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March 15, 2019

By NYSCEF and Hand Delivery

The Hon. Barry R. Ostrager
Supreme Court, New York County
60 Centre Street, Room 232
New York, New York 10007

Re: ***People of the State of New York*** **v.** ***Exxon Mobil Corporation*****, No. 452044/2018**

Dear Justice Ostrager:

We write on behalf of Exxon Mobil Corporation ("ExxonMobil") to bring to the Court's attention additional discovery issues on which the parties have been unable to reach agreement. Specifically, the Office of the Attorney General ("OAG") has been unwilling to:

- **Meaningfully disclose the identities of third-party witnesses that it is considering calling at trial, and its communications with those third parties, including the press;**
- **Produce its document retention manuals;**
- **Apply appropriate search terms and custodians to document collection efforts, including those involving ExxonMobil's affirmative defenses and OAG's communications with third parties;**
- **Commit to producing a document-by-document privilege log; and**
- **Produce documents relevant to ExxonMobil's defenses during the pendency of its motion to dismiss or, alternatively, for a protective order.**

First, **OAG's preliminary witness list lacks any credibility. It identifies 45 current or former ExxonMobil or Imperial Oil Limited employees as potential witnesses, along with ExxonMobil's auditor. But the record clearly establishes that OAG has been in contact with—and produced over 100,000 documents, totaling more than 720,000 pages from—numerous financial institutions. If OAG potentially intends to call any of the individuals who appear in this massive volume of documents, it must make that clear now. So far, OAG has refused to do so, completely ignoring the function of a preliminary witness list and acting contrary to the spirit of the Court's Preliminary Conference Order (the "Order").** *See* **Ex. A. The Order makes clear that the preliminary witness list must be furnished "in good faith" and contemplates that any subsequent**

modifications will be made "in *advance* of trial." *Id.* at 3 (emphasis added). OAG's suggestion that it will *not* provide ExxonMobil with an updated witness list until September 27, 2019—less than a month before trial is scheduled to start and five months after the close of fact discovery—reveals its intention to try this case by ambush. *See* Exs. A, B.

This gamesmanship is unacceptable, particularly where, as here, OAG has been giving ExxonMobil the runaround on all matters related to third parties. A few examples merit this Court's attention. As we were preparing to file this letter tonight, OAG produced its first tranche of non-privileged documents in response to ExxonMobil's Third Request for the Production of Documents. *See* Ex. C. That it took OAG until the middle of March to make this initial production—after receiving this Request on December 14, 2018—demonstrates OAG's dilatory tactics. Indeed, OAG only began producing its communications with third parties on February 26, 2019, which strongly suggests OAG may not have even begun searching for responsive documents until late January or early February. By contrast, ExxonMobil made its first production of documents on January 14, 2019, just one month after receiving OAG's document requests. The Company has made five additional rolling productions since then. Also, on a meet-and-confer call on November 13, 2018, OAG denied having conducted any third-party interviews. *See* Ex. D at 1. But, more than two weeks later, OAG admitted that it did in fact "communicate with third parties in the course of the investigation" and would "respond appropriately to any document requests that Exxon propounds" seeking "notes associated with those communications." *See* Ex. E.

