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

In the matter of:	**Index No.: 0452044/2018**
PEOPLE OF THE STATE OF NEW YORK	
Plaintiff,	**PROPOSED INTERVENORS' RESPONSE TO CROSS-MOTION OF MATTHEW PAWA FOR LEAVE TO FILE AS AMICUS CURIAE**
v.	
EXXON MOBIL CORPORATION	
Defendant.	

NOW COME Proposed Intervenors, ENERGY POLICY ADVOCATES and ROBERT SCHILLING, and submit this Response to the Cross-Motion of Matthew Pawa ("Pawa") for Leave to File as a friend of the Court. Document No. 580.

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.

On January 25, 2020, Pawa filed a cross-motion seeking leave to appear as Friend of the Court. In support of his argument, Pawa filed two briefs. First, he filed a brief arguing why the Court should grant him the right to appear as a friend of the Court. Document No. 580. Second,

he filed another brief as a proposed filing should this Court grant leave to appear as a Friend of the Court. Document No. 582. Due to the last-minute nature of these twin filings, the Proposed Intervenors moved for an adjournment, and now submit this unified reply to both of Pawa's briefs. In short, Pawa's briefing is aimed at suppressing documents that clearly are subject to the public's right of access, and that are not even arguably privileged, confidential, or secret in any way. Proposed Intervenors respectfully submit that Pawa's procedural arguments are either moot or without merit, and that the time is ripe for the Court to move swiftly to the merits of Proposed Intervenors' pending motion.

II. Pawa's Main Argument in Favor of Appearing as a Friend of the Court Has Now Been Mooted

At the time Pawa filed his brief on January 25, the time for the Office of the Attorney General ("OAG") and Exxon to respond to the Proposed Intervenors had not yet elapsed. As such, Pawa argued "It is unknown as of the time of this writing whether any party will oppose EP Advocates' motion to intervene, so Pawa's proposed brief in opposition to intervention may offer unique legal argument." Document No. 580 at 2. While Pawa was correct to note as of January 25 that it was "unknown" whether any party would oppose the Proposed Intervenors' Motion, the passage of time has resolved any lingering doubts. On January 27, 2020, OAG filed a detailed opposition to the Proposed Intervenors' Motion.

To the extent that Pawa's main argument in favor of appearing as a friend of the Court was that the parties to the action might not appear or oppose the Proposed Intervenors' Motion, Pawa's argument is now mooted by subsequent events. Pawa himself cited *Kruger v. Bloomberg*, 1 Misc. 3d 192 (Sup. Ct. N.Y. Co. 2003), for the proposition that a Court must consider whether "the parties are not capable of a full and adequate presentation" and whether a prospective

amicus "could remedy this deficiency." Pawa himself expressed concern that "the proposed amicus brief may turn out to be the *only* papers submitted addressing potential deficiencies in [Proposed Intervenors'] motion." Document No. 580 at 5.

Pawa's fears that the underlying parties to this dispute might not oppose the Motion to Intervene have proven unwarranted. It is now apparent that Pawa need not participate in order for there to be a "full and adequate presentation" of the relevant facts and legal arguments in this matter.

III. Pawa's Arguments Reflect Personal Interests Rather than the Interests of a Friend of the Court

While Pawa's brief cites the *Kruger* case as the "leading case" on Friend of the Court briefs, a full reading of the *Kruger* opinion reveals that the difference between an Intervenor and a Friend of the Court is an important one. Pawa's motion and his briefs on their face assert the interests of an Intervenor rather than the interests of a Friend of the Court. That Pawa conflates these two distinct sets of interests in order to attempt to deprive the Proposed Intervenors of relief is a source of irony, but it is not grounds to deny the Proposed Intervenors the relief that they seek.

"None of the intervention statutes set forth in the CPLR use the words "amicus curiae," but they have been used to allow such intervention." *Kruger*, 1 Misc 3d at 194. In an ordinary case of intervention, "one must have a legally cognizable claim to intervene... rather than just a general interest..." *Id.* at 195 (internal citations omitted). If a party is granted Intervenor status, he subject himself to the jurisdiction of the Court and others can seek remedies against them. Intervention grants "the rights of a party, including the right to counterclaim, cross-claim, implead, appeal, etc." *Id.* By contrast, a Friend of the Court is "one who, as a standerby, when a

judge is in doubt or mistaken in a matter of law, may inform the court." *Kemp v. Rubin*, 187 Misc 707, 708 (Sup. Ct., Queens County 1946). A Friend of the Court "is not a party, and cannot assume the functions of a party." *Id.* at 196.

