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

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION *IN LIMINE* TO EXCLUDE THE PROPOSED TESTIMONY OF PETER BOUKOUZIS

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PRELIMINARY STATEMENT

The expert report that Exxon Mobil Corporation ("ExxonMobil") describes in its motion to exclude is virtually unrecognizable to anyone who has taken the time to read the May 8, 2019 Expert Report of Peter M. Boukouzis. Almost every criticism is based on an intentional misreading of the substance of Mr. Boukouzis's report. ExxonMobil criticizes Mr. Boukouzis for being "new to academia,"[1] but the source of his expertise comes from a decades-long career in finance and in the oil and gas industry. ExxonMobil criticizes Mr. Boukouzis because he "never worked as an equity analyst," but a review of equity analyst reports was only a small piece of the overall analysis that he conducted. ExxonMobil argues that no specialization is needed to determine whether ExxonMobil's public representations matched its internal practices, but assessing those internal practices requires analysis of what ExxonMobil's counsel has conceded are "complex cash flow analyses."[2]

ExxonMobil has cobbled together criticisms of various paragraphs of Mr. Boukouzis's report to try to create the impression that because Mr. Boukouzis is new to academia and to expert work, he is unqualified to serve as an expert witness in this case. Yet ExxonMobil completely misses the fundamental point that Mr. Boukouzis's opinions derive directly from his extensive experience in and with the oil and gas industry.

First, Mr. Boukouzis provides relevant information on the cost structure of integrated oil and gas companies generally, and ExxonMobil in particular, along with an explanation of the potential impact of regulatory costs on such companies based on their specific mix of assets. None of this is self-explanatory to a layperson. Like its competitors, ExxonMobil has a mix of

[1] ExxonMobil Corporation's Memorandum of Law in Support of Its Motion *In Limine* to Exclude the Proposed Testimony of Peter Boukouzis ("ExxonMobil Br.") at 1.
[2] Affirmation of Mary Kay Dunning Exhibit ("Dunning Ex.") A, 4/18/2019 Letter from D. Toal to M. K. Dunning at 2.

assets, each of which emits varying amounts of carbon based on its operations. Mr. Boukouzis's ability to explain those variances and their economic impacts is the result of specialized knowledge gained during an 18-year career as an investment banker, primarily in the oil and gas sector, plus a 10-year career as a chemical engineer for oil and gas and oil refining companies.

Second, Mr. Boukouzis provides insight into how industry specialists analyze the disclosures of integrated oil and gas companies and assess valuation. ExxonMobil and its peers are not simply selling widgets. Their business is dependent on striking a constant balance between exploration, production, and sales. While commodity prices can drive the largest swings in day-to-day prices of oil companies, the multiples at which those companies trade, as well as the long-term prospects of their assets, require specialized analysis. As an oil and gas industry specialist, Mr. Boukouzis understands and explains how to analyze ExxonMobil's disclosures in light of its risk profile.

The need for expert testimony on this subject was well in evidence this week, when defense counsel took the testimony of the fact witness Roger Read, an oil and gas analyst at Wells Fargo who covered ExxonMobil. While counsel was taking Mr. Read through the critical factors in oil and gas company valuation, including capital expenditure and free cash flow, counsel for Mr. Read raised the objection that: "He is not being asked to testify as an expert, nor do I see any reason to qualify him as an expert. It is my humble opinion that the line of questions that we are going through are more appropriately posed to an expert witness." Dunning Ex. B, Read Tr. 34. Indeed understanding the factors that go into an oil and gas company's valuation are appropriately the province of expert testimony.

Third, Mr. Boukouzis relies on his decades of experience engaging in financial modeling of oil and gas assets to assess what would have happened to the value of ExxonMobil's assets if

ExxonMobil had conformed its internal modeling of project economics to its public disclosures of future projected carbon emissions. While ExxonMobil dismissively describes such a process as simply "replacing" two costs, the process is hardly something that a lay person would be able to accomplish on his or her own. ExxonMobil has acknowledged that the company's economic models include "thousands of cells and many complex calculations."[3] Experience as an engineer and banker is essential to performing the analysis.

Ultimately, however, ExxonMobil effectively concedes that it motion to strike Mr. Boukouzis as an expert should fail when it suggests that the Court to reserve judgment on its motion until after Mr. Boukouzis testifies at trial. Taking portions of Mr. Boukouzis's report out of order and parsing individual sections to make a determination on admissibility makes no sense in the context of a bench trial. The Court is perfectly capable of assessing at trial whether Mr. Boukouzis is offering informed insight or mere speculation. Indeed, as the Southern District put it just this summer: "*Daubert* and its progeny do not apply straightforwardly in the context of bench trials, in which there is no possibility of prejudice and no need to protect the factfinder from being overawed by 'expert' analysis. Thus, unless the disputed evidence is wholly irrelevant or so speculative as to have no probative value, a court may freely receive the evidence and disregard it later if it fails to satisfy the strictures of [the rules on testimony by expert witnesses.]" *Kortright Capital Partners LP v. Investcorp Inv. Advisers Ltd.*, 392 F.Supp.3d 382, 397 (S.D.N.Y. 2019) (internal citations, brackets, and ellipses omitted).

