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 PETER BOUKOUZIS

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Exxon Mobil Corporation ("ExxonMobil") respectfully submits this memorandum of law in support of its motion *in limine* to exclude the proposed testimony of Peter M. Boukouzis, an expert witness of the New York Attorney General ("NYAG"). 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

In the absence of factual evidence to support its flawed theory, NYAG seeks to use Mr. Boukouzis to establish that ExxonMobil's representations concerning two internal metrics (proxy costs and GHG costs) were misleading and material to investors. But Mr. Boukouzis's expert report is nothing more than NYAG's factual and legal argument masquerading as expert opinion. He devotes 52 out of 96 pages to a narrative purporting to show that the investment community cares about climate regulatory risk. He then proceeds to opine that investors would have been misled by ExxonMobil's public statements concerning proxy costs and GHG costs and purports to estimate the damages to shareholders. Mr. Boukouzis is not qualified to offer these opinions, nor are they supported by a reliable methodology, objective data, or record evidence. The Court's gatekeeping function exists to preclude precisely such testimony, which entails nothing more than the witness's unqualified and unsupported subjective beliefs.

Most fundamentally, Mr. Boukouzis is not qualified as an expert in any subject on which he opines. He has never previously been proffered as an expert or vetted by a court. And he admits he is entirely new to academia, having never published an article in any field. Rather, he began teaching just over a year ago at a college in California that was

only accredited in 2016. For a case being litigated in the financial capital of the world, one might well wonder why NYAG seeks to call and qualify an unpublished, first-time expert and inexperienced assistant professor at a recently accredited college on the other side of the country in order to support its theory.

It is certainly not that Mr. Boukouzis has any specialized knowledge or familiarity with the subject matter of this case. While Mr. Boukouzis purports to opine on the likely impact of future climate change regulations, he admits he is not an expert in climate policy or in modeling demand for oil and gas. Similarly, Mr. Boukouzis—who never worked as an equity analyst—claims no prior experience, much less expertise, with climate policies, greenhouse gas regulations, or climate risk disclosures to justify his lengthy narrative concerning the significance of climate regulatory risks to investors.

Instead, Mr. Boukouzis claims his purported expertise derives from his previous employment as a mergers and acquisitions ("M&A") investment banker. Relying on that experience, he opines that ExxonMobil's public statements were misleading. But no expert testimony is needed to determine whether ExxonMobil's public disclosures were at odds with its internal practices or whether reasonable investors would consider those disclosures misleading. In any event, a former investment banker brings no special expertise to such questions. The Court is unquestionably competent to decide these ultimate issues without the aid of Mr. Boukouzis's testimony and should do so at trial.

NYAG doubtless recognizes it cannot establish materiality by showing that the purported misrepresentations alleged in the Complaint had any impact on ExxonMobil's stock price. That is why NYAG instead resorts to Mr. Boukouzis, who performed a rudimentary and irrelevant keyword search of analyst reports and other documents in an

effort to support his view that ExxonMobil's disclosures were somehow "important" to investors. But Mr. Boukouzis employs no identifiable methodology—much less one that is reliable and generally accepted—to reach his subjective conclusions concerning the "relevance" of ExxonMobil's disclosures to the investment community. To the extent he relies on evidence, it is cherry-picked, anecdotal, and does not reliably support his conclusions.

The Court should also preclude Mr. Boukouzis from testifying concerning his manipulation of ExxonMobil's internal cash flow models. His opinions on these models lack the necessary foundation because his methodology is unreliable and untethered to his conclusions. At his deposition, Mr. Boukouzis conceded he adjusted models without knowing basic information about the underlying projects and merely speculated on how these models were used (if at all) by the Company. In point of fact, none of the information he manipulated reached the market, and most did not even reach ExxonMobil senior management. Consequently, his proposed testimony that ExxonMobil's application of GHG costs somehow inflated its business outlook or biased investors lacks appropriate foundation.

Finally, Mr. Boukouzis estimates aggregate damages to ExxonMobil's shareholders by performing a calculation that relies predominantly on the conclusions of NYAG's other expert. Having failed to establish any prior experience performing this calculation, Mr. Boukouzis has not demonstrated that he is a qualified expert on this subject. Moreover, Mr. Boukouzis's damages calculation is itself unreliable as it is based on speculative data and an invalid methodology.

BACKGROUND

NYAG claims 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 primarily because ExxonMobil allegedly "appl[ied] a lower, undisclosed proxy cost based on internal guidance" when "projecting its future costs for the purposes of making investment decisions." (*Id.* ¶¶ 4, 79.) NYAG also claims ExxonMobil did "not apply the publicly represented proxy cost to the transportation sector in projecting demand for oil and gas." (*Id.* ¶ 274.)

The focal point of the Complaint is two reports—*Managing the Risks* and *Energy and Climate*—which ExxonMobil released on March 31, 2014 in response to shareholder queries concerning how ExxonMobil accounts for climate change regulatory risks. (*Id.* ¶¶ 68-69, 75, 85-94; *see also* Brooks Ex. A, Boukouzis Rpt. ¶ 68.) Specifically, NYAG takes issue with a handful of sentences concerning ExxonMobil's use of a proxy cost to reflect the potential impact of future climate policies on global demand for energy. (*See* Compl. ¶ 94.) In the same report, ExxonMobil mentioned it uses a separate planning metric (GHG costs), where appropriate, to estimate the potential direct costs on its operations from jurisdiction-specific regulations. NYAG argues that ExxonMobil's use of GHG costs in its internal investment models rendered its public representations on the proxy cost inconsistent and misleading.

