No. 451962/16

To be argued by:
ERIC DEL POZO

Supreme Court, New York County

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-Respondent,

For an Order Pursuant to C.P.L.R. 2308 to Compel Compliance
with a Subpoena Issued by the Attorney General

-against-

PRICEWATERHOUSECOOPERS LLP,

Respondent-Respondent,

-and-

EXXON MOBIL CORPORATION,

Respondent-Appellant.

BRIEF FOR PETITIONER-RESPONDENT

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Dated: December 7, 2016

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PRELIMINARY STATEMENT

In this appeal, ExxonMobil Corp. (Exxon) challenges an order compelling Exxon's independent auditor, PricewaterhouseCoopers LLP (PwC), to produce documents responsive to an investigative subpoena issued by the Office of the New York State Attorney General (NYOAG). PwC has not raised any defense to compliance. Exxon's lone objection to PwC's compliance is a claim that certain of the requested documents are protected from court-ordered disclosure by section 901.457 of the Texas Occupations Code. Supreme Court, New York County (Ostrager, J.), rejected that contention. This Court should affirm.

There is no merit to Exxon's assertion that § 901.457 creates an evidentiary accountant-client privilege. That provision merely instructs licensed Texas accountants to refrain from voluntarily revealing client information. And under the statute's plain terms, any confidentiality duty yields when disclosure is required by a court order—such as the order below, which compelled PwC to produce documents responsive to the investigative subpoena here. Indeed, the statute's broad exception for court orders means that § 901.457 cannot create an evidentiary privilege, as such privileges exist specifically to *block* compelled

disclosure. Unsurprisingly, then, no available decision of any Texas court has construed § 901.457 to create an evidentiary privilege in the statute's quarter-century existence.

In any event, even if an accountant-client evidentiary privilege existed under Texas law, Exxon's position here still would not be justified. New York law indisputably contains no such privilege. And New York's privilege law would apply to this proceeding in the case of any conflict with Texas law. Finally, there is no merit to Exxon's assertion that a court cannot properly decide a purely legal question—whether § 901.457 establishes an evidentiary privilege—without first conducting an in camera review of individual documents that Exxon seeks to withhold.

ISSUES PRESENTED

1. Does a Texas statute that expressly permits accountants to disclose client information when required by a court order create an evidentiary privilege against court-ordered disclosure?

2. Assuming that such an evidentiary privilege existed, would the privilege apply in this New York subpoena enforcement proceeding arising from the NYOAG's fraud investigation of a company doing business in New York?

3. Must a court refrain from deciding the purely legal question whether a statute creates an evidentiary privilege until the court has inspected specific documents as to which that privilege is being asserted?

Supreme Court answered no to all three questions.

STATEMENT OF THE CASE

A. A Texas Accountant's Duty of Confidentiality Under Texas Law

This appeal turns in part on whether an accountant-client evidentiary privilege exists under Texas law. There is no dispute that such a privilege existed between 1979 and 1983. *See* S.B. 797, § 26, 66th Leg., Reg. Sess. (Tex. 1979), codified at Tex. Rev. Civ. Stat. art. 41a-l, § 26 (repealed eff. Sept. 1, 1983); *see also* Br. for Resp.-Appellant (Br.) at 15 n.8. The governing statute provided that, without client permission, a licensed accountant "shall not be required to disclose or divulge information" learned in the course of performing accounting services. Tex. Rev. Civ. Stat. art. 41a-l, § 26(a). Until its repeal in 1983, the law "deemed" all such information to be "confidential and privileged," *id.*, with exceptions for civil actions brought by clients, disciplinary proceedings, and criminal cases, *id.* § 26(b)(1)–(3).

In 1989, the Texas legislature enacted a new statute imposing a duty of confidentiality on accountants.[1] The current version resides at

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[1] The Texas Rules of Evidence designate communications with an accountant privileged only when the accountant acts as the agent of a

(*continued on the next page*)

section 901.457 of the Texas Occupations Code, which begins by providing that a licensed public accountant in Texas "may not voluntarily disclose information communicated" by a client "in connection with services provided to the client," unless the client consents to disclosure. Tex. Occ. Code § 901.457(a).[2]

Section 901.457 enumerates a series of circumstances in which the statute "does not prohibit a license holder from disclosing" client information, even without the client's consent. *Id.* § 901.457(b). One such exception—which Supreme Court found dispositive here—extends to any information that "is required to be disclosed . . . under a court order signed by a judge if the order: (A) is addressed to the [accountant]; (B) mentions the client by name; and (C) requests specific information concerning the client." *Id.* § 901.457(b)(3). A separate exception allows for disclosure in response to "a summons or subpoena" issued by the Internal Revenue Service, the Securities and Exchange Commission, or

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lawyer providing legal advice. *See* Tex. R. Evid. 503(a)(4)(B); *Parker v. Carnahan*, 772 S.W.2d 151, 157 (Tex. App. 1989).

[2] Texas Occupations Code § 901.457 is reproduced in full in an addendum to this brief.

the Texas State Securities Board. *See id.* § 901.457(b)(2). The remaining exceptions to confidentiality apply to publication of audit reports, investigations and peer reviews of Texas accountants, and potential mergers of Texas accounting firms. *Id.* §§ 901.457(b)(1), (b)(4)–(b)(7).

