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

PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York, Plaintiff, -against- EXXON MOBIL CORPORATION, Defendant.	Index No. 452044/2018 IAS Part 61 Hon. Barry R. Ostrager Motion Sequence No. 4

EXXON MOBIL CORPORATION'S BRIEF OPPOSING THE ATTORNEY GENERAL'S MOTION FOR A PROTECTIVE ORDER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

Exxon Mobil Corporation ("ExxonMobil" or the "Company") submits this brief opposing the motion of the Office of the New York Attorney General ("OAG") for a protective order to prohibit ExxonMobil from deposing OAG.

PRELIMINARY STATEMENT

ExxonMobil noticed the deposition of OAG to obtain evidence in support of its defenses, just as any defendant in civil litigation is entitled to do. New York authorities recognize this right, which does not depend on the identity of the party from whom discovery is requested. CPLR 3102(f) establishes the bedrock principle that the State does not receive special consideration in civil litigation, and Commercial Division Rule 11-f, which controls here, expressly permits a party to seek the entity deposition of a government or governmental agency. Finally, settled First Department precedent confirms that the State, just like any other civil party, is subject to examination. *See People* v. *Katz*, 84 A.D.2d 381, 384 (1st Dep't 1982). Straightforward application of these authorities yields one conclusion: OAG must sit for a Rule 11-f deposition.

But OAG has adopted a position of wholesale resistance, insisting that ExxonMobil seeks a disfavored deposition of opposing counsel. By OAG's own admission, however, the Attorney General functions as a *party* in this action. Following Attorney General James's recent election, OAG stipulated that she should be "substituted *as plaintiff in this action* in the place and stead of former Attorney General Barbara D. Underwood." Dkt. No. 50 at 1 (emphasis added). The concerns courts have associated with depositions of opposing counsel do not manifest here for a simple reason: the practical distinction between OAG and its "client," the State of New York, is illusory.

Even so, ExxonMobil can easily meet its burden to depose opposing counsel. *First*, the

Company seeks material and necessary information about three subjects central to the litigation: **(i)** OAG's document preservation practices; **(ii)** the factual bases for the allegations in the Complaint; and **(iii)** OAG's relationships and communications with third parties, including outspoken climate activists and other state actors. *See* Ex. A (ExxonMobil's Rule 11-f Notice) at 6–8. OAG itself has acknowledged the relevance of the first two subjects. During a meet-and-confer early in this case, OAG stressed that document preservation is an important topic in any litigation. And in subsequent correspondence, OAG embraced the position that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." Dkt. No. 97 at 2 (quoting *Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947)). Finally, OAG's third party relationships directly inform ExxonMobil's allegations of OAG's prosecutorial misconduct. Indeed, a federal district court has already observed that ExxonMobil's prosecutorial misconduct defenses raise "important issues," including questions about whether the New York Attorney General is "trying to hide something." *See* Ex. B (Order, *Exxon Mobil Corp.* v. *Schneiderman*, No. 4:16-CV-469-K, ECF No. 180 (N.D. Tex. Mar. 29, 2017)) at 8, 12.

Second, ExxonMobil seeks a Rule 11-f entity deposition of OAG for a legitimate purpose—to efficiently fill holes in the disclosure record with respect to just three subjects. OAG's far more burdensome Rule 11-f Notice referenced 17 major topics and a 52-item appendix of complex cash flow spreadsheets. Ex. C (OAG's Rule 11-f Notice) at 4–8. OAG's blanket assertion that the deposition will necessarily intrude on privileged material is incorrect and furnishes no basis to quash the deposition. Like any other civil litigant, OAG can raise privilege objections at the deposition.

Third, OAG is the only entity positioned to provide the discovery ExxonMobil seeks. No other party could possibly provide binding testimony about *OAG*'s document preservation

practices, or the factual bases for the allegations in *OAG*'s Complaint. OAG also suggests, incorrectly, that ExxonMobil can simply approach third parties to ascertain the information it seeks. But depositions of third parties could not possibly yield testimony that would represent OAG's position, much less binding position, on its relationship with these parties. *Finally*, despite the voluminous information OAG amassed during its three-year investigation, OAG insisted mightily on eliciting Rule 11-f testimony from ExxonMobil on a sprawling array of topics—which the Company duly provided per the parties' negotiations. *See* Ex. C at 4–8. As OAG put the point: "If the production of information on a particular subject pursuant to another discovery device were sufficient to foreclose a corporate representative deposition on that subject, then few such depositions would ever take place." Dkt. No. 107 at 2 (internal quotations and alterations omitted).

