SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York, Plaintiff, -against- EXXON MOBIL CORPORATION, Defendant.	Index No. 452044/2018 IAS Part 61 Hon. Barry R. Ostrager Motion Sequence No. ___

EXXON MOBIL CORPORATION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION *IN LIMINE* TO EXCLUDE THE PROPOSED TESTIMONY OF ELI BARTOV

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Exxon Mobil Corporation ("ExxonMobil" or the "Company") respectfully submits this memorandum of law in support of its motion *in limine* to exclude the proposed testimony of the New York Attorney General's ("NYAG") expert witness, Dr. Eli Bartov. This motion presents questions of law that can be resolved in advance of trial, on the papers, and without an evidentiary hearing. Should this Court conclude that an evidentiary record is necessary to resolve the motion, ExxonMobil requests that the Court reserve judgment on the motion until the testimony is presented at trial.

PRELIMINARY STATEMENT

NYAG should not be allowed to present unreliable and unsound testimony about whether the alleged misrepresentations had a quantitative impact on ExxonMobil's stock price. Dr. Bartov's proposed testimony fails to appropriately employ any generally accepted methodology and is disconnected from NYAG's allegations and the undisputed facts in this case. His testimony should be excluded.

Dr. Bartov seeks to testify about his event study, which purports to show artificial inflation in ExxonMobil's stock price. His proposed testimony is inadmissible on two fronts. *First*, Dr. Bartov does not reliably apply generally accepted standards for conducting an event study, as required under *Frye*. Precedent, academic literature, and Dr. Bartov himself all agree that a 5% threshold is the accepted standard for statistical significance. Yet two of the three purported corrective disclosures in Dr. Bartov's event study concededly fail to meet that standard. Courts have disregarded event studies in their entirety for such fundamental defects.

Second, Dr. Bartov's testimony lacks foundation because he fails to identify corrective disclosures in his event study using a valid methodology. A corrective disclosure must correct a prior misrepresentation by revealing new information to the

market. Dr. Bartov's purported corrective disclosures, however, do not actually *correct* misrepresentations alleged in the Complaint or reveal any *new* information to the market concerning the supposed falsity of ExxonMobil's statements. Instead, Dr. Bartov merely cherry-picks news articles corresponding with stock price fluctuation and tries to shoehorn them into corrective disclosures. This disconnect between Dr. Bartov's event study and NYAG's allegations renders his testimony and expert report inadmissible.

The Court should also exclude Dr. Bartov's testimony concerning ExxonMobil's 2015 impairment analysis as lacking proper foundation because there is an unbridgeable analytical gap between Dr. Bartov's conclusions and his methodology. Dr. Bartov acknowledges that a three-step process governs impairment testing. Consistent with the GAAP standard recited in NYAG's Complaint, he also concedes that, if Step 1 of the process is not satisfied, a company need not proceed any further. But Dr. Bartov did not conclude that Step 1 was satisfied and admits that he merely assumed it was. His assumption is contradicted by the evidentiary record. Indeed, the Company's public disclosures, its witnesses, its internal documents, and its independent auditor uniformly state that there was no trigger at Step 1. Because all of Dr. Bartov's proposed testimony concerning ExxonMobil's 2015 impairment testing rests on an assumption unsupported by any evidence or methodology, it should be excluded.

BACKGROUND

A. NYAG's Allegations About ExxonMobil's Proxy and GHG Costs

In the Complaint, NYAG alleges that ExxonMobil misled investors by saying it used a proxy cost of carbon to analyze risks that might arise from potential future climate regulations. (*See* Compl. ¶¶ 1–3.) According to NYAG, that statement was false because ExxonMobil allegedly "appl[ied] a lower, undisclosed proxy cost based on internal

guidance," and did not apply "proxy costs to its GHG emissions before 2016" in its review of long-lived assets for potential impairment. (*See* Compl. ¶¶ 5, 79.) The Complaint focuses on two reports ExxonMobil released on March 31, 2014—*Managing the Risks* and *Energy and Climate*—as "the basis for ExxonMobil's alleged misrepresentations." (Brooks Ex. 1, Bartov Rpt. ¶ 57 (citing Compl. ¶ 75); *see also* Compl. ¶¶ 85–94.) Specifically, NYAG challenges the accuracy of ExxonMobil's representations in both reports concerning its use of a proxy cost. (Compl. ¶ 94 ("While Exxon noted that it applies different proxy cost values in different geographic regions, the company did not disclose that it used different proxy costs for different business purposes."). It is nevertheless undisputed that ExxonMobil's stock experienced no statistically significant price increase on the date these reports, and the claimed misrepresentations therein, were released to the public. (*See* Brooks Ex. 2, Ferrell Rpt. ¶ 15; Brooks Ex. 4, Bartov Tr. 314:8–21, 326:20–327:2.)

B. Dr. Bartov's Purported Expert Testimony

NYAG retained Dr. Bartov, an accounting professor at New York University, to provide expert testimony on two issues: (i) whether ExxonMobil's alleged misrepresentations artificially inflated ExxonMobil's stock price, and (ii) whether GHG costs should have been included in ExxonMobil's 2015 impairment testing and, if so, whether any impairment charges would have been required. (Bartov Rpt. ¶¶ 11–12.)

