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.	IAS Part 61 Hon. Barry R. Ostrager Index No. 451962/2016 Motion Sequence No. 5

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE OFFICE OF THE ATTORNEY GENERAL'S CROSS-MOTION TO COMPEL

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PRELIMINARY STATEMENT

In response to the Office of the Attorney General's ("OAG") papers detailing the factual basis for its subpoenas, Exxon Mobil Corporation ("Exxon") has now effectively admitted that, for years, the company did not apply a proxy cost of greenhouse gas emissions ("GHGs") in the manner that it repeatedly touted to its investors and the public. Rather, Exxon: (1) applied a separate internal proxy cost to investment decisions; (2) did not apply a proxy cost to its vulnerable Canadian oil sands projects; (3) excluded 90% of relevant emissions from its proxy-cost computations; and (4) did not apply a proxy cost to asset-impairment reviews.

Unable to dispute these facts as documented in its own files, Exxon resorts to an elaborate, unsupported discourse on the propriety of its now-admitted use of "different figures" for "different purposes." Exxon's rationalizations contradict a decade's worth of its public statements to investors about a "rigorous" and "consistent" risk management practice against which "everything gets tested." In doing so, Exxon has further inculpated itself—and strengthened the factual basis for OAG's ongoing investigation.

Exxon also complains about the purported burden of OAG's continuing law enforcement investigation, but does not even try to meet the applicable standard requiring evidence that compliance would seriously interfere with the operation of its business. In fact, OAG's subpoena duces tecum requests specific, targeted documents and information, and flows directly from the facts already unearthed concerning Exxon's potential fraud. This would be enough to preclude Exxon's burdensomeness argument, even if the company had not forfeited its credibility through its bad-faith violation of compliance obligations, its consequent and still-unaccounted-for document destruction, and its unprecedented and wasteful attempt to enjoin OAG's investigation in an improper federal venue.

Exxon also makes a variety of demonstrably false legal arguments, including that OAG lacks the authority to request information in the form called for by the subpoena. As chief enforcer of the State's securities and business fraud laws, OAG is authorized by the plain language of the relevant statutes to make these information requests, and no court has ever limited that authority by importing the inapposite civil-discovery case law cited by Exxon.

Likewise, Exxon's refusal to tender an employee of Imperial Oil Limited ("Imperial"), its majority-owned subsidiary, relies on an inapplicable legal standard used to assess long-arm jurisdiction in *alter ego* litigation. Exxon ignores the on-point authority that focuses on a company's practical ability to comply with a subpoena. Exxon's own documents confirm that it has the practical ability to control relevant Imperial employees, belying Exxon's assertions to the contrary in its brief.

Exxon also fails to sustain its preemption argument, which continues to conflate its valuation of long-lived assets for impairment purposes—which requires cost projections like the proxy cost of GHGs—with reporting of proved reserves as per SEC regulations. Exxon's asserted compliance with SEC regulations is not a defense if Exxon committed fraud as to its separate, repeated, affirmative promises to investors indicating that proxy costs are used in valuing assets for impairment purposes.

Finally, Exxon brazenly argues that the company has already accounted for its disturbing failure to preserve documents, and their consequent destruction, by producing a witness who knew almost nothing about the relevant facts. Under OAG questioning, this witness pled ignorance almost 200 times—and deferred specifically to the four witnesses OAG has now subpoenaed for testimony. Exxon's argument makes a mockery of the Court's March 22, 2017 order that Exxon substantiate its claimed preservation and recovery efforts.

Exxon has not tempered its resistance to OAG's investigation in light of the now-documented factual basis indicating potential fraud. To the contrary, Exxon continues to use every means that one of the largest companies in the world can afford to delay and obstruct disclosures it has no legal basis to avoid.[1] The Court should reject Exxon's tactics, deny its motion to quash, and grant OAG's cross-motion to compel.[2]

ARGUMENT

A. OAG Has Set Forth a Clear Factual Basis for the Subpoena Duces Tecum

OAG has far exceeded what is required and shown a strong a factual basis for its subpoena duces tecum by setting forth the details of how Exxon's own documents contradict its representations to its investors and to the public. In response, Exxon does not demonstrate, as it must, that the material OAG seeks is "utterly irrelevant to any proper inquiry," or that the legality of Exxon's practices is "so well established . . . as to be free from doubt." *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 332 (1988).[3] Rather, Exxon provides only attorney argument that its now-admitted use of "different figures" for "different purposes" (Exxon Memorandum, June 9, 2017, NYSCEF No. 205 ("Exxon Memo.") at 3) can be defended as somehow consistent with its plainly contradictory representations. But motions to quash or

[1] One prong of Exxon's strategy has been its facile refrain about OAG's purportedly "shifting" investigative theories, but OAG's original subpoena, issued some 17 months ago, focused specifically on the same matter at issue now—Exxon's integration of climate change-related risks into its business.

