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April 15, 2019

By NYSCEF and Hand Delivery
The Hon. 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*****, No. 452044/2018**

Dear Justice Ostrager:

We write on behalf of Exxon Mobil Corporation ("ExxonMobil") in response to the New York Attorney General's ("NYAG") April 11, 2019 pre-motion letter seeking to seal permanently third-party communications that support ExxonMobil's misconduct allegations. NYAG should not be permitted to file such a motion because there are no legitimate grounds to seal the communications at issue and the time to request sealing under the protective order expired weeks ago.

NYAG's motion to seal is untimely and baseless. At issue are five emails between NYAG attorneys and [redacted], an environmental litigator who has long targeted ExxonMobil and who instigated this proceeding. ExxonMobil attached these documents as Exhibits 8 through 12 to its proposed Amended Answer, which it filed with the Court on March 27, 2019. (*See* NYSCEF Doc. No. 119, Exs. 8–12.) In accordance with the parties' negotiated Stipulation and Order for the Production and Exchange of Confidential Information (the "protective order"), ExxonMobil filed these documents temporarily under seal. (*See* NYSCEF Doc. No. 46 ¶ 12(a).) The protective order provides that "if the Producing Party fails to move to seal within seven (7) days of the Redacted Filing, the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version." (*Id.*) Accordingly, NYAG was required to move to seal the documents no later than April 3, 2019. It failed to do so.

Because NYAG failed to file a timely sealing motion, the protective order entitled ExxonMobil to file unsealed documents on the public docket. Nevertheless, on April 8, 2019, ExxonMobil contacted NYAG as a courtesy to see if it had intended to file a sealing motion. On April 9, NYAG responded that it desired to keep the documents sealed. Despite meet and confer calls on April 9, 10, and 11, the parties were unable to reach agreement on the designation of these documents. NYAG then filed its pre-motion letter, in which it fails to acknowledge that any motion it might file would be untimely, coming weeks past the deadline. This Court should not allow NYAG to file a belated motion and further delay public filing of these documents.

In addition, NYAG's motion should not be allowed because it identifies no basis to treat the documents as confidential. NYAG invokes language in the protective order that defines confidential information as information which, if disclosed, "could be detrimental to the conduct of the Party's business." (NYSCEF Doc. No. 141 at 1.) NYAG claims that its "business is the protection of the people of the State of New York through the enforcement of state laws" and that "[t]hird parties are less likely to communicate information to the OAG if such communications are likely to be published on a state website." (*Id.* at 1–2.) Even assuming, *arguendo*, that NYAG can properly be classified as a "business," the basis for confidentiality it articulates is so broad that it could designate almost any document as confidential. Such a broad construction of protective orders violates New York law. The First Department has held that, in the business context, records should be sealed only in limited cases, such as when they implicate trade secrets, contain sensitive proprietary information, or where the "release of documents could threaten a business's competitive advantage." *Mosallem* v. *Berenson*, 76 A.D.3d 345, 350–51 (1st Dep't 2010); *see, e.g.*, *New Penn Fin., LLC* v. *360 Mortg. Grp., LLC*, 2019 WL 1405349, at *3 (Sup. Ct. N.Y. Cnty. Mar. 27, 2019) (sealing loans because terms are competitively sensitive in the mortgage industry). This standard is not applicable to the office of a regulator, especially one elected by the public.

NYAG's concerns about a chilling effect on reports to its office are irrelevant here. NYAG claims its communications with third parties must remain confidential to protect reports to its office. The cases on which it relies—*United States* v. *Amodeo*, 71 F.3d 1044 (2d Cir. 1995), and *Floyd* v. *City of New York*, 739 F. Supp. 2d 376 (S.D.N.Y. 2010)—pertain to the protection of *witnesses* or *confidential informants*. [redacted] can hardly be characterized as a witness or confidential informant in need of protection. Far from offering legitimate tips of wrongdoing, [redacted] These are not the sort of communications NYAG has any legitimate interest in protecting.

