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October 11, 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 ExxonMobil to seek the Court's assistance in obtaining necessary and relevant third-party discovery that the Office of the New York Attorney General ("OAG") improperly withheld from ExxonMobil.

On August 8, 2019, OAG made two false representations to the Court. *First*, OAG represented that it had provided ExxonMobil all of its communications with the third parties it plans to call at trial. *Second*, it told the Court that ExxonMobil should not be allowed to seek any document production from these witnesses because the document collection and production process would be prohibitively burdensome. The justifications for these assertions unraveled during the third-party depositions conducted by ExxonMobil. At each deposition conducted to date, ExxonMobil learned that (i) communications between OAG and the relevant third party had not been produced, and (ii) the production of these documents was not remotely burdensome. In fact, shortly after their respective depositions, a majority of the third parties promptly produced numerous communications exchanged with OAG which had not been produced by OAG despite its August 8 representation to the Court. That OAG consciously hamstrung ExxonMobil's

ability to conduct searching depositions smacks of gamesmanship. OAG now refuses to answer ExxonMobil's reasonable questions about whether spoliation occurred and when OAG plans to complete its production of all third-party documents.

For these reasons, and in recognition of the impending start of trial, ExxonMobil requests the following narrowly tailored relief from the Court: to order OAG to certify that all correspondence and documents exchanged with third parties have been preserved and produced to ExxonMobil. The requested relief will *not* involve additional depositions of third parties, nor will it seek to delay trial. ExxonMobil merely wishes to confirm it has all documents to which it is entitled before trial begins on October 22, 2019.

OAG Concealed from the Court That It Withheld Key Documents from ExxonMobil

More than two months ago, the Court told the parties that it wished to “hear [from] counsel” on whether ExxonMobil was entitled to correspondence between OAG and third-party witnesses.¹ Mr. Wallace responded by representing to the Court that “Exxon should have *all of that* from our – from our prior productions.”² But ExxonMobil had no such documents, as there had been no prior productions of this nature. The fact is, OAG never produced to ExxonMobil the communications it had exchanged between the third parties on its then-current witness list. That it led the Court to believe otherwise is indefensible. Indeed, the Court took OAG at its word, going so far as to state that “[i]t doesn’t surprise me that any correspondence these non-parties exchanged with [OAG] would already be in the possession of Exxon.”³ The Court nevertheless appropriately held that ExxonMobil was entitled to “[e]very piece of paper, text, e-mail that these parties exchanged with [OAG], [and] every conversation that these third-parties had with any representative of [OAG].”⁴

At recent depositions, third-party witnesses testified to dozens of communications with OAG—none of which had been produced by OAG and many of which predated the August 8 hearing.⁵ In fact, one of these third parties, Robert Fohr, has since voluntarily produced 33 e-mails he exchanged with OAG prior to August 8, which ExxonMobil never received from OAG previously.⁶

Only after recent third-party depositions exposed OAG's misrepresentation to the Court did OAG begin to produce *some* communications. When ExxonMobil inquired about the discrepancy between the third-party testimony and the lack of documents received, OAG agreed on October 1, 2019 to “search for and produce to ExxonMobil any communications with the third party individuals on the OAG's witness list through the

¹ See NYSCEF Dkt. 330, Aug. 8, 2019 Hr'g Tr. 3:13-24.

² *Id.* at 3:23-24 (emphasis added).

³ *Id.* at 4:3-6.

⁴ *Id.* at 10:15-22.

⁵ See, e.g., Fohr Dep. Tr. 22:24–23:23 (Ex. A) (discussing two phone calls in March 2019, one call in April, one call in June, and a meeting in July), 290:11-23 (estimating “probably around” “15 e-mail communications”); Lamb Dep. Tr. 13:5-22 (Ex. B) (describing between “three and nine” calls with OAG as “a reasonable approximation”).

