SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, By LETITIA JAMES, Attorney General of the State of New York, Plaintiff, – against – EXXON MOBIL CORPORATION, Defendant.	Index No. 452044/2018 IAS Part 61 Hon. Barry R. Ostrager Motion Sequence No. 4

OFFICE OF THE ATTORNEY GENERAL'S BRIEF IN SUPPORT OF ITS MOTION FOR A PROTECTIVE ORDER TO PROHIBIT EXXON MOBIL CORPORATION FROM DEPOSING THE OFFICE OF THE ATTORNEY GENERAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

BACKGROUND 2

A. The OAG's March 4, 2019 Motion for a Protective Order 2

B. ExxonMobil's March 22, 2019 Rule 11-f Notice to the OAG 3

STANDARD OF REVIEW 4

ARGUMENT 4

A. The Majority of ExxonMobil's Proposed Deposition Topics Will Be Rendered Moot if the Court Dismisses the Challenged Defenses 5

B. A Deposition on the One Remaining Topic Would Not Lead to Legitimate Discovery 6

C. ExxonMobil Has Not Shown that the Information Sought Is Material and Necessary to Any Claim or Defense or that It Has a Good Faith Basis for Seeking It 6

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Assured Guar. Mun. Corp. v. DB Structured Prod., Inc., 44 Misc. 3d 1206(A), 997 N.Y.S.2d 97, 2014 WL 3282310 (Sup. Ct., N.Y. Cnty. July 3, 2014) 8

Cynthia B. v. New Rochelle Hosp. Med. Ctr., 60 N.Y.2d 452 (1983) 4

Jones v. Maples, 257 A.D.2d 53 (1st Dep't 1999) 4

Liberty Petroleum Realty, LLC v. Gulf Oil, L.P., 164 A.D.3d 401 (1st Dep't 2018) 4, 6

People v. Katz, 84 A.D.2d 381 (1st Dep't 1982) 4, 7

State v. Grecco, No. 0009384/2002, 2008 N.Y. Slip Op. 30838(U), 2008 WL 1766377 (Sup. Ct., Suffolk Cnty. Mar. 20, 2008) 5

State v. Volkswagen of Am., 41 A.D.2d 827 (1st Dep't 1973) 5

Wiseman v. Am. Motors Sales Corp., 101 A.D.2d 859 (2d Dep't 1984) 7

RULES

C.P.L.R. § 3103(a) 4

C.P.L.R. § 3103(b) 2, 4

PRELIMINARY STATEMENT

Exxon Mobil Corporation's ("ExxonMobil") latest effort to distract attention from the merits of the fraud case brought by the Office of the Attorney General ("OAG") is to depose its attorneys. Such depositions are highly disfavored under First Department precedent and entirely improper under the facts of the case. ExxonMobil has not made – and cannot make – the required showing (1) that the information sought is material and necessary to any claim or defense, (2) that it has a good faith basis to seek the information, and (3) that the information sought is not available from other sources. Therefore, the Court should grant the OAG's motion for a protective order to prohibit ExxonMobil from deposing the OAG.

Here, almost all of the information ExxonMobil is seeking does not support any legitimate claim or defense. All but one of the proposed deposition topics are directed to ExxonMobil's improper defenses of prosecutorial misconduct, which are the subject of the OAG's pending March 4, 2019 motion to dismiss or, in the alternative, for a protective order. These requests will thus be rendered moot if the Court dismisses those defenses. The remaining topic is improper and premature as it calls for information that can be provided through other means, such as contention interrogatory responses, which the OAG has yet to serve, and unavoidably implicates privileged attorney work product. ExxonMobil also lacks a good faith basis for pursuing this deposition. In recent correspondence, ExxonMobil suggested that it should be allowed to depose OAG attorneys now because it permitted the OAG to conduct narrowly focused examinations of two of its attorneys during the investigation. ExxonMobil, however, conveniently ignores the special circumstances concerning the preservation of emails from one particularly critical email account that gave rise to those depositions, which were limited to facts regarding the email account in question. Here, by contrast, ExxonMobil has articulated no such predicate for seeking to depose OAG attorneys now.

