

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  
BARBARA D. UNDERWOOD,  
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. 7

**OFFICE OF THE ATTORNEY GENERAL'S REPLY MEMORANDUM OF LAW  
IN FURTHER SUPPORT OF MOTION TO COMPEL  
COMPLIANCE WITH INVESTIGATORY SUBPOENAS**

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## PRELIMINARY STATEMENT

From the outset of this investigation, OAG has inquired into how Exxon has incorporated the projected effects of future climate change regulation into its investment decisions, business planning, and financial reporting. To that end, from the very first subpoena, OAG has continuously requested documents concerning Exxon's purported use of projected costs of greenhouse gas ("GHG") emissions as a proxy for the effects of future GHG-related regulations on Exxon's business (*i.e.* "proxy costs").<sup>1</sup> Yet Exxon has persistently refused to produce key documents OAG has requested, and has rejected OAG's targeted requests for cash flow spreadsheets concerning 26 of Exxon's most significant projects and assets, and relevant documents Exxon previously provided to the SEC.

Exxon's production of cash flow spreadsheets for four of Exxon's assets after OAG's motion was filed further confirms the relevance of the requested documents. Rather than establishing that the documents requested by OAG are "utterly irrelevant" to its investigation, these spreadsheets contain direct evidence (albeit for only four assets) regarding whether and what specific cost of climate change regulation was employed, whether that cost was a proxy cost or an existing legislated cost, and any resulting financial impact on Exxon's assets. There can be no serious doubt that these issues are highly relevant to OAG's investigation of whether Exxon's public statements regarding its use of proxy costs were accurate or misleading.

Unable to challenge the plain relevance of these cash flow spreadsheets, Exxon instead proffers several arguments on the merits attempting to justify its use of an undisclosed, internal

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<sup>1</sup> Indeed, the federal district court that considered Exxon's complaint seeking to enjoin OAG's investigation held that Exxon failed to state a claim for violation of its constitutional rights because Exxon's allegations, including allegations concerning purported shifts in OAG's investigative theories, "fall well short of plausibly alleging that [OAG was] motivated by an improper purpose" in conducting its investigation. *Exxon Mobil Corp. v. Schneiderman*, No. 17 Civ. 2301, 2018 U.S. Dist. LEXIS 54027, at \*66-67 (S.D.N.Y. Mar. 29, 2018).

set of proxy costs (“Corporate Plan Proxy Costs”), and even existing legislated costs, in lieu of the proxy costs that it touted to investors in its Outlook for Energy reports and elsewhere (“Outlook Proxy Costs”). Such merits arguments are irrelevant on a motion to compel compliance with an investigatory subpoena, so Exxon attempts to reframe them as attacks on the factual basis for OAG’s investigation. For example, Exxon claims that Outlook Proxy Costs are irrelevant to its cost projections, and that it is reasonable to apply existing legislated costs instead of proxy costs indefinitely into the future. These merits arguments do not diminish the factual basis for OAG’s investigation. Nowhere in Exxon’s public disclosures did it inform investors that it would use *current* legislated costs to consider the risk of *future* climate change regulation. To the contrary, Exxon’s public disclosures refer to a unitary concept of proxy costs—including its application to cost projections—to account for the risk of *future* climate change regulation.

In a last-ditch effort to avoid producing this limited subset of cash flow spreadsheets from 26 projects and assets, Exxon invokes an entirely unsupported burdensomeness objection, and attempts to limit OAG to a handful of cherry-picked spreadsheets. But the affidavit submitted by Exxon confirms that spreadsheets for 14 of the 26 assets at issue are archived in a centralized file, organized by country and project. Testimony from Exxon witnesses confirms that cash flow spreadsheets are also readily accessible from other Exxon business units. Further, Exxon has inflated its purported burden by engaging in a process of pre-screening and scrubbing the handful of cash flow spreadsheets it produced.

