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

In the Matter of the Application of the PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, Petitioner, - against – PRICEWATERHOUSECOOPERS LLP and EXXON MOBIL CORPORATION, Respondents.	Index No. 451962/2016 IAS Part 61 Hon. Barry R. Ostrager Motion Sequence No. 4

AFFIRMATION OF JOHN OLESKE IN OPPOSITION TO EXXON'S MOTION TO QUASH AND IN SUPPORT OF THE OFFICE OF THE ATTORNEY GENERAL'S CROSS-MOTION TO COMPEL

JOHN OLESKE, under penalty of perjury, affirms:

1. I am Senior Enforcement Counsel to the Office of the Attorney General of the State of New York ("OAG"), counsel for Petitioner. I have personal knowledge of the matters set forth herein.

2. I make this affirmation in opposition to Exxon Mobil Corporation's ("Exxon") motion to quash OAG's investigative subpoenas, and in support of OAG's cross-motion to compel Exxon's compliance with those subpoenas.[1]

3. The facts below relate to three critical issues: (i) OAG's factual basis to believe that Exxon may have violated New York law by making false and misleading representations

[1] For the convenience of the Court and the parties, OAG addresses all facts relevant to both Exxon's motion and OAG's cross-motion in this affirmation in lieu of two separate submissions.

about its risk-management practices, investment practices and valuation practices; (ii) Exxon's bad-faith pattern of obstruction and document destruction in response to OAG's November 4, 2015 subpoena duces tecum (the "2015 Subpoena"); and (iii) the relationship between the subpoenas OAG issued on May 8, 2017, OAG's ongoing inquiries, and the relief needed to allow OAG to proceed with its concededly proper investigation.

I. OAG's Factual Basis for its Ongoing Investigation of Exxon

A. OAG's Pre-Existing Monitoring Of Potentially-Misleading Corporate Representations Concerning The Impact Of Climate Change

4. OAG is responsible for enforcing New York's anti-fraud laws, including General Business Law §§ 352 *et seq.* (the "Martin Act"), which empowers OAG to take remedial action to protect investors from false and misleading statements made in connection with the sale and purchase of securities.

5. When a company makes disclosures about the impact of climate change and related government policies on that company's core business, New York law requires it do so accurately. It may not present a picture to investors, regulators and the public that is materially at odds with what the company or its executives have concluded internally. OAG has conducted numerous investigations to ensure that corporate statements about environmental issues comply with New York laws governing commercial disclosures. For example:

- In 2008 and 2009, OAG announced the successful settlement of three investigations of potentially misleading statements by three companies operating in New York, Dynegy Inc., Excel Energy Inc. and AES Corporation, about the impact of climate change on their business.
- In 2014, OAG announced the successful settlement of two investigations of potentially misleading statements by two companies, Anadarko Petroleum Corp. and EOG Resources, Inc., concerning the financial impact of the use of hydraulic fracturing as part of the natural gas extraction process.
- In 2015, OAG announced the successful settlement of an investigation of Peabody Energy (formerly Peabody Coal). As a result of the settlement, Peabody was prohibited

from making the following misleading statements to investors: (1) stating that it could not predict the potential impact of climate regulations on its business when, in fact, Peabody *had* projected internally that such regulations would have severe negative impacts on coal demand, and (2) claiming that an International Energy Agency report had found government action affecting demand for coal unlikely, and that such demand would remain high, when the report had not, in fact, drawn that conclusion.

B. The Publication Of "Energy And Carbon–Managing The Risks" And Other Representations Related To Exxon's Purported Proxy-Cost Analysis

6. For several years prior to 2014, shareholders of several major fossil-fuel energy companies doing business in New York began proposing shareholder resolutions calling for increased disclosures concerning potential risks to the companies' value posed by the risk of future climate-change-related regulations.

7. In March 2014, Exxon negotiated the withdrawal of one such resolution proposed by a group of its shareholders in exchange for the company's agreement to publish a report concerning such risks.

8. The report, *Energy and Carbon–Managing the Risks* ("the MTR Report"), was published later that month. According to its opening paragraph, the MTR Report "seeks to address important questions raised recently by several stakeholder organizations on the topics of global energy demand and supply, climate change policy, and carbon asset risk." A true and correct copy of *Energy and Carbon–Managing the Risks* is attached as Exhibit 1.

9. In the MTR Report, Exxon represented that it "does not believe current investment in new reserves are exposed to the risk of stranded assets" and that it is "confident that none of our hydrocarbon reserves are now or will become 'stranded.'" (Ex. 1, MTR Report at 1, 19.)

10. The MTR Report specifies how Exxon purports to manage risk relating to prospective climate-change-related regulation:

> We also address the potential for future climate-related controls, including the potential for restriction on emissions, through the use of a proxy cost of carbon. This proxy cost of carbon is embedded in our current *Outlook for Energy*, and has been a feature of the report for several years. The proxy cost seeks to reflect all types of actions and policies that governments may take over the Outlook period relating to the exploration, development, production, transportation or use of carbon-based fuels. Our proxy cost, which in some areas may approach $80/ton over the Outlook period, is not a suggestion that governments should apply specific taxes . . . Perhaps most importantly, we require that all our business segments include, where appropriate, GHG costs in their economics when seeking funding for capital investments. *We require that investment proposals reflect the climate-related policy decisions we anticipate governments making during the Outlook period and therefore incorporate them as a factor in our specific investment decisions.*

(*Id.* at 17-18) (emphasis added).

11. The MTR Report's proxy cost representations followed years of similar representations by Exxon. In its annual *Outlook for Energy* reports starting in 2008, Exxon stated that it anticipated that governments would impose a cost of greenhouse gas emissions (GHGs). Exxon Mobil Corp., *2008 The Outlook for Energy: A View To 2030*, at 12. Over time, these representations grew more specific. By the 2010 *Outlook for Energy*, Exxon set out specific GHG prices, on specific timelines, that it expected as a result of regulatory action. Exxon Mobil Corp., *2010 The Outlook for Energy: A View To 2040*, at 9, 29-31. These representations grew even more detailed in the 2012 *Outlook for Energy*, in which Exxon represented that these expectations were "integral to [its] forecasts" for hydrocarbon demand. Exxon Mobil Corp., *2012 The Outlook for Energy: A View To 2040*, at 30.

12. After the MTR Report was published in March 2014, and continuing to the present, Exxon has represented that the core risk-management statements in the MTR Report

concerning the application of a proxy cost of GHGs to investment decisions apply to Exxon's business practices over the past decade, reflecting company policy going back to 2007. In reports, speeches, and on its website, Exxon has frequently repeated the representations made in the MTR Report and referred investors back to representations made in the MTR Report.

