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March 21, 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:

We write to provide a response on behalf of Exxon Mobil Corporation (“ExxonMobil”) to the speculative and inaccurate claims presented in the letter filed by the New York Attorney General on March 20, 2017. The Attorney General’s fears of a widespread loss of data at ExxonMobil are entirely unfounded, and ExxonMobil is already taking steps to provide the Attorney General with the relief he seeks in his letter. Other than providing further evidence of his penchant for hyperbole and sensationalism in his ever-shifting investigation, the Attorney General’s letter serves principally to highlight why consultation between the parties prior to seeking Court intervention is not just a rule of this Court, but also a prudent approach to routine discovery disputes like this one.¹ The Attorney General’s concerns about the collection from ExxonMobil’s Management Committee and the “Wayne Tracker” account arise in the context of a wide-ranging and complex production of documents. Those issues are addressed below and would have been addressed by ExxonMobil without the need of this Court’s attention, as so many of the Attorney General’s other requests have been. The Attorney General should

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¹ Insofar as the Attorney General’s letter seeks specific relief (Ltr. 6-7), it is properly considered a motion, which constitutes a further violation of this Court’s rules. See N.Y. R. COM NY Part 61.

have complied with this Court's rules and made a bona fide effort to pursue consultation before returning once again to court.

Production of Management Committee Documents

The principal issue raised in the Attorney General's letter is the production of documents from ExxonMobil's Management Committee. At the time the Attorney General issued his subpoena, the Management Committee consisted of six members: Rex W. Tillerson, Darren Woods, Mark Albers, Jack P. Williams, Andrew Swiger, and Michael Dolan (the "Management Committee Custodians"). All of them were placed on legal hold two days after ExxonMobil received the Attorney General's subpoena, and documents from their files have been collected and reviewed.

The Attorney General's Ever-Shifting Investigative Priorities

The Attorney General faults ExxonMobil for not making a substantial production of documents from the Management Committee Custodians until the end of 2016, notwithstanding the Attorney General's request for those documents "as early as December 2015." (Ltr. 2). That is not even half the story. While the Attorney General requested a wide range of documents from a large number of custodians in December 2015, his office then provided ExxonMobil with instructions on how to prioritize those requests.

Pursuant to those requests, ExxonMobil has produced documents from the custodians most central to the Attorney General's investigation. Most of those custodians were identified and prioritized based on the Attorney General's ever-shifting investigative theories. As relevant here, the Attorney General repeatedly instructed ExxonMobil to place the production of other custodians ahead of the Management Committee Custodians. In accordance with the Attorney General's priorities and initial investigative thesis, ExxonMobil first produced over 109,000 documents from four custodians who studied climate science. When these documents evidently refuted his investigative theory, the Attorney General informed ExxonMobil that his new "priority" was documents from certain enumerated custodians who contributed to the preparation of a 2014 report entitled "Energy and Carbon - Managing the Risks," and those on ExxonMobil's greenhouse gas issue management team. (Email from M. Wagner to P. Conlon, dated Feb. 3, 2016.) In those instructions, the Attorney General expressly stated that review of the custodial files of senior managers, such as Mr. Tillerson, was a secondary priority.

Then, in June 2016, the Attorney General again shifted his "immediate investigative priorities" to "focus[] specifically on matters relating to [ExxonMobil's] valuation, accounting and reporting," requesting that "instead of continuing with production of the previously-established next-in-line priority." The Attorney General instructed ExxonMobil that only thereafter should it "return to production of management communications." (Email from J. Oleske to T. Wells, dated June 24, 2016). The Attorney General then reaffirmed this order of priority less than a month later. (Email from J. Oleske to T. Wells and M. Hirshman, dated July 22, 2016). The documents of the Management Committee Custodians became a priority for the Attorney General only after this Court rebuffed his efforts to obtain documents outside the scope

of the subpoena, during a November 21, 2016 court appearance. The Attorney General's claim of undue delay in connection with the Management Committee Custodians thus cannot be credited.

That claim is particularly unworthy of consideration in light of the extent of the document production ExxonMobil has made to date. ExxonMobil has collected and produced documents from 121 custodians as well as from shared locations untethered to specific custodians. In total, the company has produced over 400,000 documents totaling over 2.6 million pages. The custodial list from which these materials were produced reaches nearly every part of the company, and includes the scientists who conducted ExxonMobil's climate change research, employees who developed ExxonMobil's principal communications regarding the relevance of climate change, individuals involved in accounting and valuation, personnel engaged in the planning and execution of oil and gas development projects, senior management, and even ExxonMobil's current and former Chief Executive Officers. Despite the Attorney General's assertion that ExxonMobil has not complied in good faith, at no point did ExxonMobil refuse to add a single custodian requested by the Attorney General.

