SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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| In the Matter of the Application of the<br><br>PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN,<br>Attorney General of the State of New York,<br><br>Petitioner,<br><br>-against-<br><br>PRICEWATERHOUSECOOPERS LLP and EXXON MOBIL CORPORATION,<br><br>Respondents. | Index No. 451962/2016<br><br>IAS Part 61<br><br>Hon. Barry R. Ostrager<br><br>Motion Sequence No. ___ |

**EXXON MOBIL CORPORATION'S BRIEF IN SUPPORT OF ITS MOTION TO QUASH AND FOR A PROTECTIVE ORDER**

**PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP**
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

*Attorneys for Respondent Exxon Mobil Corporation*

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## OTHER AUTHORITIES

Exxon Mobil Corporation ("ExxonMobil") submits this brief in support of its motion to quash or, in the alternative, for a protective order limiting document and testimonial subpoenas issued on May 8, 2017, by the New York Attorney General (the "Attorney General"). The document subpoena requires, among other things, all documents from the last twelve years concerning each and every decision ExxonMobil has made to (i) invest in or decline any oil and gas project; (ii) impair any long-lived assets; or (iii) estimate the oil and gas reserves associated with each of its oil and gas projects, along with a custom-made summary of all that information. The four challenged testimonial subpoenas probe past subpoena compliance, an issue fully covered already in affirmations and depositions.

## PRELIMINARY STATEMENT

Less than two months ago, the Attorney General assured this Court of his intention to complete document discovery expeditiously and "mov[e] on to the next stage of the investigation." Taking the Attorney General at his word, the Court set aggressive deadlines for finishing document production, which ExxonMobil worked diligently to meet. ExxonMobil also provided an affidavit and certification of subpoena compliance, as ordered by the Court, and it then furnished the relevant affiants for two day-long depositions. But just as the document phase of his investigation was scheduled to end, the Attorney General served a new subpoena on ExxonMobil, re-opening document discovery with demands even broader and more burdensome than those he made over a year and a half ago. And rather than move on to the "next stage" of his investigation by requesting only substantive testimony on the issues purportedly under investigation, the Attorney General issued four testimonial subpoenas focused backward on the well-

travelled territory of subpoena compliance, which was fully addressed in the affidavit, certification, and depositions this Court had ordered and the Attorney General received. In the context of a year-and-a-half-long investigation, much of it supervised by this Court, the Attorney General cannot unilaterally shift gears, open new fronts, and impose substantial burdens on ExxonMobil without a sound factual basis for these new demands commensurate with and capable of justifying the corresponding burdens.

The Attorney General has come nowhere close to satisfying that standard. Under orders this Court entered to ensure the Attorney General would receive "all the information he could possibly request," ExxonMobil has produced over 2.8 million pages of documents for a climate-change investigation that has long appeared to be more about publicity and politics than the sound administration of justice. The Attorney General has not pointed to a single produced document to justify a further request for information. Nevertheless, he issued a new subpoena demanding that ExxonMobil provide records on every oil and gas investment decision it has made—which, for an energy company like ExxonMobil, is essentially every business decision it has made—over the last 12 years, along with similar requests for the equally central functions of asset impairment and reserves estimation. Compliance with the Attorney General's document request would impose an onerous burden on ExxonMobil to collect mountains of information across multiple business lines and geographic regions. That burden could be justified only by a compelling need well supported by facts.

Having failed to identify any such need or supporting facts, the Attorney General has compounded the impropriety of his subpoena by demanding that ExxonMobil review and synthesize the requested information and compile cumbersome

spreadsheets prepared to the Attorney General's specifications (which includes unclear and nonstandard terminology). That demand is improper in its own right, even if it were not unduly burdensome as well (which it is). No statute or precedent authorizes the Attorney General to conscript subpoena recipients to prepare charts not already in existence or populate spreadsheets for the Attorney General's convenience. Were it otherwise, the Attorney General would be free to outsource his investigations to the unfortunate recipients of his subpoenas.

It is equally improper and contrary to law for the Attorney General to probe areas foreclosed from state inquiry by federal regulation, as he does here. The Securities and Exchange Commission (the "SEC") has spoken definitively on how proved reserves are to be reported and on how assets are to be impaired. It is not the place of the Attorney General to second-guess those determinations by demanding information that supports an alternative way of presenting that information. Precedent and sound policy bar the Attorney General from issuing demands for information to pursue investigative theories preempted by federal law.

The Attorney General's challenged testimonial subpoenas are likewise impermissible.[1] ExxonMobil already provided the Attorney General thorough information about its prior subpoena compliance in a submission that this Court recognized went into "great detail" and fully addressed the questions presented by the Attorney General. That submission was followed, as the Court directed, by an affidavit, a certification of compliance, and depositions. But the Attorney General again demands

[1] ExxonMobil is not challenging in this motion the testimonial subpoenas issued on May 8 for five witnesses alleged to have personal knowledge of matters the Attorney General claims to be relevant to his investigation.

more. Without identifying any substantial deficiency in the affidavit, certification, or corresponding depositions (and without even waiting to complete one of the depositions), the Attorney General issued four more testimonial subpoenas. This request cannot be reconciled with the Court's prior instructions about what information ExxonMobil was to provide to the Attorney General, and it violates well-settled precedent barring cumulative, burdensome depositions that further no legitimate law enforcement purpose.

