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. 7

EXXON MOBIL CORPORATION'S BRIEF OPPOSING PLAINTIFF'S MOTION FOR AN ADVERSE INFERENCE

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Exxon Mobil Corporation ("ExxonMobil" or the "Company") submits this brief opposing the Office of the New York Attorney General's ("OAG") motion for an adverse inference.

PRELIMINARY STATEMENT

To salvage its meritless case, OAG tries to resurrect an issue this Court resolved in 2017. The issue concerns the preservation of emails from a secondary email account (the "Secondary Account") that former-CEO Rex Tillerson used primarily to communicate with senior executives, when he used it at all. OAG raised its concerns about this account to the Court more than two years ago. The issue received a full airing and precipitated extensive discovery, including nearly thirty hours of deposition testimony. Afterwards, the Court made clear that it expected to hear back promptly if that testimony revealed evidence of wrongdoing. OAG stayed silent. Now, on the eve of trial, it makes a belated attempt to plug the gaping evidentiary holes in its case with baseless accusations that rehash issues long since resolved, and fully litigated.

New York law is clear that an adverse inference is inappropriate here. OAG must show, at a minimum, that ExxonMobil destroyed evidence with a culpable state of mind, that the evidence would have been relevant to OAG's claims, and that OAG was prejudiced as a result. OAG fails to meet this standard.

ExxonMobil undertook its document preservation and production efforts in good faith. Accordingly, OAG does not, and cannot, establish that evidence was destroyed with a culpable state of mind—an essential element of a spoliation claim. Far from it. The evidence is clear that ExxonMobil took immediate and comprehensive steps to satisfy its preservation obligations. Indeed, barely a day after it received OAG's subpoena in November 2015, ExxonMobil placed its entire Management Committee, including Mr. Tillerson, on legal hold. Then, ExxonMobil searched both of Mr. Tillerson's email accounts within just *a few months* of receiving OAG's

subpoena, using exceedingly broad search terms. When it later discovered that a technical issue in administering the hold on the Secondary Account had made some emails within the account unavailable for review, ExxonMobil described the issue to this Court transparently. This Court specifically acknowledged the Company's robust explanation of its "practice for gathering and producing management and board documents." Ex. A (Mar. 22, 2017 Hr'g Tr.) at 6:7-10. The Company then directed significant resources to investigating and remediating the issue. ExxonMobil acted with care, not negligence.

OAG also fails to establish that any emails within the Secondary Account would have been relevant to the subject of its adverse inference. The only period of time for which emails in the account were unavailable spanned September 5, 2014 to November 27, 2014. But OAG concedes that this 84-day timeframe is not at issue. Instead, OAG's requested adverse inference inexplicably concerns a business decision that took place in June 2014—*three months* before the timeframe at issue. OAG's theory crumbles when considered against Mr. Tillerson's testimony that he "rarely" used email and kept his account "cleaned up." Ex. B (Tillerson Tr.) at 176:20, 177:14.

Having failed to establish required elements of spoliation, OAG also fails to meet its burden to establish that it was prejudiced by the lack of items allegedly lost or destroyed. All the senior managers with whom Mr. Tillerson would have communicated through the Secondary Account (including during the September through November 2014 timeframe) were immediately placed on legal hold at the outset of OAG's investigation. There is no dispute that their documents were properly preserved, collected, and produced. That means any communications between the Secondary Account and senior managers were, in fact, fully preserved. OAG presents no evidence to suggest otherwise. Indeed, because OAG's adverse inference concerns a business decision allegedly approved by *senior management* (all of whom were on hold), OAG necessarily

concedes—as it must—that it already has *all* emails exchanged between senior management and the Secondary Account. The Court underscored this principle of "proportionality" when it first addressed OAG's concerns in March of 2017. Ex. A at 23:2-13.

Finally, trial will show that OAG's requested adverse inference is predicated on a theory of the case totally at odds with the evidentiary record. OAG asks this Court to infer that emails within the Secondary Account would "corroborate other evidence" that ExxonMobil conformed its practices to align with its public disclosures. But no such "other evidence" exists, a point ExxonMobil looks forward to establishing at trial. ExxonMobil asks this Court to reject OAG's eleventh-hour gamesmanship and to deny its motion for an adverse inference.