13. For example, in November 2014, Exxon published an article on its *Perspectives* website, in which it stated that "ExxonMobil's Outlook for Energy" assumes a proxy cost of carbon of $80 per ton. Exxon Mobil Corp., *More On Divestment: A Letter to Tim Wirth* (Nov. 6, 2014), http://www.exxonmobilperspectives.com/2014/11/06/more-on-divestment. In a December 2, 2015 article on the same website, Exxon stated that "ExxonMobil has included a proxy price on carbon in our business planning since 2007." Exxon Mobil Corp., *ExxonMobil and the Carbon Tax* (Dec. 2, 2015), https://energyfactor.exxonmobil.com/corporate-citizenship-sustainability/exxonmobil-and-the-carbon-tax/.

14. Likewise, in a 2016 report entitled "Meeting Global Needs – Managing Climate Change Business Risks," Exxon stated that "in most OECD nations, we assume an implied cost of carbon dioxide ("CO2") emissions that will reach about $80 per metric ton in 2040," and that "this GHG proxy cost is integral to Exxon's planning." Exxon Mobil Corp., *Meeting Global Needs – Managing Climate Change Business Risks*, http://corporate.exxonmobil.com/en/current-issues/climate-policy/climate-perspectives/managing-climate-change-business-risks.

15. Exxon's proxy notices to shareholders contained similar representations. In Exxon's April 13, 2016 notice of the company's 2016 annual shareholder meeting, Exxon repeated the representations in the MTR Report quoted *supra* at ¶ 10, and also represented that the "proxy cost of carbon is embedded in our *Outlook for Energy*, and has been a feature of the report since 2007." Exxon Mobil Corp., *Notice of 2016 Annual Meeting & Proxy Statement*

(Apr. 13, 2016), http://cdn.exxonmobil.com/~/media/global/files/investor-reports/2016/2016_Proxy_Statement.pdf.

16. On May 25, 2016, Exxon's then-Chairman and CEO Rex Tillerson told attendees at Exxon's annual shareholder meeting that the company's "price of carbon gets put into all of our economic models when we make investment decisions as well. It's a proxy… So we choose to put it in as a cost. *So we have accommodated that uncertainty in the future, and everything gets tested against it.*" (emphasis added). A true and correct copy of the relevant portion of the transcript of this meeting is attached as Exhibit 2.

17. In Exxon's April 13, 2017 notice of the company's 2017 annual shareholder meeting, Exxon recommended that shareholders vote against two proposals relating to the integration of climate-regulatory risk, referring shareholders to the MTR Report for a description of "how the Company integrates consideration of climate change risks into planning processes and investment evaluation." Exxon Mobil Corp., *Notice of 2017 Annual Meeting & Proxy Statement*, at 66 (Apr. 13, 2017), http://cdn.exxonmobil.com/~/media/global/files/investor-reports/2017/2017_proxy_statement.pdf.

18. On May 31, 2017, Exxon shareholders voted in favor of a proposal that the company publish an annual assessment of the long-term financial impacts of climate change. At the shareholder meeting itself, Exxon's CEO Darren Woods stated that Exxon's *Outlook for Energy* is consistent with the Paris Accord and that all of Exxon's businesses are required to include where appropriate an estimate of the costs associated with greenhouse gas emissions.

19. Exxon has repeated its proxy cost representations in multiple 10-Ks, multiple submissions to the Carbon Disclosure Project (CDP)[2], its annual *Outlook for Energy* public reports, and a separate report it issued in March 2017 entitled *2016 Energy and Carbon Summary*.

20. Evidence reviewed by the OAG to date indicate that Exxon's major oil and gas projects often span multiple decades, and that the proxy cost of GHGs can have a material effect on the long-term profitability of Exxon's projects and the value of its assets.

C. Evidence Indicates That Exxon's Internal Proxy Cost Policies Were Inconsistent With Its Representations

21. The investigation to date has uncovered evidence that, from 2010 through June 2014, the proxy cost Exxon set out in its internal policies was lower than the proxy cost the company publicly represented that it used in investment decisions. In other words, Exxon represented to investors and the public that it was incorporating higher costs of GHG regulation into its business decisions than documents indicate that it actually was using, thereby potentially misleading investors and the public about the extent to which it was protecting its business from regulatory risks related to climate change.

22. In particular, Exxon publicly stated in the MTR Report and its *Outlook for Energy* reports that for projects in developed countries, it applied proxy costs that reached $60/ton of GHGs by 2030, and $80/ton by 2040. In fact, the proxy cost figures used for Exxon's internal planning and budgeting reached only $40/ton by 2030. *See infra* at ¶ ¶ 23-25, Exs. 3-5.

[2] The Carbon Disclosure Project ("CDP") is a United Kingdom-based nongovernmental organization that runs a global disclosure system that enables companies and governments to measure and manage their environmental impacts. CDP's data enables its network of investors, supply chain purchasers and policy makers to link environmental integrity, fiduciary duty and public interest to make better-informed decisions on climate action. Thousands of corporations voluntarily report their GHGs to the CDP. Each year Exxon submits answers to questions about climate change posed by the CDP.

23. It appears that this discrepancy was known at Exxon's highest levels. As one example, an email from Exxon's Corporate Greenhouse Gas Manager acknowledged as early as 2010 that the publicly disclosed proxy cost figures were "more realistic" than those that Exxon actually used. A true and correct copy of this correspondence, EMC 000339155, is attached as Exhibit 3.

24. As another example, a 2011 email states that CEO Rex Tillerson was "happy with the difference" because using a lower proxy cost was "conservative" from the perspective of investing in projects, like carbon capture and storage, that allow Exxon to claim emissions-reduction credits. The email acknowledged, however, that using a lower cost than publicly disclosed was "not conservative . . . from the perspective of debiting actions that increase emissions," such as investing in oil and gas development projects. A true and correct copy of this correspondence, EMC 000354827, is attached as Exhibit 4.

25. It was not until June 2014 that Exxon sought to eliminate this glaring inconsistency between external and internal figures. At that time, Exxon's new Corporate Greenhouse Gas Manager acknowledged in an internal presentation that the proxy costs that Exxon used internally were "non-conservative" with respect to projects that increase carbon emissions, and admitted that, in public reports, "we have implied that we use the [publicly-disclosed] basis for proxy cost of carbon when evaluating investments." A true and correct copy of this presentation, EMC 000539921, is attached as Exhibit 5.

26. According to documents produced from the custody of Jason Iwanika, a Development Planner at Imperial Oil Limited ("Imperial"), Exxon's majority-owned subsidiary in Canada, another planner at another Exxon affiliate referred to the 2014 alignment of external

and internal proxy cost figures as a "huge change." A true and correct copy of this correspondence, EMC 000556782, is attached as Exhibit 6.

27. Exxon did not inform investors about the undisclosed variation in its use of proxy-cost formulas when it represented in 2016 that it had been applying its publicly-touted proxy-cost analysis since 2007. *Supra* at ¶ 15.

D. Exxon's Documents Indicate That Exxon Often Did Not Apply Any Proxy Cost Of Ghgs

28. Compounding the discrepancy between Exxon's public representations and its internal policies, it now seems apparent that Exxon has not applied a proxy cost of GHGs at all with respect to many of its oil and gas projects. This understanding is based both on documents Exxon has produced, and on documents that Exxon has failed to produce but that OAG would have expected to see if Exxon's much-touted proxy cost analysis was consistently implemented.