Disclosure of confidential information in situations other than those just recited can prompt disciplinary sanctions, ranging from a reprimand to a license suspension or revocation. *See id.* §§ 901.501(a), 901.502(5).

B. The New York Attorney General's Investigation of Exxon for Possible Securities, Business, and Consumer Fraud Under New York Law

1. The investigation's factual basis

This appeal arises from an order compelling compliance with a document subpoena issued to PwC in furtherance of the NYOAG's investigation of Exxon for possible violations of New York business, securities, and consumer fraud laws.

In the years leading up to the NYOAG's investigation, Exxon made numerous public statements concerning its purported understanding of the causes, course, and business and financial impact of climate change. For example, a 2014 report (titled "Energy and

Carbon—Managing the Risks") assured investors that Exxon was "confident that none of [its] hydrocarbon reserves are now or will become 'stranded,'" *i.e.*, not economically recoverable. The same report also claimed that Exxon factors the likely cost of carbon regulation into corporate decision-making. Apparent contradictions between some of Exxon's public statements and internal company documents that became available in early 2015, along with apparent contradictions within Exxon's public reporting, suggested that Exxon may not have accurately portrayed the company's own conclusions or beliefs on these topics in statements to investors and consumers.[3] (Record on Appeal (R.) 95.)

In November 2015, the NYOAG accordingly issued a document subpoena to Exxon under General Business Law § 352 *et seq.* (the Martin Act), New York's securities fraud statute; Executive Law § 63(12), which prohibits ongoing fraud or illegality in the conducting of

[3] A more detailed overview of the basis of the investigation and subpoena appears in the Affirmation of Katherine C. Milgram and accompanying exhibits (Record on Appeal 94–306).

business; and General Business Law § 349, New York's consumer fraud statute (*see* R. 95, 308, 416).

Massachusetts also is investigating Exxon's possible violations of that State's laws and has demanded relevant documents from Exxon. In June 2016, Exxon sued the Massachusetts Attorney General in a Texas federal court under 42 U.S.C. § 1983, seeking to quash Massachusetts' demand as violating Exxon's rights under the First Amendment and various other provisions of the U.S. Constitution. *See* Br. at 5–7 (discussing complaint at R. 355–387). On October 17, 2016—one business day after this state court subpoena enforcement proceeding against PwC and Exxon began—Exxon moved to add the NYOAG as a defendant in the federal action (*see* R. 388–407).

Following Supreme Court's order directing full compliance with the subpoena issued to PwC (see *infra* at 14–15), the Texas federal court granted Exxon's motion to amend. In November 2016, Exxon thus added the NYOAG as a defendant to the pending federal case, alleging that the subpoena issued by the NYOAG to Exxon a year earlier, in November 2015, also violated Exxon's constitutional rights—despite

that Exxon already had produced over one million pages of documents in response to that subpoena (*see* R. 408–456).

In this proceeding, and in stark contrast to the allegations in Texas, neither Exxon nor PwC contests the NYOAG's authority under Executive Law § 63(12) or the Martin Act to subpoena documents in furtherance of the investigation of Exxon (R. 98). These parties have therefore conceded that the NYOAG's investigation has "some factual basis" and that "the information sought bears a reasonable relationship to the subject matter under investigation and the public interest to be served." *Matter of Am. Dental Co-op., Inc. v. Att'y-Gen.*, 127 A.D.2d 274, 280 (1st Dep't 1987) (reciting standard for ordering compliance with NYOAG subpoena). At the hearing below, Supreme Court noted—without any objection from Exxon—that the subpoena at issue here was presumed to be "reasonable and appropriate" (R. 31). And Exxon did not dispute the express premise that the NYOAG's investigation is being conducted in "good faith" (R. 79–80).

2. The document subpoena issued to PwC

Since before 2010, PwC has served as Exxon's independent auditor. In that role, PwC audits and opines on the accuracy of the disclosures in Exxon's financial statements. According to Exxon, PwC's audits extend to Exxon's "'internal control over financial reporting' and 'overall financial statement presentation,' including 'assessing the risk that a material weakness exists'" (R. 97 (quoting Exxon's publicly filed 2015 annual report)). PwC also has acted as a global advisor and report writer for the Carbon Disclosure Project, a nonprofit organization that works with companies to disseminate environmental information, such as greenhouse-gas emissions statistics and other data relating to climate change (R. 97–98).

On August 19, 2016, the NYOAG served PwC with a subpoena for documents concerning PwC's audits of Exxon. The requested materials pertain to the accuracy of Exxon's public statements about the impact of climate change and related policies on Exxon's business, including on its reserves, impairments, and capital expenditures. (R. 101–119.)

Prior to the subpoena's return date, counsel for PwC confirmed to the NYOAG that PwC likely possessed responsive documents and would

develop a plan for production. The NYOAG then agreed to extend the return date by a week. At no point did PwC mention any purported accountant-client privilege. (R. 98–99.)

3. Exxon interferes with PwC's response by asserting a nonexistent privilege

In a phone discussion two days before the subpoena's revised return date, counsel for Exxon told the NYOAG that Exxon planned to assert an accountant-client privilege over responsive documents under Texas Occupations Code § 901.457. The next day, counsel for PwC relayed that Exxon had instructed PwC to deliver all responsive documents to Exxon for a privilege review before production. At PwC's request, and without agreeing that any such privilege existed or would apply, the NYOAG again agreed to extend the return date. (R. 99.)