BACKGROUND

I. ExxonMobil Took Its Document Preservation Obligations Seriously

A. The Secondary Account Was Created for Legitimate Business Purposes

In October 2007, ExxonMobil created a secondary email account for then-CEO Rex Tillerson. *See* Ex. C (Amended Affidavit of Connie Lynn Feinstein) ¶ 41. It was known only to select individuals, and it allowed Mr. Tillerson to efficiently access key emails. *See id.* ¶¶ 43-44; Ex. K (Trelenberg Tr.) at 61:25-62:4 ("I learned of [the Secondary Account] when I read about it in the news, that literally is the first time I ever knew about [the Secondary Account]."). By contrast, Mr. Tillerson's primary email account was known to the public and, as such, frequently inundated with irrelevant external emails. *See* Ex. C ¶ 44; Ex. B at 175:8-10; ExxposeExxon, *Make a Difference! Write a Letter to ExxonMobil Executives* (Mar. 8, 2006), https://web.archive.org/web/20060308104636/http:/www.exxposeexxon.com (encouraging visitors to "send an email asking brand new ExxonMobil CEO Rex Tillerson to change the company's course before it's too late"). The Secondary Account was designed to save

Mr. Tillerson from having to "scroll through 25, 30 screens to find an email somebody had sent me an hour ago." Ex. B at 175:22-23.

The existence of the Secondary Account did not mean Mr. Tillerson actively communicated by email. When asked at his deposition how frequently he used email, Mr. Tillerson testified, "[w]ell, probably not as often as people might think," in part because "I didn't sit at my computer much." *Id.* at 174:14-19. He "rarely" used the Secondary Account to communicate with others and "just didn't use email." *Id.* at 177:12-15. This description accords with other employees' testimony about how they used the Secondary Account. Bill Colton, the former Vice President of Corporate Strategic Planning, testified that he "really restricted" emailing the account and "would only use it when . . . I thought there was something that [Mr. Tillerson] *needed to see*." Ex. D (Colton Tr.) at 341:4-7 (emphasis added). In other words, the account was used primarily by others to communicate key information *to* Mr. Tillerson—not to carry on extensive conversations or deliberations. *See id.* at 532:10-17 (revealing that Mr. Colton would initiate "almost all" communications with Mr. Tillerson).

As is to be expected, more extensive deliberations took place in meetings. Take, for example, the subject of OAG's requested adverse inference: ExxonMobil's decision to have two carbon cost assumptions partially converge in the future (the "Convergence Decision"). This decision was clearly the subject of a May 2014 Management Committee presentation. *See* Pl.'s Br. ("Br.") at 4. Any debate about this proposal—to the extent it occurred—almost certainly would have taken place during this meeting, not over the Secondary Account months later.

B. ExxonMobil Took Steps to Preserve the Secondary Account

On November 6, 2015, barely a day after ExxonMobil received OAG's subpoena,

ExxonMobil placed Mr. Tillerson on legal hold. *See* Ex. E (Legal Hold Notice) (redacted).[1] His primary email account received a legal hold notice that day, which an executive assistant forwarded hours later to his Secondary Account. *See id.* Also on November 6, 2015, ExxonMobil placed the rest of its Management Committee on hold. *See* Ex. C ¶¶ 7-8. By December 2015, just one month after receiving OAG's subpoena, ExxonMobil had placed over 230 employees on hold. *See generally* Dec. 22, 2015 Letter from S. Jansen to M. Wagner (identifying the names of employees on hold at the time). That list included more than 630 individuals by April 2017. *See* Ex. F (Certification of Compliance) ¶ 12.

Having taken steps to ensure that Mr. Tillerson was placed on hold, ExxonMobil and its outside counsel understood that Mr. Tillerson's emails were being preserved. In fact, the Secondary Account was searched on or around January 29, 2016, just 84 days after the very first custodians in this case had been placed on hold. Broad search terms, including "GHG," "carbon," and "CO2," were run across the account, and OAG advances no claim that these terms were deficient. There is also no dispute that emails dating back to November 28, 2014 were captured in this early search. *See* Ex. C ¶¶ 13, 17, 56, internal Ex. A. After the search, ExxonMobil's outside counsel was encouraged to see that emails from the Secondary Account "were being produced because Rex Tillerson was a custodian." Ex. G (Hirshman Tr.) at 137:6-12.