(a) Dr. Bartov's Event Study of ExxonMobil's Stock Price

Dr. Bartov opines that ExxonMobil's stock was artificially inflated between April 1, 2014 and June 1, 2017 due to the Company's alleged misrepresentations concerning its "management of the risks posed to its business by climate change regulation." (Bartov Rpt. ¶ 16.) To support that conclusion, he presents an event study, which purports to

analyze the market's reaction to so-called "corrective disclosures" that supposedly revealed ExxonMobil's alleged fraud to investors. (Bartov Rpt. ¶ 55.) Dr. Bartov identified purportedly "curative" statements by searching for news articles regarding "the New York Attorney General's investigation" or other "government investigations" of "ExxonMobil's public statements about its climate change risk management" for the period beginning "the day after ExxonMobil released the *Energy and Carbon - Managing the Risks* and the *Energy and Climate* reports" and ending on the date NYAG filed its Complaint. (Bartov Rpt. ¶ 57.)

Based on his event study, Dr. Bartov concludes that—out of the 318 news articles considered—ExxonMobil's stock price reacted in "statistically significant" ways to three purported corrective disclosures:

(i) the September 20, 2016 announcement of the SEC's now-closed investigation of ExxonMobil,

(ii) a January 20, 2016 news report of the California Attorney General's ("CAAG") supposed investigation of ExxonMobil, and

(iii) NYAG's June 2, 2017 court filing opposing ExxonMobil's motion to quash, in which NYAG claimed to have evidence that ExxonMobil made materially false and misleading statements.

(*See id.* ¶¶ 64–68.) Dr. Bartov concedes that the generally accepted standard for statistical significance in an event study is 5% or less. (*Id.* ¶ 62.) By his own admission, however, only one of his claimed corrective disclosures satisfies the 5% standard. (*See id.* ¶ 64 & Ex. 5). For the other two supposed corrective disclosures, Dr. Bartov reports "statistically significant abnormal returns at the 10% level." (*Id.* ¶ 64.) This means there is a 10% chance—rather than a 5% chance—the observed market movement is due to random chance. (Ferrell Rpt. ¶ 21.)

(b) Dr. Bartov's Opinions About ExxonMobil's Impairment Disclosure

Dr. Bartov also discusses ExxonMobil's impairment testing and concludes that ExxonMobil should have used a so-called "GHG Emission Proxy Cost" in the impairment testing of one asset in 2015: Mobile Bay. (*Id.* ¶ 16.)[1] He further opines that, had ExxonMobil included such costs in its 2015 impairment testing, it would have been required to record an impairment loss for Mobile Bay in 2015. (Bartov Rpt. ¶ 48.) Dr. Bartov does not challenge ExxonMobil's impairment disclosures for any other asset or any other time period.

The framework for testing long-lived assets for impairment is undisputed between the experts. Accounting Standards Codification 360 ("ASC 360") prescribes a three-step asset impairment process:

(i) Step 1: Look for indicators of impairment (known as "impairment triggers");

(ii) Step 2: Test the recoverability of the asset; and

(iii) Step 3: Measure the impairment of the asset.

The first step of the process is satisfied only if there is an impairment indicator or "trigger" suggesting the asset is not recoverable. If a Step 1 trigger is not identified, the impairment assessment comes to an end. (*See* Compl. ¶ 229.)

Dr. Bartov does not conclude that ExxonMobil should have identified an impairment trigger for Mobile Bay or any other asset in 2015. Instead, Dr. Bartov assumes

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[1] Dr. Bartov's report, like NYAG's Complaint, ignores the distinction between the "proxy cost of carbon" and "GHG costs"—both of which he terms "GHG Emission Proxy Costs." (Bartov Rpt. ¶ 11.) As ExxonMobil has previously disclosed, these are distinct metrics that serve two different purposes. The proxy cost, which is embedded in the Company's *Outlook for Energy*, is a tool used to assess the impact of potential climate policies on future global energy demand. By contrast, GHG costs are applied, where appropriate, to estimate the direct financial impact of emissions regulations on specific projects and investment opportunities. (*See Managing the Risks* at 17–18.)

a Step 1 trigger was identified, and then begins his analysis by considering whether the Company complied with Step 2's requirements for calculating Mobile Bay's undiscounted cash flows in a recoverability review. (*See* Bartov Rpt. ¶ 47.) He opines that ExxonMobil was required at Step 2 to include the so-called "GHG Emission Proxy Costs" in its cash flow projections.[2] (*See* Bartov Rpt. ¶ 43.) After including those costs, Dr. Bartov concludes that the asset was impaired because its future cash flows fell short of the asset's book or "carrying" value. Dr. Bartov opines that ExxonMobil should have taken an impairment charge between $320 million and $478 million in 2015 for Mobile Bay. (*See* Bartov Rpt. ¶ 51.)

Dr. Bartov does not opine on whether this alleged impairment loss would have been material to ExxonMobil's 2015 financial statements (which reported net income of $16.15 billion and valued the Company's assets at $336.76 billion) or to its investors. *See* Brooks Ex. 10, 2015 Form 10-K at 30. Nor does Dr. Bartov's event study attempt to address the market's reaction to any disclosure concerning ExxonMobil's impairment review of Mobile Bay.

LEGAL STANDARD

"Before accepting expert testimony, a trial court is required to conduct a two-step analysis." *Guzman ex rel. Jones* v. *4030 Bronx Blvd. Assocs. L.L.C.*, 54 A.D.3d 42, 46 (1st Dep't 2008). First, it must confirm that "the methodology used by the expert to arrive at a conclusion is generally regarded as reliable by the scientific community." *Id.* New York

[2] "GHG Emission Proxy Costs" is not a term ExxonMobil has ever used in its public disclosures. Rather, both of NYAG's experts claim to have independently coined this term. *See* Bartov Tr. 90:12–13 ("[T]hat's why I added the emission. I like clarity"), 94:17–95:7, 103:11 ("Maybe I made it up."); Brooks Ex. 6, Boukouzis Tr. 67:19–25 ("A. It was a term that I coined, I guess. Q. You coined on your own? A. Yes."). At his deposition, Dr. Bartov clarified that he uses the term "GHG Emission Proxy Costs" to refer to the GHG costs in the Dataguide. (Bartov Tr. 182:16–183:2.)

courts apply the *Frye* standard, which dictates that expert testimony is admissible only if a scientific "principle or procedure has 'gained general acceptance' in its specified field." *People* v. *Wesley*, 83 N.Y.2d 417, 422 (1994) (quoting *Frye* v. *United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)).

