

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

EXXON MOBIL CORPORATION'S PROPOSED FINDINGS OF FACT

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PRELIMINARY STATEMENT

Exxon Mobil Corporation (“ExxonMobil”) respectfully submits the following fifteen proposed findings of fact based on the evidentiary record developed at trial. Record citations supporting each factual finding appear at the end of each numbered paragraph. These factual findings show that none of ExxonMobil’s disclosures about proxy costs and GHG costs were materially misleading under the relevant legal standard. The parties agree that for a statement to be materially misleading, there must be “a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.” *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *State of New York v. Rachmani Corp.*, 71 N.Y.2d 718, 726 (1988).

Multiple independent grounds establish that the disclosures were not materially misleading. While the Attorney General loosely refers to a number of ExxonMobil’s GHG cost disclosures, it has not shown how any of those statements significantly altered the total mix of information available to investors. ExxonMobil’s GHG cost disclosures could not have been materially misleading to investors in light of their content and the absence of evidence showing that reasonable investors would have considered the disclosures to have significantly altered the total mix of information available. ExxonMobil’s disclosures had no bearing on its financial statements, stock price, or analyst valuation, which provides further, independent grounds to conclude they were not materially misleading. When viewed individually or collectively, the evidence shows reasonable investors would not have considered the disclosures at issue here to have significantly altered the total mix of information available. ExxonMobil urges this Court to find that each of these grounds provides an independently sufficient and compelling basis to

conclude that there were no material misrepresentations, and when viewed collectively, they provide overwhelming support for a judgment for ExxonMobil.

PROPOSED FINDINGS OF FACT

I. Key Background Facts about ExxonMobil’s Disclosures on the Proxy Cost of Carbon and GHG Costs.

A. ExxonMobil Uses Planning Metrics about Climate Regulations to Evaluate Their Possible Impact on Potential Capital Investments.

1. By 2007, ExxonMobil’s former CEO Rex Tillerson recognized that government regulations addressing climate change were becoming more likely and could affect ExxonMobil’s business. In light of those concerns, Mr. Tillerson established a comprehensive system to evaluate how climate regulations might affect the global demand for energy and ExxonMobil’s potential capital investments. Under that system, ExxonMobil used two planning metrics to evaluate two different potential impacts those regulations might have on its business. ExxonMobil used a proxy cost of carbon (“proxy costs”) to quantify the potential impact of climate regulations on projected global energy demand. It also used greenhouse gas costs (“GHG costs”) to estimate the projected costs of regulations imposed directly on the emissions of ExxonMobil’s potential projects in particular jurisdictions. (Tr. 1063:10-1066:12 (R. Tillerson testifying that during his tenure as CEO of ExxonMobil, he developed a system to address climate regulatory risk); Tr. 1023:12-1024:11, 1076:15-1080:13 (R. Tillerson testifying about the two planning metrics); Tr. 401:1-405:3 (D. Rosenthal testifying on same); Tr. 1652:22-1653:12 (W. Colton testifying on same); Tr. 1746:23-1747:24 (T. Eizember testifying on same); Tr. 1086:19-23 (R. Tillerson testifying ExxonMobil began using proxy costs in 2007); DX 628 (emails showing same); Tr. 540:6-20 (R. Bailes testifying ExxonMobil began using GHG costs in 2007); Tr. 3:20-4:1, 74:15-19 (Attorney General conceding ExxonMobil uses two separate cost metrics); Tr. 2115:14-16

(Attorney General does “not dispute, for purposes of its demand projections around the world, Exxon applied a proxy cost.”.)

