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. 5

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR AN ADVERSE INFERENCE AGAINST EXXONMOBIL FOR SPOLIATION OF EVIDENCE

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Plaintiff, the People of the State of New York, by Letitia James, Attorney General of the State of New York, respectfully submits this memorandum in support of its motion for an adverse inference at trial against Defendant Exxon Mobil Corporation ("ExxonMobil").

PRELIMINARY STATEMENT

In November 2015, at the outset of its investigation into ExxonMobil, the Office of the Attorney General ("OAG") served ExxonMobil with a document subpoena. Rex Tillerson, ExxonMobil's then-CEO, was identified as a custodian because he possessed responsive documents, including emails. ExxonMobil quickly learned that Mr. Tillerson used a second email account while CEO, under the pseudonym "Wayne Tracker" (wayne.tracker@exxonmobil.com) (the "Tracker Account"). But according to the sworn deposition testimony of ExxonMobil's outside counsel, ExxonMobil chose not to produce documents from the Tracker Account, on the theory that incidental references to "Wayne Tracker" in documents that were produced would provide "an interesting test of whether the Attorney General's office is reading the documents."

After the OAG brought the Tracker Account to this Court's attention, ExxonMobil revealed that it had failed to preserve any emails from that account before August 18, 2015. This was caused by ExxonMobil's failure to disable its automatic "file sweep" deletion program for the Tracker Account, even though ExxonMobil turned off the automatic deletion program for every other custodian after receiving the Subpoena.

ExxonMobil's failure to preserve emails from the Tracker Account prior to August 18, 2015 has had serious consequences for this litigation. In his deposition this summer, Mr. Tillerson testified that the Tracker Account was his primary email account, both for communications within and outside the company. Mr. Tillerson also testified that

rex.w.tillerson@exxonmobil.com, which the company had preserved and had previously characterized as Mr. Tillerson's "primary" email, was in fact an account that he "almost never looked at[.]" Particularly significant is ExxonMobil's failure to preserve emails from the Tracker Account that were sent and received in 2014, a year of key events in this case in which Mr. Tillerson participated. In that year, Mr. Tillerson approved public reports that misrepresented ExxonMobil's internal practices concerning its management of climate change risks, and specifically the projected cost of greenhouse gas ("GHG") emissions that ExxonMobil purportedly applied as a proxy for the expected effects of future regulation to combat climate change ("GHG proxy costs"). In 2014, Mr. Tillerson also authorized a change in ExxonMobil's internal practices that attempted to (but ultimately did not) correct those misrepresentations.

As set forth below, the OAG asks the Court to adopt an adverse inference that is specifically tied to Mr. Tillerson's activities in and around the time period in which ExxonMobil failed to preserve emails from the Tracker Account. Specifically, the OAG seeks an inference that emails from the Tracker Account before August 2015 would have corroborated other evidence indicating that ExxonMobil senior management, including Mr. Tillerson, revised the company's internal GHG proxy cost schedules because the company had disclosed in its March 2014 public reports to shareholders that it used a higher GHG proxy cost when evaluating investment decisions and business planning.

The Court of Appeals has held that the integrity of our judicial system depends on the ability to gather evidence without fear of being thwarted by spoliation, and it grants trial courts broad discretion in levying sanctions in spoliation matters. *Ortega v. City of New York*, 9 N.Y.3d 69, 76, 79 (2007). Here, the facts regarding ExxonMobil's failure to preserve the primary email

account used by Mr. Tillerson as the CEO of ExxonMobil warrant an adverse inference in the OAG's favor at trial.