[2] The Court should also deny Exxon's request, made in a footnote without motion or support, for a retroactive protective order that would oblige OAG to provide notice before filing any document produced by Exxon. Exxon has not cited any authority that would support such a restriction. Nor has Exxon established that it would have had any basis to request that the documents attached to OAG's June 2 papers be sealed. It is not sufficient that Exxon may have preferred that documentary evidence of its suspected fraud be kept confidential, especially in the context of these motions, where Exxon challenged OAG to identify evidence of Exxon's suspected fraud in order to justify its subpoenas. "Confidentiality is clearly the exception, not the rule, and the party seeking to seal court records has the burden to demonstrate compelling circumstances to justify restricting public access." *Mosallem v. Berenson*, 905 N.Y.S.2d 575, 579 (1st Dep't 2010) (internal citation and quotation marks omitted).

[3] *See also Hogan v. Cuomo*, 888 N.Y.S.2d 665, 667 (3d Dep't 2009) ("The person challenging a subpoena bears the burden of demonstrating a lack of authority, relevancy or factual basis for its issuance.").

compel the enforcement of an investigative subpoena are not the appropriate vehicles to resolve the merits of such disputes. *See Nicholson v. State Comm'n on Judicial Conduct*, 50 N.Y.2d 597, 611 (1980) (holding that recipient of subpoena may not "avoid compliance by attacking the specific allegations upon which the investigation is based").[4]

That these subpoenas were not the first ones issued in this investigation does not change the fundamental principle that OAG need only show "some factual basis for [the] investigation" and "the relevance of the items sought." *Am. Dental Coop., Inc. v. Attorney-General*, 514 N.Y.S.2d 228, 232 (1st Dep't 1987); *see also* OAG Memorandum, June 2, 2017, NYSCEF No. 168 ("OAG Memo.") at 15 & n.18 (citing cases); *N.Y. State Joint Comm'n on Pub. Ethics v. Campaign for One N.Y., Inc.*, 53 Misc. 3d 983, 998 (Sup. Ct. Albany Cnty. 2016) (enforcing follow-on subpoena with "sufficient" factual basis; refusing to decide factual and legal disputes that would be at issue if a proceeding were ultimately filed).

The authorities cited by Exxon (Exxon Memo. at 5) do not counsel otherwise. This is not a case like *Myerson v. Lentini Bros. Moving & Storage Co.*, in which a bare reference to "numerous complaints" was insufficient to justify requiring the production of "all books and records" of a company. 33 N.Y.2d 250, 259-60 (1973); *see also id.* at 258 (making clear that a "strong and probative basis for investigation" was not required). Nor is this a case like *Napatco, Inc. v. Lefkowitz*, in which the only evidence of wrongdoing was a single advertisement and form letter. 43 N.Y.2d 884, 885-86 (1978).[5] OAG's detailed recitation of its factual findings to date provides a more than sufficient basis to justify its narrowly-targeted subpoena duces tecum.

[4] *See also F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 879 (D.C. Cir. 1977) ("[S]ubstantive issues which may be raised in defense against an administrative complaint are premature in an enforcement proceeding . . . . [I]f a formal complaint is issued, subpoenaed parties may assert their defenses.").

[5] *See also* OAG Memo. at 14 n.14 (discussing additional cases cited by Exxon).

In any event, Exxon's new, unsupported assertions about its internal practices, and its tortured interpretation of its prior representations, do not survive even minimal scrutiny, let alone provide a basis to conclude that the legality of Exxon's conduct is "well established."[6] Indeed, Exxon now admits that for years it maintained two separate proxy cost figures—one that it represented to its investors and to the public, and a second, secret, lower figure, that Exxon applied in its internal planning and budgeting. Exxon attempts to justify this inconsistency by asserting that it used its public "proxy cost" figures to forecast global demand for energy, while using a "separate GHG cost" to evaluate the impact of potential climate change-related regulations on investments in specific projects. (Exxon Memo. at 8.) This explanation, however, appears nowhere in Exxon's public disclosures, which plainly state just the opposite.

As just one example, in its 2014 *Energy and Climate* report, Exxon refers not to a separate "proxy cost" for demand projections and a "GHG cost" for investment evaluations, but to "*this GHG proxy cost*."[7] Exxon then boasts of its "robust process for evaluating investment opportunities and managing our portfolio of operating assets," and specifically states that it "requires that all business units use a *consistent corporate planning basis, including the proxy cost of carbon discussed above*, in evaluating capital expenditures and developing business plans."[8] Indeed, Exxon's new interpretation of its prior disclosures is contradicted by its own Greenhouse Gas Manager, who specifically acknowledged that "*we have implied that we use the*

[6] While Exxon has set out its version of the facts in a memorandum of law, signed by an attorney, the company was required to provide actual, competent evidence to the extent it intended to present a factual dispute on the merits.

[7] Exxon Mobil Corp., *Energy and Climate* (2014), at 6 (emphasis added), *available at* http://cdn.exxonmobil.com/~/media/global/files/energy-and-environment/report---energy-and-climate.pdf.

[8] *Id.* at 20 (emphasis added); *see also* Oleske Aff. ¶¶ 10-19; Ex. 1 at 17-18.

[publicly-disclosed] basis for proxy cost of carbon when evaluating investments." (Affirmation of John Oleske, June 2, 2017, NYSCEF No. 169 ("Oleske Aff."), Ex. 5, at 3) (emphasis added).[9]

This evidence alone is more than enough to provide a sufficient factual basis for the subpoena—but there is considerably more. The investigation to date has also revealed three significant areas in which Exxon appears not to have applied a proxy cost of GHGs at all, in direct contradiction of its representations to investors and the public.

