To be Argued by:
THEODORE V. WELLS, JR.

New York County Clerk's Index No. 451962/16

New York Supreme Court

Appellate Division—First Department

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-Respondent,

For an Order pursuant to C.P.L.R. § 2308(b) to compel compliance with a Subpoena issued by the Attorney General

– against –

PRICEWATERHOUSECOOPERS LLP,

Respondent-Respondent,

– and –

EXXON MOBIL CORPORATION,

Respondent-Appellant.

BRIEF FOR RESPONDENT-APPELLANT

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Respondent-Appellant Exxon Mobil Corporation ("ExxonMobil") submits this memorandum of law in support of its appeal from the Order of Supreme Court, New York County ("Order," R. 9-13.),[1] entered by the New York County Clerk on October 26, 2016, granting Petitioner-Respondent's motion to compel.

QUESTIONS PRESENTED

1. Does Texas Occupations Code section 901.457, which creates an evidentiary accountant-client privilege, permit a court to order production of otherwise privileged documents pursuant to an investigative subpoena where the subpoena does not fall within the privilege's enumerated exceptions?

The lower court answered the question in the affirmative.

2. Do choice of law principles require a New York court to apply New York privilege law, rather than conduct an interest balancing test, to resolve a dispute about the existence of a privilege simply because a discovery proceeding was commenced in New York?

The lower court answered the question in the affirmative.

3. Does Texas Occupations Code section 901.457(b)(3) authorize a court to order production of otherwise privileged materials before there has been an

[1] Citations in the form "R. ___" are references to the Record on Appeal.

assertion of privilege and without any guidance about the scope of the privilege from a Texas court?

The lower court implicitly answered the question in the affirmative.

PRELIMINARY STATEMENT

Texas Occupations Code section 901.457—entitled the "Accountant-Client Privilege"—creates an evidentiary privilege covering information communicated by a client to its accountant. Texas is one of seventeen states[2] that recognizes such an evidentiary privilege, which is designed to promote the free and honest exchange between an accountant and its client. ExxonMobil expressed its intention to assert this privilege, where applicable, after its independent auditor PricewaterhouseCoopers LLP ("PwC") received an investigative subpoena from the Attorney General of the State of New York ("Attorney General"), on August 19, 2016 (the "PwC Subpoena") as part of his investigation of ExxonMobil. On October 14, 2016, the Attorney General sought an order compelling PwC to produce documents without regard to ExxonMobil's potential assertion of the accountant-client privilege, and denying ExxonMobil even the opportunity to conduct a privilege review prior to their production. The lower court entered an order granting the Attorney General's motion to compel on October 26, 2016 (R. 9-13.).

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[2] David M. Greenwald et al., *Testimonial Privilege* 737 (2015 ed.).

The lower court's decision should be reversed for three reasons.

First, Texas Occupations Code section 901.457 creates an evidentiary privilege with specific, enumerated exceptions, none of which covers the PwC Subpoena. These exceptions include a carve-out for investigative subpoenas issued pursuant to specified federal and Texas laws in subsection (b)(2),[3] but the PwC Subpoena does not fall under this exception or any other exception. Nevertheless, the lower court erroneously held that an out-of-state agency that issues an investigative subpoena could essentially ignore and bypass subsection (b)(2) by obtaining, without any evidentiary showing, a ministerial court order under subsection (b)(3) of the statute.[4] The Order impermissibly transforms the "court order" exception of subsection (b)(3) into a boundless catchall, which is inconsistent with, and would obviate the need for, the other enumerated statutory exceptions. The decision below finds no support in Texas case law relating to the "court order" exception. No Texas court has previously analyzed the "court order" exception in the context of investigative subpoenas, like the PwC Subpoena, let

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[3] Tex. Occ. Code § 901.457(b)(2) ("This section does not prohibit a license holder from disclosing information that is required to be disclosed . . . (2) under a summons or subpoena under the provisions of the Internal Revenue Code of 1986 and its subsequent amendments, the Securities Act of 1933 (15 U.S.C. Section 77a et seq.) and its subsequent amendments, the Securities Exchange Act of 1934 (15 U.S.C. Section 78a et seq.) and its subsequent amendments, or The Securities Act (Article 581-1 et seq., Vernon's Texas Civil Statutes).").

[4] Tex. Occ. Code § 901.457(b)(3) ("This section does not prohibit a license holder from disclosing information that is required to be disclosed . . . (3) under a court order signed by a judge if the order: (A) is addressed to the license holder; (B) mentions the client by name; and (C) requests specific information concerning the client.").

alone held that investigative subpoenas not covered by subsection (b)(2) can be excepted from the privilege through a summary court order purportedly issued under subsection (b)(3).

Second, under well-established choice of law principles as articulated by the Court of Appeals in *Babcock* v. *Jackson*, 12 N.Y.2d 473 (1963), a New York court must apply the law of the forum with the greatest interest in applying its law when determining which privilege law should apply. In this case, Texas law controls whether an accountant-client privilege exists because Texas has the predominant interest in the application of its privilege law to accountants operating within Texas. However, without even acknowledging the mandate of *Babcock*, the court below erroneously held that it need not balance the interests of New York and Texas to determine which state's privilege law applies to the PwC Subpoena. The court instead incorrectly concluded that a per se rule invariably requires the application of the law of the forum where any trial or discovery proceeding will be held. The Court of Appeals has stated no such rule, and such a holding is contrary to the over fifty-year-old mandate of *Babcock*.

Third, courts usually resolve privilege disputes on a document-by-document basis after a party has asserted a privilege over a particular document. As of the date of the lower court's Order, ExxonMobil had not yet asserted a claim of privilege over a single document. Rather than wait for ExxonMobil to actually

assert the privilege, the lower court improperly granted the Attorney General's motion on a barren record and without any guidance about the scope of the privilege from a Texas court.

The Order should be reversed.

NATURE OF THE CASE

A. The Attorney General's Investigation of ExxonMobil

On November 4, 2015, the Attorney General initiated an investigation into ExxonMobil, seeking nearly 40 years of its documents relating to climate change and other topics, on the theory that ExxonMobil had misrepresented its knowledge of climate change. (R. 66.) The next morning, *The New York Times* had already reported the commencement of the Attorney General's investigation. (R. 66.) Despite the unsettling press leak, ExxonMobil began complying with the subpoena.