BACKGROUND

This brief assumes the Court's familiarity with the OAG's pending March 4, 2019 motion to dismiss ExxonMobil's defenses of selective enforcement, official misconduct, and conflict of interests or, in the alternative, for a protective order. (*See* Mot. Seq. No. 2.) The following section refers to that motion only to contextualize the present motion.

A. The OAG's March 4, 2019 Motion for a Protective Order

On February 22, 2019, the OAG submitted a letter pursuant to Commercial Division Rule 24 advising the Court of its intention to make a motion to dismiss certain defenses or, in the alternative, for a protective order. (Dkt. No. 56.) On February 26, ExxonMobil submitted a letter in response. (Dkt. No. 58.) Upon receipt of the two letters, the Court issued a notice on February 27 allowing the OAG to file its motion and allowing ExxonMobil, "in the interim," "to pursue discovery on its defenses." (Dkt. No. 59.)

Accordingly, on March 4, 2019, the OAG filed its motion. (*See* Dkt. Nos. 60-71.) On its face, the OAG's Proposed Protective Order of March 4 would protect the OAG from answering certain enumerated document requests that ExxonMobil had propounded at that time as well as "[a]ny future or pending discovery request related to [the disputed defenses] to the extent such request calls for information that does not concern the factual basis of the allegations in the Complaint." (Dkt. No. 61.)

In its opening brief, the OAG made clear to ExxonMobil that it would not produce materials that are subject to its motion for a protective order during the pendency of that motion. (Dkt. No. 71 at 10); *see* C.P.L.R. § 3103(b). Nevertheless, in compliance with the Court's February 27 notice, the OAG, while reserving all rights, is continuing to produce documents that ExxonMobil ostensibly requested to support its disputed defenses. To date, the OAG has produced more than

9,000 pages of documents from its custodial files over the course of four biweekly productions between February 26, 2019 and April 12, 2019, using the search terms and custodians that the OAG proposed in a February 1, 2019 letter to ExxonMobil. (*See* Dkt. No. 66.) The OAG anticipates making a final production from its custodial files on Friday, April 26.

B. ExxonMobil's March 22, 2019 Rule 11-f Notice to the OAG

On March 22, 2019, ExxonMobil served the OAG with a Commercial Division Rule 11-f notice (the "11-f Notice") seeking the oral examination of the OAG. The notice is attached as Exhibit A to the accompanying affirmation of Marc Montgomery ("Montgomery Aff."). The notice included a list of proposed matters for deposition related to the OAG's document preservation policies and practices (Montgomery Aff., Ex. A, Matters 1-7); the "facts underlying the allegations" in 54 specified paragraphs of the Complaint (*id.*, Matter 8); and the OAG's interactions with various third parties cited in ExxonMobil's allegations of prosecutorial misconduct (*id.*, Matters 9-17). With the exception of Matter 8, all of these topics appear to be related to ExxonMobil's disputed defenses and thus are subject to the pending March 4, 2019 motion for a protective order.

The OAG responded by letter on March 29, 2019, noting that the requested deposition would necessarily entail the disfavored practice of requiring attorney testimony. (Montgomery Aff., Ex. B.) The OAG also directed ExxonMobil to New York precedent discouraging depositions of OAG attorneys and identifying alternative methods available to ExxonMobil for obtaining the information it seeks. The OAG requested that ExxonMobil withdraw its Rule 11-f Notice, which ExxonMobil refused in a letter dated April 5, 2019. (Montgomery Aff., Ex. C.)

