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

OFFICE OF THE ATTORNEY GENERAL'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR A PROTECTIVE ORDER TO PROHIBIT EXXON MOBIL CORPORATION FROM DEPOSING THE OFFICE OF THE ATTORNEY GENERAL

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PRELIMINARY STATEMENT

Exxon Mobil Corporation ("ExxonMobil") claims that it needs to depose the Office of the Attorney General ("OAG") "to clear its name, which OAG has sullied with its investigation and Complaint." Dkt No. 197 ("ExxonMobil Br.") at 12. To be sure, ExxonMobil has every right to present a vigorous defense. However, ExxonMobil has not met the standard for taking a deposition of opposing counsel because it does not and cannot demonstrate that the information sought is necessary and material to any claim or defense, that it has a good faith basis for seeking it, or that it is not available from another source.

ExxonMobil's argument that it should be allowed to take this testimony is based on a legally unsound theory of reciprocity. For example, ExxonMobil claims that the OAG's examination of two of the company's attorneys during the investigation "set a clear precedent for deposing opposing counsel" in this matter. *Id.* at 4. Even if reciprocity were a guiding principle at some abstract level in *civil litigation*, there is no reciprocity during an *investigation* by the OAG. The OAG has broad statutory powers to subpoena documents and testimony, and to bring enforcement actions where the evidence developed during the course of the investigation so warrants, as the OAG did here. The filing of a complaint by the OAG does not confer on a defendant the right to conduct its own reciprocal investigation of the OAG.

Having no qualms about false equivalence, ExxonMobil claims that it "recently discovered that AG Schneiderman maintained a personal email account that he used for work purposes," and that this email account is analogous to Rex Tillerson's Wayne Tracker account that was the basis for the examinations of ExxonMobil's attorneys. *Id.* at 4. However, the emails cited by ExxonMobil only serve as evidence that when AG Schneiderman did receive errant work-related emails on his personal account, he diligently forwarded those emails to his OAG account for

purposes of preservation. Far from demonstrating a need for testimony on document preservation, these emails show that AG Schneiderman took appropriate steps to ensure that work-related emails were stored and preserved on his work account. By comparison, former CEO Rex Tillerson's Wayne Tracker account was a work account on the ExxonMobil server that ExxonMobil was legally required to preserve, but failed to do, despite in-house and outside counsel's knowledge of the account and knowledge that emails not preserved would be subject to automatic deletion.

Ultimately, ExxonMobil fails to establish that a deposition of the OAG is warranted. The argument that the OAG should be treated as a party rather than as opposing counsel is frivolous, and the suggestion that the OAG could somehow prepare a non-attorney as a witness is illusory and impracticable under the circumstances of this case. Under the standard for obtaining a deposition of opposing counsel, ExxonMobil does not and cannot show that the testimony it seeks is material and necessary, that it has a good faith basis for seeking the testimony, and that it cannot obtain the information from another source. The company's endless references to the purported inconvenience and offensiveness of the OAG's requests suggest that it is motivated by a desire for retribution, rather than a good faith effort to seek material and necessary information that it cannot obtain from another source. And the fact that ExxonMobil failed to depose any third party with potentially relevant information before the close of fact discovery does not strengthen its claim that it should be entitled to a deposition of the OAG.

STANDARD OF REVIEW

C.P.L.R. § 3103(a) provides that a court may, in its discretion, issue a protective order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." In assessing whether a protective order should issue, a court must weigh the

need for discovery against the detrimental effects of disclosure "in light of the facts of the particular case before it." *Cynthia B. v. New Rochelle Hosp. Med. Ctr.*, 60 N.Y.2d 452, 461 (1983). In addition, "[w]hen the disclosure process is used to harass or unduly burden a party, a protective order eliminating that abuse is necessary and proper." *Jones v. Maples*, 257 A.D.2d 53, 56-57 (1st Dep't 1999) (internal citations and quotation marks omitted). During the pendency of a motion for a protective order, disclosure obligations related to the challenged discovery are suspended. C.P.L.R. § 3103(b) ("Service of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute.").

