STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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Via NYSCEF and Hand Delivery

May 17, 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 of May 15, 2019, complaining about the list of potential non-party witnesses that the OAG provided on April 5, 2019.

No rule requires parties to provide witness lists months before trial, and the Practice Rules for Part 61 provide for the exchange of witness lists 14 days before trial.[1] Nonetheless, in an attempt to accommodate ExxonMobil and avoid burdening the Court with this issue, the OAG first provided a preliminary witness list on February 1, and then provided a disclosure akin to what is called for in Rule 26(a)(1)(A) of the Federal Rules of Civil Procedure on April 5. The OAG's April 5 disclosure, which includes 28 non-party entities, largely overlaps with the non-parties specified in the complaint, and includes the names of specific relevant individuals at the listed entities where known.[2] This disclosure was fully consistent with both Rule 26(a)(1)(A), which provides that information should be disclosed about individuals likely to have information "that the disclosing party may use to support its claims or defenses," and with the Court's understanding that OAG would "identify within reason the people who may be called as trial witnesses."[3] With five months remaining until trial, the OAG has not yet determined which witnesses it will call at

[1] Practice Rules for Part 61, Rule 28; *see also Gonzalez v. City of New York*, 151 A.D.3d 629, 632 (1st Dep't 2017) (reversing trial court order that precluded testimony of witnesses not specified in a witness list; "nothing in the CPLR requires a party to generate a trial witness list").

[2] As the OAG informed ExxonMobil, to the extent that ExxonMobil stipulates to the admission of certain publicly-available reports, testimony from each of these institutions may not be necessary. (4/15/2019 ltr. from Kim A. Berger to Daniel Toal, NYSCEF No. 220, at 2-3). However, no such stipulations have been made to date.

[3] Transcript of 3/21/2019 Hearing, NYSCEF No. 203, at 9-11.

trial, but has nonetheless gone beyond any legal requirements in providing ExxonMobil with information about potential non-party witnesses.

Although it has received more information about non-party witnesses than it is entitled to at this stage under the C.P.L.R., the Commercial Division Rules, the rules and orders of this Court, or even the Federal Rules of Civil Procedure, ExxonMobil remains unsatisfied. In particular, ExxonMobil seeks the extraordinary relief of requiring the OAG to provide yet another witness list by *May 20* – two days *before* the hearing at which ExxonMobil requests that this issue be considered. This bit of gamesmanship is evidently intended to set up ExxonMobil's even more extraordinary proposal that, in the alternative, the OAG be precluded from calling witnesses not included in the OAG's list of February 1 – completely ignoring the OAG's list of April 5. "A preclusion order requires a determination that the party engaged in willful, contumacious or bad faith conduct[.]" *Marquez v. 171 Tenants Corp.*, 161 A.D.3d 646, 646-47 (1st Dep't 2018) (reversing preclusion order); *see also Gendusa v. Yu Lin Chen*, 71 A.D.3d 1085, 1086 (2d Dep't 2010) (reversing trial court that precluded plaintiff from calling nonparty witness, even though plaintiff did not provide witness's name and address; noting that "any prejudice could have been avoided by granting an adjournment of trial to allow the defendant to depose the witness").[4] Nothing of the sort has occurred here.[5]

Indeed, despite the wealth of information that the OAG provided in its complaint, in two witness lists, and in numerous other exchanges, ExxonMobil did not notice the deposition of a single non-party witness prior to the close of fact discovery on May 1. Nothing better demonstrates ExxonMobil's actual priorities in litigating this case than the fact that the only deposition notice ExxonMobil served during fact discovery was of the OAG itself.

To the extent that the Court decides to entertain ExxonMobil's arguments, the OAG respectfully submits that ExxonMobil should be required to move for sanctions under a new motion sequence, so that the OAG can make a full written response and, if necessary, take an appeal from a complete written record.

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[4] *See also McLeod v. Taccone*, 122 A.D.3d 1410, 1411-12 (4th Dep't 2014) (affirming decision not to impose "extreme" penalty of precluding nonparty testimony); *Holliday v. Jones*, 36 A.D.3d 557, 557-58 (1st Dep't 2007) (affirming decision rejecting preclusion; holding that "[i]n order to invoke the drastic remedy of preclusion (CPLR 3126), the court must determine that the party's failure to comply with a disclosure order was willful, deliberate and contumacious"); *Busse v. Clark Equip. Co.*, 182 A.D.2d 525, 526 (1st Dep't 1992) (even "flagrantly specious responses" did not justify the "extreme remedy of preclusion"); *In re 650 Fifth Ave. & Related Props.*, No. 08 Civ. 10934 (KBF), 2013 U.S. Dist. LEXIS 80248, at *12-14 (S.D.N.Y. June 5, 2013) (not ordering preclusion even when the government failed entirely to provide a court-ordered witness list).

[5] The cases ExxonMobil cites demonstrate the wide gulf between this case and those where preclusion is an appropriate remedy. *See, e.g.*, *Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d 201, 208 (2d Dep't 2012) (imposing sanctions due to "intentionally false and misleading" responses that "were interposed for the purpose of avoiding the [party's] obligation to provide timely and meaningful discovery responses"); *Schoffel v. Velez*, 118 A.D.2d 492, 493 (1st Dep't 1986) (where party agreed to provide witness identities within 90 days, but did not do so for seven months, and "inexplicably failed" to provide addresses it had promised, party was precluded from calling witnesses "whose identity and address have not been heretofore disclosed"); *Crespo v. Metro. Transp. Auth.*, No. 20387/03, 2007 NYLJ LEXIS 2385, at *11-12 (Sup. Ct. Bronx Cnty., Apr. 2, 2007) (precluding testimony when identity of witness was disclosed *two and a half years* after preliminary conference, and one year after filing of note of issue).

Respectfully submitted,

Kevin Wallace

cc: All Counsel of Record (by NYSCEF)