There is nothing in these new requests that is proportional to the needs of an investigation that has been pending for over a year and a half, particularly where this Court has already struck the appropriate balance between the Attorney General's entitlement to information and the burden imposed on ExxonMobil. It also flies in the face of the efforts this Court and ExxonMobil have made to bring document discovery to a close. Particularly at this stage of the investigation, proportionality and fundamental fairness mandate that the Attorney General's further requests for information have an adequate factual basis and a scope proportional to the demonstrated investigative need. These subpoenas have neither, and therefore should be quashed.

## STATEMENT OF FACTS

### A. The Attorney General's November 2015 Subpoena Seeks Historical Climate Change Documents.

On November 4, 2015, the Attorney General issued an extraordinarily broad and burdensome subpoena to ExxonMobil that demanded numerous categories of documents concerning global warming and climate change. As set forth in the subpoena and contemporaneous public statements, the Attorney General's investigation was then focused on a purported disconnect between ExxonMobil's past public statements on climate change and its internal views. The subpoena expressly called for "all

communications" since 1977 concerning any research "or other consideration" performed by ExxonMobil regarding "the causes of Climate Change." (Anderson Ex. A at 7-8.)[2] The Attorney General's statements to the press confirmed that his investigation concerned a suspected inconsistency—apparently decades old—between ExxonMobil's public and internal statements. During a November 10, 2015 interview on the *PBS NewsHour*, the Attorney General thus described his investigation as probing ExxonMobil's purported decision to "shift[] [its] point of view" and "change[] tactics" on climate change after conducting scientific studies on climate change "[i]n the 1980s." (Anderson Ex. B at 2.) The Attorney General's public statements also revealed that his investigation was largely and improperly focused on altering public policy and public perception of the risks presented by climate change.

Notwithstanding its misgivings about the transparently political nature of the investigation, ExxonMobil complied with the 2015 subpoena, subject to a reservation of its "right to seek to quash or otherwise object to the subpoena."[3] (Anderson Ex. C at 3.) Over the last year and a half, ExxonMobil has provided the Attorney General with over 2.8 million pages of documents from more than 140 custodians, including many of ExxonMobil's most senior executives. That extensive production, much of it court-supervised, has reflected the shifting priorities established by the Attorney General.

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[2] References to "Anderson Ex." refer to exhibits to the Affirmation of Justin Anderson, filed herewith.

[3] Separate and apart from ExxonMobil's reservation of rights as to conventional challenges to the 2015 subpoena, ExxonMobil filed an action against the Attorney General and another state attorney general in federal court for constitutional torts arising from a conspiracy to restrict ExxonMobil's speech and otherwise to violate its constitutional rights. That action, which pertains to issues not before this Court, was initially filed in federal court in Texas, but was recently transferred to federal court in New York.

**B. The Court Rejects the Attorney General's Efforts to Improperly Broaden the November 2015 Subpoena.**

On June 24, 2016, the Attorney General requested documents pertaining to "(i) [ExxonMobil's] valuation, accounting, and reporting of its assets and liabilities, including reserves, operational assets, extraction costs, and any impairment charges; and (ii) the impact of climate change and related government action on such valuation, accounting, and reporting." (Anderson Ex. D at 2-3.) ExxonMobil agreed to comply with that request insofar as responsive documents also pertained to climate change, which was consistent not only with the text of the 2015 subpoena, but also with the Attorney General's statements to the press. For example, as reported in a September 2016 *Wall Street Journal* article, the Attorney General's office was "investigat[ing] the company's knowledge of the impact of climate change and how it could affect its future business." (Anderson Ex. F at 1.)

The Attorney General challenged ExxonMobil's position by order to show cause. On November 21, 2016, the Court heard argument and rejected the Attorney General's position that the 2015 subpoena reached accounting documents unrelated to climate change. Explaining its decision, the Court identified "a difference between an inquiry relating to climate change and an entirely different inquiry relating to Exxon's general accounting procedures." (Anderson Ex. H at 23:19-22.)

Next, in December 2016 the Attorney General filed motions with the Court complaining about various aspects of ExxonMobil's production of climate change-related documents under the 2015 subpoena. Among other things, the Attorney General's December 1, 2016 correspondence asked the Court to compel production of documents relating to ExxonMobil's oil and gas reserves, and materials concerning "how [] policies

and procedures [relating to the proxy cost of carbon] have been applied to specific oil and gas projects." (Anderson Ex. I at 2.) The Court declined that request, instead imposing reasonable limits on the Attorney General's demands for documents. For example, the Court refused to order ExxonMobil to perform an exhaustive search of shared network locations across the entire company. Instead, the Court held that the Attorney General's request was disproportionately burdensome, explaining that "it's unreasonable for Exxon to deliver to the New York Attorney General's Office every document that Exxon has in its possession" and admonishing the Attorney General for pursuing a strategy of "throwing darts against the wall." (Anderson Ex. J at 23:19–25.) To ensure that the burden on ExxonMobil would be proportionate to the Attorney General's stated need for information, the Court permitted the Attorney General to identify a "handful of additional search terms and a handful of additional custodians." (*Id*. at 20:14–18.)