ARGUMENT

The OAG's motion for a protective order should be granted. First, ExxonMobil's attempt to depose the OAG should be reviewed based on the standard for deciding when a deposition of opposing counsel is warranted. Second, under this standard, ExxonMobil cannot establish that the information sought is necessary and material, that it has a good faith basis for seeking it, or that the information is not available from other sources.

A. ExxonMobil's Attempt to Depose the OAG Is Subject to the Standard in *Liberty Petroleum Realty* for Depositions of Opposing Counsel

To depose the OAG, ExxonMobil must satisfy the standard for deposing opposing counsel set forth by the First Department in *Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 164 A.D.3d 401, 406-08 (1st Dep't 2018). ExxonMobil claims that standard should not apply here, as the OAG should not be treated as opposing counsel but instead as a party. Unsurprisingly, ExxonMobil cites no case law for this proposition, which would represent a significant departure from the current relationship between prosecutors and defense counsel. Instead, the company speciously argues that the OAG *admitted* that it was a party through a pro forma stipulation to amend the caption.

ExxonMobil Br. at 1. The source of the purported admission was a provision that the current Attorney General's name would be "substituted as plaintiff" in place of her predecessor's name. *Id.* However, as ExxonMobil understood perfectly well, this stipulation did not remove the People of the State of New York from the caption. Instead, it provided that plaintiff would be captioned as "People of the State of New York, by Letitia James, Attorney General of the State of New York."

ExxonMobil also argues that the OAG could prepare and designate a *non-attorney* to sit for the deposition. ExxonMobil Br. at 7. ExxonMobil cites dicta in one case from a federal district court in Florida for the proposition that an entity will "generally" designate a non-attorney as a witness for a federal 30(b)(6) deposition. ExxonMobil Br. at 7 (citing *SEC v. Merkin*, 283 F.R.D. 689, 698 (S.D. Fla. 2012)).[1]

While that practice may make sense for government agencies that rely on non-attorneys in investigations, it does not make sense here, where the OAG has conducted the investigation and litigation primarily through its attorneys. The OAG staff most knowledgeable about the proposed topics are attorneys, and the knowledge necessary to prepare a witness is in the possession of OAG attorneys. A deposition of any OAG staff member in this case would be equivalent to deposing an

[1] *SEC v. Merkin* also conflicts with New York law. Whereas the First Department held in *Liberty Petroleum Realty* that a deposition of opposing counsel was unavailable if the information could be obtained from another source, the federal district court in *SEC v. Merkin* held that federal courts would not require litigants to use a different discovery tool before resorting to a deposition. *Compare Liberty Petroleum Realty*, 164 A.D.3d at 406 ("[T]he party seeking the deposition must show that the deposition is necessary because the information is not available from another source.") *and People v. Katz*, 84 A.D.2d 381, 384-85 (1st Dep't 1982) (denying request for deposition testimony when it had yet to be determined whether the requested information could be obtained through a bill of particulars) *with SEC v. Merkin*, 283 F.R.D. at 698.

attorney with respect to privilege concerns, and would not justify a departure from the standard set forth in *Liberty Petroleum Realty*.

Even if the standard for deposing opposing counsel did not apply, however, there is good cause for a protective order on the basis that the deposition notice calls for testimony that is inextricable from attorney work product. For example, one topic seeks the facts underlying various allegations in the Complaint. The OAG's analysis of how the facts and evidence in this case relate to each of the various allegations is attorney work product, and would not cease to be attorney work product upon being conveyed to a non-attorney. All other topics in the deposition notice relate only to the affirmative defenses at issue in the OAG's pending motion to dismiss. If the Court grants that motion, those topics will be outside the scope of discovery no matter what standard applies.

B. ExxonMobil Fails to Meet the Standard in *Liberty Petroleum Realty*

The party seeking a deposition of opposing counsel must demonstrate that the information sought is "material and necessary" and that the party has a "good faith basis for seeking it." *Liberty Petroleum Realty*, 164 A.D.3d at 406-08. Moreover, "in the unusual situation where a party seeks to depose opposing counsel, . . . the party seeking the deposition must show that the deposition is necessary because the information *is not available from another source*." *Id.* at 406 (emphasis added). ExxonMobil has not and cannot make any of these showings.