[redacted] efforts to delegitimize ExxonMobil and coordinate with NYAG are thus already well documented in the public domain. *See, e.g.*, *Is Eric Schneiderman Colluding with Other AGs in an Illicit War on Exxon?*, N.Y. Post (Apr. 19, 2016, 7:31 p.m.), https://nypost.com/2016/04/19/is-eric-schneiderman-colluding-with-other-ags-in-an-illicit-war-on-exxon/ (attached as Exhibit A).

It is disingenuous for NYAG to now claim this information is confidential or that its desire to shield these documents from public scrutiny has anything to do with protecting its ability to receive information from the public. NYAG has no basis to claim its correspondence with [redacted] is confidential. *See, e.g.*, *Doe* v. *Bellmore-Merrick Cent. High Sch. Dist.*, 770 N.Y.S.2d 847, 849

(Sup. Ct. Nassau Cnty. Dec. 3, 2003) ("If the information sought to be sealed is already a matter of public record and is demonstrably of public interest, then the sealing of the record is inappropriate." (citing *N.Y. Times Co.* v. *United States*, 403 U.S. 713, 733 (1971))); *Standard Inv. Chartered, Inc.* v. *Nat'l Assoc. of Secs. Dealers, Inc.*, 2008 WL 199537, at *5 (S.D.N.Y. Jan. 22, 2008) (prior public disclosures "may undercut [a party's] argument that continuing protection is necessary to prevent injury"). NYAG may not conceal its wrongdoing—a matter of significant public interest—from the very public it is tasked with serving. This Court should reject that effort.

NYAG identifies no basis to delay a ruling on the documents' confidentiality. NYAG claims that the documents at issue are relevant "only if the Court determines that ExxonMobil has adequately pleaded the defenses related to allegations of collusion with third parties." (NYSCEF Doc. No. 141 at 1.) It thus seeks to delay a ruling on the documents' confidentiality until after this Court resolves its motion to dismiss. But NYAG's mere hope that the Court may one day render these documents irrelevant to issues in the case provides no basis to keep them indefinitely sealed.

NYAG's failure to comply with a protective order it negotiated has delayed public filing of these documents for weeks. Further delay would be unreasonable, particularly given NYAG's efforts to slow roll the production of these documents. Indeed, NYAG improperly withheld these documents for ***months*** before noticing its motion to dismiss. It continues to withhold key documents critical to ExxonMobil's defenses, and the number of documents is anyone's guess. NYAG's blanket request to seal future "similar documents" suggests the existence of many additional documents it has so far failed to produce. With the May 1 fact discovery deadline fast approaching, NYAG persists in withholding documents concerning **(i)** its communications with the press, **(ii)** the March 2016 press conference, **(iii)** its common interest agreement with other state attorneys generals, and **(iv)** its employment of two privately funded fellows from the NYU State Energy & Environmental Impact Center. NYAG adamantly refuses to produce documents responsive to all of ExxonMobil's defenses, while simultaneously attempting to shield from public scrutiny the few documents it has begrudgingly produced.

Finally, any motion to seal should concern only the five documents at issue. NYAG seeks to seal not only the five documents at issue, but "any similar documents filed in the future." (NYSCEF Doc. No. 141 at 2.) Such overbroad requests are improper. *See, e.g.*, *Casas-Montejano* v. *Holder*, 2011 WL 3320532, at *1 (E.D. Cal. July 28, 2011) ("A blanket order sealing all future documents is over broad as Plaintiff has not made a showing that there is a compelling reason to seal every document that may exist in this action."). This Court should hold NYAG to the protective order it negotiated, which allows it to move to seal a "confidential" document within seven days of its filing. NYAG should not be permitted to cause further delay by litigating the confidentiality of other documents that have not been—and may never be—placed at issue.

We are available to discuss these issues with the Court at its convenience.

Respectfully submitted,

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

cc: All Counsel of Record (by NYSCEF)