FACTUAL BACKGROUND

A. Mr. Tillerson Testified that He Reviewed and Approved Company Decisions and Exchanged Communications that Are Central to this Litigation

Mr. Tillerson's central role in this case is undeniable. Rex Tillerson served as the CEO and Chairman of the Board of Directors of ExxonMobil from 2006 through December 31, 2016.[1] Mr. Tillerson is on the witness lists of both ExxonMobil and the OAG.[2]

Mr. Tillerson's role in this case is particularly salient in and around the period in which ExxonMobil allowed emails from the Tracker Account to be destroyed. In the years leading up to 2014, ExxonMobil repeatedly represented that it (1) assumed that governments would impose an escalating cost of greenhouse gas ("GHG") emissions over the coming decades to combat climate change, and (2) incorporated a GHG proxy cost in its investment decisions and business planning as a proxy for the expected effects of such future regulation. Indeed, ExxonMobil laid out a specific set of GHG proxy cost figures to convey to the market how seriously it was taking the risk that governments would adopt more exacting and costly climate change regulations. However, the evidence at trial will show that ExxonMobil's Corporate Plan Dataguide ("Dataguide"), an internal company document that set out economic assumptions for employees to use in investment decisions and business planning, directed employees to apply lower GHG proxy costs to the company's projected emissions than the costs the company publicly represented it was applying.

[1] Liskow Affidavit Exhibit ("Ex.") A (Deposition of Rex Tillerson ("Tillerson Dep.")) at 11:1-4.
[2] Ex. B (ExxonMobil's and the OAG's Trial Witness Lists of September 27, 2019).

The evidence will show that during his tenure as CEO, Mr. Tillerson reviewed and approved both (1) ExxonMobil's public representations about the GHG proxy costs it was purportedly using, and (2) the lower, undisclosed internal figures the company actually applied in its cost projections. In 2011, for example, an ExxonMobil manager specifically highlighted the difference between the internal and the publicly-disclosed GHG proxy costs in an email to another ExxonMobil employee, adding that: "Rex [Tillerson] has seemed happy with the difference previously[.]"[3]

In late 2013, ExxonMobil received shareholder proposals pressing the company to make additional disclosures about the risks posed to the value of its assets by anticipated climate change regulation. In exchange for the withdrawal of those proposals, ExxonMobil issued two reports, entitled *Energy and Carbon—Managing the Risks* ("*Managing the Risks*"), and *Energy and Climate*, in March 2014. Those reports provided additional details about ExxonMobil's purported use of its GHG proxy cost, and again provided specific figures for ExxonMobil's GHG proxy cost assumptions around the world. Mr. Tillerson testified that he reviewed these reports for accuracy and to ensure they were "fully responsive to what the shareholder inquiries were about," before approving their release.[4] However, at the time these reports were issued, ExxonMobil continued to apply the significantly lower set of GHG proxy costs set out in its internal Dataguide.

Then, in a May 2014 presentation that was ultimately delivered to the ExxonMobil's Management Committee, including Mr. Tillerson, the company's Corporate GHG Manager urged management to increase the internal GHG proxy costs to align with the company's public representations. One of the reasons provided for aligning these costs was that, in *Managing the*

[3] Doc No. 1 (Complaint) at ¶ 130.
[4] *See* Ex. A at 107:5-108:20; 116:18-117:19.

Risks and *Energy and Climate*, "we have implied that we use the EO [publicly-disclosed *Energy Outlook*] basis for proxy cost of carbon when evaluating investments." The other stated reason for recommending this alignment was that the lower, internal GHG proxy cost "provides a non-conservative view for evaluating capacity growth investments that involve GHG emissions creating (combustion / venting / flaring etc.)."[5]

Shortly thereafter, in June 2014, ExxonMobil issued a revised internal Dataguide that did, in fact, align certain of the internal and external GHG proxy costs, as recommended.[6] Mr. Tillerson testified at his deposition that he would have been responsible, as a member of ExxonMobil's Management Committee, for that decision.[7] However, Mr. Tillerson testified that he could not recall either the separation of these costs or their later alignment. When confronted with the May 2014 presentation, Mr. Tillerson testified that he could not recall any discussions concerning the reason for aligning these costs in 2014.[8] Thus, while there is substantial evidence that ExxonMobil did in fact align its internal and external GHG proxy costs for the reasons stated in the May 2014 presentation – to correct the representations in the two public reports as to ExxonMobil's use of the higher GHG proxy costs for investment evaluation purposes – Mr. Tillerson's recollection did not extend to those events. In this context, ExxonMobil failure to take active steps to prevent the destruction of pre-August 2015 documents from the Tracker Account – Mr. Tillerson's primary email account – is highly significant.