When the parties could not agree on the terms and custodians to be used, the Attorney General returned to Court weeks later demanding even more custodians and search terms. (Anderson Ex. L at 12:13–13:10.) After again weighing the burden on ExxonMobil against the Attorney General's need, this Court authorized the addition of nine custodians and "six to eight" search terms. (*Id.* at 12:13-23.) After granting that request, the Court observed that the cumulative total of custodians and search terms "is going to yield . . . all the information [the Attorney General] could possibly request." (*Id.* at 14:12-14.)

Before and during that court appearance, the Attorney General again demanded documents concerning ExxonMobil's oil and gas reserves, as well as the "incorporation of the proxy cost of carbon into specific oil and gas projects." (Anderson

Ex. K at 3.) The Attorney General also requested the production of "gate review packages," which ExxonMobil uses at various points to decide whether to invest in new projects or to expand existing projects. (*Id.* at 3; *see also* Anderson Ex. L at 5:20-6:2.) Rejecting those requests as disproportionately burdensome, this Court observed, "I don't think that [ExxonMobil has] to do any more than I've ordered here for [the Attorney General] to receive all of the documents that [he] require[s]." (Anderson Ex. L at 15:15–17.)

**C. ExxonMobil Provides Detailed Sworn Statements About Its Compliance with the November 2015 Subpoena.**

On March 13, 2017, the Attorney General formally requested that ExxonMobil provide detailed information about its production of documents from members of ExxonMobil's Management Committee and the secondary email account used by former CEO Rex Tillerson (the "Wayne Tracker" account). (Anderson Ex. M.) In response, ExxonMobil filed a detailed submission explaining the processes used to collect Management Committee documents and providing extensive information about the Wayne Tracker account. (NYSCEF No. 128.) At a March 22, 2017 hearing, this Court observed that ExxonMobil's letter had "addressed each of the items [the Attorney General] . . . requested" except for establishing a production deadline, which the Court set at the hearing. (Anderson Ex. N at 4:15-20.). To assuage any lingering concern the Attorney General may have had, the Court directed ExxonMobil to submit affidavits "from custodians attesting to what counsel has represented in [its] letter" and a certification of compliance. (*Id.* at 14:19–24, 27:25-28:4.) The Court also authorized the Attorney General's office to "cross-examine the affiants" at subsequent depositions. (*Id.* at 14:22-24.)

On March 31, 2017, ExxonMobil provided the Attorney General with a detailed affidavit from Connie Feinstein (the "Feinstein Affidavit"), a senior ExxonMobil Information Technology employee, describing (i) the procedures used to collect responsive documents from members of the Management Committee, and (ii) the Wayne Tracker account and the steps ExxonMobil took to recover documents related to it. (Anderson Ex. O.) On April 10, 2017, Michele Hirshman, outside counsel for ExxonMobil, provided the Attorney General with a certification of compliance with the 2015 subpoena (the "Certification"), which described ExxonMobil's extensive efforts to identify and produce responsive materials. (Anderson Ex. P.) ExxonMobil supplemented both the Feinstein Affidavit and the Certification. (Anderson Exs. Q and R.) Finally, Ms. Feinstein (April 26, 2017) and Ms. Hirshman (May 10, 2017) each appeared separately for day-long depositions at the Attorney General's offices. (Anderson Aff. ¶ 3.)

**D. The Attorney General Issues Exceedingly Broad Document and Testimonial Subpoenas.**

Throughout his appearances before this Court, the Attorney General has claimed to support the expeditious resolution of document discovery. As early as November 2016, the Attorney General's representative spoke of the need for "finality" in the document production, urging that "the production of documents from a company like Exxon has to have an ending, Judge. We have to have some expectations of the finality." (Anderson Ex. H at 20:19–23.) The Attorney General struck the same chord two months ago, when his representative stated, "[n]o one wants more than the Attorney General to complete the process of obtaining these documents and moving on to the next stage of the investigation." (Anderson Ex. N at 7:3–6).

In direct contradiction of these repeated claims of wanting to bring document discovery to a close, the Attorney General issued ten subpoenas to ExxonMobil on May 8, 2017: one for documents and nine for testimony. The earliest return date of the subpoenas is May 22, 2017. The document subpoena is divided into requests for information and requests for documents. (Anderson Ex. T.) The nine requests for information would require ExxonMobil to collect and analyze the content of records pertaining to a myriad of corporate decisions and specific oil and gas projects over the last 12 years, and then distill that information into lists and tables describing in minute detail ExxonMobil's decision-making process in every instance. (*Id.* at 8-12.) The areas covered by the Attorney General's requests include:

(a) every decision ExxonMobil has made to invest in or decline a particular oil or gas project;

(b) the application of, and assumptions underlying, a proxy cost of carbon and other greenhouse gases to the life of every oil and gas project;

(c) every decision ExxonMobil has made relating to the impairment or write-down of any of its long-lived assets anywhere in the world; and

(d) every estimate of oil and gas reserves, including the application of, and assumptions underlying, any proxy cost of carbon used in that process.

