STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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Via NYSCEF and Hand Delivery

March 20, 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 the Court's March 19 Notice.

With respect to the discovery requests set forth in ExxonMobil's March 15 letter, the OAG responds as follows:

1. The OAG has responded to request 3 (document retention materials) and request 5 (a document-by-document privilege log). Those materials are being produced on a rolling basis, and we do not believe these requests present an issue for the Court at this time.

2. The OAG *is* currently producing documents responsive to request 6 related to ExxonMobil's affirmative defenses, consistent with the Court's February 27 Notice. The parties, however, have not been able to reach an agreement on the scope of discovery that ExxonMobil is entitled to in pursuit of those defenses. The OAG thus relies on its motion for a protective order and C.P.L.R. § 3103(b) to focus its production at present in light of ExxonMobil's overly broad discovery requests related to these affirmative defenses, and in recognition that argument on the motion to dismiss these defenses and the motion for a protective order will be scheduled in the near future. *See* Proposed Order, Dkt. No. 61.

3. The OAG is not simply producing a log of communications with third parties, but is producing non-privileged communications themselves. The OAG has already produced to ExxonMobil approximately 800,000 pages of documents received by the OAG from third

parties during the course of the investigation. In addition, the OAG is currently in the process of producing third-party communications that are relevant to ExxonMobil's affirmative defenses based upon the search terms and custodians set forth in the OAG's February 1, 2019 letter to ExxonMobil that is also attached as Exhibit F to ExxonMobil's March 16 letter to this Court (Dkt. No. 96). The OAG is also reviewing and logging notes taken by OAG's attorneys of interviews or discussions with third parties, and the privilege log will reflect the names of those third parties. The OAG has not taken the position that its communications with third parties are privileged, with the limited exception of communications with other Attorney General's offices, with which the OAG had a common interest agreement.

4. The OAG has not agreed to update the preliminary witness list before the exchange of final witness lists contemplated in the November 15, 2018 Preliminary Conference Order (the "Preliminary Conference Order") on September 27. If, however, the concern is that ExxonMobil does not know the identity of potential third party trial witnesses, the OAG is willing to provide information similar to that called for in Rule 26(a)(1)(A) of the Federal Rules of Civil Procedure, specifically the "name and, if known, address and telephone number of each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." We would note, however, that this information is largely already available to ExxonMobil through the Complaint and its own documents. Nonetheless, in the interest of compromise, the OAG would support such a solution. We would propose that both parties make such disclosure no later than Friday, April 5 at 5:00 p.m.

5. The OAG objects to ExxonMobil's overly expansive proposed search terms and additional custodians. The OAG has requested relief from these unreasonable discovery requests in its pending motion for a protective order. *See* Proposed Order, Dkt. No. 61.

As to the document requests particularized in the OAG's letter of March 4: specifically tailored interrogatories could suffice for the purposes of establishing that ExxonMobil's public statements concerning its application of a cost of GHG emissions were false. Interrogatories would not suffice, however, to establish the scope of the misstatement and its impact on the value of ExxonMobil's assets and overall business. Under the OAG's theory of the case, detailed information about the specific costs of GHG emissions that ExxonMobil applied in its projects and its planning, including in its estimation of company reserves and resource base volumes, is necessary because the company made a broad disclosure to investors that it applied a conservative cost of GHG emissions across its business segments. That representation was material to investors and indeed was directly used to convince investors to withdraw shareholder proposals in 2014. While ExxonMobil takes the position that this allegation is a "distortion" and takes the company's statements out of context, it is manifestly the theory in the Complaint and the theory that will be tested at trial. If the OAG is correct, investors would have expected that ExxonMobil's proxy cost of GHG emissions had been applied to the cost projections in the company's cash flow models, and a detailed review of those models is necessary to establish what costs ExxonMobil actually applied and the economic impact of the disparity.

Interrogatory responses would be insufficient to support that quantification. During the investigation, on August 31, 2018, the OAG issued interrogatories seeking information with respect to cash flow models used for purposes of company reserves and resource base evaluations that are subject of the present requests. (Exhibit A, Instruction 3.) In response, ExxonMobil refused to provide such information, on the ground that it had not made public statements on those topics. (Dkt. No. 86 at 12.) As set forth in the Complaint (*see* ¶¶ 196-205) and in the OAG's March 4, 2019 letter (Dkt. No. 72 at 3), the OAG does not share that view. Instead of providing the requested information concerning company reserves and resource base evaluations, ExxonMobil only provided information with respect to investment decisions.