STANDARD OF REVIEW

C.P.L.R. § 3103(a) provides that a court may, in its discretion, issue a protective order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." In assessing whether a protective order should issue, a court must weigh the need for discovery against the detrimental effects of disclosure "in light of the facts of the particular case before it." *Cynthia B. v. New Rochelle Hosp. Med. Ctr.*, 60 N.Y.2d 452, 461 (1983). In addition, "[w]hen the disclosure process is used to harass or unduly burden a party, a protective order eliminating that abuse is necessary and proper." *Jones v. Maples*, 257 A.D.2d 53, 56-57 (1st Dep't 1999) (internal citations and quotation marks omitted). During the pendency of a motion for a protective order, disclosure obligations related to the challenged discovery are suspended. C.P.L.R. § 3103(b) ("Service of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute.").

ARGUMENT

The Court should grant the OAG's motion for a protective order. Once a party seeking a protective order has made a prima facie showing that "the information sought is irrelevant" or that a deposition "will not lead to legitimate discovery," the party seeking a deposition of opposing counsel must demonstrate that the information sought is "material and necessary" and that it has a "good faith basis for seeking it." *Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 164 A.D.3d 401, 406-08 (1st Dep't 2018). Moreover, "in the unusual situation where a party seeks to depose opposing counsel, . . . the party seeking the deposition must show that the deposition is necessary because the information *is not available from another source*." *Id.* at 406 (emphasis added). That requirement has been recognized in the context of requests, like ExxonMobil's request here, for depositions of the OAG. *See, e.g.*, *People v. Katz*, 84 A.D.2d 381, 384-85 (1st Dep't 1982)

(explaining that the "Attorney-General must not be unnecessarily delayed in his protection of the State by the imposition of burdensome and extended discovery" and denying defendant's request for deposition testimony when it was yet to be determined if the requested information could be obtained through a bill of particulars); *see also State v. Grecco*, No. 0009384/2002, 2008 N.Y. Slip Op. 30838(U), 2008 WL 1766377 (Sup. Ct., Suffolk Cnty. Mar. 20, 2008) ("It is well settled that where the State's Attorney General is acting in representative capacity . . . neither the Attorney General nor his staff will be subject to being deposed in the absence of special circumstances . . . ." (citing *State v. Volkswagen of Am.*, 41 A.D.2d 827 (1st Dep't 1973)).[1]

Here, the OAG has made a prima facie showing that the proposed deposition topics concerning prosecutorial misconduct are irrelevant to any legitimate claim or defense. (*See* Mot. Seq. No. 2.) As discussed *infra*, the sole remaining topic also will not lead to legitimate discovery, as it impinges on the mental impressions and work product of attorneys. The burden therefore shifts to ExxonMobil, which has made no showing that would warrant a deposition of the OAG.

A. The Majority of ExxonMobil's Proposed Deposition Topics Will Be Rendered Moot if the Court Dismisses the Challenged Defenses

All but one of the proposed deposition topics relate to the defenses challenged by the OAG in the pending motion to dismiss. Nine of the proposed topics in the 11-f Notice seek information in support of ExxonMobil's defenses of prosecutorial misconduct that are the subject of the

[1] ExxonMobil has argued that *Grecco* is invalid because it "cite[s] cases that predate *Katz*" and "fail[s] to meaningfully contend with *Katz*," which purportedly eliminated the requirement that a party must demonstrate "special circumstances" in order to depose the OAG. (Montgomery Aff., Ex. C, at 1-2.) Even if *Katz* controlled, however, the same result would obtain. *Katz* simply clarified the court's *discretion* to order discovery. In *Katz*, the First Department held that a court *may* order the deposition of the OAG "as is appropriate," despite the traditional requirement of "special circumstances." 84 A.D.2d at 384. Even without the "special circumstances" requirement, the First Department held that it would be an abuse of discretion to allow defendant to depose the OAG when other methods of discovery were available. *Id.* at 385-86.

pending March 4, 2019 motion. (*See* Montgomery Aff., Ex. A, Matters 9-17.) An additional seven topics are nothing more than a fishing expedition for evidence of spoliation concerning documents that are ostensibly relevant to the same illegitimate defenses. (*See id.*, Matters 1-7.) Accordingly, these requests will be rendered moot if the Court grants the OAG's pending motion to dismiss those defenses. (*See* Mot. Seq. No. 2.)