In the absence of evidence, NYAG offers Mr. Boukouzis's *ipse dixit* to bolster its unsubstantiated claims. Mr. Boukouzis is a former M&A investment banker who previously worked as a chemical engineer in the oil and gas industry. (Boukouzis Rpt. ¶ 12.) He claims no prior experience with climate regulations or climate change disclosures. Although Mr. Boukouzis purports to rely on his "years of experience

analyzing and valuing oil and gas companies" (*Id.* ¶¶ 20, 89, 104, 108), his testimony consists largely of analyzing ExxonMobil's internal communications and guidance documents, which are not available to investors, and proprietary internal economic models that he does not fully understand. He offers the following opinions:

- Increasingly stringent climate policies pose a significant risk to the oil and gas industry generally and to ExxonMobil in particular. (*Id.* ¶¶ 15-16, 27, 38-44, 47-48, 62-65.)

- The investment community considers climate change regulatory risk an "importan[t]" and "salient risk factor" when considering investments in the oil and gas sector. (*Id.* ¶¶ 49, 61, 72, 76; *see also id.* ¶¶ 15-16, 48-61, 72-87, 89.) And ExxonMobil's disclosures concerning how it accounts for such risks were a "relevant consideration" in the investment community's evaluation of ExxonMobil. (*Id.* ¶¶ 71, 77-81, 84-87 & Ex. 8.)

- Investors likely would have interpreted ExxonMobil's public disclosures concerning the figures it uses for proxy costs and GHG costs in a manner that is inconsistent with its internal practices. (*Id.* ¶¶ 17-20, 66-71, 88-115.)

- Mr. Boukouzis adjusts 27 of the Company's internal cash flow models by replacing GHG costs with proxy costs. (*Id.* ¶¶ 21, 116-129.) He concludes this adjustment would, in aggregate, reduce projected undiscounted cash flows by 7.2%, total net present value by 3.9%, and the internal rate of return by 0.6%. (*Id.* ¶¶ 21, 120-125.) He further speculates that this difference "likely positively biased the valuation of ExxonMobil." (*Id.* ¶¶ 22, 126-129.)

- Mr. Boukouzis estimates the potential number of shares impacted by Dr. Bartov's purported corrective disclosures. Then, using Dr. Bartov's calculation of inflation per share, he estimates aggregate damages to ExxonMobil's shareholders as between $476 million and $1.6 billion. (*Id.* ¶¶ 23, 130-39.)

ARGUMENT

I. APPLICABLE LAW

"A precondition to the admissibility of expert testimony is that the proposed expert is 'possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable.'" *Flanger* v. *2461 Elm Realty Corp.*, 123 A.D.3d 1196, 1197 (3d Dep't 2014) (quoting

Matott v. *Ward*, 48 N.Y.2d 455, 459 (1979)).

Upon determining that a proposed expert is qualified, a trial court must perform a two-step analysis to determine whether the expert's conclusions are admissible. *See Guzman ex rel. Jones* v. *4030 Bronx Blvd. Assocs. L.L.C.*, 54 A.D.3d 42, 46 (1st Dep't 2008). First, using the test derived from *Frye* v. *United States*, the court must determine that "the methodology used by the expert to arrive at a conclusion is generally regarded as reliable." *Guzman*, 54 A.D.3d at 46 (citing 293 F. 1013 (D.C. Cir. 1923)); *see also Cornell* v. *360 W. 51st St Realty, LLC*, 22 N.Y.3d 762, 780 (2014). "Second, the court must establish the admissibility of the specific evidence—*i.e.*, the trial foundation." *Guzman*, 54 A.D.3d at 46 (citing *People* v. *Wesley*, 83 N.Y.2d 417, 428 (1994)).[1]

An expert opinion lacks an appropriate foundation and is therefore unreliable where **(i)** "the accepted methods" are not "appropriately employed" by the expert, *Parker* v. *Mobil Oil Corp.*, 7 N.Y.3d 434, 447 (2006); or **(ii)** the expert's ultimate assertions are "speculative" or are "unsupported by any evidentiary foundation," "data or methodology," *Diaz* v. *N.Y. Downtown Hosp.*, 99 N.Y.2d 542, 544 (2002); *Verdugo* v. *Seven Thirty One Ltd. P'ship*, 70 A.D.3d 600, 602 (1st Dep't 2010). In this foundational inquiry, "[t]he question is whether the expert's opinion sufficiently relates to existing data or 'is connected to existing data only by the *ipse dixit* of the expert.'" *People* v. *Brooks*, 31 N.Y.3d 939, 941 (2018) (quoting *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 146 (1997)).

NYAG bears the burden of establishing the reliability and admissibility of Mr. Boukouzis's opinions. *See Schechter* v. *3320 Holding LLC*, 64 A.D.3d 446, 451 (1st Dep't

[1] "Although the *Frye* inquiry and the foundational inquiry are distinct, they may proceed simultaneously." *Fraser* v. *301-52 Townhouse Corp.*, 57 A.D.3d 416, 420 n.5 (1st Dep't 2008) (citing *Wesley*, 83 N.Y.2d at 436 n.2 (Kaye, C.J., concurring)).

2009).

II. MR. BOUKOUZIS IS NOT A QUALIFIED EXPERT

Mr. Boukouzis is not an established expert in any field. He concedes he is "new" to serving as an expert witness. (Brooks Ex. D, Boukouzis Tr. 29:4-5.) Indeed, he has never previously been accepted by a court as an expert witness—having been retained, although not yet proffered, as an expert in only one other case. (*Id.* at 30:10-31:4.) Mr. Boukouzis's deposition testimony makes clear that he lacks any credentials or experience in the subject matter of this case to support his acceptance as an expert for the first time here.