ExxonMobil is entitled to a reciprocal deposition of OAG. OAG's motion seeking relief from that deposition should be denied.

BACKGROUND

I. OAG's Deposition of Opposing Counsel

In the early summer of 2017, OAG subjected *its* opposing counsel—two ExxonMobil lawyers—to rigorous examination. Citing purported concerns about ExxonMobil's compliance with OAG's investigatory subpoena, OAG took the position that "a senior representative of Exxon[Mobil]'s legal department" who would have "overseen the actions of Exxon[Mobil]'s employees in most of the relevant compliance activity" would be an "appropriate witness" to testify about various document preservation issues. *See* Ex. D (Apr. 21, 2017 Letter from J. Oleske to M. Hirshman et al.) at 2. Ultimately, OAG examined both an ExxonMobil in-house lawyer and one of the Company's outside lawyers. OAG further suggested it had "latitude" to elicit information from ExxonMobil's employees *and counsel* given that "data preservation and loss are at issue." *See id.* (citing Grimm, et al., *Discovery about Discovery: Does the Attorney-Client*

Privilege Protect All Attorney-Client Communications Relating to the Preservation of Potentially Relevant Information? 37 U. BALT. L. REV. 413 (2008)).

OAG made full use of this "latitude," questioning ExxonMobil's inside and outside counsel on a wide array of topics for roughly 10 hours. ExxonMobil's in-house counsel testified, for instance, about **(i)** the Company's Law Department, including where its employees work and its reporting structure; **(ii)** counsel's familiarity with e-discovery case law; and **(iii)** the search protocol used to identify responsive documents. Likewise, ExxonMobil's outside counsel was questioned about awards she had received as a lawyer and her substantive understanding of ExxonMobil's *Managing the Risks* report.

By insisting on and taking these examinations, OAG set a clear precedent for deposing opposing counsel. That precedent establishes not only that document preservation is a legitimate topic of disclosure, but also that opposing counsel is uniquely positioned to explain how it fulfilled its preservation obligations. More broadly, the First Department has made clear that parity is paramount in civil litigation. *See Marie Dorros, Inc.* v. *Dorros Bros.*, 274 A.D. 11, 13–14 (1st Dep't 1948). "All that may be said in favor of examinations before trial as an instrument of getting at the facts is in favor of *bilateral rather than unilateral examinations*, and *equality of opportunity* in examining." *Id.* at 14 (emphasis added). ExxonMobil is entitled to an equal opportunity to elicit key facts from OAG in this matter—especially because ExxonMobil has document preservation concerns that closely track those OAG raised during the investigation. ExxonMobil recently discovered that former Attorney General Eric Schneiderman maintained a personal email account that he used for work purposes. But, to date, OAG has been unable to clarify whether it properly preserved and collected all emails from this account. ExxonMobil seeks precisely the type of follow-up testimony OAG elicited from the Company's inside and outside

counsel on analogous issues.

II. The Court's Notice Permitting ExxonMobil to Pursue Discovery Related to Its Defenses

In October 2018, OAG filed what this Court aptly described as a "very thick" Complaint, containing 329 paragraphs and spanning 90 pages. *See* Ex. E (Corrected Mar. 21, 2019 Hr'g Tr.) at 13:5. ExxonMobil raised selective enforcement, official misconduct, and conflict of interest defenses in response. *See* Dkt. No. 44 at 35–37. The Company has since detailed how OAG colluded with special interest groups to target ExxonMobil because of its policy views. *See* Dkt. No. 119 at 35–48. OAG, however, initially refused to produce any documents relating to these defenses, arguing that "discovery pertaining to Exxon[Mobil]'s allegations of prosecutorial misconduct is palpably improper." Dkt. No. 96 at 2.