First, Exxon represented to investors that it was assuming rising GHG costs over time, reaching certain milestones such as $60/ton of CO2-equivalent in 2030, and $80/ton in 2040, and applying those assumptions to safeguard Exxon's business for the long term. Such projections of future GHG costs were intended to "reflect all types of actions and policies that governments may take" over a multi-decade period. (Oleske Aff., Ex. 1, at 17-18.) However, in 2015, Exxon directed planners at Imperial, its majority-owned subsidiary, not to apply a proxy cost of GHGs to the company's oil sands projects, and instead to apply indefinitely into the future the much lower GHG tax under existing Alberta law. (Oleske Aff. ¶¶ 29-33; *see also infra* at 12.) Exxon's response that "[w]hen an actual cost is known, it serves no legitimate purpose to ignore that cost and replace it with one that is hypothetical" (Exxon Memo. at 11) is completely at odds with what Exxon told investors it was doing, and why. Projecting and applying future GHG costs, which Exxon now dismisses as "hypothetical" and not even "legitimate," is exactly what Exxon told investors and the public it was doing.[10] Exxon's approach to its Alberta oil sands

[9] Given that a GHG cost that affects global demand would also affect the profitability of Exxon's oil and gas projects, there is no sound basis for applying different proxy cost figures for demand projection purposes and planning and budgeting purposes, and any such distinction would not have been apparent to Exxon's investors.

[10] *See also* Exxon Mobil Corp., *Corp. Citizenship Report 2014*, at 37, *available at* http://cdn.exxonmobil.com/~/media/global/files/corporate-citizenship-report/2014_ccr_full_digital_approved.pdf ("We believe our view on the potential for future [climate-related] policy action is realistic and, by no means represents a 'business as usual' case.").

projects suggests that Exxon may have fraudulently disregarded its claimed proxy-cost analysis when it produced less profitable results.

Second, Exxon represented in public filings that, as required by GAAP, its "[c]ash 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." (Oleske Aff. ¶ 47) (emphasis added). However, documents produced by Exxon's independent auditor PricewaterhouseCoopers LLP ("PwC") indicate that prior to 2016, Exxon did not apply a proxy cost of GHGs when estimating future cash flows for purposes of determining whether to take an impairment charge on its long-lived assets, such as oil and gas reserves and resources. (*Id.* ¶¶ 41-54.) Exxon does not dispute this fact; instead, the company defends its past practices by making incorrect statements about GAAP requirements that are directly contradicted by its own public statements. (Exxon Memo. at 10.) GAAP specifically requires that companies consider projected cash flows in making impairment evaluations, and Exxon represents that it follows these requirements. (Oleske Aff. ¶¶ 44-46.)[11]

Third, Exxon publicly represented 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 . . . *use* of carbon-based fuels." (Oleske Aff. ¶ 38) (emphasis added). However, documents produced by Exxon indicate, and Exxon does not deny, that it did not apply a proxy cost of GHGs to so-called "Scope 3" emissions caused by the "use" of fossil fuels. (*Id.* ¶ 40.) Such emissions constitute approximately 90% of fossil-fuel-related GHGs. (*Id.* ¶ 39.)

[11] *See also* SEC Staff Guidance on Accounting Standards Codification 360, *available at* https://www.sec.gov/interps/account/sabcodet5.htm (stating that "forecasts made for purposes of applying FASB ASC Topic 360 [must] be consistent with other forward-looking information prepared by the company, such as that used for internal budgets").

These inconsistencies between Exxon's statements to its investors and its documented internal practices make the absence of documents reflecting the actual application of the proxy cost of GHGs all the more alarming. Exxon cites only to a handful of stray mentions of GHG costs (Exxon Memo. at 13),[12] none of which consists of or even discusses actual cash flow models or other key documents necessary for investment or impairment evaluations—much less one that includes a proxy cost of GHGs.

Finally, Exxon's refrain that "no law or policy" required it to apply a proxy cost of GHGs is simply false in light of Exxon's representations. (Exxon Memo. at 13.) New York's anti-fraud laws require that Exxon make accurate representations to investors and the public. It was shareholder demands for more robust reporting concerning the company's response to the financial risks posed by climate change, rather than any pre-existing legal requirement, that apparently led Exxon to make many of its representations concerning proxy costs. (Oleske Aff. ¶¶ 6-8.) Exxon cannot now escape scrutiny simply because its choice to make these false representations was unforced.

B. <u>The Subpoena Duces Tecum Does Not Pose Undue Burdens</u>

OAG's May 8, 2017 subpoena duces tecum to Exxon[13] flows directly from the facts described above. Specifically, the subpoena requires Exxon to state whether it applied a proxy cost of GHGs as part of its economic decision-making process for the very decisions for which it

[12] Specifically, these documents consist of mentions of GHG costs to an executive of another company (Affirmation of Justin Anderson, June 9, 2017, NYSCEF No. 206, Ex. I) and to a university professor (*id.* Ex. J), a general environmental policy that is not specific to proxy costs (*id.* Ex. L), a document concerning an anomalous project in which Exxon generated GHG credits by selling CO2 to other operators (*id.* Ex. M), and a document concerning Exxon's compliance with the EPA's Mandatory Greenhouse Gas Reporting Rule (*id.* Ex. N). Exxon places great emphasis on excerpts from the two-page insert in Exxon's Corporate Plan Dataguide Appendix (*id.* Exs. K and O), but that document only describes certain parameters concerning what Exxon *promised* to do, and does not provide any evidence of what it actually did.