The playing field changed on March 29, 2016.[5] The Attorney General hosted a highly politicized, public press conference entitled, "AGs United For Clean Power." (R. 67.) He announced that he, several other attorneys general—

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[5] That same month, Virgin Islands Attorney General issued a subpoena to ExxonMobil, requesting 40 years of its documents related to climate change. (R. 66-67.) ExxonMobil filed a petition in Texas state court, seeking a declaration that the subpoena violates ExxonMobil's First Amendment, Fourth Amendment, and due process rights. (R. 67-68.) In June 2016, ExxonMobil and the Virgin Islands Attorney General entered into a joint stipulation whereby the Virgin Islands Attorney General withdrew his subpoena and ExxonMobil dismissed its lawsuit. (R. 68.)

the self-proclaimed "Green 20"—and former Vice President Al Gore, were banding together to address Congress's perceived inability to address climate change. (*Id.*) As part of that policy mission, the Attorney General discussed his investigation of ExxonMobil. (*Id.*) The next month, the Massachusetts Attorney General, a member of the "Green 20," issued a civil investigative demand to ExxonMobil, also seeking nearly 40 years of climate change documents. (R. 68.) In June 2016, ExxonMobil moved to enjoin enforcement of the civil investigative demand in the United States District Court for the Northern District of Texas and to quash the demand in Massachusetts state court. (R. 68-69.)

On August 19, 2016, the New York Attorney General issued the PwC Subpoena and—that same day—engaged in a lengthy interview with *The New York Times*. (R. 69.) During the interview, the Attorney General noted that his investigation of ExxonMobil was now focused on its oil and gas reserves and speculated that there might be "massive securities fraud" at ExxonMobil. (*Id.*)

On September 19, 2016, the Texas federal court heard ExxonMobil's preliminary injunction motion. At the hearing, Judge Ed Kinkeade suggested that the Massachusetts and New York Attorneys General had the same questionable motive in pursuing their investigations of ExxonMobil. (R. 69.) On October 13, 2016, Judge Kinkeade ordered the Massachusetts Attorney General to respond to discovery about her potential bad faith in initiating an investigation of

ExxonMobil. According to the federal court, Attorney General Healey's remarks at the March 29 press conference hosted by Attorney General Schneiderman were "concerning." (R. 73.) The very next day, the New York Attorney General commenced the action in the court below. On October 17, 2016, ExxonMobil filed a motion to amend the complaint in Texas federal court to join as a defendant the New York Attorney General. (R. 69-73.)

B. The PwC Subpoena

As noted above, on August 19, 2016, the Attorney General issued a *subpoena duces tecum* to PwC pertaining to its client, ExxonMobil. (R. 101-19.) The PwC Subpoena seeks documents related to PwC's audits of ExxonMobil's financial statements and public disclosures, among other topics. (R. 108-10.) The PwC Subpoena had an original return date of September 2, 2016. (R. 101.)

On September 7, 2016, counsel for ExxonMobil informed the Attorney General that some documents in PwC's possession that were potentially responsive to the PwC Subpoena might be privileged under Texas's "Accountant-Client Privilege," codified at Texas Occupations Code section 901.457. (R. 99.) Section 901.457 (in effect since September 1, 2013) provides:

> (a) A license holder or a partner, member, officer, shareholder, or employee of a license holder may not voluntarily disclose information communicated to the license holder or a partner, member, shareholder, or employee of the license holder by a client in connection with services provided to the client by the license holder or a partner, member, shareholder, or employee of the

license holder, except with the permission of the client or the client's representative.

(b) This section does not prohibit a license holder from disclosing information that is required to be disclosed:

(1) by the professional standards for reporting on the examination of a financial statement;

(2) under a summons or subpoena under the provisions of the Internal Revenue Code of 1986 and its subsequent amendments, the Securities Act of 1933 (15 U.S.C. Section 77a et seq.) and its subsequent amendments, the Securities Exchange Act of 1934 (15 U.S.C. Section 78a et seq.) and its subsequent amendments, or The Securities Act (Article 581-1 et seq., Vernon's Texas Civil Statutes);

(3) under a court order signed by a judge if the order:

(A) is addressed to the license holder;

(B) mentions the client by name; and

(C) requests specific information concerning the client;

(4) in an investigation or proceeding conducted by the board;

(5) in an ethical investigation conducted by a professional organization of certified public accountants;

(6) in the course of a peer review under Section 901.159 or in accordance with the requirements of the Public Company Accounting Oversight Board or its successor; or

(7) in the course of a practice review by another certified public accountant or certified public accountancy firm for a potential acquisition or merger of one firm with another, if both firms enter into a nondisclosure agreement with regard to all client information shared between the firms.

Tex. Occ. Code § 901.457.

Separately, the Attorney General agreed to PwC's request to extend the return date of the PwC Subpoena, and PwC agreed to produce certain categories of documents to the Attorney General beginning on September 23, 2016. (R. 99.)

On September 23, 2016, counsel for ExxonMobil advised the Attorney General that it planned to review "certain categories of responsive documents that may be subject to the accountant-client privilege, prior to production of those documents by PwC." (R. 283.) Counsel for ExxonMobil informed the Attorney General that if any responsive document was determined to be privileged under Texas law, it would assert the privilege and specifically identify that document on a privilege log. (R. 283-84.) The Attorney General raised no objection at that time.

C. The Attorney General's Motion to Compel

On October 14, 2016, the Attorney General moved by order to show cause for an order (1) compelling PwC to comply with the PwC Subpoena, without providing ExxonMobil an opportunity to determine the applicability of the Texas accountant-client privilege, and (2) compelling ExxonMobil to allow PwC to produce documents without regard to its privilege claim. (R. 94-100.)

On October 18, 2016, the lower court entered the order to show cause and ordered briefing followed by an appearance by the parties on October 24, 2016. (R. 91-93.)

D. The Decision Below

Oral argument was held on October 24, 2016, and the lower court issued a decision and order on October 25, 2016, (R. 84-89), followed by a corrected order on October 26, 2016. (R. 9-13.) In its five-page Order, the court below reviewed the procedural history and granted the Attorney General's motion. (*Id*.)