B. A Deposition on the One Remaining Topic Would Not Lead to Legitimate Discovery

Deposing the OAG on the sole remaining topic also would not lead to legitimate discovery. (*See* Montgomery Aff., Ex. A, Matter 8.) Contrary to ExxonMobil's assertions, a deposition regarding the factual bases for the allegations in the Complaint would necessarily implicate the "mischief that can be caused by noticing the deposition of an attorney who has appeared in the litigation." *Liberty Petroleum Realty*, 164 A.D.3d at 406. And ExxonMobil's suggestion that the OAG could prepare and designate a *non-attorney* to sit for the deposition is illusory. (Montgomery Aff., Ex. C at 3.) The OAG acts through its attorneys. Here, the persons most knowledgeable are attorneys, and the knowledge necessary to prepare a witness is in the possession of OAG attorneys. ExxonMobil's request for testimony on the factual basis for the OAG's claims would necessarily intrude on privileged content, regardless of the identity of the witness. *See Volkswagen*, 41 A.D.2d at 827.

C. ExxonMobil Has Not Shown that the Information Sought Is Material and Necessary to Any Claim or Defense or that It Has a Good Faith Basis for Seeking It

In *Liberty Petroleum Realty*, the First Department explicitly added a new hurdle to deposing an adversary's attorneys—namely, that "the party seeking the deposition must show that the deposition is necessary because the information is not available from another source." 164 A.D.3d at 406. ExxonMobil has not done so and cannot. As discussed above, ExxonMobil's 11-f

Notice includes only a single topic that is independent from the challenged prosecutorial misconduct defenses. That request, which calls for the "facts underlying" 54 enumerated paragraphs in the Complaint, should be rejected out of hand. First, ExxonMobil served contention interrogatories on April 1, and the OAG's responses are due on May 1. ExxonMobil thus has not yet received, let alone shown any deficiencies in, the OAG's contention interrogatory responses, which provide defendants with an opportunity to request clarification of allegations in a complaint. *See Wiseman v. Am. Motors Sales Corp.*, 101 A.D.2d 859, 860 (2d Dep't 1984) (noting that responses to contention interrogatories are intended to "amplify the allegations in the complaint and state the bases for the legal theories upon which plaintiff has elected to premise his cause of action. . . . so as to prevent unfair surprise at trial"). ExxonMobil's purported need for testimony prior to even receiving the OAG's contention interrogatory responses illustrates the absence of good faith behind this discovery request. Even more telling, ExxonMobil did not even bother to include in its contention interrogatories many of the paragraphs it now claims can only be explained through deposition testimony. (Montgomery Aff., Ex. D.) At the very least, the Court should deny ExxonMobil's request with leave to renew if it can demonstrate that the OAG's contention interrogatory responses are insufficient. *See Katz*, 84 A.D.2d at 385-86.

In addition, the OAG has identified in good faith the documents on which it currently intends to rely at trial through its preliminary exhibit list, which it provided to ExxonMobil on February 1, 2019. The documents listed in that submission support the allegations in the Complaint and make clear the OAG's factual basis for those allegations.

To the extent, however, that ExxonMobil seeks attorney testimony as to how the OAG applied the facts in these documents to any legal analysis or conclusions, such testimony would be privileged as attorney work product. *See Volkswagen*, 41 A.D.2d at 827. Moreover, to the extent

ExxonMobil is seeking information about methodologies for determining the extent of harm caused by its misrepresentations, that is a matter for expert discovery. *See, e.g.*, *Assured Guar. Mun. Corp. v. DB Structured Prod., Inc.*, 44 Misc. 3d 1206(A), 997 N.Y.S.2d 97, 2014 WL 3282310, at *3 (Sup. Ct., N.Y. Cnty. July 3, 2014) ("Determining the proper methodology for establishing [the figures on which damages are based] is a matter for expert discovery."). The Preliminary Conference Order provides that ExxonMobil will receive such information in the form of one or more expert reports. ExxonMobil will have the opportunity to probe the opinions set forth in those reports by deposing the OAG's experts – not by deposing the OAG's attorneys.

