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VIA HAND DELIVERY
Honorable Barry R. Ostrager
Supreme Court, New York County
60 Centre Street, Room 629
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 ExxonMobil Corporation*, Index No. 451962/2016, Motion Seq. No. 2

Dear Justice Ostrager:

We write to follow-up on Your Honor's directive at the November 21, 2016 conference that the parties agree on a production schedule for Exxon Mobil Corporation ("Exxon") to complete its production of documents in response to the investigatory subpoena issued by the Office of the Attorney General ("OAG") on November 4, 2015 (the "Subpoena").

Although the parties have agreed in principle on a production schedule,[1] there is a fundamental disagreement between the parties regarding the parameters of what constitutes a reasonable production. The process by which Exxon has proposed to complete its production of responsive documents is neither reasonable nor sufficient to constitute a complete production under the Subpoena, and constitutes a basic failure to meet its obligation to identify, collect, and produce responsive documents for the three reasons set forth below.

First, despite OAG's identification of numerous key categories of documents that were missing from Exxon's production, Exxon continues to insist on producing only those documents collected from a select group of document custodians using search terms that OAG, based on its

[1] The parties have agreed that pending OAG's review of Exxon's production to date and privilege logs, it will require no further production in response to Request Nos. 1, 2, 6, and 7 at this time. In addition, the parties have agreed that Exxon will complete its production in response to Request Nos. 3, 4, and 5 by December 31, 2016, and that Exxon will complete its production in response to Request Nos. 8, 9, 10, and 11 by January 31, 2017. OAG initially proposed (i) December 9, 2016 for Request Nos. 3 and 4, (ii) December 16, 2016 for Request No. 5, (iii) January 16, 2017 for Request Nos. 8-11, and (iv) January 31, 2017 for any remaining responsive documents, but Exxon rejected that schedule.

review of the documents Exxon already produced, repeatedly informed Exxon are inadequate.[2] The use of document custodians and search terms is a means of facilitating the process of responding to the Subpoena, but does not relieve Exxon of its obligation to identify, collect and produce all responsive documents. See Skyline Steel, LLC v. Pilepro, LLC, 101 F. Supp. 3d 394, 410 (S.D.N.Y. 2015) ("[C]ounsel has an obligation to take 'affirmative steps' to ensure that 'all sources of discoverable information are identified and searched.'") (quoting Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432 (S.D.N.Y. 2004)). Rather than drawing on its knowledge of internal company processes and terminology to identify and produce relevant documents, Exxon instead continues to insist on producing from a select group of custodians using search terms it has been advised repeatedly are inadequate, which results in significant gaps in the production of responsive documents. A few examples follow:

- Proxy cost documents: Although Exxon has publicly stated that it integrates the impact of climate change into its business by using a proxy cost of carbon, representing the costs that potential carbon regulation will likely impose on its capital investments, its production does not include documents sufficient to show: (1) its internal policies and procedures governing the manner in which proxy costs are applied; (2) how these policies and procedures have been applied to specific oil and gas projects;[3] and (3) how this process has collaterally affected Exxon's valuation, accounting, and reporting of its oil and gas assets and liabilities.

- Reserve documents: Although Exxon has publicly stated that it does not believe that its oil and gas reserves will be stranded due to climate change, Exxon has produced fewer than 1,200 documents (of the total of over 214,000 documents it has produced) from reserve-related custodians. In particular, OAG has repeatedly requested six categories of documents related to both climate change and reserves (or other oil and gas assets) for over five months: (1) the impact of carbon regulation on Exxon's oil and gas reserves; (2) the impact of climate change on Exxon's reserve replacement ratio; (3) potential stranded and/or impaired assets resulting from carbon regulations; (4) Exxon's CEO's statement that most of the company's projects are either too short-term or too large for the cost of carbon to affect its decision making; (5) the rate at which Exxon's proved reserves will be utilized, as described in its climate change report entitled *Energy and Carbon – Managing the Risks*; and (6) the likelihood of low-carbon-emission scenarios. Even though all of these are categories are clearly responsive to the Subpoena, Exxon has refused to confirm that it will produce such documents.

