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

August 5, 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" or the "Company") to address the Office of Attorney General's ("OAG") letter dated August 2, 2019.[1] In that letter, OAG insists that ExxonMobil seeks to delay trial by requesting document discovery from third-party witnesses OAG may call at trial. Nothing could be further from the truth. ExxonMobil will not jeopardize the October 23, 2019 trial date. Rather, it aims only to rectify the consequences of OAG's belated third-party disclosure—which OAG produced two months *after* the close of fact discovery. OAG should not be permitted to use its own dilatory tactics as a basis for denying ExxonMobil information material and necessary to its defense. And, in all events, OAG lacks standing to do so. If the third parties themselves have any basis for narrowing the scope of discovery or simplifying the production process, that will be an issue for ExxonMobil and the third parties to address. OAG may not insert itself into these negotiations. We therefore ask the Court to deny OAG's request to preclude ExxonMobil from seeking third-party document discovery.

I. OAG Manufactured This Dispute by Withholding Its Third-Party Witness List Until Two Months After the Close of Fact Discovery.

The origins of this dispute date back to February 1, 2019, the court-ordered deadline for OAG to provide ExxonMobil with its preliminary witness list.[2] OAG elected at that time to serve on ExxonMobil a facially overbroad list of 46 preliminary witnesses—the vast majority of whom were current or former employees of ExxonMobil and Imperial Oil Limited ("IOL").[3] OAG failed to identify any third-party witnesses on that list, but purported to reserve its right to make

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1 *See* Dkt. No. 314 (Aug. 2, 2019 Letter from K. Wallace to J. Ostrager).
2 *See* Dkt. No. 45 at 3 (Nov. 11, 2018 Preliminary Conference Order).
3 *See* Ex. A at App. A. (Feb. 1, 2019 Letter from K. Berger to D. Toal).

subsequent modifications.[4] ExxonMobil promptly responded to this list by expressing concern that OAG had not identified a single *non* ExxonMobil- or IOL-affiliated employee other than ExxonMobil's outside auditor.[5] The Company explained that if OAG intended to call any other third parties, it was obliged to disclose them so that ExxonMobil could pursue pretrial discovery.[6]

At the parties' March 21, 2019 discovery conference, ExxonMobil reiterated its need for a "meaningful list" of third-party witnesses.[7] The Company explained that it hoped to determine which third-party depositions should be noticed before the close of fact discovery.[8] In response, the Court observed that "it's in the interest of both sides to be reasonably transparent about who are *likely to be witnesses at this trial*."[9] OAG acknowledged the Court's instruction on the record, promising not to "dump a huge list on" ExxonMobil.[10]

But OAG did just that. On April 5, 2019, OAG identified 25 nonparty individuals and seven financial institutions likely to have "discoverable information that the OAG *may* use to support its claims."[11] For these seven institutions, which collectively employ more than 600,000 people, OAG failed to identify a single individual who may be called as a witness. By disclosing hundreds of thousands of potential third-party witnesses less than a month before the end of fact discovery, OAG effectively precluded ExxonMobil from deposing any third-party witnesses in a timely manner.

It was not until June 26—almost five months after the deadline for submission of its preliminary witness list and two months after the close of fact discovery—that OAG finally submitted an amended list identifying 13 third-party witnesses.[12] Of these, only one is domiciled in New York State. OAG further delayed the discovery process by failing to respond to ExxonMobil's repeated requests for the contact information of counsel for each of the third-party witnesses with whom OAG had been communicating.

Against this backdrop, OAG disingenuously complains that seeking document discovery from these third parties would amount to an impermissible reopening of fact discovery. In truth, OAG improperly delayed disclosing third-party witnesses it planned to call until after the close of fact discovery, thereby preventing ExxonMobil from seeking documents from and deposing these witnesses prior to May 1, 2019. Indeed, one third party disclosed to ExxonMobil that OAG had contacted the third party prior to its receipt of ExxonMobil's document requests. During that conversation, OAG advised the third party that, absent a formal request to reopen fact discovery, it would not be obliged to produce any documents if it testified at trial. To date, OAG has not responded to ExxonMobil's July 26, 2019 letter, in which it confronted OAG about its dilatory tactics concerning third-party discovery.[13]

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4 *See id.* at 1.
5 *See* Ex. B at 3–4 (Mar. 1, 2019 Letter from D. Toal to M. Montgomery).
6 *See id.*
7 Ex. C at 10:16 (Mar. 21, 2019 Revised Hr'g Tr.)
8 *Id.* at 10:8-20.
9 *Id.* at 10:21-23 (emphasis added).
10 *Id.* at 11:6.
11 Ex. D at App. A (Apr. 5, 2019 Letter from K. Wallace to D. Toal) (emphasis added).
12 *See* Ex. E at 3 (June 26, 2019 Letter from K. Wallace to D. Toal).
13 *See* Ex. F at 2 (July 26, 2019 Letter from D. Toal to K. Berger).

II. ExxonMobil Is Entitled to Third-Party Discovery.

OAG argues that ExxonMobil has no right to seek document discovery from third parties at this stage of the litigation. Alternatively, OAG complains that ExxonMobil's discovery requests are burdensome, inappropriate, and likely to jeopardize the trial date. Each of these arguments fail.