[3] Dunning Ex. C, 11/20/2017 Letter from D. Toal to J. Oleske at 3.

ARGUMENT

I. Legal Standards

"As a general rule, [an] expert should be permitted to offer an opinion on an issue which involves professional or scientific knowledge or skill not within the range of ordinary training or intelligence." *Selkowitz v. Nassau Cnty.*, 45 N.Y.2d 97, 102 (1978) (internal quotations omitted). An expert is qualified to render expert testimony if he or she possesses the "requisite skill, training, education, [or] knowledge" with respect to the topics for which the expert was retained. *Matott v. Ward*, 48 N.Y.2d 455, 459 (N.Y. 1979); N.Y. Evid. Rule 7.01(1).

Expert testimony is subject to the foundational requirements "that appl[y] to all evidence." *People v. Wesley*, 83 N.Y. 2d 417, 429 (1994). If the expert's testimony is "based on scientifically developed procedures, tests, or experiments," the party must show that "there is general acceptance within the scientific community of the validity of the theory or principle underlying the procedure, test, or community." Rule 7.01(2). Where, however, the expert evidence is not scientific, or if the issue is not a novel one, Rule 7.01(2) and analysis under *Frye v. United States*, 293 F. 1013 (1923) are inapplicable. *See Wesley*, 83 N.Y.2d at 429; *Doviak v. Finkelstein & Partner*s, LLP, 137 A.D.3d 843, 847 (2d Dept. 2016) ("[A]n expert opinion based on personal training and experience is not subject to a *Frye* test.") (internal citations omitted); *Parker v. Crown Equipment Corp.*, 39 A.D. 3d 347, 348 (1st Dept. 2007) (*Frye* test unnecessary where expert testimony posed no new theories). If a *Frye* analysis is performed, it "requires no more" than establishing "the general reliability" of the expert's methodology. *Wesley*, 83 N.Y.2d at 426 (1994).

At a bench trial, where "there is no possibility of prejudice[] and no need to protect the factfinder from being overawed by 'expert' analysis," a court should "freely receive the evidence and disregard it later" if it does not satisfy the expert evidence rules. *Kortright Capital Partners,*

LP v. Investcorp Investment Adv. Ltd., 392 F. Supp. 3d 382 (S.D.N.Y. 2019)(internal quotations and citations omitted.) Moreover, where the expert's testimony is "based on more than theoretical speculation," the absence of specific "textual authority … is relevant only to the weight to be given the testimony, but does not preclude its admissibility." *Zito v. Zabarsky*, 28 A.D.3d 42, 46 (2d Dep't 2006).

Disputes between the parties as to the expert's credentials, methodology, and support for the expert's opinions "go to the weight, not the admissibility, of [the expert's] testimony." *McCullock v. H.B.Fuller Co.*, 61 F.3d 1038 (2d Cir. 1995); *Wathne Imports, Ltd. v. PRL USA, Inc*., 101 A.D.3d 83, 87 (1st Dep't 2012) ("The perceived flaws in plaintiff's expert's analysis are relevant to the weight a jury should give to the expert's report and testimony; they do not present sufficient grounds for ruling that analysis inadmissible.")

II. Mr. Boukouzis Possesses the Requisite Experience to Qualify as an Expert.

ExxonMobil's attempt to exclude Mr. Boukouzis's testimony must be denied because Mr. Boukouzis qualifies as an expert with specialized knowledge based on his career and industry experience. *See* N.Y. Evid. Rule 7.01(1). Mr. Boukouzis was an investment banker for nearly 20 years, primarily focused on the oil and gas industry sector. (Dunning Ex. D, May 8, 2019 Expert Report of Peter M. Boukouzis [hereinafter "Boukouzis Rpt."] ¶ 2). In addition, he was a chemical engineer for almost a decade in the oil and gas industry. *Id.* He also possesses an undergraduate degree in chemical engineering from the University of Illinois, and a Masters

of Business Administration from the University of Chicago. *Id*. ¶ 1.

A. ExxonMobil's Criticisms that Mr. Boukouzis is "New" to Being an Expert Witness and "Not a Credentialed Academic" Are Irrelevant to the Analysis of Whether He is a Qualified Expert.

ExxonMobil's contention that Mr. Boukouzis's expert testimony should be excluded because he is a "new" expert witness and "not a credentialed academic" (ExxonMobil Br. at 7) is elitist, hypocritical, and without legal basis. The Office of the Attorney General ("OAG") is offering Mr. Boukouzis as an expert not because of his academic experience or research, but because of his real-world experience gained over the past 30 years dealing with the economics of oil and gas companies. Since his recent retirement from that career, Mr. Boukouzis has become an assistant professor and chair of the Business Department at the University of St. Katherine (Dunning Ex. E, Boukouzis Tr. 17:6-8). This would seemingly satisfy even ExxonMobil's enhanced test for experts. Unable, therefore, to discredit him on that basis, ExxonMobil resorts to a condescending dismissal of the University of St. Katherine and of Mr. Boukouzis's altruistic view that teaching in retirement is a way of "giving back" to his community. (ExxonMobil Br. at 8).

