STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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Via NYSCEF and Hand Delivery

March 18, 2019

The Honorable Barry R. Ostrager
Supreme Court, New York County
60 Centre Street, Room 232
New York, NY 10007

Re: *People of the State of New York v. Exxon Mobil Corporation*, Index No. 452044/2018 (Sup. Ct. N.Y. Cnty.)

Dear Justice Ostrager:

The Office of the Attorney General ("OAG") submits this letter in response to Exxon Mobil Corporation's ("ExxonMobil") letter dated March 15, 2019, which was electronically filed on Saturday, March 16 at 2:36 a.m. In its letter, ExxonMobil raises a host of new issues and asks the Court to order specific responses from the OAG in six different areas. The letter also raises concerns about the Rule 11-f deposition notice the OAG served on February 27, but does not seek relief on that issue as yet. Given the discovery conference scheduled for March 21 to address the OAG's letter of March 4 (Dkt. No. 72), and seeking to avoid the need for a series of hearings, the OAG will be prepared to discuss these new issues at the scheduled conference and sets out its position below.

First, ExxonMobil's letter largely concerns items as to which the OAG twice offered to meet and confer. *See* 3/4/2019 letter from the OAG to ExxonMobil, Dkt. No. 70 ("we would be happy to discuss the remaining issues in your March 1 letter tomorrow or Wednesday"); 3/8/2019 letter from the OAG to ExxonMobil (Exhibit A) ("You have not responded to our March 4 letter. We remain more than willing to schedule a meet-and-confer to discuss these issues."). ExxonMobil completely ignored those offers to meet and confer. Had ExxonMobil been willing to schedule a phone call with the OAG, it would have learned, first, that the OAG is producing its document retention policy (ExxonMobil Request 3), and second, that the OAG is producing a document-by-document privilege log (ExxonMobil Request 5).[1] Indeed, the OAG produced a privilege log, along with its document production on Friday evening at 5:40 p.m.,

[1] For ease of reference, we identify each of the six numbered requests on page 5 of ExxonMobil's 3/16/19 letter, Dkt. No. 90, as "ExxonMobil Request [No.]".

nine hours before ExxonMobil filed its latest letter. That log should have made clear to ExxonMobil that the OAG had agreed to produce a document-by-document log, but, to the extent there was any ambiguity, a phone call to the OAG would have made that clear and obviated the need to raise an issue with this Court that is not in dispute.

Second, the OAG is entitled to a stay of discovery as to any materials that are subject to its proposed protective order (ExxonMobil Request 6). *See* Proposed Order, Dkt. No. 61. The OAG's pending motion is grounded on two distinct issues: (a) ExxonMobil has not met the legal standard for pursuing certain defenses, and (b) even if ExxonMobil had a legal basis for pursuing such defenses, the company is not entitled to the overbroad discovery requests it has put forward in connection with those defenses. The OAG's pending request for a protective order stems from the second issue – the overly broad nature of ExxonMobil's discovery requests. As set forth in the OAG's motion, C.P.L.R. § 3103(b) provides that "[s]ervice of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute." Memorandum of Law, Dkt. No. 71 at 10. The OAG further stated that, consistent with the C.P.L.R., it "will not produce materials that are the subject of the proposed protective order pending the resolution of [its] motion." *Id* at 10 n.3. Finding no authority to contradict the plain language of the C.P.L.R., ExxonMobil has resorted to inapposite authorities as to whether or not a motion to *dismiss* triggers an automatic stay in the Commercial Division. *See* 3/16/19 letter from ExxonMobil to the Court, Dkt. No. 90 at 4. But the OAG did not simply file a motion to dismiss; it has also moved for a protective order. *See Coffey v. Orbachs*, 22 A.D.2d 317, 319 (1st Dep't 1964) (explaining that service of a motion for a protective order "automatically stays the disclosure sought").

