

1 SUPREME COURT OF THE STATE OF NEW YORK

2 COUNTY OF NEW YORK: TRIAL TERM PART 61

3 ----- X

4 PEOPLE OF THE STATE OF NEW YORK
5 by LETITIA JAMES,
6 Attorney General of the State of New York,

7 Plaintiff,

8 - against -

9 EXXON MOBIL CORPORATION,

10 Defendant.

11 ----- X
12 Index No. 452044/2018

13 August 8, 2019
14 60 Centre Street
15 New York, New York 10007

16 B E F O R E: THE HONORABLE BARRY R. OSTRAGER, Justice

17 A P P E A R A N C E S:

18 STATE OF NEW YORK OFFICE OF THE
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21 New York, New York 10005

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(Appearances continued on next page.)

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1 A P P E A R A N C E S: (Continued)

2 EXXON MOBIL CORPORATION
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Official Court Reporter

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1 THE COURT: Good morning.

2 I have multiple letters, and I'm pleased to know
3 that both sides are committed to the October 23rd trial date
4 in this case which will take place on October 23rd.

5 The issue before me this morning is the discovery
6 that we discussed at the last conference. As I understand
7 it, the Office of the Attorney General agreed that Exxon
8 could take the depositions of certain non-parties, and in
9 connection with scheduling depositions of those certain
10 non-parties, Exxon has requested the non-parties to produce
11 large categories of documents which is something that we
12 didn't discuss at the last conference.

13 So I'll, of course, hear counsel, but it seems to
14 me that the reasonable resolution of this issue is for Exxon
15 to depose the non-parties, and to the extent the non-parties
16 confirm in their depositions that they exchanged
17 correspondence with the Office of the Attorney General,
18 Exxon would be entitled to such correspondence, but no other
19 documents.

20 MR. WALLACE: Your Honor, I don't know that there
21 is really a motion pending, but I will take a moment to
22 speak.

23 I think Exxon should have all of that from our --
24 from our prior productions. We are happy to look at that
25 now to the extent that there is any correspondence with the

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1 third-parties that has not been turned over to Exxon. We
2 can double-check our files.

3 THE COURT: It doesn't surprise me that any
4 correspondence these non-parties exchanged with the Office
5 of the Attorney General would already be in the possession
6 of Exxon.

7 So what I'm ruling is that they are entitled to
8 those documents, they are entitled to determine if there are
9 other and different documents that for whatever reason
10 weren't part of the Office of the Attorney General's
11 production, but they can't go on a gigantic, burdensome
12 fishing expedition to exhume hundreds or thousands of
13 documents that have no relevance to the issues in this case.

14 MR. WALLACE: I think we agree with that so I'll
15 sit down and let ExxonMobil have their piece.

16 MR. TOAL: Your Honor, we are not seeking massive
17 volumes of documents, notwithstanding what the Attorney
18 General has represented.

19 I think it's important to remember that we are
20 only here, we are only in this position because the Attorney
21 General didn't provide a preliminary witness list including
22 third-parties when it was supposed to on February 1st.

23 We have had to meet before the Court twice to try
24 and get a semi-plausible preliminary witness list from the
25 Attorney General. When we first came here the New York

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1 Attorney General's Office didn't identify any of these
2 third-party witnesses on its preliminary witness list.

3 The entire pretrial schedule was predicated on the
4 idea that we get this good faith witness list in February,
5 we then would be able to pursue discovery -- obviously
6 depositions are much more useful if you actually have
7 documents -- and then we had to come back before the Court.

8 Your Honor indicated that they should not provide
9 us with a kitchen sink list of witnesses, and they provided
10 us with a kitchen sink list of witnesses. They have 25
11 individuals, seven entities, that collectively employed more
12 than 600,000 people, and we had to come back before your
13 Honor. You agreed that they needed to do a better job of
14 identifying witnesses. It wasn't until June 26th that we
15 got for the first time a plausible preliminary witness list
16 that list had 13 people on it. They have now withdrawn
17 several of those people.

18 The document requests that we have advanced are
19 targeted. We are looking for information concerning their
20 investment criteria for oil and gas companies, we are
21 looking for information concerning their knowledge of
22 weather and how oil and gas companies take potential effects
23 of climate change regulation into account, and we are
24 looking for information concerning Exxon's disclosures some
25 of which are at the epicenter of this case including

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1 managing risks.

2 It's not true that the Attorney General has
3 produced documents on these issues. There certainly is not
4 a complete overlap. They understandably directed their
5 document request to documents that they thought would be
6 helpful to them. We have never had an opportunity to try
7 and get documents from these witnesses and these
8 organizations that would be helpful to our defense.