Second, the court must establish the "admissibility of the specific evidence—i.e., the trial foundation." *Wesley*, 83 N.Y.2d at 428; *People* v. *LeGrand*, 835 N.Y.S.2d 523, 528 (2007). An expert opinion lacks an appropriate trial foundation where, *inter alia*, (1) "the accepted methods" are not "appropriately employed" by the expert, *Parker* v. *Mobil Oil Corp.*, 7 N.Y.3d 434, 447 (2006); or (2) "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation." *Diaz* v. *N.Y. Downtown Hosp.*, 99 N.Y.2d 542, 544 (2002).

NYAG bears the burden of establishing the admissibility of Dr. Bartov's opinions. *See Schechter* v. *3320 Holding LLC*, 64 A.D.3d 446, 451 (1st Dep't 2009).

ARGUMENT

I. Dr. Bartov's Event Study Results Should Be Excluded as Unreliable and Lacking Proper Foundation

Dr. Bartov's testimony claiming artificial inflation of ExxonMobil's stock price should be excluded as unreliable because he employs a standard for statistical significance that, by his own admission, is not generally accepted. His event study is also plagued with foundational defects that render his ultimate conclusions unreliable and untethered to the facts of this case. Critically, the so-called corrective disclosures he identifies neither provide any new information to the market nor "correct" any misstatements alleged in the Complaint. Because Dr. Bartov impermissibly cherry-picks dates solely to identify a statistically significant price impact, his event study should be excluded.

A. Dr. Bartov's Event Study Employs a 10% Level of Significance That Is Neither Generally Accepted Nor Reliable

Dr. Bartov's event study fails the *Frye* test for reliability because he deviates from the generally accepted standard for assessing statistical significance. Two of the three purported corrective disclosures Dr. Bartov identifies as having a "statistically significant" stock price impact are—as his own report acknowledges—statistically significant only at a 10% significance level. (Bartov Rpt. ¶ 64.) But Dr. Bartov himself admits, and ExxonMobil's expert confirms, that the "commonly accepted" standard for assessing statistical significance is judged at a more stringent 5% significance level. (Bartov Rpt. ¶ 62; Bartov Tr. 375:7–17 ("[T]he standard in the literature—in the academic literature . . . the standard is five percent."); Ferrell Rpt. ¶ 20; Brooks Ex. 5, Ferrell Tr. 158:11–15 ("So the academic norm—and I agree with Dr. Bartov on this—is five percent.").) Indeed, at his deposition, Dr. Bartov effectively conceded the irrelevance of these two disclosures, offering them only "as additional information in case a trier of fact wants to consider ten percent." (Bartov Tr. 376:20–22; *see also* Bartov Rpt. ¶ 64 (characterizing these disclosures as "useful information.").) Dr. Bartov's event study thus concededly deviates from the generally accepted level of significance for event studies. As two of his purported corrective disclosures show no statistically significant price reaction, his opinions and analysis regarding them should be excluded as unreliable.

Expert testimony fails the *Frye* standard for reliability where, as here, the expert "depart[s] from the generally accepted methodology" for conducting a given analysis. *See Cornell* v. *360 West 51st Street Realty, LLC*, 986 N.Y.S.2d 389, 403 (2014) (holding expert who "repeatedly equated association with causation . . . departed from the generally accepted methodology" and failed *Frye*). For instance, New York courts have excluded

expert testimony under the *Frye* standard where the expert relied on a sample size that was too small to permit "a statistically significant inference." *Clemente* v. *Blumenberg*, 705 N.Y.S.2d 792, 795 (Sup. Ct. Monroe Cty. 1999). Where the expert's methodology "deviate[s] significantly from the methodology generally accepted" and does not adhere to the standards the expert "himself testified was the generally accepted procedure in his profession," the testimony is inadmissible as a matter of law. *See Hassett* v. *Long Island R.R. Co.*, 787 N.Y.S.2d 837, 840 (Sup. Ct. Kings Cty. 2004).

As the party offering Dr. Bartov's testimony, NYAG bears the burden of coming forward with authority to establish that the methodology employed "is generally accepted" in the field. *Lara* v. *New York City Health & Hosps. Corp.*, 305 A.D.2d 106, 106 (1st Dep't 2003); *Saulpaugh ex rel. Saulpaugh* v. *Krafte*, 774 N.Y.S.2d 194, 196 (3d Dep't 2004). NYAG cannot satisfy that burden here because "judicial opinions, scientific or legal writings, [and] expert opinion" all require the satisfaction of a 5% threshold for statistical significance. *See Selig* v. *Pfizer*, 713 N.Y.S.2d 898, 901 (Sup. Ct. N.Y. Cty. 2000).

