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April 17, 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 Office of the Attorney General's ("OAG") April 11, 2019 letter (NYSCEF Dkt. No. 140, the "Letter"). In that Letter, OAG announces its intention to move for a protective order barring ExxonMobil from deposing OAG under Commercial Division Rule 11-f. *See id.* at 1. Because any such motion would be meritless, this Court should not allow it. Just as ExxonMobil will sit for its Rule 11-f deposition, OAG is obligated to do the same. OAG's refusal to cooperate would prevent ExxonMobil from being "ready on trial day to meet the issue[s]." *Marie Dorros, Inc.* v. *Dorros Bros.*, 274 A.D. 11, 13 (1st Dep't 1948). Such an outcome would be improper.

On March 22, 2019, ExxonMobil noticed OAG's deposition under Rule 11-f. That Notice seeks testimony on three overarching topics material and necessary to the claims and defenses implicated by OAG's Complaint: OAG's document preservation policies, the factual bases underlying select allegations within the Complaint, and OAG's relationships and communications with third parties. *See* Exhibit A at 6–8. ExxonMobil's focused Notice stands in stark contrast to OAG's Notice, which references a 52-item appendix and 17 sprawling topics. *See* Exhibit B at 4–8. Even so, OAG has refused to engage with ExxonMobil on the Company's Notice. *See* Exhibit C (Mar. 29, 2019 Letter from OAG); Exhibit D (Apr. 5, 2019 Letter from ExxonMobil). Below, we first explain why ExxonMobil is entitled to depose OAG. Then, we address OAG's objections.

OAG Must Sit for a Rule 11-f Deposition

New York law, as the Court is aware, accords no special treatment to the State in civil litigation. The State, like any other private plaintiff, must sit for a Rule 11-f deposition: on its face, Rule 11-f expressly permits the entity deposition of a "government, or governmental subdivision, agency or instrumentality." Comm. Div. R. 11-f(a). New York's Civil Law and Practice Rules also could not be clearer on this score. CPLR 3102(f) provides that: "[i]n an action in which the state is properly a party . . . disclosure by the state shall be available as if the state

were a private person." When OAG, like any other private plaintiff, brings a complaint, it must be prepared to articulate the basis of its claims and respond to the opposition's defenses. The First Department decision, *People* v. *Katz*, 84 A.D.2d 381 (1st Dep't 1982), which controls here, confirms that "defendants are entitled to examine the State"—and that the State, as a practical matter, operates through OAG. *See id.* at 384–86. Straightforward application of these authorities yields one conclusion: OAG must sit for a Rule 11-f deposition.

ExxonMobil Is Entitled to Depose OAG Despite Its Claimed Status as "Opposing Counsel"

OAG tries to deflect attention from these authorities by insisting that ExxonMobil seeks a "disfavored" deposition of opposing counsel. *See* Letter at 1. To be sure, OAG had no reservations about deposing ExxonMobil's inside and outside counsel for over 10 hours in connection with this matter. But nothing in the Company's Rule 11-f Notice mandates that OAG designate an attorney as its Rule 11-f witness. Federal courts applying Rule 11-f's analogue, Rule 30(b)(6) of the Federal Rules of Civil Procedure, have also recognized this exact point. "Litigants (and their counsel) served with a 30(b)(6) notice decide which witnesses to designate[,] and those witnesses need not be (and generally are not) attorneys." *SEC* v. *Merkin*, 283 F.R.D. 689, 698 (S.D. Fla. 2012). Further, "the fact that government attorneys are the only individuals with the requisite knowledge to answer Defendants[']] questions does not prevent them from preparing a designee to answer the questions." *United States* v. *Health All. of Greater Cincinnati*, 2009 WL 5227661, at *3 (S.D. Ohio Nov. 20, 2009).

But even if a Rule 11-f deposition of OAG entailed the deposition of opposing counsel, such a deposition would be justified under *Liberty Petroleum Realty, LLC* v. *Gulf Oil, L.P.*, 164 A.D.3d 401 (1st Dep't 2018). There, the court held that a party seeking to depose opposing counsel must ultimately show that the testimony it seeks is material and necessary, it has a good faith basis for seeking the deposition, and it cannot obtain the information "from another source" than opposing counsel. *See id.* at 406. ExxonMobil can easily make each of these three showings.

