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March 16, 2017

By NYCSEF

The Honorable Barry R. Ostrager
Supreme Court of the State of New York
Commercial Division
60 Centre Street, Room 629
New York, NY 10007

Re: In the Matter of the Application of the People of the State of New York, by Eric T. Schneiderman, Index No. 451962/2016.

Dear Justice Ostrager:

On March 13, 2017, the New York Attorney General filed a letter with this Court regarding former CEO Rex Tillerson's use of multiple ExxonMobil email accounts. That letter marked the first time ExxonMobil learned of the Attorney General's concern about Mr. Tillerson's email accounts. The fact that Mr. Tillerson used two email accounts was readily apparent from documents produced in this matter over the past year. While there is nothing improper about using more than one account to organize and prioritize emails, it is entirely improper for the Attorney General to raise this issue for the first time in a letter filed publicly with the Court. Not only did that letter violate this Court's requirement that parties attempt to resolve disputes before bringing them to the Court, it has unfairly prejudiced ExxonMobil in the eyes of the public based on sensational coverage in the press. A simple question about subpoena compliance should not have been handled this way.

The "Wayne Tracker" Email Account

At times during his tenure as CEO, Mr. Tillerson used two email accounts on the ExxonMobil platform: a primary account identified by his first and last name and a secondary account for priority emails identified by the name "Wayne Tracker." When complying with the subpoena issued by the New York Attorney General (the "NYAG"), ExxonMobil searched the

Wayne Tracker email account, along with Mr. Tillerson's primary account. As fully disclosed to the NYAG in prior communications, ExxonMobil's collection and production efforts have focused on specific *custodians* (*i.e.*, employees and officers of the company), not specific *email accounts*. In keeping with that approach, Mr. Tillerson was designated a custodian, which means that the ExxonMobil email accounts he used were within the scope of ExxonMobil's search for responsive documents. The search of documents from Mr. Tillerson thus reached not only his primary ExxonMobil email account, but also the Wayne Tracker account.

None of this should come as a surprise to the NYAG. ExxonMobil produced emails sent to the Wayne Tracker account for the first time on February 20, 2016, and it has continued to do so over the last year. Mr. Tillerson's use of the Wayne Tracker account is evident from the face of a number of those emails, several of which were transparently addressed to or signed by "Rex" or "RWT" in the body of the email.

Notwithstanding insinuations to the contrary, Mr. Tillerson's use of the Wayne Tracker account was entirely proper. It allowed a limited group of senior executives to send time-sensitive messages to Mr. Tillerson that received priority over the normal daily traffic that crossed the desk of a busy CEO. The purpose was efficiency, not secrecy. Were it otherwise, emails to the Wayne Tracker account would have scrupulously avoided any reference to Mr. Tillerson as the intended recipient. Instead, numerous emails to the Wayne Tracker account are expressly addressed to Mr. Tillerson or contain his initials in the body of the email. And, while some of those emails pertain to climate change, the Wayne Tracker account was not established for the purpose of discussing that or any other particular topic. It was a general purpose means of sending priority communications to the CEO of the company.

In light of the questions raised by the Attorney General in his March 13 letter, ExxonMobil reexamined the Wayne Tracker account in connection with the NYAG's subpoena. ExxonMobil confirmed that it searched for potentially responsive documents from both Mr. Tillerson's primary account and the Wayne Tracker account in January 2016, approximately two months after the NYAG issued his subpoena. Those searches were conducted against the emails that were in the accounts at that point in time. In addition, ExxonMobil confirmed that it also searched both accounts again after the parties agreed to a supplemental set of search terms in January 2017.

In the course of this process, ExxonMobil confirmed that it placed a litigation hold on Mr. Tillerson promptly after receipt of the NYAG subpoena. The legal hold process at ExxonMobil, which was designed and implemented prior to this subpoena, engages a technology that protects emails in accounts from automated processes for persons subject to legal hold. ExxonMobil determined, however, that despite the company's intent to preserve the relevant emails in both of Mr. Tillerson's accounts, due to the manner in which email accounts had been configured years earlier and how they interact with the system, these technological processes did not automatically extend to the secondary email account. ExxonMobil is in the process of determining whether this preexisting technology process design had any impact on the production process. A number of factors suggest that any possible impact will not be significant. First, ExxonMobil searched the Wayne Tracker account within two months of receiving the

NYAG's subpoena. Second, many of the emails sent to or from the Wayne Tracker account included Mr. Tillerson's primary account as a recipient, which means email would appear in both accounts. Third, a limited number of senior executives used the Wayne Tracker address to communicate with Mr. Tillerson, and many of them—including, as relevant here, those who work on matters related to climate change—are on litigation hold. As ExxonMobil's evaluation of this issue continues, we will provide the Court and the NYAG with further information.

Obtaining publicity, not information, appears to have been the real goal of the NYAG's March 13 letter. Under this Court's rules, discovery disputes such as this one should be resolved bilaterally, between the parties, prior to being raised with the Court. But the Attorney General did not do so, raising his concerns about the Wayne Tracker email account for the first time in a public filing received by the Court, ExxonMobil, and the press at the same time. Such an approach does not serve the productive resolution of discovery disputes, but it does serve the NYAG's well-established preference to litigate his case in the press rather than court. That objective also explains the NYAG's decision to portray an innocuous business practice unfairly and inaccurately as a sinister effort to withhold information.