2. ExxonMobil’s *Outlook for Energy* contains the company’s analysis of global energy demand and likely sources of supply to meet that demand. The *Outlook for Energy* pertains to the entire energy industry, not just ExxonMobil’s operations. In 2007, ExxonMobil started using proxy costs in its demand analysis for the *Outlook for Energy* due to growing global interest in reducing greenhouse gas emissions. ExxonMobil used proxy costs to quantify on a “macro” level the potential impact of climate policies in demand sectors where there was uncertainty about future climate policies. In the transportation sector, it was unnecessary to use proxy costs because ExxonMobil had more concrete information on how climate policies would impact demand, namely in the form of fuel efficiency standards and other metrics. ExxonMobil therefore used these fuel efficiency metrics, which more accurately depressed projected demand in the transportation sector. ExxonMobil senior management used the energy demand projections in the *Outlook for Energy* to set the oil and gas price assumptions (“price bases”) used throughout the company. Proxy costs are therefore embedded within the price bases. ExxonMobil disseminates the price bases in its internal Corporate Plan Dataguide (“Dataguide”), which employees use to prepare budgets, analyze potential investments, and evaluate assets. (Tr. 1080:16-1081:23 (R. Tillerson explaining that the *Outlook for Energy* analyzes global energy demand and supply); Tr. 507:23-508:2 (R. Bailes explaining that the *Outlook for Energy* analyzes the global energy system); Tr. 1747:21-24 (T. Eizember testifying that the *Outlook for Energy* pertains to the entire energy industry, not just ExxonMobil); Tr. 1777:15-1778:8 (T. Onderdonk explaining why ExxonMobil developed proxy costs in 2007); Tr. 1004:14-1005:11 (R. Tillerson testifying on the purpose of proxy costs); Tr. 1778:9-21, 1784:3-16 (T. Onderdonk testifying on same); Tr. 1634:19-

1636:18 (W. Colton testifying on same); Tr. 1786:8-17 (T. Onderdonk testifying on modeling proxy-cost impact to demand); JX 931 (email describing same); DX 659 (2014 proxy cost and energy demand model); Tr. 1796:7-1801:18 (T. Onderdonk testifying on transportation sector demand); DX 657 (spreadsheet describing same); JX 931 (email discussing same); Tr. 1638:8-12 (W. Colton testifying that use of fuel efficiency metrics in transportation sectors suppressed demand more than proxy costs); Tr. 1088:15-1089:7 (R. Tillerson testifying that the *Outlook for Energy* is used to develop the price bases in the Dataguide); Tr. 1009:19-1010:21 (R. Tillerson testifying that price bases are used to evaluate investments and long-term planning); DX 619 at 7-8 (price bases in 2012 Dataguide.)

3. ExxonMobil used GHG costs to estimate on a “micro” level the potential costs that climate regulations might impose directly on the emissions of potential capital projects. The Dataguide instructs project planners to consider whether and how GHG costs might impact the operating expenses of potential long-lived capital investments. The Dataguide provides default assumptions for GHG costs that are a starting point for the analysis, but it also instructs planners to use their judgment about whether those default assumptions are appropriate in a particular case. One reason planners might not use default assumptions is that existing or anticipated local regulations in a particular jurisdiction (so-called “local specifics”) might suggest that another assumption is more appropriate. In such circumstances, planners consult with the GHG cost experts who work at corporate headquarters and regional experts who have knowledge of the local regulatory environment. In Alberta, Canada, for example, Imperial Oil (“IOL”) planners used their local experts’ understanding of Alberta’s climate regulations to determine an appropriate assumption for potential future costs that might be imposed on GHG emissions. Local policy experts provided planners with guidance specific to Alberta’s regulatory framework so planners

could accurately evaluate the projected operating expenses of potential projects in the region. (DX 851 (excerpts of GHG cost guidance); Tr. 548:10-549:13 (R. Bailes testifying on application of GHG cost guidance); Tr. 759:8-14 (J. Iwanika testifying that GHG cost guidance in the Dataguide is a starting point for analysis); Tr. 542:22-543:18, 546:5-24 (R. Bailes testifying on same); Tr. 1096:9-21 (R. Tillerson testifying on same); JX 919 at 37 (2010 GHG cost guidance); Tr. 488:12-490:1, 499:7-500:12, 555:15-20 (R. Bailes testifying on consideration of local specifics in the GHG cost guidance); Tr. 658:22-659:16, 660:3-661:1 (G. Powell testifying on same); Tr. 822:1-19, 827:11-17 (J. Iwanika testifying on same); Tr. 1048:2-19 (R. Tillerson testifying on same); Tr. 852:9-25, 862:10-19 (J. Iwanika testifying on use of local specifics in Alberta); Tr. 659:17-660:2 (G. Powell testifying on same); Tr. 962:11-19 (D. Hoy testifying on Alberta regulation's projected effect on operating expenses); Tr. 861:13-19 (J. Iwanika testifying on same); Tr. 554:25-555:4 (R. Bailes testifying on same); Tr. 912:8-914:15 (D. Hoy testifying on IOL's GHG experts in Alberta); Tr. 853:2-854:25 (J. Iwanika testifying on same); JX 928 (emails showing Alberta planners consulting local GHG experts); Tr. 854:19-855:15 (J. Iwanika testifying on local guidance IOL experts provided); DX 802 (email providing local Alberta GHG guidance).)