OAG has established that the evidence produced to date reveals serious discrepancies between Exxon’s public representations to investors and its internal practices. The requested documents are highly relevant to establishing the extent to which such deviations occurred across the company in its largest and most vulnerable projects, and the resulting financial impact on

Exxon's business. OAG respectfully requests that its motion to compel be granted in its entirety.

## ARGUMENT

### I. The Cash Flow Spreadsheets Are Relevant to OAG's Investigation

There are two core questions in this investigation as it relates to proxy costs: (1) did Exxon represent to investors that it applied a proxy cost in its investment decision-making, corporate planning, impairment assessments, and reserves estimation?; and (2) what did Exxon in fact do in this regard? As long as OAG has "some factual basis" to pose these two questions, it has a basis to investigate the evidence relevant to them.<sup>2</sup> Here, there is abundant evidence that Exxon made such representations, and that the company did not consistently do as it represented. The relevance of the cash flow spreadsheets—which would show what proxy cost, if any, Exxon applied, and the economic consequences of any disparity between its representations and its actions—is undeniable in light of this evidence.

This investigation is not about semantics or predicated on some misunderstanding of terms. Exxon told investors that it applied proxy costs to its investment decisions, business planning, and financial reporting, including with respect to its projections of the costs Exxon may incur in its operations. Exxon never told investors that it only applied the proxy costs it publicly described for purposes of projecting the price of oil and gas in the market, much less that it ceased applying proxy costs to its cost projections when doing so would have caused "massive GHG costs"<sup>3</sup> and "large write-downs."<sup>4</sup> There is a strong factual basis to investigate

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<sup>2</sup> *Am. Dental Coop., Inc. v. Attorney-General*, 514 N.Y.S.2d 228, 232 (1st Dep't 1987); see also *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 331-32 (1988) (party opposing motion to compel compliance with OAG investigative subpoena must demonstrate that "the futility of the process to uncover anything legitimate is inevitable or obvious or . . . the information sought is utterly irrelevant to any proper inquiry.").

<sup>3</sup> Oleske Aff. ¶ 47, Ex. 38.

<sup>4</sup> Oleske Aff. ¶ 50, Ex. 41.

these practices, and the cash flow spreadsheets OAG seeks are highly relevant in this regard.<sup>5</sup>

**A. Cash Flow Spreadsheets Are Highly Relevant to Understanding Exxon's Use of Proxy Costs in Investment Decisions, Business Planning, and Financial Reporting**

Exxon publicly touted its use of Outlook Proxy Costs, but in practice applied undisclosed internal Corporate Plan Proxy Costs to its cost projections.<sup>6</sup> These internal figures were considerably lower than the figures Exxon described publicly, and were thus “non-conservative” and accounted for less risk in comparison to the publicly disclosed figures.<sup>7</sup> Additionally, for some major projects, particularly in Alberta, Canada, Exxon did not apply a proxy cost at all to its cost projections, but rather applied existing legislated costs for periods of time well into the future. Further, contrary to its public representations, Exxon did not apply any proxy costs to the expense projections in its base economic models for projects in non-OECD countries.<sup>8</sup> As a result, Exxon applied less conservative projected costs in its investment decision-making, business planning, and financial reporting than it represented.

The cash flow spreadsheets OAG seeks on this motion could not be more relevant in determining whether Exxon did in fact apply the proxy cost it represented to investors, and the resulting financial consequences.<sup>9</sup> The new “exemplar” spreadsheets produced by Exxon on July 9, 2018 only confirm this: of the four assets covered by the exemplars, two assets show various applications of proxy costs that appear to deviate from the company's representations,

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<sup>5</sup> Further, Exxon's assertion that it “double counts” proxy costs (Exxon Opp. at 18) is erroneous, because failing to incorporate proxy costs into cost projections would effectively assume, contrary to the company's representations, that future climate policies will affect only the price of oil and gas, and not Exxon's costs of producing oil and gas.