(*Id.*) The Attorney General also asks ExxonMobil to identify every ExxonMobil employee involved with these issues. Needless to say, preparing these analyses, assuming it could even be done, would require a massive and disruptive diversion of company resources.

The document requests only add to this undue burden. (*Id.* at 13.) The materials requested could easily dwarf the production ExxonMobil has already made to the Attorney General, which this Court has observed should provide the investigators all they need to evaluate their case. The requests begin by asking for all documents used to

prepare the responses to the burdensome requests for information, itself an onerous task. (*Id.*) The subpoena then seeks documents responsive to certain of the November 2015 requests, this time up through May 2017, thereby expanding the scope of the prior (backward-looking) subpoena by 18 months. (*Id.*) In addition, the subpoena seeks 12 years' worth of documents (i) relating to the impairment of any of ExxonMobil's long-lived assets, (ii) sent between any ExxonMobil employee and any financial firm that concern climate change or asset impairment, and (iii) from all members of ExxonMobil's internal oil and gas reserves committees. (*Id.*) Finally, the requests also purport to compel the production—for an investigation under *state* law—of all documents ExxonMobil has provided to the SEC in connection with the SEC's inquiry into compliance with *federal* accounting rules. (*Id.*)

The testimonial subpoenas fall into two categories: four seek testimony from ExxonMobil employees involved in responding to the 2015 subpoena, one of whom is in-house counsel for the company (Anderson Exs. U-X.); and five seek testimony from either ExxonMobil or Imperial Oil employees with personal knowledge of matters the Attorney General claims to be relevant to his investigation. ExxonMobil challenges here only the four testimonial subpoenas directed to individuals involved with responding to the 2015 subpoena. Under the Attorney General's own characterization, those subpoenas are directed exclusively at probing the efforts ExxonMobil took to comply with the 2015 subpoena, which have already been documented in affirmations 30 pages long and 15 hours of deposition testimony from Ms. Feinstein and Ms. Hirshman. (Anderson Exs. S and U.)

The Attorney General has provided no grounds that would explain, much

less justify, the intrusive requests contained in these subpoenas.

## ARGUMENT

The Attorney General's overreach cries out for court intervention. Flawed on multiple levels, the recently issued subpoenas impose an undue burden on ExxonMobil unjustified by any legitimate need, compel ExxonMobil to generate work product for the Attorney General's benefit, and further an investigation preempted by federal regulation. As in the past, it regrettably falls to this Court to compel the Attorney General to recognize the limits of his power.

### I. The Document Subpoena Should Be Quashed for Imposing an Undue Burden, Compelling the Creation of Analysis, and Pursuing a Preempted Investigation.

#### A. The Document Subpoena Should Be Quashed for Imposing an Onerous Burden Disproportionate to any Legitimate Need.

The document subpoena (Anderson Ex. T) imposes a burden on ExxonMobil that far exceeds even that imposed by the original subpoena, which although broad, was at least limited to documents pertaining to climate change. Unfettered by even that restriction, the new subpoena requires ExxonMobil to retroactively document every investment decision it has made over the last 12 years, provide supporting documentation, and then produce even more documents on other topics. This demand would be eyebrow-raising in its breadth even if it occurred at the outset of an investigation; but coming as it does a year and a half into the Attorney General's investigation, it is indefensible. In the absence of any compelling need that is firmly rooted in an articulable factual basis, the request is unsupportable and must be quashed.

To comply with the requests for information, ExxonMobil must prepare three detailed spreadsheets documenting each time over the past 12 years it has

(i) evaluated an oil and gas project, (ii) considered whether to impair an asset, and (iii) estimated reserves and resources—in other words, nearly every business decision it has made. (Anderson Ex. T at 8-12.) Each of those spreadsheets must describe, for each and every line-entry, whether and how ExxonMobil's proxy cost of carbon, which is meant to capture the potential regulatory costs of emitting greenhouse gases, factored into the relevant decision. (*Id.*) Among other things, each entry must explain (a) the amount of the proxy cost and the basis for setting it at that level; (b) emission intensity and the basis for setting it at that level; (c) the range of emissions against which the proxy cost was applied; (d) the "policies, procedures, or controls" governing the application of the proxy cost; (e) the relative and absolute effect of the proxy cost; and (f) any actual greenhouse gas costs associated with the project. (*Id.*)

In addition to preparing that onerous analysis, ExxonMobil must also produce the documents used to generate the three spreadsheets and prepare a list identifying all individuals with "personal knowledge" of the information recorded on the spreadsheets. (*Id.*) The document subpoena further requires ExxonMobil to provide (i) an "update" to the 2015 subpoena for the time period of November 4, 2015 through May 8, 2017; (ii) 12 years' of documents related to the ExxonMobil and Imperial Oil reserves committees, the impairment of long-lived assets, and communications with the securities industry; and (iii) copies of all materials provided to the SEC. (*Id.* at 13.)