4. ExxonMobil consistently uses proxy costs and, where appropriate, GHG costs in its evaluation of new capital projects. When evaluating a potential capital investment, ExxonMobil prepares cash flow models containing the projected economics of the investment. Those models are affected by both proxy costs and GHG costs. Proxy costs influence the price bases, which in turn are used to project future revenue streams in the cash flow models. GHG costs are included, where appropriate, in the operating expenses of the cash flow models to project potential costs a project might bear because of its direct emissions. Both metrics are therefore reflected in the net income projection in the cash flow models. (Tr. 506:19-508:2 (R. Bailes testifying on how proxy

costs are included in evaluating potential investments); Tr. 417:10-24 (D. Rosenthal confirming that the price bases are used to assess every potential investment); Tr. 490:9-20 (R. Bailes testifying that GHG costs are included, where appropriate, in evaluating potential investments); Tr. 1100:2-7 (R. Tillerson testifying on same); DX 634 at 1 (email discussing same); Tr. 1100:9-12 (R. Tillerson confirming both metrics are included in cash flow models for potential investments); Tr. 535:14-536:21 (R. Bailes testifying on same); Tr. 1652:22-1653:4 (W. Colton testifying on same); Tr. 415:19-416:6 (D. Rosenthal testifying on same).)

5. Since at least 2010, ExxonMobil considered aligning the dollar values assigned to proxy costs and GHG costs based on ongoing geopolitical developments indicating that OECD countries might converge on a regulatory approach to stem carbon dioxide emissions in the coming decades. In June 2014, renewed global action to address climate change signaled to ExxonMobil that a universal carbon tax was more likely to be enacted in mature regulatory environments in the longer term. ExxonMobil therefore decided, as a planning assumption, to partially align its proxy cost and GHG cost metrics, but only for OECD countries in the years 2030 and beyond. The two metrics, however, continued to serve different purposes, and the dollar values assigned in the years prior to 2030 remained distinct. (Tr. 514:6-25, 519:16-520:13, 565:12-570:10 (R. Bailes testifying on discussions in 2010 regarding proxy cost and GHG cost alignment); JX 923, JX 926 (emails discussing same); Tr. 620:3-21 (G. Powell explaining why ExxonMobil partially aligned the cost metrics in 2014); Tr. 556:22-557:13, 585:6-586:2 (R. Bailes testifying on same); Tr. 1652:14-1655:14 (W. Colton testifying on same); DX 621 at 31 (2014 Dataguide Appendices describing partial alignment).)

B. ExxonMobil Addressed Requests from Shareholder Proponents Seeking Conceptual, High-Level Information about Climate Risk.

6. In 2013, ExxonMobil received shareholder proposals requesting information about the impact of climate regulations that might be enacted in the future. Natasha Lamb, Managing Director of Arjuna Capital, spearheaded this effort because of her concerns about climate change. Ms. Lamb participated in high-level discussions with ExxonMobil officers about ExxonMobil's use of proxy costs in its demand projections for the *Outlook for Energy*. Afterward, Ms. Lamb asked ExxonMobil to disclose non-proprietary information about whether it used any other tools when assessing potential investments. David Rosenthal, ExxonMobil's then-head of investor relations, agreed to disclose that the "proxy cost of carbon [was] not the only factor [ExxonMobil] consider[ed] in assessing investment opportunities." In light of Ms. Lamb's request, ExxonMobil elected to disclose its use of GHG costs to evaluate investment opportunities. On March 31, 2014, ExxonMobil issued two reports on climate risk, *Energy and Carbon – Managing the Risks* ("Managing the Risks") and *Energy and Climate*, pursuant to the agreement with the shareholders to withdraw their proposals. The evidence, including Ms. Lamb's testimony, established that ExxonMobil engaged in good faith with Ms. Lamb and the other shareholder proponents, and then released the two reports in good faith and without any intent to deceive. (PX 149, PX 382 (shareholder proposals); Tr. 166:20-168:14, 169:3-10 (N. Lamb testifying on subject of requested disclosure); Tr. 322:15-323:20, 326:20-330:3, 425:4-434:17 (D. Rosenthal describing meeting with proponents); PX 130 (presentation discussing *Outlook for Energy*); JX 982 at 2 (letter memorializing ExxonMobil's commitment to providing disclosure on other metrics); Tr. 388:14-391:4 (D. Rosenthal explaining decision to provide GHG cost disclosures); PX 265 (N. Lamb letter withdrawing shareholder proposal); Tr. 332:19-333:12 (D. Rosenthal discussing withdrawal of

second shareholder proposal); Tr. 170:5-18 (N. Lamb testifying ExxonMobil engaged with shareholders in good faith); PX 001 (*Managing the Risks*); PX 002 (*Energy and Climate*).

