



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

August 2, 2019

Via NYSCEF and Hand Delivery

The Honorable 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*, Index No.
452044/2018 (Sup. Ct. N.Y. Cnty.)

Dear Justice Ostrager:

We write on behalf of the Office of the Attorney General (“OAG”) in response to Exxon Mobil Corporation’s (“ExxonMobil”) letter of July 30, 2019 concerning third-party witnesses. In seeking broad document discovery from seven third-party witnesses at this late stage, ExxonMobil is mischaracterizing the agreement of the parties at the June 28 conference and is seeking to impose disproportionate burdens on these witnesses in a transparent attempt to discourage them from testifying voluntarily, and threatening to upend the trial schedule. The OAG respectfully requests that the Court order ExxonMobil to stop pursuing document discovery from these third-party witnesses.

Immediately prior to the June 28 hearing in this matter, ExxonMobil asked the OAG to consent to limited depositions of the third parties on the OAG’s preliminary witness list. In particular, Mr. Wells told the OAG that ExxonMobil needed to understand what these witnesses may testify to at trial. Although fact discovery in this matter closed on May 1, the OAG agreed in the interest of compromise that it would not oppose ExxonMobil’s request to take what Mr. Wells described “probably, two or three hour deps” that “all go to one issue.”¹ The Court summarized the parties’ agreement as follows:

¹ Conference Transcript, June 28, 2019 (Exhibit A) at 4:22, 5:25.

THE COURT: All I'm asking is, whether or not you and the Office of Attorney General have agreed that you could depose all thirteen of these people and it won't effect [sic] the trial schedule?

MR. WELLS: Yes, that is our agreement.²

Two business days later, on July 2, ExxonMobil sent letters to eight of the third parties (or their representatives) on the OAG's preliminary witness list. Those letters stated:

The New York Attorney General ("NYAG") has identified [witness] as a potential witness on its June 26, 2019 witness list. We understand that [witness] resides and works in [state], and therefore cannot be compelled to testify at a trial in New York, but nonetheless may be willing to testify voluntarily. If [witness] does not plan to make herself available to testify in the trial of this matter, please let us know. In the event that [witness] will testify at trial, however, NYAG has agreed that Defendant ExxonMobil is entitled to discovery concerning her relevant knowledge. This discovery will include both a documentary subpoena and a testimonial subpoena for a pre-trial deposition. Please confirm by July 9, 2019, whether [witness] plans to testify at the trial of this matter.³

In these letters, on which the OAG was not copied, ExxonMobil falsely implied that the OAG had agreed that ExxonMobil was entitled to document discovery from these witnesses. In fact, at no point—either in conversation with counsel or in colloquy with the Court on June 28—did ExxonMobil raise the issue of document production. After learning secondhand about ExxonMobil's July 2 letters, the OAG told ExxonMobil that its requests for document production from these third parties were misleading and improper. Nonetheless, ExxonMobil continued pressing third-party witnesses for documents by serving or notifying the OAG of its intent to serve subpoenas to these witnesses. ExxonMobil now seeks the Court's assistance in compelling third parties to produce a broad array of documents.

ExxonMobil should be ordered to stop pursuing document discovery from these third parties. As described above, ExxonMobil never asked—and the OAG certainly never agreed—that ExxonMobil could engage in document discovery from third-party witnesses at this stage. Fact discovery in this matter closed on May 1, as provided by the express terms of the Court's Preliminary Conference Order, and the OAG has now filed a note of issue pursuant to the Court's direction. The OAG did not oppose ExxonMobil's attempt to secure limited depositions of third-party witnesses, and it has no objection to ExxonMobil's request for testimonial subpoenas, to the extent they are necessary. Reopening document discovery, however, is an entirely different matter and is incompatible with the filing of the note of issue.

The practical reality is that allowing ExxonMobil to pursue these document demands will lead to unwarranted burdens and delays. Each of ExxonMobil's proposed document requests asks for a category of "all documents" or "all communications" on a particular topic.⁴ In

² Exhibit A at 6:10-6:14.

³ See, e.g., Exhibit B (letter from Daniel Toal to Sylvia Wu of As You Sow) at 1.