The NYAG knows better. To date, ExxonMobil has produced more than 2.4 million pages of documents in connection with the NYAG's climate-change investigation and has worked diligently to respond to the NYAG's extraordinarily broad and, in our view, often unreasonable and improper, investigative demands. So far the NYAG has found no evidence of the far-flung campaign to mislead the public that he routinely claims has been going on for decades. The NYAG now suggests that a single email account might house the evidence that his 18-month investigation has yet to uncover. The suggestion is preposterous. If the Wayne Tracker account was used to communicate with other ExxonMobil executives about climate change, those emails would reside in the accounts of the other executives. But the NYAG nowhere claims that the emails he has seen involving the Wayne Tracker account are of any significance whatsoever. All that remains is false innuendo and suspicion. Predictably, ExxonMobil received press inquiries within minutes of receiving the NYAG's letter, and advocacy groups allied with the NYAG in his campaign against the company quickly issued press releases denouncing ExxonMobil's purported misdeeds, going so far as to suggest that the Wayne Tracker account was used to conceal information about climate change. The facts, as known to the NYAG, come nowhere near supporting such allegations. And ultimately no amount of distortion and dissembling can distract from the NYAG's failure to develop any evidence supporting the allegations he has been pressing for the last year and a half.

The NYAG's Other Concerns

The NYAG raises three other challenges to ExxonMobil's production that are either frivolous, premature, or both. None is worthy of this Court's consideration at this time.

First, the NYAG falsely contends that ExxonMobil "delayed and obstructed" the production of documents from its top executives. Ltr. 1. The record says otherwise, as ExxonMobil has worked with the NYAG to address an ever widening and ever changing scope of demands and questions about the production. In keeping with that approach, ExxonMobil will

shortly produce additional Management Committee documents to the NYAG on March 17, 2017. The NYAG should not be heard to complain about the adequacy of this production until he has at least taken the time to review it.[1]

Second, the NYAG erroneously argues that 34 additional email accounts contain information that should have been produced to his office. Ltr. 2-3. The NYAG first expressed interest in these accounts a mere 24 hours before filing his March 13 letter, and this request amounts to nothing more than an impermissible attempt to expand the number of custodians beyond the limit expressly ordered by this Court. ExxonMobil is not required to produce documents from every employee within the company, and the NYAG offers no reason to believe that the identified individuals or email addresses are reasonably likely to possess unique responsive documents, as the law requires.

Third, the NYAG wrongly contests ExxonMobil's public statements regarding the manner in which it incorporates a "proxy cost of carbon" into its business operations. Ltr. 3. This argument is refuted by the record. Contained within the documents produced to date are (a) ExxonMobil Dataguide Appendices, *i.e.*, internal policy documents that specify precisely how ExxonMobil applies its proxy cost of carbon in every jurisdiction worldwide through the year 2040 (*see, e.g.*, EMC 002571948), and (b) numerous documents that reflect the actual application of the precise figures used in the Dataguide Appendices to Company-sponsored projects (*see, e.g.*, EMC 000137097). More fundamentally, the thousands of "proxy cost" documents produced to date show that the information contained in ExxonMobil's internal documents is entirely consistent with its public statements—including, for example, ExxonMobil's 2014 *Outlook for Energy*.[2]

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[1] The NYAG's March 12, 2017 email demanded answers to five questions in just 22 hours. When ExxonMobil informed the NYAG that it would provide a response "promptly," but would not meet the NYAG's arbitrarily short deadline, instead of responding, his office filed a letter with the Court approximately two hours later.

[2] The NYAG simply has no reasonable basis for believing that ExxonMobil has failed to apply its proxy cost of carbon in precisely the manner described in its public statements and its internal policies, let alone that any supposed failure affected any New York consumer or investor. As the NYAG is well aware, even among the companies that do utilize internal proxy costs of carbon, it is a matter of public record that the highest carbon prices used by ExxonMobil are in most cases higher than those reported by other energy companies, and among the highest reported by any company. *See, e.g.*, Carbon Disclosure Project, *Putting a Price on Risk: Carbon Pricing in the Corporate World* at 6 (Sept. 2015), *available at* https://www.oceanfdn.org/sites/default/files/CDP%20Carbon%20Pricing%20in%20the%20corporate%20world.compressed.pdf (last visited Mar. 15, 2017); *see also* Cntr. for Amer. Progress, *Proxy Carbon Pricing: A Tool for Fiscally Rational and Climate-Compatible Governance* at 7 (Apr. 2016), *available at* https://cdn.americanprogress.org/wp-content/uploads/2016/04/13143140/CarbonPricing.pdf (last visited Mar. 15, 2017). This simply underscores that the proxy cost of carbon utilized by ExxonMobil is eminently reasonable. In view of this fact, and the NYAG's acknowledgement that companies utilize a range of proxy costs for carbon, ExxonMobil is once again left to conclude that the NYAG's investigation has more to do with the identity of the subject than with any good faith theory that the Company has violated any law.

Respectfully Submitted,

/s/ Theodore V. Wells, Jr.
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