As 2016 progressed, OAG shifted its focus to other custodians. Their documents, however, failed to reveal any plausible legal theory for OAG to pursue against ExxonMobil. So in early 2017, after document discovery during the investigation had officially closed, OAG manufactured a new theory: the relevant documents must have been destroyed.

Against this backdrop, in March of 2017, OAG asked ExxonMobil to confirm whether 35

[1] The parties agreed not to produce litigation hold notices during discovery because they are privileged.

email accounts, which OAG claimed were repositories for Management Committee documents, had been preserved from the outset of the investigation. *See* Mar. 12, 2017 Email from J. Oleske to Counsel for ExxonMobil, Index No. 451962/2016, Dkt. No. 126. One of the accounts listed was the Secondary Account. *See id.* ExxonMobil promptly investigated OAG's query and concluded that—despite Mr. Tillerson being placed on hold—the automatic-delete function for the Secondary Account had not been disabled. *See* Ex. C ¶ 53. This outcome, as ExxonMobil would later explain to OAG and the Court, inadvertently resulted from the design of ExxonMobil's information technology ("IT") infrastructure.

At ExxonMobil, individual employees—not email accounts—are placed on legal hold. *See id.* ¶ 42. ExxonMobil's IT infrastructure was built with this principle in mind. Each individual in ExxonMobil's directory is associated with no more than a single email account. *See id.* ¶ 40. When individuals are placed on legal hold, ExxonMobil's computer systems suspend a "file sweep" tool that ordinarily deletes emails after approximately thirteen months. *See id.* ¶ 51 n.4. The legal hold that had been instituted for Mr. Tillerson operated in exactly this way and disabled the file-sweep tool on his primary account. The file-sweep tool was not disabled on his Secondary Account because the account had been linked within ExxonMobil's directory to an IT employee, to ensure the account's security. *See id.* ¶ 55; *see also* Ex. H (Helble Tr.) at 23:19-24:25. Even so, ExxonMobil diligently searched the Secondary Account and produced responsive documents from it, as described above.

II. This Court Resolved OAG's Concerns During the Investigative Phase

When ExxonMobil discovered that the file-sweep tool had not been disabled for the Secondary Account, it promptly notified this Court. *See* Mar. 16, 2017 Letter from ExxonMobil to the Court, Index No. 451962/2016, Dkt. No. 123 at 2; Mar. 21, 2017 Letter from ExxonMobil to the Court, Index No. 451962/2016, Dkt. No. 128 at 5-6. The parties' letters on this issue

culminated in a hearing before the Court on March 22, 2017. At that hearing, the Court directed ExxonMobil to produce affidavits addressing the extent of any non-preservation of the Secondary Account and permitted OAG to cross-examine the affiants. *See* Ex. A at 14:19-24, 17:17-26.

ExxonMobil complied in full with the Court's directive. On March 31, 2017, the Company produced an affidavit from Connie Feinstein, a senior employee in ExxonMobil's IT department. The affidavit, later amended, detailed **(i)** the history of the Secondary Account, **(ii)** the rationale for its creation, and **(iii)** ExxonMobil's efforts to preserve and recover documents from the account. *See* Ex. C ¶¶ 40-60. Over 50 members of ExxonMobil's IT department spent more than 1,000 hours over a 17-day period on remediation efforts. *See id.* ¶ 59. These efforts included:

- Collecting backup drives that contained emails from the Secondary Account stretching back to August 18, 2015;
- Searching available Company-owned laptops, iPads, and iPhones used by Mr. Tillerson;
- Hiring a third-party vendor to perform a "data carving" forensic analysis of the laptop last used by Mr. Tillerson; and
- Searching emails of individuals known to communicate with the Secondary Account and sequestering them for manual review. *See id.* ¶¶ 57 n.5, 59(a-e).

Separately, ExxonMobil's outside counsel provided a Certification of Compliance describing the Company's steps to comply with OAG's November 4, 2015 subpoena. *See generally* Ex. F. Ms. Feinstein and ExxonMobil's outside counsel both testified for a full day each. OAG, however, insisted on gathering even more information and issued four additional testimonial subpoenas relating to document preservation. After briefing and a hearing, the Court ruled on June 16, 2017 that OAG could take its desired depositions, but not because they were strictly necessary. When ExxonMobil's counsel argued, "I don't think these are good faith depositions that have a reasonable basis," this Court responded, "If you are asking me whether this is being handled in a proper, proportional manner, I would tell you I don't think so, but they [OAG] are entitled to do this." June 16, 2017 Hr'g Tr., Index No. 451962/2016, Dkt. No. 236 at 66:14-19.