The burden of complying with this new subpoena cannot be overstated. ExxonMobil is in the business of assessing whether to pursue oil and gas projects. Its records on such matters are housed in various locations across regions and business lines. There is no single repository of information that would summarize all of its decisions

across a 12-year period on whether to approve, decline, or defer a project. Creating what is essentially a log of all of ExxonMobil's business activities for the last 12 years would require a staggering investment of resources. ExxonMobil personnel would be required to distill countless records into the voluminous tables and charts the Attorney General seeks. The same is true of the analysis for reserves and asset impairment. For a company in the business of identifying new oil and gas reserves, with more than $300 billion in assets as of December 31, 2016, the volume of materials that would need to be gathered, reviewed, and distilled in order to document all decisions made with respect to estimating reserves and impairing assets is enormous—and that would be so even if the request were for only one year, let alone 12.

The other requests simply add to the already crushing burden that the creation of the spreadsheets would entail. The documents requested by the subpoena cover the same broad territory as the spreadsheets, sweeping in records pertaining to the evaluation of projects, estimation of reserves, and impairment of assets. Such a production would come vanishingly close to impermissibly requiring that "all records" at the company be turned over. *See N.Y. State Comm'n on Judicial Conduct* v. *Doe*, 61 N.Y.2d 56, 62 (1984) (modifying a subpoena which would have required the recipient "to produce virtually all of his financial records" over a ten-year period). These requests also require the re-collection, review, and production of materials for an 18-month period from all 142 custodians and 11 shared drives identified for the 2015 subpoena. The request for communications with securities industry professionals would likely require the addition of new custodians and review of countless documents pertaining to routine communications.

These extraordinarily broad and burdensome requests must be justified by and proportional to the Attorney General's need for the information. While the Attorney General enjoys wide latitude in his investigative authority, that power is not without limits. When reviewing the exercise of the Attorney General's subpoena power, New York courts "weigh[] the scope and basis for the issuance of the subpoena against the factual predicate for the investigation 'lest the powers of investigation, especially in local agencies, become potentially instruments of abuse and harassment.'" *See Airbnb, Inc.* v. *Schneiderman*, 44 Misc. 3d 351, 356 (Sup. Ct. Albany Cnty. 2014) (quoting *Myerson* v. *Lentini Bros. Moving & Storage Co*. 33 N.Y.2d 250, 258 (1973)). The showing the Attorney General must make to sustain a subpoena depends on the "status of the investigation at the time the subpoena issues." *Myerson*, 33 N.Y.2d at 257. Where, as here, the investigation has gone beyond the preliminary stage, the Attorney General "may not rest alone on [the] inference" that some wrongdoing may have occurred. *A'Hearn* v. *Comm. on Unlawful Practice of Law of N.Y. Cty. Lawyers' Ass'n*, 23 N.Y.2d 916, 919 (1969). Instead, as the First Department teaches in *Horn Const. Co.* v. *Fraiman*, "[w]hen a subpoena *duces tecum* is attacked, as here, after an investigation of the scope and extent already had," it must be justified by a "reasonable relationship" between the demand for new information and the investigative need or "at least" present grounds for a court to conclude that the investigator's "efforts would or reasonably might prove fruitful." 34 A.D.2d 131, 133 (1st Dep't 1970). Courts applying principles of reasonableness and proportionality thus put a stop to inquiries where, as here, an investigator "[c]ontinue[s] fishing in otherwise apparently calm waters in the mere hope that some lead or indicia or possible wrongdoing will be uncovered." *Id.*

The Attorney General has failed to show that his burdensome document subpoena bears any reasonable relationship to or is proportionate to the needs of his investigation. According to the Attorney General, the document subpoena will "advance our investigation and promote the efficiency of further proceedings." (Anderson Ex. S at 2.) But that boilerplate, conclusory justification falls well short of the mark. To satisfy the "rule of proportionality in discovery" that this Court has previously recognized and imposed in supervising the Attorney General's investigation (Anderson Ex. N at 23:2-13), and that other New York courts have recognized in other contexts, *see, e.g.*, *Airbnb*, 44 Misc. 3d at 356; *Myerson*, 33 N.Y.2d at 258, the Attorney General must do more. He must provide a factual basis for his need for the broad information requested in the document subpoena, and he must establish that the demand is proportional to the need.

There is good reason to believe that the Attorney General has not made this showing because he cannot do so. For the last year and a half, ExxonMobil has provided the Attorney General with over 2.8 million pages of documents, incurring substantial cost and business distraction in the process. Yet in seeking to inflict a crushing burden on ExxonMobil in the form of these requests, the Attorney General has pointed to nothing ExxonMobil has produced thus far as justifying any continued inquiry at all. That silence speaks volumes.

With particular reference to the Attorney General's evident focus on ExxonMobil's use of a proxy cost of carbon, ExxonMobil has already produced to the Attorney General its internal policies specifying how it applies the proxy cost of carbon in every jurisdiction worldwide, and for each year from the present through 2040. It also has produced numerous documents responsive to the Attorney General's prior requests

that reflect the actual application of the precise figures used in these policies to company-sponsored projects. (Anderson Aff. ¶ 2.) The multitude of "proxy cost" documents ExxonMobil has already produced to the Attorney General—including internal ExxonMobil documents—thus demonstrate that ExxonMobil applies its proxy cost of carbon to its projects in exactly the manner it has described publicly. The Attorney General has identified nothing even suggesting otherwise.