On September 23, 2016, the subpoena's new return date, Exxon's counsel wrote a letter to the NYOAG "to confirm [Exxon's] intention . . . to assert the accountant-client privilege, codified at Section 901.457 of the Texas Occupations Code, with respect to certain documents that may be responsive to" the PwC subpoena (R. 283). According to Exxon, the privilege would be asserted "on a

document-by-document basis" and a privilege log provided "45 days after production" (R. 283–284). The letter cited no authority for the notion that the duty of confidentiality in § 901.457 created an evidentiary privilege.

On Friday, October 14, 2016, Katherine Milgram, Chief of the NYOAG's Investor Protection Bureau, told Exxon's counsel in a voice message that the privilege claim was unsupported and provided no basis for a "document-by-document review for this privilege" (R. 328). Ms. Milgram requested a response "as soon as possible" (R. 328). Several hours later, Exxon's counsel responded by email offering to "arrange a call next week" (R. 329). Exxon then spent the weekend preparing (or finalizing) a proposed amended federal complaint seeking to enjoin the NYOAG from enforcing its prior subpoena to Exxon. The proposed complaint was filed in Texas the following Monday morning, after this proceeding had begun. See *supra* at 8.

C. This Subpoena Enforcement Proceeding

1. The Attorney General moves to compel PwC's full compliance

Faced with the prospect of a protracted document-by-document review for an illusory privilege, plus an additional period of six weeks from any production for a privilege log, the NYOAG moved under C.P.L.R. 403(d) and 2308(b) for a court order compelling PwC's immediate and full compliance with the subpoena (R. 94).

At the motion hearing below, PwC expressly declined to defend the alleged existence of an accountant-client evidentiary privilege under Texas Occupations Code § 901.457 (R. 33–34). Exxon alone argued that such a privilege existed and would bar disclosure even under a court order, despite the exception in § 901.457(b)(3) permitting disclosure under court orders (R. 51–57). Exxon contended that Texas law should govern because the NYOAG had not yet filed a fraud complaint, thus distinguishing this situation from those where New York courts have applied New York privilege law in active state enforcement suits; according to Exxon, this still "is a mere investigation," which the NYOAG "ha[s] the right to conduct" (R. 49).

At the hearing, counsel for Exxon also outlined the three-step "protocol" that Exxon has put in place for privilege review (R. 36). First, PwC searches for responsive documents, which are sent to Exxon's counsel; second, Exxon's counsel reviews all documents for the alleged Texas privilege; and third, PwC re-reviews the subset of documents marked by Exxon's counsel as "privileged" to determine whether these materials in fact reflect confidential communications between Exxon and PwC (R. 36). During this process, PwC has refused to permit Exxon itself (as opposed to its lawyers) to review responsive material; according to Exxon's counsel, this "disagreement" between the parties has further delayed compliance (R. 36–37).

2. Supreme Court orders PwC to produce all responsive documents

By Decision and Order issued on October 25, 2016, and corrected on October 26, 2016, Supreme Court (Ostrager, J.) granted the NYOAG's motion in all respects and ordered PwC to produce all documents responsive to the investigative subpoena (R. 9–13, 89).

The court held that Texas Occupations Code § 901.457 "does not preclude production of the requested documents" as a matter of that

statute's "plain meaning" (R. 10–11). The court reasoned that the exception in § 901.457(b)(3) allowing disclosure pursuant to a court order "would be satisfied by an order from this Court compelling [PwC's] compliance" with the subpoena, inasmuch as the subpoena requests "specific information concerning Exxon" (R. 12).

Supreme Court further held that, in any event, New York privilege law governs this proceeding (R. 12). The court thus concluded that even "[i]f there were an applicable accountant-client privilege under Texas law, it would be nevertheless unavailing" (R. 12).

Following the ruling, Exxon and PwC stipulated to the production of all responsive documents not subject to an alleged privilege claim. *See* Stip. & Order for Partial Stay ¶ 4, *People ex rel. Schneiderman v. PricewaterhouseCoopers LLP*, No. 451962/16 (Sup. Ct. N.Y. County Nov. 1, 2016).

ARGUMENT

POINT I

SUPREME COURT'S ORDER OF PRODUCTION VITIATES ANY CONFIDENTIALITY RESTRICTION ON PWC UNDER TEXAS LAW

Supreme Court properly ordered PwC to comply with the NYOAG's investigative subpoena without regard to Exxon's assertions of a purported defense of an accountant-client evidentiary privilege.

Exxon's invocation of an alleged Texas evidentiary privilege in this New York judicial action implicates choice-of-law principles. The "first step" of any such analysis "is to determine whether there is an actual conflict between the laws of the jurisdictions involved." *Matter of Allstate Ins. Co. (Stolarz)*, 81 N.Y.2d 219, 223 (1993). "If no conflict exists, then the court should apply the law of the forum state in which the action is being heard." *Excess Ins. Co. v. Factory Mut. Ins. Co.*, 2 A.D.3d 150, 151 (1st Dep't 2003), *aff'd*, 3 N.Y.3d 577 (2004).