This Court disagreed. In late February, OAG informed the Court it sought to move to dismiss, or, alternatively, limit discovery on ExxonMobil's affirmative defenses. *See generally* Dkt. No. 56. In response, ExxonMobil argued that OAG's motion was meritless, and asserted its rights under the CPLR to "full disclosure" of information related to the Company's defenses. *See generally* Dkt. No. 58. On February 27, 2019, this Court directed that, although OAG could file its proposed motion, ExxonMobil was "privileged to pursue discovery on its defenses" in "the interim." *See* Dkt. No. 59.

III. OAG's Demand That ExxonMobil Withdraw Its Rule 11-f Notice

On March 22, 2019, ExxonMobil served a Rule 11-f Notice on OAG. *See* Ex. A. Matters 1 through 7 in the Company's Notice concern OAG's document preservation procedures. *See id.* at 6. Matter 8 concerns the factual bases underlying select paragraphs within OAG's Complaint. *See id.* at 7. And Matters 9 through 17 concern OAG's relationships and communications with third parties. *See id.* at 7–8.

In response, OAG asked that ExxonMobil "immediately withdraw its 11-f Notice," and refused to produce a witness on any topic. *See* Dkt. No. 151 at 2. ExxonMobil responded on April 5, 2019, explaining the legal justification for its Rule 11-f Notice of OAG. *See generally* Dkt. No. 152. OAG refused to further engage with ExxonMobil. By contrast, from late March through much of April, ExxonMobil engaged in extensive negotiations with OAG about its demand for Rule 11-f testimony from the Company. *See generally, e.g.*, Ex. F (Apr. 25, 2019 Letter from M.K. Dunning to D. Toal). Ultimately, ExxonMobil's corporate representative witness testified for a full day about 11 topics, ranging from the Company's cost-projection practices to matters discussed during a 2016 internal workshop. *See id.* at 1; *see also* Ex. C at 4–5.

LEGAL STANDARD

"The discovery provisions of the CPLR have traditionally been liberally construed to require disclosure 'of any facts bearing on the controversy which will assist parties' preparation for trial.'" *Cynthia B.* v. *New Rochelle Hosp. Med. Ctr.*, 60 N.Y.2d 452, 461 (1983) (quoting *Allen* v. *Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 406 (1968) (alterations omitted)). CPLR 3103(a) provides that a court may issue a protective order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." But, in their discretion, courts consider whether such an order would improperly "curtail[]" New York's policy of "full disclosure." *See Cynthia B.*, 60 N.Y.2d at 463; *see also C.R. Ness Co.* v. *Exec. Life Ins. Co.*, 35 A.D.2d 919, 919 (1st Dep't 1970).

ARGUMENT

I. OAG Is Not Entitled to Special Consideration in Discovery Matters

OAG seemingly believes it is not subject to the discovery rules applicable in civil litigation. That belief is contrary to the law. The State of New York, on whose behalf OAG acts, is not

entitled to special consideration in civil litigation. CPLR 3102(f) mandates that "[i]n an action in which the state is properly a party, whether as plaintiff, defendant or otherwise, disclosure by the state shall be available as if the state were a private person." As the First Department explained in *People* v. *Katz*, this principle holds true even where, as here, the State acts in its "protective" capacity. 84 A.D.2d at 384. Commercial Division Rule 11-f further confirms the availability of discovery against the State; it expressly permits the entity deposition of a "government, or governmental subdivision, agency or instrumentality." Comm. Div. R. 11-f(a). OAG has not once acknowledged the plain text of CPLR 3102(f) or Rule 11-f, which contemplate that parties may depose State entities in the ordinary course of civil discovery. ExxonMobil seeks nothing more than to exercise this basic right—to depose the State.