⁶ See Oct. 4, 2019 Letter from A. Bond-Lewis to N. Ahmed (Ex. C).

present day.”⁷ OAG, however, justified its previous lack of productions by claiming it had “no obligation” to produce “non-substantive scheduling emails on a rolling basis, and ha[d] not undertaken to do so.”⁸

OAG’s resolution to decide unilaterally whether a document is “substantive” enough to warrant production is a clear violation of this Court’s order that ExxonMobil is entitled to “[e]very piece of paper, text, e-mail that these parties exchanged with [OAG].”⁹ Information about the nature, form, and frequency of OAG’s third-party communications is highly relevant. For example, one document reveals that Sister Patricia Daly expressed an eagerness to “help in this investigation” as early as March 2019.¹⁰ Likewise, Natasha Lamb professed at her deposition no recollection of when she was first contacted by OAG or how many conversations she had.¹¹ The recent document production, however, included calendar invitations for meetings and phone conversations with Ms. Lamb from November 2018 through January 2019.¹² If ExxonMobil had this information, the Company would have used it to better understand the scope of Ms. Lamb’s recollection and to adduce additional relevant testimony.

To be clear, even OAG’s late-breaking production on October 7, 2019 is facially deficient. As an initial matter, all but two documents *predate* the August 8 hearing.¹³ The third parties revealed during their depositions, however, that OAG has had other recent communications with them. For example, Michael Garland testified that he had met with OAG twice in the month prior to his deposition on October 4, 2019 and that he also received a binder of documents apparently prepared by OAG.¹⁴ But OAG’s October 7 production contains no information regarding these communications. This flies in the face of OAG’s agreement to “search for and produce to ExxonMobil any communications with the third party individuals on the OAG’s witness list *through the present day*.”¹⁵

OAG has also refused to provide any guidance as to when ExxonMobil can expect to receive productions of such communications or, for that matter, any future communications OAG may have with third parties. Given OAG’s recently articulated position that it is not obligated to update its production of third-party documents “on a rolling basis,” ExxonMobil is left to conclude that OAG does not intend to produce any more third-party correspondence before trial is set to begin in two weeks.¹⁶

Most disturbing of all, OAG has failed to respond to ExxonMobil’s recent questions regarding what OAG has preserved and whether any communications previously located

⁷ See Oct. 1, 2019 Letter from K. Berger to N. Ahmed at 2 (Ex. D).

⁸ See *id.* at 1.

⁹ See NYSCEF Dkt. 330, Aug. 8, 2019 Hr’g Tr. 10:15-22.

¹⁰ See NYOAG0016245 (Ex. E).

¹¹ See Lamb Dep. Tr. 10:2–16:14 (Ex. B).

¹² See, e.g., NYOAG0016135 (Ex. F) (Nov. 19, 2018 e-mail from M. DeRoche to N. Lamb); NYOAG0015885 (Ex. G) (Jan. 18, 2019 calendar invitation).

¹³ See NYAOAG0016700 (Ex. H); NYOAG0016701 (Ex. I).

¹⁴ See Garland Dep. Tr. 80:21–81:19, 90:19–93:3 (Ex. J).

¹⁵ See Oct. 1, 2019 Letter from K. Berger to N. Ahmed at 2 (emphasis added) (Ex. D).

¹⁶ See *id.* at 1.

in OAG's files have been deleted.¹⁷ OAG's refusal to identify a custodian for each document in its October 7 production arouses further suspicion about whether OAG has, in fact, preserved all of its communications.¹⁸

OAG Exaggerated to the Court the Burden of Discovery on Third Parties

OAG's recent third-party depositions also revealed that OAG made another misrepresentation to the Court on August 8. Before that hearing, OAG claimed that having third parties produce relevant documents would impose an "enormous and unnecessary burden[]" on them.¹⁹ Their testimony and their actions, however, confirm the exact opposite.

By way of example, Ms. Lamb explained that (i) she keeps all of her ExxonMobil-related documents in two file folders on her computer—one associated with ExxonMobil and one associated with an OAG subpoena—that would be "[e]asily retrievable" with a single keystroke; (ii) she has paper files containing notes of conversations with OAG that would be "easy to find," and (iii) locating any e-mail communications with OAG would be "easily accomplished."²⁰ Mr. Garland also testified that if he were "asked to look for documents related to ExxonMobil," he would "be able to locate those documents readily" and "within a few hours."²¹ In fact, when ExxonMobil requested that Mr. Garland produce handwritten notes he took during meetings with OAG and an exhibit that OAG had discussed with him, he produced those documents the very next morning.²² Likewise, within one week of receiving a request from ExxonMobil, Mr. Fohr produced all of his communications with OAG as well as notes he took during a meeting with OAG.²³