[5] *See* Ex. I (May 12, 2014 ExxonMobil email and slides concerning internal GHG proxy costs) at 4.
[6] The OAG also alleges that, when ExxonMobil attempted to apply the GHG proxy costs set out in its revised Dataguide, that change affected many of the company's economic projections in a very negative fashion, leading ExxonMobil to decide not to apply those revised costs after all in many cases.
[7] Ex. A (Tillerson Dep.) at 141:15-143:2; Doc. No. 1 (Complaint) at ¶¶ 121-135.
[8] Ex. A (Tillerson Dep.) at 132:12-141:13.

B. Mr. Tillerson Recently Testified That as CEO of ExxonMobil He Used the Tracker Account as His Primary Email Account

On June 19, 2019, Mr. Tillerson was deposed in this case. During the course of that deposition, Mr. Tillerson testified that while he was the CEO of ExxonMobil, he had two email accounts -- rex.w.tillerson@exxonmobil.com and wayne.tracker@exxonmobil.com.[9] In his deposition, Mr. Tillerson described the creation and use of the Tracker Account:

> So our technical team, our systems people, working with my security people said, well, look, let's set up another account that's a nondescript name, and it will be available to people inside the company or anybody else that I wanted to have it for business purposes, and that was Wayne.Tracker@ExxonMobil.com.
>
> And that allowed people that needed to correspond to me – allowed me to look at that quickly and not have to scroll through 25, 30 screens to find an email somebody had sent me an hour ago. That was the nature of what would happen to my email inbox, and so we left the Rex.W[.Tillerson@ExxonMobil.com] out there to be the catch all of this stuff. And then my assistant would go through there, and if there was something in there that came through that address, she would forward it over to my Wayne.Tracker account so I would see it. So I almost never looked at the Rex.W anymore. I operated off Wayne.Tracker@ExxonMobil.com.

Id. at 175:14-176:6.

According to Mr. Tillerson, the Tracker Account served as his "primary email account" for his communications with employees of ExxonMobil as well as individuals outside the company. *Id.* at 176:7-177:17; *see also id.* at 176:7-10 ("Q: So you're using the Wayne.Tracker primarily? That was the primary email account? A: It became my primary for company business, yeah.").

As Mr. Tillerson's primary email account, the Tracker Account likely contained documents relevant to the OAG's claims. The Wayne Tracker email account was in existence

[9] Ex. A (Tillerson Dep.) at 175:24-176:10.

during the entire relevant period, as it was created in 2007.[10] ExxonMobil employees used the Tracker Account to communicate with Mr. Tillerson about sensitive and important matters. For example, David Rosenthal, the current Corporate Controller of ExxonMobil, testified in his deposition that he used the Wayne Tracker email address to transmit sensitive financial information to Mr. Tillerson.[11] Mr. Tillerson also received information through the Tracker Account relating to climate change risks in particular. In December 2016, after the automatic deletion of the Tracker Account came to an end, ExxonMobil's Vice President of Public and Government Affairs sent Mr. Tillerson, through the Tracker Account, an email exchange with institutional investors concerning ExxonMobil's position on climate issues..[12] These exchanges are consistent with Mr. Tillerson's use of the Tracker Account as his primary email account, including with respect to matters relevant to this litigation.

C. ExxonMobil Failed to Preserve the Wayne Tracker Documents, Which Were Responsive to the OAG's 2015 Subpoena

On November 4, 2015, the OAG issued a subpoena to ExxonMobil ("Subpoena"). Ex. D. The Subpoena included a request for all documents and communications concerning "the integration of Climate Change-related issues" into ExxonMobil's business decisions, and whether and how the company disclosed the impact of climate change to investors. *Id.* at 8.