Where experts use "event studies, *i.e.*, regression analyses," to determine the impact of a "corrective disclosure" on a company's stock price, it is well established that courts regard a *p-value* of 5% or lower (or a confidence level of 95% or higher) as the threshold for finding statistical significance. *See, e.g.*, *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 309 F.R.D. 251, 257, 270 (N.D. Tex. 2015) (finding "no price impact" where expert found a "statistically significant price reaction . . . only at a 90% confidence level, which is less than the 95% confidence level both experts require in their regression analyses and which the Court [found was] necessary"); *In re Moody's Corp. Sec. Litig.*, 274 F.R.D. 480, 493 n.12 (S.D.N.Y. 2011) (rejecting expert's use of 90% confidence level as "below the

conventional statistical measure of a 95% confidence level and therefore [] not sufficient evidence of a link between the corrective disclosure and the price"). Dr. Bartov's reliance on a 10% *p-value* to identify purported corrective disclosures is a fundamental and fatal defect in his methodology. New York courts have rejected expert opinions relying on a "regression analysis and event study" that "did not provide a statistically significant evaluation" of the impact of the defendant's action on the value of a company's stock. *See Mahoney-Buntzman* v. *Buntzman*, 824 N.Y.S.2d 755, 755 n.19 (Sup. Ct. Westchester Cty. 2006), *aff'd as modified on other grounds*, 51 A.D.3d 732 (2008), *aff'd*, 12 N.Y.3d 415 (2009).

Academic literature likewise regards the 5% significance level as the standard for achieving statistical significance. *See* Brooks Ex. 7, Federal Judicial Center, *Reference Manual on Scientific Evidence* 320 (3d ed. 2011) ("In most scientific work, the level of statistical significance required to reject the null hypothesis (*i.e.*, to obtain a statistically significant result) is set conventionally at 0.05, or 5%."); Brooks Ex. 8, 2 Litigating Tort Cases § 21:30 (Dec. 2018) ("Commonly used levels of significance, are 5% (0.05), 1% (0.01) and 0.1% (0.001)."). In the absence of a 5% significance level, a study's findings cannot be considered reliable because there is an unacceptably high risk that the study's observed outcome is simply due to random chance. *See* Brooks Ex. 7, *Reference Manual on Scientific Evidence* at 250.

Notwithstanding the abundant legal and academic support for a 5% threshold, and his own acknowledgement of that standard, Dr. Bartov's report mischaracterizes two purported corrective disclosures that fail the 5% standard as producing a "statistically significant" effect on ExxonMobil's stock price. (Bartov Rpt. ¶ 64.) His departure from

the generally accepted level of significance for event studies renders his testimony inadmissible under *Frye*. Indeed, where, as here, the majority of dates in an event study are unreliable, a court may properly "treat[] the entire event study as inadmissible." *Bricklayers & Trowel Trades Intern. Pension Fund* v. *Credit Suisse Sec. (USA) LLC*, 752 F.3d 82, 96 (1st Cir. 2014). At a minimum, the Court should preclude Dr. Bartov from testifying concerning the two corrective disclosures that fail the 5% significance threshold. Nor should he be permitted to rely on these corrective disclosures in calculating the purported inflation of ExxonMobil's stock price.

B. Dr. Bartov Improperly Cherry-Picked Dates with Market Movement, Rather Than Identifying Actual Corrective Disclosures

Dr. Bartov's event study also lacks a valid factual foundation because he does not—and cannot—show that any of his purported corrective disclosures actually *corrected* misrepresentations alleged in the Complaint or otherwise provided any *new* information to the market about them. On the contrary, he reviews stock price movements corresponding to announcements of investigations into ExxonMobil, without regard to whether these newspaper articles revealed any misrepresentations—much less any concerning its proxy cost. Nor does he address possible confounding information that could provide alternative explanations for any change in stock price. His analysis boils down to a search for dates with a stock price movement, which he retrofits to support a preconceived conclusion about price inflation. Opinions premised on such data dredging warrant exclusion.

1. Dr. Bartov's Purported "Corrective Disclosures" Do Not Correct Any Alleged Misrepresentations

By definition, a corrective disclosure must correct or cure a market misconception by "reveal[ing] a prior misleading statement." *See, e.g.*, *In re Vivendi Universal, S.A. Secs. Litig.*, 765 F. Supp. 2d 512, 555 (S.D.N.Y. 2011); *see also Lentell* v. *Merrill Lynch & Co.*,

396 F.3d 161, 175 n.4 (2d Cir. 2005). None of Dr. Bartov's purported corrective disclosures are "corrective" because none reveals the "falsity" of any "alleged misstatement" identified in the Complaint. *See In re Bristol Myers Squibb Co. Sec. Litig.*, 586 F. Supp. 2d 148, 164 (S.D.N.Y. 2008).

Dr. Bartov claims to search for artificial inflation resulting from alleged misrepresentations in ExxonMobil's March 31, 2014 reports concerning its use of "the proxy cost of carbon." (Bartov Rpt. ¶ 57.) But none of his purported corrective disclosures "relate back to the[se] misrepresentation[s]." *See In re Williams Sec. Litig.*, 558 F.3d 1130, 1140 (10th Cir. 2009). In fact, Dr. Bartov's claimed corrective disclosures do not even mention the proxy cost, much less reveal any new information about how ExxonMobil applies this metric. Instead, each of the purported corrective disclosures merely announces the existence of an investigation into ExxonMobil's climate change disclosures. But the commencement of a government investigation "without more, is insufficient to constitute a corrective disclosure." *See Meyer* v. *Greene*, 710 F.3d 1189, 1201 (11th Cir. 2013) (announcement of SEC investigation did not qualify as a corrective disclosure). That is because the announcement may have a "*negative* effect on stock prices, but not a *corrective* effect." *In re Initial Pub. Offering Sec. Litig.*, 399 F. Supp. 2d 261, 266 (S.D.N.Y. 2005) (emphasis in original).

