is narrowly tailored to serve that interest." *United States v. Smith*, 985 F. Supp. 2d 506, fn. 5 (S.D. N.Y. 2013) (internal citations omitted).

To determine whether the First Amendment right of access applies to judicial records, the U.S. Supreme Court has held that courts should consider (i) whether the proceeding or filing at issue has "historically been open to the press and general public" (the "experience" prong), and (ii) whether "public access plays a significant positive role in the functioning of the particular process in question" (the "logic" prong). *United States v. Smith*, 985 F. Supp. 2d 506, 517 (S.D. N.Y. 2013), citing *Press–Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 106 S.Ct. 2735 (1986). While Courts initially construed the First Amendment right of access narrowly, recent decisions have expanded the scope of this Constitutional right. In *United States v. Gerena*, 869 F.2d 82, 85 (2d Cir.1989), the First Amendment right of access was expanded to include a right to view "briefs and memoranda" filed in connection with motions. In *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir.2004), the Court noted that the First Amendment right of access is a "necessary corollary of the capacity to attend the relevant proceedings"). The Southern District of New York has held that the First Amendment right is implicated when access "will significantly enhance public understanding and appreciation of the judicial process or improve the process itself." *Smith*, 985 F. Supp. 2d at 528.

Even if the First Amendment right is not implicated, however, the common law right of access still attaches. The common law right of public access to judicial records predates the U.S

Constitution, and arose in the courts of England. *U.S. v. Mitchell*, 551 F.2d 1252, 1257-58 (D.C. Cir. 1977). American courts, however, have broadened the right from its English roots because limitations on public access are "repugnant to the spirit of our democratic institutions." *Id*. Federal Courts impose a three-part test to balance the "presumption of access" against the "countervailing interests" of protecting parties from disclosure of confidential information. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2nd Cir. 2006). In New York, the law is simpler: "if the documents were filed in Court, they [are] subject to access by the media in the first instance." *People v. Sullivan*, 640 N.Y.S.2d 714, 168 Misc.2d 803 (N.Y. Cty. Ct. 1996).

Lastly, the strong public policy of this state in favor of an open court system is recognized by the legislature in Judiciary Law § 4, which requires "the sittings of every court within this state be public" except that "the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court." The exception allowing exclusion, however, is narrowly construed. "The purpose of the exception is to grant the Judge the 'power to refuse to turn his courtroom into a peep show.'" *Leggett*, 423 NY2d at 637, quoting *United Press Assns. v. Valente*, 308 N.Y. 71, 87, 123 N.E.2d 777, 784 (1954). Judiciary Law § 4 is not a license to exclude the public from viewing matters which may be merely sensitive or embarrassing.

Whether this Court views the Motion to Unseal in this case through the lens of the U.S Constitution, the common law right of access, or through New York statutory law, the result is the same: the pleadings in this matter must be unsealed. The Proposed Intervenors seek to unseal an answer and other vital pleadings which will, in the words of the *Smith* Court, "significantly enhance public understanding and appreciation of the judicial process." Yet even if the Proposed Intervenors do not assert a right of Constitutional dimensions, the common law nevertheless

prohibits sealing vital records in a dispute between the Chief Law Enforcement Officer for the State of New York and a powerful corporation, especially when the dispute in question has cost the taxpayers enormous sums, and when the records at issue reflect upon how private interests influenced law enforcement decisions.

B) Factual Findings Will be Needed to Perform a Balancing Test

For any items the Court wishes to remain under seal, the Court must make specific factual findings which justify sealing or redactions under the appropriate standard. If the Constitution is implicated, as discussed above, such factual findings must demonstrate that the sealing or redaction is "narrowly tailored" and serves a "compelling interest." If the common law right of access is implicated, such factual findings must balance the "presumption of access" against the "countervailing interests" of nondisclosure. In either event, the Proposed Intervenors are entitled to factual findings for any remaining redactions. Absent factual findings, the Court cannot determine whether there is a "compelling" governmental interest for nondisclosure, or whether redactions have been narrowly tailored as set forth in *Globe Newspaper Co. v. Superior Court for Cnty. of Norfolk*, 457 U.S. 596, 102 S.Ct. 2613 (1982). Neither can the Court conduct a balancing test as set forth in *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2nd Cir. 2006).