[13] Affirmation of Justin Anderson, May 19, 2017, NYSCEF No. 132, Exhibit T.

publicly represented that it was doing so. To the extent that Exxon did apply a proxy cost, the subpoena requests specific information about the price, intensity, scope, and pass-through assumptions that Exxon applied, as evidence reviewed by OAG indicates that Exxon has in many cases adjusted those assumptions to make its proxy-cost analysis all but meaningless.[14] These requests are designed to focus further investigation by separating projects for which Exxon applied proxy costs from those for which it did not. The subpoena also requests documents that are highly relevant to these questions.[15] Exxon does not, and cannot, contest the relevance of OAG's requests to the investigation.

Instead, Exxon asserts, without any factual support, that complying with the subpoena would be unduly burdensome. "Relevancy, and not quantity, is the test of the validity of a subpoena," *Am. Dental Coop., Inc. v. Attorney-General*, 514 N.Y.S.2d 228, 234 (1st Dep't 1987) (internal brackets and citation omitted), and "courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business." *N.L.R.B. v. Am. Med. Response, Inc.*, 438 F.3d 188, 193 n.4 (2d Cir. 2006). Establishing that "the cost of gathering this information is unduly burdensome *in light of the company's normal operating costs*" is a "difficult burden" to meet. *E.E.O.C. v. Sterling Jewelers Inc.*, No. 11-CV-938A, 2013 WL 5653445, at *9–10 (W.D.N.Y. Oct. 16, 2013) (emphasis in original) (citing cases; holding that although the subpoena recipient's "cost estimate for complying with the [subpoena] is substantial, it fails to identify how this cost would present an

[14] For example, there is evidence that Exxon has (i) applied a lower proxy cost than it publicly represented to investors; (ii) applied a proxy cost to only a fraction (i.e. limited intensity) of GHG emissions from a given project; (iii) applied a proxy cost to only certain GHGs and not others; (iv) applied a proxy cost to only direct emissions as opposed to emissions stemming from end use of the oil and gas (i.e. "Scope 3" emissions); and (v) assumed 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. (Oleske Aff. ¶ 110.)

[15] The relevance of these documents, which Exxon does not dispute in more than a cursory fashion, is set out at OAG Memo. at 10 and Oleske Aff. ¶¶ 113-16.

undue burden for a retailer of its size"); *see also F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (enforcing investigative subpoena concerning hundreds of gas fields when "the breadth complained of is in large part attributable to the magnitude of the producers' business operations" which were the legitimate subject of investigation; noting that burdens were mitigated through negotiations with investigating agency); *Gelb v. Kuriansky*, 118 Misc. 2d 960, 962 (Sup. Ct. Kings Cnty. 1983) ("[t]he problem of volume" is "inherent to investigations involving . . . extensive business operations"; parties operating "extensive" businesses "cannot complain of the magnitude of their own operation as a basis for resisting compliance with otherwise lawful subpoenas.").[16] Exxon has presented no evidence of such a significant disruption here.[17]

Rather than meeting and conferring with OAG in good faith to determine whether there is a narrowed subset of documents or information that would meet OAG's legitimate investigative interests, Exxon has chosen to engage in hyperbole concerning the burdens of compliance.[18] In fact, the answers to most of OAG's requests are likely found in Exxon's projections and models used in making investment or impairment decisions. OAG has not located in Exxon's productions, and Exxon has not identified, any such projections or models that include a proxy

[16] *See also* OAG Memo. at 16 (citing cases).

[17] The cases Exxon cites (Exxon Memo. at 15-17) do not support its position. *See Reuters Ltd. v. Dow Jones Telerate, Inc.*, 662 N.Y.S.2d 450, 454 (1st Dep't 1997) (declining to enforce subpoena issued to a non-party in private litigation; noting that a "broader view of relevance may be applied when the subpoena is issued by an administrative or legislative investigatory body, since the relevance of such an 'office subpoena' depends on the authorized breadth of the investigation itself"); *D'Alimonte v. Kuriansky*, 535 N.Y.S.2d 151, 152 (3d Dep't 1988) (subpoena sought "materials that clearly are irrelevant to the matter at hand"); *Smith v. Russo-Asiatic Bank*, 170 Misc. 408, 411 (Sup. Ct. Albany Cnty. 1939) (compelling production of "a mass of papers" so long as they do not constitute "all the books and papers of a party" and thereby "completely put[] a stop to business of a corporation"); *N.Y. State Comm'n on Judicial Conduct v. Doe*, 61 N.Y.2d 56, 62 (1984) (modifying subpoena to exclude only documents "having no relation to the matters presently under investigation").

