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October 15, 2019

By NYSCEF and Hand Delivery

The Hon. Barry R. Ostrager
Supreme Court, New York County
60 Centre Street, Room 232
New York, NY 10007

Re: People of the State of New York v. *Exxon Mobil Corporation*, No. 452044/2018

Dear Justice Ostrager:

We write on behalf of ExxonMobil in response to the Court's notice dated October 10, 2019. That notice requested the parties' respective positions on bifurcating the upcoming trial into separate phases for liability and damages. On October 14, 2019, the parties met and conferred on the issue, but were unable reach an agreement. ExxonMobil respectfully opposes bifurcation of the trial for the following reasons:

First, OAG effectively conceded that bifurcation was unnecessary at the March 21, 2019 discovery conference. Prior to that conference, OAG threatened to seek bifurcation *if* the Court denied OAG's request for additional document discovery. *See* Dkt. No. 72 at 5. The Court, however, granted OAG's request, and ExxonMobil was instructed to produce "a reasonable sample" of the documents OAG requested. Mar. 21, 2019 Hr'g Tr. 22:19-25. OAG agreed to this compromise and proceeded to have its expert witness (who plans to testify at trial) prepare a report opining on damages.

Second, OAG must prove investor loss at trial to establish liability on its common law fraud claim. *See Basis PAC-Rim Opportunity Fund (Master)* v. *TCW Asset Mgmt. Co.*, 149 A.D.3d 146, 149 (1st Dep't 2017). ExxonMobil submits OAG has failed to present any competent evidence of damages, which is among the reasons judgment should entered in ExxonMobil's favor on OAG's common law fraud claim. In seeking bifurcation, OAG essentially asks this Court to relieve it of its failure to prove a necessary element of its claim.

Third, bifurcation would be improper here because damages are inextricably intertwined with materiality—a necessary element for all of OAG's claims. OAG attempts to establish both damages and quantitative materiality through the same mechanism: a flawed event study that purports to show ExxonMobil stock trading at an inflated price. But, where, as here, a damages determination cannot be divorced from a liability determination, bifurcation is inappropriate. *See*

Carpenter v. *County of Essex,* 67 A.D.3d 1106, 1107 (3d Dep't 2009). Trying damages separately from liability will hinder judicial economy.

Finally, we object to OAG's characterization of our expert witness, Dr. Allen Ferrell, as conceding that that the "precise distribution" of damages "need not be resolved at this trial." Dkt. No. 403 at 49. That claim strips the statement of its context. Dr. Ferrell's aim was to critique the aggregate damages model proposed by OAG's expert, which relied on "speculation" as to the "actual timing of trading activity." Ferrell Expert Rep. ¶ 56. At a post-trial claims process, however, shareholders prove damages by submitting records of their "actual trading activity." *Id.* To the extent OAG now argues bifurcation is necessary, it is effectively abandoning the damages analysis of its own expert.

* * *

ExxonMobil is available to address the issue of bifurcation at the upcoming pretrial conference on October 16, 2019.

Respectfully submitted,

/s/ Theodore V. Wells Jr.
Theodore V. Wells Jr.

cc: All counsel of Record (by NYSCEF)