The Production of Documents from Management Committee Custodians

The Attorney General next complains that ExxonMobil initially produced what he considered too few documents from the Management Committee Custodians, which triggered an inquiry from the Attorney General, followed by a production of further documents from ExxonMobil. (Ltr. 2.) The Attorney General characterizes this iterative process as a failure of ExxonMobil's efforts, but that is an unwarranted and cynical characterization. To the contrary, this process describes exactly how parties are meant to behave when dealing with large, complicated document productions: the requesting party raises concerns, the producing party investigates those concerns, and additional documents are located and produced, if necessary. The Attorney General has no legitimate grounds to complain about a routine aspect of modern discovery.

Turning to the manner of collection and production from the Management Committee Custodians, the Attorney General contends ExxonMobil "inexplicably has collected and produced [documents from Management Committee Custodians] differently from the remainder of its production." (Ltr. 2). There is nothing inexplicable about the tailored approach ExxonMobil took to the collection, review, and production of the Management Committee Custodians' documents. As the most senior members of the company, the Management Committee Custodians were privy to highly confidential and sensitive information about ExxonMobil's ongoing business, which could include details of acquisitions or other commercial matters. The information contained in their files, if revealed, would confer an unwarranted competitive advantage on ExxonMobil's competitors and could easily move markets. To preserve the confidential nature of the extremely sensitive information held by these custodians, ExxonMobil developed a search protocol that would prevent the upload and review of large quantities of Management Committee files unrelated to the subject matter of the Attorney General's subpoena to the platforms of outside vendors assisting ExxonMobil in producing documents.

First Search

When initially implemented in January 2016, the search protocol for the Management Committee involved conducting searches in Microsoft Outlook to extract files likely to contain potentially responsive information. This search differed from the one used for other ExxonMobil custodians, which began with the upload of large quantities of unfiltered data (*i.e.*, data to which search terms had yet to be applied) to a third-party e-discovery vendor's database. It was only after this unfiltered material was uploaded that the complex search terms, requested by the Attorney General on December 16, 2015, were applied. For the Management Committee Custodians, however, an unfiltered collection risked exposing commercially sensitive data to third parties. That is why ExxonMobil elected to conduct a preliminary review of the Management Committee Custodians' emails and attachments in Microsoft Outlook before collecting them and providing them for third-party review.

To conduct that preliminary review, ExxonMobil used simplified versions of the search terms requested by the Attorney General because the native capabilities of Microsoft Outlook do not support the use of Boolean search strings—which include, for example, proximity connectors. In many cases, these search terms were even broader than the already sweeping search terms requested by the Attorney General. For example, rather than applying a long Boolean search string to identify every document that had the words “carbon dioxide” or “CO2” within a certain number of words of other terms, ExxonMobil simply searched for documents that contained the word “carbon” or the term “CO2.” This search was conducted with the assistance of ExxonMobil's Information Technology Department (“EMIT”) and under the direction of the ExxonMobil Law Department. Potentially responsive hard copy documents were scanned and uploaded to the e-discovery vendor's database for review. Other potentially responsive electronic documents were stored in an archive folder in the custodian's personal drive. On December 31, 2016 and, in subsequent productions on January 20, 2017 and January 31, 2017, responsive, non-privileged documents from the Management Committee Custodians were produced to the Attorney General.

Second Search

In December 2016, during a court-ordered meet-and-confer with the Attorney General, ExxonMobil agreed to run the term “proxy cost” across all custodians from whom it had produced documents to date to accommodate the Attorney General's ever-changing investigative theory. At that time, ExxonMobil determined that it was appropriate to run additional simplified search terms across the email files of the Management Committee Custodians to ensure that all potentially responsive documents had been captured. The additional search terms were exceedingly broad, including “climate,” “weather,” “temperature,” “anthropogenic,” “stranded,” “fossil fuel emissions,” and “proxy cost.” Again, under the supervision of EMIT and the Law Department, this search was conducted, documents reviewed, and responsive, non-privileged documents were produced to the Attorney General.

Third Search

On January 17, 2017, ExxonMobil agreed with the Attorney General to run four additional complex Boolean search strings against the data of all its custodians to ensure that all potentially responsive documents were captured. A month later, the Attorney General inquired about the volume of the data produced from the Management Committee Custodians' files. In response to that inquiry, ExxonMobil used eight simplified search terms to capture all documents that would have been caught by the four supplemental Boolean search strings. These terms included "proxy," "implied," "shadow," "methane," "CH4," "climat!" "emission!" and "emit!" ExxonMobil also applied all original and additional simplified search terms to the Management Committee Custodians' hard drives and shared drives. All documents collected from this process were uploaded to the e-discovery vendor's database for review. Responsive, non-privileged documents were produced on March 18, 2017.

