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VIA E-FILING AND HAND DELIVERY

The Honorable Barry R. Ostrager  
Supreme Court, New York County  
60 Centre Street, Room 341  
New York, NY 10007

Re: *People of the State of New York, by Eric T. Schneiderman, Attorney General of the State of New York, v. PricewaterhouseCoopers, LLP and Exxon Mobil Corporation*,  
Index No. 451962/2016, Motion Seq. No. 2

Dear Justice Ostrager:

We write on behalf of the Office of the Attorney General (“OAG”) in reply to Exxon Mobil Corporation’s (“Exxon”) March 16<sup>th</sup> letter. Exxon’s letter demonstrates, more dramatically than ever, the company’s ongoing refusal to comply in good faith with OAG’s investigative subpoena dated November 4, 2015 and with this Court’s orders directing compliance with the subpoena.

Exxon’s letter is further evidence of its pattern and practice of hiding the ball in response to OAG’s investigation. First, Exxon fails to answer any of the open questions regarding its preservation, collection, and production of documents from the company’s management committee, Board, and other top executives (the “Management Documents”).<sup>1</sup> Second, Exxon concedes that it failed to preserve all documents from an alias email account used by Rex Tillerson, Exxon’s former Chairman and CEO. Notably, Exxon is silent on whether such preservation issues extended to the dozens of other email accounts identified by OAG that were used by the custodians of the Management Documents. Finally, Exxon’s most recent supplemental production on March 18<sup>th</sup> raises additional concerns about the preservation, collection and production of these documents.

In spite of Exxon’s assurances to this Court that it would move “heaven and earth” to comply with the subpoena, Exxon’s conduct outside this Court reflects a pattern of stonewalling and disingenuousness, requiring OAG to seek judicial intervention at every turn to force Exxon

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<sup>1</sup> These questions are listed at page 4 of OAG’s March 13, 2017 letter to the Court, and seek, *inter alia*, explanations for the small volume of Management Documents Exxon has produced and the differences in the collection process for these documents as compared to other documents.

to comply with its obligations.<sup>2</sup> Given the risk of further preservation failures and/or spoliation of documents, OAG now seeks more rigorous remedies than it requested in its March 13<sup>th</sup> letter to the Court, including broad preservation holds, re-production of the Management Documents in the format in which they were originally kept, and a comprehensive report from Exxon explaining the extent of its non-preservation and its efforts to recover lost documents.<sup>3</sup>

***A. Exxon Has Failed to Produce All Responsive Management Documents and Continues to Evade Questions About the Preservation, Collection, and Production of These Documents.***

Despite Exxon's representations and assurances to this Court and OAG, Exxon's conduct reflects an ongoing effort to avoid the production of the Management Documents.

First, Exxon has deliberately delayed the production of the Management Documents. Although OAG repeatedly requested, as early as December 2015, that Exxon prioritize the production of the Management Documents, Exxon placed these highly relevant documents at the tail end of its production queue and did not begin to produce any of these documents until December 31, 2016, after OAG filed its November 14, 2016 motion to compel. Only after being hauled before this Court did Exxon expressly acknowledge that it "owed" such Management Documents to OAG and commit to the Court to produce such documents by January 31, 2017.

Second, Exxon has failed to complete its production of these documents by the Court-ordered deadline. Between December 31, 2016 and the Court-ordered production deadline of January 31, 2017, Exxon produced *fewer than 700 Management Documents, including only approximately 160 emails*, out of the over 420,000 documents produced to date in response to the Subpoena. Despite its minimal production, Exxon falsely claimed that it had substantially completed its production in response to the Subpoena. It was only after OAG questioned the small volume of Management Documents and the different manner in which they were produced<sup>4</sup> that Exxon acknowledged (three weeks later) that its production was not complete and that it would be producing additional Management Documents on March 17, 2017, more than six weeks after the Court-ordered production deadline. It is particularly telling that Exxon produced an additional 394 documents from Mr. Tillerson on March 18, 2017 after assuring OAG that its production of 291 documents from his files six weeks earlier amounted to "substantial completion" of its obligations in that regard.

Third, Exxon inexplicably has collected and produced the Management Documents differently than the remainder of its production, which conceals the true source of these

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<sup>2</sup> This is best evidenced by Exxon's improper attempt to enjoin OAG's enforcement of the Subpoena through an unprecedented attack on OAG's authority in federal district court in Texas, an effort which Exxon initially failed to disclose to this Court. Even after OAG disclosed Exxon's gamesmanship and forum-shopping to this Court, Exxon has pointedly refused to submit its purported constitutional claims advanced in Texas to the scrutiny of this Court, claims which Exxon concedes this Court has retained jurisdiction over from the outset.