As Supreme Court correctly concluded (R. 10–12), there is no conflict between the relevant laws of New York and Texas. New York does not recognize an accountant-client evidentiary privilege. *See First Interstate Credit All., Inc. v. Arthur Andersen & Co.*, 150 A.D.2d 291, 292 (1st Dep't 1989). Likewise, there is no "authority for the proposition

that an accountant-client evidentiary privilege exists in Texas." *In re Patel*, 218 S.W.3d 911, 920 n.6 (Tex. App. 2007). Under Texas law, such a privilege must derive from that State's Constitution, a state statute, or a rule promulgated under statutory authority. *See* Tex. R. Evid. 501(c); *In re Fisher & Paykel Appliances, Inc.*, 420 S.W.3d 842, 848 (Tex. App. 2014). Exxon's attempt to conjure an evidentiary privilege from Texas Occupations Code § 901.457 lacks merit.

A. Texas Occupations Code § 901.457 Does Not Create an Evidentiary Privilege.

Statutory interpretation begins "with the statute's words" and analyzes "those words within their context." *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 562 (Tex. 2014); *see In re Ford Motor Co.*, 442 S.W.3d 265, 271 (Tex. 2014) (considering "ordinary meaning" of statutory text within its "lexical environment").[4]

Texas Occupations Code § 901.457 imposes a duty of confidentiality on accountants licensed in Texas, such as PwC. It provides that an accountant "may not voluntarily disclose information"

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[4] The NYOAG agrees that Texas case law governs the interpretation of § 901.457. *See* Br. at 21 n.12.

received from a client, "except with the permission of the client." Tex. Occ. Code § 901.457(a). Section 901.457 then enumerates various circumstances in which the statute "does *not* prohibit" an accountant from revealing client information. *Id.* § 901.457(b) (emphasis added). One such circumstance exists where the information "is required to be disclosed . . . under a court order signed by a judge if the order: (A) is addressed to the [accountant]; (B) mentions the client by name; and (C) requests specific information concerning the client." *Id.* § 901.457(b)(3).

Exxon's assertion that this provision establishes an "evidentiary accountant-client privilege" (Br. at 1, 15, 35) fails for at least three related reasons.

First, § 901.457 imposes a duty exclusively on accountants themselves, who "may not *voluntarily disclose* information" learned from the client without the client's permission. Tex. Occ. Code § 901.457(a) (emphasis added). A law aimed only at a professional's own "authority or lack thereof to disclose" records does not create an evidentiary privilege under Texas law. *Rodriguez v. State*, 469 S.W.3d 626, 633 (Tex. App. 2015); *see also In re Monsanto Co.*, 998 S.W.2d 917,

922 (Tex. App. 1999) (recognizing that evidentiary privileges prohibit "involuntary disclosure").

By contrast, the former Texas provision creating an accountant-client evidentiary privilege commanded that a licensed accountant "shall not *be required* to disclose or divulge information" learned from a client. Tex. Rev. Civ. Stat. art. 41a-l, § 26(a) (emphasis added). Examples of similar evidentiary privileges abound in Texas law.[5] For instance, "statement[s] or record[s]" prepared during peer review of licensed Texas accountants are not "subject to discovery, subpoena, or other means of legal compulsion for release to" third parties. Tex. Occ. Code § 901.161(a). Exxon cites yet more examples from the Texas Occupations Code (Br. at 34 n.16): § 160.007(e), which provides that medical peer-review communications are "not subject to subpoena or discovery" and are "not admissible as evidence in any civil

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[5] While mentioning that § 901.457 is titled "Accountant-Client Privilege" (Br. at 2, 13, 34), Exxon does not explicitly argue that this title controls the statute's interpretation. Indeed, the title of a Texas statute "has no enacting force," *Moore v. Trevino*, 94 S.W.3d 723, 726 (Tex. App. 2002), and "does not limit or expand" the law's meaning, Tex. Gov't Code § 311.024. The statute in place from 1979 to 1983, which indisputably created an accountant-client evidentiary privilege, was titled "Client-Accountant Communications." *See* Br. at 15 n.8.

judicial or administrative proceeding"; and § 258.102(a), which states that dental records are "privileged and may not be disclosed except" in fee-collection and malpractice suits. These provisions show that the Texas legislature knows how to create a privilege "when it deems the situation appropriate."[6] *In re Fisher & Paykel*, 420 S.W.3d at 848.

Second, § 901.457(b)(3) explicitly does "not prohibit" disclosure when required by "a court order" that is "signed by a judge" and that directs an accountant to release "specific information concerning the client." In general, "privileged matters are not discoverable." *In re Anderson*, 973 S.W.2d 410, 411 (Tex. App. 1998); *see also* Tex. R. Civ. P. 192.3(a); C.P.L.R. 3101(b); Edward J. Imwinkelried, 2 *The New Wigmore–A Treatise on Evidence: Evidentiary Privileges* § 1.3 (2016 rev.). Provisions broadly allowing disclosure under court orders, as here, cannot create evidentiary privileges by definition. *See In re Arriola*, 159

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[6] The same is true of other States' legislatures, and thus Exxon gains little from relying on decisions of those States' courts. *See* Br. at 15; Fla. Stat. § 90.5055(2) ("A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications with an accountant . . . ."); Ga. Code § 43-3-29(b) (deeming accountant-client communications "privileged" from disclosure "in all courts or in any other proceedings whatsoever").