Significantly, at the end of this hearing, the Court made clear that OAG should promptly inform the Court if OAG discovered information indicating that ExxonMobil did not fulfill its document preservation obligations. "So if you come back here and you say we ***just*** deposed X, and X has indicated that Exxon wrongfully discarded all of the relevant documents, well, then we will have a different discussion than we are having today." *See id.* at 73:26-74:5 (emphasis added). OAG stayed silent for more than two years. Now, days before trial, OAG asks this Court to gift it evidence it has failed to adduce since it began investigating ExxonMobil. This Court should not entertain OAG's baseless and desperate request for an adverse inference.

LEGAL STANDARD

A party seeking spoliation sanctions must establish at least three elements: **(i)** the party with control over the evidence was obligated to preserve it; **(ii)** evidence was destroyed with a culpable state of mind; and **(iii)** the evidence was relevant to the party's claim. *See Pegasus Aviation I, Inc.* v. *Varig Logistica S.A.*, 26 N.Y.3d 543, 547 (2015).

But whether sanctions are ultimately appropriate depends on whether the moving party suffered any prejudice. That is because, as the Court of Appeals has emphasized, courts enjoy discretion to provide "*proportionate* relief" to remedy the loss of evidence. *Pegasus*, 26 N.Y.3d at 551 (emphasis added). Applying this principle, New York courts have routinely rejected invitations to impose sanctions in the absence of prejudice. *See Gunzburg* v. *Quality Bldg. Servs. Corp.*, 26 N.Y.S.3d 274, 276 (1st Dep't 2016) ("Plaintiff is not entitled to spoliation sanctions, since she failed to show that she was prejudiced by the lack of any items allegedly lost or destroyed."); *see also Sarris* v. *Fairway Grp. Plainview, LLC*, 169 A.D.3d 734, 736-37 (2d Dep't 2019) (reversing the trial court's imposition of sanctions in part because of the absence of prejudice); *Dulac* v. *AC & L Food Corp.*, 119 A.D.3d. 450, 451-52 (1st Dep't 2014) (noting that "the extent that the spoliation of evidence may prejudice a party" is relevant to a decision about

whether even to impose sanctions). OAG completely ignores this authority.

ARGUMENT

I. OAG Cannot Bring a Spoliation Sanctions Motion on the Eve of Trial

As an initial matter, this Court should deny OAG's motion for an adverse inference as untimely. OAG's concerns about the Secondary Account were raised and resolved in 2017. OAG's effort to reprise them now—whether to garner publicity, derail trial by creating an issue for appeal, or plug gaping holes in its case—should be rejected.

A. In June 2017, This Court Directed OAG to Advise It of Any Alleged Issues Regarding the Secondary Account, but OAG Remained Silent

OAG received a full airing of its document preservation concerns during this matter's investigative phase. OAG first expressed its concerns in publicly filed letters to the Court. *See* Mar. 13, 2017 Letter from OAG to the Court, Index No. 451962/2016, Dkt. No. 122; Mar. 20, 2017 Letter from OAG to the Court, Index No. 451962/2016, Dkt. No. 124. Then it received a comprehensive affidavit from a senior ExxonMobil employee detailing various aspects of the Company's e-discovery protocol, as well as a certification from ExxonMobil's outside counsel that ExxonMobil had complied with OAG's subpoena. *See* Ex. C; Ex. F. OAG deposed both this employee and outside counsel for a full day each. This Court then granted an even wider berth for OAG to explore the issue, permitting four additional depositions on the subject. The Court noted, however, that if these depositions yielded evidence that ExxonMobil "wrongfully discarded" relevant documents, OAG was to promptly advise the Court so "a different discussion" could be had. *See* June 16, 2017 Hr'g Tr., Index No. 451962/2016, Dkt. No. 236 at 73:26-74:5. OAG took these additional depositions. But it did *not* advise the Court that any wrongdoing had occurred, despite appearing before the Court six more times. Even after Mr. Tillerson's deposition in June of this year, at which OAG asked him about his use of the Secondary Account, OAG did not

express any specific concerns about the account. Instead, it waited until 17 days before trial to claim it was entitled to a sweeping adverse inference based on alleged document preservation issues.

