



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETTITIA JAMES
ATTORNEY GENERAL

By NYSCEF and Hand Delivery

October 15, 2019

The Honorable 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*, Index No.
452044/2018 (Sup. Ct. N.Y. Cnty.)

Dear Justice Ostrager:

We write on behalf of the Office of the Attorney General (“OAG”) in response to the October 10, 2019 notice concerning bifurcation. As Exxon Mobil Corporation (“ExxonMobil”) noted in its letter, the parties met and conferred and could not reach agreement on the issue. The OAG is in favor of bifurcation.

What the parties are describing as damages are in fact restitution with respect to the OAG’s Martin Act claim. Under the Martin Act, restitution is an equitable remedy, and if liability is established at trial, the Court is free to craft an equitable process for administering such relief. *See* G.B.L. § 353(3); *see also State of N.Y. v. McLeod*, 12 Misc. 3d 1157(A) at *20, 819 N.Y.S.2d 213 (Sup. Ct. N.Y. Cnty. Feb. 9, 2006) (ordering hearing as to amount of restitution to be paid under the Martin Act). Awarding aggregate damages in an amount established by the OAG’s expert is one approach to setting damages. ExxonMobil’s expert, Dr. Allen Ferrell, expressed the opinion in his report that a post-trial claims process would be a superior methodology. Ferrell Report at 29 (“in my opinion and based on my experience, damages—when present—are best addressed during the post-trial claims process.”) The OAG does not take exception to Dr. Ferrell’s suggestion that a post-trial claims process is appropriate in this matter.

As to the other points raised by ExxonMobil: (i) While the event studies conducted by the experts for both parties may have relevance to materiality, they are not the mechanism through which the OAG will establish that element. There is ample documentary and testimonial evidence outside the event studies to demonstrate materiality. (ii) The OAG is not seeking to be “relieved” of any obligation to prove damages to establish common law fraud. If the OAG has not established the elements of a Martin Act claim, *a fortiori*, it will not have established a common law fraud claim. Therefore, leaving a proceeding on damages until after a determination of the other elements of fraud will provide the same judicial economy as bifurcation of the Martin Act claim. And (iii)

the Court is well within its discretion to consider the issue of bifurcation at any time during trial regardless of the fact that the OAG may have raised the question in an earlier letter.

Ultimately the question of whether to bifurcate liability and damages is well within the Court's discretion. *Plainview Water Dist. v. Exxon Mobil Corp.*, 66 A.D.3d 754, 755 (2d Dep't 2009) ("The decision whether to conduct a bifurcated trial, severing various issues of liability and damages, rests within the discretion of the trial court.") Here the Court is free to formally bifurcate, to reserve decision on damages or to simply order a post-trial claims process as equitable relief. We view each of these approaches as potentially sound means to streamline trial, conserve resources and reach an equitable outcome.

We are happy to discuss the issue in greater detail at tomorrow's conference.

Sincerely,

/s Kevin Wallace

Kevin Wallace

/s Kim Berger

Kim Berger