This Court has already cautioned the Attorney General's office that it may not conduct investigations by indiscriminately "throwing darts against the wall." (Anderson Ex. J at 23:25.) Yet the Attorney General has articulated no basis at all to suspect that ExxonMobil has failed to apply its proxy cost of carbon in the manner described in its public statements, let alone one that would justify his intrusive requests. Allowing this subpoena, which appears to be based on nothing more than idle curiosity or groundless suspicion, to stand is contrary to both this Court's prior instructions and the First Department's prohibition on the unjustifiable prolonging of already-advanced investigations. *Horn*, 34 A.D.2d at 133. In the absence of a factual basis demonstrating both reasonableness and proportionality, the document subpoena must be quashed.

**B. The Document Subpoena's Requests for Information Should Also Be Quashed for Improperly Compelling ExxonMobil to Generate Custom Analysis.**

The Attorney General's requests for information should be quashed for the independent reason that they run afoul of New York law, which prohibits the Attorney General from using a subpoena to commandeer the resources of ExxonMobil to create new documents and analyses not previously in existence.

General Business Law § 352(2) empowers the Attorney General to request production of "books or papers." Executive Law § 63(12) likewise authorizes the

Attorney General "to issue subpoenas in accordance with the civil practice law and rules," which contemplates subpoenas *duces tecum* that seek the "production of books, papers and other things." CPLR § 2301. Construing the "books, papers, and other things" language of § 2301, New York courts have long held that "a party cannot be compelled to create new documents or other tangible items in order to comply with particular discovery applications." *Rosado* v. *Mercedes-Benz of N. Am., Inc.*, 103 A.D.2d 395, 398 (2d Dep't 1984); *see also Sanon* v. *Sanon*, 37 N.Y.S.3d 208, 2016 N.Y. Slip Op. 50657(U), at *2 (Sup. Ct. Monroe Cnty. Jan. 27, 2016); *Heins* v. *Public Storage*, 959 N.Y.S.2d 89, 2012 N.Y. Slip Op. 51374(U), at *7 (Sup. Ct. Suffolk Cnty. July 11, 2012) (collecting cases).

A subpoena *duces tecum* functions only "to compel the person upon whom it is served to produce, under penalty, documents or records in his possession." *Matter of Slipyan (Shapiro)*, 145 N.Y.S.2d 630, 632 (Sup. Ct. N.Y. Cnty. 1955). It has no force beyond that limited mandate and, contrary to the Attorney General's position here, "may not be used to compel a person to do any affirmative act other than the production of such documents or records as they exist at the time of service of the subpoena." *Id.* That simple command is unaffected by any countervailing showing of need by the requesting party because a party "cannot compel the creation of an otherwise nonexistent writing on the theory that its manufacture may constitute material and necessary evidence." *Jonassen* v. *A.M.F., Inc.*, 104 A.D.2d 484, 486 (2d Dep't 1984). And this rule is equally applicable to private parties and the government. *See, e.g.*, *Liberty Mut. Ins. Co.* v. *City of N.Y. Comm'n on Human Rights*, 39 A.D.2d 860, 860 (1st Dep't 1972), *aff'd*, 31 N.Y.2d 1044 (1973).

Applying these principles, courts routinely reject attempts to compel the creation of new documents using a document subpoena. For example, in a medical malpractice case, the Fourth Department held that a medical practice could not be compelled by subpoena to create lists of the number of babies delivered, the number of prior claims against it, the materials viewed by it on a particular topic, and the textbooks in the party's possession. *Orzech ex rel. Orzech* v. *Smith*, 12 A.D.3d 1150, 1151 (4th Dep't 2004). Similarly, in *Durham Medical Search, Inc.* v. *Physicians Int'l Search, Inc.*, the Fourth Department held that a party could not be required to create a list of its customers. 122 A.D.2d 529, 530 (4th Dep't 1986). In *Slavenburg Corp.* v. *North Shore Equities, Inc.*, the First Department reversed an order compelling the creation of a document setting forth the basis for a claim, observing that it is "plain that it is not the function of that section [of the CPLR provision regarding document production] to require a party to create new documents." 76 A.D.2d 769, 770 (1st Dep't 1980).

This well-settled precedent bars the Attorney General's attempt to use the document subpoena to commandeer ExxonMobil's employees to generate analyses that are totally unwarranted. If he wishes to have tables and spreadsheets prepared, he must rely on his own staff to do so. All he may compel ExxonMobil to do is provide documents already in existence pursuant to a reasonably tailored request.

### C. The Document Subpoena Should Be Quashed Insofar as It Pursues an Investigation Preempted by Federal Law.

Certain document requests in the subpoena are independently impermissible for improperly attempting to pursue matters preempted by the SEC. Under New York law, a subpoena must be quashed where the "futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly

irrelevant to any proper inquiry." 58A N.Y. Jur. 2d § 816; *see also Anheuser-Busch, Inc.* v. *Abrams*, 71 N.Y.2d 327, 331-32 (1988); *In re Office of Attorney Gen. of State of N.Y.*, 269 A.D.2d 1, 12–14 (1st Dep't 2000). Here, the Attorney General's request for information related to the estimation of proved reserves and impairment of assets falls within the exclusive domain of the SEC. It is not the place of the Attorney General to conduct an investigation that necessarily second-guesses and conflicts with the reasoned judgment of that agency. Requests designed to support such an inquiry must be quashed.