S.W.3d 670, 676 (Tex. App. 2004) (reaching this conclusion in regard to Texas medical confidentiality laws). It is thus unsurprising that "no court has elevated the professional standard established by this statute to an evidentiary privilege." *Canyon Partners, L.P. v. Developers Diversified Realty Corp.*, 2005 WL 5653121, at *1 n.2 (N.D. Tex. 2005) (holding that nothing in § 901.457 prevented court from ordering compliance with subpoena).

No different conclusion arises from the fact that, as originally enacted in 1989, § 901.457 contained an even broader exception permitting disclosure in any "'court proceeding.'" Br. at 16 (quoting Public Accountants, § 26(2), 1989 Tex. Sess. Law Serv. 41a-1 (Vernon's)). A leading treatise—which Exxon repeatedly cites (Br. at 2, 15, 33)—calls it "misleading to consider" a confidentiality law that yields "in any court proceeding" as "creating a meaningful privilege." David M. Greenwald *et al.*, *Testimonial Privileges* § 3:14, at 758 (3d ed. 2015). As an example of such an illusory "privilege," the authors specifically cite the current Texas Occupations Code § 901.457—with its exception for disclosure pursuant to court orders. *See id.* n.2.

Third, the Texas Occupations Code sets forth several possible disciplinary sanctions for breaches of confidentiality by accountants, ranging from a reprimand to a license suspension or revocation. *See* Tex. Occ. Code §§ 901.501(a), 901.502(5). Consequences that "sound[ ] in professional discipline" are a hallmark of professional duties of confidentiality and serve to distinguish such duties from evidentiary privileges. Imwinkelried, *Evidentiary Privileges* § 1.3 (listing reprimand, suspension, and revocation as typical sanctions for confidentiality breaches). In this case, the party facing possible sanctions—*i.e.*, the accountant, PwC—has declined to defend Exxon's assertion of an evidentiary accountant-client privilege. As PwC noted during the motion hearing below, it was "not going to argue" that such an evidentiary privilege exists (R. 34). In its brief, PwC similarly took "no position on the applicability of" § 901.457 (R. 471). This development only underscores the lack of merit in Exxon's position.

B. Texas Occupations Code § 901.457 Explicitly Permits, Rather than Bars, PwC's Compliance with Supreme Court's Order.

1. Section 901.457(b)(3) authorizes disclosure of client information when required by a court order, such as the order directed to PwC here.

In rejecting Exxon's privilege assertion, Supreme Court relied on the exception to confidentiality in § 901.457(b)(3), which permits an accountant to disclose client information when necessary to comply with a court order. The court below reasoned that this exception "would be satisfied by an order" compelling PwC to comply with the NYOAG's subpoena, inasmuch as the subpoena requests "specific information concerning Exxon" (R. 12). In so concluding, Supreme Court correctly determined that § 901.457(b)(3) "has a plain meaning" (R. 11). And where a statute's "text is clear," as here, the "text is determinative." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009).

As already shown (see *supra* at 17–18), § 901.457 restrains only the voluntary disclosure of client information by a licensed accountant without client consent. Tex. Occ. Code § 901.457(a). Further, the statute "does not prohibit" an accountant from revealing information that "is

required to be disclosed . . . under a court order signed by a judge," if the order meets basic specificity requirements. *Id.* § 901.457(b)(3).

At most, therefore, § 901.457(a) restricted PwC from freely producing confidential information received from Exxon, without Exxon's permission. And, indeed, two days before the subpoena's scheduled response date, Exxon instructed PwC not to reveal any such information, a stance memorialized by Exxon in a letter to the NYOAG (R. 99, 283).

Exxon's withholding of consent to disclosure forced the NYOAG to seek a judicial order compelling PwC to fulfill its production obligations. In the decision below, Supreme Court granted the NYOAG's motion "in all respects" and signed an order directing PwC to comply with the subpoena on a schedule that was not to be "unnecessarily protracted" (R. 13). By the statute's plain terms, § 901.457 "does not prohibit" PwC from disclosing any and all responsive information—which now "is required to be disclosed . . . under a court order signed by a judge." Tex. Occ. Code § 901.457(b)(3).

Whatever limited right § 901.457 might have conferred on Exxon to impede PwC's response thus dissolved upon issuance of Supreme

Court's order. *See In re Patel*, 218 S.W.3d at 920 (holding that trial court's order to produce subpoenaed documents vitiated any asserted privilege given exception in § 901.457(b)(3)); *In re Arnold*, 2012 WL 6085320, at *4 (Tex. App. 2012) (mem.) (holding that trial court's order denying motion to quash deposition fell within § 901.457(b)(3), thus negating any privilege assertion).[7]

Contrary to Exxon's contention (Br. at 24), Supreme Court did not impermissibly construe § 901.457(b)(3)'s reference to a "court order" to include the subpoena to PwC. Rather, the court simply ordered PwC to comply with the subpoena, causing any alleged restraint on disclosure to dissipate under § 901.457(b)(3)'s plain terms. *See In re Arnold*, 2012 WL 6085320, at *3–*4; *In re Patel*, 218 S.W.3d at 920–21. Indeed, Exxon does not appeal from a subpoena, but rather contests a *court order* compelling production. Section 901.457 provides no basis for relief from PwC's disclosure obligations under that court order.

