



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

April 11, 2019

VIA NYSCEF AND HAND DELIVERY

The Honorable Barry R. Ostrager,  
Supreme Court, New York County

Re: *People v. Exxon Mobil Corporation*, Index No. 452044/2018

Dear Justice Ostrager:

As directed by Commercial Division Rule 24, the Office of the Attorney General (“OAG”) submits this pre-motion letter in connection with its intention to move for a protective order pursuant to CPLR § 3103(a) to prohibit ExxonMobil from conducting a Commercial Division Rule 11-f deposition of OAG attorneys. There is substantial overlap between this anticipated motion and the OAG’s pending motion for a protective order concerning the defenses of prosecutorial misconduct (Motion No. 2), and our anticipated motion will insure that any decision with respect to that motion also extends to the Rule 11-f notice. There are, however, additional issues that extend beyond the scope of the pending motion that we would address.

On March 22, 2019, ExxonMobil served the OAG with a Rule 11-f notice for oral examination of the OAG. The notice included a list of proposed matters for deposition related to (a) the OAG’s document preservation policies and practices, (b) the “facts underlying the allegations” in 54 specified paragraphs of the Complaint and (c) the OAG’s interactions with third-parties cited in ExxonMobil’s allegations of prosecutorial misconduct. The OAG responded by letter on March 29, 2019, noting that ExxonMobil’s requested deposition would necessarily entail the disfavored practice of requiring attorney testimony. The OAG also directed ExxonMobil to New York precedent militating against the deposition of OAG attorneys and pointing out alternative methods available to ExxonMobil for obtaining the information it seeks through deposition. The OAG requested that ExxonMobil withdraw its Rule 11-f notice but ExxonMobil refused.

In the OAG’s view, all but one of ExxonMobil’s proposed deposition topics are directed to the misconduct defenses at issue in the pending motion to dismiss.<sup>1</sup> The OAG’s obligation to respond to those requests is thus suspended pursuant to CPLR 3103(b) until the Court rules on the OAG’s pending motion for a protective order. The OAG also objects, however, to ExxonMobil’s broad request to depose OAG attorneys on the facts underlying the allegations in the Complaint.

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<sup>1</sup> The OAG believes that ExxonMobil’s inquiries into the OAG’s document preservation policies derive from its theory that the OAG conspired with third-party activists and ExxonMobil’s mistaken belief that communications with such third-parties were not preserved.

In short, ExxonMobil has not demonstrated a particularized need for such testimony that would justify subjecting the OAG to a deposition.

Contrary to ExxonMobil's assertions, a deposition regarding the factual bases for the allegations in the Complaint would necessarily implicate the "mischief that can be caused by noticing the deposition of an attorney who has appeared in the litigation." *Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 164 A.D.3d 401, 406 (1st Dep't 2018). Noting the numerous reasons such practice is disfavored, the First Department recently held that, in addition to demonstrating a good faith basis, a party seeking an attorney deposition "must show that the deposition is necessary because the information is not available from another source." *Id.*<sup>2</sup> ExxonMobil has made no such showing nor explained why written discovery, such as interrogatories, could not provide the clarification it seeks. Furthermore, ExxonMobil's assertion that it is not seeking the deposition for improper purposes, such as to disqualify attorneys from working on this matter, rings hollow in light of the fact that the company has stated its intention to object to the presence of an OAG attorney at an upcoming deposition on the ground that he was hired through a university fellowship program that ExxonMobil alleges to be subject to a conflict of interest.

We are available to discuss our anticipated motion for a protective order in more detail at conference should the Court so desire.

Sincerely,

/s/ Marc Montgomery  
Marc Montgomery

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<sup>2</sup> ExxonMobil also relies on *People v. Katz*, 84 A.D.2d 381 (1st Dep't 1982), for its purported right to require the attorneys prosecuting this case to sit for questioning by ExxonMobil's counsel. The First Department in *Katz*, however, did not permit the deposition of OAG attorneys absent a showing that the information sought was not available from other sources. *Id.* at 384. In fact, the court found that despite the vagueness of certain allegations set forth in the complaint at issue, the defendant failed to demonstrate a need for deposition testimony regarding those allegations, as a bill of particulars would "supply most of the information" sought by the defendant. *Id.* at 384-85.