Conducting the Constitutional tailoring analysis or the common law balancing test will require the Court to analyze specific harms which may occur as a result of disclosure, rather than mere arguments of the Plaintiff or the Defendant. The Court has discretion to find good cause to seal or redact a document "when a party shows that disclosure will result in a clearly defined, specific and serious injury." *In re Terrorist Attacks on September 11, 2001*, 454 F. Supp. 2d 220, 222 (S.D.N.Y.2006). But "broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing." *United States v. Wecht*, 484 F.3d

194, 211 (3rd Cir. 2007). If the Plaintiff or Defendant seek to keep any pleadings under seal "the burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the protective order." *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1122 (3rd Cir. 1986).

Should the Court deny the Motion to Intervene and Unseal in whole or in part, factual findings supporting redaction will be necessary as part of any balancing test the Court conducts. The Proposed Intervenors note that the Amended Answer is the basis upon which this case was tried and decided. Counsel described that document as the "operative" Answer in this matter because it included all defenses. See NYSCEF Doc. No. 240 at 57:12 *et seq*. The briefs were the basis for this Court's ruling on the pretrial motions. On information and belief, the sealed information related to Exxon's selective enforcement defense and contains non-privileged communications between the Attorney General's Office and outside parties which is relevant to that defense. To conduct a balancing test, this Court will need to determine the relative importance of these documents to the public discourse. Moreover, the Court will need to weigh any harms from release of the information at issue, including whether information already in the public domain moots any need for secrecy. This Court itself noted in a hearing related to the Amended Answer and selective enforcement defense that "there are fifty people in the courtroom listening to your argument, so it's certainly been made public to those fifty people who in turn will transmit it to a much larger number of people." NYSCEF Doc. No. 240 at 49:2 *et. seq*.

C) Media Reports, Other Public Records Since Released, and the Now-Final Judgment in this Matter Militate in Favor of Disclosure.

Interest in this case is exceptional, and prompted widespread and national media coverage. Moreover, this case is one among a series of related litigation against parties that

outside interests have asked attorneys general and other state and local governmental actors to target, on the same basis, including for the purpose of giving private tort actions a helpful boost. Key among these are *People of the State of New York v PricewaterhouseCoopers* and *Exxon Mobil Corporation*, New York Co. Supreme Court, No. 451962/2016, and related litigation in1:17-cv-2301 (S.D.N.Y.), *State of Rhode Island v. Chevron et al*., Rhode Island Superior Court PC-2018-4716, and *Commonwealth of Massachusetts v. Exxon Mobil Corporation*, Suffolk County Superior Court, 19-3333. Media reports suggest that other such litigation prompted by the same tort lawyer's recruiting campaign may remain under consideration.

The Proposed Intervenors believe that documents filed in this matter will shed light on the important ongoing debate about the propriety of the New York Attorney General's actions in this matter. Regardless, they will show how such costly if failed litigation came to pass, or at least key influences thereon. Further, they will do so in a way that citizens of other states have been able to examine, about their own attorneys general offices.

Importantly, documents recently obtained from another attorney general, also obtained by Proposed Intervenor Energy Policy Advocates, have heightened public interest while also placing in relief the importance of certain sealed records in this matter — and affirming that they are not properly privileged or sealed, but only revealing. These include emails from Mr. Pawa's tort firm describing the (presumably same) "global warming presentation on Exxon,"[1] and in Mr. Pawa's

[1] January 13, 2016, email from Ben Krass of the Pawa Law Group to California OAG's Janill Richards and David Zonana, Subject: Re: Global Warming Presentation.

own words as being about "information that has recently come to light"[2], which information these emails make expressly clear is public news stories — stories that, the public record also shows, were arranged for by parties promoting this same litigation/investigation campaign.

For example, the newly obtained records addressing these efforts include a December 2015 Pawa email to Massachusetts' Office of Attorney General arranging his slide show, in which Pawa revealed that this "information that had come to light" was in fact media "articles that have generated so much attention on this issue", presented "to various government officials", which "is just information provided as a public service that [OAG] may be able to use as [OAG] consider whether to take a closer look at this matter."[3]

After speaking to major political donor Wendy Abrams, one Illinois OAG aide wrote to a colleague, "The NY AG is investigating the company and [Abrams] wanted to know if this was something the AG may be interested in supporting or signing on to…She would like to bring in a lawyer named Matt Pawa, who has offices in Boston and DC. Wendy says he may have been the one to go to the NY AG's office about Exxon."[4] Ms. Abrams's and Pawa emails to Illinois OAG also affirm that Pawa was pitching those same public news items arranged for by allies.[5]

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[2] March 31, 2016 email from Matt Pawa to Perry Zinn-Rowthorn, Matthew Levine and Kimberly Massicotte of the Connecticut OAG, Subject: Climate Change, available at https://climatelitigationwatch.org/wp-content/uploads/2019/10/Pawa-clearly-not-offering-whistleblowing-CT-OAG-email-1.png. *See also*, e.g., December 1, 2015 email from Matt Pawa to Massachusetts OAG's Christophe Courchesne and Melissa Hoffer, Subject: global warming, available at https://climatelitigationwatch.org/wp-content/uploads/2019/10/Screen-Shot-2019-10-17-at-10.59.16-PM.png.