<sup>6</sup> Affirmation of John Oleske (“Oleske Aff.”) ¶¶ 4-13, 23-44.

<sup>7</sup> Oleske Aff. ¶ 25, 33.

<sup>8</sup> Oleske Aff. ¶¶ 29-32.

<sup>9</sup> Exxon argues that cash flow spreadsheets for the Syncrude joint venture and its acquisition of XTO are not relevant. See Exxon Opp. at 9 n.3. As to Syncrude, whether that asset is operated by Exxon or a third party is irrelevant to Exxon's investment and financial stake. The XTO acquisition is also a significant economic investment by Exxon that occurred during a time that Exxon represented it applied proxy costs. See *infra* note 34.

and the remaining also include proxy cost-related information that OAG continues to analyze.<sup>10</sup>

Exxon argues that the cash flow spreadsheets are irrelevant on the grounds that OAG's prospective theory is wrong on the merits for two reasons: first, that the company did not in fact represent that it applied the Outlook Proxy Costs on the cost side of its investments and assets; and second, that when GHG regulations are currently in effect and impose a cost on Exxon's operations, it is reasonable to apply those existing costs indefinitely into the future in lieu of a proxy cost.

Exxon's merits-based arguments have no bearing on a motion to compel compliance with an investigative subpoena, and the Court should not entertain them at this time.<sup>11</sup> Nonetheless, Exxon's arguments are meritless.

The evidence shows that Exxon has not, as it now claims, "consistently maintained in public disclosures that Proxy Costs and GHG Costs are distinct metrics."<sup>12</sup> As a threshold matter, Exxon's argument that the Corporate Plan Proxy Costs are not in fact "proxy costs," and thus are not encompassed by Exxon's proxy cost-related representations, is specious. Even assuming that Exxon's description of the purposes for which it used these costs is accurate, both figures are a *proxy* for anticipated future "GHG costs," and the term "proxy" (like the term "GHG") describes both costs.<sup>13</sup>

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<sup>10</sup> Reply Affirmation of Jonathan Zweig ("Reply Zweig Aff.") ¶¶ 4-7. Exxon's gamesmanship in delaying production of these documents until after OAG filed this motion, as well as the complexity of the spreadsheets, have precluded a more complete analysis of these spreadsheets at present.

<sup>11</sup> June 21, 2017 Order Tr. 17:14-26 ("[OAG]: [T]his is not a merits dispute. The posture we are in on subpoena compliance in a law enforcement investigation does not allow for the weighing of merits disputes. [THE COURT]: I completely and totally agree."); see also *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943) (merits arguments cannot "be accepted as a defense against [an investigative] subpoena"). Cf. *Exxon Mobil Corp. v. Schneiderman*, 2018 U.S. Dist. LEXIS 54027, at \*67 ("It is to be expected that Exxon disagrees with the merits of the [OAG's] investigation[.]").

<sup>12</sup> Exxon Opp. at 17.

<sup>13</sup> Oleske Aff. ¶ 37. By contrast, both the Outlook and Corporate Plan Proxy Costs are distinct from *actual* GHG costs that are prescribed by existing law. Thus, in its May 8, 2017 subpoena, OAG requested information both about Exxon's "Proxy Costs," and about any "Actual GHG Costs" to which its assets were subject. Exxon's argument that



In any event, contrary to Exxon's assertions, the company's public statements did not distinguish Outlook Proxy Costs from Corporate Plan Proxy Costs—much less disclose that the Corporate Plan Proxy Costs were considerably lower and accounted for less risk. For example, in its March 2014 *Energy and Climate* report, Exxon explained that its “GHG proxy cost is integral to ExxonMobil's planning,”<sup>14</sup> and stated that it “requires that all business units use a consistent corporate planning basis, including the proxy cost of carbon . . . in evaluating capital expenditures and developing business plans.”<sup>15</sup> Exxon not only conflated the purportedly distinct “GHG” and “proxy” terms, but also touted the consistency of its planning basis at a time when its Corporate Plan Proxy Costs were markedly *inconsistent* with the Outlook Proxy Costs. Exxon also conflated these costs in the company's March 2014 *Managing the Risks* report,<sup>16</sup> and on many other occasions. This is why Exxon's GHG Manager acknowledged that Exxon had “implied that we use the [Outlook] basis for proxy cost of carbon when evaluating investments,” and therefore recommended aligning the Outlook and Corporate Plan Proxy Costs.<sup>17</sup>