1. Evidence Reveals A Corporate Decision To Abandon Proxy-Cost Analysis For Its Canadian Oil Sands Projects

29. The investigation to date has uncovered evidence that indicates that, by 2015, the company faced a problem with respect to its multi-decade, multi-billion-dollar oil sands projects in Alberta, Canada. These projects, which have a significant impact on the company's bottom line, apparently have not been as profitable as Exxon expected. As described above, Exxon had in mid-2014 increased the proxy cost of GHGs in its internal analyses to match those that it had been touting to the public for years. This change would have affected the projected profitability of all of Exxon's projects, including its oil sands projects, and, according to evidence reviewed by OAG, may have rendered at least one of its major oil sands projects unprofitable over the life of the project.

30. Evidence reviewed to date indicates that the company's response was not to faithfully apply the proxy-cost analysis and recognize losses as appropriate. Rather, evidence indicates that Exxon decided in the fall of 2015 to abandon the proxy-cost figures applicable to Alberta projects that were set out in its internal policies, and decided instead to apply the current, much lower GHG tax that existed under Alberta law at that time.

31. The proxy cost analysis set out in Exxon's internal policies required the incorporation of an escalating GHG cost, reaching $80/ton of carbon dioxide (or CO2 equivalent in other GHGs) by 2040, into the company's economic forecasting for purposes of corporate decision-making. Instead of applying this analysis, Exxon applied the Alberta GHG tax, which did not exceed $24/ton (U.S. currency), and held that figure flat indefinitely into the future. Further, Exxon applied this cost of carbon to only a small percentage of emissions – 15% to 20% – specified under existing Alberta law, resulting in an effective cost of less than $4/ton.

32. Applying a GHG tax that already exists is not a "proxy" for anything, and does not "address the potential for future climate-related controls," as Exxon repeatedly represented that its proxy cost of GHGs was intended to do. (*See* ¶ 10 *supra*.) The apparent discrepancy between Exxon's words and actions is particularly significant where, as here, the actual GHG costs Exxon applied were both significantly lower than its purported proxy costs, and applied only to a very limited percentage of its GHGs.

33. Indeed, evidence shows that Jason Iwanika, the Imperial Development Planner discussed *supra* in ¶ 26, sought direction from Exxon concerning how to apply the GHG assumptions set out in the Corporate Plan Dataguide to the Canadian oil sands projects, and questioned Exxon's directions that he deviate from those assumptions. Nonetheless, it appears

that Exxon ignored his concerns and instructed him to disregard the proxy-cost assumptions set out in its internal policies.

2. Exxon Has Produced No Documents Reflecting Consistent Application of Proxy-Cost Analysis to Investment Decisions

34. It appears that Exxon's proxy-cost risk-management process may be a sham based on the fact that the company has failed to produce certain documents it would have had to create to accomplish its publicly-stated representations.

35. Notwithstanding the numerous deficiencies in its subpoena compliance, Exxon has produced approximately 450,000 documents, including documents from a number of custodians who should have been involved in the application and management of the proxy-cost analysis described in Exxon's public representations. These documents appear to be devoid of evidence that Exxon applied any consistent proxy-cost analysis – whether the publicly-stated figures or its secret internal version – to its major investment decisions.

36. The two documents Exxon points to in its motion papers do not provide any evidence of Exxon actually doing what it told investors. First, Exxon cites a two-page insert that it published annually in its Corporate Dataguide Appendix, which does little more than list the purportedly-applicable proxy costs across geographic regions and timeframes. However, as set out above, it appears that this internal policy clashed with Exxon's public representations for years, and that Exxon did not even follow this policy in many instances. Beyond these two pages, Exxon has not produced any company-wide or region-specific procedures, guidance, or analysis related to the proxy cost of GHGs, undermining any notion that Exxon implemented its touted proxy-cost analysis across a meaningfully wide spectrum of investment or planning decisions. Further, evidence reviewed by OAG reveal a widespread lack of awareness among employees of the proxy cost policy, or how it should be applied.

37. Second, the single instance in which Exxon has affirmatively identified to OAG and this Court its purported application of the proxy-cost analysis concerned a single, unusual project in which applying the proxy cost was to the company's benefit. For this project, Exxon sold CO2 to other operators rather than releasing it into the atmosphere, generating GHG credits rather than added costs. Thus, the evidence shows that Exxon applied it proxy-cost analysis to generate additional profit, but failed to apply it in cases that would have reduced profits or increased losses. This in no way constitutes the kind of risk-management exercise for future oil and gas development and production as described by Exxon's proxy-cost representations, and in any event concerns only a single project. (Feb. 11, 2017 Toal Letter to OAG at 2; Mar. 16, 2017 Toal Letter to Court at 4.) True and correct copies of this correspondence are attached as Exhibits 7 and 8.

3. Evidence Indicates That It Excluded 90% of Emissions When Applying Its Purported Proxy-Cost Analysis

38. Exxon represented to investors that its proxy-cost analysis included emission from the end use of its fossil fuels, *i.e.*, Scope 3 emissions, when it stated in the MTR Report (and elsewhere) that "[t]he proxy cost seeks to reflect all types of actions and policies that governments may take over the Outlook period relating to the… *transportation or use* of carbon-based fuels". (*e.g.*, Ex. 1, MTR Report at 17.)

39. Emissions from the end-use of fossil fuels, synonymous with Scope 3 emissions, account for approximately 90% of all fossil-fuel-related greenhouse gases, as Exxon acknowledged in its submission to the CDP. (*See*, *e.g.*, Exxon's 2015 submission to the CDP at 23, Answer CC14.4c) ("approximately 90 percent of petroleum-related GHG emissions are generated when customers use our products and the remaining 10 percent are generated by

industry operations.") A true and correct copy of Exxon's 2015 submission to the Carbon Disclosure Project is attached as Exhibit 9.

40. Yet Exxon's documents indicate that even in the few instances where Exxon tried to apply some semblance of a proxy-cost, Exxon failed to include costs relating to end use, or Scope 3, emissions, thus ensuring that even in Exxon's most robust application of proxy cost it failed to account for 90% of the "use" of its fossil fuels. (*e.g.*, EMC 000548250.) A true and correct copy of one example, EMC 000548250, is attached as Exhibit 10.

E. Documents Produced By Pwc And Exxon Indicate That Exxon Failed To Apply The Proxy-Cost Analysis To Its Impairment Decisions Prior To 2016

41. As set forth above, Exxon's internal policies concerning its application of a proxy cost of GHGs were inconsistent with its representations to investors. In addition, its actual practices with respect to major investment decisions were inconsistent with both internal policies and representations to investors. The evidence OAG has reviewed to date indicates that, at least until 2016, Exxon failed to apply a proxy cost of GHGs in determining whether its long-lived assets, such as oil and gas reserves and resources, were impaired, rendering its representations false and misleading.