1. ExxonMobil Has Not Demonstrated that the Information Is Necessary or Material to Any Defense

With the exception of one topic, which seeks information about the facts underlying 54 paragraphs in the Complaint, all of the proposed deposition topics relate only to ExxonMobil's prosecutorial misconduct defenses, which the OAG has moved to dismiss. *See* Mot. Seq. No. 2.

Accordingly, if the Court grants the OAG's pending motion to dismiss, those deposition topics will not be relevant to any valid claims or defenses and will therefore be outside the scope of disclosure authorized by C.P.L.R. § 3101(a). ExxonMobil attempts to sidestep this point by arguing that the OAG's decision to challenge any discovery requests that are based on the disputed defenses is tantamount to "usurping the judicial function." ExxonMobil Br. at 12. For good measure, ExxonMobil adds that "what constitutes a 'legitimate' defense is for this Court—not OAG—to decide." Of course, the OAG agrees that the legitimacy of the defenses is for the Court to decide: the OAG has challenged the defenses by filing a motion to dismiss those defenses, which, by definition, asks for a *decision by the Court*. The OAG will tailor its discovery responses in accordance with any decision by the Court.

In any case, ExxonMobil has not demonstrated that the testimony it is seeking is necessary or material. ExxonMobil's argument that it should be allowed to take testimony concerning document preservation is not based on need or materiality, but rather on vague notions of reciprocity. In particular, ExxonMobil claims that the OAG's examination of two of the company's attorneys during the investigation "set a clear precedent for deposing opposing counsel" in this matter. *Id.* at 4. To support this proposition, ExxonMobil cites a case from 1948 that rejected the outdated rule that only the party with the burden of proof may take a deposition. *Id.* (citing *Marie Dorros, Inc. v. Dorros Bros.*, 274 A.D. 11, 13-14 (1st Dep't 1948)). Even if reciprocity were a guiding principle to any degree in *civil litigation*, there is no reciprocity during an *investigation* by the OAG. The OAG has broad statutory powers to subpoena documents and testimony, and to bring enforcement actions based on evidence developed during the course of investigations, as the OAG did here. *See, e.g.*, Executive Law 63(12). The fact that the OAG took examinations of two

attorneys during the investigation related to ExxonMobil's failure to preserve a secondary email account of its then CEO is irrelevant to ExxonMobil's present attempt to depose the OAG.

Lacking a cogent explanation as to why ExxonMobil actually needs such testimony, ExxonMobil claims that the circumstances that gave rise to the OAG's examinations of two of its attorneys during the investigation are present here. To that end, the company cites a handful of emails by former Attorney General Eric Schneiderman that purportedly show that he "maintained a personal email account that he used for work purposes." *Id.* at 4. These emails, however, do not demonstrate any need for deposition testimony. Quite the opposite, they evince former AG Schneiderman's diligence in forwarding emails to his OAG account that he thought might be of interest to OAG personnel or relevant to OAG matters, to ensure they were captured and preserved in accordance with the OAG's policies and document retention obligations.

This is not, as ExxonMobil suggests, a case where a government official is seeking to "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." ExxonMobil Br. at 9-10 (citing *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 150 (D.C. Cir. 2016)). It is precisely the opposite. The emails cited by ExxonMobil show a government official taking steps to ensure that emails potentially relevant to the work of the agency were properly preserved. Moreover, a review of the emails cited by ExxonMobil support a finding that former AG Schneiderman took an over-inclusive approach to designating emails as work-related. A majority of these emails consist of third parties sending publicly available links and newsletters to him, including TED talks, articles and daily news briefings. In only three emails is there any message whatsoever *from* former AG Schneiderman to any third party. In one, he forwarded an article from the New York Daily News to a third party with a brief note informing the recipient

that the recipient was quoted in different article in the same issue. In another, he replied "Thanks!" More importantly, in every single instance, former AG Schneiderman followed the prudent practice of promptly forwarding these emails to his OAG email account. *See, e.g.*, *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 319 F. Supp. 3d 431, 437 (D.D.C. 2018); *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 241 F. Supp. 3d 14, 21-22 (D.D.C. 2017). Here, as elsewhere, government employees "are entitled to the presumption that they complied with agency policies," including email policies, "absent evidence to the contrary." *Competitive Enter. Inst.*, 241 F. Supp. 3d at 21 (citing *Bracy v. Gramley*, 520 U.S. 899, 909 (1997)). ExxonMobil has cited no evidence to the contrary.