ExxonMobil likewise attempts to discredit Mr. Boukouzis by arguing that, because he is "'new' to serving as an expert witness," (ExxonMobil Br. at 7), he is somehow disqualified from acting as one now. This argument is contrary to New York law. *See In re J.W.*, 45 Misc. 3d. 933, 937 (Sup. Ct. Monroe Cnty. 2014) (first-time expert witness was not precluded from testifying because he was "new" nor because he was not a specialist in the field). Indeed, logically, barring every first-time expert would eventually eliminate all expert testimony.

Further, two of ExxonMobil's own expert witnesses – Ms. Linda MacDonald and Dr. Marc Zenner – lack the very credentials that ExxonMobil clams that Mr. Boukouzis lacks. Ms.

MacDonald has never taught in any college or university, with the sole exception of having been a guest speaker at her alma mater. (Dunning Ex. F., MacDonald Tr. 19:23-20:4). Nor has she ever authored any substantial academic publications. Rather, she has written two articles, only one of which she described as having been "peer-reviewed." (*Id.* 18:13-20). Dr. Zenner has never filed an expert opinion that was "accepted by a court" (ExxonMobil Br. at 12), which ExxonMobil implies is a requirement for serving as an expert witness. In fact, Dr. Zenner has only testified in two cases over the past four years. (Dunning Ex. G, June 19, 2019 Expert Report of Marc Zenner, Ph.D [hereinafter "Zenner Rpt."], Appx. B). And ExxonMobil conveniently sidesteps the fact that Dr. Zenner's testimony was soundly rejected by the court in *FourFront Capital Group, LLC. v. Taube*, 2019 WL 1313408, *26 (Del. Ch. Ct. Mar. 22, 2019) (finding that one of Dr. Zenner's analyses was incomplete, while the "other was not statistically significant and lacked explanatory power"). The fact that ExxonMobil engaged Ms. MacDonald, who is not, even by ExxonMobil's own definition, a "credentialed academic," as well as Dr. Zenner, who has never been qualified as an expert, renders disingenuous ExxonMobil's argument that Mr. Boukouzis should be precluded because, notwithstanding three decades of relevant industry experience, he is new to academia and to litigation.

B. Mr. Boukouzis's Work Experience Qualifies Him as an Expert in Financial Modeling of Oil and Gas Companies, and, Contrary to ExxonMobil's Strawman Argument, the OAG is Not Proffering Mr. Boukouzis as a Climate Policy Expert.

During his long career as an investment banker, Mr. Boukouzis performed valuations of oil and gas companies that "were "fundamental to [his] job as an M&A banker." (Boukouzis Tr. 353:11-16). Mr. Boukouzis's valuation work involved the creation and review of "hundreds of financial and operating models, including models related to the oil and gas industry," and included "net present value ('NPV') analyses, three-statement financial models combining the

income statement, balance sheet, and statement of cash flows, oil and gas company operating and financial cash flow models, oil and gas project operating and financial cash flow models, statistical calculations and regressions, and budgets and forecasts." (Boukouzis Rpt. ¶ 6).

Likewise, as a chemical engineer for oil and gas refining companies, Mr. Boukouzis was responsible for financial modeling on a project and asset basis. (Boukouzis Tr. 52:6-53:25). Thus, ExxonMobil's contention that Mr. Boukouzis lacks experience in "reviewing internal project analyses" and in "internal project planning" (ExxonMobil Br. at 12-13) is simply baseless.

Further, while deeming Mr. Boukouzis's experience in mergers and acquisitions as "irrelevant to this litigation" (ExxonMobil Br. at 14), ExxonMobil is proffering as an expert witness, Dr. Zenner, who lists his mergers and acquisitions experience as one of his key qualifications. (Zenner Rpt. at 3). Indeed, Mr. Boukouzis's work centered on the energy industry, while Dr. Zenner testified that the majority of his investment banking experience did not involve oil and gas companies. (Zenner Tr. 41-45, 54, 64). Also, Dr. Zenner – unlike Mr. Boukouzis – was relatively uninvolved in the nuts-and-bolts of the financial transactions that he worked on. (*Id.* 69:23-70:3) ("[T]ypically, I would be involved in conversations around the M&A transaction…. But the lead in execution would be the M&A banker."). Rather, Dr. Zenner's experience largely consisted of providing ad hoc advisory opinions on specific issues that arose during financial transactions. (Zenner Tr. 36:19-41:9). And unlike Mr. Boukouzis, Dr. Zenner did not draft fairness opinions "because that responsibility would reside with the M&A team." (Zenner Tr. 73:11-19). Moreover, while ExxonMobil criticizes Mr. Boukouzis as not "advis[ing] on stock investment decisions" (ExxonMobil Br. at 14), Dr. Zenner testified that he was not involved in giving advice on investments in oil and gas companies. (Zenner Tr.

130:20-131:9). Thus, Exxon's criticism of Mr. Boukouzis's extensive experience as irrelevant is entirely disingenuous.

ExxonMobil also attempts to preclude Mr. Boukouzis's testimony on those sections of his expert report that provide factual descriptions of the history and current status of climate change regulation, as well as his statements that climate change regulations are expected to be more stringent in the future, arguing that Mr. Boukouzis is not an expert on climate policy. (ExxonMobil Br. at 9). Likewise, ExxonMobil seeks to block Mr. Boukouzis from testifying that "future [climate] policies" would result in lower demand for oil. (ExxonMobil Br. at 10).

