



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETTITIA JAMES
ATTORNEY GENERAL

By NYSCEF and Hand Delivery

October 15, 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:

We write on behalf of the Office of the Attorney General (“OAG”) in response to Exxon Mobil Corporation’s (“ExxonMobil”) letter of October 11, 2019 concerning third-party discovery. ExxonMobil contends that the OAG has improperly withheld documents, spoliated evidence and misled the Court. The record is clear that the OAG has done none of those things. ExxonMobil has now taken all of the testimony and obtained all of the documents the Court said it was entitled to on August 8, 2019. Nevertheless, ExxonMobil’s October 11 letter seeks two additional items: (i) a certification of completeness from the OAG, and (ii) certain electronic files from one third-party witness.

First, ExxonMobil seeks a certification that “all correspondence and documents exchanged with third parties have been preserved and produced to ExxonMobil.” As a preliminary matter, we produced all documents the OAG received from third parties at the outset of this action before ExxonMobil filed a discovery request. What has been produced more recently, and what is at issue in the October 11 letter, are communications between the third-party witnesses and the OAG that largely consist of emails scheduling meetings or arranging telephone calls. ExxonMobil now has those documents from two sources, the OAG and the third-party witnesses themselves. None of those documents have been added to ExxonMobil’s exhibit list, reflecting the fact that the documents are non-substantive and of little or no relevance.¹ We note that ExxonMobil has itself continued to produce documents to the OAG at the last moment, including on Monday, October 7, and just yesterday, and even added some of those documents to its trial exhibit list. While this

¹ For example, ExxonMobil cites to “33 emails” exchanged between Robert Fohr and the OAG prior to the August 8 hearing. Those emails reflect every individual message between the OAG and Mr. Fohr including pro forma responses like “Great-thanks!” on August 1, 2019 at 2:36 PM. Even without this insight, ExxonMobil was able to effectively depose Mr. Fohr over the course of more than 8 hours on September 24, 2019.

could be taken to suggest that ExxonMobil was less than diligent in producing documents responsive to the multiple subpoenas in the investigation and this litigation, we have nevertheless refrained from accusing the defendant of acting in bad faith or seeking relief from the Court.

As to the requested “certification,” the OAG attorneys are well aware of their preservation obligations with respect to this litigation and take those obligations seriously. In addition, ExxonMobil is aware that all OAG employees who had any communications with the third-party witnesses have been on litigation hold since well before those communications took place. We also informed ExxonMobil that the OAG conducted a reasonable search for communications between the OAG and the third-party witnesses in this case, and we produced all of the communications we identified to ExxonMobil, by the date ExxonMobil requested. We do not believe that an additional certification is necessary, but will provide any certification the Court deems appropriate.

Second, ExxonMobil requests that, “as a pre-condition to her testifying at trial, Natasha Lamb produce (i) her hard copy OAG file, (ii) a copy of the subpoena issued to her by OAG, and (iii) the ExxonMobil electronic files that she testified were retrievable with a single keystroke.” As preliminary matter, Ms. Lamb is represented by counsel, who was not copied on the letter. If Ms. Lamb is going to be ordered to do anything her counsel should have an opportunity to be heard. Following her deposition testimony, counsel for Ms. Lamb and ExxonMobil exchanged several letters concerning document discovery. Counsel for Ms. Lamb offered to provide ExxonMobil with any “notes of discussions or meetings with the [OAG] about [her] testimony and OAG’s lawsuit against ExxonMobil,” if ExxonMobil would agree to seek no further documents.² ExxonMobil is now seeking relief from this Court with respect to an out-of-state witness who is represented by counsel without informing her counsel of this application.³

Ms. Lamb’s documents are not in the OAG’s possession, custody, or control, and we have no ability to compel their production. In any event, ExxonMobil has everything it could reasonably need from Ms. Lamb. ExxonMobil has every document the OAG received from Ms. Lamb during the investigation. ExxonMobil even has the subpoena it asks for in item (2)(ii) of its letter. (It bears the production number NYOAG-000000001.) ExxonMobil also has every communication between the OAG and Ms. Lamb from the OAG, which consist of several emails attempting to schedule calls or meetings with Ms. Lamb, and the witness herself has offered to produce her notes of communications with the OAG.

Additionally, we would note that ExxonMobil’s claim that the OAG “exaggerated” the burden on third parties during the August 8 hearing is disingenuous. At that time, ExxonMobil was seeking large swaths of documents from third parties, including documentation of all of their oil and gas investments and investing guidelines. The Court rejected those requests, and allowed ExxonMobil to seek communications between the OAG and the third-party witnesses – and that is what ExxonMobil has obtained. Further, ExxonMobil’s emphasis on the fact that Ms. Lamb may be able to access certain folders with a “keystroke” is absurd. While it may be possible to access some folders simply by clicking on them, reviewing documents for responsiveness and privilege can be a burdensome process, and the Court explicitly ruled that the third-party witnesses

² Ex. A, 9/27/19 ltr. from J. Anderson to P. Gregory; Ex. B, 10/2/19 ltr. from P. Gregory to J. Anderson.

³ See Ex. C, 10/3/19 ltr. from J. Anderson to P. Gregory; Ex. D, 10/8/19 ltr. from P. Gregory to J. Anderson; Ex. E, 10/8/19 ltr. from J. Anderson to P. Gregory.

were not required to undertake such a review of their internal documents.⁴

We are now far afield from ExxonMobil's original request for depositions of third-party witnesses on the purported basis that these would be "two or three hour deps" that "all go to one issue" – what the witnesses will testify to at trial. (June 28 Hearing, Dkt. No. 296 at 4:22, 5:25.) Instead of conducting the limited depositions it described, ExxonMobil has used them as a pretext to make expansive document requests, harass the witnesses with absurd lines of questioning, and angle for any possible pretext to preclude their testimony at trial. For example, ExxonMobil deposed Ms. Lamb from 10:00 a.m. until 7:30 p.m., asking such questions as:

Do you think that people that currently rely on cow dung would like to have a cleaner-burning source of energy in their future?⁵

And based on your own personal experience, you can envision that there are some people that actually would want to have cow dung to heat their homes?⁶

What happened about a decade ago in Massachusetts when it was proposed to build wind turbines outside Senator Kennedy's compound?⁷

You would be okay if they had wind turbines in your backyard? . . . And do you have a view of the coast from your house?⁸

ExxonMobil has had all the discovery it needs from Ms. Lamb and then some. Not surprisingly, ExxonMobil has cited no cases for the extreme relief it now seeks, in which an out of state third-party witness was precluded from testifying at trial for not voluntarily producing certain documents – particularly when a court had already ruled that such production was not required. There is no basis for the serious sanction that ExxonMobil seeks of precluding Ms. Lamb's testimony.

Sincerely,

/s Kevin Wallace
Kevin Wallace

/s Kim Berger
Kim Berger

cc: Philip Gregory, Esq.

⁴ "What I'm also ruling is that [ExxonMobil is] not entitled to burden these third-party witnesses with demands for internal documents that were never communicated to the Office of the New York Attorney General, and which are going to require these third-party witnesses to expend enormous resources to produce the documents." (Dkt. No. 330 at 8:12-17.)

⁵ Ex. F, Excerpts of Transcript of Deposition of Natasha Lamb, 195:20-23.

⁶ *Id.*, 196:13-16.

⁷ *Id.*, 180:23-181:2.

⁸ *Id.*, 181:19-182:1.