7. *Managing the Risks* and *Energy and Climate* provided a high-level conceptual description of ExxonMobil's views concerning, and its approach to, managing the impacts of potential future climate regulations. Neither report disclosed proprietary or granular information, and ExxonMobil stated in *Managing the Risks* that it does "not publish the economic bases" used to evaluate investments "due to competitive considerations." ExxonMobil did not disclose in either report the levels at which it set GHG costs. As for proxy costs, both reports included a color-coded map showing the range of proxy cost assumptions it used for the year 2040 across various regions. ExxonMobil cited the *Outlook for Energy* as the source material for this map. In *Energy and Climate*, ExxonMobil stated that it used a "consistent corporate planning basis . . . including the proxy cost of carbon" for all investments. ExxonMobil's witnesses testified credibly that the "consistent corporate planning basis" referred to the price bases used to evaluate investments, not GHG costs or proxy costs. (PX 001 at 16-18, 21 (*Managing the Risks*); PX 002 at 6, 20 (*Energy and Climate*); Tr. 1693:1-1694:1, 1695:22-1696:9 (W. Colton testifying GHG cost disclosures were intended to be high-level); Tr. 1111:22-1112:20 (R. Tillerson testifying on same); Tr. 1645:1-1646:4 (W. Colton testifying ExxonMobil did not disclose how, when, or whether it applied GHG costs to potential capital investments); Tr. 1113:20-1114:11 (R. Tillerson testifying that *Managing the Risks* tied proxy costs to the *Outlook for Energy*); Tr. 442:17-443:11 (D. Rosenthal confirming that color-coded map cites to *Outlook for Energy*); Tr. 1007:23-1008:16 (R. Tillerson testifying that color-coded map referred to proxy costs); Tr. 1661:20-1662:13 (W. Colton testifying on same); JX 912 at 36 (2013 *Outlook for Energy*); Tr. 1009:15-1010:3 (R. Tillerson defining "consistent corporate planning basis"); Tr. 355:7-356:21 (D. Rosenthal defining same).)

II. Multiple Independent Factual Grounds Establish Individually and Collectively That ExxonMobil’s Disclosures about Proxy Costs and GHG Costs Were Not Materially Misleading.

A. Contrary to the Attorney General’s Promises, No Investor Testified to Making an Investment Decision Based on ExxonMobil’s GHG Cost Disclosures, Nor Did They Affect ExxonMobil’s Stock Price or Ratings by Equity Analysts.¹

8. In its pretrial brief and opening statement, the Attorney General promised to prove “the investment community” and a “diverse population of investors” considered ExxonMobil’s disclosures about its GHG cost assumptions to be material to their investment decisions. But none of the witnesses who testified at trial provided testimony that the disclosures significantly altered the total mix of information. The Attorney General’s first witness, Ms. Lamb, is not an investor in ExxonMobil stock. She does not own and has never made recommendations to buy ExxonMobil stock. None of her model portfolios have ever included ExxonMobil stock. Ms. Lamb filed the shareholder proposal that culminated in the publication of *Managing the Risks* on behalf of two ExxonMobil shareholders; neither shareholder was involved in drafting the proposal or appeared at trial. Ms. Lamb also exhibited bias against ExxonMobil by endorsing the Attorney General’s lawsuit as a “day of reckoning” for ExxonMobil on climate change. Ms. Lamb is a serial filer of shareholder proposals, and the co-owner of her company owns ExxonMobil shares for the sole purpose of filing proposals. Ms. Lamb’s testimony was not credible. The Attorney General’s second witness, Michael Garland, who works in the Office of Corporate Governance and Responsible Investment for the New York City Comptroller, does not make investment decisions to buy or sell ExxonMobil stock. Mr. Garland testified that he did not read *Managing the Risks* when it was published, skimmed it in preparation for his deposition, and has never read *Energy and Climate*. Mr. Garland likewise did not read the report ExxonMobil issued in 2018 in response