State law is preempted when it conflicts with, or stands as an obstacle to, federal laws and regulations. So-called "conflict preemption" occurs when it is either "impossible for one to act in compliance with both the Federal and State laws" or "state law . . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law. *Guice* v. *Charles Schwab & Co.*, 89 N.Y.2d 31, 39 (1996) (internal brackets, quotations, and ellipsis omitted). Courts find that state law is obstacle-preempted when the law effectively second guesses a federal agency's exercise of its reasoned judgment to balance competing policy interests. For example, in *Geier v. Am. Honda Motor Co.*, the federal regulatory scheme provided car manufacturers with a range of choices among passive restraint devices. 529 U.S. 861, 875 (2000). The petitioner's lawsuit, which claimed that manufacturers had a duty to install airbags, was preempted because a rule of state tort law imposing such a duty would have presented "an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 881. Conflict preemption can arise before litigation has commenced; indeed, a subpoena can be challenged on preemption grounds. *See Gobeille* v. *Liberty Mut. Ins. Co.* 136 S. Ct. 936 (2016) (a subpoena recipient "need not wait to bring a pre-emption claim until confronted

with numerous inconsistent obligations and encumbered with any ensuing costs"); *Cuomo* v. *Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 535-36 (2009).

As relevant here, SEC regulations require energy companies to estimate and report proved reserves in light of "existing . . . government regulations." 17 C.F.R. § 210.4–10(a). The agency issued that regulation after considering how best to provide investors with a "comprehensive understanding of oil and gas reserves, which should help investors evaluate the relative value of oil and gas companies." *Modernization of Oil & Gas Reporting*, SEC Release No. 78, File No. S7-15-08, 2008 WL 5423153, at *1 (Dec. 31, 2008). The SEC likewise exercised its reasoned judgment to adopt as authoritative the accounting standards issued by the Financial Accounting Standards Board (the "FASB"), which govern when, and how, ExxonMobil assesses whether its assets are impaired.[4] Where, as here, "an agency is required to strike a balance between competing statutory objectives," that factor weighs heavily in favor of "a finding of conflict preemption." *Farina* v. *Nokia Inc.*, 625 F.3d 97, 123 (3d Cir. 2010).

Those SEC regulations cover the ground tread upon by the Attorney General. His new subpoena purports to compel the production of (i) documents pertaining to oil and gas reserves, (ii), the impairment of assets, and (iii) all materials produced to the SEC. (Anderson Ex. T at 13.) Those requests are designed largely to support the Attorney General's discredited "stranded asset" theory of fraud. As Attorney General Schneiderman has explained to the press, his investigation concerns whether ExxonMobil has overstated its assets by not accounting for "global efforts to address climate change" that might require it "to leave enormous amounts of oil reserves in the

[4] *See* Commission Statement of Policy Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, 68 Fed. Reg. 23,333–401 (May 1, 2003).

ground." (Anderson Ex. E at 1.) As the Attorney General is well aware, however, federal law requires ExxonMobil to estimate proved reserves in light of *current* regulatory conditions. The Attorney General therefore may not penalize ExxonMobil for failing to estimate its reserves in light of possible *future* government regulations. Nor may he second-guess the SEC's reasoned judgment by requiring additional disclosures beyond those required by federal law. To do so would result in a "re-balancing" of the objectives that the SEC has already considered and weighed in crafting its own regulations. *Farina*, 625 F.3d at 123. The Attorney General's proffered investigative theory related to ExxonMobil's oil and gas reserves is thus preempted, and there is no good faith basis to "investigate" it.

The document requests are also designed to support the Attorney General's theory that energy companies must evaluate assets for impairment using the Attorney General's assumptions about the possible future effects of climate change. Indeed, in an "extensive" *New York Times* interview regarding his investigation, the Attorney General advanced the baseless theory that ExxonMobil may be engaged in a "massive securities fraud" by not utilizing the Attorney General's own assumption that future international efforts to reduce climate change will require ExxonMobil to leave oil in the ground untouched. (Anderson Ex. E at 1.) The FASB's rules, however, require ExxonMobil to "incorporate [its] own assumptions" about future events when deciding whether to impair oil and gas assets.[5] The Attorney General's theory would punish ExxonMobil for complying with accounting standards mandated by the SEC and therefore would create a textbook conflict with federal regulations.

[5] *See* FASB Accounting Standards Codification 360-10-35-30; *see also* Statement of Financial Accounting Standards No. 144 ¶ 17.

This conflict is not an abstract, hypothetical matter. It has been widely reported in the press that the SEC is conducting an inquiry of ExxonMobil on these very matters. As reported by the *Wall Street Journal*, the SEC "is investigating how Exxon Mobil Corp. values its assets in a world of increasing climate-change regulations" and is "homing in on how Exxon calculates the impact to its business . . . including what figures the company uses to account for the future costs of complying with regulations to curb greenhouse gases as it evaluates the economic viability of its projects." (Anderson Ex. G at 1.) This line of inquiry is preempted, and any requests in furtherance of it should be quashed.