[18] Additionally, Exxon's repeated invocation of the number of pages it has produced rings hollow, as most of the documents it produced were not responsive to the production priorities that OAG repeatedly made clear to Exxon, duplicative, or both.

cost of GHGs. But given Exxon's public statements that it "*rigorously* consider[s] the risk of climate change in [its] planning bases and investments,"[19] engages in "*structured* management processes across an asset's life cycle,"[20] and has established "*common* worldwide expectations for addressing risks inherent in [its] business,"[21] all of this information should be readily available to the company.

Contrary to Exxon's assertion that the subpoena requires Exxon to produce information about every investment decision ever made at the company for the past 12 years, OAG remains willing to consider the prioritization of the requested information for a subset of representative projects that meet particular criteria (such as geography, dollar value, or GHG emission levels), or as to which OAG has significant unanswered questions.

C. Exxon Continues to Ignore OAG's Express Statutory Authority to Request Information

Exxon does not, and cannot, contest OAG's express statutory authority to request data and information as part of its investigations, or the clear case law upholding such authority. (OAG Memo. at 17-19.)[22] Instead, Exxon makes an unsupported semantic argument that only "interrogatories," not requests for information, are permitted, ignoring OAG's authority to "require such other *data and information* as [it] may deem relevant[.]" Gen. Bus. Law § 352(1)

[19] Oleske Aff., Ex. 1, at 21 (emphasis added).

[20] Exxon Mobil Corp., *Environmental Management* (emphasis added), *available at* http://corporate.exxonmobil.com/en/environment/environmental-performance/environmental-stewardship/overview.

[21] Exxon Mobil Corp., *Operations Integrity Management System* (emphasis added), *available at* http://corporate.exxonmobil.com/en/company/about-us/safety-and-health/operations-integrity-management-system.

[22] Once again, Exxon's citations (Exxon Memo. at 18) are to inapposite decisions in the civil litigation context that do not concern OAG's statutory authority. In *Litemore Elec. Co.* v. *City of N.Y.*, 467 N.Y.S.2d 200, 202 (1st Dep't 1983), a civil contract dispute, the interrogatories did not "pinpoint the critical areas of contest," and in *Mijatovic* v. *Noonan*, 569 N.Y.S.2d 176, 177 (2d Dep't 1991), the court struck only interrogatories that sought "opinions or conclusions of law, rather than relevant facts." Those are not the circumstances here.

(emphasis added).[23] Further, as described above, the subpoena calls for existing "data and information," not "analysis" as Exxon incorrectly asserts. (Exxon Memo. at 18-19.)

D. OAG's Investigation Is Not Preempted

Exxon's preemption argument is premature, as no complaint has been filed. (OAG Memo. at 21.) It is also misguided, as Exxon's internal long-lived asset valuations, and the impairment decisions they feed into, are entirely separate from the SEC-mandated proved reserve estimates upon which Exxon inexplicably continues to focus. (*Id.* at 19-21.) Unlike proved reserve reporting under the SEC formula, under which retroactive oil and gas prices and existing costs are applied, impairment evaluations require consideration of projected costs (such as proxy costs) over time. (*See supra* at 7.) If Exxon misrepresented its own impairment-valuation practices, OAG cannot be preempted from enforcing classic securities-fraud claims that flow from those misrepresentations.[24]

E. Exxon Should Be Required to Produce Mr. Iwanika for Testimony

Exxon concedes that under New York law, a parent company subject to New York jurisdiction can be compelled to produce for testimony employees of a foreign subsidiary under that parent's control. (Exxon Memo. at 19-20.) But Exxon sets out the wrong test for determining whether it controls its majority-owned subsidiary, Imperial, for purposes of requiring Exxon to produce Imperial employee Jason Iwanika for testimony. The "mere

[23] Were Exxon's prospective responses to be deemed written testimony, the result would be the same, as "OAG may require a potential violator to file "a statement in writing . . . as to all the facts and circumstances concerning the subject matter . . . and for that purpose may prescribe forms upon which such statements shall be made." Gen. Bus. Law § 352(1). In any event, if Exxon were questioning nothing more than the subpoena's formal header, it should not have occupied the Court's time, but should have simply requested that a replacement subpoena be issued.

[24] Exxon's argument that OAG's investigation represents an attempt to compel Exxon "to adopt [OAG's] preferred assumptions about the potential impact of future climate change policies" (Exxon Memo. at 19) is simply false, and bears no relation to the potential fraud claims OAG has described.

department" test that Exxon cites (*id.* at 20-21) applies to establishing jurisdiction over a foreign entity based on an *alter ego* theory of liability.[25] Jurisdiction, however, is not at issue here.

Rather, the question is whether Exxon has the "practical ability" to produce the requested witness. *Commonwealth of N. Mariana Is. v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 62-63 (2013). Under applicable case law, majority ownership of a foreign subsidiary, particularly when combined with practical control over the subsidiary as to matters at issue in the case, is sufficient to meet this standard as to production of both documents and testimony. *See Bank of Tokyo-Mitsubishi, N.Y. v. Kvaerner, A.S.*, 175 Misc. 2d 408, 411 (Sup. Ct. N.Y. Cnty. 1998) (parent company must "produce any and all appropriate discovery under its aegis, including that under the control of its subsidiary"); *Grande Prairie Energy LLC v. Alstom Power, Inc.*, 5 Misc. 3d 1002(A), 2004 N.Y. Slip Op. 51156(U), at *3 (Sup. Ct. N.Y. Cnty. Oct. 4, 2004) ("a parent company . . . can be compelled to produce for deposition an employee of its foreign subsidiary"; holding that "significant ties" between company and employee of affiliate as to matters at issue were sufficient to require deposition).