Pawa's brief makes clear that he is not asserting rights of a "standerby." Nor is he asserting that this Court was "mistaken in a matter of law." By contrast, Pawa is attempting to assert his own, individual rights, but without incurring the benefits and obligations incumbent on parties to this case. And Pawa wholeheartedly defends the previous rulings of this Court, including specifically those Proposed Intervenors challenge by their Motion to Intervene.

Pawa was candid in asserting why he seeks to appear as a Friend of the Court: "Because it is his emails with OAG that are now at issue in this case, he has moved to appear as an amicus curiae." Document No. 582 at 3. Pawa's counsel further states that he seeks to appear to prevent "the disclosure of the Pawa-OAG communications." Document No. 580 at 5. According to Pawa, if this Court grants him leave to appear as a Fried of the Court he "may provide valuable argument to the Court... about the prejudice involved in unsealing his [own] communications with the OAG." Document No. 580 at 4. The proposed Friend of the Court brief repeats these same themes. In that filing, Pawa claims that the Proposed Intervenors "seek access to Pawa's emails." Doc. No. 282 at 4. Proposed Intervenors dispute the characterization that, once sent, correspondence recruiting a public office to one's cause are one's own emails (as Proposed Intervenors' and others' public records requests have proved; see, e.g., FN 2, *infra*). Regardless, these are not the arguments that one might expect of a "standerby" with no underlying interest in the proceedings, but rather are interests personal to Pawa himself.

The *Kruger* court also cited older cases which explain the purpose of Friend of the Court arguments. Among those cases, *Kemp* stands for the proposition that Friends of the Court should

be permitted to appear in order to challenge the judiciary "when a judge is in doubt or mistaken in a matter of law." 187 Misc. at 708. However, Pawa's briefing indicates he does not wish to challenge this Court, but to defend its previous rulings. Pawa argues, in lockstep with OAG, that this Court's original sealing orders should stand, and that the Proposed Intervenors have not made their motion in a timely manner. Pawa has not asserted that this Court is doubtful or mistaken.

Because Pawa does not seek to appear as a "standerby," but rather seeks to assert interests that are personal to him, this Court should not permit him to appear as an *amicus curiae*. Because Pawa has made no attempt to show that this Court is "in doubt or mistaken," there is no grounds for him to appear as a Friend of the Court. The proper remedy for any ills Pawa feels will come as a result of unsealing, is for Pawa himself to intervene pursuant to CPLR 1013. It is thus ironic that Pawa has taken great pains not only not to intervene on his own behalf, but to prevent the Proposed Intervenors from seeking relief.

IV. Pawa Attempts to Parrot Arguments Made by OAG

"[T]he function of an `amicus curiae' is to call the court's attention to law or facts or circumstances in a matter . . . that might otherwise escape its consideration." *Kemp v. Rubin*, 187 Misc. at 709. Rather than raising issues which might otherwise escape attention, however, Pawa's briefing merely mimics the arguments raised by OAG.

Pawa's proposed Friend of the Court brief claims intervention should be denied on three grounds: First, Pawa alleges the intervention motion was untimely. Second, Pawa argues the Proposed Intervenors' interests were adequately represented by Exxon. Lastly, Pawa argues that

the Proposed Intervenors lack "a real and substantial interest in the outcome of the proceedings." Document No. 582 at 3.[1]

Each and every one of the arguments Pawa raises have also been raised by OAG. OAG has also claimed Proposed Intervenors' motion was untimely. Document No. 584 at 4-5. OAG detailed at length the efforts taken by Exxon to oppose sealing. Document No. 584 at 2-3. And OAG also raised its concern that Proposed Intervenors lack a "real and substantial" interest sufficient to justify intervention. Document No. 584 at 4.

Even irrelevant and *ad hominem* arguments raised by Pawa echo the arguments of OAG rather than present new material for the court to consider. For example, OAG raised the specter of *pro hac vice* counsel's associations with one of the Proposed Intervenors, Energy Policy Advocates. Doc No. 584 at 5. Pawa's brief parrots such associations, and throws in *ad hominem* arguments about entirely separate non-parties. Doc No. 582 at 6-7. Both OAG and Pawa confusedly fixate on long-resolved matters brought by different parties under the Freedom of Information Law. Doc No. 582 at 4-5, 7 and Doc No. 584 at 5.[2]

Because Pawa has not demonstrated he intends to offer any new argument on a topic that "might otherwise escape" this Court's consideration, the Court should not grant him leave to argue as a Friend of the Court. Leave would only serve the dilatory purpose of requiring counsel to argue and respond to the same issues twice.