This lay-behind-the-log tactic should not be countenanced. Rather, it represents exactly the kind of gamesmanship courts reject. In *Travelers Prop. Cas. Co.* v. *Mountaineer Gas. Co.*, the court denied a spoliation sanctions motion as untimely, on a rationale that applies squarely here:

> The timing of the [moving party's spoliation] Motion therefore belies its true intention. Presumably frustrated by a lack of evidence to support its claims and defenses in the days winding down to trial, [the moving party] accused Travelers of destroying relevant evidence, the destruction of which was known to it nearly four years prior to the filing of its motion.

2018 U.S. Dist. LEXIS 43208, at *19 (S.D. Va. Mar. 16, 2018).

B. OAG's Dilatory Motion Is Inexcusable

If OAG were genuinely concerned about the loss of emails relevant to its case, it should have raised that issue before it filed its Complaint or, at the very latest, during civil discovery. Even if some form of remedy were warranted—and it is not—this Court could have allowed OAG to, for example, develop the evidence it sought "from other sources." *Id.* at *18 (quoting *Goodman* v. *Praxair Servs.*, 632 F. Supp. 2d. 494, 508 (D. Md. 2009)). That is why the "least disruptive time" to raise spoliation concerns is "*during* the discovery phase, not after it has closed." *Id.*

OAG cannot justify its belated motion on the ground that it deposed Mr. Tillerson only this year. OAG made *no* effort to interview him during the investigation, when Mr. Tillerson was still employed by the Company. Further, all the exhibits to OAG's brief, other than the parties' witness lists and excerpts from Mr. Tillerson's deposition, are materials from the investigation—demonstrating that OAG had all the information it needed in 2017 to raise any purported spoliation issues. OAG did not do so. Instead, it brought this motion days before trial in a desperate effort to buttress a baseless case. This Court should reject OAG's motion as untimely.

II. OAG Cannot Meet the Legal Standard for an Adverse Inference

Under New York law, to justify any form of spoliation sanction, OAG must show that ExxonMobil destroyed evidence with culpability and that the evidence would have been relevant to OAG's claims. *See Pegasus*, 26 N.Y.3d at 547. OAG falls far short of making either showing.

A. ExxonMobil Undertook Its Document Preservation Obligations in Good Faith

From the outset, ExxonMobil has acted diligently to fulfill its document preservation obligations. But OAG goes so far as to describe an isolated technical issue affecting the Secondary Account as evidence of gross negligence—an allegation at odds with New York case law. Gross negligence is "conduct that evinces a reckless disregard of the rights of others or smacks of intentional wrongdoing." *Auffarth* v. *Herald Nat'l Bank*, 2016 WL 3405632, at *2 (N.Y. Sup. Ct. June 21, 2016). Gross negligence findings are based on repeated, critical failures in document-preservation protocol—not isolated, inadvertent mistakes. *VOOM HD Holdings LLC* v. *EchoStar Satellite LLC* illustrates the centrality of "bad faith" to a finding of gross negligence. 93 A.D.3d 33, 40 (1st Dep't 2012). There, the First Department concluded the defendant had acted with gross negligence in failing to preserve documents. In a previous case, the defendant had been sanctioned for "gross spoliation." *See id.* at 44. Despite knowing from that case about "the problems associated with its automatic deletion of e-mails," the defendant did not cease the automatic deletion of emails in *VOOM* until four months after it was sued. *Id.* at 44, 46. The court specifically relied on that fact in its culpability analysis. *Id.* at 46; *see also Spring Hill Bioventures SDN BHD* v. *Tsai*, 2015 WL 4885344, at * 2-3 (N.Y. Sup. Ct. Aug. 12, 2015).

