



STATE OF NEW YORK
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Via NYSCEF and Hand Delivery

April 26, 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 requesting enforcement of the Court’s Order of March 21, 2019 requiring Exxon Mobil Corporation (“ExxonMobil”) to “meet and confer and agree on appropriate samples of the categories of documents that they [the OAG] want.” (*See Ex. A (Corrected Mar. 21, 2019 Hr’g Tr. at 24:19-21)*). The parties have reached an impasse in the meet-and-confer process, and the OAG now seeks Your Honor’s intervention.

The OAG proposed that a certain set of 25 assets that it identified during its investigation (the “25 Assets”) constituted a representative cross-section of ExxonMobil’s practices concerning greenhouse gas (“GHG”)-related costs. In particular, the OAG requested, for the limited period of 2013-2015, all cash flow models used for the 25 Assets in ExxonMobil’s (1) annual corporate planning, (2) company reserves and resource base estimates, and (3) investment decision-making. The OAG also requested that ExxonMobil provide a scaling factor that our experts can use to extrapolate from the 25 Assets to ExxonMobil as a whole, such as the percentage of ExxonMobil’s total projected GHG emissions that is attributable to the 25 Assets. *See Ex. B at 2 (Mar. 28, 2019 Letter from K. Wallace to J. Anderson)*. We respectfully remind Your Honor that the OAG’s Complaint alleges, among other things, that ExxonMobil misled investors when it represented that it incorporated GHG-related costs into its (1) annual corporate planning, and (2) company reserves and resource base estimates. (*See Compl., NYSCEF No. 1 at ¶¶ 81-104; 196-205*).

ExxonMobil agrees that the 25 Assets “reflect a reasonable cross-section of the Company’s overall business.” (*See Ex. C at 1 (Apr. 12, 2019 Letter from J. Anderson to K.*

Wallace)). However, it will not agree to produce all cash flow models used for these purposes for the 25 Assets. Instead, ExxonMobil agreed to produce cash flow models concerning certain one-time investment decisions (so-called “full funding” models) for only 10 of the 25 Assets – those where there happened to be full funding decisions during the relevant timeframe, in addition to full funding models that it had already produced to the OAG, which amounts to models for 15 assets.¹ ExxonMobil declared that the set of models relating to the 15 Assets constitutes an “appropriate sample[] of the categories of documents that [OAG] want[s].” (*See* Ex. D at 1 (Apr. 18, 2019 Letter from D. Toal to M.K. Dunning) (*quoting* Mar. 21, 2019 Hr’g Tr. at 24:24-25)).

Thus, even though ExxonMobil had previously agreed that the 25 Assets constitute a reasonable cross-section of its overall business, it has now changed its position and proclaims that only certain full funding models associated with the 15 Assets constitute the representative sample of cash flow models that Your Honor ordered it to produce. On April 18, 2019, ExxonMobil informed the OAG that it “does not plan to produce additional Models, and OAG should proceed as it deems appropriate.” (*See* Ex. D. at 2 (Apr. 18, 2019 Letter from D. Toal to M.K. Dunning)). Further, ExxonMobil has failed to respond to the OAG’s request for a scaling factor for the OAG’s experts to use in their extrapolation work.

In sum, ExxonMobil refuses to produce (1) annual corporate planning cash flow models for the 25 Assets, (2) cash flow models used for company reserves and resource base estimates for the 25 Assets, and (3) full funding cash flow models for 10 of the 25 Assets, even though it agrees with the OAG that the 25 Assets constitute a reasonable cross-section of its overall business. This refusal runs afoul of Your Honor’s Order directing that ExxonMobil “provide [the OAG] with a reasonable sample of what it is that [the OAG] want[s].” (*See* Ex. A (Corrected Mar. 21, 2019 Hr’g Tr. at 22:19-23)). Further, Exxon’s failure to provide a scaling factor defeats the essential purpose of the sampling exercise as ordered by the Court, which contemplated the OAG’s “expert . . . extrapolating from their [Exxon’s] sample.” (*See id.* at 22:23-25)).