"While an expert's competency can be derived from either formal training or '[l]ong observation and *actual* experience,'" Mr. Boukouzis has failed to establish any basis for his expertise in the subjects on which he opines. *People* v. *Burt*, 270 A.D.2d 516, 518 (3d Dep't 2000) (emphasis in original). Mr. Boukouzis has no academic or professional background that is relevant to the opinions he advances. And he lacks any experience in analyzing climate policy or climate risk disclosures, in reviewing internal project analyses, or in calculating shareholder damages.

A. Mr. Boukouzis Is Not a Credentialed Academic

Mr. Boukouzis admits he is "new" to academia. (Boukouzis Tr. 23:6-7, 29:4-5, 395:25-396:3.) Specifically, just over a year ago, he was hired as an assistant professor at the University of Saint Katherine in San Marcos, California. (*Id.* at 16:21-17:8; Boukouzis Rpt. A-1.) Mr. Boukouzis describes the school as a "small startup university," which was founded in 2010 and only accredited in 2016, with a current enrollment of approximately

200 students. (Boukouzis Tr. 395:16; Boukouzis Rpt. A-1.)[2] While the very first line of Mr. Boukouzis's expert report states he is "the business chair" at St. Katherine (Boukouzis Rpt. ¶ 1), he conceded its business department has no full-time professors for him to supervise (Boukouzis Tr. 17:9-25, 18:13-14, 395:13-396:10).

At his deposition, Mr. Boukouzis clarified that he views his position at St. Katherine as "more of giving back than what we would consider a job." (*Id.* at 18:13-14.) Mr. Boukouzis does not have tenure and teaches on average "ten hours a week." (*Id.* at 17:9-10, 18:3-13.) He confirmed he has never published in any field in which he teaches or purports to be an expert. (*Id.* at 23:2-17.) In fact, he has not published academic articles on any subject. (*See id.* at 22:5-12; Boukouzis Rpt. A-1.) In sum, Mr. Boukouzis points to no academic specialization that explains NYAG's decision to retain an inexperienced assistant professor at a recently accredited school on the opposite side of the country to testify as an expert in a securities case being litigated in New York.

B. Mr. Boukouzis Lacks Relevant Professional Experience Assessing Climate Risks, Impacts, and Disclosures

Although Mr. Boukouzis repeatedly touts his "professional experience" working for 18 years as an M&A investment banker, (Boukouzis Rpt. ¶¶ 12, 20, 22, 71, 89, 100, 104, 113), he fails to identify any experience with climate policy, climate risk disclosures, or internal project planning. It is well established that even "20 years" experience working in an industry "does not, standing alone, establish that [a witness] can render a reliable expert opinion" on matters related to that industry. *Schechter*, 64 A.D.3d at 451 (holding that experience "servicing and repairing elevators" did not render witness competent to opine on "the cause of the failure"). Rather, expert testimony is inadmissible where, as

[2] *See* https://www.usk.edu/overview.

here, the expert does "not mention whether he had any specific training or expertise" in the "specialized area of practice" or otherwise provide a basis for his understanding of the issues at hand. *See Behar* v. *Coren*, 21 A.D.3d 1045, 1046-47 (2d Dep't 2005).

Here, the industry in which Mr. Boukouzis worked—mergers and acquisitions—is irrelevant to this litigation. Mr. Boukouzis testified he "was an M&A banker for [his] entire career." (Boukouzis Tr. 48:13-14.) He spent most of that career at BMO Capital Markets and Rothschild, Inc. where he advised on M&A transactions. (Boukouzis Rpt. ¶ 2 & A-1.) By contrast, he did not advise on stock investment decisions. (Boukouzis Tr. 47:8-21.) Nor did he work as an equity analyst, or even "have much contact" with analysts. (*Id.* at 48:10-18.) And he testified he "never did an evaluation" of "ExxonMobil, Chevron" or other major oil and gas companies. (*Id.* at 354:20-22, 356:6-10; *see also id.* at 114:3-7, 115:10-15.) Put simply, Mr. Boukouzis's experience providing advice on mergers and acquisitions does not qualify him as an all-purpose expert on the oil and gas industry.

In particular, Mr. Boukouzis's M&A experience does not qualify him to opine on how climate policy is likely to evolve or to affect ExxonMobil. At his deposition, he admitted he is "not an expert in climate change policy" or in greenhouse gas "regulations." (*Id.* at 19:3-4, 282:2-3.) In fact, he was unable to answer basic questions about a regulatory regime discussed in his report. (*Id.* at 283:17-285:25 (characterizing the Alberta regulatory regime as "out of my scope").) He nevertheless devotes a section of his report to describing "Key Climate Change Regulations," (Boukouzis Rpt. ¶¶ 38-44), and impermissibly opines that "future climate change regulations are likely to get stricter in the future" (*id.* ¶ 63). This testimony should be excluded.

Mr. Boukouzis also impermissibly opines on how future policies will impact

ExxonMobil, for instance, by making consumers "likely to demand less oil." (*Id.* ¶ 27.) By his own admission, however, he is not an expert in forecasting demand for oil and natural gas, which he conceded was not "part of [his] job . . . as an investment banker." (Boukouzis Tr. 21:12-22:4, 368:22-23 ("[A]s a banker, that's just not what we're trying to do.").) His opinion that ExxonMobil "inflated the demand for its products" in the transportation sector, (Boukouzis Rpt. ¶ 19), is particularly unsupported by whatever expertise Mr. Boukouzis might have given his concession, "I don't consider myself as an expert" in the transportation sector. (Boukouzis Tr. 368:11-23.)