For example, the newspaper article that announced a CAAG investigation on January 20, 2016 does not function as a corrective disclosure because it did not reveal anything more than the supposed fact of the CAAG's investigation of ExxonMobil.[3] The

[3] Ivan Penn, *California To Investigate Whether Exxon Mobil Lied About Climate-Change Risks*, L.A. Times (Jan. 20, 2016), https://www.latimes.com/business/la-fi-exxon-global-warming-20160120-story.html.

article makes no mention of proxy costs or even ExxonMobil's statements concerning the risks climate change posed to its business. To the extent the article sheds any light on the subject matter of the CAAG's investigation, it merely reported that the CAAG was "reviewing what Exxon Mobil knew about global warming and what the company told investors."[4] That inquiry into ExxonMobil's views on climate science has no connection to the purported misrepresentations concerning the proxy cost alleged in NYAG's Complaint. Consequently, Dr. Bartov fails to lay the foundation necessary to conclude that any stock price movement reflects inflation attributable to misrepresentations alleged in NYAG's Complaint.

2. Dr. Bartov's Purported "Corrective Disclosures" Do Not Reveal Any New Information

In any event, "because a corrective disclosure must reveal a previously concealed truth, it obviously must disclose *new* information." *FindWhat Investor Group* v. *FindWhat.com*, 658 F.3d 1282, 1311 n.28 (11th Cir. 2011) (emphasis added). Hence, "[a]n event study" must analyze "the responsiveness of a security's price . . . to announcements that contain new information" not previously known to the market. *See In re Netbank, Inc. Sec. Litig.*, 259 F.R.D. 656, 673 n.9 (N.D. Ga. 2009). But, by January 2016, the market was already aware of allegations about ExxonMobil's historical knowledge of climate science. Dr. Bartov's supporting documents establish that fact. Indeed, for his alleged corrective disclosure, Dr. Bartov relies on an *LA Times* article reporting that the CAAG's investigation originated in a series of articles published by various news outlets the preceding fall.[5] In other words, the CAAG's investigation probed subject matter that had

[4] *Id.*

[5] *Id.*

been in the public domain for months. The only new information released on January 20 was that the CAAG was purportedly conducting an investigation.

The existence of investigations by state attorneys general was hardly breaking news on January 20, 2016. NYAG had publicly announced its investigation of ExxonMobil months earlier, on November 5, 2015.[6] As Dr. Bartov's report confirms, the market price of ExxonMobil stock had no statistically significant reaction to the November 2015 disclosure of the NYAG investigation. *See* Bartov Rpt. Ex. 5. To the extent Dr. Bartov claims news of the CAAG investigation bolstered NYAG's allegations of fraud, this would run afoul of the principle that corrective disclosures "cannot be merely confirmatory." *FindWhat Investor Group*, 658 F.3d at 1311 n.28. And, in any event, a theory of bolstering would not explain Dr. Bartov's finding of no market reaction to the subsequent announcements of investigations by the Virgin Islands and Massachusetts Attorneys General. (Bartov Rpt. Ex. 5.)

At his deposition, Dr. Bartov insisted that the market did not react to the disclosure of NYAG's investigation in November 2015 because it appeared in *The New York Times*' Science section, which he presumed to be inaccessible to the financial markets, whereas the article subsequently disclosing the CAAG investigation appeared in the *Los Angeles Times*' Business section. (Bartov Tr. 352:14–25.) But that flimsy justification is belied by the facts. The suggestion that reports of the CAAG's tag-a-long investigation received greater publicity than the announcement of NYAG's investigation (the first climate change investigation of ExxonMobil) is patently false. Indeed, NYAG's investigation appeared

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[6] Justin Gillis & Clifford Krauss, *Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General*, N.Y. Times (Nov. 5, 2015), https://www.nytimes.com/2015/11/06/science/exxon-mobil-under-investigation-in-new-york-over-climate-statements.html.

on the *front page* of *The New York Times*' website on November 5, 2015 and on the front page of the print edition the following morning.[7] Moreover, on November 5, the NYAG investigation was also reported in articles appearing in the Business sections of *The Wall Street Journal*, *U.S. News & World Report*, and *The Washington Post*, among others.[8] ExxonMobil also held a media call that day to discuss the investigation.[9] Dr. Bartov's report thus fails to explain what *new* information about the alleged misstatements was revealed by a report on the CAAG's then-unconfirmed investigation into ExxonMobil.

3. Dr. Bartov Cherry-Picks Dates in an Effort to Bolster His Finding of Stock Price Inflation

A regression analysis "must examine an appropriate selection of data" and "may not 'cherry-pick' the time-frame or data points so as to make [the] ultimate conclusion stronger." *See Reed Constr. Data Inc.* v. *McGraw-Hill Cos.*, 49 F. Supp. 3d 385, 400 (S.D.N.Y. 2014). Courts should therefore exclude expert testimony where the expert "selected event dates based on unreliable criteria" and was "more concerned simply with

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7 Gillis & Krauss, *supra* note 7; Justin Gillis & Clifford Krauss, *Inquiry Weighs Whether Exxon Lied on Climate Change*, N.Y. Times, Nov. 6, 2015, at A1.