ExxonMobil's letter leaves the misleading impression that the OAG has refused to produce any materials related to the affirmative defenses subject to the motion to dismiss. That is not the case. Consistent with the Commercial Division Rules and the Court's February 27 notice, the OAG has been and continues to produce documents related to ExxonMobil's affirmative defenses, limited only by the terms set out in the proposed protective order.

Indeed, shortly after the Complaint was filed, and before a discovery schedule was set, the OAG began producing documents received from third parties during the course of the investigation. To date, the OAG has produced nearly 800,000 pages of documents from such third parties. In addition, the OAG has agreed to search for and produce documents and materials conveyed to the OAG by third parties that are relevant to the allegations in the Complaint. (ExxonMobil Request 2.) That review and production is underway and is being conducted pursuant to very broad search terms, such as "Exxon" and "climate change," among others. *See* 2/1/19 letter from the OAG to ExxonMobil, Dkt. No. 66 at 4-5. Further, the OAG is running that search in the files of nine custodians that include the most senior leadership of the OAG during the investigation, including then-Attorney General Schneiderman. *Id.* To be clear, the OAG is producing all third-party communications from the files of those nine custodians in which factual information regarding ExxonMobil was conveyed to the OAG in the course of the investigation. Notwithstanding its position that the challenged defenses are improper, the OAG is thus producing a broad range of documents that will be more than sufficient for ExxonMobil to gain an understanding of what role, if any, third parties played in the OAG's understanding of ExxonMobil's conduct that prompted the investigation. In other words, the OAG is providing

ExxonMobil precisely the type of documents required to ascertain the validity of ExxonMobil's claims of misconduct.

ExxonMobil, however, continues to insist that the OAG exponentially expand its search to encompass a massive volume of documents that would almost certainly provide no additional substantive information. (ExxonMobil Request 4.) Rejecting the OAG's proposed custodian list and search terms, ExxonMobil insisted that the OAG search the files of all Assistant Attorneys General who ever worked on the ExxonMobil matter as well as the entirety of the OAG's press office. 2/13/19 letter from ExxonMobil to OAG, Dkt. No. 67 at App. A. ExxonMobil also demanded that the OAG include an additional 48 categories of search terms (for a total of 59) in its collection. *Id.* at App. B. Test searches indicate that ExxonMobil's demands would require the OAG to review approximately 1,000,000 documents for production. *See* Memorandum of Law, Dkt. 71 at 18. ExxonMobil has refused to meet and confer on mutually agreeable search terms and custodians. *See* 2/1/19 letter from the OAG to ExxonMobil, Dkt. No. 66 at 1, 5. Instead, ExxonMobil has continuously sought to deflect attention from the allegations in the Complaint to unfounded conspiracy theories that would now involve the participation of three successive Attorneys General of the State of New York.

With respect to ExxonMobil's demands for attorney notes from third party interviews, the OAG maintains that documents of that nature are fully protected as work product under *Hickman v. Taylor*, 329 U.S. 495 (1947). As the Court of Appeals has noted, "production of [an] attorney's account of witness statements is justified only in 'rare' cases and is not appropriate when potential for 'direct interviews with the witnesses themselves' is possible." *People v. Kozlowski*, 11 N.Y.3d 223, 245-246 (2008) (quoting *Hickman*, 329 U.S. at 513). This is not such a case. The OAG has already begun the process of collecting and logging attorney notes from interviews and discussions with third parties. *See* 3/15/19 letter from OAG to ExxonMobil, Dkt. No. 93 at Ex. B (Privilege Log). ExxonMobil offers no reasons why it is unable to interview any third parties identified in the OAG's privilege log or other exceptional circumstances that would justify requiring the OAG to produce attorney work product.[2]