[3] December 1, 2015 email from Matt Pawa to Massachusetts OAG's Courchesne and Hoffer.

[4] February 26, 2016, email from Eva Station to Ali Khadija Courtney Levy, and Kirsten Holmes; Subject, RE: Phone call. Available at https://climatelitigationwatch.org/wp-content/uploads/2018/08/FN-147-Abrams-says-Pawa-may-have-brought-investigation-to-NYOAG-copy.pdf.

[5] February 26, 2016, email from Wendy Abrams to OAG aide Ali Khadija, Subject: Background information. Available at https://climatelitigationwatch.org/wp-content/uploads/2020/01/IL-OAG-email-affirms-Pawa-presentation-is-re-public-information.pdf

The same correspondence strongly suggests that it was this same information that Mr. Pawa used to lobby NY OAG to launch its expensive, failed litigation in this matter. For example, "I have been giving this presentation to various government officials and am told that it has been very helpful to their understanding of the situation as they consider options similar to those the NY AG has commenced."[6]

Public records affirm that Mr. Pawa's presentation was not "What Matt Pawa Knew"or "whistleblower"-type information, but "What Exxon Knew," citing publicly available news stories. Rather than representing confidential law enforcement investigative materials, this presentation is an effort by a tort lawyer to help his own cases by enlisting attorneys general, part of a coordinated campaign with activists and "prospective funders", "going after climate denialism [sic]—along with a bunch of state and local prosecutors nationwide".[7] The public should see this presentation, and correspondence discussing it and Pawa's lobbying effort to recruit New York's OAG to his case.

The public deserves to see documentation of the effort by a tort lawyer to help his tort campaign against by enlisting the New York Office of Attorney General, successfully, if in pursuit of terribly unsuccessful prosecution at a cost, clearly, of millions of taxpayer dollars.

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[6] December 1, 2015 email from Matt Pawa to Massachusetts OAG's Courchesne and Hoffer.

[7] April 25, 2016 email from UCLA Law School's Cara Horowitz to Harvard and UCLA center funder Dan Emmett, available at https://climatelitigationwatch.org/wp-content/uploads/2019/10/Screen-Shot-2019-10-17-at-11.11.47-PM.png. This email from one participant was sent from what another participant called a "secret" briefing by this campaign for OAG staff and "prospective funders" in pursuit of "potential state causes of action against major carbon producers". OAG participated. See, e.g.,regarding "the list of attendees, including any states", from co-host Shaun Goho of Harvard Law School, "We are still finalizing the list of attendees , but we know that there will be people from at least the following states: California, Connecticut, Illinois, Maryland, Massachusetts, and New York." April 6, 2016, email from Vermont Deputy AG Scot Kline to Harvard Clinical instructor Shaun Goho; Subject: Voice message.

Particularly given the strong presumption of public access, and the unprecedented machinations between law enforcement, the tort bar, policy activists and donors this prosecution represents and to which these records relate, the public deserves to see these records that Proposed Intervenors ask this Court to unseal.

IV. Conclusion

The Court should grant the Motion to Intervene and set a hearing at which all parties can be heard, and factual findings can be made, regarding what, if any, documents ought to remain sealed in this action.

Respectfully submitted this the 10th day of January, 2020.

LAW OFFICE OF FRANCIS MENTON
Attorney for the Petitioners

By:_______/s/_________________
Francis Menton
85 Broad Street, 28th floor
New York, New York 10004
(212) 627-1796
fmenton@manhattancontrarian.com

Matthew D. Hardin*
324 Logtrac Road
Stanardsville, VA 22973
(434) 202-4224
MatthewDHardin@gmail.com
**pro hac vice to be filed*

Certification of Word Count

Pursuant to Rule 17 of the Rules of Practice for the Commercial Division of the Supreme Court, I certify that this affirmation complies with that rule because it contains 3,295 words, exclusive of the caption, table of contents, table of authorities, signature block, and this certification statement. In making this certification, I relied on MacBook Page's "Word Count" tool.

Dated: January 10, 2020
New York, NY

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Francis J. Menton