Although ExxonMobil conducted custodial interviews for certain company employees after receiving the Subpoena, neither ExxonMobil nor its outside counsel conducted a custodial

[10] Ex. C (Amended Affidavit of Connie Feinstein ("Feinstein Aff.")) at ¶ 41. Mr. Tillerson's recent testimony expanded upon ExxonMobil's prior statements that the Wayne Tracker account had been used "to help prioritize important internal communications." *Id.* at ¶ 45.
[11] Ex. T (Deposition of David Rosenthal) at 93:25-94:13 ("Typically, if it was something that was very sensitive around earnings or something like that, I would use [the Wayne Tracker email address]").
[12] See Ex. P (2016 email from Exxon employee to "Wayne Tracker" forwarding an investor's email, stating "Rex [Tillerson]: recall post election, some NGOs were indicating we would change our position [on climate issues]. We tweeted to ensure people understood our consistency. See coverage and Tim Smith's note below.")

interview of Mr. Tillerson.[13] Instead of interviewing Mr. Tillerson, ExxonMobil issued an automated "legal hold notice" to Mr. Tillerson.[14] The company emailed the hold notice to the rex.w.tillerson@exxonmobil.com email account, but not to the Tracker Account.[15] The email contained instructions not to delete information that Mr. Tillerson deemed relevant to the investigation, but the email did not prevent Mr. Tillerson from deleting documents or emails.[16] Neither ExxonMobil nor its counsel followed up with Mr. Tillerson after the legal hold email was sent, to explain or reiterate that he was required to maintain evidence relevant to the investigation.[17]

Crucially, ExxonMobil also failed to disable its automatic "file sweep" deletion program for the Tracker Account, although ExxonMobil turned off the automatic deletion program for every other custodian after receiving the Subpoena.[18] The record is clear that ExxonMobil knew of the existence of the Tracker Account at the time it failed to prevent the deletion of emails from that account. *See* Ex. L (Deposition of Robert Lauck) at 126:19-127:8 (ExxonMobil IT staff member testifying that the existence of the Wayne Tracker account was "general knowledge" in Executive Desktop Support); *id.* at 39:16-40:19; Ex. M (Deposition of Daniel Bolia) at 110:19-111:6 (counsel for ExxonMobil testifying that he knew about the Wayne Tracker account starting in 2010).

[13] Ex. E (chart produced by ExxonMobil counsel, May 3, 2017, identifying custodian interviews); Ex. F (Deposition of Michele Hirshman ("Hirshman Dep.")) at 60:21-25; 63:13-25; 66:9-67:23; 74:24-75:4.
[14] Ex. G (Certification of Compliance of Michele Hirshman ("Hirshman Cert.")) at ¶ 6.
[15] Ex. H (Deposition of Connie Feinstein ("Feinstein Dep.")) at 203:6-9.
[16] *See* Ex. H (Feinstein Dep.) at 133:7-15; Ex. G (Hirshman Cert.) at ¶ 6.
[17] *See* Ex. F (Hirshman Dep.) at 50:11-52:18; 60:21-25; 63:13-25; 66:9-67:23.
[18] If it is not disabled by ExxonMobil, its automatic file sweep program removes all emails from an email user's mailbox 395 days after they are received or sent, moves them to a recycle bin, and then deletes them permanently after 32 days. Ex. C (Feinstein Aff.) at ¶51 n.4.

Moreover, outside counsel for ExxonMobil had knowledge of the existence of the Tracker Account at the time that emails were being deleted.[19] Counsel for ExxonMobil testified that by "the first part of 2016" she had reviewed emails from the accounts of people who had communicated with "Wayne Tracker," and knew that it was Mr. Tillerson's email account. However, not only did ExxonMobil fail to produce emails from that account, but counsel deliberately chose not to notify the OAG about the existence of the email account:

> I knew about [the Wayne Tracker emails] and I read them and I said, well, **this will be an interesting test of whether the Attorney General's office is reading the documents**, because there are documents from that e-mail account [Wayne Tracker] and they say Rex Tillerson on them.