ExxonMobil's preclusion argument is a strawman. Mr. Boukouzis is not opining on what specific future climate regulations are likely to be in the future. The issue in this case is not about how climate change regulations might evolve over time, but rather how the market perceived ExxonMobil's disclosures about how the company was accounting for climate change risk in its business decisions. As such, the expertise necessary for this case involves the impact of climate change regulatory costs on the financial valuation and modeling of an oil and gas company. Mr. Boukouzis offers no opinion on what costs ExxonMobil should have used, rather he tests what the impact would be on the company if they had done what they told investors they were doing.

Further, as Mr. Boukouzis testified, the OAG did not retain him as an expert on climate policy. Rather his "assignment was to compare what was publicly disclosed with what [he] saw internally" (Boukouzis Tr. 80:25-81:3) and to assess how ExxonMobil's climate disclosures were factored into the investment community's evaluation of the company. (Boukouzis Rpt. at 4-5). His expertise lies in assessing and explaining the investment community's climate policy

expectations and its perception of how an oil and gas company's disclosures reflect its accounting for climate change risk not in the interpretation of climate change regulations.

In addition, during his deposition, Mr. Boukouzis demonstrated his understanding of how future costs – like climate change costs – should be addressed in financial projections. (Boukouzis Tr.157:11-158:22). When asked whether it would be appropriate not to account for future greenhouse gas costs if the producer has a permit allowing a "certain volume of greenhouse gas emissions," Mr. Boukouzis responded:

> I actually don't agree with that statement . . . [W]hether it's GHG emissions or maybe it could be water costs or processing costs or anything on the cost line, I think ultimately, when you do your financials and your economics on such a long project, you have to keep in mind that if you think things are changing, you've got to use the appropriate numbers:

(Boukouzis Tr.157:2-158:4). In other words, a GHG cost is treated like any other long-term cost that an oil and gas company needs to incorporate into its economic planning and analysis. The necessary expertise is in the financial planning and modeling process, not projecting future regulatory developments.

It is telling that none of ExxonMobil's own expert witnesses has extensive experience in climate change policy or projections either. For example, Ms. MacDonald testified that she had never taken a class in climate change, nor had she worked in that area. (MacDonald Tr. 25:19-26:18). She also testified that she had no experience in forecasting government regulations about climate change, nor how ExxonMobil used a projected cost of greenhouse gases. (MacDonald Tr. 26:19-27:4). Similarly, Dr. Zenner testified that none of his research focused on issues concerning the economic impact of climate change or climate change regulation on the valuation of oil and gas companies and their assets. (Zenner Tr. 28:22-29:4). ExxonMobil's third expert witness, Allen Ferrell, likewise testified that he had provided advice on how to vote proxies on

only a "handful" of shareholder proposals relating to disclosures of greenhouse emissions, and he had no recollection that any of the companies were oil and gas companies. (Dunning Ex. I, Ferrell Tr.16:8-17:6).

C. Mr. Boukouzis's Long Tenure as an Investment Banker Who Specialized in Oil and Gas Mergers and Acquisitions Qualifies Him to Opine on Shareholder Damages in This Case.

ExxonMobil broadly contends that Mr. Boukouzis lacks the qualification to "perform a damages calculation," again ignoring the specific question he was asked to address. (ExxonMobil Br. at 11). Mr. Boukouzis was not asked to simply "calculate damages," but was rather asked to aggregate the impact of the inflated price in ExxonMobil shares identified by Dr. Bartov. As clearly stated in his report he was asked to "calculate the potential number of shares held by ExxonMobil's institutional shareholders . . .and estimate the potential aggregate damages suffered by ExxonMobil's shareholders due to ExxonMobil's alleged misrepresentations." (Boukouzis Rpt. at 6)

Mr. Boukouzis is well qualified to perform these calculations based on his finance background. Mr. Boukouzis's expert report demonstrates his financial acumen and clearly explains that, during his lengthy tenure as an investment banker in the oil and gas sector, he regularly reviewed publicly available financial information and trading data that he reviewed in this matter as well. For example, he explains that he commonly "analyzed the current and historical shareholder bases of public companies, noting changes in their holdings over time to estimate the potential entry basis of their holdings through analysis of market and trading data." (*See* Boukouzis Rpt. ¶ 5). His work on multi-million and billon dollar valuations of companies, as well as financial modeling background, also demonstrates his aptitude for performing complex computations.

III. Mr. Boukouzis is Not Acting as a Summary Witness by Opining That the Investment Community Considers Climate Change Regulatory Risk and Employs a Reliable Methodology in So Doing.

ExxonMobil claims that Mr. Boukouzis employs no "discernable methodology" in opining that climate change regulatory risk is relevant to the investment community's assessment of oil and gas companies in general and of ExxonMobil in particular. (ExxonMobil Br. at 12). It further complains that in so doing, "Mr. Boukouzis acts as a summary witness offering factual and legal argument under the guise of expert opinion." *Id.* But contrary to ExxonMobil's assertion that the OAG is using Mr. Boukouzis's analysis "to paper over its yawning evidentiary gaps," *id.*, Mr. Boukouzis in fact employs a rigorous methodology to review analysis available to the investment community.