Imperial's status as a majority-owned, rather than wholly-owned, subsidiary of Exxon does not alter this conclusion. In *Krasinski v. Polimeni Org. LLC*, the court, applying *Bank of Tokyo*, held that a parent company subject to jurisdiction in New York was required to produce

[25] Specifically, *Delagi v. Volkswagenwerk A.G. of Wolfsburg, Germany*, 29 N.Y.2d 426 (1972) and *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117 (2d Cir. 1984), address whether foreign corporate manufacturers can be subject to New York's jurisdiction by virtue of sales of their product by a subsidiary in New York. In *People v. H & R Block, Inc.*, 16 Misc. 3d 1124(A), 2007 N.Y. Slip Op. 51562(U) (Sup. Ct. N.Y. Cnty. July 9, 2007), the court held that it lacked personal jurisdiction over a non-resident corporation with no presence in or contacts with New York. In *OneBeacon Am. Ins. Co. v. Newmont Mining Corp.*, 918 N.Y.S.2d 470 (1st Dep't 2011), the court dismissed a complaint against foreign companies on the grounds of lack of personal jurisdiction and *forum non conveniens*.

documents of its majority-owned foreign affiliate, even though the court lacked jurisdiction over the affiliate. N.Y.L.J., Jun. 19, 2003, p. 23, col. 5 (Sup. Ct. Nassau Cnty. 2003, Austin, J.).[26]

Documents produced by Exxon demonstrate its practical control over Imperial in connection with the proxy cost analysis. (Oleske Aff. ¶¶ 33 & 120.) These documents show that Mr. Iwanika believed that he and his team were "held" to Exxon's Corporate Plan guidance specific to Alberta, regardless of contradictory instructions from his colleagues at Imperial. Mr. Iwanika then followed Exxon's instructions to abandon the Corporate Plan guidance on proxy cost and instead hold flat into future years the much lower actual GHG tax under existing Alberta law. Having produced these documents, Exxon should not be permitted to change course and withhold Mr. Iwanika's testimony on the very topic as to which it exercised control over him and over Imperial.[27]

F. Exxon Should Be Required to Produce the Four Employees that Exxon's Own Witness Identified as Having Relevant Knowledge of Exxon's Apparent Spoliation

Exxon does not deny that years' worth of emails from key custodians, including the company's former Chairman and CEO, Rex Tillerson, have been destroyed. Exxon also does not deny that the witness it proffered in purported compliance with the Court's prior order was unable to explain the company's identification, preservation, collection, destruction, or reclamation of the destroyed documents, and instead repeatedly referred to the four witnesses

[26] *See id.* (holding that "[a] party, which is subject to the in personam jurisdiction of the New York courts and controls a foreign business entity, should be obligated to produce, in New York, all appropriate discovery including documents and records in the control of the foreign entity wherever the foreign entity may be located.") (attached as Exhibit 1).

[27] Additionally, Exxon's listing of Mr. Iwanika (and other Imperial employees) on its privilege log evinces Exxon's control over Mr. Iwanika and over Imperial. Exxon's assertion that privilege was not broken because Exxon and Imperial share a common interest in responding to OAG's subpoena is unavailing, as the common interest doctrine "extend[s] no further than communications related to pending or reasonably anticipated litigation." *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 630 (2016). Exxon does not assert that these communications bear any such relationship to litigation. Thus, it is only because of Exxon's control over Mr. Iwanika that his inclusion in a communication does not break privilege.

OAG has subpoenaed. Instead, Exxon principally argues that because it produced a witness with a very limited amount of second-hand knowledge, it cannot be compelled to produce the individuals with first-hand information. (Exxon Memo. at 23.) This is simply absurd.[28]

Exxon also argues that its admitted document destruction is unlikely to have eliminated evidence relevant to the OAG's investigation. Exxon bases its argument on the documents that were *not* destroyed—not the communications that *were* destroyed, such as those between the Wayne Tracker email account and any individuals not on litigation hold, including any of Mr. Tillerson's several assistants, on which no one else may have been copied. In any event, whether "unique" responsive documents were actually lost is not at issue at this stage, where OAG is simply attempting to determine the basic facts of Exxon's document destruction and recovery efforts. If OAG ultimately seeks a remedy for this document destruction, Exxon can make these arguments then, in the context of full disclosure and a complete record.

CONCLUSION

For the reasons set forth above and in OAG's prior memorandum, Exxon's motion to quash should be denied in its entirety, and OAG's cross-motion to compel compliance with OAG's subpoena duces tecum, its four subpoenas for the testimony of record custodians, and its subpoena for the testimony of Mr. Iwanika should be granted in its entirety.

[28] Incredibly, Exxon claims that "the Court has already determined that ExxonMobil has responded to each of the Attorney General's concerns" relating to subpoena compliance (Exxon Memo. at 25), as if the Court's prior order compelling Exxon to produce a spoliation witness contained a pre-determination that no further witnesses would be required, even if Exxon proffered an unknowledgeable witness in bad faith, as it did here.

