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June 19, 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:

ExxonMobil urges this Court to enforce the Rule 11-f Notice (the "Notice") issued to the Office of the Attorney General ("OAG"), attached here as Exhibit A. The Company seeks binding testimony on the factual bases for particular allegations in the Complaint. *See* Ex. A ¶ 8. Absent a Rule 11-f deposition, ExxonMobil will be forced to go to trial without clarity on the claims OAG intends to pursue and the factual predicates for each. Take for example OAG's failure to identify which of the more than 40 representations or omissions placed at issue in the Complaint it plans to try. If, in the end, OAG plans to home in on only one statement made on a particular day, its Executive Law § 63(12) claim dies. OAG has also failed to identify facts that support scienter or reliance—without which it will be forced to abandon its common law and equitable fraud claims. Finally, the Complaint fails to identify how OAG calculated a "more than $25 billion" understatement of GHG-related costs. Compl. ¶ 12. OAG should not be allowed to force ExxonMobil to squander resources preparing for a trial it knows full well will revolve only around a single Martin Act claim and a single statement. As we demonstrate below and in the sample questions attached as Exhibit B, only OAG is capable of settling these outstanding issues. A Rule 11-f deposition is proper here.

I. ExxonMobil Requires a Rule 11-f Deposition to Present a Full Defense

The stark imbalance in discovery to date underscores the need for a Rule 11-f deposition. During its three-year investigation, OAG extracted more than four million pages of documents from ExxonMobil and examined 18 witnesses for nearly 200 hours. OAG then took full advantage of civil discovery, during which it collected over 250,000 additional pages of documents; received responses to nearly 100 discrete interrogatories; and took seven additional depositions, including a Rule 11-f deposition of ExxonMobil. By contrast, ExxonMobil's opportunities for discovery have been limited to targeted document requests and 25 interrogatories. The Rule 11-f deposition thus represents ExxonMobil's one and only opportunity to press OAG on the factual bases for its claims. *See SEC* v. *Kramer*, 778 F. Supp. 2d 1320, 1328 (M.D. Fla. 2011) (finding in the analogous

federal context that a party is entitled to discover "facts underlying the claim[s]" against it). The Company cannot obtain the information it seeks through an alternative source or disclosure device.

ExxonMobil seeks information material and necessary to its defense. We draw the Court's attention to three critical topics fit for binding testimony. *First*, with just months left before trial, OAG has sown confusion about which alleged misrepresentations or omissions it plans to place at issue. On the one hand, the Complaint references at least 40 alleged misrepresentations or omissions that span nearly a decade. *See* Ex. A ¶ 8 (citing Compl. ¶¶ 6, 12, 15, 80, 106, 108-16, 123, 125, 127, 158-61, 165, 175, 177, 183, 185-86, 210, 246, 254, 269, 274-75, 299-302, 309-11). On the other hand, [redacted] To defend itself, ExxonMobil needs to pin down the extent to which OAG has narrowed its case. An 11-f deposition prevents parties "from thwarting inquiries during discovery, then staging an ambush during a later phase of the case." *Rainey* v. *Am. Forest & Paper Ass'n*, 26 F. Supp. 2d 82, 95 (D.D.C. 1998) (discussing the federal analogue of Rule 11-f). ExxonMobil seeks binding testimony on this critical issue.

Second, OAG has failed to articulate factual bases supporting key elements of at least two of its four claims: common law and equitable fraud. The Complaint repeatedly asserts that ExxonMobil maintained two sets of books: one for its "publicly represented proxy costs" and another for alleged "internal proxy costs." *See* Ex. A ¶ 8 (citing Compl. ¶¶ 12, 80, 123, 125, 127, 158-61). But the Complaint is silent on scienter (a common law fraud requirement) and investor reliance (an equitable fraud requirement):

- **Scienter**: OAG alleges that ExxonMobil misled investors, but witness testimony refutes that ExxonMobil acted with scienter. *Compare* Ex. A ¶ 8 (citing Compl. ¶¶ 309-11), *with*, *e.g.*, Apr. 17, 2019 [redacted] Tr. at 94:9-103:9, 108:18-128:7 (establishing that OAG's factual allegations that form the basis for its scienter claim are unfounded). Absent any evidence of wrongdoing, OAG lacks a claim for actual fraud. ExxonMobil thus should be permitted to clear its name—establishing once and for all that OAG's case is wholly untethered to any fraud claim. *Cf. Kramer*, 778 F. Supp. 2d at 1328.