As a preliminary matter, an assessment of investors' reporting and commentary to support an opinion on the importance of information to investors is not impermissible "summary" testimony. In *United States v. Schiff*, for example, the court rejected a party's attempt to exclude an expert opinion about what information is important to the reasonable investor on the basis that, *inter alia*, the expert's "'factual summaries' are not appropriate expert testimony." 538 F.Supp.2d 818, 844-45 (D.N.J. 2008):

> The [expert] testified at the hearing that he cites to analyst reports for corroborating evidence of his opinions regarding what information is important to investors. Moreover, even if [the expert] is offered to summarize the information available from analyst reports, such testimony may still be useful to the jury.

Id. at 845. While the Court retains the ultimate authority to determine the materiality to investors of ExxonMobil's representations, an expert witness can provide to the factfinder an assessment of what is important to an investor in a particular field, such as what Mr. Boukouzis does by demonstrating that climate change risk is a factor significant to the investment community. *See U.S. v. Schiff*, 538 F.Supp.2d 818, 844-45 (2008).

Seizing on a single paragraph in Mr. Boukouzis's report in which he describes how he determined which equity research reports on ExxonMobil to evaluate (*see* Boukouzis Rpt. ¶ 81), ExxonMobil attempts to characterize Mr. Boukouzis's report as a narrow quantitative examination of equity reports, criticizing the "methodology" of his selection of equity reports as if Mr. Boukouzis had purported to engage in statistical analysis of the reports. This is a red herring.

Mr. Boukouzis did not conduct a review of analyst reports simply to identify the number of times carbon costs or GHG costs were mentioned in analyst reports. That requires almost no expertise. Rather, Mr. Boukouzis reviewed relevant analyst reports to make a qualitative assessment of what risks investors identified as central to ExxonMobil's business and how its asset portfolio might be impacted by carbon cost regulations. Indeed, Mr. Boukouzis begins his review by analyzing why ExxonMobil is particularly vulnerable to carbon cost regulations because of its many investments in GHG Emission-intensive projects that extract oil and gas reserves from non-conventional sources. (*See* Boukouzis Rpt. ¶ 64).

ExxonMobil criticizes Mr. Boukouzis's use of a keyword search to narrow the universe of equity reports when their own expert—Dr. Zenner—did the same thing. Dr. Zenner performed a two-step review. First, he identified 482 equity research reports that mention ExxonMobil. Second, he applied four search terms to this universe of equity research reports to identify any discussions of carbon costs. This is a distinction without a difference. Contrary to ExxonMobil's framing, Mr. Boukouzis did not narrow a universe of equity reports to those discussing climate change regulatory risk in order to draw conclusions based on the resulting quantity of reports.

The narrowness of ExxonMobil's focus is consistent with the narrowness of the opinion of its expert, Dr. Zenner. In his report and deposition, in which he concludes that climate change regulatory risk did not substantially influence "market participants'" assessment of ExxonMobil, Dr. Zenner acknowledges that he did not evaluate material from investors. (Zenner Tr. 126). Dr. Zenner admits that, in forming his opinions, he did not "look at any documents specifically from investors in ExxonMobil . . . [meaning] entities, institutional investors, anyone who hold[s] ExxonMobil equity." (Zenner Tr. at 141-42.) He also failed to review any documentation concerning ExxonMobil shareholder proposals. (Zenner Tr. at 152-53).

In other words, unlike Mr. Boukouzis, Dr. Zenner did not look for, identify, read, or evaluate ExxonMobil shareholder commentary, actions, or proposals to support his opinions in this matter. Instead, he myopically focused on equity research reports, filtering them by applying search terms.[4] (Zenner Tr. 127-128, 168). As Mr. Boukouzis explains in his report, a 2017 shareholder proposal requesting an annual report from ExxonMobil on the long-term portfolio impacts of climate change received widespread support from major institutional shareholders, including State Street, Vanguard, and BlackRock. (Boukouzis Rpt. ¶ 75). The resolution passed with 62.1% voting in favor. (*Id.*). The direct votes of 62 percent of ExxonMobil shareholders provides direct evidence of investor priorities.

Further, it is disingenuous for ExxonMobil to accuse Mr. Boukouzis of offering "nothing more than a cherry-picked selection of reports haphazardly identified through a basic keyword search" to support his opinion that ExxonMobil's disclosures about carbon costs were a relevant consideration in the investment community's assessment of ExxonMobil. (ExxonMobil Br. at 13). Rather than merely summarizing, he uses his experience as a banker to interpret the

[4] Mr. Zenner also [reviewed] credit rating reports from a period of a few weeks after the Complaint in this case was filed, in October 2018. *Id.*

discussion in multiple sources including not only analyst reports, but shareholder proposals and investor commentary as well, to support his opinion that climate change risk was one of the important considerations in investment community's evaluation of ExxonMobil.

IV. Mr. Boukouzis Does Not Intrude Upon the Court's Factfinder Role.

ExxonMobil states axiomatically that "[b]y definition, no special expertise is needed to determine how a reasonable investor would interpret a public disclosure." (ExxonMobil Br. at 17). Yet, ExxonMobil does not cite any case in support of this axiom that is within the realm of securities litigation. It instead relies on personal injury cases, a murder case, a real-estate fraud case, and a construction contract case.