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[7] Both *In re Patel* and *In re Arnold* have binding force in Texas. *See* Tex. R. App. P. 47.7, cmt. to 2008 change (confirming that "[a]ll opinions and memorandum opinions in civil cases" handed down after 2003 "have precedential value"). And both constitute on-point "guidance about the scope of" § 901.457(b)(3) "from a Texas court." Br. at 5.

2. Exxon's attempts to limit the scope of § 901.457(b)(3) lack merit.

Exxon has offered no meaningful response to Supreme Court's conclusion that the "court order" exception in § 901.457(b)(3) permits PwC to comply with an order compelling production.

For example, Exxon cannot sidestep § 901.457(b)(3) by deriding Supreme Court's order as "ministerial" (Br. at 3) or "pro forma" (*id.* at 13). As Texas courts have held, where an order compels the disclosure of specified information, or overrules defenses on a motion to quash, that is sufficient to dissolve § 901.457(a)'s confidentiality restriction.[8] To enforce an investigative subpoena, the NYOAG must persuade a New York court that the subpoena seeks information relevant to a factually supported and authorized investigation. *See* C.P.L.R. 2308(b)(1); *Matter of La Belle Creole Int'l, S.A. v. Att'y-Gen.*, 10 N.Y.2d 192, 196–97 (1961); *Matter of Am. Dental Co-op.*, 127 A.D.2d at 280. To discharge that

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[8] *See In re Arnold*, 2012 WL 6085320, at *4 (order refusing to quash deposition of accountant with relevant knowledge); *In re Patel*, 218 S.W.3d at 918 (order compelling accountant to produce relevant documents); *see also Canyon Partners*, 2005 WL 5653121, at *1 (order compelling accountant to comply with document subpoena; sole question was "whether the documents sought [were] reasonably calculated to lead to the discovery of admissible evidence").

burden here, the NYOAG made a robust "evidentiary showing" (Br. at 3, 35) comprising (1) the affirmation of an investigating official, and (2) hundreds of pages in exhibits, detailing the NYOAG's investigation into the accuracy of Exxon's disclosures about the impact of climate change and related policies on Exxon's business (*see* R. 94–306).

In response to the State's proof, Exxon offered *no* argument or evidence to refute the subpoena's authorization, basis, or scope. Despite its claims to a Texas federal court (see *supra* at 7–8), Exxon has never disputed in *this* action that the NYOAG's investigation is legitimate and undertaken in "good faith" (R. 80), or that the subpoena to PwC is "reasonable and appropriate" (R. 31). Exxon's counsel even admitted in open court that the NYOAG "ha[s] the right to conduct the investigation" (R. 49). To the extent Exxon now attacks Supreme Court's ruling as "perfunctor[y]" (Br. at 11), Exxon invited that approach by deciding to forfeit all objections other than its alleged privilege defense.

There is also no support, textual or otherwise, for Exxon's claim that § 901.457(b)(3) does not apply here because it extends only to court orders emanating from some undefined class of preexisting or ongoing

court proceedings. *See* Br. at 13, 18–19. To begin with, there is no merit to Exxon's suggestion that this action does not qualify as an "existing court proceeding" (Br. at 13). "Upon a party's failure to comply with a nonjudicial subpoena," as here, "CPLR 2308(b) permits that a motion be made in Supreme Court to compel compliance." *Dias v. Consol. Edison Co. of N.Y.*, 116 A.D.2d 453, 454 (1st Dep't 1986). The NYOAG thus began this special proceeding for subpoena enforcement (*see* R. 93, 307), in which Exxon and PwC have had the opportunity to mount all available defenses, *see* C.P.L.R. 404(a) (allowing respondent in special proceeding to raise "objection[s] in point of law").

In any event, there is no statutory basis for the "ongoing litigation" requirement (Br. at 19) that Exxon seeks to graft onto § 901.457(b)(3). That subsection has four limitations: the court order must be signed by a judge, be directed to the accountant, mention the client, and identify the information requested. *See* Tex. Occ. Code § 901.457(b)(3)(A)–(C). Moreover, an added requirement of "ongoing litigation" would produce anomalous results. Under such a reading, the NYOAG *could* secure documents from PwC in an already-filed enforcement action against Exxon—but could *not* obtain those same

materials from PwC ahead of time, to determine whether to bring an enforcement action. *See, e.g.*, Executive Law § 63(12) (authorizing issuance of subpoenas during enforcement proceeding); General Business Law § 352(2) (same). The courts "will not read a statute to draw arbitrary distinctions resulting in unreasonable consequences." *In re Blair*, 408 S.W.3d 843, 851 (Tex. 2013).