1. Standards Governing Impairment

42. Financial Accounting Standards Board ("FASB") Accounting Standards Codification ("ASC") 360 governs the accounting for the impairment of long-lived assets under U.S. generally-accepted accounting principles ("GAAP"). A true and correct copy of relevant excerpts from ASC 360 is attached as Exhibit 11. As set out below, Exxon represents in its public filings that it follows the guidance set out in ASC 360.

43. ASC 360 sets out a three-step process for identifying and measuring the impairment of long-lived assets or asset groups.

44. First, a company must routinely assess whether indicators of impairment are present. Examples of such indicators, also known as "impairment triggers," include:

a. a "significant decrease in the market price of a long-lived asset";

b. a "significant adverse change in legal factors or in the business climate that could affect the value of a long-lived asset . . . including an adverse action or assessment by a regulator";

c. an "accumulation of costs significantly in excess of the amount originally expected for the acquisition or construction of a long-lived asset"; and

d. a "current-period operating or cash flow loss combined with a history of operating or cash flow losses or a projection or forecast that demonstrates continuing losses associated with the use of a long-lived asset[.]"

(Ex. 11, ASC 360-10-31-21.) Exxon has repeatedly represented to investors and to the public that it meets these accounting requirements by "perform[ing] asset valuation analyses on an ongoing basis as a part of its asset management program" to determine whether events and circumstances such as those set out in ASC 360-10-31-21 are present. (*See, e.g.*, Exxon's 2015 Form 10-K at 57, 69.) A true and correct copy of Exxon's 2015 Form 10-K is attached as Exhibit 12.

45. Second, if one or more impairment triggers are present, a company must test the asset in question to determine whether the balance sheet carrying amount of the asset exceeds the sum of the undiscounted future cash flows expected to result from the use and disposition of the asset. (Ex. 11, ASC 360-10-35-17, 360-10-35-21.) Exxon has represented to investors and to

the public that it has complied with its obligations under this accounting requirement. (*See, e.g.*, Ex. 12, Exxon Mobil Corp., 2015 Form 10-K at 57, 70.)

46. Third, if it is determined that the carrying amount of a long-lived asset is not recoverable, a company must determine the fair value of the asset and calculate an impairment loss based on this fair value. ASC 360-10-35-17. Exxon has represented to investors and to the public that it has complied with its obligations under this accounting requirement. (*See, e.g., id.* at 57, 70.)

47. In developing future cash flow estimates for impairment analyses, accounting standards require that a company must "incorporate the entity's own assumptions . . . and shall consider all available evidence." (Ex. 11, ASC 360-10-35-30.) Further, "[t]he assumptions used in developing those estimates shall be reasonable in relation to the assumptions used in developing other information used by the entity for comparable periods, such as internal budgets and projections, accruals related to incentive compensation plans, or information communicated to others." *Id.* Exxon has represented to investors and to the public that it has met this obligation as well. (*See, e.g.*, Ex. 12, Exxon Mobil Corp., 2015 Form 10-K at 70) ("Cash flows used in impairment evaluations . . . make use of the Corporation's price, margin, volume, and cost assumptions developed in the annual planning and budgeting process, and are consistent with the criteria management uses to evaluate investment opportunities.").

2. Exxon's Omission of Proxy Cost of GHGs in Impairment Decisions

48. Because Exxon refused to produce documents relating to valuation of its assets for impairment purposes, OAG subpoenaed the company's accountants, PricewaterhouseCoopers LLP ("PwC") in October 2016, and has since received approximately 38,000 documents from PwC.

49. The evidence to date indicates no attempt at all, by Exxon or by PwC, to incorporate a proxy cost of GHGs into the economic models of cash flows used in determining whether a trigger for impairment testing existed or whether Exxon's assets were actually impaired prior to 2016. To the contrary, these documents indicate that Exxon and PwC only began incorporating proxy cost assumptions into some of Exxon's impairment-related accounting analyses in 2016, after OAG first subpoenaed Exxon.

50. Exxon's apparent failure to incorporate a proxy cost of GHGs into its impairment-related decisions is particularly important in light of Exxon's stated accounting approach to low oil and gas prices. Exxon has stated that it "does not view temporarily low prices or margins as a trigger event for conducting impairment tests." (Ex. 12, Exxon Mobil Corp., 2015 Form 10-K at 57.) Exxon has also asserted that it instead considers prices over the "long term," *id*., and that its "assessment is that its operations will exhibit strong performance over the long term." (*Id.* at 42.) Indeed, documents produced by PwC show that, with oil and gas prices at low levels, Exxon relied on long-term cash flow models to forecast that certain of its projects, even if losing money currently and in the near-to-medium term, will ultimately generate cash flows that exceed their balance sheet carrying values, and thus are not impaired or do not exhibit triggers for impairment evaluation.

51. Such forecasts must abide by Exxon's representations, and GAAP requirements, that the company use the same assumptions in its impairment decisions that it uses (or purports to use) in its other business decisions, including the application of a proxy cost of GHGs that grows over time. *See supra*. To the extent that Exxon did not do so, it seems clear that the company misled investors about the value of the company's assets and its risk management

processes in light of the dual challenges of ongoing low oil and gas prices and growing GHG costs over time.

52. Exxon's apparent failure to incorporate a proxy cost of GHGs into its impairment-related cash flow models is even more relevant given its public stance with respect to the question of whether its long-lived assets could become stranded or uneconomical to produce due to rising GHG costs. In the MTR Report, Exxon represented that it was "confident that none of [its] hydrocarbon reserves are now or will become 'stranded'" (Ex. 1 at 1) and that "the company does not believe current investments in new reserves are exposed to the risk of stranded assets[.]" (*Id.* at 19.) The MTR Report originally contained a footnote addressing impairment, but that footnote was removed at the request of David Rosenthal, Exxon's Vice President for Investor Relations, after he stated in a March 25, 2014 email: "[t]hat word gives folks on the third floor heartburn." A true and correct copy of that correspondence, at EMC 001198245 is attached as Exhibit 13.

3. The Importance of Production of Exxon's Impairment-Related Documents

53. OAG has received impairment-related documents from PwC, but without documents from Exxon itself, OAG's window into Exxon's impairment-related decisions is limited. Documents produced by PwC indicate that Exxon has not shared with PwC all relevant documents on this topic, including many of the cash flow models Exxon uses for impairment-related purposes. In other cases, PwC was shown such documents, but Exxon did not permit PwC to retain them. Further, PwC does not appear to possess drafts of relevant Exxon documents such as impairment memoranda and asset recoverability reviews. Nor does PwC possess related internal Exxon communications. Such documents are reasonably related–indeed, highly relevant–to OAG's inquiry.

54. Additionally, despite the First Department's May 23, 2017 Decision and Order unanimously affirming this Court's order granting OAG's October 14, 2016 petition to compel Exxon and PwC to comply with OAG's subpoena notwithstanding any purported accountant-client privilege, PwC has still not produced the documents that were withheld on that basis, as Exxon has sought and received a stay from the First Department. There is likely to be some (though not complete) overlap between the withheld PwC documents and responsive documents in Exxon's possession, and therefore requiring Exxon to produce such documents would avoid further delays.