Courts "routinely allow expert testimony regarding whether undisclosed information, or information that was later disclosed, was material." *SEC v. ITT Educ. Services, Inc.*, 311 F.Supp.3d 977 (S.D. Ind. 2018) (citing *SEC v. Ferrone*, 163 F.Supp.3d 549, 565 (N.D. Ill. 2016). In *U.S. v. Litvak,* 808 F.3d 160, 181 (2d Cir. 2015), the Second Circuit found that it was error to exclude expert testimony, which, in the words of the appellant, was "about the process investment managers use to evaluate a security, and the irrelevance of the broker-dealer's acquisition price to that process, [which] was directly probative of whether [the] misstatements would have been material to a reasonable investor." The Second Circuit found that the testimony excluded by the lower court "would have been highly probative of materiality, the central issue in the case." *Id.* at 182.

Courts have also admitted expert testimony specific to the issue of materiality in non-securities cases. *See U.S. v. Yagman*, No. CR 06-227(A), 2007 WL 4532670, at *3-4 (C.D. Cal., May 11, 2007) (permitting expert testimony regarding information disclosed by bankruptcy debtors because the testimony was relevant to the issue of materiality). Thus, "it is within the court's discretion to permit an expert to offer an opinion as to the ultimate issue of fact to be

determined at trial," *Pergament v. Roach*, 18 Misc.3d 1141(A) (Sup. Ct. Nassau Cnty. 2008) (citing *People v. Miller*, 91 N.Y.2d 372, 379 (1998)). This discretion is particularly appropriate "in complex cases involving the securities industry, [where] expert testimony may help a jury understand unfamiliar terms and concepts." *Id.* (quoting *People v. Schwartz*, 21 A.D.3d 304, 308 (1st Dep't 2005)).

There is absolutely no reason, in law or in fact, that the Court cannot avail itself of Mr. Boukouzis's knowledge and expertise in the field of investing, particularly his extensive experience in evaluating oil and gas companies. The Court is in turn fully capable of deciding what weight to accord opinions and testimony.

V. Mr. Boukouzis's Opinion That ExxonMobil's Application of Carbon Costs Was Inconsistent with Its Public Disclosures Is Based Upon a Direct Analysis of ExxonMobil's Own Cash Flow Models.

Part of Mr. Boukouzis's assignment was to estimate the impact of ExxonMobil's exclusion of the GHG proxy costs it represented it was using in investment decision-making and business planning. His methodology was as direct as it was reliable: utilizing the GHG proxy cost figures that ExxonMobil represented to the public into the cash flow models that ExxonMobil produced in this matter. ExxonMobil's criticism that Mr. Boukouzis's methodology was flawed boils down to an argument that his revisions to its models was not necessary to comport with its public representations. That is one of the core issues that this Court will decide at trial.

Far from "cherry-picking" models to suit a narrative, Mr. Boukouzis's methodology is conservative and likely dramatically underestimated the impact of ExxonMobil's exclusion of the GHG proxy costs from the cost projections in its economic models. First, as the Court well knows from the protracted discovery disputes about cash flow models in this matter, ExxonMobil produced cash flow models for only a fraction of its projects, and Mr. Boukouzis

was limited to analyzing those models. Second, because GHG proxy costs can only be calculated by multiplying a cost per ton figure by projected GHG emissions, Mr. Boukouzis could only use models that in fact contained GHG emissions projections – which many did not. Thus, in effect, Mr. Boukouzis analyzed only models that included some costs associated with greenhouse gases – albeit far lower than the costs ExxonMobil publicly represented – and he was unable to use models that included no such costs at all. Additionally, for the cash flow analysis, Mr. Boukouzis relied on the description of the models and their purpose that ExxonMobil itself provided in its interrogatory responses in this case.

But the impact that Mr. Boukouzis did find as a result of his analysis is nonetheless highly significant and consistent with factual evidence from ExxonMobil. As Jason Iwanika, a development planning supervisor, stated in an internal analysis in 2014, a change in profitability rate of 0.5-1% is considered "very material" by ExxonMobil's planners. (Dunning Ex. J, PX052 at 1). Indeed, a decrease in profitability need not result in a project becoming unprofitable in order for it to be highly significant, for the simple reason that ExxonMobil's investors expect the company to do more than to eke out a nominal profit with the capital it invests. Thus, for example, if ExxonMobil were to learn that a project's expected discounted cash flow rate of return is 10% instead of 12%, it might well decide to invest those dollars elsewhere. This is the very purpose of a GHG proxy cost: to incentivize lower-emitting projects at the expense of higher-emitting projects, to preserve the company's long-term profitability in a world of increasingly stringent climate change regulation.[5]

[5] ExxonMobil also contests Mr. Boukouzis's methodology of applying the company's publicly represented GHG proxy costs to 100% of its projected emissions, rather than to a small fraction of emissions as set out under existing Alberta law. ExxonMobil's position may be that it was entirely consistent with its representations to assume that existing costs (effectively about $5/ton) will remain frozen in place forever, but the OAG disagrees.

