PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 AVENUE OF THE AMERICAS NEW YORK, NEW YORK 10019-6064
TELEPHONE (212) 373-3000

WRITER'S DIRECT DIAL NUMBER
(212) 373-3089
WRITER'S DIRECT FACSIMILE
(212) 492-0089
WRITER'S DIRECT E-MAIL ADDRESS
twells@paulweiss.com

UNIT 5201, FORTUNE FINANCIAL CENTER
5 DONGSANHUAN ZHONGLU
CHAOYANG DISTRICT, BEIJING 100020, CHINA
TELEPHONE (86-10) 5828-6300

HONG KONG CLUB BUILDING, 12TH FLOOR
3A CHATER ROAD, CENTRAL
HONG KONG
TELEPHONE (852) 2846-0300

ALDER CASTLE
10 NOBLE STREET
LONDON EC2V 7JU, UNITED KINGDOM
TELEPHONE (44 20) 7367 1600

FUKOKU SEIMEI BUILDING
2-2 UCHISAIWAICHO 2-CHOME
CHIYODA-KU, TOKYO 100-0011, JAPAN
TELEPHONE (81-3) 3597-8101

TORONTO-DOMINION CENTRE
77 KING STREET WEST, SUITE 3100
P.O. BOX 226
TORONTO, ONTARIO M5K 1J3
TELEPHONE (416) 504-0520

2001 K STREET, NW
WASHINGTON, DC 20006-1047
TELEPHONE (202) 223-7300

500 DELAWARE AVENUE, SUITE 200
POST OFFICE BOX 32
WILMINGTON, DE 19899-0032
TELEPHONE (302) 655-4410

May 2, 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") to raise a discovery dispute over which the parties have reached an impasse. On December 14, 2018, ExxonMobil served document requests on the Office of the Attorney General ("OAG"). The OAG initially refused to make any production in response to ExxonMobil's requests but later recognized its obligation to produce responsive documents. ExxonMobil provided the OAG with search terms and custodians far more modest and far less burdensome than those the OAG demanded ExxonMobil apply. As of the date of this letter, however, the OAG has refused to apply them, even though it acknowledges that ExxonMobil's proposal imposes a negligible burden. While ExxonMobil continues to negotiate with the OAG over its compliance with ExxonMobil's discovery requests, the OAG has stated it will not under any circumstances search the records of three custodians central to ExxonMobil's defenses. ExxonMobil is therefore compelled to seek relief from the Court. The OAG should be ordered to search the files of the three disputed custodians and, if the parties cannot reach agreement on the remaining search terms and custodians, undertake the minimal effort of conducting that search.

The Disputed Custodians Likely Possess Discoverable Information.

To support its defenses of official misconduct and conflict of interest, ExxonMobil requested documents from an employee in the OAG's press office and two special assistant attorneys general compensated by and reporting to the State Energy & Environmental Impact Center (the "Impact Center"). ExxonMobil requested documents from a member of the OAG's press office to obtain further evidence of the OAG's abuse of its investigative authority to limit ExxonMobil's speech and generally disparage the company. In light of the OAG's repeated press leaks and coordination with media outlets, it is reasonable to believe that records of the press office will yield further evidence of the OAG's official misconduct. To obtain that evidence,

ExxonMobil made a targeted, narrow request that the documents of only one custodian—and not every member of the press office—be searched. The OAG has refused to undertake that search.

ExxonMobil also asked the OAG to search the records of the two special assistant attorneys general who are employed as "fellows" by the Impact Center. The Impact Center pays the salaries of its fellows who are then embedded in the offices of state attorneys general throughout the country. As a condition of accepting these fellows, the OAG agreed to assign them to matters that aligned with the Impact Center's political agenda and to provide reports to the Impact Center on the fellows' work. The Impact Center also retained the right to terminate funding of the OAG's fellows if it disapproved of how the OAG deployed them. In keeping with its obligations to the Impact Center, the OAG assigned one of those fellows to the action the OAG filed against ExxonMobil in this Court, and that fellow has attended depositions, communicated with counsel, signed court filings, and attended court proceedings in this matter. The other fellow signed an amicus brief on behalf of the OAG opposing ExxonMobil in litigation now pending in the United States Court of Appeals for the Second Circuit. ExxonMobil's conflict-of-interest defense is predicated on the divided loyalties generated by the OAG's participation in the Impact Center's fellows program. Narrow discovery from the custodial files of those two fellows is likely to yield evidence that could support that defense. Nevertheless, the OAG has refused to undertake that search.

ExxonMobil's request to search the records of these three custodians falls well within the CPLR's permissive standard for pretrial discovery, and the OAG has presented no valid justification for its refusal to make a responsive "disclosure, upon request, of any facts bearing on the controversy which will assist in the preparation for trial." *In re 91st Street Crane Collapse Litig.*, 2011 WL 10798522, at *3 (quotations omitted). The OAG has not claimed that searching the records of these three custodians will impose a disproportionate burden, and if that were the case, it is well past time for the OAG to make that argument. Instead, the OAG has attempted to justify its flat refusal to undertake this search by claiming, without support, that ExxonMobil is not entitled to this discovery. ExxonMobil does not accept the OAG's *ipse dixit* and neither should this Court. The disputed custodians are likely to possess responsive information that will impose only a minimal burden on the OAG to collect, review and produce. This Court should order the OAG to do so.

The Remaining Search Terms and Custodians Are Reasonable and Would Impose No More Than a Minimal Burden on the OAG.

ExxonMobil has worked in good faith to propose a narrow, targeted set of custodians and search terms for the OAG to apply in its search. On February 13, ExxonMobil made its initial proposal of custodians and search terms, and the OAG responded by refusing to make any production at all. After the Court stated on February 27 that ExxonMobil was "privileged to pursue discovery" on its defenses, NYSCEF Dkt. No. 59, the OAG changed course and agreed to produce discovery on ExxonMobil's defenses. Rather than apply or address ExxonMobil's proposal, however, the OAG unilaterally decided to apply 11 search terms of its own choosing to the documents of only nine hand-selected custodians.

ExxonMobil objected to the OAG's methodology and revised its proposed custodians and search terms to further minimize any burden the OAG might bear when complying with its discovery obligations. On March 21, ExxonMobil proposed that the OAG search the files of only six additional custodians, applying 17 additional targeted search terms. The burden imposed by this marginal search pales in comparison to the burden the OAG imposed on ExxonMobil during the investigative phase, when OAG demanded that ExxonMobil apply 500 unique search terms against the files of more than 150 custodians. (That comparison is illustrated in Exhibit A to this letter.) Indeed, the OAG has confirmed that applying ExxonMobil's search terms would cause it to search at most 2,500 additional documents, and ExxonMobil has agreed to a further restriction on this search that would likely reduce that volume by half. Likewise, adding the three non-disputed custodians would add no more than 15,000 documents for the OAG to review, and ExxonMobil has agreed to a limitation on that search that would reduce the burden by a third.

ExxonMobil is hopeful that the parties will reach an agreement on this aspect of the OAG's discovery obligations and that court intervention will be unnecessary. In the event that the parties cannot reach an agreement, however, ExxonMobil requests that the Court direct the OAG to apply the custodians and search terms ExxonMobil proposed on March 21.

* * *

ExxonMobil looks forward to discussing these issues with the Court during the May 8 status conference.

Respectfully submitted,

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

cc: All counsel of Record (by NYSCEF)