First, OAG has only itself to blame for the timing of these document requests. For months, ExxonMobil sought disclosure of third-party witnesses, as contemplated by this Court's pre-trial order, precisely because it sought to timely complete pre-trial discovery. OAG dragged its feet until almost two months *after* the close of fact discovery when—for the first time—it belatedly and begrudgingly disclosed its preliminary list of third-party witnesses. OAG's dilatory tactics have prejudiced ExxonMobil's right to seek timely discovery. Courts routinely respond to such efforts at "trial by ambush" by precluding the party that has withheld its witnesses' identities from calling those witnesses at trial. *See, e.g.*, *Crespo* v. *Metropolitan Transp. Auth.*, 2007 WL 1053879, at *4 (Sup. Ct. Bronx Cty. Apr. 2, 2007); *Schoffel* v. *Velez*, 118 A.D.2d 492, 493 (1st Dep't 1986); *Arpino* v. *F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d 201, 213 (2d Dep't 2012). ExxonMobil is not presently seeking this relief. If, however, OAG seeks to call these third parties at trial, it should be incumbent on OAG to facilitate, rather than frustrate, legitimate pre-trial discovery of these witnesses.

Second, OAG's application for relief regarding the third-party discovery ExxonMobil seeks is a non-starter because OAG lacks standing to complain about any asserted burden on nonparty witnesses. *See 38–14 Realty Corp.* v. *New York City Dept. of Consumer Affairs*, 103 A.D.2d 804, 804 (1984). A party lacks standing to quash a subpoena directed at a nonparty unless the party can show a proprietary or privileged interest in the subject matter. *See Knight Equity Mkts., L.P.* v. *McCarthy*, 2007 WL 4221623, at *2 (Sup. Ct. N.Y. Cty. Nov. 1, 2007). OAG has neither. Its request for relief is therefore dead on arrival.

Third, in any event, ExxonMobil's document requests seek targeted information that is "material and necessary" to its defense. CPLR 3101(a)(4). The Company primarily seeks documents concerning: **(i)** the third parties' investment criteria in oil and gas companies; **(ii)** their knowledge of whether and how oil and gas companies assess the impact of potential climate change regulations; and **(iii)** certain ExxonMobil disclosures. These requests bear on whether ExxonMobil's disclosures "assumed *actual significance* in the deliberations of the reasonable shareholder"—a necessary precondition for OAG to establish materiality. *State* v. *Rachmani*, 71 N.Y.2d 718, 726 (1988) (emphasis in original) (quoting *TSC Indus.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976)). ExxonMobil also requests communications between third parties and, to the extent they exist, OAG and other organizations. This Court expressly held that evidence about OAG's "motivation for the filing of the complaint" would be admissible at trial "within reasonable constraints."[14] Thus, ExxonMobil's requests fall squarely within the broad parameters of CPLR 3101, which "embodies a policy determination that liberal discovery encourages fair and

[14] Dkt. No. 296 at 16:10-11 (June 28, 2019 Hr'g Tr.).

effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise." *Spectrum Sys. Intern. Corp.* v. *Chemical Bank*, 78 N.Y.2d 371, 376 (1991).

OAG nonetheless argues that ExxonMobil's document requests are unnecessary because ExxonMobil has "all of the documents produced by third parties" to OAG.[15] But OAG collected documents under parameters designed to advance its own case—not ExxonMobil's defense. ExxonMobil is entitled to seek from third parties discovery supportive of its own defenses. *See generally* CPLR 3101(a)(4); *Kapon* v. *Koch*, 23 N.Y.3d 32, 38 (2014). And, contrary to OAG's assertion, ExxonMobil's communications with third parties were entirely appropriate.[16] It should not be a controversial proposition that ExxonMobil need not seek discovery from, and thereby inconvenience, a third-party witness who will not testify at trial.

Finally, OAG's claim that ExxonMobil seeks to jeopardize the October 23, 2019 trial date is patently false. The Company is eager to vindicate itself in court and remains committed to completing third-party discovery as expeditiously as possible and well before trial. ExxonMobil has already shared its discovery requests with all third parties on OAG's preliminary witness list who may still testify at trial. The Company is willing to negotiate the scope of its requests, as appropriate, so that **(i)** document discovery can be completed as soon as possible, and **(ii)** all depositions can be taken no later than early October.

* * *

ExxonMobil asks this Court to deny OAG's request to preclude ExxonMobil from seeking document discovery from those third-party witnesses who plan to testify at trial.[17]

Respectfully submitted,

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

cc: All counsel of Record (by NYSCEF)

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15 Dkt. No. 314 at 3 (Aug. 2, 2019 Letter from K. Wallace to J. Ostrager).

16 *See id.* at 3.

17 ExxonMobil continues to seek the Court's assistance in securing discovery from certain out-of-state third parties. *See* Dkt. No. 301 (July 30, 2019 Letter from T. Wells to J. Ostrager). The Company, however, no longer requires the Court's assistance in securing discovery from Roger Read because his employer, Wells Fargo Securities, has agreed to voluntarily accept service of both the testimonial and the document subpoena.