Internally, Exxon's employees<sup>18</sup> and auditors<sup>19</sup> often used the terms “proxy costs” and “GHG costs” interchangeably. Indeed, *Exxon's own attorneys repeatedly asserted to OAG and the Court* that the Corporate Plans—which Exxon now insists include only “GHG costs”—

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the May 8, 2017 subpoena somehow concedes that the Corporate Plan Proxy Costs are not in fact proxy costs completely misses the mark.

<sup>14</sup> Oleske Aff. ¶ 6, Ex. 1 at 6 (emphasis added).

<sup>15</sup> *Id.* at 20 (emphasis added).

<sup>16</sup> Exxon argues that its *Managing the Risks* report “clarified” that “GHG Costs” are “separate[.]” and “distinct” from, and “in addition” to, the company's “Proxy Costs.” Exxon Opp. at 10 (emphasis in original). While Exxon is free to offer this interpretation at any trial, this is a strained reading of a text that does not, in fact, use such terms as “separate,” “distinct,” or “in addition” to describe these costs. Oleske Aff. ¶ 8, Ex. 2 at 17-18, 21.

<sup>17</sup> Oleske Aff. ¶ 25, Ex. 20.

<sup>18</sup> Oleske Aff. ¶¶ 38-39, Exs. 30-31.

<sup>19</sup> Reply Zweig Aff., Ex. 6, [REDACTED] Tr. 154-55 (PricewaterhouseCoopers LLP (“PwC”) manager who handled this issue admitted that he “interchangeably” used the terms “proxy cost” and “GHG cost” in a January 2017 memorandum).

“specify precisely how ExxonMobil applie[d] its *proxy cost* of carbon[.]”<sup>20</sup> Exxon’s citation to instances in which its employees have toed the company line in recent testimony does not “conclusively refute” OAG’s prospective claims.<sup>21</sup>

Exxon’s second argument against OAG’s prospective theories – that when GHG regulations are in effect, it is reasonable to use the cost of existing regulations indefinitely into the future in lieu of a proxy cost – is erroneous in light of Exxon’s representations regarding the function of a proxy cost. Exxon assured investors that it was managing the risks posed by potential future climate regulation by applying a hypothetical cost – *i.e.*, a proxy cost. While Exxon may “know” the level of an “actual tax” currently in effect, it cannot “know” what the “actual tax” will be in 2030 or 2040, and thus purported to apply a proxy for more stringent future regulation.<sup>22</sup>

Exxon’s argument that OAG cannot enforce Exxon’s compliance with an undisclosed corporate policy (*i.e.* the Corporate Plan) is misplaced.<sup>23</sup> This investigation is about Exxon’s internal practices versus its public representations, not about its compliance with internal guidance. Likewise, Exxon’s argument that its Corporate Plan Proxy Cost guidance merely served as a starting point or outline for planners to use within their discretion is spurious, because that process is not what was disclosed to investors.<sup>24</sup>

Exxon made numerous public statements that it expects costs associated with GHG emissions to rise over time, including in Canada, and that its proxy cost accounts for projected

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<sup>20</sup> Oleske Aff. ¶ 42, Exs. 33-36 (emphasis added).

<sup>21</sup> Exxon Opp. at 15.

<sup>22</sup> Exxon Opp. at 19-21.

<sup>23</sup> See Exxon Opp. at 16.

