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Via NYSCEF and Hand Delivery

May 20, 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") latest request, following the close of discovery, for access to the personal email account of former Attorney General Eric Schneiderman. *See* ExxonMobil's May 20, 2019 letter to the Court, Dkt. No. 222 ("Letter"). The reply brief that the OAG filed last week in support of its motion for a protective order addresses many of the underlying issues, including the key point that the ten emails cited by ExxonMobil show primarily that the former AG took steps to ensure that potentially relevant communications would be preserved and thus do not support an inference that the OAG's production was incomplete. *See* Dkt. No. 211 at 1-2, 6-10. This letter seeks to address the inaccuracies in ExxonMobil's letter and to summarize why the Court should deny ExxonMobil's request. In short, ExxonMobil's effort to access the personal email account of a former employee, with no evidence that relevant emails on that account were not properly preserved, is extraordinary and should be rejected.

First, as a threshold matter, ExxonMobil's request is premised on the puzzling assertion that "[i]t is *undisputed* that Mr. Schneiderman used his Personal Account alongside his Work Account to conduct official business as Attorney General." Letter at 3 (emphasis added). If ExxonMobil had read the OAG's brief last week or the accompanying affirmation of former AG Schneiderman, it could not have believed that the OAG agreed with that proposition. Indeed, the OAG stated clearly in its brief that former AG Schneiderman "did *not* use his personal email account to conduct OAG business." Dkt. No. 211 at 8 (summarizing affirmation of Eric Schneiderman) (emphasis added).

Moreover, as the OAG has explained, the ten emails cited by ExxonMobil only serve to show that former AG Schneiderman took steps to preserve relevant emails. In particular, when he received an errant email on his personal account that he thought "might be of interest to other members of the OAG of have any relevance to the OAG's investigations or matters," he forwarded that email to his work account, where it would be preserved. *See* Dkt. 213, Exhibit A. The two examples ExxonMobil has highlighted in its letter follow exactly that pattern. The email from Mr. Pawa was an unsolicited communication that former AG Schneiderman forwarded to his work account. *See* Letter, Exhibit B. The email thread with Mr. Cuban, for its part, began as a personal exchange. *See* Letter, Exhibit C (forwarding op-ed from the *New York Daily News* to Mr. Cuban, with a note that Mr. Cuban was quoted in a different article in the same issue). When Mr. Cuban responded with information about a company that specialized in calculating reserves, which he believed could be relevant to the OAG's ExxonMobil investigation, former AG Schneiderman forwarded the entire thread to his work account. *Id.*

Second, ExxonMobil's claim that it "seeks only to hold OAG to the standard set during the investigation" in requesting access to "secondary accounts" is utter nonsense. (Letter at 4.) During the investigation, the OAG requested access to secondary *work* accounts held by ExxonMobil employees. In fact, in the letter that ExxonMobil cites to support this point, the OAG requested information on a secondary ExxonMobil account that was assigned to former CEO Rex Tillerson under the pseudonym of Wayne Tracker. *See* Letter, Exhibit F. The OAG has never pursued the personal email accounts of ExxonMobil employees, much less the personal email accounts of opposing counsel.

Third, ExxonMobil is incorrect that the existence of a work-related email on a personal account somehow defeats the presumption of compliance. See Letter at 3. Government employees are not deemed to violate document preservation policies simply by receiving an email that is potentially relevant to work. This would be impractical, as one cannot control what he or she receives. Rather, government employees are required to ensure that any such emails are preserved, for example, by forwarding them to an official account. In the case cited by ExxonMobil, the court found that the presumption did not apply where a government employee failed to forward work-related emails to his official account within twenty days, as required by federal law; in one instance, that employee did not forward a work-related email until 84 days after the fact. *See id.* (citing *Brennan Ctr. for Justice at New York Univ. Sch. of Law v. U.S. Dep't of Justice*, 2019 WL 1932757, at *5 (S.D.N.Y. Apr. 30, 2019)). Here, by comparison, in all ten instances that ExxonMobil has cited, former AG Schneiderman forwarded the email to his official account within one day.

In addition, it is settled law that an agency is not required to produce duplicates of emails that exist on multiple accounts. *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 241 F. Supp. 3d 14, 22-23 (D.D.C. 2017) (citing cases). Thus, when it is apparent that an employee had a consistent practice of forwarding work-related emails from an outside account to a work account, courts will infer that any work-related emails that exist on the outside account exist in duplicate on the work account. *Id.* ExxonMobil argues without support that this inference is only available when a government employee has forwarded thousands of such emails. Letter at 3. Under this logic, former AG Schneiderman would only be entitled to the presumption of compliance if he had received thousands of work-related emails on his personal account, rather than the ten emails that ExxonMobil has cited. ExxonMobil cites no authority for the remarkable

proposition that there is an inverse relationship between the number of work-related emails on an outside account and the need to search and review that account.

On these facts, ordering the OAG to search and produce emails from the personal account of a former employee – indeed, a former employee who was opposing counsel in the underlying investigation – with no evidence that any relevant emails on the personal account were not properly preserved, is entirely unwarranted.

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We are prepared to discuss this issue in further detail at oral argument on Wednesday.

Respectfully submitted,

/s Marc Montgomery
Marc Montgomery