Of course, Mr. Boukouzis makes no claim that the typical ExxonMobil investor would be able to recreate his analysis at home. His analysis is based on cash flow models that, as this Court is aware, ExxonMobil fought vigorously to avoid disclosing to the OAG. Likewise, while the public was informed that those costs would reach about $60/ton in 2030 and $80/ton in 2040, Mr. Boukouzis had access to more detailed internal information. The question Mr. Boukouzis is addressing with his cash flow analysis does not go to the element of falsity – that is amply demonstrated by other evidence. Rather, the question is one of materiality – the magnitude of the difference between what ExxonMobil disclosed, and what it actually did. Mr. Boukouzis found that, had ExxonMobil included the GHG proxy costs it publicly disclosed, then for the projects and assets captured by these cash flow models, ExxonMobil's undiscounted cash flows would have been reduced by $70.249 billion, its net present value by $4.987 billion, and its average internal rate of return by 0.6 percent. (Boukouzis Rpt. at 85 tbl. 3). These changes, representing a -7.2 percent adjustment to undiscounted cash flows and a -3.9 percent adjustment to net present value, can hardly be characterized as marginal. (*Id.*).

The Court need not conduct a mini-trial about the purpose of every row and column in each of these models in order to benefit from Mr. Boukouzis's conservative estimate of the magnitude of the impact of ExxonMobil's fraud on a range of cash flow projections. Moreover, as explained above, Mr. Boukouzis is highly qualified to provide analysis regarding the valuation of oil and gas investments. (Boukouzis Rpt. at 4, ¶ 2; Boukouzis Tr. 353:11-16; *see* Part II.B, *supra*). The significance of ExxonMobil's failure to abide by its representations is also confirmed by Dr. Bartov's event study analysis, as well as the strong evidence that investors were paying attention to climate change risks generally, and ExxonMobil's representations on

the subject specifically. Together, these lines of evidence will all support a finding at trial that the OAG has satisfied the element of materiality.

An expert's testimony is not inadmissible, even under the strict standard applied to scientific evidence, merely because one disagrees with that expert's conclusions. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), "is not concerned with the reliability of a certain expert's conclusions, but instead with 'whether the experts' deductions are based on principles that are sufficiently established to have gained general acceptance as reliable.'" *Lugo v. New York City Health and Hospitals Corp.*, 89 A.D.3d 42, 56 (2d Dep't 2011), quoting *Nonnon v. City of New York*, 32 A.D.3d 91, 103 (1st Dep't 2006) (quoting *Marsh v. Smyth*, 12 A.D.3d 307, 308 (1st Dep't 2004)).

VI. Mr. Boukouzis's Damages Calculation is Not Speculative, as ExxonMobil Contends, But Rather is Conservative and Based Upon the Most Accurate Trading Data That Is Publicly Available.

ExxonMobil's arguments about Mr. Boukouzis's aggregate damages calculation all go to the weight that the Court should give to Mr. Boukouzis's opinions, rather than to the admissibility of those opinions. Contrary to ExxonMobil's position, aggregate damage awards have been an accepted method that courts have used in awarding damages sustained by shareholders, and, as such, Mr. Boukouzis's damages calculation should be admissible. *See, e.g.*, *In re Puda Coal Sec. Inc. Lit*, 2017 WL 65325 at *14 (S.D.N.Y. Jan. 6. 2017) ("Aggregated damages models, such as the proportional trading model [the expert] employed, have been accepted in the District for estimating aggregate damages under Section 10(b).").

Mr. Boukouzis's damages estimate, which is based on the alleged harm suffered by purchasers of ExxonMobil stock, is not grounded in speculation or conjecture, as ExxonMobil contends. Rather, it relies on publicly available trading volume information provided in SEC Form 13F filings to estimate the portion of ExxonMobil investors who sold their shares within

the relevant time period in this case. Even by ExxonMobil's own admission, Mr. Boukouzis's damages calculation is low, as it only relies upon trading data reflected in SEC Forms 13F, which "captur[e] *only* institutional shareholders, not all shares purchased or sold during the relevant period." (*See* ExxonMobil Br. at 22 n.6) (emphasis added).

We agree with ExxonMobil that Mr. Boukouzis's analysis is limited to trading volume associated with institutional investors. Mr. Boukouzis does not attempt to estimate trading volume associated with retail investors. As such, Mr. Boukouzis's damages calculation actually understates the number of shares negatively impacted; it does not overstate the number, as ExxonMobil contends. (ExxonMobil Br. at 22).

Mr. Boukouzis's damages calculation is also conservative because the trading data upon which he relies does not reflect net changes in position by quarter by institution during the damages period, nor does it reflect intra-quarter trades. (*See* Boukouzis Rpt. ¶ 137). Mr. Boukouzis also highlights in his expert opinion the unavailability of individualized shareholder trading data in this matter and acknowledges that "the need to estimate aggregate damages is mitigated by the existence of individualized claimants who can verify the data and size of their purchase of the affected stock." (*See* Boukouzis Rpt. ¶ 131 n.290). To the extent such information becomes available, Mr. Boukouzis has offered to review the individualized data and consider updating his estimate. *Id.*

Moreover, Dr. Allen Ferrell, ExxonMobil's damages expert, agrees that the use of shareholder trading data to calculate damages would be ideal. (Dunning Ex. K, Ferrell Rpt. ¶ 57) The OAG welcomes ExxonMobil's invitation to engage in a post-trial claims process during which aggrieved shareholders can submit their actual trading history to receive compensation from ExxonMobil.