<sup>24</sup> Exxon Opp. at 12-14.

rising costs.<sup>25</sup> To highlight one of many examples, Exxon stated in its *Managing the Risks* report that “[g]overnments’ constraints on use of carbon-based energy sources and limits on greenhouse gas emissions are expected to increase throughout the Outlook period,”<sup>26</sup> and that the company applies a proxy cost to reflect climate-related steps “governments may take over the Outlook period[.]”<sup>27</sup> Exxon’s general statement that it applies proxy costs “where appropriate”<sup>28</sup> certainly did not inform investors that in lieu of its disclosed proxy costs, Exxon planners were free to apply existing legislated carbon fees held flat far into the future. Rather, that language appears to refer to the accompanying map which purports to describe the proxy cost figures that Exxon assumes in various countries around the world, including in Canada and other countries with existing carbon regulation.<sup>29</sup>

Contrary to these public representations, there is evidence that after Exxon aligned its long-term Outlook and Corporate Plan Proxy Costs for OECD countries in June 2014, Exxon directed the planners responsible for its oil sands projects in Alberta not to apply *any* proxy costs to their expense projections, and instead to assume that the government-imposed cost of emitting GHGs will remain at the current level decades into the future. According to company employees, this “alternate methodology” was used to avoid “massive GHG costs in the out years”<sup>30</sup> and “large write-downs,”<sup>31</sup> even after a planner warned that doing so resulted in costs that were “misaligned” and not “accurate.”<sup>32</sup>

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<sup>25</sup> Oleske Aff. ¶¶ 46, 53.

<sup>26</sup> Oleske Aff. ¶ 8, Ex. 2 at 15.

<sup>27</sup> *Id.* at 17.

<sup>28</sup> *Id.* at 18.

<sup>29</sup> *Id.* at 17.

<sup>30</sup> Oleske Aff. ¶ 47, Ex. 38.

<sup>31</sup> Oleske Aff. ¶ 50, Ex. 41.

<sup>32</sup> Oleske Aff. ¶ 51, Ex. 42.

The Alberta cash flow spreadsheets Exxon highlights are telling on this point.<sup>33</sup> Those cash flows indicate that pre-June 2014, Exxon apparently did apply Corporate Plan Proxy Costs (though not the figures disclosed to the public in the Outlook Reports) to its cost projections on its Alberta assets. But after June 2014, when the long-term Corporate Plan Proxy Costs increased to align with the Outlook Proxy Costs, Exxon apparently stopped applying any proxy costs to its cost projections for its Alberta investments. Exxon's misguided arguments are no reason for OAG to cease its investigation of this troubling conduct.<sup>34</sup>

### **B. Cash Flow Spreadsheets Are Highly Relevant to Understanding Exxon's Failure to Use Proxy Costs in Impairment Evaluations**

Exxon concedes that notwithstanding its representations that it used economic assumptions for impairment evaluation purposes that were consistent with those it used for investment and planning purposes, the company in fact did *not* use proxy costs in its cost projections for impairment evaluations prior to 2016. Exxon asserts that the company did not identify "price-related" impairment triggers between 2010 and 2015,<sup>35</sup> but Exxon did "review [] projected future cash flows, as prescribed [by GAAP], to determine if a triggering event [was]

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<sup>33</sup> Exxon Opp. at 21, n. 19 (citing Affirmation of Daniel J. Toal ("Toal Aff."), Ex. 25). Exxon falsely asserts that these cash flow spreadsheets depict "ever-increasing" Corporate Plan Proxy Costs. *Id.* Although not shown in the physical exhibits Exxon produced, which stop abruptly at 2022, the underlying cash flow spreadsheets flatline at \$40/ton after 2030, while the Outlook Reports described costs reaching \$60/ton in 2030 and \$80/ton in 2040.