II. Exxon Failed to Conduct a Compliant Subpoena Response, Resulting in the Still-Unexplained Destruction of Documents from Key Custodians

55. Exxon's compliance with the original subpoena has been marked by delays, obstruction, and the destruction of untold numbers of documents from over a dozen key custodians.

56. The root of Exxon's apparent destruction of subpoenaed documents was the failure of its Law Department to observe basic requirements in document preservation, collection, production, and recovery. These failures have also contributed to numerous other delays and deficiencies in Exxon's document production.

57. In an attempt to understand the scope of these failures and their impact on the prospective completion of Exxon's document production, and as specifically ordered by the Court at the March 23, 2017 conference, OAG solicited affidavits and took testimony from two witnesses proffered by Exxon: Connie Feinstein of Exxon's Information Technology Department ("EMIT") and Michelle Hirshman of Paul, Weiss.

58. Neither witness could testify to the topics for testimony stated in the subpoenas issued to Exxon. True and correct copies of the subpoenas for testimony issued to Exxon are attached as Exhibits 14 and 15.

59. Indeed, the totality of these witnesses' testimony confirms Exxon's Law Department failed to search for, collect, and preserve documents responsive to the 2015 Subpoena, resulting in the destruction of unknown number of Exxon documents from key custodians.

60. However, neither Ms. Feinstein nor Ms. Hirshman were able to provide key information about the scope of Exxon's past compliance failures or the company's conduct in attempting to recover the destroyed documents.

A. Exxon's External Counsel Was Insufficiently Involved in the Process of Subpoenas Compliance

61. An important preliminary fact was confirmed in the witness testimony: Exxon's external counsel did not supervise important aspects of Exxon's subpoena compliance.

62. Specifically, external counsel played no part in the process of interviewing potential Exxon document custodians, including top managers, their assistants, and other key custodians. (Ex. 17, May 3, 2017 Toal Letter to OAG, Ex. B; Hirshman Tr. 60-61.) A true and correct copy of the testimony taken of Michele Hirshman, dated March 10, 2017 is attached as Exhibit 16.

63. External counsel also failed to familiarize themselves with Exxon's information-technology department or Exxon's data storage and management practices. (*See, e.g.*, Ex. 16, Hirshman Tr. 119-20, 123-24, 131-32, 159-61, 174-78.)

64. External counsel failed to even learn the details of, let alone supervise, Exxon's preservation-hold process, failed to reiterate preservation instructions to potential custodians who

received preservation holds, and failed to monitor those potential custodians' actual compliance with the preservation holds. (*See, e.g.*, Ex. 16, Hirshman Tr. 36-49, 50-52, 142-44.)

65. In the absence of external supervision, Exxon's in-house Law Department repeatedly violated established compliance obligations.

B. Exxon Failed to Interview Key Custodians, Contrary to Prior Representations to OAG

66. Exxon repeatedly represented in its correspondence with OAG that its procedure for document collection began, as required, with witness interviews to identify likely repositories of responsive documents. *See, e.g.*, Ex. 18, Apr. 18, 2016 Hirshman Letter to OAG, at 6-7 ("As we have repeatedly explained, ExxonMobil is conducting a custodian-by custodian search for documents. *Documents are collected from the data sources identified by a custodian as containing potentially responsive documents*."); Ex. 19, Dec. 5, 2016 Toal Letter to Court, at 5 ("ExxonMobil crafted its custodian list through comprehensive research, witness interviews, and document review."); Ex. 20, Dec. 9, 2016 Hearing Tr. 23:13-16 (Toal: "We have asked custodians, we've interviewed custodians, we've asked them where they store documents, we asked them if they store documents on shared drives."); Ex. 21, Revised Hirshman Cert. ¶ 28 ("ExxonMobil identified the[] custodians through comprehensive research, witness interviews, and document review."). *Cf.* Ex. 17, May 3, 2017 Toal Letter to OAG at Ex. B (confirming that Management Committee members and their assistants were not interviewed until March or April of 2017, and some not at all). A true and correct copy of these letters are attached as Exhibits 17 through 21.

67. As confirmed in the witness' testimony, Exxon did not interview any of its Management Committee members or their assistants to identify the locations of responsive documents prior to March 2017. (Ex. 16, Hirshman Tr. 62,146-49.)

68. Several such custodians, including former Chairman and CEO Rex Tillerson, had left the company by that time, and apparently they were never interviewed at all. (Ex. 17, May 3, 2017 Toal Letter to OAG, Ex. B; Ex. 16, Hirshman Tr. 64-65.)

69. Exxon also did not interview custodians of reserves-related documents until at least July or August of 2016, and in some cases, has still not done so. (Ex. 17, May 3, 2017 Toal Letter to OAG, Ex. B.)

C. Exxon Failed to Preserve Documents it Knew Were Potentially Relevant, Despite OAG's Repeated Questioning of Inadequate Preservation

70. Partly as a consequence of the its failure to interview key custodians, Exxon failed to place on preservation hold documents from those and other custodians.

71. Exxon failed in this respect despite correspondence from OAG that Exxon's preservation efforts appeared inadequate. (*See, e.g.*, Ex. 16, Hirshman Tr. 154-55.)

1. Management-Committee Documents

72. Exxon failed to preserve documents from multiple custodians who it knew might possess relevant documents relating to the communications and work of the company's Management Committee.

a) Wayne Tracker

73. Exxon knew at the time the 2015 Subpoena was issued that Mr. Tillerson used a secondary email account, wayne.tracker@exxonmobil.com, in addition to his "official" email account rex.w.tillerson@exxonmobil.com.

74. Exxon knew that in its internal computer systems relating to identity-management, the company had assigned the wayne.tracker@exxonmobil.com email account not to Mr. Tillerson, but to an information-technology employee named Ramona Helble.

75. Exxon did not place Ms. Helble on a preservation hold, or otherwise take any action to ensure that documents stored with respect to the wayne.tracker@exxonmobil.com email account would be preserved.

76. During Ms. Hirshman's testimony, she testified that she personally knew in "early 2016" that there existed a second email address for Rex Tillerson – the Wayne Tracker email address, and that she believed Exxon's failure to inform OAG of this alias email address would constitute "an interesting test of whether the Attorney General's office is reading the documents." (Ex. 16, Hirshman Tr. 134.) However, Ms. Hirshman further testified that neither she nor her firm made any attempt to look further into the preservation, collection or production of documents of the Wayne Tracker email address at that time, leading to months of automatic destruction of relevant correspondence. (*Id*. at 141-42.)

b) Management-Committee Assistants

77. Exxon also knew that assistants to its Management-Committee members were highly knowledgeable of and involved in their principals' communications.

78. In previous litigations where Exxon preserved Management-Committee documents, it also placed management assistants on preservation hold.

79. Here, Exxon did not place any management assistants on preservation hold until March 2017.

c) Management-Committee Member Donald Humphreys

80. Exxon's outside counsel affirmed that management custodians requested in the 2015 Subpoena were placed on hold and their documents collected. This was not true.