The lower court first held that its Order compelling compliance with the PwC Subpoena fell under the "court order" exception to the accountant-client privilege set forth in section 901.457(b)(3).[6] (R. 12.) In reaching this conclusion, the court recognized that "[t]he case law and legislative history relating to the

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[6] The lower court appears to have agreed, without explicitly ruling, that section 901.457 creates an accountant-client privilege. (*See* R. 11 (noting that the predecessor statute "appears to have created a limited accountant-client privilege" and was thereafter amended).) In the lower court, ExxonMobil argued that the text of section 901.457, which is titled "Accountant-Client Privilege," created an evidentiary privilege based on its plain meaning. (*See* R. 51-55); *see also In re Smith*, 333 S.W.3d 582, 586 (Tex. 2011) (noting that, when interpreting a Texas statute, a court must "begin with its language"); *accord* 1-4 William V. Dorsaneo III, *Texas Litigation Guide* § 4.03(3)(a).) No Texas court has ruled otherwise. *See In re Arnold*, No. 13-12-00619-CV, 2012 WL 6085320, at *3 (Tex. App., Nov. 30, 2012) (declining to decide the existence of privilege where the party advancing the privilege claim "produced no evidence to substantiate any claim of an alleged privilege" and there was "no evidence in the record that [the person to whom the confidential communications were made was] a licensed accountant or that any communications at issue were intended to be confidential"); *see also In re Patel*, 218 S.W.3d 911, 920 (Tex. App. 2007) ("assuming without determining that an accountant-client evidentiary privilege exists in Texas"); *Canyon Partners, L.P.* v. *Developers Diversified Realty Corp*, No. 3-04-CV-1335-L, 2005 WL 5653121, at *1 (N.D. Tex. Nov. 4, 2005) (observing—based on a case that preceded the passage of a 1989 accountant-client privilege predecessor statute—that Texas courts had not recognized an accountant-client privilege). While ExxonMobil believes the statute's meaning is clear on its face, the lack of clarity in the lower court's ruling is another reason to reject its reasoning.

intent and proper interpretation of Texas Occupations Code Section 901.457 and its predecessors is sparse and not dispositive of this case." (R. 11.) It further acknowledged that "all of the limited case law addressing the statute predate[d] the 2013 version of the statute" relevant to the claim of privilege here. (*Id.*) Notwithstanding, the court found "that the statute has a plain meaning" and "does not preclude production" of potentially privileged documents. (*Id.*) This finding was predicated on the argument advanced by the Attorney General below that the "court order" exception under subsection (b)(3) functions as a "catchall" exception to override the privilege in any and all instances and for any and all reasons, including in the case of non-judicial investigative subpoenas not issued under the specific federal and Texas laws designated as exceptions to the accountant-client privilege in subsection (b)(2). (*See* R. 12 ("This Court rejects Exxon's assertion that subsections (b)(2) and (b)(3) must be read together and that because the Subpoena was not issued pursuant to one of the federal laws specified in (b)(2), the NYAG may not seek a court order compelling production pursuant to (b)(3)").) Accordingly, the lower court held perfunctorily that "the carve out in (b)(3) would be satisfied by an order from this Court compelling compliance by Exxon and PWC of the investigative subpoenas issued by the NYAG." (R. 12.)

While conceding that the above determination made it "not necessary" to resolve the choice of law issue, the court went on to hold that a claim of

accountant-client privilege would be "unavailing" because "New York law applies to the NYAG's application," and New York does not recognize an accountant-client privilege. (*Id.*) In support of this holding, the court cited purported "controlling authority" to the effect "that [t]he law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding is applied when deciding privilege issues." (*Id.*) The court did not acknowledge that such a determination can be made only after engaging in the interest balancing test mandated by the Court of Appeals in *Babcock* v. *Jackson*, 12 N.Y.2d 473 (1963).

On October 27, 2016, ExxonMobil promptly commenced an appeal of the Order by filing a notice of appeal in Supreme Court. (R. 6.) The Attorney General, ExxonMobil, and PwC filed a Stipulation and Proposed Order for Partial Stay of Decision and Order Pending Appeal in the lower court on October 28, 2016, under which the parties have agreed that PwC will not turn over to the Attorney General any document or communication that ExxonMobil identifies as covered by the accountant-client privilege during the pendency of this appeal, so as not to moot the subject matter of this appeal. The lower court "so ordered" the stipulation between the parties on November 1, 2016.[7]

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[7] The stipulation has not been made part of the record on appeal pursuant to First Department Rule 600.10(b)(1)(iv) because it post-dates the Order from which ExxonMobil appeals herein. In the event the Court wishes to review the stipulation, a copy will be provided.

ARGUMENT

I. The Lower Court's Holding that the PwC Subpoena Falls Under the "Court Order" Exception to the Accountant-Client Privilege in Section 901.457 Is Inconsistent with the Statute's Structure and Canons of Statutory Construction.

The lower court's holding that its Order compelling compliance with the PwC Subpoena falls under the "court order" exception to the accountant-client privilege based on the so-called "plain meaning" of that isolated exception is erroneous. The documents targeted by the PwC Subpoena are entitled to protection under section 901.457 because the Subpoena does not meet the requirements of the investigative subpoena exception in subsection (b)(2) and it cannot fall under the "court order" exception in subsection (b)(3) through a pro forma order outside any existing court proceeding.

A court does not give a statutory provision its "plain meaning" by reading it in isolation and separate from the larger statute. Texas courts have long held that when interpreting a statute, courts must consider "the entire act and not just isolated portions" and "interpret it to give effect to every part." *20801, Inc.* v. *Parker*, 249 S.W.3d 392, 396 (Tex. 2008). When interpreting a particular subsection of a statute, courts "must consider its role in the broader statutory scheme." *Id.* Had the lower court followed this command, it would have recognized that (i) subsection (b)(2) creates an explicit exception for investigative subpoenas issued under specified federal and Texas laws, and, (ii) in a 2013

amendment to the statute, the Texas legislature made a deliberate decision to split the investigative subpoena and the "court order" exceptions into separate and distinct subsections, each of which must be given effect. Instead, the court below improperly read subsection (b)(3)—the "court order" exception—in isolation from the larger statutory scheme and adopted a "plain meaning" that is so broad that it renders superfluous the carefully delineated exception for investigative subpoenas.

This reading, moreover, finds no basis in Texas law. The few Texas cases to consider section 901.457 have not undertaken a meaningful analysis of the provision's statutory structure or the significance of the amendments between 1999 and 2013, and none considered the application of the subsection (b)(3) exception to an investigative subpoena. Because the Order is inconsistent with the structure of section 901.457 and canons of statutory construction, it should be reversed.

A. The Order Ignores the Statutory Evolution of Section 901.457 and the Texas Legislature's Deliberate Decision to Create Specifically Delineated Exceptions.

The lower court's Order should be reversed because it is inconsistent with the statutory evolution and unsupported by the limited case law relating to Texas's accountant-client privilege. In its various iterations, the accountant-client privilege has included several exceptions, but at no time has it included an exception for investigative subpoenas issued by out-of-state law enforcement agencies, such as the PwC Subpoena.

