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May 16, 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 address the inadequacy of the Office of the Attorney General's ("OAG") third-party witness disclosures. Although the Court expected OAG to "identify within reason the people who may be called as *trial witnesses*,"[1] OAG instead identified 25 individuals and seven large entities, which employ more than 600,000 individuals. This list, seemingly by design, is of little use. As ExxonMobil explained at the March 21 discovery conference, ExxonMobil needed to know which third parties OAG was "seriously considering" calling at trial so it could determine "whose deposition [it] need[s] to take" before the May 1 fact-discovery deadline.[2] ExxonMobil asked OAG to resubmit a more reasonable list, but OAG refused, leaving ExxonMobil no choice but to seek the Court's intervention.

Context for Current Dispute

On February 1, 2019, OAG shared a preliminary witness list with ExxonMobil that identified 45 current and former ExxonMobil and Imperial Oil Limited ("Imperial") employees, but only a *single* third party.[3] Taken aback by both the breadth and lopsided nature of this list, ExxonMobil explained to OAG that, if it intends to call third-party witnesses at trial, it was obliged to share the names of those witnesses immediately to afford ExxonMobil a reasonable opportunity to pursue pre-trial discovery.[4] ExxonMobil reiterated this concern in its March 15 letter to the Court,[5] and at the March 21 discovery conference, explaining that it needs to know "whose

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1 Dkt. No. 203 (Mar. 21, 2019 Hr'g Tr.) at 11:2–4 (emphasis added).
2 *Id.* at 10:11, 19–20.
3 *See* Ex. A (Feb. 1, 2019 Letter from K. Berger & K. Wallace to D. Toal & T. Wells at Appendix A).
4 *See* Ex. B (Mar. 1, 2019 Letter from D. Toal to M. Montgomery) at 3–4.
5 *See* Dkt. No. 90 at 1–3.

deposition [it] need[s] to take" before the close of fact discovery, which at the time was less than six weeks away.[6]

The Court agreed with ExxonMobil, observing that "it's in the interest of both sides to be reasonably transparent about who are *likely to be witnesses at this trial*."[7] The Court further clarified that it "didn't interpret OAG's representation to be that they are [going to] give [ExxonMobil] a kitchen sink of names."[8] Instead, the Court stated, "I'm assuming that [OAG] [is] [going to] identify within reason the people who may be called as trial witnesses."[9] The Court could not have been clearer about its expectations: OAG had to disclose the third parties it reasonably expects to call at a trial estimated to last two to three weeks.[10]

Nor could OAG have been clearer about its defiance of the Court's expectations. On April 5, 2019, OAG identified 32 third-party individuals and institutions "who *may* have discoverable information that the OAG *may* use to support its claims."[11] For seven institutional third parties, which, together have more than half a million employees, OAG failed to identify any *individuals* who may be called as witnesses. OAG represented only that "[o]ne or more representatives" of the institution may have discoverable information.[12] ExxonMobil informed OAG that the list provided did not satisfy the Court's order and requested that OAG withdraw and resubmit a proper list.[13] In response, OAG asserted that its disclosure was sufficient because it identified third parties "'likely to have discoverable information' that the OAG 'may use to support its claims.'"[14] Defying the Court's instruction, OAG claimed that "narrowing that list at this stage would not be appropriate" because "trial [is] months away."[15]

OAG's Third-Party Witness List Is Unacceptable

OAG's third-party witness list violates this Court's clear directive for at least three reasons: **(i)** it purports to list third parties who may have discoverable information, rather than those OAG plans to call as trial witnesses; **(ii)** it fails to identify any *individual* witnesses for several institutional entities; and **(iii)** it provides ExxonMobil no meaningful notice about which third parties the Company will need to depose.

First, OAG's third-party witness list is facially incompatible with the Court's instruction to "identify within reason the people who may be called as *trial witnesses*."[16] OAG claims that it "promised, and delivered, a disclosure akin to what is called for in Fed. R. Civ. P. 26(a)(1)(A)"

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6 Dkt. No. 203 at 10:19–20.
7 *Id.* at 10:21–23 (emphasis added).
8 *Id.* at 10:24–25.
9 *Id.* at 11:2–4.
10 *See id.* at 9:11–23, 10:21–25, 11:2–4.
11 Ex. C (Apr. 5, 2019 Letter from K. Wallace to D. Toal) at Appendix A (emphasis added).
12 *See id.*
13 *See* Ex. D (Apr. 10, 2019 Letter from D. Toal to K. Wallace) at 3; *see also* Ex. E (Apr. 22, 2019 Letter from D. Toal to K. Berger).
14 *See* Ex. F (Apr. 15, 2019 Letter from K. Berger to D. Toal) at 3 (quoting Fed. R. Civ. P. 26(a)(1)(A)).
15 *Id.*
16 Dkt. No. 203 at 11:2–4 (emphasis added).

because its list identifies entities "likely to have discoverable information."[17] But OAG ignores the obvious distinction between a generalized list of individuals likely to have discoverable information and the list this Court expected OAG to provide—namely, of "people who may be called *as trial witnesses*."[18] Indeed, in a trial expected to last mere weeks, OAG cannot possibly expect to call more than a small fraction of the at least 32 individuals and financial-institution representatives encompassed in its third party disclosure, let alone the 45 current and former ExxonMobil and Imperial employees OAG previously identified. In stark contrast to OAG's expansive list, ExxonMobil's preliminary witness list identifies the ten fact witnesses "it currently expects to call at trial."[19]