- Databases: Although OAG has identified a number of Exxon databases that contain relevant and responsive information, including its reserve and emissions

[2] See, e.g., OAG letters to counsel for Exxon dated June 24, 2016; July 22, 2016; Sept. 6, 2016; Oct. 14, 2016; and Nov. 1, 2016. Each of these letters both identified key categories of documents for production and informed Exxon that its existing search terms were not sufficient with respect to such categories.

[3] When OAG suggested that Exxon may be able to proceed by prioritizing certain categories of oil and gas projects (such as tar sands, offshore, or Artic projects), Exxon responded that it would not even engage in such a discussion prior to completing production from the remaining agreed-upon custodians.

databases, Exxon has not searched such databases for responsive information or produced relevant reports from such databases.

- Shared Folders: Exxon has not collected documents from known repositories that are very likely to contain relevant and responsive documents. For example, Exxon has not produced documents from shared folders (i.e. folders that can be accessed by multiple individuals) that appear to concern the application of the proxy cost of carbon to specific oil and gas projects.

Second, the list of custodians from whom Exxon is collecting documents is inadequate. Exxon has attempted to shift the burden of identifying sources of relevant documents to OAG by demanding that OAG identify additional custodians. This is improper, particularly given that OAG has already identified specific categories of documents that are missing from the production. It is Exxon's responsibility to determine where those documents are maintained at the company. Further, counsel for Exxon has failed to interview many of the remaining agreed-upon custodians, in addition to other individuals counsel previously identified as having relevant and responsive documents, regarding the substance of their work, calling into question how Exxon can possibly assert that the custodians it has identified are sufficient to complete production.[4]

Third, the search terms that Exxon is currently using—the preliminary search terms that the parties initially agreed upon one month after the Subpoena was issued—are inadequate. When agreeing to the preliminary search term list, OAG told Exxon that other terms may be needed in the future. At the time, OAG had yet to receive or review any Exxon documents. Since then, despite OAG's identification of numerous deficiencies in Exxon's subsequent productions and repeated requests for Exxon to supplement its search terms to address such deficiencies, Exxon has refused to update these preliminary search terms. For example, during the course of reviewing proxy cost-related documents, OAG recognized (as Exxon certainly should have) that Exxon uses certain terms to describe this concept that are not captured by the preliminary search term list. After repeatedly refusing to supplement its search terms, Exxon agreed to add just *one* additional term from OAG's proposed search terms ("proxy cost"), and only on the condition that OAG agree that no additional supplemental search terms are necessary. Further, while Exxon has produced documents from certain reserve-related custodians, it has refused to craft appropriate search terms to address the impact of climate change on its reserves (such as terms related to the six categories described in the second bullet point above), creating a mismatch between terms and custodians that has resulted in very few documents being produced from certain custodians. That is simply not an appropriate way for Exxon to proceed.[5]

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[4] See Crown Castle USA, Inc. v. Fred A. Nudd Corp., No. 05-CV-6163T, 2010 U.S. Dist. LEXIS 32982, at *35 (W.D.N.Y. Mar. 31, 2010) (outside counsel's deference to in-house counsel's employee interviews insufficient to meet obligations to identify responsive documents).

[5] See William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 136 (S.D.N.Y. 2009) ("[W]here counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI's custodians as to the words and abbreviations they use, and the

In addition to the above process deficiencies, Exxon refuses to produce complete, unredacted copies of otherwise responsive documents. To date, Exxon has redacted approximately 3,500 documents on the ground that portions of the documents are non-responsive. For example, Exxon entirely redacted a six-page document except for one row of a chart, which reads, in its entirety, "Carbon Capture & Sequestration | Syncrude [a major oil sands project] | Syncrude | Increasing regulatory focus on GHG."[6] This is inappropriate as a matter of law.[7] In response to OAG's request that Exxon produce these documents without redactions or justify the redactions, Exxon took the incredible position that it did not have the burden of justifying its redactions—a position that is entirely unsupported. See O'Donnell v. Donadio, 259 A.D.2d 251, 252 (1st Dep't 1999) (holding that party redacting documents has burden of proving that such redactions are proper).[8]

Finally, Exxon continues to insist that it make rolling productions only once a month and provide privilege logs three months after each production, despite OAG's repeated requests that Exxon make weekly productions of responsive documents and privilege logs of any withheld documents two weeks after the documents are produced.[9] A weekly production schedule and bi-weekly privilege log schedule would allow OAG to review Exxon's productions and privilege logs in real time so that OAG can identify any deficiencies and request timely corrections from

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proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of 'false positives.'").