¹ A discussion of the application of law to these facts can be found in ExxonMobil’s post-trial brief in sections I.A, II.B, II.C, and III.

to the proposal Mr. Garland submitted the previous year. The Attorney General's remaining witness, Roger Read, Senior Energy Analyst for Wells Fargo Securities, is not an investor or portfolio manager. He did not read the reports at issue until a year after their publication. None of these witnesses provided testimony about how the challenged disclosures affected any investment decisions, and no evidence established that any investor considered these disclosures material when making an investment decision or that they significantly altered the total mix of information. (Dkt. No. 403 at 35, Tr. 12:16-13:9, 26:8-11 (Attorney General stating that investors will testify at trial); Tr. 134:2-7, 129:11-130:15 (N. Lamb confirming she does not own, and Arjuna Capital does not hold, ExxonMobil stock); Tr. 87:19-20, 163:16-166:1 (N. Lamb testifying she drafted proposal and that shareholders did not participate in drafting or submitting it); Tr. 138:10-139:1, DX 842 (N. Lamb exhibiting bias against ExxonMobil); Tr. 140:2-8 (N. Lamb testifying to the various shareholder proposals she has filed with ExxonMobil); Tr. 130:16-131:12 (N. Lamb testifying that the co-owner of Arjuna Capital holds ExxonMobil stock for the sole purpose of submitting shareholder proposals); Tr. 201:4-15, 201:20-202:15 (M. Garland testifying he does not make investment decisions and did not read reports); Tr. 218:15-219:11 (M. Garland testifying he did not read the report ExxonMobil issued in response to the shareholder proposal he filed); JX 988 at 14:14-15:4 (R. Read testifying he is an equity analyst); *Id.* at 57:1-16, 59:12-60:15 (R. Read affirming he read disclosures a year after publication and that neither report changed his view of ExxonMobil).)

9. ExxonMobil's stock price did not increase in response to the publication of *Managing the Risks of Energy and Climate*. ExxonMobil's expert economist, Dr. Allen Ferrell, testified credibly to the lack of stock price movement on April 1, 2014, the next trading day after the reports were published. Even if ExxonMobil's stock price had been artificially inflated by the

GHG cost disclosures in those reports, there was no evidence of a valid corrective disclosure associated with a statistically significant decrease in ExxonMobil's stock price. The Attorney General's expert witness, Dr. Eli Bartov, who was not credible, testified to the existence of three alleged corrective disclosure dates. However, two of the three alleged corrective disclosures did not trigger a stock price decline at the academically accepted five-percent level of statistical significance, and none were statistically significant after correcting Dr. Bartov's methodological errors. Moreover, none of the corrective disclosures contained statements made by ExxonMobil acknowledging an error or correcting a previous disclosure. All pertained to regulatory investigations of ExxonMobil announced in the mainstream press. Such announcements constitute bad news in their own right and may independently explain a decrease in stock price, without being "corrective" of a material misrepresentation. The *Los Angeles Times* article announcing an investigation into ExxonMobil by the California Attorney General, the lone alleged corrective disclosure that Dr. Bartov claimed to be associated with a statistically significant decrease in ExxonMobil's stock price, was not corrective of the alleged misrepresentations at issue in this case. As described in that article, the California Attorney General was investigating whether ExxonMobil had misrepresented its knowledge of climate science in the 1980s and 1990s, not anything related to its use of proxy costs and GHG costs. (Tr. 1965:9-1967:13 (A. Ferrell explaining that the two reports did not lead to an inflated stock price); DX 711 at 7-8 (A. Ferrell report discussing the same); Tr. 1212:11-1213:17 (E. Bartov identifying corrective disclosure dates and agreeing that five percent is the academically accepted statistical significance level); Tr. 1970:3-14, 1976:25-1981:5 (A. Ferrell explaining none of the alleged corrective disclosures are statistically significant); DX 711 at 9-20 (A. Ferrell report discussing the same); DX 695, JX 970, PX 311 (alleged corrective disclosures); Tr. 1970:3-1975:1 (A. Ferrell analyzing

significance of alleged corrective disclosures); Tr. 1314:7-16 (E. Bartov agreeing that announcements of regulatory investigations are not good news); JX 970 (*L.A. Times* article); Tr. 1975:23-1976:24, 1980:6-1983:4 (A. Ferrell testifying that *L.A. Times* article was not a corrective disclosure and had no impact on ExxonMobil's stock price).)