In 1989,[8] the Texas legislature created an evidentiary accountant-client privilege through an amendment to the Public Accountancy Act entitled the "Accountant-Client Privilege." Public Accountants, § 26(2), 1989 Tex. Sess. Law Serv.41a-1 (Vernon's) (codified as amended at Tex. Occ. Code Ann. § 901.457 (West)). In creating an accountant-client privilege, Texas, just like the other 16 states that have created such a privilege,[9] sought to create an "atmosphere wherein the client will transmit all relevant information to his accountant without fear of any future disclosure." *Gearhart* v. *Etheridge*, 208 S.E.2d 460, 461 (Ga. 1974); *see also Affiliated of Florida, Inc.* v. *U-Need Sundries, Inc.*, 397 So. 2d 764, 765-66 (Fla. Dist. Ct. App. 1981) (noting that the accountant-client privilege seeks "to carry out the public policy of being able to consult an attorney or accountant without fear that the resultant communications may become public"). Texas recognized that, "[w]ithout an atmosphere of confidentiality[,] the client might withhold facts he considers unfavorable . . . thus rendering the accountant

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[8] Between 1979 and 1983, Section 26 of the Texas Public Accountancy Act—entitled "Client Accountant Communications"—provided for an accountant-client privilege. Public Accountants, § 26, S.B. 797, 66th Leg., Reg. Sess. (Tex. 1979) (repealed 1983). This Act also contained exceptions. *See id.*

[9] David M. Greenwald et al., *Testimonial Privilege* 737 (2015 ed.). Notably, at the hearing before the lower court, the New York Attorney General agreed that there are sixteen other states that recognize an accountant-client privilege (R. 43), conveniently contesting the existence of the privilege in only one state: Texas.

powerless to adequately perform the services he renders." *Gearhart*, 208 S.E.2d at 461.

The 1989 statute listed five specific exceptions to the privilege, including an exception for "information required to be disclosed . . . in a court proceeding." Public Accountants, § 26(2), 1989 Tex. Sess. Law Serv.41a-1 (Vernon's). The full text of the 1989 provision provided:

> Accountant-client privilege
>
> Sec. 26. A licensee or a partner, officer, shareholder, or employee of a licensee may not voluntarily disclose information communicated to the licensee by a client in connection with services rendered to the client by the licensee in the practice of public accountancy, except with the permission of the client or a duly appointed representative of the client. This section does not prohibit disclosure by the licensee of information required to be disclosed:
>
> > (1) by the standards of the public accounting profession in reporting on the examination of a financial statement;
> >
> > (2) in a court proceeding;
> >
> > (3) in an investigation or proceeding by the board under this Act;
> >
> > (4) in an ethical investigation conducted by a professional organization of certified public accountants; or
> >
> > (5) in the course of a quality review under Section 15B of this Act.

The first substantive change to the exceptions to section 901.457[10] came in 2001 when the "court proceeding" exception was amended as indicated below:

> Accountant-Client Privilege
> . . .
> (b) This section does not prohibit a license holder from disclosing information that is required to be disclosed:
> . . .
> (2) under a summons under the provisions of the Internal Revenue Code of 1986 and its subsequent amendments, the Securities Act of 1933 (15 U.S.C. Section 77a et seq.) and its subsequent amendments, or the Securities Exchange Act of 1934 (15 U.S.C. Section 78a et seq.) and its subsequent amendments or under a *court order* if the summons or *order*:
>
> (A) is addressed to the license holder;
>
> (B) mentions the client by name; and
>
> (C) requests specific information concerning the client;
> . . .

Tex. Occ. Code. Ann. § 901.457(b)(2) (effective September 1, 2001 to August 31, 2013) (emphasis added). This amendment created two significant changes to subsection (b)(2). First, the legislature added an entirely new carve out for materials sought by a "summons" under the Internal Revenue Code, the Securities Act of 1933, or the Securities Exchange Act of 1934. *Id.* With this amendment, the legislature, for the first time, allowed for an exception to the accountant-client

[10] The 1999 amendment merely instituted non-substantive changes to the statute, changing section 26 to section 901.457. *See* Tex. Occ. Code Ann. § 901.457 (West) (effective date: September 1, 1999 to September 1, 2001).

privilege for matters brought by "summons" under the federal tax or securities laws. Second, the amendment eliminated the separate "in a court proceeding" language in the prior subsection (b)(2) and replaced it with the phrase "under a court order." *Id.*

There is no authority to support the lower court's holding that the contemplated "court order" exception was designed to function as a standalone catchall without connection to a previously existing judicial proceeding. The only two cases to consider the "court order" exception under the 2001 version of section 901.457 found it to apply in the context of ongoing civil litigation between private parties. In *In re Arnold*, No. 13-12-00619-CV, 2012 WL 6085320 (Tex. App., Nov. 30, 2012)—cited by the lower court in issuing its ruling on the "court order" exception— the court considered a motion to quash that had been filed in the course of a discovery dispute in a pending civil case between private parties. *See id.* at *3. In particular, the defendant moved to quash a deposition subpoena served on the defendant's accountant based on the accountant-client privilege. *Id.* The trial court denied the motion to quash and ordered the accountant to comply with the subpoena. *Id.* On a writ of mandamus, the Texas Court of Appeals noted that the deposition testimony sought was relevant because the accountant's "actions and knowledge regarding the ownership of the subject property [were] relevant to the premises liability issues in [the] case." *Id.* at *4. It also affirmed the trial

court's denial of the motion to quash, holding that the trial court had not abused its discretion in ordering compliance with the subpoena because the defendant had provided "no evidence" that the party from whom the plaintiff sought discovery was "a licensed accountant or that any communications at issue were intended to be confidential." *Id.* at *3.

Similarly, in *In re Patel*—the only other case to consider the "court order" exception—the court considered a motion to quash a subpoena served on the plaintiff's accountant during the course of ongoing litigation, not a free-standing proceeding initiated by an out-of-state law enforcement authority to enforce an investigative subpoena. 218 S.W.3d at 920. The insurer argued that the documents sought were relevant because they "would allow it to test the accuracy of [plaintiffs'] alleged loss of income during a particular period of time." *Id.* at 916. The trial court denied the plaintiffs' motion to quash, and the Texas Court of Appeals, again on a writ of mandamus, with an "abuse of discretion standard," affirmed that the lower court's decision that a court order compelling production in the course of ongoing discovery satisfied the subsection (b)(2) exception. *Id.* at 920-21.