Second, for seven institutional third parties, OAG states only that "[o]ne or more representatives" of these institutions may have discoverable information.[20] Such opaque disclosures are flatly inconsistent with the Court's expectation that OAG "identify within reason the *people*"—not organizations—"who may be called as trial witnesses."[21] And even if Rule 26 of the Federal Rules of Civil Procedure governed OAG's disclosure, federal courts have held that identifying "broad categories of witnesses"—*i.e.*, OAG's tactic here—"do[es] not satisfy the disclosure requirements of Rule 26." *Smith* v. *Pfizer Inc.*, 265 F.R.D. 278, 283 (M.D. Tenn. 2010)[22]; *see also* James Moore, 6 *Moore's Federal Practice – Civil*, § 26.22[4][a][i] (3d ed. 2016). If OAG plans to call representatives from these seven institutions at trial, OAG must identify them by name. OAG cannot evade this obligation by asserting that these entities have information pertaining to broad subjects implicated by the Complaint.[23]

Third, by disclosing 32 individual and institutional third parties less than a month before the close of fact discovery, OAG effectively precluded ExxonMobil from deposing any third-party witnesses OAG plans to call at trial. To be clear, any suggestion that ExxonMobil should have affirmatively sought discovery from all third parties identified in OAG's list directly conflicts with both the CPLR's and this Court's commitment to "cost effective" and "efficient" discovery.[24] CPLR 104 mandates that the "[t]he civil practice law and rules shall be liberally construed to secure the just, *speedy and inexpensive* determination of every civil judicial proceeding." (emphasis added).

The CPLR also "embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for *ambush and unfair surprise*." *Crespo* v. *Metro. Transp. Auth.*, 2007 WL 1053879, at *3 (Sup. Ct., Bronx Cty. Apr. 2, 2007) (citation omitted). In particular, CPLR 3126(2) provides that if a party "willfully fails to

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17 Ex. F at 2–3 & n.1 (quoting Fed. R. Civ. P. 26(a)(1)(A)).

18 Dkt. No. 203 at 11:3–4 (emphasis added).

19 Ex. D at 1 n.1.

20 *See* Ex. C at Appendix A.

21 Dkt. No. 203 at 11:2–4 (emphasis added).

22 In its April 15 letter to ExxonMobil, OAG unsuccessfully attempted to distinguish *Smith*. OAG argued that, in *Smith*, the court sanctioned the plaintiff because her supplemental disclosure of potential trial witnesses "violated a specific agreement with respect to the disclosure of witnesses." Ex. F at 3 n.1. But OAG ignores that the court specifically criticized the party's *initial* Rule 26 disclosure—which was filed before any agreement came into existence—for including "broad categories of witnesses." *See Smith*, 265 F.R.D. at 283.

23 *See* Ex. F at 2–3.

24 Dkt. No. 203 at 14:19.

disclose information which the court finds ought to have been disclosed," the court may enter "an order prohibiting the disobedient party . . . from producing in evidence designated things or items of testimony." OAG's last-minute and evasive disclosures have prejudiced ExxonMobil's ability to examine potential witnesses before trial. This is precisely the type of tactic that the Court's ruling sought to prevent. And it is the type of behavior that New York courts routinely sanction by precluding testimony at trial from witnesses whose identities were not sufficiently disclosed in a timely manner. *See Schoffel* v. *Velez*, 118 A.D.2d 492, 493 (1st Dep't 1986) (violation of court-ordered stipulation); *Arpino* v. *F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d 201, 213 (2d Dep't 2012) (violation of preliminary conference order); *Arcidino* v. *McCarthy*, 16 A.D.3d 1132, 1132 (4th Dep't 2005) (violation of court order compelling discovery).

OAG defends its disclosure by suggesting that ExxonMobil should have been able to divine which individuals OAG plans to call at trial by consulting OAG's vast Complaint and the Company's own records.[25] But the mere fact that OAG referenced a particular entity in its Complaint, or that it appeared among the millions of pages of documents ExxonMobil produced, is of no moment. Such references fail to provide ExxonMobil meaningful notice about whether OAG plans to call a representative of that entity as a trial witness, or the witness's identity.[26] And, in all events, if—as OAG now claims—the Complaint itself somehow reveals the third-party witnesses OAG plans to call at trial, it should be a ministerial act for OAG itself to identify them, which renders its evasive witness list all the more indefensible.

OAG also argues that, in reserving the right to amend its own preliminary witness list, ExxonMobil effectively conceded that these preliminary lists are not intended to be final trial witness lists.[27] ExxonMobil, however, has never demanded a "final" trial witness list. Instead, consistent with the Court's instruction, it has sought a list of third-party witnesses OAG reasonably expects to call at trial—information the Company itself has provided OAG.

We therefore request that this Court order OAG to either **(i)** disclose the third parties it reasonably plans to call at trial by May 20, 2019, or **(ii)** preclude OAG from calling at trial any third-party witnesses that were not disclosed in its February 1, 2019 preliminary witness list. ExxonMobil respectfully requests that the Court address this issue at the upcoming May 22, 2019 hearing.

Respectfully submitted,

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

cc: All Counsel of Record (by NYSCEF)

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[25] *See* Ex. F at 2.

[26] *See* Dkt. No. 203 at 10:21–23 ("I think it's in the interest of both sides to be reasonably transparent about *who are likely to be witnesses at this trial.*") (emphasis added).

[27] *See* Ex. F at 3.