81. Donald D. Humphreys served as a Senior Vice President on Exxon Mobil's Management Committee from January 1, 2006 to February 1, 2013.

82. Based on Exxon's representations, Exxon appears to have made no effort to preserve or collect Mr. Humphreys' documents.

d) Imperial President Richard Kruger

83. Exxon's outside counsel affirmed that management custodians requested in the 2015 Subpoena were placed on hold and their documents collected. OAG had also requested, and Exxon has produced and placed on hold responsive documents of employees of Exxon and its affiliates.

84. To date over 750 documents from the custody of Imperial employees have been produced to the OAG. Another almost 1800 documents to or from custodians with an 'esso.ca' email address (one of Imperial's domains) were also produced. *See also infra* ¶ 133.

85. Imperial President Kruger is shown in Exxon's documents as having routine contact with Exxon's Management Committee. In 2015, Mr. Kruger sent an email to the Management Committee promising detailed information about the impact of Alberta GHG regulations, including the low carbon tax Exxon used in place of a proxy cost, with respect to Exxon's oil sands projects, stating that Imperial was "turning our immediate focus to a detailed examination of the announcement and its impact on our existing operations and possible future projects in Alberta." A true and correct copy of this correspondence, EMC 001844415, is attached as Exhibit 22.

86. Despite that fact, Exxon did not place the documents of Mr. Kruger and his executive assistant on hold until April 2017, 18 months after the subpoena was issued, presumably resulting in the destruction of more than a year's worth of their documents.

2. Reserves-Related Documents

87. Exxon also knew that the 2015 Subpoena called for, and that OAG had specifically requested, documents from custodians responsible for analyzing the company's oil and gas reserves estimates.

88. Exxon did not place any such custodians on preservation hold until July 2016, and OAG believes that some relevant custodians have never been placed on hold.

89. This is in part because Exxon has refused to identify members of various reserves-related committees that existed prior to 2016. Because of Exxon's refusal, OAG cannot presently determine what potential reserves custodians' documents Exxon has failed to preserve. (*See* ¶ 126, *infra*).

D. Potentially Relevant Documents from Key Custodians Have Been Destroyed

90. As a direct consequence of these failures, an unknown number of documents from Exxon's Management-Committee and reserves custodians have been destroyed.

91. Specifically, Exxon has disclosed that its document-management software automatically "sweeps" (deletes) emails and attached documents from custodians after a period of 395 days, unless the subject email accounts are placed on a preservation hold. (Anderson Ex. Q, Amended Feinstein Aff. ¶ 51, n.4.) Non-email documents (electronic or paper) may also have been destroyed during this time by the key custodians not notified of the preservation hold.

92. Because emails and attached documents from the wayne.tracker@exxonmobil.com email account, the management assistants, Mr. Humphreys, Mr. Kruger, and relevant custodians of reserve documents were not placed on a preservation hold until March 2017, at the earliest, at least a full year's worth of emails, attached documents and

non-email documents from each of those sources during the pendency of the 2015 Subpoena have been destroyed.

E. Exxon Falsely Represented that it Conducted a Compliant Search for Management Documents While Its Document Destruction was Ongoing

93. Exxon represented that its document production protocol began with witness interviews and otherwise conformed to its compliance obligations, including through the application of agreed-upon Boolean search terms. (*See supra* at ¶ 66; *see also* Ex. 23, Dec. 22, 2015 Jansen Letter, at 1 ("[I]n your December 16, 2015 correspondence, you suggested several modifications to the search terms that ExxonMobil is using to identify potentially relevant electronic data. ExxonMobil confirms that we have incorporated all of your suggested modifications."); Ex. 19, Dec. 5, 2016 Toal Letter to Court, at 5 n.4 ("Here, the parties did 'carefully craft' the set of search terms."). A true and correct copy of December 22, 2015 Jansen Letter is attached as Exhibits 23.

94. In fact, as was only disclosed in March 2017, Exxon had actually conducted document collection and production of Management-Committee documents in a wholly undisclosed and non-compliant fashion prior to that time.

95. Specifically, Exxon did not interview Management-Committee custodians, nor their assistants, to identify likely locations of responsive documents.

96. Instead, Exxon's Law Department gave still-undisclosed instructions directly to the Management-Committee assistants directing them to collect paper documents and an unspecified range of electronic documents.

97. Separately, Exxon's Law Department purportedly instructed an EMIT employee named Bob Lauck to conduct a noncompliant search of the individual management custodians' documents in Microsoft Outlook, a method which has severe technical deficiencies in collecting

all relevant documents – including those observed by courts[3] – rather than Exxon's own document collection software and processes.

98. Based on what Exxon has been able to explain thus far, these searches did not employ the agreed-upon Boolean search terms,[4] and otherwise failed to meet basic standards for e-discovery compliance.

F. Exxon's Failure to Explain the Scope of the Document Destruction or its Remediation Efforts, Requires Testimony From Additional Witnesses

99. Even though OAG made its specific need for witness testimony to assess the scope and remediation of Exxon's document destruction clear at the conference before the Court on March 23, 2017, in multiple letters and emails leading up to both witnesses' testimony, and in the noticed topics for testimony, Exxon failed to proffer witnesses who could explain the full scope of Exxon's document destruction and the details of how it came about, the nature and operation of Exxon's data backup systems, or the efforts Exxon has made to recover documents known to have been destroyed.

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[3] *See, e.g.*, *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency*, 877 F. Supp. 2d 87, 106-07 (S.D.N.Y. 2012) ("Seemingly minor decisions – whether intentional or not – will have major consequences. Choosing 'subject field' rather than 'subject field and message body' during a search using the Microsoft Outlook email client will dramatically change its scope and results."); *see also T.A. Ahern Contrs. Corp. v. Dormitory Auth. of State of N.Y.*, 875 N.Y.S.2d 862, 865 (N.Y. Sup. Ct. N.Y. Cnty. 2009) ("Microsoft Outlook… does not allow for mailbox-wide searches which could potentially locate project-specific e-mails and/or documents."); *Burke v. Ryan*, No. OCN-L-1642-13, 2013 N.J. Super. Unpub. LEXIS 2331, at *7 (N.J. Law Div. Sept. 17, 2013) ("In order to search for records [defendant] uses the search engine which will only search the sender's name and subject line. She explained that Outlook will not search the actual attachment itself.")

[4] The "simple" search terms used by Exxon to search documents in Outlook were in some cases narrower than the compound terms. For example: "anthropogenic emissions" is not a simplified term for "anthropogenic"; "climate model" and "climate research" are not simplified terms for the following terms: climate! /5 (skeptic! or deni! or model! or research! or fund! or support! or warming or low or science); "climate change," "climate model," and "climate research" are not simplified terms for the following terms: climate /5 uncertain!; the terms "stranded asset" and "stranded reserve" will not collect the plurals of the following agreed-upon terms: stranded /5 (asset! or reserve!). (*See* Anderson Ex. Q, Amended Feinstein Aff. Ex. A.)