Here, by contrast, ExxonMobil has acted in good faith at every turn. Barely a day after it had been served with OAG's subpoena, ExxonMobil placed its entire Management Committee, which included Mr. Tillerson, on legal hold. *See* Ex. C ¶¶ 7-8. Both of Mr. Tillerson's ExxonMobil email accounts received a litigation hold notice. *See* Ex. E. ExxonMobil's computer

systems also properly disabled the file-sweep function as to Mr. Tillerson's primary ExxonMobil account and the accounts of the hundreds of other custodians on legal hold. Then, ExxonMobil searched the Secondary Account for responsive emails just *a few months* after receiving OAG's subpoena. Ex. C ¶ 56. As soon as it discovered the file-sweep issue, it described the issue to the Court, complied with all subsequent orders, and directed massive resources towards remediating the issue. OAG does not, and cannot, dispute these basic facts, which preclude a finding of gross negligence. *See* Br. at 8 (conceding that "ExxonMobil turned off the automatic deletion program for every other custodian after receiving the Subpoena").

OAG's claim that ExxonMobil acted with simple negligence also ignores the unique factual circumstances here. Any state-of-mind analysis is necessarily fact dependent. *See Pegasus*, 26 N.Y.3d at 552. OAG makes much of cases indicating that the failure to suspend the automatic deletion of emails can support an adverse inference. But the analysis in those decisions assumes that the account in question would have contained unique, responsive emails. That is just not the case here. *See infra* Sections II.B & III.

Moreover, the authorities OAG relies on to justify its request for an adverse inference are all inapposite. Take, for example, *Arbor Realty Funding, LLC* v. *Herrick, Feinstein LLP*. 140 A.D.3d 607 (1st Dep't 2016). There, the defendant Herrick moved for spoliation sanctions against the plaintiff, Arbor Realty. *Id.* at 608. The court determined that Arbor Realty reasonably anticipated litigation as of June 2008 but did not institute *any* litigation hold until almost two years later. *See id.* As a result, Arbor Realty's record destruction policies operated as usual. *See id.* This led to the deletion of "*employees*' emails" and the "erasure of employee hard drives and email accounts upon the employee's departure from the firm." *Id.* (emphasis added). In *Arbor Realty*,

then, the failure to cease the automatic deletion of emails was *global*.[2] Those are not the facts here. ExxonMobil's file-sweep function was disabled for *every* relevant email account, except one, which its owner rarely used. *See* Ex. C ¶¶ 51-54. Additionally, unlike in the cited cases, ExxonMobil actually searched the Secondary Account within 84 days after the very first custodian in this case was placed on hold. *See* May 3, 2017 Letter from D. Toal to J. Oleske at C-15 ("May 2017 Legal Hold Letter") (listing, *inter alia*, the names of employees on hold and detailed information about document-collection dates). There is no evidence that ExxonMobil acted with the requisite culpable state of mind to warrant an adverse inference.

B. Emails in the Secondary Account Would Not Have Been Relevant

OAG lacks any basis to claim that emails in the Secondary Account during an 84-day window in the fall of 2014 would have been relevant to the Convergence Decision made in the early summer. OAG's motion for an adverse inference fails for this reason as well. *See Pegasus*, 26 N.Y.3d at 547-48.

Even if ExxonMobil had disabled the file-sweep tool for the Secondary Account as soon as it received OAG's subpoena, the earliest emails in that account would date back to September 5, 2014—three months *after* the Convergence Decision was made. *See* Ex. C ¶ 56. Critically, because the Secondary Account was searched for responsive documents just a few months into the

[2] OAG's other cited authorities are similarly distinguishable. In those cases, the sanctioned party either intentionally destroyed unique, responsive files or made no effort to retain any relevant emails after receiving a litigation hold. *See VOOM HD Holdings LLC* v. *EchoStar Satellite LLC*, 93 A.D.3d 33, 40 (1st Dep't 2012) (indicating that the alleged spoliator had not disabled automatic-delete function for any of the employees who had received a litigation hold notice); *Harry Weiss, Inc.* v. *Moskowitz*, 106 A.D.3d 668, 669 (1st Dep't 2013) (finding that the alleged spoliator threw away the computer that contained the only copies of relevant electronic files after the commencement of the litigation); *915 Broadway Assocs. LLC* v. *Paul, Hastings, Janofsky & Walker, LLP*, 2012 WL 593075, at *7-8 (N.Y. Sup. Ct. Feb. 16, 2012) (finding that the alleged spoliator was "actively involved in the transaction at issue" and "actively deleted all of his emails related to the transaction underlying this action" after receiving a litigation hold); *Einstein* v. *357 LLC*, 2009 WL 4543044, at *23 (N.Y. Sup. Ct. Nov. 12, 2009) (finding that the alleged spoliators "made no effort to stop [the] deletion policy or to make an image of [the spoliators'] inboxes or computer hard drives" even after receiving the court's repeated warnings about insufficient discovery).

investigation, that search captured documents from as early as November 28, 2014. *See id.* As a result, only *84 days* of additional emails would have been available had the account been preserved from the beginning of OAG's investigation.