<sup>3</sup> OAG limits this reply to issues relevant to Exxon's non-compliance, and does not respond in detail to Exxon's attempt to argue the merits of OAG's underlying investigation into the potentially misleading nature of Exxon's public statements regarding the company's risk management policies relating to climate change.

<sup>4</sup> See February 17, 2017 OAG letter to Exxon's counsel, attached as Exhibit 1.

documents, in violation of the Subpoena's instructions requiring that documents be produced with underlying information about the source of the document. Instead, Exxon appears to have placed the Management Documents in electronic folders that were created as part of the collection process, obscuring their actual source locations in Exxon's computer systems.<sup>5</sup> In addition, rather than produce any emails in the original format in which they were kept in the ordinary course of Exxon's business, Exxon has converted such documents from their native format to imaged files which lack critical metadata such as actual email addresses. Exxon's practices prevent OAG from understanding Exxon's internal organization and retention of electronic files, thereby hindering OAG as it attempts to verify Exxon's compliance with the Subpoena. As just one example, Exxon's impermissible altering of the native format of the email communications without including the metadata has made it more difficult for OAG to determine with certainty whether any particular email address corresponds to a particular individual, as most recently evidenced by OAG's discovery of Mr. Tillerson's use of an alias email account.<sup>6</sup>

Finally, despite its obligation to identify all sources of Management Documents, and to preserve, collect, and produce responsive documents from such sources as part of its obligation to respond to the Subpoena, Exxon has failed to confirm that it has done so. Specifically, Exxon will not confirm whether documents from dozens of email accounts identified by OAG, which are now known to have been used for sending and receiving Management Documents, and which include email accounts assigned to the managers' administrative assistants and secondary email accounts used by the managers themselves,<sup>7</sup> were actually preserved, collected and produced. Exxon blithely dismisses OAG's inquiry as an "impermissible attempt to expand the number of custodians," without confirming whether documents from these sources were preserved, collected and produced, even though they are known sources of Management Documents. Exxon's assertion of additional custodians is completely at odds with Exxon's own claim that it employed the required procedures in connection with identifying and searching all sources of the Management Documents. (Exxon letter at p. 2).<sup>8</sup>

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<sup>5</sup> To illustrate this problem, attached as Exhibit 3 is a list of the 30 purpose-made folders created as "sources" for the Management Documents, accompanied by the list of 297 *actual* source folder locations, containing detailed subject-matter information and revealing intricate internal-organizational distinctions, disclosed in Exxon's metadata for one *single* other custodian, Peter Trelenberg.

<sup>6</sup> *Sexton v. Lecavalier*, 11 F. Supp. 3d 439, 442 (S.D.N.Y. 2014) (with respect to request for e-mail, requiring party to produce "a functionally native format that preserves relevant metadata"); *Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L.*, 2006 U.S. Dist. LEXIS 10838, at \*8-9 (N.D. Ill. Mar. 8, 2006) (requiring production of native files per party's request; "it is clear that the TIFF documents do not contain all of the relevant, nonprivileged information contained in the designated electronic media . . . unlike the original electronic media, the TIFF documents do not contain information such as the creation and modification dates of a document, e-mail attachments and recipients, and metadata").

<sup>7</sup> See March 12, 2017 OAG email to Exxon's counsel, attached as Exhibit 2.

<sup>8</sup> Exxon previously has represented to OAG and the Court that it interviewed relevant custodians to determine the location of all potentially responsive documents in those custodians' possession, custody or control. In its letter to the Court, Exxon fails to confirm that it followed this process for the custodians of the Management Documents.

***B. Exxon's Letter Reveals Additional Preservation Failures and Attempts to Shift Responsibility for Such Failures to OAG.***

Exxon avoids addressing these broader problems with its production of Management Documents by focusing its letter almost entirely on the Wayne Tracker alias email account used by Mr. Tillerson. In doing so, Exxon reveals, for the first time, yet another significant failure in its compliance obligations, and makes a number of misstatements.

First, Exxon admits that its “automatic” preservation procedures *did not capture* files associated with Mr. Tillerson’s alias e-mail account, and that Exxon *still does not know* if emails located in that account were in fact preserved after it received the Subpoena. (Exxon Letter p. 2). This fact alone, which Exxon revealed to OAG for the first time in Exxon’s letter to the Court, requires the Court’s immediate intervention.