Id. at 135:22-136:4 (emphasis added). Yet despite knowing about the account, ExxonMobil did not take active steps to prevent the deletion of emails from the Tracker Account, as set forth above.[20]

D. After the OAG By Chance Discovered the "Wayne Tracker" Account, ExxonMobil Admitted that It Had Failed to Preserve Mr. Tillerson's Emails

In early 2016, counsel for ExxonMobil informed the OAG that they were processing documents from members of the Management Committee, including Mr. Tillerson. On December 31, 2016,[21] ExxonMobil first produced documents from those Management Committee custodians.[22] Contrary to the Subpoena instructions and ExxonMobil's practices for other custodians, ExxonMobil did not disclose the source locations of documents for the Management Committee members.[23]

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[19] Ex. F (Hirshman Dep.) at 133-144.
[20] *See id.* at 135:13-136:4; Ex. M (Deposition of Daniel Bolia) at 110:19-111:3; Ex. K (March 21, 2017 ExxonMobil letter to the Court) at 5-6.
[21] This was the same day that Mr. Tillerson stopped working for ExxonMobil. Ex. A (Tillerson Dep.) at 11:2-4.
[22] Ex. K (March 21, 2017 ExxonMobil letter to the Court) at 4.
[23] Ex. D (Subpoena) at 14; Ex. N (March 13, 2017 letter from OAG to the Court) at 1-2.

In reviewing these documents, the OAG discovered that Mr. Tillerson had been emailing under the pseudonym "Wayne Tracker."[24] ExxonMobil had not disclosed the existence of the Tracker Account to the OAG,[25] nor had ExxonMobil included the Tracker Account in its privilege logs or on its list of preserved sources.[26] In addition, it appeared that ExxonMobil had not produced any documents from the Tracker Account. *Id*.

In order to understand the issues surrounding the Tracker Account and what possibilities existed for recovering the emails contained in that account, the OAG met and conferred with ExxonMobil and took testimony of six people with knowledge of the account, including outside counsel.[27] The parties also submitted letters to this Court, and ExxonMobil produced affidavits concerning the deletion of emails from this account.

Shortly after the OAG brought the Tracker Account to the attention of this Court, ExxonMobil admitted that it had not disabled the file sweep deletion program for the Tracker Account,[28] resulting in the permanent deletion of emails from this account.[29] This admission came over a year after ExxonMobil had been served with the Subpoena. The company then made an effort to find missing Wayne Tracker emails through a backup search, but was only able to

[24] Ex. N (March 13, 2017 letter from OAG to the Court) at 2.
[25] *Id.*; Ex. F (Hirshman Dep.) at 135:13-136:4; 140:22-141:10.
[26] Ex. N (March 13, 2017 letter from OAG to the Court) at 2.
[27] *See* Exs. F, H, L, M, Q, R.
[28] When the OAG later took testimony from ExxonMobil witnesses about the evidence loss, it was revealed that in order to disguise Mr. Tillerson's alias account, the account was linked in the email system to an IT employee, as opposed to Mr. Tillerson. Ex. H (Feinstein Dep.) at 206:13-207:3. Because of how the company chose to identify the Wayne Tracker account in the system, its emails were subject to the automatic file sweep even after Mr. Tillerson was sent a legal hold notice. *Id.* at 234:18-235:7.
[29] *See* Ex. C (Feinstein Aff.) at ¶ 53; Ex. O (Transcript of March 22, 2017 hearing before the Court) at 9:14-24.

recover emails after August 2015.[30] Accordingly, emails in the Tracker Account before August 18, 2015 were permanently lost.[31]

ARGUMENT

The obligation of parties to preserve evidence is fundamental. "The integrity of our judicial system depends on the ability of litigants to locate and identify relevant proof without fear that the truth-seeking process will be thwarted by spoliation of evidence. Destruction of evidence by parties with a duty of preservation simply cannot be condoned[.]" *Ortega*, 9 N.Y.3d at 79.