Even if Mr. Boukouzis were qualified to opine on these issues—which he is not—he lacks the requisite "degree of confidence in his conclusions" to render them admissible. *Matott*, 48 N.Y.2d at 459-60; *see also Duffen* v. *State*, 245 A.D.2d 653, 654 (3d Dep't 1997). At his deposition, Mr. Boukouzis repeatedly declined to answer questions about the impact of climate policies on consumer demand and project expenses, on the ground that it is uncertain what policies governments will adopt. (Boukouzis Tr. 103:8-11, 106:2-5, 152:18-20, 283:14-16.) Again and again, he repeated that "it wasn't part of [his] assignment to say what Exxon should do" to accurately model these risks, but only to say whether its practices were "consistent." (*Id.* at 106:6-9; *see also id.* at 104:2-105:2, 375:4-377:20.) Accordingly, the Court should preclude Mr. Boukouzis from opining that ExxonMobil "inflated the outlook for its business" or presented an overly "optimistic" outlook to investors. (Boukouzis Rpt. ¶¶ 19, 22.)

Mr. Boukouzis's M&A experience also does not qualify him to judge whether ExxonMobil's disclosures on how it accounts for climate change regulatory risks were consistent with its internal practices or to adjust ExxonMobil's internal cash flow

investment models to alter these assumptions. (*See id.* ¶¶ 20-22, 101-129.) During his career as an investment banker, Mr. Boukouzis never reviewed disclosures concerning climate risks or regulations. (Boukouzis Tr. 79:14-80:12, 356:6-10.) He did not even read the reports at issue in this case—*Managing the Risks* and *Energy and Climate*—prior to being retained. (*Id.* at 113:23-114:7.) And Mr. Boukouzis never analyzed how "climate change policies or GHG regulations" would impact a company. (Boukouzis Tr. 80:3-12, 353:9-356:10.)[3] Moreover, his opinions on how investors would interpret ExxonMobil's disclosures are premised on internal, non-public documents he concedes would not ordinarily be available to analysts or investors. (*See, e.g.*, Boukouzis Rpt. ¶ 69; Boukouzis Tr. 201:14-24, 204:20-205:3.) Where, as here, an expert report fails to "establish any specialized knowledge, experience, training, or education" in the specific subject matter, even a "licensed" professional does not qualify as an expert. *See Hofmann* v. *Toys "R" Us--NY Ltd. P'ship*, 272 A.D.2d 296, 296 (2d Dep't 2000).

C. Mr. Boukouzis Lacks Experience Calculating Shareholder Damages

Finally, Mr. Boukouzis fails to establish that he possesses "the requisite skill, training, knowledge, or experience" to render him an expert in computing shareholder damages. *See Burt*, 270 A.D.2d at 517-18. He merely asserts his "professional experience" made him "aware" of other "business professionals" and "academics" using institutional shareholder data to analyze "trading activity." (*See* Boukouzis Rpt. ¶ 131 n.290.) This is insufficient to qualify him as an expert on performing damages calculations. At a

[3] To the contrary, because he "didn't cover the Chevrons or the BPs or the Exxons of the world," he testified that he "wouldn't have specifically environmental type of aspects . . . in [his] valuation material." (Boukouzis Tr. 355:9-356:10 ("I don't recall one single one of my clients or the folks that I covered that either talked to me about [prospective climate change regulations] or publicly disclosed some estimate.").)

minimum, Mr. Boukouzis is obligated to present some "evidence that he ha[s] any practical experience with" the subject matter or methodology employed before he can be qualified to render an expert opinion on the issue. *See Leicht* v. *City of New York Dep't of Sanitation*, 131 A.D.3d 515, 516 (2d Dep't 2015). He fails to do so. And, as explained in Part VI *infra*, his methodology is deficient and therefore unreliable.

III. MR. BOUKOUZIS'S NET OPINIONS ON THE RELEVANCE OF CLIMATE REGULATORY RISK SHOULD BE EXCLUDED

Because Mr. Boukouzis is unqualified to offer expert testimony, it is unsurprising that he fails to properly apply any reliable methodology in reaching his opinions. He devotes the bulk of his report to his opinion that climate regulatory risk is relevant to the investment community's assessment of oil and gas companies generally and ExxonMobil in particular. (Boukouzis Rpt. ¶¶ 45-87.) But in lieu of any discernable methodology, Mr. Boukouzis acts as a summary witness offering factual and legal argument under the guise of expert opinion. This Court should not allow NYAG to paper over its yawning evidentiary gaps in this manner.

A. Mr. Boukouzis Acts as a "Summary Witness," Not an Expert, When Opining That Climate Change Regulatory Risks Are Important to Investors

Mr. Boukouzis employed no discernable objective methodology—much less a generally accepted or reliable one—to support his extensive testimony that climate regulatory risk is an "importan[t]," "relevant," or "salient risk factor" in the investment community's assessment of oil and gas companies, including ExxonMobil. (Boukouzis Rpt. ¶¶ 49, 61, 71, 76; *see also id.* ¶¶ 15-16, 48-61, 72-87, 89.) To the contrary, his methodology merely involves his anecdotal and unreliable survey of analyst reports, shareholder proposals, and statements by "Environmental, Social, Governance" ("ESG")

activists. Before accepting this opinion, the Court must determine that it is based on a "generally accepted" methodology, not "solely on the[ ] expert's own unsupported beliefs." *See Rowe* v. *Fischer*, 82 A.D.3d 490, 491 (1st Dep't 2011).