Second, Exxon’s vague description of the failure of its systems to “automatically” capture the Wayne Tracker emails within its preservation hold raises questions as to whether the preservation, collection, and/or production of other responsive documents was also compromised. Specifically, Exxon’s carefully-chosen language implies, without specifically acknowledging, that the Wayne Tracker emails were housed on one or more secondary hardware systems that are or were physically separated from the primary hardware systems from which the bulk of Exxon’s production appears to have originated. Without further explanation from Exxon, there is no reason to believe that such separate hardware systems would have contained *only* Mr. Tillerson’s alias emails. Indeed, this may explain why Exxon has concealed the source locations of Management Documents, as described above. Exxon should be compelled to clarify whether the Wayne Tracker emails were stored on separate hardware, whether other custodians’ documents were also stored on such separate hardware and, in any event, whether those other documents were also subject to preservation failures.

Third, Exxon falsely claims that OAG did not raise the issue of the Wayne Tracker email account with Exxon prior to sending its March 13, 2017 letter to the Court. (Exxon Letter pp. 1, 3). As Exxon well knows, OAG specifically inquired into the preservation, collection, and production of documents from that particular account in its March 12, 2017 email correspondence to Exxon.<sup>9</sup> In that correspondence, OAG requested specific information relating to both Exxon’s forthcoming supplemental document production after the Court-ordered deadline, and the preservation, collection, and production of Management Documents originating in the email accounts OAG had identified as belonging to relevant assistants or being used by the managers themselves, including the Wayne Tracker email account.<sup>10</sup> Receiving no timely response to its request for readily-available information and concerned that a substantial risk of document loss and/or spoliation existed—a justifiable concern, as we now know—OAG sought

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<sup>9</sup> Remarkably, Exxon acknowledges OAG’s March 12, 2017 correspondence in a later footnote, but fails to inform the Court that this correspondence specifically requested details concerning the Wayne Tracker account, belying Exxon’s unfounded claim of surprise.

<sup>10</sup> Several of the identified email addresses are secondary email addresses for identified management-committee custodians, utilized to advise and seek approval from those custodians regarding ongoing or proposed corporate activities.

judicial relief.

Finally, Exxon attempts to shift blame for its inexcusable failure to disclose the true identity of the Wayne Tracker account holder to OAG, arguing that because some of the Wayne Tracker emails were incidentally produced within documents from other custodians, OAG was somehow put on fair notice of Exxon's practices relating to alias accounts. This suggestion is absurd, and ignores the serious consequences of Exxon's nondisclosure that have now been made plain. Instead of addressing the company's now-admitted preservation problem relating to the Wayne Tracker email account at the outset, Exxon is apparently only now beginning to address it sixteen months after the issuance of the Subpoena. Moreover, tellingly, Exxon never states that its failure to preserve documents from Mr. Tillerson's "secondary account" is an isolated occurrence.<sup>11</sup>

***C. Exxon's Supplemental Production on March 18, 2017 Raises Even More Concerns About the Preservation, Collection and Production of the Management Documents.***

Exxon argues that OAG's letter was premature, because Exxon had promised to produce additional Management Documents by March 17, 2017. Given Exxon's prior concealment of details concerning those documents, and its persistent and ongoing refusal to answer basic questions about their preservation, collection, and production, OAG was compelled to seek the Court's assistance. Having now received this production—a day late, and outside of business hours<sup>12</sup>—OAG is even more concerned even after only the most preliminary review.

First, Exxon's supplemental production, although still incongruously small in comparison to the overall production, is notably larger with respect to some custodians than the production Exxon had previously declared "substantially complete." In addition to the increase in Mr. Tillerson's documents noted above, similar disparities exist with respect to two other management custodians.<sup>13</sup> At the same time, the supplemental production contains *no new*

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<sup>11</sup> In stark contrast to the company's unwillingness to provide OAG or the Court with timely answers to basic questions about its production, Exxon offered a series of purported explanations to the press immediately after OAG filed its letter with the Court. Specifically, Exxon's corporate spokesperson has falsely claimed to the press that Exxon had "made clear" that Mr. Tillerson used the Wayne Tracker alias email account, and has contended that OAG should have discovered the alias account on its own despite Exxon's non-disclosure.

<sup>12</sup> Exxon's counsel delivered a labeled CD containing the supplemental production to OAG on Friday, March 17, 2017 at approximately 4:15 p.m.. After OAG had already loaded this data to its IT system, revealing an approximate document count of about 1,000 documents, Exxon's counsel telephoned and emailed OAG to state that the production had been made in error. Relying on a representation by Exxon's counsel that OAG was "not entitled" to the documents on the CD, OAG agreed to return the CD without viewing the documents, with the instruction to Exxon that the documents on the mistakenly-delivered CD should be preserved. OAG received a CD containing the "correct" documents around 1 p.m. on Saturday, March 18, 2017. The second CD contained a nearly-identical number of documents as the "incorrect" CD to which OAG was purportedly "not entitled."