⁴ See Document Requests Common to All Third Parties, NYSCEF No. 305.

practice, requests of this kind are addressed by applying a list of search terms to a list of custodians, within a specified date range. Each of these elements may be subject to negotiation. Once that process is completed, the collection, review, and production of responsive, non-privileged documents may take place. Here, that process would impose unnecessary burdens and expense on the third party witnesses, particularly given the compressed timeframe. Some of these third parties work for small institutions and have not yet retained counsel; others work for large institutions where the burden of responding to these requests would be onerous. It is not reasonable to require these third parties, in a matter of weeks, to negotiate search parameters, sift through and produce reams of documents, sit for a deposition, and then testify at trial. ExxonMobil's document requests will inevitably result in delays, threatening the trial schedule.

Further, ExxonMobil's document requests are vastly overbroad. For example, ExxonMobil is seeking documents that are unrelated to the company or the matters at issue in this litigation, including "All Documents Identifying Any investment Criteria, and Any changes to that Criteria, used to evaluate Your investments in oil and gas companies generally,"⁵ and "All Documents Concerning Your oil and gas holdings generally[.]"⁶ ExxonMobil also seeks these witnesses' communications with the OAG and other people and organizations, even though the only conceivable relevance of those documents related to the affirmative defenses that this Court has dismissed.⁷ There is no plausible justification for these expansive requests.

Indeed, ExxonMobil's requests are likely unreasonable by design. As set out above, ExxonMobil began its July 2 letters to these third parties by telling them that they could not be compelled to testify in New York, and that if they simply say that they do not agree to testify voluntarily, then ExxonMobil's requests will disappear. ExxonMobil's strategy of discouraging these third parties from testifying by maximizing the burden of document production is apparent, and is far different from the agreement presented at the June 28 conference.

Ultimately, ExxonMobil does not need and is not entitled to these documents. Mr. Wells told the OAG on June 28 that the purpose of the requested depositions was to understand what these third party witnesses are likely to testify to at trial. ExxonMobil does not need documents that were not previously produced in this matter in order to gain that understanding. Indeed, ExxonMobil's requests encompass the entire organizations that employ these witnesses, extending far beyond the witness' own individual experiences and recollections, which will naturally be the subject of trial testimony. Further, ExxonMobil has ample documentation already, as the OAG produced to ExxonMobil months ago all of the documents produced by third parties in the course of the OAG's investigation. Additionally, ExxonMobil's own productions contain numerous documents reflecting the company's years-long engagement with the individuals named by the OAG as potential trial witnesses. To the extent that ExxonMobil wished to gather additional documents, it could have done so during fact discovery, when

⁵ *Id.*, Request 1.

⁶ *Id.*, Request 2.

⁷ *Id.*, Request 6 ("All Communications between You and the Attorney General Concerning (i) Any investigation into ExxonMobil conducted by the Attorney General, (ii) Any actual or contemplated legal action Concerning ExxonMobil, or (iii) climate change.") and Request 7 ("All Communications Concerning ExxonMobil between You and Matthew Pawa, Peter Frumhoff, Naomi Oreskes, Geoffrey Supran, the Rockefeller Family Foundation, Sharon Eubanks, Hagens Berman Sobol Shapiro LLP, Richard Heede, Sher Edling LLP, 350.org, or the Union of Concerned Scientists.")

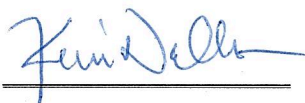
ExxonMobil was well aware of the existence of key third parties discussed in the Complaint and the potential third party witnesses disclosed in April. Instead of seeking discovery from those witnesses, ExxonMobil spent fact discovery pursuing conspiracy theories about the OAG's investigation. That was a strategic decision by ExxonMobil, and the OAG did not agree to a wholesale reopening of fact discovery.

With the deadline for submission of pre-trial materials fast approaching, there is every likelihood that reopening document discovery at this stage will lead to cascading delays. The OAG has worked hard to meet the compressed schedule in this matter and does not want to jeopardize the trial schedule.

Lastly, ExxonMobil's strategy of maximizing the burdens on the third-party witnesses has resulted in some third parties deciding not to testify voluntarily. In light of this reality, the OAG is seeking a commission from this Court to compel the deposition testimony of one third-party witness, Rakhi Kumar of State Street Global Advisors, located in Massachusetts. The OAG requests that this Court issue a commission, attached as Exhibit C, to subpoena Ms. Kumar's testimony.

We are available to discuss these issues at the August 8 conference or at the Court's convenience.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Kevin Wallace", is written over a horizontal line.

Kevin Wallace