While the OAG believes that the Court's ruling on its motion to dismiss will obviate the need for any analysis of the topics related to ExxonMobil's prosecutorial misconduct defenses, ExxonMobil has similarly failed to demonstrate that deposition testimony is necessary with respect to those subject areas. The OAG has produced the relevant non-privileged documents related to ExxonMobil's proposed topics concerning communications with third parties, and ExxonMobil is free to depose the third parties themselves. ExxonMobil's deposition requests that are directed to the OAG's document retention policy are also unfounded. Without any evidence whatsoever that the OAG has failed to properly preserve documents, ExxonMobil has no basis to contend that such requests are "material and necessary" to any of ExxonMobil's defenses. They are simply irrelevant. What is more, the OAG has produced its document retention policies and a list of the individuals subject to a litigation hold, as well as the date each individual received a hold notice. The OAG is currently making biweekly productions of its custodial files to ExxonMobil. If ExxonMobil has a good faith basis to believe that any relevant document has been improperly destroyed or withheld, it should say so and demonstrate why the OAG could not provide any necessary clarification through written responses.

Finally, the fact that the OAG examined two attorneys for ExxonMobil two years ago provides no basis for ExxonMobil's efforts to depose the OAG's attorneys today. The circumstances are not remotely similar. To provide some context, the OAG's prior examinations of ExxonMobil's attorneys were narrowly focused on the company's failure to preserve emails from an undisclosed alias account held by former CEO Rex Tillerson, despite in-house and outside counsel's knowledge of the account. When the Court ordered ExxonMobil to provide an affidavit attesting to the company's efforts to preserve certain documents, ExxonMobil provided an affirmation of outside counsel, Michele Hirshman. (*See* Montgomery Aff., Ex. E, Mar. 22, 2017 Hearing Transcript at 17.) When the OAG sought "testimony from other witnesses with personal knowledge of facts recited in the Hirshman Affirmation, which [it] expect[ed] [would] not include Ms. Hirshman," ExxonMobil proffered the testimony of Ms. Hirshman herself. (Montgomery Aff., Ex. F, Apr. 13, 2017 Letter from the OAG to ExxonMobil at 2; Montgomery Aff., Ex. G, Apr. 27, 2017 Letter from ExxonMobil to the OAG at 4.) Here, by contrast, ExxonMobil has articulated no predicate whatsoever for seeking to depose OAG attorneys, and should not be allowed to take that extraordinary step without any such basis.[2]

CONCLUSION

For the foregoing reasons, the OAG respectfully requests that the Court grant its motion for a protective order prohibiting ExxonMobil from conducting a Rule 11-f deposition of the OAG.

[2] Separately, the OAG's Rule 11-f notice to ExxonMobil has no relevance to the present dispute. That notice calls for testimony concerning topics that are at the core of the OAG's allegations against ExxonMobil and does not implicate the considerations that disfavor attorney testimony. After a lengthy period of negotiation, ExxonMobil agreed to provide Rule 11-f testimony on a subset of the noticed topics, and the OAG agreed to hold the remaining topics in abeyance.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 17 of the Commercial Division of the Supreme Court, Marc Montgomery, Assistant Attorney General for the Office of the Attorney General of the State of New York, hereby certifies that, according to the word count feature of the word processing program used to prepare this brief, this brief complies with the length limits of Rule 17.

Dated: April 24, 2019
New York, New York

/s Marc Montgomery
Marc Montgomery