Dated: New York, New York
June 14, 2017

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Exhibit 1

DECISION OF INTEREST; Supreme Court; DOI

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Supreme Court

Nassau County

Krasinski v. The ***Polimeni*** Organization LLC - Defendant, ***Polimeni*** International, appeals from the Order of Special Referee Frank Schellace appointed by this Court to oversee the conduct of the accounting in this action claiming that he exceeded his authority in directing discovery and to clarify the judgment which directed the accounting.

Background

Plaintiff commenced this action seeking declaratory relief and injunctive relief, specific performance of an agreement, an accounting, money damages based upon breach of contract, breach of fiduciary duty, fraud and unjust enrichment.

Plaintiff had entered into an agreement with Defendant Polimeni Organization LLC (Organization), whereby Plaintiff agreed to assist Organization in developing commercial property in Poland. Upon the performance of his services, Plaintiff would be entitled to receive a percentage of Defendant Polimeni International LLC (International). The percentage of the interest that Plaintiff would receive in International would depend upon Plaintiff's level of participation in the transactions.

After trial, a judgment was entered in this action declaring that Plaintiff was entitled to a 5 percent interest in International and two other limited liability companies to be formed by International with regard to owning and operating shopping centers in Gniezno and Gliwice, Poland. This action was then referred to Special Referee Frank Schellace to conduct the accounting and to determine the amount owed to Plaintiff pursuant to the fifth and sixth decretal paragraphs of the judgment.

One of the entities in which Plaintiff claims to have an interest is Polimeni International Konin entity Sp. zo. o. (Konin entity). The Konin entity is a limited liability company formed in Poland which operates a shopping center in Konin, Poland. International owns 89 percent of the Konin entity and is the controlling member of the Konin entity.

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The Konin entity was named as a Defendant in this action. By decision and order of this Court dated August 20, 2002, summary judgment was granted dismissing the action against the Konin entity on the grounds that the court lacked long arm jurisdiction over it. Nevertheless, Plaintiff's claim for an interest in that entity remained viable.

At a conference held before Special Referee Schellace on January 28, 2003, counsel for International furnished to counsel for Plaintiff copies International's 2001 income tax return and preliminary financial statement dated December 31, 2002. At this conference, counsel for the Plaintiff requested the underlying financial records of the Konin entity and copies of the leases for the shopping center. After argument, Special Referee Schellace directed that the financial records of Konin entity and the leases be produced.

The motion before the court is, in essence, an appeal from this ruling pursuant to CPLR 3104 (d).

Discussion

International, as movant/appellant herein, argues that the non-party Konin entity is a Polish entity which is not subject to the jurisdiction of this Court. Thus, International contends that discovery, as provided in the Hague Convention, is mandatory. This Court disagrees.

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Convention) is not the exclusive or necessarily primary method for obtaining document discovery from a foreign entity. Societe Nationale Industrielle Aerospatiale v. United States District Court., 482 U.S. 522, 535 (1987). See also, Kreinerman v. Casa Vearkamp, S.A. de C.V., 22 F. 3d 634, 640 (5th Cir. 1994). The procedures of the Hague Convention apply to discovery sought from a non-party in a foreign jurisdiction. Orlich v. Helm Bros., Inc., 160 A.D. 2d 135 (2nd Dept.1990). See also, Carmody-Wait 2d, New York Practice 42.39. As the United States Supreme Court held in Societe Nationale:

[T]he text of the Convention draws no distinction between evidence obtained from third parties and that obtained from the litigants themselves; nor does it purport to draw any sharp line between evidence that is 'abroad and evidence that is within the control of a party subject to the jurisdiction of the requesting court. Thus, it appears clear to us that the optional Convention procedures are available whenever they will facilitate the gathering of evidence by the means authorized in the Convention. Although these procedures are not mandatory, the Hague Convention does 'apply' to the production of evidence in a litigant's possession in the sense that it is one method of seeking evidence that a court may elect to employ. Supra at 541.

Here, Plaintiff has attempted to employ discovery procedures available under the CPLR against a party litigant which does not deny having access to the documents and records sought by virtue of its majority status and control thereof.

The party asserting that the provisions of the Hague Convention are applicable has the burden of establishing the reasons for employing the procedures of the Convention. See, Scarminach v. Goldwell GmbH, 140 Misc. 2d 103, 107 (Sup.Ct. Monroe Co. 1988), where Special Term held that in doing so, that party must establish * * * that resort to the Convention is required, given the particular fact of this case, the sovereign interests involved, and the effectiveness of such procedures. See also, In re Anschuetz & Company, GmbH, 838 F. 2d 1362 (5th Cir. 1988); and In re Benton Graphics v. Uddeholm Corp., 118 F.R.D. 386 (D.N.J., 1987).

In this case, the Defendants have failed to make an adequate showing as to the privacy of the Hague Convention over competing, available state discovery procedure. The affidavit of counsel submitted in support of International's motion/appeal fails to establish or even hint as to how production of these documents would be an affront to Polish sovereignty inasmuch as they do not assert that the documents would not be discoverable under the provisions of the Hague Convention had Plaintiff sought discovery of these documents pursuant to those procedures. A party should not be required to use the costly and cumbersome procedures of the Hague Convention where discoverable documents can be obtained through the discovery procedures established by the CPLR. See, Wilson v. Lufthansa German Airlines, 108 A.D. 2d 393 (2nd Dept. 1983).