The Texas's legislature's most recent amendment in 2013 created a specific exception for investigative subpoenas issued under specified federal and Texas laws, which plainly does not include subpoenas issued by out-of-state

attorneys general pursuant to their own state's laws, such as the PwC Subpoena. More specifically, the legislature first divided subsection (b)(2) into two parts, moving the "court order" component of the exception into its own subsection (b)(3), where it is found today. *See* Tex. Occ. Code. § 901.457(b)(3). The legislature also expanded the "summons" exception in subsection (b)(2) to include a "subpoena" issued under the specified federal statutes. *Id.* at § 901.457(b)(2). Finally, the legislature also added to the (b)(2) exception disclosures required by summons and subpoenas issued under the Texas Securities Act, Tex. Rev. Civ. Stat. Ann. art. 581-1 et seq. (Vernon's), which authorizes actions by the Texas Attorney General and the Texas Securities Commission.[11] *Id.* As noted in the House Committee Bill Analyses of the 2013 amendment, this amendment "*expands* the categories of information not protected under the accountant-client privilege" to disclosures required by "a subpoena issued under *specified* federal laws" or by "a summons or subpoena issued under The [Texas] Securities Act." (Tex. B. An., H.B. 608, 83rd Leg., 2013 Reg. Sess., at 1 (2013) (emphasis added).)

The evolution of section 901.457 demonstrates that the "court order" exception cannot be divorced from its broader statutory context. Nevertheless, in its Order, the lower court chose to read the (b)(3) "court order" exception,

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[11] The Order mistakenly indicated that the exception concerned only "federal laws." (*See* R. 12.)

untethered from its statutory history, as a catchall that ignores the enumerated investigative subpoenas in subsection (b)(2). (*See* R. 12 ("[T]he carve out in (b)(3) would be satisfied by an order from this Court compelling compliance by Exxon and PWC of the investigative subpoenas issued by the NYAG . . . .").) The limited case law, developed entirely in the context of discovery disputes arising out of ongoing civil litigation between private parties and the determinations needed for the disposition of those disputes, provides no support for this reading. More importantly, had the Texas legislature intended the "court order" exception to function as a catchall, it would have had no need to amend subsection (b)(2) to add to the privilege's exceptions.

B. The Order Runs Counter to Canons of Statutory Construction Which Require Courts to Read Specifically Enumerated Lists as Exhaustive and Give Effect to Each Statutory Provision.

The lower court's reading of section 901.457 is also flawed because it does not comport with three well-established principles of statutory interpretation.[12]

[12] When interpreting a Texas statute, courts apply Texas canons of statutory construction. *See R.E.G. Flushing Med. PC* v. *Integon Nat'l Ins. Co.*, 31 Misc. 3d 1234(A), *4 (Dist. Ct. Nassau Cty. 2011) (applying North Carolina rules of statutory construction in the court's interpretation of a North Carolina statute); *see also Ogg* v. *Ogg*, 165 S.W. 912, 914 (Tex. Civ. App. 1914) ("[W]here the statutes of another state are pleaded and proven, the courts of this state will refer for its construction to the reports of decisions of that state."); *Carbone* v. *Nxegen Holdings, Inc.*, No. HHDCV136039761S, 2013 WL 5781103, at *4 (Conn. Super. Ct. Oct. 3, 2013) ("In interpreting the Delaware statute, the court applies Delaware's rules of statutory construction.").

First, the lower court's reading expands the investigative "subpoena" exception well beyond the limited exceptions enumerated in subsection (b)(2). Under well-established principles of statutory construction, the express enumeration of a particular thing, person, consequence, or class is tantamount to the express exclusion of all others. *See In re Bell*, 91 S.W.3d 784, 790 (Tex. 2002) ("[E]very word excluded from a statute must be presumed to have been excluded for a purpose." (internal quotation marks omitted)); 67 Tex. Jur. 3d Statutes § 115. In the case of section 901.457, the Texas legislature excepted from the privilege only subpoenas issued pursuant to specific federal and Texas laws listed in subsection (b)(2). *See* Tex. Occ. Code. § 901.457(b)(2). The enumeration of an exception for investigative subpoenas issued pursuant to particularized statutes necessarily implies the exclusion of all others.

The legislature could easily have included a carve out for summons and subpoenas issued pursuant to other states' securities statutes, such as New York's Martin Act, or named other agencies with investigative powers under subsection (b)(2). It chose not to do so, and that choice must be given effect. *See In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008) (observing words not included by the Legislature "were purposefully omitted"); *Comm'n for Lawyer Discipline* v. *Denisco*, 132 S.W.3d 211, 216 (Tex. App. 2004) (rule's omission of any other motion that a court may hear or any other action that the court may take "led to the

unavoidable conclusion that a court has no power to do anything other than what is so carefully and specifically stated in the rule"). Under this well-settled authority, because the PwC Subpoena was not issued pursuant to the specifically enumerated laws in subsection (b)(2), the legislature is presumed not to have intended for there to be an exception for it.

Second, the lower court's reading fails to give effect to the Texas legislature's deliberate decision in 2013 to create a separate exception for investigative subpoenas and, as a result, renders the "subpoena" language in subsection (b)(2) superfluous. When a legislature amends a statute, it "intend[s] to make some changes in the existing law . . . and it is the duty of the courts to give effect to the amendment." *Travenol Labs., Inc.* v. *Bandy Labs., Inc.*, 608 S.W.2d 308, 313-314 (Tex. Civ. App. 1980), *writ refused NRE* (Feb. 4, 1981). By adding an exception for subpoenas issued under specified statutes, the legislature intended this exception to be considered and given effect separate from the existing "court order" exception. *See id.* Despite the fact that subsections (b)(2) and (b)(3) were part of the same exception until 2013, the lower court remarkably rejected ExxonMobil's position that "(b)(2) and (b)(3) must be read together." (R. 12.) The court therefore refused to give effect to the Texas legislature's decision to except from the privilege only those disclosures required to be made in response to subpoenas issued under the authority of certain statutes. (*Id.* (finding "no textural

support for the proposition that the carve out in subsection (b)(3) is tethered to the carve out in subsection (b)(2) while the carve outs in subsections (b)(4), (b)(5), (b)(6), and (b)(7) are not").) By reading subsection (b)(3)'s "court order" exception to include the PwC Subpoena—which was not issued pursuant to any of the specifically enumerated laws in subsection (b)(2)—the lower court rendered the addition of the "subpoena" language to subsection (b)(2) entirely superfluous. That was not the Texas legislature's intent.