Nevertheless, Ms. Lamb has refused to provide relevant documents—even though she has confirmed any burden would be minimal. Specifically, she refuses to produce (i) local drive folders that house ExxonMobil-specific information, including documents related to the 2017 subpoena that OAG issued to her; and (ii) a hard-copy folder of documents in her possession that were responsive to an OAG subpoena.²⁴ Ms. Lamb has staked out this position in spite of her testimony that she could access the first category of documents with the push of a button.²⁵

* * *

¹⁷ See Oct. 4, 2019 Letter from N. Ahmed to K. Berger et al. at 2 (Ex. K).

¹⁸ See *id.* at 3.

¹⁹ See NYSCEF Dkt. 325, Aug. 7, 2019 Letter from K. Wallace to the Court at 2.

²⁰ See Lamb Dep. Tr. 23:9–24:4, 28:7–11, 30:14–18, 99:20–100:14 (Ex. B).

²¹ See Garland Dep. Tr. 102:12–25 (Ex. J).

²² See Oct. 7, 2019 Letter from D. Toal to M. Peguese (Ex. L); Oct. 8, 2019 E-mail from M. Peguese (Ex. M).

²³ See Sept. 27, 2019 Letter from N. Ahmed to A. Bond-Lewis (Ex. N); Oct. 4, 2019 Letter from A. Bond-Lewis to N. Ahmed (Ex. C).

²⁴ See Sept. 27, 2019 Letter from J. Anderson to P. Gregory at 1 (Ex. O); Lamb Dep. Tr. 23:20–30:18 (Ex. B).

²⁵ See Oct. 2, 2019 Letter from P. Gregory to J. Anderson at 1 (Ex. P); Lamb Dep. Tr. 30:7–18 (Ex. B).

To date, OAG has not addressed ExxonMobil's contention that OAG knew it had communications with third-party witnesses and falsely represented to the Court that it had produced them. ExxonMobil sent OAG a letter on October 4, 2019 raising this very concern.²⁶ In response, OAG produced 121 documents regarding correspondence it had with the third parties, but it offered no explanation as to why these documents were being belatedly produced.²⁷ Yesterday, ExxonMobil provided OAG with a final opportunity to address ExxonMobil's legitimate concerns regarding (i) OAG's misrepresentations; (ii) OAG's failure to produce these communications previously; (iii) OAG's plan for producing future communications; (iv) the possibility of spoliation; and (v) custodian information.²⁸ Rather than engage ExxonMobil on these issues, OAG demurred.

OAG responded with a letter that offered no explanation as to why it had made false representations to this Court.²⁹ As to why OAG did not produce these communications immediately after the August 8 hearing, the only explanation provided was that ExxonMobil did not ask for them—even though OAG represented to the Court that it had already produced all of them.³⁰ In the end, OAG offered no plan for producing its remaining or future communications with third-party witnesses. And OAG made no mention whatsoever of spoliation or requested custodian information. Thus, it appears no answers are forthcoming from OAG.

Accordingly, ExxonMobil requests that the Court order:

1. OAG to certify that all correspondence and documents exchanged with third parties have been preserved and produced to ExxonMobil.
2. That, as a pre-condition to her testifying at trial, Natasha Lamb produce (i) her hard copy OAG file, (ii) a copy of the subpoena issued to her by OAG, and (iii) the ExxonMobil electronic files that she testified were retrievable with a single keystroke.

Respectfully Submitted,

/s/ Daniel J. Toal

Daniel J. Toal

cc: All counsel of Record (by NYSCEF)

²⁶ See Oct. 4, 2019 Letter from N. Ahmed to K. Berger et al. at 1–2 (Ex. K).

²⁷ See Oct. 7, 2019 Letter from J. Zweig to D. Toal et al. (Ex. Q).

²⁸ See Oct. 10, 2019 Letter from N. Ahmed to K. Berger et al. (Ex. R).

²⁹ See Oct. 10, 2019 Letter from K. Berger to N. Ahmed (Ex. S).

³⁰ See *id.* at 1–2.