Although an expert may rely on out-of-court documents, a witness who seeks merely to summarize the contents of such documents "is acting as a summary witness, not an expert." *State* v. *J.R.C.*, 47 Misc.3d 969, 975-76 (Sup. Ct. Livingston Cty. Feb. 25, 2015) (collecting cases). Here, more than a third of Mr. Boukouzis's expert report consists solely of reciting the contents of reports the Court is fully competent to read. (*See* Boukouzis Rpt. ¶¶ 49-50, 52, 54, 56, 77-78, 82, 84-87.) This does not qualify as a generally accepted or reliable methodology. *See Ratner* v. *McNeil-PPC*, 91 A.D.3d 63, 76 (2d Dep't 2011) ("Courts have recognized that observational studies or case reports are not generally accepted." (alteration omitted)). In the absence of any accepted methodology, the Court should exclude Mr. Boukouzis's conclusory opinion that climate regulatory risk is important to investors. *See Kulak* v. *Nationwide Mut. Ins. Co.*, 40 N.Y.2d 140, 148 (1976); *Fortunato* v. *Dover Union Free Sch. Dist.*, 224 A.D.2d 658, 658-59 (2d Dep't 1996).

B. Mr. Boukouzis's Opinions Concerning the Investment Community's Response to ExxonMobil's Disclosures Cannot Withstand *Frye* Scrutiny

Nor does Mr. Boukouzis employ any identifiable or reliable methodology to support his opinion that ExxonMobil's disclosures concerning proxy costs and GHG costs were a "relevant consideration in the Investment Community's assessment of ExxonMobil." (Boukouzis Rpt. ¶¶ 71, 77-81, 84-87, 89.) To support this conclusion, he offers nothing more than a cherry-picked selection of reports haphazardly identified through a basic keyword search.

Mr. Boukouzis states that he identified 99 analyst reports by "major investment

banks" containing what he deems "relevant discussion regarding ExxonMobil's Climate Change Regulatory Risk or GHG Emission Proxy Cost," 53 of which were published in 2016 or earlier. (*Id.* ¶ 81.) Based on the mere existence of these reports, he concludes "analysts were interested in ExxonMobil's exposure to Climate Change Regulatory Risk while alleged misrepresentations regarding ExxonMobil's use of GHG Emission Proxy Cost were ongoing." (*Id.*) But Mr. Boukouzis could not describe the methodology he used to reach his conclusion. At his deposition, he revealed that he merely ran a keyword search to identify analyst reports that both referenced ExxonMobil and contained generic terms like "climate change" or "GHG emissions." (Boukouzis Tr. 306:15-307:20, 312:21-313:5.) He did not and could not describe, however, how he identified: (i) the universe of reports to search, (ii) the precise search terms used, or (iii) whether analyst discussion related to the challenged disclosures. (*See id.* at 308:6-311:2, 312:21-313:5.)

Critically, Mr. Boukouzis fails to articulate any objective criteria, test, threshold, or comparator for measuring whether a factor is "relevant" to investors. (*Id.* at 310:12-311:2 ("I don't remember exactly what triggered relevance versus irrelevance."), 305:24-306:14.) For instance, he represented it was inconsequential to him whether a report actually referenced "ExxonMobil's particular proxy cost" or whether it merely "discussed climate change as a general issue" or perhaps only included one of his keywords "buried on page 112 in a footnote" or in "boilerplate language that goes into all reports in the oil and gas industry." (*Id.* at 308:6-310:22; Brooks Ex. B, Zenner Rpt. ¶¶ 60-65; Brooks Ex. C, Ferrell Rpt. ¶ 48.) In fact, he did not limit himself to analyst reports published *after* the allegedly misleading disclosures. (*See* Boukouzis Rpt., Ex. 8 (identifying reports from 2010, 2012, and 2013).) Nor did he limit himself to reports that discuss climate change in the context

of the analyst's valuation, which he said "wasn't in my scope." (*Id.* at 325:9-326:19.) To the contrary, he relies on a number of reports not prepared for investment purposes. (Zenner Rpt. ¶ 65; Ferrell Rpt. ¶ 52.)

The acceptance of expert testimony in the absence of a stated methodology constitutes reversible error. *See Nationwide Mut. Fire Ins. Co.* v. *Morgan Fuel & Heating Co.*, 98 A.D.3d 570, 572 (2d Dep't 2012). The lack of discernable and generally accepted methodology is of particular concern where, as here, the expert shirks his obligation to "examine an appropriate selection of data" and instead "cherry-pick[s]" the data on which to base his conclusions. *See, e.g.*, *Reed Constr. Data Inc.* v. *McGraw-Hill Cos.*, 49 F. Supp. 3d 385, 400 (S.D.N.Y. 2014), *aff'd*, 638 F. App'x 43 (2d Cir. 2016). Even assuming Mr. Boukouzis identified some reports with relevant discussion, he fails to identify the prevalence of such analyst discussion. By his own admission, he performed no "statistical analysis on the dataset." (*Id.* at 316:10-24.) By contrast, when ExxonMobil's expert, Dr. Marc Zenner, reviewed nearly 500 analyst reports, he found only 6% contained the terms "emissions," "greenhouse," "GHG," or "climate change"—which are presumptively keywords Mr. Boukouzis searched, given that they appear in almost all of his analyst reports. (Zenner Rpt. ¶ 66; Boukouzis Tr. 311:16-313:5.) This discrepancy demonstrates that, instead of performing an objective analysis, Mr. Boukouzis sought out information to support a pre-determined conclusion. Indeed, as Mr. Boukouzis himself characterized his process, he "looked toward what folks were saying in the investment community . . . to substantiate, if you will, you know, what I thought the opinion was." (Boukouzis Tr. 79:9-13; *see also id.* at 74:6-20.)