<sup>34</sup> Exxon's attempt to limit its production of cash flow spreadsheets to those that postdate 2013 or 2014 (Exxon Opp. at 16 n.14) also is meritless. First, Exxon's relevant representations concerning its expectations regarding projected costs associated with GHG emissions and its application of proxy costs began in at least 2010. (Oleske Aff. ¶ 4.) Notably, the discrepancy between Exxon's Outlook and Corporate Plan Proxy Costs stretches back at least to 2010. (*Id.* ¶ 24.) Second, Exxon has repeatedly represented that it has applied proxy costs "since 2007." (Oleske Aff. ¶ 12, Ex. 5 (December 2015 Exxon publication).) Evaluating the accuracy of those statements requires reviewing documents from before 2013 or 2014. Third, with respect to the statute of limitations, "[t]he scope of a subpoena's demands turns on the nature of the investigation . . . rather than arbitrary time periods, or even the Statute of Limitations." *Am. Dental Coop.*, 127 A.D.2d at 284; *see also Big Apple Concrete Corp. v. Abrams*, 103 A.D.2d 609, 615 (1st Dep't 1984) ("the fact that an action may be barred for violations which occurred during the period covered by the records requested pursuant to a subpoena does not of itself render these records irrelevant"). Fourth, as the Court of Appeals has made clear, Executive Law § 63(12) authorizes OAG to bring certain fraud claims subject to a six-year statute of limitations. *People v. Credit Suisse Sec. (USA) LLC*, 2018 N.Y. Slip Op. 04272, 2018 N.Y. LEXIS 1451, at \*14 (June 12, 2018).

<sup>35</sup> Exxon Opp. at 22.

present” during that period.<sup>36</sup> Contrary to its representations, Exxon did not include proxy costs in the cost projections in these assessments.<sup>37</sup> The cash flow spreadsheets OAG seeks are highly relevant to understand the scope and implications of Exxon’s conduct, such as by examining how Exxon applied proxy costs to impairment evaluations in 2016 and analyzing how applying such costs would have influenced earlier evaluations.<sup>38</sup>

### **C. Cash Flow Spreadsheets Are Highly Relevant to Understanding Exxon’s Apparent Failure to Include Proxy Costs in Company Reserves and Resource Base Estimates**

Contrary to Exxon’s claim that it made no disclosures regarding company reserves and resource base estimates after 2009,<sup>39</sup> Exxon repeatedly touted to investors that its resource base, which it calculates as part of its company reserves process using its own economic assumptions (unlike proved reserves calculated pursuant to SEC regulation), constitutes approximately 90 billion oil-equivalent barrels.<sup>40</sup> Exxon has also asserted publicly that its resource base estimates are “aligned with” industry guidelines that require companies to apply “a consistent set of forecast conditions, including assumed future costs and prices,” and further specify that the “estimated costs associated with the project . . . including environmental . . . costs charged to the project, [should be] based on the [company’s] view of the costs expected to apply in future periods.”<sup>41</sup>

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<sup>36</sup> Oleske Aff., Ex. 15 at 26. Further, economic changes *unrelated* to oil and gas prices also trigger cash flow analyses, implicating proxy costs.

<sup>37</sup> Exxon mischaracterizes as exculpatory a January 2017 PwC memorandum, but the author of the memorandum testified that PwC never analyzed whether it would have been reasonable for Exxon to *exclude* proxy costs, and only concluded that it was reasonable for Exxon to *include* such costs in its 2016 impairment assessment. Reply Zweig Aff., Ex. 6, [REDACTED] Tr. 183-85, 379-81.

<sup>38</sup> OAG also has significant reason to question whether the manner in which Exxon applied proxy costs to the cost projections associated with its impairment evaluations in 2016 conformed to the company’s public statements.

<sup>39</sup> Exxon Opp. at 23.

<sup>40</sup> Oleske Aff. ¶ 14-15, Ex. 2 at 25, and Ex. 7 at 17. Exxon’s resource base, according to the company’s public statements, includes not all quantities of hydrocarbons naturally occurring (Exxon Opp. at 23 n. 25), but rather those that the company “believe(s) will ultimately be developed,” Oleske Aff. ¶ 14, Ex. 2 at 25, which necessarily implicates economic considerations.