In the face of this backpedaling, OAG now refuses to produce communications with various third parties, including financial institutions and the press, on indefensible privilege and relevance grounds. For example, in a February 1, 2019 letter, OAG appeared to suggest that the attorney-client privilege applied to its communications with third parties. *See* Ex. F at 3–4. But the attorney-client privilege does not cover communications *with non-client third parties*. *See generally* CPLR 4503. OAG's blanket assertion of the work product protection over third-party communications is also inappropriate. ExxonMobil merely seeks factual matter conveyed by third parties to OAG. *See Hoffman* v. *Ro-San Manor*, 73 A.D.2d 207, 211 (1st Dep't 1980) ("Not every manifestation of a lawyer's labors enjoys the absolute immunity of work product."). All ExxonMobil seeks are the names of entities and individuals with whom OAG spoke, the subject matter of those discussions, and any facts exchanged during those discussions. In particular, any information third parties shared that would undermine OAG's case or disprove ExxonMobil's alleged liability also lies squarely within the scope of ExxonMobil's requests. CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution *or defense* of an action, regardless of the burden of proof." (emphasis added). Finally, OAG declared in its February 22, 2019 letter that it "will not review or log internal discussions with members in [its] press office," adding in a footnote that "OAG's communications with the press and the OAG press office could only be relevant in the context of the affirmative defenses that the OAG will challenge in its motion [to dismiss]." Ex. G at 2 & n.1. OAG's position rests on the faulty premise that documents and information related to ExxonMobil's affirmative defenses are outside the scope of discovery here. The Court has made no such ruling, and its February 27, 2019 Notice stated that ExxonMobil "is privileged to pursue" this very discovery. *See* Ex. H.

In the end, OAG may not excuse itself from producing communications with third parties and use that as a basis to flout this Court's Order. When the Attorney General of the State of New York enters the halls of justice as a civil plaintiff, she is bound by the same discovery obligations that apply to any other plaintiff. *See* CPLR 3102(f). By its very terms, the Order contemplates that the parties will, in good faith, submit modified witness and exhibit lists in advance of trial. It does so to provide the parties with ample time to notice and take the depositions of witnesses the other side may call at trial. The close of fact discovery is May 1, 2019. OAG may not suppress its third party communications and exclude third parties from its preliminary witness list as a tactic to prevent ExxonMobil from deposing any third parties before the May 1 deadline.

Second, OAG's refusal to produce its document retention manuals is inappropriate. ExxonMobil first requested these documents on November 30, 2018. *See* Ex. I at 13 (Doc. Request No. 42). To date, more than three months have passed, but these documents have still not been produced. OAG takes the self-defeating position that its document retention manuals are "irrelevant" to the claims and defenses in this action. *See* Ex. G at 2. But, just this evening, OAG provided a list identifying the recipients of its hold notice and the dates they were placed on hold, contradicting any assertion that OAG's document preservation policies are irrelevant. *See* Ex. C. Having conceded the relevance of these policies, OAG cannot now claim that its manuals setting forth these policies are somehow exempt from disclosure. Further, some of the earliest materials ExxonMobil produced to OAG during the investigation were the Company's record retention policies. The Company produced these materials fewer than 60 days after OAG initiated its investigation. OAG should cease any further delay and produce its document retention manuals with dispatch.

Third, OAG has refused to apply appropriate search terms and custodians in collecting documents, including those related to OAG's third-party communications and ExxonMobil's affirmative defenses. OAG rests on the argument that it need not act on discovery requests related to ExxonMobil's affirmative defenses and that ExxonMobil's proposed search terms and custodians are, accordingly, overbroad. *See* Ex. G at 1–2; Ex. J at 1. The argument falls flat. This Court has made clear that ExxonMobil is privileged to pursue discovery on its affirmative defenses. *See* Ex. H. And ExxonMobil's proposed search terms and custodians represent the *minimum* necessary to yield responsive documents. OAG's proposed nine custodians and 11 search terms are plainly inadequate because, as OAG explains, they relate narrowly to the "factual basis for the allegations in the Complaint," not ExxonMobil's affirmative defenses. Ex. G at 2; *see also* Ex. F at 4–5. OAG is obligated to apply appropriate search terms and custodians to its document collection efforts.