Fourth Search

ExxonMobil has undertaken more than reasonable efforts to provide the Attorney General with the documents he seeks, producing 1,660 documents—spanning 11,377 pages—from the Management Committee Custodians. Nevertheless, as a further accommodation to the Attorney General and to avoid a protracted debate about search methodologies, ExxonMobil has elected to re-collect, re-review, and re-produce the Management Committee Custodians' documents.

In this regard, ExxonMobil undertook a significant investment to deploy a process by which the highly sensitive documents of the Management Committee Custodians (including emails) were searched again, this time with the exact Boolean operators and search strings that the Attorney General had requested, to produce a set of documents for review by outside counsel. This process is substantially completed, and an additional production of responsive documents, identified pursuant to this process, was made earlier today. By taking this action, ExxonMobil has fully addressed any complaint the Attorney General might have raised—no matter how insubstantial—about different procedures applied to the Management Committee Custodians. Furthermore, the new production includes all appropriate metadata, eliminating any need for the Attorney General to seek native files. A load file updating the metadata of the previously produced documents from the Management Committee Custodians will be provided to the Attorney General tomorrow morning. In sum, this production and the load file provides the Attorney General with the principal relief he seeks in his March 20 letter, and he should not be heard to complain further until he has taken the time to review that data.

The "Wayne Tracker" Preservation Issue Pertains to Only One Email Account

The Attorney General also expresses concern that the potential loss of information in the Wayne Tracker account might not be "an isolated occurrence." (Ltr. 5). The Attorney General speculates that "the production of other responsive documents was also compromised" by the same issue that affected the Wayne Tracker account and questions whether "separate hardware systems" may have been the root cause of the issue. (Ltr. 4). The Attorney General's

concerns are misplaced, and his speculation is unfounded. The issue that affected the Wayne Tracker account was an isolated occurrence that resulted from the standard configurations of ExxonMobil's Microsoft Exchange email system, the Microsoft "Active Directory" service² and ExxonMobil's mechanism for suspending the automatic deletion of email (known as a "file sweep"). The Wayne Tracker account was exempted from the suspension of the ordinary course "file sweep" because it was classified as a non-personal account.³ As a result of this unique issue, emails that might otherwise have been in the Wayne Tracker account between September 5, 2014, and September 16, 2015 were not available for review when the fourth search described above was conducted. When the January 2016 search was conducted using the broad search terms, however, emails from that time period were available for review except for a far shorter time period between September 5, 2014 and November 28, 2014. Mr. Tillerson was the only custodian who used a secondary account, and ExxonMobil is aware of no email account, other than the Wayne Tracker account, for which this issue has arisen.

Without delving further into technical details, ExxonMobil can provide these assurances that the Wayne Tracker account preservation issue did not occur with other email accounts at ExxonMobil because no other legal hold custodian has used a second ExxonMobil email account. That issue is thus limited to the Wayne Tracker account.

Finally, with respect to the unique circumstance of the continued operation of the "file sweep" against email in the Wayne Tracker account, while that process may have removed relevant emails from the Wayne Tracker account, it would not have affected any emails to/from/cc/bcc the Wayne Tracker account that would exist in other mailboxes of persons subject to legal hold, including Mr. Tillerson's primary account (which was often copied on emails) and the limited number of other ExxonMobil executives that communicated with Mr. Tillerson via email.

* * *

While the Attorney General strives to create the appearance of impropriety in connection with ExxonMobil's good faith efforts to comply with the subpoena, the record refutes that allegation. Despite this highly politicized and bad faith investigation, ExxonMobil has endeavored to provide the Attorney General with the information requested by the subpoena, to respond to the Attorney General's inquiries and shifting priorities as they are presented, and to maintain the confidentiality of highly sensitive information within the company. It has now even adjusted its efforts to prioritize the Attorney General's purported investigative needs over the company's legitimate concerns about confidentiality. The Attorney General's denigration of these good faith efforts should be rejected.

² At a high (and non-technical) level, the Microsoft "Active Directory" service is essentially the way in which a company provides "keys" to a user to enable authorized access to systems, applications, and storage locations appropriate for that individual.

³ Microsoft designed its platforms so that you can have one and only one Exchange email account associated with a person's Active Directory account.

Justice Ostrager

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Respectfully Submitted,

/s/ Theodore V. Wells, Jr.

Theodore V. Wells, Jr.

cc: Manisha Sheth, Esq. Mandy DeRoche, Esq. Daniel J. Toal, Esq.
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