A party, which is subject to the in personam jurisdiction of the New York courts and controls a foreign business entity, should be obligated to produce, in New York, all appropriate discovery including documents and records in the control of the foreign entity wherever the foreign entity may be located. Bank of Tokyo-Mitsubishi, Ltd., v. Kvaerner, 175 Misc.2d 408, (Sup.Ct., N.Y. Co. 1998). See also, Carmody-Wait 2d, New York Practice 42.39.

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In this case, it is undisputed that International owns an 89 percent interest in Konin entity and is the controlling member of the Konin entity. Under these circumstances, the Court finds no basis for requiring Plaintiff to resort to the provisions of the Hague Convention. Special Referee Schellace properly concluded that International should produce these documents.

Contrary to International's assertion, the Court is not compelling the Konin entity to account. The Court is simply directing International to provide documents which will aid the Special Referee in determining the value of Plaintiff's 5 percent interest in the Konin entity. Utilizing the records and documents of the 89 percent owner of Konin entity - International - is a fair, reasonable and cost effective means to accomplish that goal.

This is consistent with CPLR 3101 (a) (1) which provides for full discovery of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof from a party to an action. The provisions of CPLR 3101(a)(1) are to be liberally interpreted. The term material and necessary requires disclosure of * * * any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test should be one of usefulness and reason. Allen v. Crowell-Collier Publishing Co., 21 N.Y. 2d 403, 406 (1968).

In lieu of utilizing the cumbersome process of the Hague Convention, CPLR 3120 (a) (1) (i) provides for discovery against a party of any designated documents * * * which are in the possession, custody or control of the party served; * * * . In order to obtain disclosure of a document, the party seeking its disclosure must demonstrate that the document exists and is in the possession, custody or control of the party served. Corriel v. Volkswagen of America, Inc., 127 A.D. 2d 729 (2nd Dept.1987); Linton v. Lehigh Valley Railroad Co., 25 A.D.2d 334 (3rd Dept. 1966); and Avila Fabrics, Inc. v. 152 West 36th Street Corp., 22 A.D.2d 238 (1st Dept. 1964). The only basis for avoiding such disclosure from a party is for the party opposing disclosure to establish that the demanded material is subject to privilege, an evidentiary privilege, established pursuant to CPLR 3101 or that the demanded document does not exist. Corriel v. Volkswagen of America, Inc., supra. See also, Rosado v. Mercedes-Benz of North America, Inc., 103 A.D.2d 395 (2nd Dept. 1984); and Caveney v. Sorrano, 84 A.D.2d 557 (2nd Dept.1981). In order to assert that the documents do not exist or are not in the party's possession, custody or control, the party opposing disclosure must submit an affidavit from the party or someone with knowledge indicating that the documents do not exist or are not in the party's possession, custody or control. See, Fugazy v. Time, Inc., 24 A.D. 2d 443 (1st Dept.1965).

In this case, International does not assert that discovery of the requested documents is subject to any legally recognized privilege. In addition, and more importantly, the Defendant does not assert that the demanded documents are not in its possession, custody or control or are not obtainable. In this circumstance, Plaintiff is demanding production of specifically identified documents which are in the possession, custody and control of International, a party to this action and which is subject to the jurisdiction of this Court. The Hague Convention does not apply to discovery sought in New York from an entity subject to the jurisdiction of the New York courts. The source of the documents is irrelevant to the issue of whether they can be obtained in discovery. See, Wilson v. Lufthansa German Airlines, supra, and Bank of Tokyo-Mitsubishi v. Kvaerner, supra.

This Court will not force Plaintiff to resort to the costly Hague Convention procedure which would be tantamount to denying discovery against a party which is subject to this Court's jurisdiction and which undisputedly has control of the foreign entities which possess the demanded documents. Bank of Tokyo-Mitsubishi v. Kvaerner, supra.

Finally, with regard to the scope of discovery to be permitted herein, this Court specifically found that Plaintiff is entitled to five percent of International and the Konin entity as well as the entities to be formed upon the development in Gniezno and Gliwice, Poland. As a result, Plaintiff is entitled to an accounting of the finances of International and the Konin entity. International must thus produce all documents relating to its business and its finances and those of the Konin entity in its possession and which it can obtain in its role of majority shareholder.

Accordingly, it is,

ORDERED, that Defendant's motion declaring that the Special Referee appointed to supervise the accounting in this matter exceeded his authority or clarifying the judgment with respect to discovery is denied; and it is further

ORDERED, that the Order of Special Referee Frank Schellace which directed production of documents and records of Konin entity is hereby confirmed and the stay thereof is hereby vacated; and it is further,

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ORDERED, that Defendant Polimeni International LLC, shall produce said documents and records within 30 days of the date of this order; and it is further,

ORDERED, that parties shall appear for a conference in the within matter before Special Referee Frank Schellace on July 16, 2003 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Load-Date: August 6, 2011

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