STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

August 7, 2019

Via NYSCEF and Hand Delivery

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:

We write on behalf of the Office of the Attorney General ("OAG") in response to Exxon Mobil Corporation's ("ExxonMobil") letter of August 5, 2019 concerning third-party witnesses. This extended exchange of letters demonstrates why ExxonMobil's effort to conduct full-scale discovery of third party witnesses at this stage of the litigation is unworkable. ExxonMobil offers no compelling reason why this extensive document discovery is necessary more than three months after the close of fact discovery and after the filing of the Note of Issue.

First, ExxonMobil once again raises complaints about the OAG's preliminary witness list. However, the OAG has provided ExxonMobil with considerably more information about potential third-party witnesses than defendants are entitled to receive under the CPLR and the Rules of the Commercial Division, including the provision of preliminary witness lists on February 1 and April 5 of this year. Then, on June 26, over three months before the deadline for the exchange of final witness lists specified in the Preliminary Conference Order, the OAG provided ExxonMobil with an even further revision of its preliminary witness list, which reflected the OAG's work in the interim to narrow the list of potential witnesses. The OAG has now removed additional witnesses from its preliminary witness list, on which seven third-party witnesses remain.

At no time prior to or during the June 28 conference did ExxonMobil indicate that it intended to seek documents from third parties. Indeed, months ago, the OAG provided to ExxonMobil all of the documents received from third parties in the course of the investigation, comprising over 750,000 pages. If ExxonMobil found this insufficient, it

was free to contact witnesses to seek an understanding of their relevant recollections, and to issue any appropriate subpoenas for documents during fact discovery. Instead, ExxonMobil chose to focus on the affirmative defenses that have now been dismissed.

Second, while each of the third parties may seek to protect their own interests from this overbroad and out-of-time discovery, the OAG has statutory standing to challenge ExxonMobil's document subpoenas to third parties, regardless of any proprietary or privileged interest in the requested documents. CPLR §§ 2303(a) and 3120(3) provide that a subpoena for documents, including to a non-party, must be served on each party in a pending proceeding, and CPLR § 3103(a) provides that "any party" may seek a protective order to limit the use of "any disclosure device." Courts have made clear that parties may challenge subpoenas issued to non-parties under this procedure.[1] Further, as a practical matter, the OAG is in a better position than the third parties to address (1) the relevance, if any, of ExxonMobil's requests to the issues in this case, and (2) the likely effect of ExxonMobil's requests, if granted, on the trial schedule.

Third, ExxonMobil's document requests to third parties are vastly overbroad. Documents concerning third parties' oil and gas holdings generally, and the criteria they use to evaluate those holdings – much less "all documents" on these subjects – do not pertain to the issues that will be the subject of these witness' testimony: what ExxonMobil represented to them, and the significance of those representations.[2] The OAG's subpoenas to the third parties amply covered the relevant topics.[3] By contrast, ExxonMobil's document requests will impose enormous and unnecessary burdens. To take one example, the retirement funds managed by the Office of the New York City Comptroller have almost $200 billion in assets under management and likely have extensive oil and gas holdings across a wide number of asset managers.

Furthermore, communications between these third parties and the OAG or other individuals apparently connected to ExxonMobil's dismissed affirmative defenses are irrelevant. Third-party discovery concerning affirmative defenses that have been

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[1] *See, e.g.*, *Hyatt v. State of Cal. Franchise Tax Bd.*, 105 A.D.3d 186, 195 (2d Dep't 2013) (holding that, "in addition" to having standing due to a proprietary interest in the records at issue, party also had standing to contest subpoenas to non-parties under CPLR § 3103(a)); *Velez v. Hunts Point Multi–Service Center, Inc.*, 29 AD3d 104, 109-12 (1st Dep't 2007) (stating that parties must be provided notice of non-party subpoenas in order to provide parties with an opportunity to respond); *Cordts v. Fiege*, 2018 NY Slip Op. 28112, 60 Misc. 3d 617, 619-20 (Sup. Ct. Monroe Cnty. 2018) (holding that, based on CPLR § 3103(a), a party may seek to quash a subpoena to a non-party); *Snedeker v. Schiff Hardin LLP*, 2010 NY Slip Op. 30151(U), 2010 N.Y. Misc. LEXIS 1354, at *7 (Sup. Ct. Nassau Cnty. 2010) ("CPLR § 3103(a) . . . permits any party opposing the disclosure to make the motion on behalf of the non-party."); *Morano v. Slattery Skanska, Inc.*, 18 Misc.3d 464, 472 (Sup. Ct., Queens Cnty. 2007) (holding that the defendant had standing to move to quash subpoena issued to non-party, "notwithstanding" her privacy interest in the requested records; stating that the procedure set out in CPLR §§ 2303(a), 3103(a), and 3120(3) is "tantamount to statutory standing"). The cases ExxonMobil cites, by contrast, do not address statutory standing.

[2] *See Chaikin v. Fid. & Guar. Life Ins. Co.*, No. 02 C 6596, 2003 U.S. Dist. LEXIS 20630, at *4 (N.D. Ill. Nov. 14, 2003) (holding that subpoenas for documents from non-parties were overbroad because they requested all documents concerning categories of transactions and securities and were not limited to the transactions and securities at issue, and because they requested all communications with a party).

[3] *See, e.g.,* Exhibit A (Subpoena from the OAG to Wells Fargo) at 9.

dismissed would be a wholly unwarranted burden, and would threaten to transform the Court's dismissal of those defenses into a matter of form rather than substance.

Lastly, ExxonMobil's document requests will inevitably result in unnecessary delays. Indeed, ExxonMobil now states that it intends to complete third-party discovery in "early October" – *after* the parties' exhibit lists and deposition designations are due on September 27. In any event, third parties cannot reasonably be expected to make vast document productions, sit for depositions, and testify at trial in a matter of weeks, and ExxonMobil's attempt to require them to do so is likely aimed at discouraging their trial testimony. This stands in stark contrast to the short, targeted depositions ExxonMobil discussed with the OAG and the Court last month.

For these reasons, as stated in the OAG's August 2 letter, ExxonMobil should be ordered to stop pursuing documents from third-party witnesses at this stage of the litigation.

Respectfully submitted,

/s Kevin Wallace

Kevin Wallace

cc: All counsel of record (via NYSCEF)