It is well established that those who do not preserve evidence face sanctions. Spoliation sanctions are appropriate when: 1) the party with control over the evidence had an obligation to preserve it when it was destroyed; 2) the evidence was destroyed with a "culpable state of mind," which may include simple negligence; and 3) the evidence was relevant to the claim or defense. *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 547-48 (2015). "Spoliation sanctions … are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party's negligent loss of evidence can be just as fatal to the other party's [case]." *Standard Fire Ins. Co. v. Fed. Pac. Elec. Co.*, 14 A.D.3d 213, 218 (1st Dep't 2004) (quoting *Squitieri v. City of New York*, 248 A.D.2d 201, 202-03 (1st Dep't 1998)). *See also Ahroner v.*

[30] Ex. C (Feinstein Aff.) at ¶¶ 55-59; Ex. H (Feinstein Dep.) at 226:22-229:6; 246:11-248:6.
[31] *Id.* While ExxonMobil has indicated that the proper disabling of the file sweep deletion program after its receipt of the November 2015 Subpoena would have only preserved emails dating back to September 2014, there is no way for anyone to know at this point whether, during the period September 2014-August 2015, the inbox folder or other folders in the Tracker Account may have included earlier emails. In any event, communications during the September 2014-August 2015 period may well have concerned the publication of the key reports, presentation to the Management Committee, and decision to align certain internal and external GHG proxy costs, all of which took place earlier in 2014. Such communications may have also preserved, in email chains, exchanges from an earlier period. Due to ExxonMobil's spoliation, there is no way to know what emails from the Tracker Account no longer exist, and the OAG "cannot be faulted" for not being able to establish the precise dates and topics of the emails that ExxonMobil failed to preserve. *Alleva v. United Parcel Service, Inc.*, 112 A.D.3d 543, 544 (1st Dep't 2013).

Israel Discount Bank of N.Y., 79 A.D.3d 481, 482 (1st Dep't 2010) ("A 'culpable state of mind,' for purposes of a spoliation inference, includes ordinary negligence[.]").

Moreover, when the party's destruction is willful or grossly negligent, the relevance of the destroyed evidence is presumed. *Arbor Realty Funding, LLC v. Herrick, Feinstein LLP*, 140 A.D.3d 607, 609-610 (1st Dep't 2016).

A. ExxonMobil Had an Obligation to Preserve the Wayne Tracker Account

ExxonMobil was obligated to preserve Mr. Tillerson's Wayne Tracker email account. Parties are required to preserve electronic evidence that may be relevant to a reasonably foreseeable litigation. *VOOM HD Holdings v. EchoStar Satellite*, 93 A.D.3d 33, 36 (1st Dep't 2012) (adopting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)); *QK Healthcare, Inc. v. Forest Labs., Inc.*, 2013 N.Y. Slip Op 31028(U), *4-5 (Sup. Ct. NY Cnty. 2013) (imposing an adverse inference for party's loss of electronic files after litigation was reasonably anticipated, but well before litigation commenced). There is no question, and counsel for ExxonMobil does not dispute, that ExxonMobil was obligated, upon receipt of the OAG's Subpoena, to preserve documents responsive to the Subpoena,[32] and that documents responsive to the Subpoena included Mr. Tillerson's emails.

B. ExxonMobil Deleted the Wayne Tracker Emails with the Requisite Culpable State of Mind

It is well-established that negligence in the preservation of evidence is sufficient to satisfy the culpability requirement for spoliation sanctions. *See Pegasus Aviation*, 26 N.Y.3d at 547-48. Here, ExxonMobil's conduct was at least negligent, if not grossly negligent.

[32] *See* Ex. F (Hirshman Dep.) at 13:12-15:19.

A party with an obligation to preserve documents must take "active steps" to halt destruction of documents that would otherwise occur under ordinary business practices. *See Suazo v. Linden Plaza Assocs., L.P.*, 102 A.D.3d 570, 571 (1st Dep't 2013); *VOOM*, 93 A.D.3d at 39-40, 41. Although ExxonMobil suspended its "file sweep" deletion program for all other custodians, it took no steps to ensure the preservation of the primary email account used by its CEO and Chairman of the Board to communicate with individuals within and outside the company for business purposes, despite knowing that Mr. Tillerson's emails contained information potentially relevant to the OAG's claims. Instead, the company sent an automated "legal hold notice" email to one of Mr. Tillerson's email accounts, not to his Wayne Tracker email account. The company did not even perform a custodial interview of Mr. Tillerson, as it did for other employees.[33]

