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July 26, 2019

*Via Email*

Kim Berger, Esq.  
Office of the Attorney General  
State of New York  
28 Liberty St.  
New York, New York 10005

Re: *People of the State of New York v. Exxon Mobil Corporation*, No. 452044/2018

Dear Kim:

We write in response to the Office of Attorney General's ("OAG") correspondence dated July 22, 2019 (the "Letter"). That Letter attempts to walk back our prior agreement to depose all third-party witnesses expected to testify at trial as expeditiously as possible. OAG's dilatory tactics have prejudiced ExxonMobil's right to timely seek document discovery and examine these witnesses before trial. Below, we address each of the points raised in OAG's Letter.

*First*, OAG misstates the record with respect to the parties' agreement to depose third-party witnesses before trial. Counsel for ExxonMobil expressed his good-faith belief that the parties had agreed to "work out a schedule" using the next 30 to 45 days as a benchmark.<sup>1</sup> Mr. Wells further affirmed that this "would not [a]ffect the summary judgment motion schedule nor will it [a]ffect the trial date."<sup>2</sup> When Mr. Wells asked whether he had fairly represented the parties' understanding, OAG replied, in no uncertain terms, "[y]ou did."<sup>3</sup> OAG had an opportunity to object to the recitation of the parties' agreement. It did not do so because Mr. Wells provided an accurate account.

*Second*, OAG's suggestion that ExxonMobil is attempting to reopen fact discovery after the May 1, 2019 deadline is disingenuous. Recall that ExxonMobil first raised OAG's failure to

<sup>1</sup> Dkt. No. 296, June 28, 2019 Hr'g Tr. 4:15-18.

<sup>2</sup> *Id.* at 4:19-20.

<sup>3</sup> *Id.* at 5:2-3.

identify a single third party in its preliminary witness list on March 1, 2019.<sup>4</sup> It took OAG more than a month to submit a wildly overbroad list of 32 nonparty individuals and institutions “likely to have discoverable information.”<sup>5</sup> In total, this disclosure listed 25 individuals and 7 institutions employing more than 600,000 people.<sup>6</sup> ExxonMobil therefore asked OAG to resubmit a proper list of potential third-party witnesses, but OAG refused.<sup>7</sup>

Left with no alternative, ExxonMobil advised the Court that OAG’s list failed to provide “meaningful notice” of those third parties likely to be called as trial witnesses.<sup>8</sup> The Court agreed, admonishing OAG to “do a better job of identifying potential witnesses with great specificity.”<sup>9</sup> But, seemingly by design, OAG ran out the clock on fact discovery, preventing ExxonMobil from deposing third parties before May 1, 2019. OAG submitted its revised preliminary witness list, which included 13 third parties, on June 26, 2019—almost two months after the planned close of fact discovery.<sup>10</sup> OAG has no one but itself to blame for the timing of the document requests to those third parties OAG plans to call at trial. If anything, OAG’s attempt to opine on the discovery obligations of third parties is improper. Because OAG does not represent these parties, its legal views on the scope of any requested discovery are misplaced. To the extent OAG has provided legal advice to third parties, such conduct would be wholly improper and obstructive. Please advise us immediately if you have engaged in such activity and provide the name of the third party and the OAG representative who provided this advice.

ExxonMobil is entitled to discovery relating to witnesses that OAG will likely call at trial. This includes document discovery, which the CPLR authorizes in connection with depositions and nonparties more generally. *See* CPLR 3111, 3120. OAG has not identified any prejudice that would result from third-party document production. And, contrary to OAG’s assertions, ExxonMobil did not falsely represent to witnesses that they “would be subject to document discovery.”<sup>11</sup> It was ExxonMobil’s understanding, implicit in noticing several depositions, that a limited amount of document discovery would be necessary. Conveying that understanding to potential third-party witnesses was not a misrepresentation. Nor does it mean that ExxonMobil’s requested discovery is somehow improper.

*Third*, OAG accuses ExxonMobil of downplaying the scope of its requested discovery before the Court only to enlarge that scope “when speaking to the third parties in an attempt to discourage them from testifying.”<sup>12</sup> Nothing could be further from the truth. As an officer of the court, Mr. Wells represented to Justice Ostrager that third-party depositions would be limited in terms of time and substance.<sup>13</sup> That ExxonMobil’s deposition requests do not contain express limitations on time or substance does not mean the Company intends to conduct extensive, time-

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<sup>4</sup> *See* Mar. 1, 2019 Letter from D. Toal to M. Montgomery at 3–4.

<sup>5</sup> Apr. 5, 2019 Letter from K. Wallace to D. Toal at 1 (quoting Fed. R. Civ. P. 26(a)(1)(A)).

<sup>6</sup> *See id.* at App. A.

<sup>7</sup> *See* Apr. 15, 2019 Letter from K. Berger to D. Toal.

<sup>8</sup> *See* Dkt. No. 214, May 16, 2019 Letter from T. Wells to J. Ostrager at 2–4.

<sup>9</sup> Dkt. No. 240, June 12, 2019 Hr’g Tr. 7:12–14.

<sup>10</sup> *See* June 26, 2019 Letter from K. Wallace to D. Toal at 3.

<sup>11</sup> Letter at 2.

<sup>12</sup> *Id.*

<sup>13</sup> *See* Dkt. No. 296, June 28, 2019 Hr’g Tr. 4:22, 5:24–6:6.

Kim Berger, Esq.

3

consuming discovery. ExxonMobil stands by its commitment to conduct third-party depositions as quickly and efficiently as possible.

*Fourth*, while appreciated, OAG's efforts to confirm which third-party witnesses will in fact testify at trial have come at the eleventh hour. We therefore reiterate our request that OAG disclose, as soon as possible, (i) any additional third-party witnesses who have confirmed their willingness to testify on behalf of OAG at trial, and (ii) the depositions OAG believes should receive highest priority for scheduling purposes. ExxonMobil simply wishes to avoid the delay and inefficiency of subpoenaing third parties who ultimately will not be called at trial.

*Fifth*, OAG claims that counsel contact information for third-party witnesses is contained in its April 5, 2019 disclosure.<sup>14</sup> But OAG's so-called initial disclosure only listed counsel for 13 of the 32 individuals and institutions likely to have discoverable information.<sup>15</sup> We understand that not all third-party witnesses are currently represented by counsel and that OAG's contacts may have differed from those of ExxonMobil. To avoid unnecessary confusion and delay, OAG needs to be transparent about its communications with third parties. Accordingly, ExxonMobil requests that OAG promptly disclose the contact information of known counsel for each of its third-party witnesses.

*Finally*, Neil Higgins is an employee of Imperial Oil Limited ("Imperial"). We have repeatedly made clear to OAG that Imperial is a separate entity over which ExxonMobil does not exercise control. OAG therefore should contact counsel for Imperial to determine Mr. Higgins's availability for a deposition. As we made clear previously, ExxonMobil has no objection to OAG deposing Mr. Higgins.

Sincerely,

/s/ Daniel J. Toal  
Daniel J. Toal, Esq.

cc: Kevin Wallace, Esq.	Theodore V. Wells, Jr., Esq.	Patrick Conlon, Esq.
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<sup>14</sup> See Letter at 3.

<sup>15</sup> See Apr. 5, 2019 Letter from K. Wallace to D. Toal at App. A.