Further, it is well-established there is no single established methodology to make an aggregated damages estimate that is uniformly favored by courts. The sort of specialized quantitative analysis conducted by Mr. Boukouzis that is grounded in corporate finance principles is commonly used as a complement to judicial expertise. Thus, "[t]he determination as to the relevance and reliability of such evidence is committed to the sound discretion of the trial court." *Primavera Familienstifung v. Askin*, 130 F.Supp.2d 450, 522 (S.D.N.Y. 2001) (citations omitted). Mr. Boukouzis's report provides specific factual support for his opinions and has a "traceable analytical basis in objective fact." *Id.* (quoting *Bragdon v. Abbott*, 524 U.S. 624, 653 (1998)). ExxonMobil is trying to strip away the Court's discretion to weigh such evidence.

ExxonMobil's complaint that Mr. Boukouzis's methodology for assessing damages is flawed because it is inconsistent with the "out-of-pocket rule" is yet another strawman argument invented to attack Mr. Boukouzis. ExxonMobil claims that under New York law, the only acceptable measure of securities fraud damages is "the actual pecuniary loss sustained as the direct result of the wrong." *See Starr Found. v. Am. Int'l Grp., Inc.*, 76 A.D.3d 25, 27 (1st Dep't 2010). Because he relies on quarterly trading data, ExxonMobil argues, Mr. Boukouzis "cannot determine the actual number of shares impacted by the purported corrective disclosures," (ExxonMobil Br. at 22) and, as such, Mr. Boukouzis's damages methodology cannot capture actual pecuniary loss.

ExxonMobil mischaracterizes the holding of *Starr* by suggesting that it is unacceptable to employ a methodology that relies on quarterly trading data when calculating damages in a securities fraud litigation. In *Starr*, the plaintiff held shares of the defendant's common stock and alleged that the defendant made misrepresentations regarding the degree of risk associated with its portfolio, thereby causing the plaintiff to continue to hold, rather than sell, a large block

of the defendant's stock before the stock price sharply declined. The plaintiff tried to recover the value it would have realized in a hypothetical sale of its block of stock, and the First Department affirmed the trial court's dismissal of the case because the plaintiff suffered no actual pecuniary loss. *See Starr*, 76 A.D.3d at 27. Yet, ExxonMobil misleadingly cites *Starr* for the proposition that quarterly trading data cannot be used in a securities fraud litigation as the basis upon which to calculate reliable damages. In fact, the *Starr* court nowhere mentions quarterly trading data, nor does it discuss the adequacy of any set of data.

ExxonMobil's reliance on a few federal cases to discount courts' application of aggregate damages in other securities fraud cases is also distorted. Indeed, ExxonMobil vastly mischaracterizes *In re Broadcom Corp. Secs. Litig.* by suggesting that the court there excluded expert testimony in part because of an expert's use of an aggregate damages theory. The *Broadcom* case makes it abundantly clear that "[a]fter review of the PSLRA, the Court concludes the statute neither requires nor prohibits proof of aggregate damages. The statute leaves it open for a court to select the most reliable method of damages proof that is available in that particular case." 2005 U.S. Dist. LEXIS 12118 (C.D. Cal. June 3, 2005). Any dispute about an expert's methodologies—which is the actual dispute raised by ExxonMobil here—go to the weight of the evidence, not its admissibility.[6] *See In re Longtop Fin. Tech. Sec. Litig.*, 32 F. Supp. 453, 461 ("[T]rial courts must consider only the *admissibility* of expert evidence rather than its weight or credibility." (emphasis in original); *see People v. Miller*, 239 A.D.2d 787, 789 (3d Dep't. 1997)

[6] Similarly, the issues raised by ExxonMobil in footnote 6 of its Memorandum of Law – namely how Mr. Boukouzis treated shares that may have benefited from an inflated stock price – reflect a disagreement between Mr. Boukouzis's analysis and that of ExxonMobil's expert, Dr. Ferrell. In that footnote, ExxonMobil mischaracterized Mr. Boukouzis's testimony as having conceded ExxonMobil's point when in fact, Mr. Boukouzis expressly refuted it during his deposition. (Boukouzis Tr. 387:4-9). This issue therefore goes to the weight that this Court will give to each witness's testimony at trial, but it is not a basis for precluding Mr. Boukouzis's testimony.

(whether expert's testimony was based on hearsay "goes to the weight of such evidence and not to its admissibility").

CONCLUSION

To address whatever misguided questions and purported flaws it sees in Mr. Boukouzis's expert opinions, ExxonMobil is entitled to elicit relevant information during cross-examination at trial and to present contrary evidence. Wholesale exclusion of Mr. Boukouzis's expert report testimony, which ExxonMobil seeks, is not supported here. As such, we respectfully request that this Court deny the Defendant's Motion *In Limine* to Exclude the Proposed Testimony of Peter Boukouzis.

Dated: New York, New York
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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 6,968 words, exclusive of the caption, table of contents, and signature block. In making this certification, I relied on Microsoft Word's "Word Count" tool.

Dated: October 11, 2019
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