OAG's suggestion that emails from this 84-day period may have "preserved, in email chains, exchanges from an earlier period" amounts to bald speculation divorced from the record. Br. 11 n.31. *See Dulac*, 119 A.D.3d at 452 (rejecting spoliation sanctions given plaintiff's "mere speculation" that unpreserved evidence would have supported her claim). At his deposition, Mr. Tillerson testified that he would "delete messages if [he] didn't—you know, it was something somebody needed to tell me. Read it, gone." Ex. B at 176:16-18. In short, he worked to keep his email inbox "cleaned up." *Id.* at 176:20. "We all try," OAG's counsel conceded. *Id.* at 176:22. OAG thus lacks any basis to suggest that, in September 2014, the Secondary Account would have contained emails relevant to the June 2014 Convergence Decision.

Furthermore, any unavailable emails from this 84-day window would only have been exchanged with junior or non-ExxonMobil employees, who had nothing to do with the Convergence Decision. *See* May 2017 Legal Hold Letter at internal Ex. A. After all, the Management Committee members along with various other senior executives—with whom Mr. Tillerson communicated through the Secondary Account—were on hold from the outset of the investigation. OAG's suggestion that Mr. Tillerson was communicating about the Convergence Decision with junior employees not on legal hold is at odds with its separate theory that the Convergence Decision was hatched and executed by ExxonMobil's "senior management." *See* Br. at 15, 17. OAG also fails to explain how Mr. Tillerson's potential communications with non-ExxonMobil employees—over the Secondary Account no less—would be relevant to the

Company's narrow decision to converge two *internal* planning assumptions. OAG's motion is defeated by its very own twisted logic.

III. OAG's Adverse Inference Is Unwarranted Given the Absence of Prejudice

OAG did not suffer any prejudice from a purported lack of access to duplicative emails sent from, or received by, the Secondary Account during the 84-day window at issue. *See* Ex. C ¶ 56. This fact provides an independent and sufficient basis to deny OAG's motion for an adverse inference. *See, e.g.*, *Gunzburg*, 26 N.Y.S.3d at 276. Three facts establish that OAG did not suffer prejudice here.

First, any emails exchanged between members of "senior management" who allegedly approved the Convergence Decision and the Secondary Account were *fully* preserved. *See* Br. at 17. During the investigation, this Court expressly noted that multiple email accounts can contain the same documents:

> [T]here's a rule of proportionality in discovery, and it's the case that with respect to a significant percentage of the documents that you're seeking and that have been produced, they've been sent to multiple people with cc's or bcc's, and ***even if you don't get that document from custodian[] X, the same document that's in custodian X's e-mail inbox is in custodian Y's e-mail inbox, and you have it***, and that doesn't excuse Exxon from doing what it undertook to do, it doesn't excuse Exxon from complying with your information subpoena, but ***there's a rule of proportionality here***.

Ex. A at 23:2-13 (emphasis added). Here, when Mr. Tillerson used the Secondary Account, he used it primarily to communicate with senior ExxonMobil executives, all of whom were on legal hold during the relevant timeframe. Correspondence with the Secondary Account frequently included Mr. Tillerson's primary account, which was preserved. *See, e.g.*, Ex. I (internal email sent to both of Mr. Tillerson's email accounts). Indeed, the custodians most relevant to the Convergence Decision were on hold as of November 6, 2015: **(i)** the GHG Manager who sent the email and PowerPoint deck OAG cites as the basis of its adverse inference; **(ii)** the Planning

Manager who gave the presentation at issue to the Management Committee; and **(iii)** a Vice President who approved the Convergence Decision before it was presented to the Management Committee for review. *See* May 2017 Legal Hold Letter at internal Ex. A.