Third, and relatedly, having read the subsection (b)(2) exception to be superfluous, the court below proceeded to improperly expand subsection (b)(3) so dramatically that it swallows the exceptions set forth in subsection (b)(2). When a court construes a statute, it is presumed that each sentence, clause, phrase, and word of the statute is intended to be effective. Tex. Gov't Code § 311.021(2) ("In enacting a statute, it is presumed that: . . . the entire statute is intended to be effective."); *see also City of San Antonio* v. *City of Boerne*, 111 S.W.3d 22, 29 (Tex. 2003); *cf*. N.Y. Stat. Law § 97-98 ("All parts of a statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof."). Reading the "court order" exception under subsection (b)(3) to include orders to compel compliance with non-judicial investigative subpoenas not enumerated in subsection (b)(2), the lower court improperly expanded subsection

(b)(3) well beyond its plausible meaning to "swallow up" subsection (b)(2). *See E. El Paso Physicians Med. Ctr., L.L.C.* v. *Vargas*, No. 08-13-00358-CV, 2014 WL 5794622, at *3 (Tex. App. Nov. 7, 2014) (overbroad reading of subsection improperly "threaten[ed] to swallow up the statute in its entirety and render the specifically enumerated class of carefully selected claims essentially meaningless by opening a back door through which virtually any claim could be captured"). To the contrary, the meaning of subsection (b)(3) must be constrained by the subsections around it because all parts of the statute must be read to exist in harmony. The lower court's reading eviscerates the specific and exhaustive exceptions for investigative subpoenas under subsection (b)(2). While the lower court may disagree with Texas's enumerated exceptions, it may not ignore them. The Order below should therefore be reversed.

II. The Lower Court Erred in Applying New York Law to Determine the Application of the Texas Privilege.

The lower court's alternative holding that New York privilege law controls this case is erroneous. The court's holding that New York law necessarily governs the Attorney General's motion because "controlling authority" dictates that courts apply the privilege "law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding" (R. 12.) is contrary to the weight of precedent, which requires a balancing of competing interests. As the Court of Appeals first articulated in *Babcock* v. *Jackson*, 12

N.Y.2d 473 (1963), when determining which forum's laws to apply, courts must "giv[e] controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has *the greatest concern with the specific issue raised in the litigation*." *Id.* at 481 (internal quotation marks and citation omitted) (emphasis added). The Court of Appeals has repeatedly affirmed the choice-of-law approach articulated in *Babcock*. *See, e.g.*, *Edwards* v. *Erie Coach Lines Co.*, 17 N.Y.3d 306, 318 (2011) (New York "abandoned what had long been our choice-of-law rule whereby the law of the place of the tort invariably governed").

Lower courts have heeded this command and have balanced competing interests when determining which forum's privilege law to apply. In *Hyatt* v. *State Franchise Tax Board*, the Second Department considered whether to apply the privilege law of New York or Nevada in connection with *subpoenas duces tecum* served by the California Franchise Tax Board on Hyatt's former business partner, Philips, in connection with a California tax proceeding. 105 A.D.3d 186, 191 (2d Dep't 2013). The California Tax Board subpoena sought documents related to licensing agreements, payments, and communications between Hyatt, a Nevada resident at the time the documents were prepared, and Philips, a New York-based company. *Id.* at 194. The Tax Board also sought to depose attorneys who worked for Philips. *Id.* After noting that "New York courts

apply an interest analysis" to "determine which state's privilege law should apply" to the document and deposition subpoenas, the court held that "New York has the greatest interest in applying its privilege law to the subject subpoenas, which seek documents created in New York regarding a licensing program administered in New York by. . . a New York corporation, and to depose New York-based attorneys." *Id.* at 204. Conversely, Nevada's only connection to the dispute was "Hyatt's alleged (and disputed) residency in Nevada during a portion of the relevant period." *Id.* Like the instant case, *Hyatt* concerned a state investigative subpoena issued to an out-of-state entity. *See id.* at 192. However, *Hyatt* did not apply California law even though the documents sought were to be introduced in a California proceeding—in fact, the court did not even consider applying California law to the privilege question at issue. The interest balancing in *Hyatt* stands in stark contrast to the lower court's rigid choice-of-law rule under which privilege is always controlled by the law of the forum hearing the discovery motion or state in which the evidence is to be introduced.

Hyatt follows this Court's decision in *First Interstate Credit Alliance* v. *Arthur Anderson & Co.*, which considered whether to apply New York or Maryland privilege law in determining the applicability of an accountant-client privilege in a fraud action brought in New York state court. 150 A.D.2d 291, 292 (1st Dep't 1989). In that decision, this Court employed a balancing test to

determine that New York privilege law controlled because much of the conduct underlying the dispute occurred in New York and Maryland had only a "limited" connection to the issue in the lawsuit. *Id.* at 293.

Federal courts sitting in diversity likewise have applied New York's "interest-balancing test to determine which state has the greatest interest in applying its law" to resolve choice-of-law disputes regarding evidentiary privileges. *See Conduit* v. *Dunne*, 225 F.R.D. 100, 108 (S.D.N.Y. 2004) (applying New York privilege law because New York had the greater interest); *see also Tartaglia* v. *Paul Revere Life Ins. Co.*, 948 F. Supp. 325, 326 (S.D.N.Y. 1996) ("[I]n determining which state's law of privileges applies to this discovery dispute, the Court must refer to New York's conflict of laws rules. New York choice of law gives 'controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.'" (quoting *Babcock*, 12 N.Y.2d at 481-82)).

Despite the controlling precedent of *Babcock* and its progeny, the lower court neglected to balance the interests of Texas and New York and summarily concluded that "controlling authority holds that [t]he law of the place where the evidence . . . will be introduced at trial or the location of the discovery proceeding controls." (R. 12.) This one-sentence holding misapprehends the

weight of the controlling authority and the analysis in the cases it relies upon for its conclusion. Specifically, as articulated above, the weight of controlling authority does not support the lower court's categorical approach and instead *requires* a balancing of the competing interests of each jurisdiction. Interest balancing "usually [leads] New York courts to apply the law of the jurisdiction in which the assertedly privileged communications were made, which in most of the cases was also the jurisdiction in which the party that made the communications resided." *See, e.g.*, *Delta Fin. Corp.* v. *Morrison*, 13 Misc. 3d 1229(A) (Sup. Ct. 2006) (internal quotation marks and citation omitted). Courts have reached this conclusion because "the parties who made the communications expected that those communications would remain confidential under the law of that jurisdiction, and the state has an interest in furthering the policies behind the privilege at issue." *Id.* (internal quotation marks and citation omitted).