<sup>13</sup> In Exxon's first nineteen productions of documents, 291 documents were produced from Mr. Tillerson's custody, 167 from Mr. Dolan's custody and 99 from Mr. Williams' custody. In contrast, in Exxon's twentieth production, delivered March 18<sup>th</sup>, 394 documents were produced from Mr. Tillerson's custody, 241 from Mr. Dolan's custody and 262 from Mr. Williams' custody.

*documents at all* for two other key management custodians.<sup>14</sup>

Second, Exxon has *continued* to produce all Management Documents from newly-created, purpose-made source folders, instead of revealing the actual source locations of the documents in Exxon's system. Indeed, more than half of the Management Documents in the supplemental production list an Exxon information-technology employee, and not any of the executives themselves, as the source custodian.

Third, Exxon has failed to produce Management Documents from critical time periods when Exxon is known to have been formulating and publicizing key policies and related representations regarding the company's resilience to the impacts of climate change and climate change regulations.<sup>15</sup>

Finally, even with its March 18<sup>th</sup> production, Exxon has failed to explain how these additional documents were identified, collected, or produced, or why they were not timely produced. Moreover, Exxon has not provided any assurance (and likely cannot) that this latest untimely production now completes its production of the Management Documents.

***D. OAG Requests Additional Remedies to Address Exxon's Confirmed Non-Compliance with the Subpoena.***

Exxon's failure to confirm the preservation of known sources of the Management Documents, its continuing refusal to provide information explaining significant deficiencies in its production of such documents, and its revelation that it still does not know what documents it preserved, collected, and produced from any secondary email accounts, including those of Mr. Tillerson, all require this Court's intervention. OAG respectfully requests that at the upcoming conference, the Court order the following relief in addition to the relief requested in OAG's March 13<sup>th</sup> letter, to mitigate any further risk of non-preservation and/or spoliation of responsive documents:<sup>16</sup>

- 1) The production of all remaining Management Documents by a date certain;
- 2) An immediate and verifiable preservation hold on all documents in the custody of any

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<sup>14</sup> No additional documents were produced from the custody of Mr. Woods, the current CEO, or Mr. Raymond, the CEO prior to Mr. Tillerson, in Exxon's twentieth production, delivered March 18th. Only 15 documents total have been produced from Mr. Woods' custody and only 7 documents have been produced from Mr. Raymond's custody.

<sup>15</sup> For example, there are just 20 documents from Mr. Tillerson's custody from the period January 2014 through May 2014, which spans the time period where the company issued its two climate change-related public reports in response to shareholder proposals, published its Form 10-K Annual Report, sent its Notice of Annual Meeting and Proxy Statement and held its Annual Shareholder meeting, very few of which relate to these important company disclosures and none of which are authored or prepared by Mr. Tillerson. Most notably, during that same time span in 2016, when Exxon, and Mr. Tillerson specifically, made several public statements about how the company incorporates the use of a proxy cost of carbon into its business operations, just 5 documents from Mr. Tillerson's custody were produced, none of them pertinent to those public disclosures.

<sup>16</sup> OAG further reserves all rights relating to additional motion practice concerning Exxon's non-compliance with the Subpoena.

individuals (including the holders of the 34 email accounts identified by OAG)<sup>17</sup> or shared locations, employed or utilized, respectively, by Exxon's management committee, Board, other top executives, or legal department;

- 3) An immediate and verifiable preservation hold on all servers and backup tapes that may contain responsive Management Documents, including any backup or alternative copies of such documents or information relating to the retention and/or deletion of such documents;
- 4) The immediate re-production of all Management Documents in native format as they were maintained in the ordinary course of Exxon's business and with the underlying source information; and
- 5) A complete report by Exxon to this Court that (i) sets forth the extent of any non-preservation of responsive documents; (ii) identifies whether any such documents are capable of being recovered; and (iii) recovers any such documents for production to the extent possible.

Thank you for Your Honor's consideration of this submission.

Respectfully submitted,

/s

John Oleske

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<sup>17</sup> This hold should include any other executive assistants to managers or board members. For example, in the March 18th production, a document revealed the identity of Malcolm A. Farrant, yet another executive assistant to Mr. Tillerson who was not previously identified on Exxon's list of preserved custodians.