8 Lynn Cook, *Exxon Mobil Gets Subpoena From N.Y. Regarding Climate-Change Research*, The Wall Street Journal (Nov. 5, 2015, 6:59 PM), https://www.wsj.com/articles/exxon-mobil-gets-subpoena-from-n-y-regarding-climate-change-research-1446760684; Alan Neuhauser, *Exxon Mobil on Hot Seat for Global Warming Denial*, U.S. News & World Report (Nov. 5, 2015), https://www.usnews.com/news/articles/2015/11/05/exxon-mobil-under-investigation-for-climate-change-denial; Chris Mooney, *New York Is Investigating Exxon Mobil for Allegedly Misleading the Public About Climate Change*, The Washington Post (Nov. 5, 2015), https://www.washingtonpost.com/news/energy-environment/wp/2015/11/05/exxonmobil-under-investigation-for-misleading-the-public-about-climate-change/.

9 ExxonMobil News Release, *ExxonMobil To Hold Media Call on New York Attorney General Subpoena* (Nov. 5, 2015, 5:23 PM), https://news.exxonmobil.com/press-release/exxonmobil-hold-media-call-new-york-attorney-general-subpoena.

identifying abnormal market movement than in supporting the [plaintiff's] allegations." *See Bricklayers*, 752 F.3d at 91.

Here, Dr. Bartov fails to limit his analysis to *new* information that was revealed to the market. And there is a "complete disconnect between the event study and the complaint" with regard to the supposed misstatements examined. *Id.* Rather than identify a misstatement and subsequent corrective disclosures, Dr. Bartov impermissibly cherry-picks dates to identify a price impact and then searches for something to call a corrective disclosure. Any finding of price impact developed in that manner is irredeemably unreliable.

4. Dr. Bartov Fails To Address Confounding Factors

The flaws in Dr. Bartov's methodology are only compounded by his failure to adequately address confounding factors that might otherwise explain a movement in stock price on his purported corrective disclosure dates. "[W]hen conducting an event study, an expert must address confounding information that entered the market on the event date." *Bricklayers*, 752 F.3d at 95; *see also Reed*, 49 F. Supp. 3d at 400 ("[A] regression analysis must control for the 'major factors' that might influence the dependent variable."). An expert who fails to do so will reach conclusions that are unreliable.

Dr. Bartov falls short on this front as well. He ignores the possibility that the price movement he identifies could be attributable to investor concerns about the costs that might result from the investigation itself, rather than the revelation of underlying misstatements. *Cf. Loos* v. *Immersion Corp.*, 762 F.3d 880, 890 (9th Cir. 2014); Ferrell Rpt. ¶¶ 49–50. He merely assumes "if the market response is statistically significant, it must be more than a frivolous allegation." (Bartov Tr. 331:8–10.) Dr. Bartov was obliged to "establish a[ ] reliable means of addressing this problem" and to explain "any methodological

underpinning" for his approach. *See Bricklayers*, 752 F.3d at 95. Because he "does not explain what other possible causes he ruled out or in, much less why he did so," *see Cornell*, 986 N.Y.S.2d at 405, his event study is attenuated from his ultimate conclusions.

II. The Court Should Exclude Dr. Bartov's Testimony Concerning Impairment Testing as Speculative and Contrary to the Evidentiary Record

Dr. Bartov's opinions concerning ExxonMobil's 2015 impairment testing of Mobile Bay should be excluded because, by his own admission, Dr. Bartov did not perform the predicate analysis at Step 1 to lay the foundation for his opinions concerning how ExxonMobil supposedly should have conducted impairment testing at Step 2. Absent any basis for concluding that Step 2 or Step 3 testing was warranted, Dr. Bartov's opinions on how such testing ought to have proceeded, and whether an impairment should have been taken in 2015, are speculative and unsupported by the evidentiary record.

A. Dr. Bartov Admittedly Did Not Evaluate Whether Step 1 Was Satisfied

The parties agree that ASC 360 establishes a three-step process for impairment testing. (Bartov Rpt. ¶ 20; Bartov Tr. 141:14–18; Compl. ¶ 227.) At Step 1, the company must assess whether there is an impairment indicator or "trigger" suggesting that the asset is not recoverable. *See* Brooks Ex. 9, ASC 360-10-35-21. A trigger could be identified, for example, if an asset is operating at a loss currently and has "a projection or forecast that demonstrates continuing losses." *Id.* In the absence of a trigger, no further impairment testing is required. *See* ASC 360-10-35-21(a), (e).

If, on the other hand, a trigger is identified, Step 2 of the process requires the company to assess whether an asset's current book value (*i.e.*, "carrying value") is recoverable through its future undiscounted cash flows. *See* ASC 360-10-35-17; *see also* Compl. ¶ 229 (stating companies must proceed to Step 2 only "if one or more impairment

triggers are present"). At Step 2, ASC 360 requires that the assumptions used in modeling undiscounted cash flows be "reasonable in relation to" the assumptions used by the company in other relevant contexts. *See* ASC 360-10-35-30. If the asset's future undiscounted cash flows fall short of the asset's book or "carrying value," the company must then determine the amount of the impairment at Step 3 by measuring the difference between the asset's fair value and its carrying value. *See* ASC 360-10-35-17.

The parties agree that ASC 360 requires proceeding to Step 2 only if an impairment trigger is found at Step 1. (Bartov Rpt. ¶ 20; Bartov Tr. 142:8–11; Compl. ¶ 229.)[10] As Dr. Bartov explains, "Because it would be impractical to test all long-lived assets for impairment at the end of every reporting period, ASC 360 requires impairment testing *only when* events or changes in circumstances indicate that a long-lived asset's carrying value (*i.e.*, book value) may not be recoverable." (Bartov Rpt. ¶ 20 (emphasis added).)[11] But Dr. Bartov disregards this rule in forming his opinions. Instead, he bypasses Step 1—which he presumes to be satisfied—and begins his analysis by opining on whether ExxonMobil adhered to ASC 360's requirements, and its own public statements and internal policies, at Step 2. (Bartov Rpt. ¶¶ 43, 47.)