It is of course true that, in certain cases, the state in which the "proceeding" is located and the state with the greatest interest are one and the same. But there is no way of knowing whether that was true here because the court below failed to analyze the question. The lower court should have identified the interests of Texas and New York and then weighed those interests to determine which jurisdiction had the "greatest concern with the specific issue raised" in the Attorney General's application. *Babcock*, 12 N.Y.2d at 481. Had the lower court

conducted an interest analysis, it too would have found that Texas, not New York, law applies because ExxonMobil is based in Texas, the materials at issue are located in Texas, the PwC audit team is based in Texas, and the communications at issue were made in Texas.

The purported "controlling authority" cited by the lower court does not countenance the court's failure to conduct this analysis. For example, *People* v. *Greenberg*, 50 A.D. 3d 195 (1st Dep't 2008), involved an appeal by two former officers of American International Group, Inc. ("AIG"), who sought to obtain legal memoranda prepared by AIG's counsel during their tenure as officers of AIG. *Id.* at 197-98. The officers argued that they were entitled to the documents under Delaware law, while AIG claimed the documents were protected from disclosure under New York law because the privilege attaching to the documents belonged to the corporation alone and could properly be asserted against former officers. *Id.* at 198. The majority opinion began its analysis with the observation that "courts *routinely* apply the law of the place where the evidence in question will be introduced." *Id.* at 198. But it did not stop there. The court focused on the facts that (i) the privileged communications were made in New York; (ii) there was an actual case that had been filed in New York in which the communications were sought in order for the defendants to mount a defense; (iii) the discovery was sought in New York; and (iv) the plaintiff was the New York Attorney General.

Id. at 199.[13] It thereafter held that New York law should apply because New York had the most significant interest in the case, while "other than being the state where AIG was incorporated, Delaware ha[d] *no connection to the litigation*." *Id.* at 199 (emphasis added). Having determined that New York law applied, the court concluded that the former officers were entitled to obtain the legal memoranda. *Id.*at 199; *see also Warren* v. *Amchem Prods., Inc.*, 2016 NY Slip Op 31393[U], *11 (Sup. Ct., N.Y. Cty. 2016) ("As defendant correctly notes, [*Greenberg*] held that New York courts routinely apply the law of the place where the evidence will be introduced when deciding privilege issues, *but nevertheless applied an interest analysis in concluding that New York law governed in lieu of Delaware law*." (emphasis added)).

The lower court ignored entirely the balancing analysis that this Court undertook in *Greenberg*, transforming this Court's observation about what courts *routinely* do after a balancing analysis into a dictate that no balancing need be

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[13] Notably, Justice Friedman concurred in the decision but wrote separately because she believed that both New York and Delaware law compelled the court's decision. *Greenberg*, 50 A.D. 3d at 204. Justice McGuire also concurred in the decision, but wrote separately because he believed that Delaware law controlled the case. *Id.* at 208. Both concurrences make clear that the decision involved an interest balancing analysis. *See id.* at 203-04, 208-09.

performed.[14] That is not the law, and the lower court's decision on this point should be reversed.

III. The Lower Court Improperly Decided a Privilege Question of First Impression on a Barren Record.

At the time of the argument below, a significant part of the PwC production had yet to be provided to ExxonMobil for privilege review, which remains the case as the date of this filing. Nonetheless, the lower court erroneously took the extraordinary step of deciding issues of first impression under Texas law without reviewing a single document or considering whether, in any concrete sense, overriding the Texas accountant-client privilege was justified in this case.

Resolving the privilege dispute between the Attorney General and ExxonMobil on a barren record was premature and unwarranted: courts typically resolve privilege disputes after there has been an assertion of privilege. *See, e.g.*, *Willis* v. *Willis*, 79 A.D.3d 1029, 1030 (2d Dep't 2010) ("The scope of the [attorney-client] privilege is to be determined on a case-by-case basis."); *Pritchard*

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[14] The court below also cites *JP Morgan Chase & Co.* v. *Indian Harbor Ins. Co.*, 98 A.D.3d 18 (1st Dep't 2012), *Fine* v. *Facet Aerospace Products Co.*, 133 F.R.D. 439 (S.D.N.Y. 1990), and *G-I Holdings, Inc.* v. *Baron & Budd*, No. 01 CIV. 0216 (RWS), 2005 WL 1653623, at *2 (S.D.N.Y. July 13, 2005), all of which highlight only the location of the proceedings in their analysis, without any recognition of *Babcock* or the need to conduct interest balancing. *Babcock* and its progeny demand a more in-depth balancing of the competing interests. Moreover, *JP Morgan* relies exclusively on *Greenberg* for this proposition, a case in which, as noted above, this Court in fact balanced interests to resolve the privilege choice of law question. *See Greenberg*, 50 A.D.3d at 199.

v. *County of Erie*, No. 04CV534C, 2006 WL 2927852, *3 (W.D.N.Y. 2006) (declining to resolve privilege dispute prior to deposition; noting "normal practice" dictates that deposition should proceed so that parties may "create a record of where questionable inquiries, objections, or assertions of privilege arose and furnish a context for the dispute," thereby enabling the court to resolve the dispute on a "concrete record").

A deliberate, document-by-document review would have been particularly prudent here where the lower court was asked to decide the scope of a Texas statute with virtually no guidance from the Texas state courts. Because no Texas court had opined on the investigative subpoena exception—or even definitively decided the scope of the Texas accountant-client privilege[15]—considerations of comity cautioned against resolving these issues without a full record. In New York, "comity is . . . a voluntary decision by one state to defer to the policy of another." *Boudreaux* v. *State of La., Dep't of Transp.*, 11 N.Y.3d 321, 326 (2008). In applying the doctrine of comity, New York courts "defer to

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[15] In the lower court, the Attorney General argued that section 901.457 does not qualify as an evidentiary privilege, in part because the word "privilege" does not appear in the provision's text. (*See* R. 43.) However, the fact that the text of section 901.457 does not mention the word privilege is not dispositive as to whether the statute creates a privilege. Several other states statutes similarly do not include the word privilege in the text of the statute creating the privilege. *See, e.g.*, N.M. Stat § 38-6-6 (2013); Tenn. Code § 62-1-116; *see also* David M. Greenwald et al., *Testimonial Privilege* 737 (2015 ed.) (noting that New Mexico and Tennessee courts have recognized an accountant-client privilege pursuant to those state's statutes).