10. No equity research analysts mentioned ExxonMobil's GHG cost disclosures in connection with their valuation of ExxonMobil or their recommendation to buy or sell ExxonMobil stock. Dr. Marc Zenner, an ExxonMobil expert witness, identified close to 500 equity analyst reports published about ExxonMobil between February 2014 and 2017. About 94% of these reports did not mention climate-related issues at all, and virtually none discussed ExxonMobil's approach to climate regulatory risk in detail. The only report that did refer to the relevant disclosures lowered ExxonMobil's valuation range because of the headline risk of the since-closed SEC investigation, not because of any corrective factual information regarding the alleged misrepresentations at issue in this case. Moreover, Dr. Zenner testified credibly that none of the 27 equity-analyst and rating-agency reports issued after the Attorney General filed its Complaint against ExxonMobil mentioned proxy costs, GHG costs, or the Attorney General's allegations against ExxonMobil. The Attorney General's expert witness, Peter Boukouzis, who was not credible, used an undisclosed and unreliable methodology to identify a number of reports he claimed showed investor concern for the disclosures at issue. Even were it possible to set aside the flaws in his methodology, Mr. Boukouzis identified only one equity analyst, Roger Read, who had written about proxy costs in any detail. Mr. Read testified that he considered ExxonMobil to be ahead of the curve in pricing climate risk, but that view did not factor into his assessment of ExxonMobil in any way. Mr. Read did not read *Managing the Risks* or *Energy and Climate* until a year after their publication and never discussed these reports in his equity research. Mr. Read

also did not adjust his rating of ExxonMobil following media reports of the regulatory investigations of the company concerning climate regulatory risk. (Tr. 1826:1-1843:22 (M. Zenner describing methodology to analyze reports); DX 712 at 20-24 (M. Zenner report on same); Tr. 1849:4-1850:1 (M. Zenner confirming no analyst reports discussed Attorney General's complaint); Tr. 1489:18-1491:15 (P. Boukouzis discussing methodology); JX 972 (report on same); JX 988 at 134:21-24 (R. Read affirming carbon pricing had no impact on his view of ExxonMobil); *Id.* at 57:1-16, 59:12-60:15 (R. Read confirming he read both reports about a year after their publication and that he never discussed either report in his equity research); *Id.* at 63:3-64:16, 85:8-19 (R. Read's valuation of ExxonMobil unchanged due to investigations); PX 074, JX 977 (R. Read references proxy costs but does not change ExxonMobil's buy rating or target price).)

11. The information ExxonMobil disclosed was too speculative to have significantly altered the total mix of information available to investors. In its *Outlook for Energy* publications and elsewhere, ExxonMobil disclosed that it assigned dollar amounts for proxy costs up to \$60 per ton in 2030 and \$80 per ton in 2040 in OECD countries. Apart from those two data points, ExxonMobil has not disclosed any other proxy cost figure, let alone its complete proxy cost schedules. And the Attorney General has confirmed that assumptions used in the years 2030 and 2040 are the focal point of its case. These two data points are inherently speculative, reflecting the company's planning bases about what may occur in the future. The *Outlook for Energy* itself states that the policies represented by the proxy cost "remain uncertain." ExxonMobil's independent auditor concluded that such cost assumptions represent "speculative" costs, given the "uncertainty in this regulatory area." No reasonable investor would have considered such speculative assumptions about projected costs in 2030 and 2040 to have significantly altered the

total mix of information available. (Tr. 1686:21-25 (Attorney General stating that 2030 and 2040 are the only dates at issue); Tr. 1697:3-1698:8 (W. Colton confirming ExxonMobil never disclosed complete proxy cost schedules); Tr. 1443:8-1444:19 (P. Boukouzis agreeing investors did not have access to full proxy cost figures); Tr. 1004:12-1005:3 (R. Tillerson testifying that proxy costs are speculative); Tr. 1698:9-21, 1699:6-21 (W. Colton testifying that proxy costs are an estimate of what may occur); Tr. 1684:24-169:10 (N. Lamb agreeing ExxonMobil did not provide her with a year-by-year breakdown of its proxy costs); Tr. 169:25-170:4 (N. Lamb agreeing no one knows what the carbon cost will be in 2040 and that other companies use varying carbon cost estimates); JX 912 at 36 (2013 *Outlook for Energy* stating future climate policies “remain uncertain”); DX 672 at 5 (auditor memo).)