Nevertheless, in response to a letter from ExxonMobil asserting that emails forwarded to former AG Schneiderman's OAG account established that he used his personal account for OAG business, and asserting that the OAG was obliged to review and produce emails from the personal account, the OAG contacted former AG Schneiderman and requested clarification of the circumstances surrounding the use of that account. Mr. Schneiderman confirmed that (a) he was fully aware of and complied with all of his discovery obligations, (b) he did not use his personal email account to conduct OAG business, (c) he diligently forwarded to his OAG account any emails that were sent to his personal email account concerning the OAG's investigations or other OAG matters to ensure the preservation of such emails, (d) the 10 emails referenced in ExxonMobil's April 29th letter all reflect that practice, (e) he did not use his personal email account to engage in any substantive communications regarding the OAG's investigation of ExxonMobil, and (f) he is confident that there are no communications to or from his personal email account that are relevant to ExxonMobil's affirmative defenses or to the OAG's investigation of ExxonMobil that were not forwarded to his official OAG account. *See* Second Montgomery Aff.,

Ex. A (Schneiderman Aff.). Thus, any potentially relevant communications in Mr. Schneiderman's personal email account would be duplicated in his OAG account and, thus, available to ExxonMobil. Therefore, the examples cited by ExxonMobil do not raise any questions concerning preservation to warrant deposition testimony. *See Matter of Smith v. New York State Off. of the Attorney Gen.*, 159 A.D.3d 1090, 1091 (3d Dep't 2018) (explaining that FOIL dispute as to former AG Spitzer's personal email account was resolved by affidavit of Spitzer attesting that he did not have responsive records on his personal account); *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 241 F. Supp. 3d 14, 22 (D.D.C. 2017) (explaining that affidavit attesting to practice of routinely forwarding work-related emails to a work account was sufficient to show that, more likely than not, the employee forwarded any particular email to his work account); s*ee also Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150-51 (1980) (no obligation to produce documents outside of agency's custody and control).

By contrast, the examination of two of ExxonMobil's attorneys during the investigation involved a work account of the company's former CEO on the ExxonMobil server that ExxonMobil was legally required to preserve. It was not an account for circulating news clippings or TED talks. [redacted]. Second Montgomery Aff., Ex. B (Rosenthal Tr.) at 94 [redacted].

Contrary to ExxonMobil's characterization, the examinations were narrowly focused on potential spoliation of evidence in connection with that account. The questions, including those that mentioned ExxonMobil's *Managing the Risks* report, were aimed narrowly at probing (1)

whether ExxonMobil was aware of the Wayne Tracker account and (2) whether ExxonMobil understood that the Wayne Tracker emails needed to be preserved. *See, e.g.*, Second Montgomery Aff., Ex. C (Hirshman Tr.) at 81 [redacted]. The examinations confirmed that in-house and outside counsel knew of the account and knew that emails not preserved would be subject to automatic deletion. [redacted] *Id.* at 135-36. By the time the OAG learned that the Wayne Tracker account belonged to Rex Tillerson, a significant number of emails had been irretrievably lost by automatic deletion. *Id.* at 150-51.