. . . the public policy embodied within the statute enacted by [the foreign] *legislature*." *Id.* at 325-26 (emphasis added). Accordingly, deference to a foreign legislature can be particularly important when considering questions of privilege. *Cf. Stinson* v. *City of N.Y.*, No. 10 CIV. 4228 (RWS), 2015 WL 8675360 (S.D.N.Y. Dec. 11, 2015) ("[A]s a matter of comity, federal courts must balance the deference to be accorded state created privileges with the need for the information sought to be protected by the privilege."); *Daniels* v. *City of N.Y.*, No. 99 CIV 1695, 2001 WL 228091, at *1 (S.D.N.Y. Mar. 8, 2001) (noting that, as a matter of comity, "the policies underlying state evidentiary privileges must still be given serious consideration, even if they are not determinative" (internal quotation marks and citations omitted)). ExxonMobil is unaware of any case—and the Attorney General identified none below—where a court resolved an unsettled issue under another state's privilege law without reviewing a single disputed document.

Here, Texas has statutorily expressed its public policy by creating a privilege provision entitled "Accountant-Client Privilege," Tex. Occ. Code § 901.457, which is consistent with its broader policy of extending privileges to additional professional relationships beyond those identified in the Texas Rules of Evidence through the Texas Occupations Code.[16] Texas has a legitimate interest in

[16] *See, e.g.*, Tex. Occ. Code § 160.007 (medical peer review privilege); *id.* § 258.102 (dentist-patient privilege); *id.* § 202.402 (podiatrist-patient privilege); *In re Higgins*, 246 S.W.3d 744, 745 (Tex. App. 2007) (holding dental records to be privileged based on a "plain reading of"

the issue of whether Texas law protects communications made in Texas among speakers located in Texas. Neither the court below nor the Attorney General identified any countervailing interest that would warrant the lower court's decision to set aside the conventions of both New York and Texas and issue its decision on the undeveloped record before it. *See In re Baytown Nissan Inc.*, 451 S.W.3d 140, 147 (Tex. App. 2014) ("declin[ing] to adopt a blanket rule of privilege between a trade association's members and the association's counsel" and holding that, "[c]onsistent with our precedent," privilege determinations "must be determined on a case-by-case basis").

CONCLUSION

The state of Texas created an evidentiary accountant-client privilege in Occupations Code section 901.457 to promote honest and open communications between an accountant and its client. Since its enactment, the evidentiary privilege has included specifically enumerated exceptions. Under the lower court's Order, though, there is only one exception that matters: the "court order" exception, which allows out-of-state regulators to bypass the limited investigative subpoena exception by obtaining—with no evidentiary showing—a *pro forma* court order. Such an outcome is not what the Texas legislature intended and runs counter to

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Tex. Occ. Code § 258.102); *In re Living Centers of Texas, Inc.*, 175 S.W.3d 253, 257 (Tex. 2005) (observing that the privilege in § 160.007 extends to communications to a medical peer review committee).

section 901.457's statutory structure and history, as well of canons of interpretation. Compounding its error, the court below misapplied well-established precedent to adopt a rigid choice-of-law test that is unsupported in the case law. New York courts have long applied interest-balancing to resolve choice-of-law questions in the privilege context, and the lower court ignored the weight of authority when it mechanically held that New York privilege law controlled. Finally, contrary to well-established principles of comity in the context of privilege determinations, the court below took the novel approach of resolving a privilege dispute on a barren record. For the foregoing reasons, the lower court's Order should be reversed.

Dated: New York, New York
November 7, 2016

Respectfully submitted,

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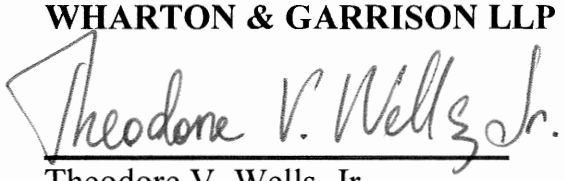

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I hereby certify pursuant to 22 NYCRR § 600.10 that the foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used, as follows:

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

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, For an order pursuant to C.P.L.R. § 2308(b) to compel compliance with a subpoena issued by the Attorney General -against- PRICEWATERHOUSECOOPERS LLP and EXXON MOBIL CORPORATION, Respondents.	Index No. 451962/2016 IAS Part 61 Justice Barry Ostrager

PREARGUMENT STATEMENT

Respondent-Appellant Exxon Mobil Corporation ("ExxonMobil") submits this Pre-Argument Statement pursuant to § 600.17 of the Rules of the Appellate Division of the Supreme Court of the State of New York, First Department.

1. **TITLE OF ACTION:** The action's title is set forth in the caption above.

2. **FULL NAMES OF ORIGINAL PARTIES:** The original parties are those identified in the caption above, The People of the State of New York, by Eric T. Schneiderman, Attorney General of the State of New York and PricewaterhouseCoopers LLP and Exxon Mobil Corporation.

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5. COURT FROM WHICH APPEAL IS TAKEN: This appeal is taken from an Order of the Supreme Court of the State of New York, County of New York (Honorable Barry Ostrager) (IAS Part 61), dated on October 26, 2016 and entered in the

Office of the Clerk of New York County on October 26, 2016. Notice of Entry of the Order was served on the parties on October 27, 2016 by Respondent-Appellant Exxon Mobil Corporation.

6. NATURE AND OBJECT OF CAUSES OF ACTION: On August 19, 2016, the People of the State of New York, by the Attorney General of the State of New York, Eric T. Schneiderman, issued a subpoena (the "PwC Subpoena") to ExxonMobil's independent auditor, PricewaterhouseCoopers LLP ("PwC").

On October 14, 2016, the Attorney General filed a proposed order to show cause, moving to compel PwC and ExxonMobil to comply with the PwC Subpoena without applying the accountant-client privilege as recognized under Texas Occupations Code § 901.457.

7. RESULT REACHED IN COURT BELOW: On October 26, 2016, the Honorable Barry Ostrager granted the Attorney General's motion to compel, ordering PwC and ExxonMobil to comply with the PwC Subpoena because (1) the Texas accountant-client privilege does not preclude disclosure of documents pursuant to the PwC Subpoena; and (2) even if there were an accountant-client privilege under Texas law, New York law applies to the Attorney General's motion. This appeal arises from that Order, dated October 26, 2016.

8. GROUNDS FOR SEEKING REVERSAL: Respondent-Appellant ExxonMobil seeks reversal of the trial court's Order, dated October 26, 2016, on the grounds that it incorrectly decided two issues of first impression in granting the Attorney General's Motion to Compel, the first regarding the applicability of the Texas accountant-client privilege to an investigative subpoena, and the second regarding the

operation of choice of law principles to determine what privilege law applies to an investigation as opposed to an ongoing litigation.

9. RELATED ACTIONS OR PROCEEDINGS NOW PENDING IN ANY COURT: There are no related actions or proceedings concerning the PwC Subpoena that are now pending in any court of this or any jurisdiction.

Dated: New York, New York
October 27, 2016

Respectfully submitted,

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