## II. The Four Testimonial Subpoenas Should Be Quashed for Imposing an Undue Burden.

The four testimonial subpoenas related to ExxonMobil's subpoena compliance (Anderson Exs. U-X) should also be quashed.[6] In response to the Attorney General's inquiry about document production from ExxonMobil's Management Committee and the Wayne Tracker account, ExxonMobil prepared a detailed account of its efforts to identify and produce responsive materials from those custodians. This Court found that ExxonMobil's account "went into great detail explaining ExxonMobil's practice for gathering and producing management and board documents" and directed ExxonMobil to follow up with "affidavits from ExxonMobil people attesting to what's represented by counsel," as well as a certification of completion. (Anderson Ex. N at 6:7-10; 17:17-19; 27:25-28:4.) ExxonMobil provided an affidavit from senior Information Technology Manager Connie Feinstein and a certificate of compliance from its outside

[6] By filing the instant motion, ExxonMobil does not waive the right to designate substitute deponents pursuant to CPLR § 3106(d).

counsel Michele Hirshman, and also made Ms. Feinstein and Ms. Hirshman available for deposition. Ms. Feinstein and Ms. Hirshman both appeared for day-long depositions.

The Attorney General has come forward with no concrete explanation of why the copious information already provided is insufficient for his purposes. *Cf. Hanan v. Corso*, No. CIV.A. 95-0292, 1998 WL 429841, at *7 (D.D.C. Apr. 24, 1998) (rejecting request for "discovery about discovery" where a party had "produced several declarations detailing under oath the efforts made to comply"). Indeed, he did not even wait until the later of the two depositions had been completed before issuing a request for four more depositions. That alone suggests these testimonial subpoenas were issued without a careful balancing of burden and need. It is far too little for the Attorney General to rely on the possibility that one or more of these four witnesses "may possess" some unspecified quantum of "relevant information" about ExxonMobil's subpoena compliance that Ms. Feinstein was purportedly "unable to provide." (Anderson Ex. S at 2.) Such a "bare statement" of a purported need to drag four employees—including an attorney[7]—from Texas to New York for cumulative testimony is insufficient to sustain the subpoenas. *McGrath* v. *State Bd. for Prof'l Med. Conduct*, 88 A.D.2d 906, 906 (2d Dep't 1982).

At this stage, the Attorney General may not "rest alone on [his] inference" but must identify (a) *what* information the prior deponents were unable to provide, (b) *which* of the new witnesses may be able to provide these "missing" pieces of information,

[7] The subpoena directed to ExxonMobil's in-house counsel, Daniel Bolia, should be quashed for the independent reason that the Attorney General has failed to establish "that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." *Dufresne-Simmons* v. *Wingate*, *Russotti & Shapiro, LLP*, 53 Misc. 3d 598, 606-07 (Sup. Ct. Bronx Cnty. 2016); *see also Q.C.* v. *L.C.*, 47 Misc. 3d 600, 602 (Sup. Ct. Westchester Cnty. 2015). In propounding its abusive subpoenas, the Attorney General has not so much as acknowledged, let alone met, this high burden.

(c) *how* these supposedly-missing facts are relevant to the investigation, and (d) whether this information, if relevant, could be provided in a manner *less* intrusive than compelling *four* witnesses to fly a thousand miles to be deposed. *A'Hearn*, 23 N.Y.2d at 919. In the absence of such an explanation, the subpoenas seeking to compel cumulative testimony appear more as "instruments of abuse and harassment" than bona fide instruments meant to gather information for a legitimate investigative purpose. *Airbnb*, 44 Misc. 3d at 356. They should be quashed as such.

## CONCLUSION

After conducting an investigation for the past year and a half and receiving over 2.8 million pages from ExxonMobil, the Attorney General has not "moved on to the next stage of the investigation," as he promised he would. Rather, he has issued new document and testimonial subpoenas that violate multiple provisions of law. The document subpoena imposes a crushing burden on ExxonMobil by demanding records pertaining to nearly every business decision the company made over the last 12 years. Even worse, it impermissibly conscripts ExxonMobil to review, analyze, and distill that information into spreadsheets prepared according to the Attorney General's specifications and probes areas preempted by federal regulations. The four testimonial subpoenas cover the same ground that was previously addressed in the affidavit, certification, and depositions ordered by this Court. The Attorney General has come forward with no compelling justification for imposing this disproportionate burden, and therefore the subpoenas should be quashed.

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Respectfully submitted,

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP

/s/ Daniel J. Toal

Theodore V. Wells, Jr.
twells@paulweiss.com
Michele Hirshman
mhirshman@paulweiss.com
Daniel J. Toal
dtoal@paulweiss.com

1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

Justin Anderson
janderson@paulweiss.com

2001 K Street, NW
Washington, D.C. 20006-1047
(202) 223-7300
Fax: (202) 223-7420

*Attorneys for Exxon Mobil Corporation*