First, the three major topics in ExxonMobil's Rule 11-f Notice concern matters material and necessary to the claims and defenses at issue here. Courts, and OAG itself, have acknowledged that ascertaining whether documents were properly preserved is a relevant and important topic in any litigation. *See, e.g.*, *United States* v. *Halliburton Co.*, 74 F. Supp. 3d. 183, 191 (D.D.C. 2014). Likewise, "get[ting] out the facts" underlying the allegations in the Complaint is the basic "purpose of examinations before trial." *Dorros Bros.*, 274 A.D. at 13. Finally, discovery concerning OAG's third-party relationships goes to the heart of ExxonMobil's defenses. *See generally* NYSCEF Dkt. No. 114 (Mar. 27, 2019) (opposing OAG's motion to dismiss ExxonMobil's defenses).

Second, ExxonMobil has a good faith basis to seek this deposition: to efficiently acquire information the Company needs to prepare for trial. As this Court recently reminded the parties, "cost effective[ness]" and "efficien[cy]" are important values in the discovery process. *See* Mar. 21, 2019 Hr'g Tr. at 14:22–15:5. With trial set to begin in October, a Rule 11-f deposition of OAG would allow ExxonMobil to elicit, on one occasion, binding testimony sufficient to fill the holes in the disclosure record. OAG's insinuation that ExxonMobil seeks this deposition for improper purposes amounts to a gross conflation of two distinct concepts. *See* Letter at 2. *Liberty* cautioned that depositions of opposing counsel should not be "sought as a tactic intended solely to disqualify

counsel," that is, to *create* a conflict of interest. 164 A.D.3d at 406. But OAG is free to choose its Rule 11-f designee, and ExxonMobil's independent objection to the involvement in this case of NYU Fellows is premised on an entirely separate, *preexisting* conflict of interest.

Third, a deposition of OAG is necessary to elicit the information ExxonMobil requires. In *Liberty*, the First Department held that a party seeking to depose opposing counsel must be able to show that "the deposition is necessary because the information is not available from another *source*." *Id.* at 406 (emphasis added). That is, the information must not be available from a source *other than opposing counsel*. OAG suggests that the party seeking the deposition must show that it cannot obtain the information through another *discovery vehicle*, such as interrogatories. *See* Letter at 2. But this interpretation is patently inconsistent with *Liberty*, which adopted the "unavailability" requirement in discussing the Court of Appeals decision, *Matter of Kapon* v. *Koch*, 23 N.Y.3d 32 (2014). *See* 164 A.D.3d at 406. *Kapon*'s discussion, in turn, reveals that "unavailability" in this sense means that the information cannot be obtained from any *entity* other than the one from whom it is sought. *See* 23 N.Y.3d at 37–38. Here, OAG is the only party that could possibly provide binding testimony on OAG's document preservation policies, the factual bases underlying the Complaint, and OAG's relationships and communications with third parties.

OAG's Remaining Objections Are Meritless

OAG maintains that, under CPLR 3103(b), its motion for a protective order concerning certain ExxonMobil defenses relieves OAG from sitting for a deposition that implicates those defenses. *See* Letter at 1. OAG's position ignores a key fact: the Court ruled that "Exxon Mobil is privileged to pursue discovery on its defenses" despite OAG's motion, and OAG has since produced documents related to these very defenses. *See* NYSCEF Dkt. No. 102 at 2 (Mar. 18, 2019 Letter from K. Wallace to J. Ostrager). "Consistent with the Commercial Division Rules and the Court's February 27 notice, the OAG has been and continues to produce documents related to ExxonMobil's affirmative defenses, limited only by the terms set out in the proposed protective order." *Id.* OAG offers no principled basis for its willingness to produce documents related to ExxonMobil's defenses, but not deposition testimony. Indeed, OAG's document disclosures to date make the Company's need for follow-up Rule 11-f testimony all the more pressing.

OAG incorrectly relies on *Katz* for the proposition that a deposition of the State is not permitted "absent a showing that the information sought [is] not available from other sources." *See* Letter at 2 n.2. In fact, *Katz* forecloses any suggestion that a defendant must exhaust *all* disclosure vehicles before deposing the State, as OAG implies. *See* 84 A.D.2d at 386. There, the defendants had moved to examine the State just a month after it filed its complaint. *Id.* at 382–83. The court observed that "[a]t this stage in the proceedings" a bill of particulars would be appropriate, but specifically granted defendants leave to renew their motion to examine the State should they require additional disclosure. *See id.* at 385–86. Here, in stark contrast to the defendants in *Katz*, ExxonMobil served its Rule 11-f Notice *after* trying to elicit information from OAG through a host of other disclosure vehicles, including a notice to admit, document requests, and interrogatories. A Rule 11-f deposition is entirely appropriate at this stage in the litigation.

This Court should require OAG to provide testimony pursuant to ExxonMobil's Rule 11-f Notice.

Respectfully submitted,

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

cc: All counsel of Record (by NYSCEF)