9 Of course, the CPLR is predicated on the notion
10 that there should be liberal discovery. The goal is to try
11 to encourage resolution on the merits, to avoid trial by
12 ambush, and that's exactly what we are confronted with here
13 because the Attorney General didn't provide us with this
14 witness list on February 1st, they dragged out the process,
15 forced us to seek your intervention twice, and then didn't
16 give us this witness list until June 26th which is two
17 months after the close of fact discovery. So we are seeking
18 very targeted requests.

19 The Attorney General represented their letter
20 yesterday to your Honor that they've turned over to us
21 750,000 pages of production from these third-parties. I
22 would submit that's wildly misleading. The vast, vast
23 majority of those documents were documents that PWC and
24 Ernst & Young produced to the Attorney General's Office.
25 The volume of documents from these witnesses who may testify

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1 at trial is just 3,000 documents, and three of the six
2 people who remain on their witness list have not produced a
3 single document either personally or from the organizations
4 that they worked with.

5 So the Attorney General now comes before you
6 trying to shut down this entire process of getting targeted
7 documents from these witnesses that we can obtain and use in
8 depositions that we'll conduct well before trial and will
9 not affect the trial schedule. I think to reward the
10 Attorney General for its exercise in evasion that about
11 which third-party witnesses will be is exactly contrary to
12 the idea of avoiding trial by ambush.

13 That's all we are seeking here, your Honor.

14 So we have asked specifically for your Honor's
15 assistance in two ways: One, there is a witness in
16 Massachusetts, Natasha Lamb, who works for Arjuna Capital,
17 and because Massachusetts is not a signatory to the Uniform
18 Interstate Depositions and Discovery Act we need a
19 commission from this court that we can take to the court in
20 Massachusetts to take her deposition in advance of trial.
21 Secondly, with respect to Michael Garland who works for the
22 New York City Office of the Comptroller, under CPLR 2307 we
23 can't issue that subpoena directly. That subpoena for
24 documents of a municipal agency can only be issued by a
25 justice of the Supreme Court. So we are asking for your

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1 Honor to issue --

2 THE COURT: If you have those commissions with
3 you, I'll sign them right now.

4 I agree with 90 percent of what you said, but
5 these non-party witnesses are fact witnesses, they are not
6 expert witnesses, and any facts that they disclosed to the
7 Attorney General or any communications that the Attorney
8 General had with these witnesses with respect to the facts
9 that these witnesses are going to testify to that's
10 memorialized in documents, I've ruled that you're entitled
11 to those documents.

12 What I'm also ruling is that you're not entitled
13 to burden these third-party witnesses with demands for
14 internal documents that were never communicated to the
15 Office of the New York Attorney General, and which are going
16 to require these third-party witnesses to expend enormous
17 resources to produce the documents.

18 So they are fact witnesses. When you depose them
19 you will learn all the facts that they are in possession of
20 and which they might testify about at the trial. I am in no
21 way precluding you from exhaustively examining these
22 third-party witnesses so that you're not surprised at trial
23 by the testimony that they are about to give because you can
24 ask them flat out, what is it that you are going to testify
25 about? What is the basis for the testimony that you plan to

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1 give? What support do you have for the testimony that you
2 are about to give? What communications did you have with
3 the Office of the Attorney General either by telephone or in
4 person? What documents did you exchange with the Office of
5 the Attorney General? Who did you meet with and discuss
6 anything about the subject matter of this case with
7 representatives of the Office of the Attorney General?

8 You are an extremely professional and capable
9 interrogator. You're not going to be surprised at trial by
10 the testimony these witnesses give if you take their
11 depositions observing the ground rules that I've fixed here
12 which is if they had discussions with the Office of the
13 Attorney General or communicated in writing or by e-mail or
14 by text with the Office of the Attorney General, you're
15 entitled to all of that. What you're not entitled to is
16 what the business is of these people, and you're perfectly
17 allowed to ask them why it is that they want to testify at
18 the trial. You can exhaustively examine them.

19 So what I would like to do is, I would like to
20 sign the two commissions you need so you can expeditiously
21 take these deponents examinations, and to the extent that
22 other issues rear themselves between now and the trial, the
23 Court is available to meet with you on short notice after
24 receiving correspondence with you requesting further
25 guidance from the Court. My overriding objective is to see

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1 to it that both sides get a fair trial, are on a level
2 playing field, and that the trial take place on
3 October 23rd.

4 MR. TOAL: Your Honor, could I also be given an
5 opportunity to discuss with these parties and discuss with
6 the Attorney General a document request that is even more
7 targeted than the one we proposed?