This was obviously insufficient to satisfy the company's preservation obligations. "A party's discovery obligations do not end with the implementation of a 'litigation hold' – to the contrary, that's only the beginning." *915 Broadway Associates LLC v. Paul, Hastings, Janofsky & Walker, LLP*, 34 Misc. 3d 1229(A), 2012 NY Slip Op 50285(U), *10 (Sup. Ct. N.Y. Cnty. 2012). ExxonMobil was obligated to ensure that relevant information was identified, retained, and produced to the OAG. *Ahroner*, 2009 NY Slip Op 31526(U), *18-19 (citing *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004)), *aff'd*, 79 A.D.3d 481, 482 (1st Dep't 2010). The company failed to fulfill its preservation obligations when it did not conduct a custodial interview with Mr. Tillerson to identify all of the relevant sources of discoverable information and confirm compliance with the terms of preservation notice. *See Zubulake*, 229 F.R.D. at 432 ("[I]t is *not* sufficient to notify all employees of a litigation hold and expect that

[33] Ex. E (ExxonMobil chart of interviewed employees); Ex. F (Hirshman Dep.) at 60:21-25; 63:13-25; 66:9-67:23; 74:24-75:4.

the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.") (emphasis in original).

ExxonMobil's failure to preserve the emails from the Tracker Account demonstrates a "blatant disregard for [its] preservation duties" that "constitutes, at the least, gross negligence." *915 Broadway*, 2012 NY Slip Op 50285(U), *10. A party's failure to "suspend the deletion policy or to investigate the basic ways in which emails were stored and deleted" has been deemed an act "rising to the level of gross negligence or willfulness." *Einstein v. 357 LLC*, 2009 NY Slip Op 32784(U), *26 (Sup. Ct. N.Y. Cnty. 2009). *See also Arbor Realty*, 140 A.D.3d at 609 (party's destruction of electronic records constituted gross negligence at a minimum where it failed to institute a formal litigation hold for two years and failed to identify key players and preserve their records); *Harry Weiss, Inc. v. Moskowitz*, 106 A.D.3d 668, 668-69 (1st Dep't 2013) (plaintiff "was, at the very least, grossly negligent" in delaying disclosing that a computer containing its bookkeeping records had been discarded and that it had not issued a litigation hold to its bookkeeper); *Energy EIAC Capital Ltd. v. Maxim Group LLC*, 2013 NY Slip Op 33361(U), *7 (Sup. Ct. N.Y. Cnty 2013) (company deemed grossly negligent where, as here, "only some of [executive's] email addresses were searched").

ExxonMobil's emails from the Tracker Account, whether merely negligent or grossly negligent, plainly satisfies the culpability test for the imposition of spoliation sanctions.

C. The Wayne Tracker Emails Were Relevant

Given the nature of Mr. Tillerson's role and responsibilities as ExxonMobil's CEO and Chairman of the Board of Directors during time periods central to the OAG's claims, there is no question that emails from the primary email account Mr. Tillerson used to conduct business are

relevant. As set forth above, Mr. Tillerson played a key role in events at the core of the OAG's allegations, and he used the Tracker Account to communicate about climate risks and other important matters.

ExxonMobil will likely argue that because it produced emails from other custodians, there was little harm. But preserving other custodians' email accounts is no excuse for failing to preserve the primary account of the company's CEO. Only a small fraction of ExxonMobil's vast number of employees were custodians in this case, and even those employees who were designated as custodians may have deleted emails before the litigation hold went into effect. Further, Mr. Tillerson testified that he used the Tracker Account to communicate with individuals outside the company for business purposes, and those communications would not be captured by the production of emails from other ExxonMobil custodians.

Fundamentally, the OAG is not required to do the impossible by specifying exactly what was lost in the Tracker Account. *See Alleva v. United Parcel Service, Inc.*, 112 A.D.3d 543, 544 (1st Dep't 2013) (plaintiff "cannot be faulted" for not establishing that the evidence spoliated by defendant would have been critical to his case); *see also 915 Broadway*, 2012 NY Slip Op 50285(U),*8:

> Given the inherent unfairness of asking a party to prove that the destroyed evidence is relevant even though it no longer exists and cannot be specifically identified as a result of the spoliator's own misconduct, courts will usually reject an argument that the deprived party cannot establish the relevance of the evidence[.]