Second, ExxonMobil searched the Secondary Account just *a few months* after receiving OAG's subpoena. *See id.* at C-15. Accordingly, the search captured emails dating back to November 28, 2014. *See* Ex. C ¶ 56. That search also used exceedingly broad search terms—like "GHG," "greenhouse," "carbon," and "CO2"—that would have captured documents relating to the Convergence Decision. *See id.* at internal Ex. A. Incidentally, the single document OAG relies on to justify its requested adverse inference—which itself does not reference Mr. Tillerson—contains *repeated* references to the terms "GHG" and "CO2." *See* Pl.'s. Ex. I, Index No. 452044/2018, Dkt. No. 386. Thus, any emails or attachments in the Secondary Account pertinent to the Convergence Decision would have been captured from a search conducted on or around January 29, 2016, just a few months into OAG's investigation. *See* May 2017 Legal Hold Letter at C-15.

Third, OAG's assumption that the Secondary Account contained a significant number of emails at all betrays a willful blindness to Mr. Tillerson's role as CEO. Mr. Tillerson "rarely" used email to communicate, a fact OAG conveniently omits from its brief. *See* Ex. B at 177:12-15. As he explained at his deposition, and is common sense, running one of the world's largest corporations is not a desk job. *See id.* at 174:16-19. Mr. Tillerson was charged with making difficult strategic decisions that would set the Company's course. Those decisions were made in meetings, typically with the rest of the Management Committee or senior executives. *See, e.g.*, Ex. J (Eizember Tr.) at 139:8-18 (confirming that the decision about where to set ExxonMobil's oil and gas price assumptions was a "collective decision" of the Management Committee). By design, most ExxonMobil employees did not even know about the Secondary Account. *See, e.g.*,

Ex. K at 61:25-62:4. There is no reasonable possibility that this account ever contained emails relevant to the Convergence Decision.

Because no evidence suggests OAG was prejudiced by the loss of *any* emails from the Secondary Account, its motion should be denied. *See, e.g.*, *Gunzburg*, 26 N.Y.S.3d at 276.

IV. OAG Lacks a Factual Basis for Its Requested Adverse Inference

OAG's conclusory adverse inference is predicated on a theory of the case totally at odds with the evidentiary record, and should be rejected for this reason as well. OAG asks this Court to find that allegedly missing emails from the Secondary Account "would have corroborated other evidence indicating that ExxonMobil senior management" revised internal planning assumptions to conform to public representations purportedly about those assumptions. Br. at 17. But this inference assumes that **(i)** ExxonMobil made a representation about its internal planning assumptions; **(ii)** the misrepresentation was misleading; and **(iii)** "other evidence" indicates that the Company changed its business practices to cover up that purported misrepresentation. Each of these assumptions is baseless, as ExxonMobil will establish at trial.

In particular, OAG's "other evidence" of a purported cover-up is a farce. According to sworn testimony, the Convergence Decision was based on a considered view of an evolving climate policy landscape. *See* Ex. L (Powell Tr.) at 279:4-7. OAG blithely ignores this testimony and rests its theory on unattributed speaker notes within a presentation whose context OAG flagrantly misrepresents. *See* Br. at 4-5. OAG asserts that "in a May 2014 presentation that was ultimately delivered to the ExxonMobil's [sic] 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." *Id.* at 4. There is no support for any element of this incendiary assertion: that the speaker notes in question were ever uttered before the Management Committee; that the GHG Manager drafted these speaker notes; or that he even

attended the presentation before the Management Committee. On the contrary, he testified that he "was not" at the presentation and did not recall drafting the speaker notes on which OAG relies. Ex. L at 712:14-22, 716:6-7. OAG's motion for an adverse inference should be rejected because it rests on outright falsity.

CONCLUSION

On the eve of trial, OAG seeks an adverse inference based on an issue this Court fully resolved more than two years ago. The timing of OAG's motion smacks of desperation, at best, and a publicity stunt, at worst. In any event, OAG's motion does not withstand scrutiny. OAG claims that emails allegedly missing from Mr. Tillerson's Secondary Account in the fall of 2014 would have shed light on a business decision senior management made at least three months earlier. But the reality is this: Mr. Tillerson barely used email at all, and all the senior ExxonMobil employees involved in this decision were placed on legal hold from the outset of OAG's investigation. As such, no unique, responsive emails were lost. Because OAG suffered no prejudice from a localized technical issue that affected the Secondary Account, OAG's request for an adverse inference should be denied.

Dated: October 11, 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 5,872 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 11, 2019
New York, New York

By: /s/ *Theodore V. Wells, Jr.*
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