Dr. Bartov admitted that he performed no analysis to verify his "assumption . . . that Step 1 created a trigger" before proceeding to "re-calculate the 2015 undiscounted cash flows associated with Mobile Bay (Step 2 of impairment testing)." (Bartov Tr. 181:7–8; Bartov Rpt. ¶ 47.) To the contrary, Dr. Bartov testified that he "took for granted . . .

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[10] If Dr. Bartov is permitted to testify on the Company's impairment testing, ExxonMobil reserves the right to contest any of his interpretations and applications of ASC 360, including at Steps 2 and 3.

[11] *See* ASC 360-10-35-21 (There is no need to perform a recoverability review unless "events or changes in circumstances indicate that [the asset's] carrying amount may not be recoverable.").

without questioning, that Step 1 failed." (Bartov Tr. 180:20–21.) But it is "settled and unquestioned law" that an expert witness "cannot reach [a] conclusion by assuming material facts not supported by evidence" and "may not guess or speculate in drawing a conclusion." *Cappolla* v. *City of New York*, 302 A.D.2d 547, 549 (2d Dep't 2003). Indeed, "an expert's opinion not based on facts is worthless." *Caton* v. *Doug Urban Constr. Co.*, 65 N.Y.2d 909, 911 (1985). Dr. Bartov's impairment analysis should therefore be excluded as "unsupported by data or methodology." *Verdugo* v. *Seven Thirty One Ltd. P'ship*, 70 A.D.3d 600, 602 (1st Dep't 2010).

Dr. Bartov's counterfactual assumption regarding the existence of a Step 1 impairment trigger was particularly unwarranted here where the Company's public disclosures, its witnesses, its internal documents, and its independent auditor all uniformly report that there was no trigger at Step 1. *See, e.g.*, 2015 Form 10-K at 57; Brooks Ex. 11, PNYAG0330371 at 6; Brooks Ex. 12, PNYAG0001268 at 5; Brooks Ex. 3, MacDonald Rpt. ¶ 36. Dr. Bartov acknowledges that "ExxonMobil concluded that no impairment triggering event had occurred," a determination that was contemporaneously recorded in ExxonMobil and PwC documents, disclosed to investors in the annual 10-K filing, and confirmed in deposition testimony. (Bartov Rpt. ¶ 37.) The very materials on which Dr. Bartov purports to rely confirm that the Company found no impairment trigger for Mobile Bay in 2015. (*See, e.g.*, Bartov Rpt. ¶¶ 33, 37 n.36.) In ExxonMobil's 2015 10-K, the Company reported it had assessed certain long-lived assets for potential impairment, and "[t]he results of this assessment confirm the absence of a trigger event." *See* 2015 Form 10-K at 57. The Company's auditor, PwC, similarly prepared a memorandum reporting that "Management concluded that an impairment triggering event did not exist for the

Mobile Bay asset" and that PwC did "not take exception to Management's assessment and conclusions." (Brooks Ex. 12, PNYAG0001268 at 10.)[12]

Dr. Bartov does not claim to have reached a conclusion that there was a trigger, nor does he claim ExxonMobil was wrong to conclude that no trigger event existed. In fact, he did not perform any independent analysis to challenge ExxonMobil's auditor-approved, publicly disclosed conclusion that there was no trigger. (Bartov Tr. 180:13–181:8) ("[T]his was not critical to my analysis at all."). Nor does he identify any record evidence to challenge the accuracy of statements by the Company and PwC that there was no trigger, which appear in the documents on which he purports to rely. (*See, e.g.*, Bartov Rpt. 7 n.13, 14 nn.36–38.) Instead, Dr. Bartov concedes that he did not consider this issue because of the instructions NYAG provided him. (Bartov Rpt. ¶ 12; Bartov Tr. 180:13–17) ("I only testify about the three questions that I addressed here. I did not address this question."). His opinions therefore rest on an assumption that is "speculative or unsupported by any evidentiary foundation," and should be excluded on that basis. *See Wong* v. *Goldbaum*, 23 A.D.3d 277, 279 (1st Dep't 2005).

The sole justification Dr. Bartov offers for proceeding directly to Step 2 without first identifying an impairment trigger is that ExxonMobil "effectively complet[ed] Step 2" because—whether required to do so or not—the Company did, in fact, estimate cash flows for Mobile Bay in 2015. (Bartov Rpt. ¶ 37.) But no academic, legal, or evidentiary authority supports Dr. Bartov's suggestion that a company's decision to undertake a cash

[12] The absence of an impairment in 2015 is consistent with ExxonMobil's 2016 impairment assessments. As Dr. Bartov concedes, "ExxonMobil included GHG Emission Proxy Costs in its cost projections for its 2016 impairment testing of Mobile Bay," but still found no impairment. (Bartov Rpt. ¶¶ 39–40.) Dr. Bartov does not dispute the conclusions of ExxonMobil's 2016 impairment review.

flow assessment establishes the existence of an impairment trigger at Step 1. (Bartov Tr. 157:12–19.)