2. ExxonMobil Has Not Demonstrated a Good Faith Basis for Seeking the Deposition

ExxonMobil claims that it needs to depose the OAG "to clear its name, which OAG has sullied with its investigation and Complaint." ExxonMobil Br. at 12. However, with one exception, the deposition topics are focused on developing affirmative defenses that have no bearing on whether or not it misled its investors, and thus no bearing on the allegations that purportedly "sullied" the company's name. For example, ExxonMobil seeks to depose the OAG about its communications with "former Vice President Albert Gore," its relationship with NYU, its "policies governing press [c]ommunications," and its involvement in a conference in La Jolla in 2012 that the OAG did not attend. At best, the company wishes to use the deposition to bolster conspiracy theories that form the basis of defenses that should be dismissed pursuant to the OAG's

pending motion. In any case, as discussed below, that discovery could be efficiently obtained through the third parties referenced by the company without the need to take the extraordinary deposition at issue here. Accordingly, the company has not established a good faith basis for this deposition. *See Liberty Petroleum Realty*, 164 A.D.3d at 406-08.

ExxonMobil's request for testimony about 54 paragraphs of the complaint – the one request that is not relevant exclusively to ExxonMobil's prosecutorial misconduct defenses – is improper as well. In particular, the company's insistence that it "seeks only to discover the facts underlying the claims," ExxonMobil Br. at 10-11, does not capture the reality of what deposing the OAG about its allegations entails. Asking the OAG to explain, in a deposition, how the evidence in this case bears upon the various allegations in the complaint intrudes into the heartland of attorney work product. A deposition in which every question is met with a privilege objection and an instruction not to answer would be pointless.

After all of the correspondence, arguments, and examinations in this matter, ExxonMobil's claim that it is unaware of, and needs a deposition concerning, the basis of the OAG's allegations is baseless. First, the Complaint sets out, in detail, the evidence supporting the claims that were made. Second, the OAG has provided a preliminary exhibit list that includes the documents that form the basis of the allegations. Third, in the three weeks since the filing of this motion, the OAG has produced responses to contention interrogatories and expert reports that set out opinions, with detailed support, that go directly to the allegations that ExxonMobil seeks to inquire about. The proper format for ExxonMobil to test those opinions is by deposing the OAG's experts, not by deposing the OAG itself.

3. ExxonMobil Has Not Demonstrated that the Information Is Not Available from Another Source

Finally, ExxonMobil has had months to elicit testimony from third parties who could speak to the allegations in the Complaint or to its affirmative defenses. ExxonMobil argues that it cannot obtain the testimony it needs from third parties because it needs testimony that would bind the OAG. ExxonMobil Br. at 13. However, the standard is whether the information sought is *available* from another source, not whether the information sought could be used to *bind* an adversary. *See Liberty Petroleum Realty*, 164 A.D.3d at 406. It is also notable and compelling evidence of ExxonMobil's true motivation in seeking this deposition that ExxonMobil did not depose a single witness before the close of fact discovery. Instead, ExxonMobil made a decision in this litigation to depose only the OAG when it could have deposed up to nine other individuals or entities as of right. It cannot claim now that a deposition of the OAG is the only way to obtain the information necessary and material to its defenses.

Moreover, as discussed *supra*, ExxonMobil has now received the OAG's responses to contention interrogatories, which explain the factual basis underlying the allegations in the Complaint, including how the OAG calculated various figures contained in its allegations, and which direct ExxonMobil to specific documents that the OAG is relying upon for specific allegations. ExxonMobil has also now received the OAG's expert reports, which explain in detail the OAG's theory of liability and damages. ExxonMobil is entitled to depose the OAG's experts to test their theories and probe their factual basis. As such, ExxonMobil's argument that the information is not available from other sources is demonstrably false on multiple counts. *See Liberty Petroleum Realty*, 164 A.D.3d at 406.

CONCLUSION

For the foregoing reasons, the OAG respectfully requests that the Court grant its motion for a protective order prohibiting ExxonMobil from conducting a Rule 11-f deposition of the OAG.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 17 of the Commercial Division of the Supreme Court, Marc Montgomery, Assistant Attorney General for the Office of the Attorney General of the State of New York, hereby certifies that, according to the word count feature of the word processing program used to prepare this brief, this brief complies with the length limits of Rule 17.

Dated: May 15, 2019
New York, New York

/s Marc Montgomery
Marc Montgomery