C. The Exception in § 901.457(b)(2) for Disclosure in Response to Certain Subpoenas is Immaterial.

Exxon also incorrectly maintains that a "court order" under § 901.457(b)(3) cannot mean an order compelling compliance with a request not mentioned in § 901.457(b)(2), which permits disclosure in response to subpoenas issued under certain federal and Texas laws.[9] *See* Br. at 21–25. Exxon purports to derive this conclusion from "principles of statutory interpretation." *Id.* at 21. But courts do "not apply rules of construction" to a clear and unambiguous statute. *In re Blair*, 408 S.W.3d at 855; *see also, e.g.*, *City of Rockwall v. Hughes*, 246

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[9] Specifically, § 901.457(b)(2) allows an accountant to disclose client information in response to "a summons or subpoena" issued under the Internal Revenue Code, the Securities Act of 1933, the Securities Exchange Act of 1934, or the Texas Securities Act.

S.W.3d 621, 625–26 (Tex. 2008). Here, § 901.457(b)(3) plainly allows for production by PwC under Supreme Court's order, making interpretative maxims unnecessary to resolve this appeal.

As Supreme Court correctly observed, § 901.457(b)(2) does not constrain § 901.457(b)(3)'s separate exception for court orders: the statute contains *seven* exceptions to confidentiality, and there is no "support for the proposition that the carve out in (b)(3) is tethered to the carve out in (b)(2) while the carve outs in (b)(4), (b)(5), (b)(6), and (b)(7) are not" (R. 12). Exxon acknowledges that the "subpoena" and "court order" exceptions were in the *same* subsection until the Texas legislature made the "deliberate decision in 2013" to divide them (Br. at 23)—a choice that hardly supports construing the (b)(2) exception for subpoenas as an implied limitation on the now-independent (b)(3) exception for court orders.

Nor do the maxims invoked by Exxon require excluding from § 901.457(b)(3) all court orders issued in favor of agencies not referenced in § 901.457(b)(2). Exxon first cites the principle that only the "specific exclusions or exceptions" in a statute will be held to apply. *Unigard Sec. Ins. Co. v. Schaefer*, 572 S.W.2d 303, 307 (Tex. 1978); *see*

Br. at 22–23. But Supreme Court did not apply any exception beyond those stated in § 901.457. Rather, the court gave full effect to one such exception, § 901.457(b)(3). *See State v. Shumake*, 199 S.W.3d 279, 287 (Tex. 2006) (refusing to read limitations in one statutory subsection as unstated restrictions on adjacent subsection); *In re Huag*, 175 S.W.3d 449, 453 (Tex. App. 2005) (same). Exxon next relies on the maxim that every part of a statute is presumed to have meaning. *See* Br. at 24–25. Far from either's being "superfluous" (Br. at 23), however, the exceptions in (b)(2) and (b)(3) serve distinct functions. The latter permits accountants to disclose information when required by a court order, whereas the former identifies requests for which "a court order allowing release of client records is *not* required." *In re Grand Jury Proceedings*, 607 F. Supp. 2d 803, 805–06 (W.D. Tex. 2009) (emphasis added). For other demands, a client has the procedural right to withhold consent and force the agency to seek enforcement in court. That happened here, and the resulting order of compliance falls within the unambiguous terms of § 901.457(b)(3).

POINT II

NEW YORK PRIVILEGE LAW APPLIES HERE IN ANY EVENT

The absence of an accountant-client evidentiary privilege under Texas law obviates the need for a further choice-of-law analysis. But as Supreme Court concluded in the alternative, even if § 901.457 were to create such an evidentiary privilege, "it would be nevertheless unavailing" because New York privilege law governs here (R. 12).

On this question, Supreme Court dutifully adhered to this Court's holding 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." *JP Morgan Chase & Co. v. Indian Harbor Ins. Co.*, 98 A.D.3d 18, 25 (1st Dep't 2012); *accord People ex. rel. Spitzer v. Greenberg*, 50 A.D.3d 195, 198–99 (1st Dep't 2008). New York is both the place of the discovery proceeding and where the evidence would be introduced at any trial. That being so, New York's privilege rules govern.

Exxon wrongly faults the court below for not also weighing the relative interests of New York and Texas in having their "privilege" laws apply. *See* Br. at 25–32 (citing *Babcock v. Jackson*, 12 N.Y.2d 473

(1963)). The Court of Appeals has never endorsed weighing of interests for choosing among rules of privilege. That standard primarily governs allocation of loss in "'tort cases with multi-State contacts.'" *Edwards v. Erie Coach Lines Co.*, 17 N.Y.3d 306, 318 (2011) (quoting *Babcock*, 12 N.Y.2d at 481). By contrast, the "admissibility of evidence" traditionally has "depend[ed] upon the law of the place where the suit is brought." *United States Mortg. & Trust Co. v. Ruggles*, 258 N.Y. 32, 40 (1932). And "exceedingly rare" are "cases in which counsel have seriously contended that any other rule should be adopted." *Able Cycle Engines, Inc. v. Allstate Ins. Co.*, 84 A.D.2d 140, 147 (2d Dep't 1981) (quotation marks omitted).

Even if interest balancing were appropriate, New York's privilege rules still would govern. Exxon cites New York decisions that have addressed states' relevant contacts to the litigation before deciding what privilege law applies. *See* Br. at 26–27, 30–31. Only one of those decisions, *People v. Greenberg*, was a law-enforcement action, and the defendant there "concede[d]" that "New York courts routinely apply the law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding when deciding privilege

issues." 50 A.D.3d at 198 (quotation marks omitted). The Court in *Greenberg* applied New York privilege law, observing that the documents were sought for possible use in a New York action brought by the NYOAG for alleged violations of New York securities law. *See* 50 A.D.3d at 198–99. The same features exist here and similarly call for the application of New York law. *See id.* In addition, the subpoena to PwC is returnable in New York (R. 101), where PwC maintains its domestic headquarters (R. 306).