Even as to investment decisions, ExxonMobil's interrogatory responses provided very limited information, and we expect that interrogatories at this stage would elicit similarly limited responses. The OAG's interrogatories requested, among other things, that ExxonMobil state, in numbers, the amount of the projected future costs of GHG emissions that the company applied with respect to specific business processes. ExxonMobil did not do so, and instead responded in many cases with broad generalities. For example, with respect to three investment decisions, ExxonMobil broadly referenced its application of "local specifics" without specifying the costs that it actually applied (*see* Cold Lake entry, Dkt. No. 86 at 9). Additionally, ExxonMobil refused to provide information concerning its joint ventures (*see* Gorgon, Kashagan, and Syncrude entries, *id.* at 9-11). Further, rather than providing definitive information, ExxonMobil's interrogatory responses contained the caveat that they were only "likely" to be accurate. *See id.* at 9-12 (referencing "likely" costs and "likely" percentage of emissions taxed).

Despite ExxonMobil's deficient interrogatory responses, the OAG collected evidence that formed a factual basis for the allegations in the Complaint. This evidence included the cash flow models that ExxonMobil produced in response to the Court's order, which only concerned investment decisions at fourteen of ExxonMobil's many hundreds of assets.

Even if ExxonMobil had provided perfectly adequate interrogatory responses, however, cash flow models themselves are vital to assessing the impact of the discrepancy between what ExxonMobil told investors it was doing, and what it actually did. As ExxonMobil notes in its March 16 letter, these models are "intricately complex" (Dkt. No. 90 at 4), and frequently include thousands of rows. By examining and manipulating these models, an expert can assess how using different cost figures—such as, for example, the cost figures that ExxonMobil publicly represented it was using—would affect the asset's total costs, and ultimately its projected profitability. Without access to those models, the OAG's experts would be left in the dark. Further, to the extent that a cash flow model contains no GHG-related figures at all, ExxonMobil's GHG emissions projections for that asset would also be necessary in order to assess the impact of applying such costs (such as by multiplying a cost per ton of emissions by those emissions projections to arrive at a total cost figure).

In light of this reality, after filing the Complaint on October 24, 2018, the OAG requested these materials in its December 14, 2018 document requests, per the schedule set forth in the Preliminary Conference Order. ExxonMobil declined to produce these documents in its January 14, 2019 Responses and Objections. The parties met and conferred through February in an attempt to narrow their differences, but were not able to resolve these issues. (*See* OAG's

3/4/2019 ltr. to the Court at 1, n.1.) The OAG therefore brought these issues before the Court on March 4.

The OAG is not seeking an enormous quantity of additional documents beyond those ExxonMobil has already produced. Each cash flow model, while complex, is simply an Excel spreadsheet that would be straightforward to produce. Indeed, a development planning supervisor at ExxonMobil testified that cash flow models used for company reserves and resource base evaluations are saved in a "specific centralized location," and that she "would have been able to find" particular models "by looking at the folder structure." (Dkt. No. 80 at 224-25.) That these spreadsheets are stored in a central location and easily accessible is hardly surprising given their importance; the same ExxonMobil supervisor agreed that "there is no way to know how an asset's field life and resulting associated reserves might change until you see the details of the costs that are being put into the economic models[.]" (*Id.* at 396-97.) ExxonMobil has gone to great lengths to withhold these crucial documents, but the guise of undue burden is belied by the testimony of the company's own witness.

Ultimately the requested cash flow models and GHG emissions forecasts are vital to assessing the impact of ExxonMobil's misrepresentations, but are less critical to the primary dispute between the parties – whether ExxonMobil's public statements were misleading in the first place. In the event that the Court is not inclined to require ExxonMobil to produce additional cash flow models at present, the OAG believes that a bifurcation in which the first phase of discovery and trial concerns the parties' dispute about the meaning and significance of ExxonMobil's representations, and the second phase (if necessary) concerns the company-wide impact of the company's misstatements, would be an efficient and cost-effective solution. In that scenario, full responses by ExxonMobil to tailored interrogatories, together with deposition testimony, would establish that ExxonMobil did not apply GHG-related costs in accordance with its representations, while the company-wide impact of that discrepancy would await a second phase.

We thank the Court for providing this opportunity to provide supplementary information in advance of the discovery conference.

Respectfully submitted,

/s/ Kevin Wallace

Kevin Wallace