Third, ExxonMobil's assertion that the OAG's preliminary witness list "lacks credibility" and that the OAG intends to "try this case by ambush" is baseless. (ExxonMobil Request 1.) Neither the C.P.L.R., the Commercial Division Rules, nor the Practice Rules for Part 61 call for a preliminary witness list. Nonetheless, at ExxonMobil's insistence, the parties "agree[d] to furnish in good faith preliminary witness and exhibit lists without prejudice to subsequent modification in advance of trial." Preliminary Conference Order, Dkt. No. 45 at 3. The parties further agreed that "[t]he provision of this information does not alter the rights or obligations of the parties under the C.P.L.R., the Rules of the Commercial Division or the Practice Rules for Part 61." *Id.* In negotiating this provision, the OAG made clear that sharing witness lists more than nine months before trial would be of limited value. Nonetheless, pursuant to this provision, the OAG provided a preliminary witness list on February 1 (Exhibit B), and ExxonMobil provided a

[2] Contrary to ExxonMobil's letter, the OAG is not refusing to produce third-party communications on the grounds of attorney-client privilege. The OAG is asserting attorney-client privilege in response to exactly one of ExxonMobil's 74 document requests—namely, ExxonMobil's request for draft talking points and draft press releases, which appears to contemplate internal communications with the OAG's *internal* press office. *See* ExxonMobil's Third Request for Production of Documents, Dkt. No. 64, Request No. 2.

preliminary witness list on February 15 (Exhibit C). The OAG's list and ExxonMobil's list each included one third-party witness, a PricewaterhouseCoopers LLP employee. The OAG's submission made clear that the "OAG is continuing to assess whether it will call other potential witnesses, including investors in securities of Exxon Mobil Corporation." The OAG's response on February 1 was made in good faith, and the OAG still has not made decisions today, seven months before trial, with respect to its witness list.

Further, ExxonMobil's insistence that the OAG provide continual updates as to its consideration of potential trial witnesses is unfounded. In fact, in negotiating the Preliminary Conference Order, ExxonMobil sought to include a provision requiring continual updates, which the OAG rejected as unworkable. Accordingly, the Preliminary Conference Order does not require such updates, and simply provides that final witness lists are to be exchanged by September 27. ExxonMobil's attempt to twist language allowing "modification in advance of trial" into an agreement to provide continual updates is disingenuous. To the extent that ExxonMobil is interested in knowing how its investors understood the company's disclosures concerning its management of climate change risks that are at the heart of the OAG's Complaint, ExxonMobil no doubt has far greater access to its own investors than the OAG does.[3]

Fourth, on February 27, the OAG issued a deposition notice to ExxonMobil for testimony by a corporate representative pursuant to Commercial Division Rule 11-f on topics that go to the heart of the OAG's allegations against ExxonMobil. Corporate representative testimony is vital here, particularly because numerous individual witnesses produced by ExxonMobil during the course of the investigation denied having any recollection of these issues. *See* 3/12/2019 letter from the OAG to ExxonMobil at 3 (Exhibit E). Given ExxonMobil's representation that it is "formulating a proposal" in response to the notice, there is no need to address this issue further here. *See* 3/16/2019 letter, Dkt. No. 90 at 4.

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We are prepared to discuss each of these issues in detail at the conference on Thursday.

Respectfully submitted,

/s/ Kevin Wallace

Kevin Wallace

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[3] ExxonMobil's accusation that the OAG has been "giving ExxonMobil the runaround" with respect to third party witnesses is divorced from reality. As set out in detail in the OAG's letter to ExxonMobil of December 14, 2018 (Exhibit D), the OAG never "denied having conducted any third-party interviews." Rather, when asked during a November 13 meet-and-confer telephone call whether it had conducted "formal office interviews of third parties in lieu of testimony," the OAG stated that it had not done so. Subsequently, the OAG recognized that the terms "formal," "office," and "in lieu of testimony" in ExxonMobil's question were vague and ambiguous in this context. To avoid any potential misunderstanding, the OAG clarified shortly thereafter that, as one would expect, it had communicated with third parties in the course of the investigation. No prejudice whatsoever resulted from these events, all of which occurred well before the deadline for ExxonMobil's document requests to the OAG. ExxonMobil is attempting to derive tactical benefit from the OAG's voluntary provision of information and active steps to avoid any misunderstanding.