In short, because Mr. Boukouzis "identified no procedures actually employed . . .

that would enable him to offer a reliable . . . opinion based on accepted methodology," the Court should exclude his opinions concerning the relevance of climate change regulatory risk to the investment community. *Guzman*, 54 A.D.3d at 49.

IV. MR. BOUKOUZIS'S OPINIONS ON ISSUES THAT THE COURT IS COMPETENT TO DETERMINE SHOULD BE EXCLUDED

It is well established that expert testimony that "intrude[s] on the province of the [factfinder] to draw inferences and conclusions" is "both unnecessary and improper" unless the factfinder would otherwise be unable "to comprehend the issues, to evaluate the evidence, and finally" to resolve the issues presented. *Kulak*, 40 N.Y.2d at 148; *accord Fortunato*, 224 A.D.2d at 658. The factfinder "may be aided, but not displaced, in the discharge of its fact-finding function by expert testimony." *People* v. *Inoa*, 25 N.Y.3d 466, 472 (2015). Expert testimony is therefore admissible "only when it would help to clarify an issue calling for professional or technical knowledge possessed by the expert and beyond the ken" of the factfinder. *White* v. *Mhatre*, 283 A.D.2d 573, 574 (2d Dep't 2001).

The crux of Mr. Boukouzis's testimony cannot overcome this hurdle. As he repeatedly stated at his deposition, the scope of his assignment was to analyze whether ExxonMobil's public statements were "consistent" with its internal practices. (Boukouzis Tr. 106:13-21, 160:6-161:5, 182:2-9, 265:18-266:11, 282:20-283:5, 377:13-378:12.) But by his own account, the only methodology he employed to interpret ExxonMobil's statements is the same process available to the Court. He recounted, "I read the disclosure and, based on my 20 years as a banker, you know, formed an opinion on how that would be received." (*Id.* at 77:15-25.) The Court is fully competent to undertake that same inquiry, as the disclosures are directed at the general public.

This case is akin to *Kaufman* v. *Cohen*, where the First Department affirmed the preclusion of expert testimony concerning "custom and usage regarding 'sweat equity'" in a fraud action, because the testimony concerned an ultimate issue that "was not dependent upon technical or other information beyond the ordinary knowledge and experience of the jurors." 55 A.D.3d 380, 380 (1st Dep't 2008). By definition, no special expertise is needed to determine how a reasonable investor would interpret a public disclosure. *Compare Seward Park Hous. Corp.* v. *Greater N.Y. Mut. Ins. Co.*, 70 A.D.3d 468, 468 (1st Dep't 2010) (precluding construction expert testimony on whether "plaintiff acted with 'reasonable' speed"), *with People* v. *Brown*, 97 N.Y.2d 500, 505 (2002) (allowing expert testimony on "specialized terminology used in the course of narcotics street sales"). Given that the Court does "not require professional or scientific knowledge or skill" to determine whether ExxonMobil's internal practices were inconsistent with its public disclosures, *Fortunato*, 224 A.D.2d at 658, Mr. Boukouzis should not be permitted to testify on this subject.

V. MR. BOUKOUZIS'S MANIPULATION OF CASH FLOW MODELS IS RIDDLED WITH SPECULATION AND UNTETHERED TO THE FACTS OF THE CASE

The Court should also preclude Mr. Boukouzis from testifying concerning his manipulation of a set of ExxonMobil's internal cash flow models because his methodology relies heavily on speculation and he lacks an evidentiary foundation for his testimony concerning inflation of the Company's business outlook or investors' valuation.

Mr. Boukouzis purports to "illustrate the potential impact of ExxonMobil's inconsistent application of GHG Emission Proxy Cost" by manipulating a set of ExxonMobil's internal cash flow models to drive up the cost assumptions. (Boukouzis Rpt. ¶ 116.) He begins by selecting 27 internal cash flow models in which ExxonMobil

included GHG cost assumptions. (*Id.* ¶¶ 117-19.) For each model, Mr. Boukouzis simply replaces the GHG cost schedule with a proxy cost schedule "that w[as] created during the Energy Outlook process," although never publicly disclosed. (*Id.* ¶ 121.) He uniformly applies these assumed costs to 100% of emissions, even in the five models where local regulations dictated only a percentage of emissions would be taxed. (*Id.* ¶ 122.) Then, leaving "[a]ll other input parameters unchanged," he observes that his adjustments marginally reduce the model's financial metrics for undiscounted cash flows ("UCF"), net present value ("NPV"), and internal rate of return ("IRR"). (*Id.* ¶¶ 121-22, 125.)

