



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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Via NYSCEF and Hand Delivery

May 6, 2019

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:

The Office of the Attorney General (“OAG”) submits this letter in response to ExxonMobil’s May 2, 2019 letter. Contrary to ExxonMobil’s assertion, the OAG never refused to produce documents in response to ExxonMobil’s discovery requests and has, despite its objections, been more than reasonable in responding to ExxonMobil’s document requests. As the Court is aware, the OAG’s objections have primarily been and remain focused on discovery requests related to ExxonMobil’s misconduct defenses, which are the subject of the OAG’s pending motion to dismiss and request for a protective order. Indeed, any remaining disputes with respect to the scope of the OAG’s document production will be rendered moot should the Court determine that ExxonMobil has not stated valid defenses of selective enforcement, conflict of interest or official misconduct. In an effort to avoid delay to this litigation, however, the OAG agreed to produce third-party communications in which nine attorneys involved in the investigation and on the trial team engaged in substantive discussions related to ExxonMobil. To that end, the OAG sent ExxonMobil a proposed list of 9 custodians and 11 search terms and offered to meet and confer on February 1, 2019. ExxonMobil did not accept the OAG’s invitation to meet and confer but responded by letter demanding that the OAG expand the scope of its review to include almost 70 search terms and every Assistant Attorney General who ever worked on the ExxonMobil matter. The OAG replied, explaining to ExxonMobil that its proposed list of search terms and custodians was far too broad and would result in significant unwarranted burden to the OAG. The OAG informed ExxonMobil that it would proceed with its review using the search terms and custodians set forth in its February 1 letter.

On March 21, roughly 90 minutes before a scheduled discovery conference, ExxonMobil provided the OAG with a revised list containing 17 additional search terms and six additional custodians. The OAG, after completing its prior document review, agreed to expand its collection process to include all 17 of ExxonMobil's additional search terms and three of the six additional custodians. Accordingly, the only remaining dispute raised in ExxonMobil's May 2, 2019 letter relates to three custodians that the OAG did not agree to include in its review and production – a former member of the OAG's press office and two attorneys who joined the OAG through a fellowship program with the NYU State Impact Center. Because these custodians are not likely to possess information that is relevant to the allegations in the Complaint or to ExxonMobil's invalid defenses, the OAG should not be required to review or produce any material related to these custodians.

OAG Press Office Communications Are Not Relevant to ExxonMobil's Defenses

ExxonMobil's request that the OAG undertake a search of a former member of the OAG's press office is totally unwarranted. That is made clear by ExxonMobil's inability to articulate a need for this information beyond the vague claim that it may "yield further evidence of the OAG's official misconduct" in light of the OAG's "repeated press leaks and coordination with media outlets." ExxonMobil's May 2, 2019 Letter to Court, Dkt. No. 186. ExxonMobil fails, however to offer any explanation of how the OAG's press-related activities are in any way relevant to its misconduct allegations, all of which require a finding that there was no reasonable basis to investigate ExxonMobil and that improper motives were the but-for cause of former Attorney General Eric Schneiderman's decision to investigate ExxonMobil. *See* ExxonMobil Proposed Amended Answer, Dkt. No. 119, at 18 ("The Attorney General has singled out ExxonMobil because it expresses views on climate policy the Attorney General disfavors."), 17 ("First, the Attorney General's motives for pursuing its investigation are improper."), 15 ("The fellows program creates a financial incentive for the Attorney General to pursue and prioritize investigations and enforcement actions supported by the Center."). There are no grounds to believe that the communications between the OAG's press office and third parties would offer any insight into whether improper motives were the but-for cause of the investigation, much less whether there was a reasonable basis for the investigation. Further, to the extent that ExxonMobil is relying upon the OAG's statements to the press to decipher the mindset of Mr. Schneiderman, those statements are a matter of public record. At bottom, ExxonMobil's efforts to obtain communications by the OAG's press office is not based upon a search for relevant information but instead reflects a long held resentment over public statements by the former Attorney General and a desire to harass the office. As such, the Court should deny ExxonMobil's request with respect to the press office custodian.

Communications of NYU Fellows Are Not Relevant to ExxonMobil's Defenses

As fully set forth in the OAG's briefing in support of its pending motion to dismiss, ExxonMobil's request that the Court order the OAG to search the emails of two attorneys who joined the OAG through a fellowship with the NYU State Impact Center is equally baseless. ExxonMobil's allegations regarding the fellowship program are directly negated by the terms of the fellowship agreement, which make clear that the fellows working for the OAG work exclusively under the direction of, and owe a duty of loyalty to, the OAG. OAG Opp. and Reply,

Dkt. No. 132, at 12-13. Based on that agreement the Joint Commission on Public Ethics determined in an informal opinion that the fellowship did not violate any ethical rules pertaining to conflicts of interest. *Id.*

It is also worth noting that neither of the two attorneys in question was working for the OAG when the investigation was initiated. Both attorneys joined the OAG in 2018, when the investigation was in its final stages. In fact, one of the attorneys was serving as a clerk in the Eastern District of Pennsylvania during the period of time when the former Attorney General was allegedly improperly incentivized to take action against ExxonMobil. The second attorney never worked on this matter or the underlying investigation, but instead worked on an amicus brief in a separate lawsuit involving ExxonMobil. That brief had nothing whatsoever to do with the investigation that led to this litigation.

Finally, ExxonMobil has not alleged, nor could it, that either of the two attorneys influenced, or was in a position to influence, the OAG's decision to investigate ExxonMobil. Notably, the OAG agreed to search for any communications between the State Impact Center and nine other custodians, including the former Attorney General. This search yielded no documents that even remotely supported ExxonMobil's theory that the OAG or the fellows were beholden to outside interests. Like ExxonMobil's request for communications from a former member of the OAG's press office, this request is not a good faith effort to seek relevant information, but rather an effort to harass and intimidate. As such, the Court should deny ExxonMobil's request with respect to these two custodians.

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The OAG welcomes the opportunity to discuss these issues further with the Court during the May 8 status conference.

Respectfully submitted,

/s/ Marc Montgomery
Marc Montgomery, Esq.