B. In the Context of the Trial Evidence, the Terms “Where Appropriate” and “Best Assessment” Are Too Subjective and Open-Ended to Be Materially Misleading.²

12. *Managing the Risks* was the first ExxonMobil publication to disclose the use of GHG costs, which it accurately explained were applied “where appropriate . . . when seeking funding for capital investments.” William Colton, ExxonMobil’s former Vice President of Corporate Strategic Planning, testified credibly that he included the words “where appropriate” to explain that ExxonMobil did not automatically apply GHG costs to every investment under consideration. Whether to apply GHG costs in a particular case was based on ExxonMobil’s judgment about the potential regulatory costs associated with that project. Reflecting that exercise of judgment and discretion, *Managing the Risks* stated that GHG costs were ExxonMobil’s “best assessment of costs associated with potential GHG regulations.” *Managing the Risks* did not describe the factors ExxonMobil considered when determining whether applying GHG costs was

² A discussion of the application of law to these facts can be found in ExxonMobil’s post-trial brief in section I.C.

“appropriate” in a given case. Mr. Colton testified credibly that *Managing the Risks* contained language such as “where appropriate” and “best assessment” to alert readers that ExxonMobil did not disclose how, when, or whether GHG costs would be applied to potential capital investments. (PX 001 at 18, 21; Tr. 369:7-370:2 (D. Rosenthal confirming *Managing the Risks* was the first ExxonMobil report to discuss GHG costs); Tr. 1650:12-1651:13 (W. Colton testifying on same); Tr. 1644:20-1646:4, 1662:14-1664:13 (W. Colton defining “where appropriate”); Tr. 1093:2-1094:4, 1114:12-1116:10 (R. Tillerson defining same); DX 637 (email including “where appropriate” revision); Tr. 1647:2-1648:19 (W. Colton explaining “best assessment” holds same meaning as “where appropriate”).)

C. ExxonMobil’s GHG Cost Assumptions Did Not Affect the Company’s Income Statement, Balance Sheet, or Other Financial Disclosures.³

13. Internal cash flow models used to assess potential investment opportunities do not impact ExxonMobil’s financial statements. Those models are used to evaluate unfunded capital investments, many of which ExxonMobil will never pursue or fund. They therefore do not affect ExxonMobil’s income statement, balance sheet, or other financial disclosures. Moreover, these cash flow models were themselves never disclosed publicly, including during meetings with investors or equity analysts. Thus, these internal cash flow models could not have been material to any investor’s decision to invest in ExxonMobil stock. The evidence also established that ExxonMobil management had no incentive to deceive itself about the economics of its potential investments by using anything other than what it considered the best possible assumptions in its models. In any event, the GHG costs included in these models, like other operating costs, have never been a determining factor in ExxonMobil’s decision to pursue a potential investment. In his

³ A discussion of the application of law to these facts can be found in ExxonMobil’s post-trial brief in sections I.B and II.A.

ten years as CEO, Mr. Tillerson testified credibly that GHG costs had never been material to a decision about a potential capital investment. (Tr. 416:13-417:17, 421:8-16 (D. Rosenthal explaining that unfunded projects do not affect books and records); Tr. 1100:24-1101:9 (R. Tillerson testifying that cash flows for unfunded projects do not impact books and records); JX 988 at 45:6-47:13 (R. Read confirming he has no access to ExxonMobil's internal cash flow spreadsheets); Tr. 1444:11-19 (P. Boukouzis conceding that investors would not have access to ExxonMobil's internal cash flow spreadsheets); Tr. 1102:5-12 (R. Tillerson testifying that, during his tenure, GHG costs were not a determining factor in any investment decisions); Tr. 1097:1-1098:7 (R. Tillerson testifying ExxonMobil wanted the best assessment for potential investments and had no incentive to deceive itself); Tr. 446:10-16 (D. Rosenthal testifying on same); Tr. 518:1-10 (R. Bailes testifying on same); Tr. 1516:13-17 (P. Boukouzis conceding ExxonMobil had no incentive to understate the projected expenses of potential investments).)