Mr. Boukouzis admits he has no knowledge of how the Company used these models, or if they were used at all. He nevertheless assumes (i) the models were presented to the Management Committee, (ii) the models impacted business decisions, (iii) the Management Committee conveyed an "inflated outlook" to the investors, and (iv) the "Investment Community's assessments and valuations of ExxonMobil" were "likely positively biased" as a result. (*Id.* ¶¶ 126-130.) Neither Mr. Boukouzis's expert report nor his deposition testimony laid any foundation for these unfounded assumptions.[4]

First, Mr. Boukouzis cannot tie the models he manipulated to any business decision. He has not, for example, alleged that the models he selected were ever considered for investment or presented to the relevant decision-makers. Instead, at his deposition, he acknowledged that he lacked basic information about the models he selected for adjustment. Mr. Boukouzis testified he had "no way of knowing" (i) whether a model was

[4] Mr. Boukouzis's methodology for adjusting the cash flow models is conceptually flawed for the additional reason that he conflates the "proxy cost of carbon" and "GHG costs"—both of which he calls "GHG Emission Proxy Costs," a phrase he claims to have coined. (Boukouzis Tr. 67:19-68:13.) Mr. Boukouzis's entire cash flow analysis rests on his unsupported assumption that ExxonMobil should have been using proxy costs instead of GHG costs to represent operating expenses in its internal models. He fails to justify substituting one metric for the other, particularly given his representation that "to me, it's all one." (*Id.* at 164:15-22; 169:15-170:5.)

merely a "draft model" or an "exploratory internal working model" (Boukouzis Tr. 260:8-13, 264:15-21, 271:15-272:2); (ii) "if any of these were actually funded projects" (*id*. at 264:15-21, 266:12-18); (iii) "where exactly these models went within ExxonMobil" (*id.* at 259:14-260:7); or (iv) or whether any model was presented to the management committee (*id.* at 259:14-260:7). To the contrary, he admitted he does not "know what was communicate[d] to the [M]anagement [C]ommittee about any of the projects that [he] modified," or whether the Management Committee even reviews the "financial metrics" he analyzed. (*Id.* at 345:18-348:7.) His unfounded "assum[ption]" that "the outputs from the model . . . would be presented to the management committee" rests on sheer speculation. (*Id.* at 135:14-20.) But it is well established that "[a]n expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion." *Quinn* v. *Artcraft Constr., Inc.*, 203 A.D.2d 444, 445 (2d Dep't 1994).

Second, even assuming the information from these models was somehow conveyed to the Management Committee for an investment decision, Mr. Boukouzis identifies no evidence or authority to suggest his adjustments would have altered any business decision. Critically, Mr. Boukouzis does not—and cannot—establish that his adjustments would render any project unprofitable. His expert report confirms that the key financial metrics of UCF, NPV, and IRR—which were positive prior to his adjustments—all remain positive, even after his adjustments. (Boukouzis Rpt. Ex. 11; Zenner Rpt. ¶ 99.) His inflation of cost assumptions thus had no apparent impact on economic fundamentals for these potential projects. Accordingly, even if Mr. Boukouzis could show that the information from these models was conveyed to the Management Committee and informed

some hypothetical investment decision (which he cannot), he still cannot establish that his adjustments would have altered any business decision.

Third, Mr. Boukouzis fails to connect the models he manipulates to any overly optimistic statement to investors—either about the projects concerned or the Company's overall business. (*Cf.* Boukouzis Rpt. ¶¶ 22, 127.) At his deposition, he could not identify any communications from the Management Committee to investors that would have been different if ExxonMobil had applied proxy costs instead of GHG costs in its economic models. (Boukouzis Tr. 344:6-345:17.) Mr. Boukouzis admitted the investment community did not have access to the models he adjusted or the inputs or outputs of such models. (*Id.* at 201:13-202:10, 204:20-205:3; *see also* Zenner Rpt. ¶ 102.) Nor would investors expect to receive such granular and commercially sensitive information. Mr. Boukouzis confirmed he was not aware of any "instance in which ExxonMobil communicated to the investment community a net present value for any particular asset." (Boukouzis Tr. 356:16-25.)

Finally, Mr. Boukouzis identifies no factual predicate for his conclusory assertion that, by applying GHG cost assumptions rather than proxy cost assumptions, ExxonMobil "would have likely positively biased [the] Investment Community's assessments and valuations of ExxonMobil." (Boukouzis Rpt. ¶¶ 128-129.) Even assuming the proprietary, project-specific information he manipulates was somehow conveyed to investors, Mr. Boukouzis identifies no evidence suggesting that this information would have altered any investor's overall valuation of ExxonMobil. While he broadly alludes to ExxonMobil's communications with "equity research analysts" (*id.* ¶ 127), he fails to identify a single analyst report discussing such information, much less indicating it was

material to valuation.

Where, as here, "there is simply too great an analytical gap between the data and the opinion proffered," courts properly exclude expert opinion as failing the foundational inquiry. *Cornell*, 22 N.Y.3d at 781 (quoting *Joiner*, 522 U.S. at 146). In particular, courts routinely preclude expert opinion that rests on an "assumption [that] is not 'found in the record, personally known to [the expert], derived from a professionally reliable source or from a witness subject to cross-examination.'" *Jones ex rel. Jones* v. *Catalano*, 2010 WL 4187998, at *4 (Sup. Ct. Albany Cty. Oct. 20, 2010) (quoting *McAuliffe* v. *McAuliffe*, 70 A.D.3d 1129, 1132 (3d Dep't 2010)). In the absence of any methodology or evidence linking his models to ExxonMobil's business planning, investment decisions, public statements, or investor valuations, Mr. Boukouzis's model manipulation is a meaningless exercise that is neither "reliable, relevant [n]or helpful" to the factfinder. *See Melnick* v. *Consol. Edison, Inc.*, 39 Misc.3d 800, 818 (Sup. Ct. Richmond Cty. Feb. 15, 2013).