Fourth, OAG has refused to commit to providing a document-by-document privilege log, which has the convenient result of permitting OAG to meet a far less burdensome standard for privilege logs than OAG demanded of ExxonMobil.[1] ExxonMobil provided OAG more than 2,000

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[1] It is difficult to ascertain from the one-page, 15-entry privilege log OAG included along with its production this evening whether it is, in fact, a document-by-document log or a categorical log. For example, the opaque "Atty. Notes" description in the Document Type column does not make clear whether the corresponding entry encompasses a single document or a category of multiple documents. *See* Ex. C.

pages of document-by-document privilege logs, replete with detailed information, including the identities of individuals who were carbon copied and blind carbon copied on emails. Although the Commercial Division Rules generally favor the categorical approach to privilege logs, Rule 11-b(b)(2) makes clear that a requesting party may "insist[] on a document-by-document listing," in which case "the requirements set forth in CPLR 3122 shall be followed."[2] Here, ExxonMobil is exercising its right to refuse the categorical privilege log in favor of the document-by-document listing. Not only does this position comport with the relevant rules, but it also protects against OAG's attempt to apply double standards in this litigation.

Fifth, OAG mistakenly believes it is entitled to a stay of discovery while its motion to dismiss certain affirmative defenses is pending. But Commercial Division Rule 11(d) makes clear that this Court has discretion to decide "whether discovery will be stayed . . . pending the determination of any dispositive motion." In fact, Rule 11(d) has been interpreted as eliminating the "presumptive stay" found in CPLR 3214(b). *See Hartman* v. *Snellen*, 2014 WL 7876752, at *1 (Sup. Ct., N.Y. Cty. Sept. 17, 2014); *see also Harrop & Co.* v. *Apollo Inv. Fund VII, L.P.*, 2015 WL 3989030, at *5 (Sup. Ct., N.Y. Cty. June 25, 2015) ("The strong general practice of the Commercial Division is to allow discovery to proceed, notwithstanding the filing of a motion to dismiss, in order to ensure that cases proceed as expeditiously as possible."). To that end, this Court's February 27 Notice plainly states that, though OAG may file its motion to dismiss, "[i]n the interim, and consistent with the rules of the Commercial Division, Exxon Mobil is privileged to pursue discovery on its defenses." Ex. H. The mere fact that OAG moved in the alternative for a protective order under CPLR 3103(b) does not affect the Court's inherent authority to manage discovery in an efficient manner. *See In re 91st Street Crane Collapse Litig.*, 2011 WL 10782082, at *10 (Sup. Ct., N.Y. Cty. Mar. 16, 2011) (contemplating court's authority to lift automatic stay under CPLR 3103(b) by case management order). OAG should not be allowed to further delay discovery related to ExxonMobil's affirmative defenses.

Finally, ExxonMobil was taken aback by OAG's Rule 11-f deposition notice, which contains 17 broad lines of inquiry and a 52-item appendix of intricately complex cash flows with thousands of cells. *See* Ex. K. The duration of any resulting deposition would extend far beyond the presumptive seven hour limit, *see* Comm. Div. R. 11-d(a)(2), and preparing entity witnesses for this deposition would require inordinate resources. In the spirit of compromise, ExxonMobil is formulating a proposal that would provide OAG the information it seeks while mitigating the burden on ExxonMobil. ExxonMobil plans to share this proposal with OAG early next week and will keep the Court apprised of the parties' progress.

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[2] CPLR 3122(b) requires that the privilege log "shall indicate *the legal ground for withholding each such document*, and shall provide the following information *as to each such document*, unless the party withholding the document states that divulgence of such information would cause disclosure of the allegedly privileged information: (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document for a subpoena duces tecum." (emphasis added).

In sum, we request that the Court order OAG to:

1. Update its preliminary witness list to include all potential third-party witnesses;

2. Produce its communications with its press office and third parties, including any factual information that would support ExxonMobil's defenses; in the alternative, we request that the Court conduct an in-camera review of these documents;

3. Produce its document retention manuals;

4. Apply ExxonMobil's proposed search terms and custodians when collecting responsive documents;

5. Create its privilege log using the document-by-document approach; and

6. Produce documents related to ExxonMobil's affirmative defenses, consistent with the Court's February 27 Notice and applicable authority.

Respectfully submitted,

/s/ Theodore V. Wells, Jr.
Theodore V. Wells, Jr.

cc: All counsel of Record (by NYSCEF)