And where, as here, the spoliating party's conduct is grossly negligent, the relevance of the destroyed documents is presumed. *See Siras Partners LLC v. Activity Kuafu Hudson Yards LLC*, 171 A.D.3d 680, 680 (1st Dep't 2019) ("that the evidence was destroyed with a 'culpable state of mind,' i.e., gross negligence, . . . raises the presumption of relevance."); *Pegasus Aviation* I, 26 N.Y.3d at 547 ("Where the evidence is determined to have been intentionally or

willfully destroyed, the relevancy of the destroyed documents is presumed."); *VOOM HD Holdings LLC*, 93 A.D.3d at 45 ("destruction that is the result of gross negligence" also "is sufficient to presume relevance").

D. ExxonMobil's Spoliation Justifies Sanctions Here

This Court has wide latitude under New York common law and CPLR § 3126 to fashion relief for ExxonMobil's spoliation of evidence. Sanctions are appropriate even where the spoliator's actions were merely negligent. *See Strong v. City of New York*, 112 A.D.3d 15, 21 (1st Dep't 2013) ("[T]his Court has, on many occasions, authorized the imposition of sanctions where the destruction of evidence was negligent rather than willful"). The Court of Appeals has held that New York's trial courts have "broad discretion to provide proportionate relief to a party deprived of lost or destroyed evidence." *Pegasus Aviation*, 26 N.Y.3d at 551.

In particular, courts in New York commonly grant the sanction of an adverse inference against parties that have failed to preserve evidence. *See Arbor Realty*, 140 A.D.3d at 610 (adverse inference appropriate against party that failed to disable automatic file sweep); *Alleva*, 112 A.D.3d at 544 (summary judgment for defendant reversed where defendant did not produce a file that may have contained evidence central to plaintiff's claims; adverse inference against defendant may be appropriate at trial); *Suazo*, 102 A.D.3d at 571 (adverse inference warranted due to party's failure to take "active steps" to stop the recording over of a surveillance video); *VOOM*, 93 A.D.3d at 39-40, 48 (adverse inference imposed against defendant for failure to stop automatic deletion of emails); *Energy EIAC Capital Ltd.*, 2013 NY Slip Op 33361(U), *6-7 (adverse inference appropriate against party that, *inter alia*, failed to cease deletion of its CFO's emails); *County of Erie v. Abbott Labs, Inc.*, 30 Misc. 3d 837, 841-42 (Sup. Ct. Erie Cnty. 2010)

(adverse inference imposed where party failed to take steps to preserve relevant documents and then could not locate them).

Here, the OAG is entitled to an adverse inference sanction against ExxonMobil at trial, based on the company's failure to preserve emails from Mr. Tillerson's Wayne Tracker account. The OAG asks the Court to impose the following adverse inference, which is closely tied to the presentation to ExxonMobil's Management Committee referenced discussed above at pages 4-5:

> Emails from Rex Tillerson's "Wayne Tracker" email account from before August 2015 would have corroborated other evidence indicating that ExxonMobil senior management, including Mr. Tillerson, revised the GHG proxy cost schedules in its internal Corporate Plan Dataguide because the company had disclosed in its March 2014 public reports to shareholders that it used a higher GHG proxy cost when evaluating investment decisions and business planning.

This adverse inference is appropriately tailored to the spoliation at issue, providing an appropriate sanction for the deletion of the Tracker Account without preventing ExxonMobil from advancing its defenses.

CONCLUSION

For the foregoing reasons, the OAG respectfully requests that the Court grant the OAG's motion imposing the above-requested relief and any other relief the Court deems appropriate.

Dated: New York, New York
October 4, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 17 of the Commercial Division of the Supreme Court, Samantha Liskow, Assistant Attorney General for the Office of the Attorney General of the State of New York, hereby certifies that, according to the word count feature of the word processing program used to prepared this brief, this brief complies with the length limits of Rule 17.

Dated: October 4, 2019
New York, New York

/s/ Samantha Liskow
Samantha Liskow