100. Only three paragraphs in the Feinstein Affidavit were based exclusively on Ms. Feinstein's personal knowledge. In fact, 30 of 60 paragraphs in the Feinstein Affidavit listed other individuals, and not Ms. Feinstein, as having personal knowledge concerning the noticed topics for testimony. A true and correct copy of the April 19, 2017 Toal Letter to OAG and its Exhibit A is attached as Exhibit 24.

101. During her examination, Ms. Feinstein admitted that she did not know basic information concerning the identification, preservation, collection, destruction, or recovery of documents in connection with Exxon's response to the 2015 Subpoena. On almost 200 occasions, Ms. Feinstein testified that she did not know the requested details on the six topics in OAG's subpoena. *See, e.g.*, Feinstein Tr. 17, 27, 29, 42-43, 45-46, 49-50, 52, 54-55, 57-59, 62-63, 70, 74, 87, 89, 92-94, 96, 100, 102-03, 107, 117, 119-20, 127-29, 131-38, 141-42, 143, 148-49, 152, 155, 158-61, 164, 167, 169-76, 178, 183-85, 193, 195, 197, 199, 202-07, 209-12, 224, 226, 230, 232-37, 242-43, 246, 251, 253, 255-56, 259-62, 272-73, 275-78, 280, 282, 285-86, 289, 297-98, 300, 302. A true and correct copy of Ms. Feinstein's testimony, taken April 26, 2017, is attached as Exhibit 25.

102. Specifically, while Ms. Feinstein testified that she knew of CEO Tillerson's alias wayne.tracker@exxonmobil.com email account, and also knew that the company's new CEO Darren Woods was also assigned a secondary email account – j.e.gray@exxonmobil.com, she testified that she did not know details of the preservation, collection, destruction, or recovery of emails from those accounts. She did know, however, that Exxon had assigned these accounts' identities to a different EMIT employee, Ramona Helble, who Ms. Feinstein testified worked closely with the Management Committee. Ms. Feinstein testified that Ms. Helble would have the relevant information. (*See, e.g.*, Ex. 25, Feinstein Tr. 201-08, 265-67, 273-74.)

103. Ms. Feinstein also testified that she did not know details of Exxon's improper identification and search for Management Committee documents described in paragraphs 7 to 39 of her affidavit. (Anderson Ex. Q, Revised Hirshman Cert. ¶ ¶ 7-39.) Ms. Feinstein responded to dozens of OAG's questions seeking these details by stating that another EMIT employee, Bob Lauck, would have the relevant information. (*See*, *e.g.*, Ex. 25, Feinstein Tr. 73, 116, 126, 139-40, 148, 153-55, 171-182, 250-53.) Indeed, Ms. Feinstein referred to Mr. Lauck nearly 50 times in her examination and Mr. Lauck was listed as having personal knowledge as to 15 of the paragraphs in Ms. Feinstein's affidavit. (*Id*.; Ex. 24, Apr. 19, 2017 Toal Letter to OAG, Ex. A.)

104. Ms. Feinstein also testified that she did not know details of Exxon's email preservation, automatic destruction, backup, and recovery systems and capabilities. With respect to virtually every question OAG asked about these critical topics, Ms. Feinstein testified that another EMIT employee in the Email Collaboration Services unit, Cynthia Leong, would have the relevant information. (*See*, *e.g.*, Ex. 25, Feinstein Tr. 60-62, 83-84, 93-94, 143, 151-52, 158-59, 222-23, 226.) Indeed, Ms. Feinstein referred to Ms. Leong nearly 17 times in her examination and Ms. Leong was listed as having personal knowledge as to 11 of the paragraphs in Ms. Feinstein's affidavit. (*Id*.; Ex. 24, Apr. 19, 2017 Toal Letter to OAG, Ex. A.)

105. Finally, Ms. Feinstein testified that she did not know details of Exxon's instructions to its employees in connection with subpoena compliance. In particular, while Ms. Feinstein was generally aware that Exxon had directed Management-Committee assistants to collect documents, she could not explain what those instructions were or what they were based on, given that Exxon never interviewed the custodians or the assistants. When questioned on these topics, Ms. Feinstein testified that Daniel Bolia of Exxon's Law Department would have the relevant information. (*See*, *e.g.*, Ex. 25, Feinstein Tr. 73, 75-79, 168-69, 182-83.) Indeed,

Mr. Bolia was listed as having personal knowledge as to 29 of the paragraphs in Ms. Feinstein's affidavit. (Ex. 24, Apr. 19, 2017 Toal Letter to OAG, Ex. A.)

106. For her part, Ms. Hirshman's testimony revealed that she does not know any specific information about Exxon's preservation, backup, or recovery of the documents destroyed by Exxon during the pendency of the subpoena, and she was unable to provide any of the information Ms. Feinstein did not have, and for which Ms. Feinstein referred OAG to the four other Exxon employees identified above. (*See, e.g.*, Ex. 16, Hirshman Tr. 162-65.)

III. OAG's May 8, 2017 Subpoenas Are Reasonably Related to OAG's Investigation

A. May 8, 2017 Subpoena Duces Tecum for Documents and Information

107. OAG's May 8, 2017 subpoena duces tecum includes requests for both information ("Interrogatories") and documents. (Anderson Ex. T.)

108. The Interrogatories seek details about Exxon's purported application of a proxy cost of GHGs to its investment decisions and evaluation of assets, along with the identification of individuals assigned to various committees overseeing the company's reserves.

109. The Interrogatories are targeted first at eliciting specific information as to whether Exxon applied a proxy cost analysis to its investment decisions, impairment decisions, and internal reserves estimates. (*See* Interrogatory Nos. 1, 3, 4, and 6.)

110. The Interrogatories then follow up, in cases where Exxon did apply a proxy-cost analysis, with requests for information that may indicate practices that make Exxon's proxy cost representations meaningless and deceptive, such as: (i) applying a lower proxy cost than it publicly represented to investors; (ii) applying a proxy cost to only a fraction of GHG emissions from a given project; (iii) applying a proxy cost to only certain GHGs and not others; (iv) applying a proxy cost to only direct emissions as opposed to emissions stemming from end use

of the oil and gas; and/or (v) assuming that it could pass-through most or all of the proxy cost to its customers, while unreasonably assuming that such pass-through would have no effect on demand for its products. (Interrogatory Nos. 2, 5, and 7.) OAG has evidence from its investigation that Exxon engaged in each these practices.

111. If anything, Exxon's responses to the Interrogatories should narrow, rather than expand, the need for additional documents by focusing on instances in which Exxon actually applied proxy costs to its investment or impairment decisions.

112. The document requests seek four major categories of documents.

113. First, OAG seeks documents relating to the use and application of the proxy cost analysis from the post-November 2015 period. Such documents are relevant to Exxon's continuing proxy-cost-related representations, and any related changes in the company's practices.

114. Second, OAG seeks documents that Exxon previously produced to the Securities and Exchange Commission ("SEC") relating to impairment decisions, reserves calculations, and climate change. Such documents are relevant to the evaluation of Exxon's apparent failure to use a proxy-cost analysis in valuing assets for impairment purposes.