OAG has misleadingly framed ExxonMobil's deposition notice as an attempt to depose opposing counsel. *See* Dkt. No. 164 (OAG's Br. in Supp. of Its Mot. for a Protective Order, "Br.") at 1. The reality, however, is that the State of New York operates through its agencies and other organs of government. *See Katz*, 84 A.D.2d at 386. In *Katz*, the First Department held that "the moving defendants are entitled to examine the State," and noted that the "State *may choose* a person with knowledge of the facts to appear" at an examination. *Id.* at 384, 386 (emphasis added). Here, OAG, acting on the State's behalf, is free to designate and prepare a non-attorney witness to provide binding entity testimony on the matters listed in ExxonMobil's Notice. *See* Comm. Div. R. 11-f(c)(1). Applying the analogous federal rule for entity depositions, one court aptly observed: "Litigants (and their counsel) served with a 30(b)(6) notice decide which witnesses to designate[,] and those witnesses need not be (and generally are not) attorneys." *SEC* v. *Merkin*, 283 F.R.D. 689, 698 (S.D. Fla. 2012). OAG mistakenly argues that preparing its Rule 11-f witness to testify "would necessarily intrude on privileged content." Br. at 6. As explained in Section II.A, *infra*,

ExxonMobil's Rule 11-f Notice seeks only non-privileged factual information, and OAG is free to assert any privilege objections at the deposition itself.

II. ExxonMobil Is Justified in Deposing OAG, Even Under the Standard for Deposing Opposing Counsel

Even if this Court determines that an entity deposition of OAG would constitute a deposition of opposing counsel, ExxonMobil would be well within its rights to seek such a deposition. OAG *itself* set the precedent for deposing opposing counsel in this case when it questioned ExxonMobil's counsel for approximately 10 hours. A deposition of OAG would also be fully justified under *Liberty Petroleum Realty, LLC* v. *Gulf Oil, L.P.*, 164 A.D.3d 401 (1st Dep't 2018). There, the court held that a party seeking to depose opposing counsel must ultimately show that **(i)** the testimony it seeks is material and necessary; **(ii)** the party has a good faith basis for seeking the deposition; and **(iii)** the party cannot obtain the information "from another source" than opposing counsel. *See id.* at 406. ExxonMobil can easily make each of these three showings.

As a threshold matter, a party seeking a protective order "bears the initial burden to show either that the discovery sought is irrelevant or that it is obvious the process will not lead to legitimate discovery." *Id.* at 403. OAG cannot make this showing because ExxonMobil's Rule 11-f Notice seeks information directly relevant to the claims and defenses here. *See id.* OAG has also not demonstrated that it is obvious the deposition will not lead to legitimate discovery. *See id.* OAG's arguments to the contrary, which we address below, fall flat.

A. ExxonMobil Seeks "Material and Necessary" Information

ExxonMobil's Notice seeks testimony on three subjects material and necessary to the claims and defenses here—OAG's document collection and preservation practices; the factual bases underlying the Complaint; and OAG's relationships and communications with third parties. *See* Ex. A at 6–8.

Document Preservation Matters. As OAG itself has conceded, whether documents are properly preserved is a relevant and important topic in any litigation. *See* Dec. 11, 2018 Telephonic Meet-and-Confer. Courts agree. Take, for example, *In re eBay Seller Antitrust Litigation*, 2007 WL 2852364 (N.D. Cal. Oct. 2, 2007). There, for example, the court noted that plaintiffs "are entitled to know what kinds and categories of ESI eBay employees were instructed to preserve and collect, and what specific actions they were instructed to undertake to that end." *Id.* at *2. Indeed, defendant eBay had agreed to provide a 30(b)(6) witness to testify "regarding its ESI preservation and collection efforts" and "*d[id] not dispute* that plaintiffs are entitled to discovery on the general subject of eBay's ESI retention and collection efforts." *Id.* at *1–2. Having received OAG's document retention policies and its list of litigation-hold recipients, after months of delay, ExxonMobil now seeks reasonable follow-up testimony about how OAG implemented its document preservation policies *in this case*.

OAG's accusations of a "fishing expedition" are misplaced. Br. at 6. Setting aside the independent relevance of a party's document preservation procedures, OAG's recent document production further underscores the need for testimony on this topic. To date, we have identified at least 10 email chains that former Attorney General Eric Schneiderman forwarded from his personal account to his work account.[1] Across the board, these communications between Mr. Schneiderman and various special interests substantiate ExxonMobil's affirmative defenses of selective enforcement, conflict of interest, and official misconduct. By routinely corresponding about this litigation through his Personal Account, Mr. Schneiderman subjected that account to disclosure. *See Competitive Enter. Inst.* v. *Office of Sci. & Tech. Policy*, 827 F.3d 145, 150 (D.C.