Nevertheless, in the spirit of compromise and in an attempt to narrow the issues relating to the cash flow model sample that Your Honor ordered to be produced, the OAG proposed to ExxonMobil the following: (1) that ExxonMobil confirm that the 15 Assets for which ExxonMobil has provided full funding investment models (listed in footnote 1, below) constitute a representative sample of ExxonMobil’s overall business; and (2) that for the 15 Assets, ExxonMobil provide the appropriate scaling factor, as described in the OAG’s letter of March 28, 2019 (Ex. B), so that our experts can perform their extrapolation work. (*See* Ex. E at 1 (Apr. 24, 2019 Letter from M.K. Dunning to D. Toal)). We informed ExxonMobil that once the OAG receives the requested information from ExxonMobil, we will not seek to enforce our prior demand for the additional cash flow models contemplated by the Court’s March 21, 2019 Order, to which we maintain we are entitled. (*Id.* at 1). We requested a response from ExxonMobil by April 25, 2019 as to whether ExxonMobil is willing to confirm that the 15 Assets for which it has produced full funding models constitute a representative sample of ExxonMobil’s overall

¹ The 15 assets are: (1) Cepu; (2) Cold Lake; (3) Hebron; (4) Horn River; (5) Julia; (6) Kearl; (7) Point Thomson; (8) Sakhalin; (9) Syncrude; (10) Tapis; (11) Rotterdam; (12) Antwerp; (13) Baton Rouge; (14) Baytown; and (15) Beaumont (hereinafter, collectively, the “15 Assets”).

business and to provide us with an appropriate scaling factor for those 15 Assets. (*Id.* at 1). ExxonMobil has not responded to the OAG's compromise proposal.

Additionally, we note that pursuant to the Preliminary Conference Order in this matter (NYSCEF No. 45), the OAG is to provide its expert reports to ExxonMobil on or before May 8, 2019. As discussed above, and as the Court has recognized, the OAG's experts require a representative sample of cash flow models, along with an appropriate scaling factor, in order to complete their work, but ExxonMobil has refused to provide that information. Meeting the expert report submission date is also complicated by delays in the scheduling of the long-requested deposition of former ExxonMobil Chief Executive Officer Rex Tillerson. On April 22, 2019 counsel for ExxonMobil finally informed us that the first available date for Mr. Tillerson's deposition is June 19, 2019, seven weeks after the end of fact discovery. As with any fact deposition, Mr. Tillerson's testimony may influence the analysis performed by the OAG's experts, which is why the Preliminary Conference Order contemplates the exchange of expert reports after fact discovery is complete.

Nonetheless, the OAG intends to submit expert reports to ExxonMobil on May 8, 2019, which will be based on the information that the OAG's experts have at that time. However, because of the issues described above, these reports will necessarily be incomplete. The OAG thus asks that the Court grant the OAG leave to file supplemental or amended expert reports within two weeks after (1) ExxonMobil has provided the requested cash flow model-related information, and (2) Mr. Tillerson testifies at his deposition.

The OAG respectfully requests the following relief from the Court with respect to the cash flow model sample: **either** (1) an order directing ExxonMobil to (a) produce the cash flow models ExxonMobil used for annual corporate planning, and those it used for company reserves and resource base estimates, for the 25 Assets discussed above (*i.e.*, those assets that ExxonMobil has agreed constitute a reasonable cross-section of its overall business), and (b) provide an appropriate scaling factor for those 25 Assets; **or** (2) an order directing ExxonMobil to (a) confirm that the 15 Assets for which it has produced full funding models constitute a representative sample of its overall business, and (b) provide an appropriate scaling factor for those 15 Assets. Additionally, the OAG requests that the Court amend the Preliminary Conference Order to allow the OAG to submit supplemental or amended expert reports to ExxonMobil within two weeks of the latter of (1) ExxonMobil's provision of the requested cash flow model-related information to the OAG and (2) Mr. Tillerson's deposition.

Because the cash flow model sample issue was thoroughly discussed during the March 21, 2019 hearing, we do not believe that another conference with the Court is necessary, and believe that this issue can be decided on an exchange of letters. Alternatively, we would ask for our next conference to be advanced to the earliest available date on the Court's calendar.

Respectfully submitted,

/s/ Kevin Wallace

Kevin Wallace