115. Third, OAG seeks documents that were exchanged between Exxon and banks or other financial institutions relating to impairment decisions, reserves calculations, and climate change. Such documents are relevant to the importance that investors ascribe to climate change issues in their investment decisions.

116. Finally, OAG seeks documents related to the company's asset valuation and impairment practices for its long lived assets, particularly its hydrocarbon assets, again given

Exxon's apparent failure to use a proxy-cost analysis in its valuation and impairment practices. Documents produced by PwC are insufficient in this regard, as set out in ¶ ¶ 41-49 above.

B. May 8, 2017 Testimonial Subpoenas

117. Four of the testimonial subpoenas were issued for the witnesses discussed in ¶ ¶ 99-106, above, who were identified by Ms. Feinstein as having key information she was unable to provide about Exxon's improper preservation of and search for management documents, its consequent destruction of those documents, and its incomplete data-recovery efforts: Ms. Helble, Mr. Lauck, Ms. Leong and Mr. Bolia. (Anderson Exs. U-X.)

118. Four testimonial subpoenas were issued for fact witnesses employed directly by Exxon, all of whom are shown by Exxon's documents to have had responsibility for development and/or implementation of the proxy-cost analysis Exxon represented it applied (as well as knowledge as to other OAG theories of liability, including but not limited to other misstatements in the MTR Report[5]).

119. The remaining testimonial subpoena was issued for Jason Iwanika, an employee of Exxon's majority-owned subsidiary Imperial. A true and correct copy of the testimonial subpoena for Mr. Iwanika is attached as Exhibit 26.

120. Exxon produced approximately 670 documents from Mr. Iwanika's custody. These documents show that Mr. Iwanika was centrally involved in the instances described supra

[5] For example, among other things, OAG is investigating whether the "Substantial Costs for CO_2 Mitigation" data used by Exxon in the MTR Report was erroneously attributed to the Massachusetts Institute of Technology. *See* Ex. 1, MTR Report at 9. The MIT researcher whose study was cited in the MTR Report, John Reilly, informed the report's authors at Exxon as early as July 1, 2015 that critical figures used in the chart "[we]re not numbers we report in that study… that the chart's "numbers were extremely high," and that the overall impression created by the chart was "misleading." A true and correct copy of this correspondence, EMC 001189007, is attached as Exhibit 27. As Reilly explained to reporters just this week, his "work would not come up with that number or anywhere near it," and the data's presentation "may lend some readers to believe that that number is based on our work." A true and correct copy of the May 30, 2017 E&E News, *MIT Researcher Says Exxon Report Inflated His Data* article is attached as Exhibit 28.

at ¶ ¶ 26, 29-33, in which Exxon applied existing GHG taxes instead of the company's purported proxy costs to its Canadian oil sands assets, deviating from the company's representations and underrepresenting the company's risks.

C. OAG Attempted to Meet And Confer Regarding Exxon's Prospective Compliance with the May 8, 2017 Subpoenas

121. Prior to Exxon filing this motion, OAG initiated and attempted to conduct a meet-and-confer session with Exxon concerning its prospective compliance with the subpoenas.

122. Specifically, OAG raised the issue of a conference to discuss the subpoena on the afternoon of May 10, 2017, during an in-person discussion with Exxon's counsel after Ms. Hirshman's testimony had concluded for the day.

123. Exxon's counsel responded on May 12, 2017 that it would be available only for a telephonic meet and confer, and no earlier than Thursday, May 18, 2017, two business days before the return date of the May 8, 2017 subpoena duces tecum.

124. The parties conducted a teleconference on May 19, 2017 regarding Exxon's prospective compliance with the May 8, 2017 subpoenas.

125. During that conference, Exxon refused to consider complying with *any* of the requests in the subpoena duces tecum.

126. When OAG pointed out that Interrogatory 9 asked only for a list of names of individuals on Exxon's reserves-related committees that were predecessors to a similar committee that came into existence in 2015, Exxon refused, citing "overarching fundamental concerns."

127. When OAG pointed out that Document Request No. 5 would require Exxon to do nothing more than copy a CD previously produced to the SEC, Exxon again declined, on the same basis.

128. When OAG asked whether Exxon would consider responding to any more limited requests, Exxon stated that it would only negotiate such limitations *after* OAG withdrew its subpoena.

129. Exxon also stated that the record-witness subpoenas were unnecessary on the grounds that Ms. Feinstein's and Ms. Hirshman's affidavits and testimony complied with the Court's prior orders and purportedly satisfied all of OAG's needs concerning Exxon's subpoena compliance, and in particular, its admitted destruction of documents and its requisite recovery efforts.

130. Finally, Exxon contended that despite producing many relevant documents from Mr. Iwanika on its own volition, it could not yet confirm whether Exxon would produce Mr. Iwanika for testimony.

131. Less than an hour after this teleconference, Exxon filed this motion to quash the subpoena duces tecum and the four records-witness subpoenas for testimony from Ms. Helble, Mr. Lauck, Ms. Leong and Mr. Bolia

132. After filing this motion, Exxon told OAG that it will also not comply with the subpoena for testimony for Mr. Iwanika. Exxon followed up by letter confirming its position.

133. As discussed *supra*, Exxon has produced hundreds of documents from Iwanika's custody (¶ 120), Exxon's Law Department interviewed him (Ex. 17, May 3, 2017 Toal Letter Ex. B), and Exxon has produced privilege logs for communications purportedly containing legal advice on which Mr. Iwanika and other Imperial employees appear. Documents from other Imperial employees have been produced by Exxon, other Imperial employees have been interviewed by Exxon's Law Department, and 27 other Imperial employees have been placed on

preservation hold by Exxon's Law Department. (Ex. 17, May 3, 2017 Toal Letter Ex. B; *supra* at ¶ 84.)

134. After Exxon filed its motion, OAG sent a letter to Exxon asking the company to withdraw it, and to actually meet and confer in good faith regarding Exxon's prospective compliance.

135. Exxon responded by again rejecting any obligation to make any effort at all to negotiate the scope or timing of Exxon's prospective responses before seeking to quash OAG's subpoenas on the grounds it has advanced here.

IV. Additional Attachments

136. A true and correct copy of an excerpt of the Public Papers of Governor Lehman, dated August 15, 1933, is attached as Exhibit 29. A true and correct copy of an excerpt of the Annual Report of the Attorney-General for the Year Ending Dec. 31, 1933 is attached as Exhibit 30.

137. A true and correct copy of the former N.Y.C. Admin. Code § B1-5.0 is attached as Exhibit 31.

138. A true and correct copy of the former New York State Executive Law § 11 is attached as Exhibit 32.

139. A true and correct copy of a transcript of Exxon's fourth quarter 2016 earnings call is attached as Exhibit 33.

140. No previous application has been made to this Court or any other court for the relief requested herein.

Dated: New York, New York
June 2, 2017

_____/s_____
John Oleske