[1] *See, e.g.*, NYOAG-000005192; NYOAG-000005193; NYOAG-000005194; NYOAG-000005198; NYOAG-000005199; NYOAG-000005200; NYOAG-000005207; NYOAG-000005210; NYOAG-000011783; NYOAG-000011785.

Cir. 2016) (observing that a government official cannot "deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain"). Whether OAG properly preserved and collected all documents relating to Mr. Schneiderman's account is a subject that can be thoroughly and efficiently explored only in the unique setting of a deposition.

Finally, some clarification is in order on the history surrounding OAG's depositions of ExxonMobil's inside and outside counsel. OAG asserts that the circumstances surrounding its deposition of opposing counsel "are not remotely similar" to those surrounding ExxonMobil's requested deposition of OAG. Br. at 9. OAG represents, for instance, that its examinations of ExxonMobil's counsel were "narrowly focused" and "limited to facts" regarding "one particularly critical email account." *See id.* at 1, 9. In fact, OAG devoted only a small fraction of the roughly 10 hours it spent examining ExxonMobil's counsel directly on the email account in question. The remainder of the examinations spanned, for example, **(i)** all manner of document preservation topics; **(ii)** counsel's familiarity with e-discovery case law; and **(iii)** counsel's substantive understanding of the Company's *Managing the Risks* report. Here, ExxonMobil seeks analogous—albeit far more limited—testimony on select issues related to OAG's document preservation practices.

Factual Bases Underlying the Complaint. ExxonMobil also seeks to question OAG about the facts that underlie the Complaint's allegations. As the First Department has explained, the "[t]he purpose of examinations before trial, like the trial itself, is to *get out the facts.*" *See Dorros Bros.*, 274 A.D. at 13 (emphasis added). Claiming privilege concerns, OAG asserts that a deposition seeking to discover the factual bases underlying certain allegations would not lead to legitimate discovery. *See* Br. at 5–6. But as ExxonMobil has explained repeatedly, the Company

"s[eeks] to discover only the facts underlying the claim[s] against [it] and not the mental impressions of [the State's] counsel." *SEC* v. *Kramer*, 778 F. Supp. 2d 1320, 1328 (M.D. Fla. 2011). Even OAG has conceded that this is a sound area of inquiry. Quoting the landmark Supreme Court case, *Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947), OAG embraced the position that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." Dkt. No. 97 at 2.

Furthermore, at no point has ExxonMobil suggested that privilege be suspended during the deposition. As a federal court observed, "[c]ounsel may protect against the disclosure of work product or privileged information in 30(b)(6) depositions by interposing appropriate objections and giving instructions on a question-by-question basis." *Merkin*, 283 F.R.D. at 698.[2] OAG is free to do the same here. But what it cannot do is file a 329-paragraph, 90-page Complaint with scant references to specific documents, and at the same time deny ExxonMobil any opportunity to probe the factual foundations of its case through a deposition.

OAG's Third Party Relationships and Communications. Finally, ExxonMobil seeks legitimate discovery about its prosecutorial misconduct defenses. The Company's brief responding to OAG's motion to dismiss details the factual basis of these defenses. *See generally* Dkt. No. 114. In particular, ExxonMobil's Verified Amended Answer pleads facts showing that **(i)** OAG coordinated with special interests to target ExxonMobil because OAG disagreed with ExxonMobil's climate change opinions; **(ii)** OAG's acceptance of fellows from the State Energy & Environmental Impact Center at the New York University School of Law generates a conflict of interest; and **(iii)** OAG's investigation of, and enforcement action against, ExxonMobil are driven by improper motives. *See* Dkt. No. 119 at 35–48. ExxonMobil is entitled to full disclosure

[2] OAG has acknowledged that Rule 30(b)(6) of the Federal Rules of Civil Procedure, which also addresses entity depositions, is analogous to Rule 11-f. *See* Dkt. No. 107 at 2.

of information material and necessary to prove these defenses.