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[1] Due to a formatting irregularity, the third page of the e-filed document is labelled as page 1 at the foot of the page.

[2] Yet Pawa leaves unmentioned the sole relevant open records case, *Energy Policy Advocates v. Energy Policy Advocates v. Healey, et al.* Suffolk County, Civil Action 19-17530, Massachusetts Superior Court. That offers a helpful example in that the facts are very nearly identical. Massachusetts's OAG was, however, something of an outlier in making EPA file suit before releasing the six pages of emails between Mr. Pawa and OAG attorneys, sent for the same purpose and apparently within months of those at issue in the instant matter. *Cf.* OAGs from California, Connecticut, Illinois, Maryland, Washington state produced the records EPA has cited in this proceeding, without claims of privilege or requiring litigation.

V. To the Extent the Court Entertains Pawa's Arguments, Those Arguments are Without Merit.

The only arguments that Pawa raises which are unique to his briefing (rather than duplicative of OAG's briefing) relate to the identity of Energy Policy Advocates. Pawa cites the Practice Commentary to CPLR 1013 for the proposition that the Court can "impose appropriate conditions on the intervention."[3] Document No. 582 at 13. Pawa then asserts that the Court should penalize the Proposed Intervenors because "publicly available documents indicate that EP Advocates has a former coal attorney on its board, and is associated with at least one entity funded by coal money." *Id.*

Pawa points to no jurisprudence under the First Amendment, the Constitution of New York, the common law, or the statutory provisions of the Judiciary Law § 4, which enables the Court to restrict access to judicial records because of the identities, employment, political associations, or viewpoints of those seeking access to records. This is surely because, to the contrary, the courts have made clear at almost every level that motives and viewpoints are irrelevant in weighing whether the public is entitled to access judicial records.

The Second Circuit has made clear that "the First Amendment protects the eloquent and the insolent alike." *Sheppard v. Beerman*, 317 F.3d 351 (2nd Cir. 2003). The courts of this State have consistently held that "the protection afforded by the guarantees... in the New York Constitution is often broader than the minimum required by the First Amendment." *O'Neill v*

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[3] The Proposed Intervenors have themselves suggested an appropriate condition on intervention: that the intervention be limited to the purpose of filing and arguing a motion to unseal judicial documents. Indeed, the Proposed Intervenors even caption their Motion to Intervene as being "for the limited purpose of seeking access to judicial documents. Document Nos. 572-575. While OAG suggests in its brief that all sorts of mischief will ensue if intervenors are permitted to file motions to vacate, interfere in settlement discussions, etc., Pawa points out that the Court has the authority to limit intervention as Proposed Intervenors have themselves suggested. Compare Document No. 584 at 7-8 with Document No. 582 at 13.

Oakgrove Constr., 71 NY2d 521, 529 n. 3 (1988). The Common Law presumption of access serves similar purposes to the First Amendment and is similarly motive-neutral. Although it is true that courts may "deny access where court files might have become a vehicle for improper purposes," the federal courts have found that "the [common-law] presumption of access is at its zenith" when the records at issue "would materially assist the public in understanding the issues before the court, and in evaluating the fairness and integrity of the court's proceedings." *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 140, 142 (2nd Cir. 2016) (internal quotations and citations omitted).[4] Lastly, the Judiciary Law provides that it is the intent of the legislature that "the sittings of every court within this state shall be public, and every citizen may freely attend" without regard to political or social viewpoints. Jud. Law § 4.

Because Proposed Intervenors' identity or motives for seeking access to judicial documents are not relevant to a determination of their constitutional, common law, or statutory rights, Pawa's motivations for seeking to hinder access to such records are similarly irrelevant. However, to the extent that the Court wishes to entertain Pawa's argument that "is only fair for it to divulge any facts" about the Proposed Intervenors ties to certain industries or political viewpoints, the Proposed Intervenors have filed as Exhibit 1 to this memorandum facts in the public domain directly relevant to the records at issue here, specifically the campaign these records represent, similarly shedding light on the issue of ties and motivations.

[4] The *Bernstein* court specifically noted the public's interest in claims which are dismissed on the pleadings, and held that such pleadings are "judicial documents" subject to the Common Law presumption of access.

V. Conclusion

For the reasons set forth above, the Court should deny Pawa the right to appear as a Friend of the Court.

Respectfully submitted this the 5th day of February, 2020.

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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 2248 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: February 5, 2020
New York, NY

/s/
Francis J. Menton