8 There's no factual predicate here for suggesting
9 that the requests we made will impose any significant burden
10 certainly much less than the Attorney General's subpoenas
11 that were issued to some of these parties. Some of these
12 parties the Attorney General never even issued a subpoena,
13 and there are no documents produced from three of the six
14 parties.

15 THE COURT: I understand. We are talking passed
16 each other. I've already granted you the relief that you
17 are seeking, the targeted discovery.

18 Every piece of paper, text, e-mail that these
19 parties exchanged with the Office of the Attorney General,
20 every conversation that these third-parties had with any
21 representative of the Office of the Attorney General, that's
22 all fair game for you to take discovery about.

23 MR. TOAL: And, your Honor, will your ruling
24 encompass any internal communications that these entities
25 have related to conversations and discussions with the

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1 Attorney General so if there is a phone call somebody
2 memorialized, this is what the Attorney General asked us to
3 do --

4 THE COURT: I think that's fair, but I want there
5 to be a factual predicate for it. So when you depose
6 individual X you can ask individual X if he memorialized any
7 conversations that he had with the Office of the Attorney
8 General, and to the extent there are such documents, they
9 should be produced.

10 So long story short, you're going to -- Mr. Wells
11 knows this term -- you're going to thin out these witnesses
12 in terms of their interaction with the Office of the
13 Attorney General, and the basis for the anticipated
14 testimony, and what that testimony is going to be, and you
15 don't need anything else.

16 MR. WALLACE: Your Honor, I was going to correct
17 some of the record, and what Mr. Toal said, and sort of our
18 feeling about whether we were dilatory or doing anything
19 wrong in the nature --

20 THE COURT: Let's not go there. This has been a
21 hard-fought case by both parties. A lot of resources have
22 been expended by both parties in the prosecution and defense
23 of the case. Everybody is going to be able to present its
24 case having fully utilized and exhausted all discovery
25 mechanisms for which provisions are made by the CPLR.

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1 MR. WALLACE: Understood, your Honor.

2 I would clarify the two commissions that they are
3 seeking that would be granted are the two that relate to
4 testimonial subpoenas and not document subpoenas. We also
5 have requested a commission for a testimonial subpoena for
6 one of the parties that was on the list that we provided in
7 June.

8 THE COURT: Well, I'm perfectly prepared to sign
9 any commissions that are necessary for the conduct of these
10 depositions, and I would like that to happen expeditiously.

11 Hopefully you have the commissions with you and I
12 can sign them here and now.

13 MR. TOAL: Can I be heard on the commission that
14 the New York Attorney General's Office has put before you?

15 The Attorney General is not in a comparable
16 position to ExxonMobil. They have known who their potential
17 witnesses are for months, if not years. So they had a full
18 opportunity before the May 1st discovery deadline --

19 THE COURT: I couldn't agree more, but you're not
20 going to be prejudiced by them serving a commission on one
21 of the seven people who you've agreed is going to be
22 deposed.

23 MR. TOAL: Okay. If I can clarify, so we had one
24 commission for the deposition in Massachusetts before you.
25 Then the second one related to documents that we would be

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1 seeking from -- that we wanted to seek from the New York
2 City Office of the Comptroller. So I understand your
3 ruling, you've indicated we are entitled to certain
4 documents, but not others. So we will need to modify that
5 subpoena to reflect the scope of your Honor's ruling.

6 MR. WALLACE: My understanding was that the
7 process should be that ExxonMobil should depose the
8 witnesses. If they find out there are additional documents
9 that have not been produced, they can call for their
10 production.

11 THE COURT: That's correct. That's correct. I'm
12 not signing anything requiring the production of documents.
13 If there are documents that are identified at the deposition
14 that fall in the ambit of what I ruled, you are entitled to
15 them.

16 So I think we are done this morning.

17 If you have the commissions, I'll sign them right
18 now, and to the extent that they have to be modified to
19 reflect these rulings, you will just X out what has to be
20 modified, and I'll initial the modifications.

21 MR. TOAL: Thank you, your Honor.

22 (Handing.)

23 THE COURT: Okay. Is there a third one?

24 MR. WALLACE: Sorry?

25 THE COURT: Is there a third one?

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1 MR. WALLACE: I believe we handed up the only one
2 we have, unless there is another one from Exxon. (Handing.)
3 There's three total, two testimonial subpoenas and our
4 testimonial subpoena.

5 THE COURT: While we are waiting for this, this
6 case is going to be conducted in accordance with the Court's
7 part rules. So the Court's part rules require that the
8 parties meet and confer with respect to the admissibility of
9 exhibits, and two weeks before the trial the parties should
10 have assembled binders of trial exhibits that the parties
11 intend to introduce at trial. There shouldn't be any
12 serious issues about authenticity of documents or business
13 record status of documents, and so hopefully we will not
14 have a significant number of disputes about the
15 admissibility of documents, but if there are disputes about
16 the admissibility of documents, we will try and resolve them
17 before the trial begins so that we don't spend 20 minutes on
18 a particular document during the course of the trial while
19 witnesses are sitting in the witness stand.