OAG cites its motion to dismiss for the proposition that matters in ExxonMobil's Notice "concerning prosecutorial misconduct are irrelevant to any legitimate claim or defense." Br. at 5. But what constitutes a "legitimate" defense is for this Court—not OAG—to decide. OAG may not resist its discovery obligations by usurping the judicial function. *Cf. Nat'l All. for Accessability* v. *Calder Race Course, Inc.*, 2010 U.S. Dist. LEXIS 122513, at *6 (S.D. Fla. Nov. 2, 2010) (concluding that a party may not "circumvent the applicable discovery rules by challenging the legal viability" of the opposing party's claims). In any event, the Court made clear in its February 27 Notice that ExxonMobil is "privileged to pursue discovery on its defenses" notwithstanding OAG's pending motion to dismiss these defenses or, alternatively, limit discovery on them. *See* Dkt. No. 59 at 1. Accordingly, OAG's mootness argument is of no moment. *See* Br. at 5–6.

B. ExxonMobil Has a Good-Faith Basis for the Deposition

ExxonMobil seeks this deposition for a legitimate purpose: to efficiently acquire the information it needs to clear its name, which OAG has sullied with its investigation and Complaint. The First Department explained in *Liberty Petroleum* that a party seeking to depose opposing counsel must show "good cause" so as to "rule out the possibility that the deposition is sought as a tactic intended solely to disqualify counsel or for some other illegitimate purpose." 164 A.D.3d at 406. ExxonMobil has no interest in disqualifying opposing counsel, unduly burdening OAG, delaying discovery, or pursuing any other allegedly nefarious aim, as evidenced by the targeted nature of its Notice. On the contrary, with trial set to begin in October, a Rule 11-f deposition of OAG would allow ExxonMobil to elicit, on one occasion, binding testimony sufficient to complete the disclosure record. As recently as the parties' March 21 discovery conference, this Court emphasized "cost effective[ness]" and "efficien[cy]" as values that should guide the discovery

process. Ex. E at 14:19.

Moreover, as the discussion in Section II.A, *supra*, demonstrates, ExxonMobil seeks this deposition to acquire information directly relevant to OAG's claims and the Company's defenses. As recognized by Judge Ed Kinkeade of the United States District Court for the Northern District of Texas, ExxonMobil's prosecutorial misconduct allegations, in particular, raise "important issues." *See* Ex. B at 12. Judge Kinkeade expressed concern about OAG's conduct, noting that the New York and Massachusetts "attorneys general have conveniently cherry picked what they share with the media about their investigations." *Id.* at 9. He also identified the irony in then-Attorney General Schneiderman's liberal disclosures to the media about the investigation but "[un]willing[ness] to share the information related to the events at the March 29, 2016 meeting at the AGs United for Clean Power press conference." *Id.* at 10. "Any request for information about the events surrounding [this conference] should be welcomed by the attorneys general" to assure the public that these events "lacked political motivation." *Id.* Judge Kinkeade also noted that the "Climate Change Coalition Common Interest Agreement," the subject of Matter 17 in ExxonMobil's Rule 11-f Notice, "causes the Court to further question if the attorneys general are trying to hide something." *Id.* at 8. ExxonMobil seeks a Rule 11-f deposition of OAG to pursue exactly this line of questioning.

C. ExxonMobil Cannot Acquire the Information It Seeks From a Source Other Than OAG

A deposition of OAG is necessary to elicit the information ExxonMobil requires. In *Liberty Petroleum*, the First Department held that a party seeking to depose opposing counsel must show that it needs information "not available from another source." 164 A.D.3d at 406. Here, OAG is the only entity that could possibly provide binding testimony on OAG's document preservation policies, the factual bases underlying the Complaint, and OAG's relationships and

communications with third parties. OAG's arguments to the contrary are legally and factually unsupported.