- **Reliance**: Similarly, OAG fails to allege that investors *contemporaneously* relied on statements about the carbon costs at issue here. Indeed, OAG's reliance allegations postdate not just the March 2014 Reports, but even December 31, 2016—the document discovery date cutoff. *See, e.g.*, Compl. ¶ 116. Absent evidence of reliance, OAG cannot maintain its equitable fraud claim. If so, ExxonMobil should know now. *Cf. Kramer*, 778 F. Supp. 2d at 1328.

Third, OAG alleges that ExxonMobil did not apply "publicly represented proxy costs" to the cash flow models of 14 projects in Alberta. *See* Ex. A ¶ 8 (citing Compl. ¶¶ 12, 158-60). OAG claims that ExxonMobil purportedly "underestimated total projected GHG-related costs at those fourteen projects" by "more than $25 billion USD." Compl. ¶ 158. But no evidence in the record supports this proposition—especially because no more than 11 ExxonMobil-operated Alberta projects proceeded to ExxonMobil's Management Committee for full-funding consideration between 2010 and 2016. *See* Dkt. No. 86 at 9-10. Because OAG did not explain with particularity how it manipulated these 14 cash flow models to reach its conclusion, ExxonMobil is at a

disadvantage defending against these allegations. An 11-f deposition would rectify this issue and ensure that *both* sides have their cards on the table—not just ExxonMobil.

ExxonMobil cannot acquire the information it seeks from another source. The availability of other discovery tools does not render the Rule 11-f deposition unnecessary. *See, e.g.*, *SEC* v. *Merkin*, 283 F.R.D. 689, 698 (S.D. Fla. 2012). *People* v. *Katz*, on which OAG relies, does not hold otherwise. 84 A.D.2d 381 (1st Dep't 1982). There, when defendants sought to depose the State just one month after it filed its complaint, the court noted that a bill of particulars would be appropriate "[a]t this stage in the proceedings." *See id.* at 382-83, 385. Here, by contrast, the parties are months away *from trial*. And the limited discovery ExxonMobil has received, including interrogatory responses laden with baseless objections, does not supply key information about the factual bases for OAG's claims. Further, OAG itself agrees that interrogatories and document requests are no substitute for binding testimony that a party may obtain in a Rule 11-f deposition. *See* Dkt. No. 107 at 1-2. Only OAG can address the factual bases for the claims in its Complaint.

II. OAG Has No Basis to Avoid the Rule 11-f Deposition Contemplated Here

ExxonMobil's Notice is fully supported by law. CPLR 3102(f) mandates that in civil litigation "disclosure by the state shall be available as if the state were a private person." The First Department also has held that "defendants are entitled to examine the State," even when the State acts as a prosecutor. *Katz*, 84 A.D.2d at 384. And Rule 11-f authorizes the entity deposition of a "government, or governmental subdivision"—in this case, OAG. Comm. Div. R. 11-f(a).

OAG, however, argues for an exemption because it claims ExxonMobil must necessarily depose opposing counsel. Not so. As one court observed: "Litigants (and their counsel) served with a[n] [entity deposition] notice decide which witnesses to designate[,] and those witnesses need not be (and generally are not) attorneys." *Merkin*, 283 F.R.D. at 698. OAG has full discretion to prepare any witness to testify, including a non-attorney witness. *See* Comm. Div. R. 11-f(c)(1).[1] The witness need not be the "person most knowledgeable," as OAG is free to educate a witness on the designated topics. *See Estate of Goldberg* v. *Goss-Jewett Co.*, 2016 WL 7471427, at *1 (C.D. Cal. Feb. 19, 2016). In the end, ExxonMobil is entitled to the same discovery tools as OAG.[2]

Accordingly, ExxonMobil requests that this Court order OAG to designate and prepare a Rule 11-f witness to provide binding entity testimony pursuant to ExxonMobil's Rule 11-f Notice.

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1 Of OAG's roughly 1,800 employees statewide, only about "700 are attorneys." *Our Office*, New York State Office of the Attorney General, https://ag.ny.gov/our-office (last visited June 19, 2019). The rest include "forensic accountants, legal assistants, scientists, investigators, and support staff." *Id.*

2 For all these reasons, the *Liberty Petroleum Realty, LLC* v. *Gulf Oil, L.P.*, 164 A.D.3d 401, 406 (1st Dep't 2018) standard for deposing "opposing counsel" does not apply here. OAG cannot circumvent Rule 11-f by designating an attorney as a witness. As this Court explained when OAG successfully sought to depose ExxonMobil's counsel, "[n]obody is precluding an attorney from asserting attorney-client privilege." June 16, 2017 Hr'g Tr. at 65:7-8. But even if the *Liberty* standard applied, it would be satisfied here. ExxonMobil seeks to efficiently acquire information material and necessary to its defense, and cannot acquire the information from other sources.

Respectfully submitted,

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

cc: All Counsel of Record (by NYSCEF)