VI. MR. BOUKOUZIS'S AGGREGATE DAMAGES CALCULATION SHOULD BE EXCLUDED AS SPECULATIVE

Relying predominantly on the opinions of NYAG's other expert, Dr. Bartov, concerning stock price inflation, Mr. Boukouzis purports to estimate potential aggregate damages to ExxonMobil's shareholders. Mr. Boukouzis uses quarterly data provided by institutional shareholders in their SEC Form 13F filings as a rough metric for quantifying the number of shares impacted by Dr. Bartov's purported corrective disclosures. (Boukouzis Rpt. ¶¶ 131, 134.) Mr. Boukouzis then multiplies his estimate of impacted shares by the inflation per share that Dr. Bartov calculated. (*Id.* ¶ 131 & n.291.)[5]

[5] Using this formula, Mr. Boukouzis estimates potential aggregate damages total either $1.6 billion—considering all three of Professor Bartov's purported corrective disclosures—or $476 million using the single corrective disclosure Dr. Bartov identified as statistically significant. (Boukouzis Rpt. ¶ 139.)

As an initial matter, the Court should exclude Mr. Boukouzis's aggregate damages calculation for the same reason it should grant ExxonMobil's motion *in limine* to preclude Dr. Bartov from opining on stock price inflation. Mr. Boukouzis purports to estimate damage resulting from "the disclosures of [ExxonMobil's] alleged misrepresentations regarding its adoption of GHG Emissions Proxy Cost." (Boukouzis Rpt. ¶ 130.) But Mr. Boukouzis himself concedes that the "output" of his damages calculation should be rejected if Dr. Bartov's "input is flawed." (Boukouzis Tr. 384:11-16.) As set forth in the accompanying brief, Dr. Bartov's event study provides no evidence of inflation resulting from ExxonMobil's representations regarding the proxy cost. (*See* Boukouzis Rpt. ¶ 130.) Accordingly, the opinions of both experts should be excluded.

In any event, Mr. Boukouzis's rough estimate of impacted shares is speculative and unreliable. Under New York law, the standard approach for assessing securities fraud damages uses the out-of-pocket rule, *i.e.*, by looking at "the actual pecuniary loss sustained as the direct result of [an alleged] wrong." *Starr Found.* v. *Am. Intl. Grp., Inc.*, 76 A.D.3d 25, 27 (1st Dep't 2010) (citation omitted). Mr. Boukouzis's methodology does not reliably capture actual pecuniary loss because he relies on quarterly data that is too imprecise to determine the actual number of shares impacted by the purported corrective disclosures. Form 13F data does not provide the timing of when a trade occurred, but merely reports institutional holdings at the end of a fiscal quarter. Because none of the alleged disclosures occurred at quarter's end, Mr. Boukouzis admittedly cannot ascertain which shares were (i) purchased during the inflationary period or (ii) sold after the alleged disclosure. As a result, Mr. Boukouzis may well overestimate the number of shares negatively impacted.[6]

[6] Mr. Boukouzis's damages calculation is unreliable for two additional reasons. First, his Form 13F data captures only institutional shareholders, not all shares purchased or sold during the relevant period.

Indeed, Mr. Boukouzis concedes that he offers "just an estimate based on the best data that [he] believe[s] is available" in the absence of "more granular data." (Boukouzis Tr. 383:7-385:14; Boukouzis Rpt. ¶ 131 n.290.)

Aggregate damages calculations similar to the one performed by Mr. Boukouzis have been rejected by courts in other securities fraud cases. For instance, in *Bell* v. *Fore Systems, Inc.*, the court granted a motion *in limine* to exclude expert testimony on aggregate damages that was calculated by "multiplying the estimated number of damaged shares by the estimated artificial inflation" because it did not reflect trading data at the individual shareholder level. 2002 WL 32097540, at *1, *3 (W.D. Pa. Aug. 2, 2002) (holding Private Securities Litigation Reform Act required individualized determination of "the purchase price actually paid by [each] plaintiff for the stock" and "the sale price received by that plaintiff"). Similarly, in *In re Broadcom Corp. Secs. Litig.*, the court excluded expert testimony on aggregate damages because the expert used a "rough and ready" trading model of "highly questionable reliability and accuracy" that was based on "broad estimates and assumptions" that did not "account for the entire class." 2005 WL 1403756, at *2 (C.D. Cal. June 3, 2005). Because Mr. Boukouzis calculates damages using a speculative and unreliable estimate of impacted shares, the Court should preclude him from opining on damages.

CONCLUSION

ExxonMobil respectfully requests that the Court exclude Mr. Boukouzis's proposed testimony and expert report in their entirety. Mr. Boukouzis is not an expert on any issue

Second, he concedes he does not account for shares that would have benefited from any alleged inflation because they were purchased prior to and sold during the alleged inflationary period. (Boukouzis Tr. 385:18-389:2; *cf.* Ferrell Rpt. ¶¶ 58-60.)

beyond the competence of the factfinder. And he should not be permitted to offer mere summary testimony—unsupported by any objective methodology—on ultimate issues including how a reasonable investor would interpret ExxonMobil's disclosures or whether the disclosures were inconsistent with ExxonMobil's internal practices. Furthermore, Mr. Boukouzis fails to properly employ any discernable methodology—much less a generally accepted and reliable one—when opining on the importance of ExxonMobil's climate change disclosures to investors or the likely impact of alleged misstatements on ExxonMobil's business outlook. Finally, because he admittedly relies on speculative data, his estimate of aggregate damages is unreliable and should be excluded.

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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 6,995 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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