First, OAG incorrectly reads *Liberty Petroleum* and *Katz* as establishing the proposition that a party may notice a Rule 11-f deposition of opposing counsel only after it has exhausted all "other methods of discovery." *See* Br. at 4–5 & n.1. OAG relies on *Liberty Petroleum*'s requirement that a party seeking to depose opposing counsel must show that the information sought "is not available from another source." *Id.* at 6 (quoting *Liberty Petroleum*, 164 A.D.3d at 406). But OAG misinterprets this requirement by ignoring *Liberty Petroleum*'s reference to the Court of Appeals decision in *Matter of Kapon* v. *Koch*, 23 N.Y.3d 32 (2014). In *Kapon*, the Court of Appeals clarified that a party seeking to subpoena a nonparty need not show that it cannot obtain the disclosure sought "from *sources other than the nonparty*." *See id.* at 37–38 (quoting *Kooper* v. *Kooper*, 74 A.D.3d 6, 17 (2d Dept' 2010)) (internal quotation marks omitted) (emphasis added). The Court's discussion thus contemplates that a "source" in this context is an *entity*, not a *means* of discovery, as OAG claims. *See* Br. at 4–5 & n.1. Read in context, then, *Liberty Petroleum* holds only that a party seeking to depose opposing counsel must be able to show that the information sought is not available from *entities* other than opposing counsel.

Likewise, OAG misreads *Katz* in suggesting that a defendant must exhaust *all* disclosure vehicles before deposing the State. *See* Br. at 5 & n.1 (citing *Katz*, 84 A.D.2d at 385–86). There, the defendants had moved to examine the State just a month after the State filed its complaint. 84 A.D.2d at 382–83. The court observed that "[a]t this stage in the proceedings" a bill of particulars would be appropriate, but specifically granted defendants leave to renew their motion to examine the State should they require additional disclosure. *See id.* at 385–86. Here, in stark contrast to the defendants in *Katz*, ExxonMobil served its Rule 11-f Notice *after* trying to elicit

information from OAG through a host of other disclosure vehicles, including a notice to admit, document requests, and interrogatories.

Second, even if OAG were correct that ExxonMobil had to show the inadequacy of other disclosure vehicles before seeking a Rule 11-f deposition, ExxonMobil could easily make that showing. OAG argues that contention interrogatories should have been sufficient for ExxonMobil's purposes. *See* Br. at 7. But this position is a non-starter—just like any other civil litigant, ExxonMobil is not required to squeeze within a limited set of contention interrogatories all the information it would otherwise acquire in a seven-hour entity deposition. *See Dorros Bros.*, 274 A.D. at 13 (noting that "[t]he purpose of examinations before trial, like the trial itself, is to *get out the facts*" (emphasis added)). In any event, OAG's vague contention interrogatory responses fail to provide meaningful guidance. Throughout, OAG directs ExxonMobil to overly broad categories of documents, such as "[a]ll cash flow or economic models produced by ExxonMobil or IOL." *See* Ex. G (Pl.'s Resp. to Def.'s First Set of Contention Interrogs.) at 17.

OAG asserts that ExxonMobil can inquire into OAG's third party relationships by reviewing documents OAG has already produced and by deposing the third parties themselves. *See* Br. at 8. But neither these documents nor discussions with third parties could possibly reveal *OAG*'s position on its relationship with these parties. Likewise, OAG asserts that the documents in its preliminary exhibit list "support the allegations in the Complaint and make clear the OAG's factual basis for those allegations." Br. at 7. But a monolithic preliminary exhibit list is no substitute for testimony identifying the factual basis of *particular* allegations in the Complaint. A Rule 11-f deposition is entirely appropriate and necessary at this stage in the litigation.

CONCLUSION

As much as OAG would prefer to avoid its discovery obligations, New York authorities establish that OAG must sit for a Rule 11-f deposition. Through such a deposition, ExxonMobil will efficiently acquire information that is available only from OAG, acting on behalf of the State, and cuts to the heart of the claims and defenses here. The Attorney General's motion for a protective order should be denied.

Dated: May 8, 2019
New York, NY

Respectfully submitted,

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Certification of Compliance with Word Count

Pursuant to Rule 17 of the Rules of Practice for the Commercial Division of the Supreme Court, I certify that this brief complies with that rule because it contains 4,736 words, exclusive of the caption, table of contents, table of authorities, and signature block. In making this certification, I relied on Microsoft Word's "Word Count" tool.

Dated: May 8, 2019
New York, New York

By: /s/ *Theodore V. Wells, Jr.*
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