To the contrary, ASC 360 expressly provides that a company may rely on cash flow projections to determine whether future projected losses might constitute an impairment trigger at Step 1.[13] Indeed, Dr. Bartov himself concedes that a current-period loss and the expectation of future losses was precisely "the impairment indicator that ExxonMobil considered in its impairment testing of Mobile Bay" at Step 1. (Bartov Rpt. 7 n.13; *see also id.* ¶ 37 (recounting that ExxonMobil reviewed a "projection of future cash flows associated with Mobile Bay" during "Step 1 of impairment testing.").) In other words, "*to inform [its] conclusion as to whether an impairment trigger exists*," ExxonMobil used cash flow projections to determine whether there was an expectation of future period losses, which would constitute an impairment trigger. (*See* Brooks Ex. 12, PNYAG0001268 at 5; *see also id.* at 14 ("Management performed a cash flow recoverability analysis over the Mobile Bay asset to determine if a possible triggering event was present.").)[14]

Once the Company determined Mobile Bay was not projected to have future losses, ExxonMobil compared Mobile Bay's cash flows to its carrying value simply to "confirm the absence of a trigger event," and contemporaneously disclosed this analysis to the investing public. (2015 Form 10-K at 57; Brooks Ex. 11, PNYAG0330371 at 6). Nothing

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[13] *See* ASC 360-10-35-21 (impairment triggers include a current period "cash flow loss" combined with "a projection or forecast that demonstrates continuing losses"); Brooks Ex. 3, MacDonald Rpt. ¶ 29.

[14] In conducting his Step 2 analysis, Dr. Bartov relies on a 2015 cash flow model produced by PwC. *See* Bartov Rpt. 19 n.58. Even this model, on which Dr. Bartov chose to rely, directly contradicts his assumption that a Step 1 trigger existed. The model clearly states that "[t]he projected future cash flow was prepared as prescribed within ASC 360 condition[s], *to determine if a triggering event is present*." *See* Brooks Ex. 13, PNYAG0002790 (emphasis added).

in Dr. Bartov's expert report or ASC 360's framework even suggests that taking such a step to confirm the absence of a trigger somehow establishes the existence of a trigger.

B. Dr. Bartov's Subsequent Impairment Analysis Is Irrelevant and Lacks Proper Foundation

Dr. Bartov's analysis should have begun and ended at Step 1. As he acknowledged at his deposition, "[t]he accounting rules do not require a company to do Step 2 analysis if Step 1 indicates there is no trigger." (Bartov Tr. 157:14–17.) Nevertheless, both of his opinions concerning ExxonMobil's 2015 impairment testing depend on his unsupported and faulty assumption that an impairment trigger existed at Step 1. Having failed to identify any trigger warranting inquiry beyond Step 1, Dr. Bartov lacks foundation for his opinions concerning how ExxonMobil ought to have performed subsequent steps of impairment testing. (Bartov Rpt. ¶ 20.)

New York courts exclude expert opinions where, as here, they contradict accounting principles and the undisputed factual record. *Gerber Trade Fin., Inc.* v. *Skwiersky, Alpert & Bressler, LLP*, 12 A.D.3d 286, 286–87 (1st Dep't 2004) (rejecting the plaintiff's expert because his conclusions "are dependent on his personal opinion rather than on accounting principles, and are at odds with the uncontradicted testimony of a [company's] officer."). Absent any evidence or analysis to support Dr. Bartov's counterfactual assumption that Step 1 was satisfied, his opinions on Step 2 are "too diverse and incongruous with the facts" to be "relevant or helpful" to the factfinder. *See Melnick* v. *Consol. Edison, Inc.*, 959 N.Y.S.2d 609, 622–23 (Sup. Ct. Richmond Cty. 2013).

Accordingly, the Court should exclude Dr. Bartov's testimony concerning (i) whether ExxonMobil was obliged to include so-called "GHG Emission Proxy Costs"

when estimating future cash flows at Step 2 (Bartov Rpt. ¶¶ 43–45), and (ii) the amount of any impairment at Step 3 (*id.* ¶¶ 46–51).[15]

CONCLUSION

ExxonMobil respectfully requests that the Court preclude Dr. Bartov from testifying about the supposed inflation of ExxonMobil's stock or his event study. Dr. Bartov concedes that two of his three purported corrective disclosures cannot meet the generally accepted 5% threshold for statistical significance. At a minimum, the Court should therefore preclude Dr. Bartov from relying on these purported corrective disclosures. Moreover, the entire event study should be thrown out because none of Dr. Bartov's "corrective disclosures" revealed any new information to the market—much less "corrected" any alleged misrepresentation regarding proxy costs or GHG costs. The Court should also exclude Dr. Bartov's testimony concerning ExxonMobil's 2015 impairment testing because his entire analysis depends on his mere assumption that an impairment trigger existed at Step 1—as he himself admits. That assumption is baseless and it is contradicted by ExxonMobil's contemporaneous internal documents, public disclosures, witnesses, and its internal auditor. Because all of Dr. Bartov's proposed testimony on impairments rests on this unsupported assumption, it should be excluded.

[15] Similarly, to the extent Dr. Bartov relies on the Company's statement in its 2015 10-K that it would use "consistent" assumptions in judging the recoverability of carrying amounts, that statement is expressly limited to Step 2, after the finding of a "trigger event." *See* 2015 Form 10-K at 57. The same goes for ASC 360's "reasonable in relation" requirement, which—it is undisputed— applies solely at Step 2. *See* ASC 360-10-35-21; ASC 360-10-35-30.

Dated: October 4, 2019
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Respectfully submitted,

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Certification of Compliance with Word Count

Pursuant to Rule 17 of the Rules of Practice for the Commercial Division of the Supreme Court, I certify that this brief complies with that rule because it contains 6,862 words, exclusive of the caption, table of contents, table of authorities, and signature block. In making this certification, I relied on Microsoft Word's "Word Count" tool.

Dated: October 4, 2019
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