20 Ten days before the trial you're obligated to make
21 any motions in limine that you propose to make. You do that
22 by Order to Show Cause so that opposing counsel has time to
23 prepare on opposition to any motions in limine. And, of
24 course, two weeks before trial you will identify the trial
25 witnesses.

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1 Once the trial begins I expect the parties to give
2 the opposing party notice of the order in which witnesses
3 are going to be called in an orderly basis. So I don't
4 expect either party to list every witness in the exact order
5 that the witness is going to be called, but I do expect each
6 side to know a couple of days in advance who the next two or
7 three witnesses are going to be.

8 So we will try to conduct this as efficiently and
9 fairly as we possibly can.

10 To the extent you have any questions about any of
11 this, the Court is available for informal conferences in
12 advance of the October 23rd trial date.

13 MR. WALLACE: We understand. We are familiar with
14 all the deadlines and the Court's rules and pretrial --
15 preliminary conference order.

16 I do think we've proposed a broad stipulation on
17 documents. We have not heard back from Exxon on that, but
18 we are prepared to start issuing our list of documents. The
19 process as far as the parties meeting and conferring on
20 exhibits hopefully can start in the next week or so.

21 I think one question we would have and would be
22 happy to work with the Court's clerks on is the logistics of
23 the physical space to the extent that the parties are
24 bringing in technology. We have not conferred on that yet,
25 but I think we can do that relatively quickly and come to an

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1 agreement to make sure we are respecting the Court's space
2 and time that it's going to take for any technology to be
3 put in or anything along those lines.

4 THE COURT: I'm not telling anybody how to try the
5 case, but if you're contemplating introducing 12,000
6 documents in evidence, you should rethink that, and if you
7 are contemplating introducing 1,200 documents in evidence,
8 you should rethink that too.

9 MR. TOAL: Your Honor, in terms of -- to the
10 extent that the New York Attorney General intends to present
11 ExxonMobil witnesses on its case, because they are not in
12 the state, by and large, we would think we would need more
13 notice to the witness about when they intend to call them so
14 that travel arrangements can be made.

15 THE COURT: That seems perfectly fair.

16 You've gotten along with each other well enough --

17 MR. WALLACE: Well enough.

18 THE COURT: -- so that you can extend those types
19 of courtesies to each other.

20 MR. WALLACE: To further that, I guess it would be
21 helpful to know from the Court at one point what anticipated
22 trial days during the week would be and when you would want
23 us to meet. We can block out the calendar with a little
24 more detail in a week to know how long we will anticipate
25 before we get to certain Exxon witnesses.

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1 THE COURT: I'm allocating a maximum of three
2 weeks for the trial, the time to be divided appropriately.

3 The Court sits every morning from 9:30 to 12:45
4 and from 2:15 to 4:30. On Tuesdays the Court has
5 conferences that last approximately an hour and a half.
6 Other than that, the courtroom is yours from October 23rd to
7 whatever date three weeks after October 23rd turns out to
8 be.

9 MR. TOAL: Your Honor, in terms of exhibits, do
10 you generally require the parties to submit lists of which
11 exhibits are coming in through which witnesses? Is that
12 something you prefer or --

13 THE COURT: That's optional. I'll be able to
14 follow the testimony, and I'll be able to manipulate the
15 binders of exhibits while the witness is testifying, but,
16 again, if you are contemplating 1200 exhibits, you are doing
17 something wrong.

18 Anything else this morning, gentlemen and ladies?

19 MR. WALLACE: Not from New York.

20 MR. TOAL: Your Honor, are you anticipating having
21 opening statements?

22 THE COURT: Yes, and I'll give each side a half
23 hour which is twice or three times as much time as I give
24 any other litigants to give opening statements.

25 There will obviously be technology that you will

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be using during the trial. Please make arrangements with the part clerk to set that up a day or two, a court day or two before the trial begins.

MR. WALLACE: Thank you, your Honor.

MR. TOAL: Thank you.

THE COURT: Okay. Have a great summer.

C E R T I F I C A T E

I, Terry-Ann Volberg, C.S.R., an official court reporter of the State of New York, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes.

Terry-Ann Volberg
Terry-Ann Volberg, CSR, CRR
Official Court Reporter

SO ORDERED
Barry R. Ostrager
BARRY R. OSTRAGER, J.S.C.
8/19/19

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