14. ExxonMobil did not represent that it applied GHG costs to its impairment assessments. ExxonMobil has controls in place that continuously monitor the energy industry and performance of assets to identify potential impairment triggers. In 2015, ExxonMobil assessed whether an impairment trigger existed for Mobile Bay—a mature asset ExxonMobil recently sold—and determined there was no trigger. PricewaterhouseCoopers (“PwC”), ExxonMobil's independent auditor, took no exception to the determination, as reported in ExxonMobil's 2015 10-K, that no trigger event had occurred. In the absence of a trigger, ExxonMobil was not required to perform additional analyses to determine whether the asset was impaired. The Attorney General's expert Dr. Bartov agreed that if no triggers are identified at step one of the analysis, the impairment analysis is terminated and no impairment is taken. Even if an impairment had been indicated for Mobile Bay in 2015, the alleged impairment would have been immaterial and fallen

well below the relevant materiality thresholds PwC established. ExxonMobil's independent auditor testified that PwC could have issued an unqualified opinion in 2015, even if the impairment was required but not taken. ExxonMobil's market capitalization was approximately \$336 billion in 2015. Even assuming an impairment of \$320 to \$478 million for Mobile Bay, it represented between 0.09 and 0.14 percent of ExxonMobil's total market capitalization. Dr. Bartov conceded that the impairment would have been significantly less than one percent of ExxonMobil's market capitalization in 2015. (Tr. 1117:13-17 (R. Tillerson testifying ExxonMobil did not represent it applied GHG costs to impairment assessments); Tr. 1539:14-1540:15, 1554:1-11, 1557:8-1558:17 (R. Auter testifying to ExxonMobil's 2015 impairment assessment); JX 906 at 59 (ExxonMobil's 2015 Form 10-K confirming there was no trigger event); Tr. 1247:19-25 (E. Bartov agreeing that if there is no trigger at step one, the impairment analysis stops); Tr. 1580:3-1582:25 (R. Auter defining impairment materiality threshold and that PwC could have issued unqualified opinion); JX 906 at 38, 41 (ExxonMobil's 2015 Form 10-K showing market capitalization of approximately \$336 billion); JX 973 at 7 (E. Bartov's report alleging Mobile Bay's 2015 impairment loss would have been \$320 million to \$478 million); Tr. 1345:16-1346:8 (E. Bartov testifying alleged impairment would have been much less than one percent of ExxonMobil's market capitalization).)

15. ExxonMobil did not represent that it incorporated GHG costs in its internal reserves estimates, which are not publicly disclosed in any event. ExxonMobil discloses its proved reserves in accordance with SEC regulations. When estimating proved reserves, companies must use only "existing economic conditions, operating methods, and government regulations." Projected future GHG costs cannot be included under that regulation. In addition to proved SEC reserves, ExxonMobil also discloses its total resource base, but the quantities of oil and gas included in that estimate may be sub-commercial. Because inclusion in the resource base does not require that

quantities are currently commercially viable, the application of GHG costs would not cause any quantity of oil and gas to be excluded from or included in the resource base. (Tr. 1117:20-24 (R. Tillerson testifying ExxonMobil did not represent it applied GHG costs to its reserves or resource base); Tr. 736:7-16 (K. Bannister testifying on SEC proved reserves and company reserves disclosures); 17 C.F.R. § 210.4-10(a)(22) (SEC definition of proved reserves); Tr. 737:5-22 (K. Bannister testifying that existing conditions are applied to estimate proved reserves); Tr. 740:11-25 (K. Bannister testifying on reclassification process of reserves); Tr. 1119:17-22 (R. Tillerson testifying on same).)

CONCLUSION

The foregoing findings of fact demonstrate that the New York Attorney General has not established that ExxonMobil's disclosures about its GHG costs and proxy costs were materially misleading. Whether considered individually or collectively, multiple factual findings establish that the disclosures were not materially misleading. Accordingly, ExxonMobil urges this Court to enter findings concluding that NYAG has not offered sufficient evidence to establish any material misstatement or to support any of the theories of wrongdoing alleged in the Complaint.

Dated: November 18, 2019
New York, NY

Respectfully submitted,

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Certification of Compliance

Pursuant to the October 8, 2019 Court Notice (NYSCEF Dkt. 423), I hereby certify that this proposed findings of fact is no longer than 25 pages, exclusive of the caption and signature block.

Dated: November 18, 2019
New York, New York

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