By Exxon's admission, the only connection between this action and Texas is that Exxon is based in Texas and PwC's audits occurred there. *See* Br. at 30. As this Court has held, those few contacts cannot justify stymying discovery into frauds that "might have been committed" by a company, like Exxon, that indisputably does "a great deal of business in New York." *First Interstate Credit*, 150 A.D.2d at 293–94 (rejecting application of Maryland's accountant-client privilege in private civil lawsuit, despite that audits happened in Maryland); *see also Matter of Hyatt v. State Franchise Tax Board*, 105 A.D.3d 186, 190 (2d Dep't 2013) (applying New York privilege law in New York action to enforce subpoenas issued "in connection with a California tax proceeding").

Further, PwC's own interests align in key respects with those of New York. As a certified public accountant, PwC "owes ultimate allegiance to [a] corporation's creditors and stockholders, as well as to the investing public." *United States v. Arthur Young & Co.*, 465 U.S. 805, 817–18 (1984). New York's parallel interest in promoting transparent New York financial markets thus outweighs any public policy Texas may have in shrouding PwC's audit files in secrecy. *See* Restatement (Second) of Conflict of Laws § 139(2) (requiring "special reason" to elevate foreign jurisdiction's privilege over forum law favoring disclosure).

Indeed, PwC and Exxon opted *out* of Texas's legal regime by choosing New York law to govern any disputes between them arising from PwC's audits of Exxon (R. 534, 541). *See Bamco 18 v. Reeves*, 685 F. Supp. 414, 416 (S.D.N.Y. 1988) (holding that parties' choice of New York law in underlying contract supported applying New York privilege law to discovery sought from accountant in fraud case). For these reasons, no accountant-client evidentiary privilege applies here even if Texas Occupations Code § 901.457 were to create one.

POINT III

THE EXISTENCE OF EXXON'S CLAIMED PRIVILEGE IS A PURE QUESTION OF LAW THAT SUPREME COURT COULD DECIDE WITHOUT A DOCUMENT-BY-DOCUMENT REVIEW

Finally, Exxon fails to justify its claim that before a court may decide the purely legal issue whether Texas Occupations Code § 901.457 creates an accountant-client evidentiary privilege, the court must examine documents that Exxon wishes to withhold under this alleged privilege. *See* Br. at 32–35.

Exxon's demand to tender individually withheld documents for inspection confuses whether an evidentiary privilege *exists* with whether one *applies*. Analyzing records is the typical means for determining whether an established privilege applies to specific material—as recognized by the authority on which Exxon relies. *See, e.g.*, *In re Baytown Nissan Inc.*, 451 S.W.3d 140, 146–47 (Tex. App. 2014) (assessing whether attorney-client privilege extended to communications between group's members and counsel). But whether § 901.457 *creates* an evidentiary privilege is a question of statutory interpretation. And statutory interpretation "is purely a question of law." *Colon v. Rent-A-Ctr., Inc.*, 276 A.D.2d 58, 61 (1st Dep't 2000).

In light of the irrelevance of specific documents to the legal question Exxon has raised, the added procedures that Exxon seeks would only cause unnecessary delay. Many responsive documents in PwC's possession will reflect "information communicated" by Exxon "in connection with services provided" to Exxon, thus falling under § 901.457(a). Moreover, Exxon has confirmed its intention to assert a privilege claim over all documents in this category (*see* R. 283). The "deliberate, document-by-document review" (Br. at 33) conducted so far by Exxon has caused PwC to withhold material that PwC has never objected to disclosing and this Office to be deprived of highly relevant documents in the meanwhile (*see* R. 284). And the convoluted, multi-step review process—which has bred "disagreement" between Exxon and PwC (R. 36–37)—has slowed the production of responsive material that is not purportedly privileged. The injury to the NYOAG's investigation is concrete, and the statutory question is ripe for resolution.

CONCLUSION

This Court should affirm Supreme Court's order compelling PwC to produce all documents responsive to the NYOAG's investigative subpoena.

Dated: New York, NY
December 7, 2016

Respectfully submitted,

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Addendum

Vernon's Texas Statutes and Codes Annotated
Occupations Code (Refs & Annos)
Title 5. Regulation of Financial and Legal Services
Subtitle A. Financial Services
Chapter 901. Accountants (Refs & Annos)
Subchapter J. Practice of Public Accountancy (Refs & Annos)

V.T.C.A., Occupations Code § 901.457

§ 901.457. Accountant-Client Privilege

Effective: September 1, 2013
Currentness

(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.

Credits

Acts 1999, 76th Leg., ch. 388, § 1, eff. Sept. 1, 1999. Amended by Acts 2001, 77th Leg., ch. 1497, § 31, eff. Sept. 1, 2001; Acts 2013, 83rd Leg., ch. 36 (S.B. 228), § 2, eff. Sept. 1, 2013.

Notes of Decisions (5)

V. T. C. A., Occupations Code § 901.457, TX OCC § 901.457
Current through the end of the 2015 Regular Session of the 84th Legislature