[6] The Bates number of this document is EMC 001107171.

[7] See Jewels v. Casner, No. 12-cv-1895 (KAM)(SLT), 2016 U.S. Dist. LEXIS 66405, at *12-13 (E.D.N.Y. May 20, 2016) (holding that there was no authority that a party had the "right to redact from admittedly responsive and relevant documents information based on that party's unilateral determinations of relevancy" and that "courts in this circuit have often rejected defendants' requests for redaction of irrelevant text within relevant documents"); see also id. at *15 (holding that unilateral redactions were improper because they deprived the requesting party of context); John Wiley & Sons, Inc. v. Book Dog Books, LLC, 298 F.R.D. 184, 186 (S.D.N.Y. 2014) ("redactions of portions of a document are normally impermissible unless the redactions are based on a legal privilege"); In re State Street Bank & Trust Co. Fixed Income Funds Invs. Litig., No. 08 Civ. 0333 (RJH) (DFE), 2009 U.S. Dist. LEXIS 34967, at *6 (S.D.N.Y. Apr. 8, 2009) (redactions for non-responsiveness "breed suspicions" and "may deprive the reader of context").

[8] During the meet and confer process, Exxon relied on several cases to support its redaction of documents based on lack of responsiveness. In those cases, the redactions were based on privilege or specific legally-applicable privacy considerations, or the court held nothing more than that irrelevant data need not be produced without discussing redactions of otherwise relevant documents. See Ohnmacht v. N.Y., 889 N.Y.S.2d 506, at *2 (Ct. Cl. 2009) (discussing public interest privilege, not responsiveness-related redactions); 425 Park Ave. Co. v. Fin. Adm'r of the City of N.Y., 69 N.Y.2d 645, 648 (1986) (not discussing redactions, but rather holding that irrelevant data did not have to be produced); Ferolito v. Arizona Beverages USA, LLC, 990 N.Y.S.2d 218, 220 (2d Dep't 2014) (concerning potential redactions for trade secrets, not responsiveness); Neuman v. Frank, 919 N.Y.S.2d 644, 649 (4th Dep't 2011) (concerning potential redactions of tax returns and cell phone records for privacy and confidentiality reasons, not simply responsiveness); In re AutoHop Litig., No. 12-CV-4155 (LTS)(KNF), 2014 U.S. Dist. LEXIS 155975 (S.D.N.Y. Nov. 3, 2014) (reasoning concerned redaction of "sensitive," not simply irrelevant information); N.Y. Times Co. v. Gonzales, 459 F.3d 160, 169 (2d Cir. 2006) (concerning redaction of reporters' sources for confidentiality reasons, not relevance).

[9] Exxon agreed to a similar schedule with regard to the production of the documents responsive to OAG's subpoena to Exxon's independent auditor, PricewaterhouseCoopers, LLC.

Exxon. Exxon's monthly production schedule—in response to a Subpoena issued over one year ago—results in unnecessary and entirely avoidable delay to OAG's investigation.

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Accordingly, OAG respectfully requests the Court to order Exxon to (i) ensure "all sources of discoverable information are identified and searched," including by adding document custodians, supplementing search terms, and searching shared folders and databases; (ii) address the deficiencies identified by OAG, as outlined above; (iii) complete its production by January 31, 2017, on the schedule set forth in footnote 1, with weekly rolling productions followed by privilege logs for each production two weeks later; and (iv) produce unredacted copies of documents previously redacted on responsiveness grounds. We are available to discuss at the Court's convenience.

Respectfully submitted,

/s

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