<sup>41</sup> Oleske Aff. ¶ 16-17 and Ex. 10 at 10, 14.

In effect, Exxon has represented that it applies assumed future costs, such as proxy costs, in its company reserves and resource base estimates, yet there is substantial evidence that, at times, it did not do so. For example, in October 2015, an Exxon reserves coordinator communicated a message from corporate headquarters that Corporate Plan Proxy Costs were not to be applied to cost projections at the Cold Lake oil sands project in Alberta, when applying such costs would have “result[ed] in enough additional opex [operating expenses] to shorten asset life and reduce gross reserves.”<sup>42</sup> The cash flow spreadsheets OAG seeks are highly relevant to understanding whether Exxon excluded proxy costs from the cost projections it used for purposes of its company reserves and resource base estimates, the circumstances surrounding any such exclusion of such proxy costs, and the financial impact of such exclusions on Exxon’s reserve estimates.

## II. OAG’s Request for Cash Flow Spreadsheets Is Not Unduly Burdensome

In its moving papers, OAG established the unremarkable proposition that Exxon, one of the world’s largest and most sophisticated corporate entities, can easily obtain and produce its own basic financial-forecasting documents, like the cash flow spreadsheets at issue here. Exxon’s response – that its prior document production reaches to the height of a skyscraper – is not only a red herring in this age of electronic data, but does not explain why Exxon has somehow failed to include the very documents that will demonstrate what proxy costs the company actually used, and which OAG has been persistently demanding *for years*. Moreover, this motion concerns a highly targeted request for cash flow spreadsheets from only 26 of

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<sup>42</sup> Oleske Aff. ¶¶ 57-58, Exs. 48-49.

Exxon's many hundreds of assets, which Exxon should have produced in response to the original subpoena.<sup>43</sup>

The legal standard for establishing that an investigative subpoena imposes undue burden is exceptionally high. Indeed, "courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business." *NLRB v. Am. Med. Response, Inc.*, 438 F.3d 188, 193 n.4 (2d Cir. 2006) (internal citations omitted). Here, there can be no doubt that the requested spreadsheets are relevant to OAG's investigation, and Exxon has failed to demonstrate that compliance with the subpoena would "unduly disrupt or seriously hinder normal operations."<sup>44</sup>

As a threshold matter, with the Affidavit of Brant Edwards ("Edwards Affidavit"), Exxon has now confirmed that ExxonMobil Development Company ("EMDC"), which is responsible for 14 of the 26 assets on OAG's list, maintains a centralized shared file called the "Milestone Library" where "EMDC-related final investment decision Cash Flows" are archived by country and project.<sup>45</sup> This aligns with the testimony of [REDACTED], a development planner, that the Milestone Library is EMDC's repository for cash flow spreadsheets that have been "completed" and "approv[ed]."<sup>46</sup> Likewise, planner [REDACTED] testified that as part of the standard economic modeling process, he sent final cash flow spreadsheets to a particular Exxon

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<sup>43</sup> OAG is not requesting "every document that Exxon has in its possession," *see* Exxon Opp. at 6, nor seeking to "start round two of producing documents," *id.* at 7. Rather, OAG is asking for a limited set of highly relevant documents that are responsive to existing subpoenas, including the original November 2015 subpoena. Additionally, OAG explicitly reserved its right to request documents concerning additional assets when it agreed to accept a limited list of EMDC projects "as an initial step" toward narrowing the scope of Exxon's assets subject to OAG's outstanding requests. Zweig Aff. ¶ 25. Exxon cannot transform OAG's acceptance of a list of assets into a bar against requesting anything else.

<sup>44</sup> Exxon's citation to *Reuters Ltd. v. Dow Jones Telerate, Inc.*, 662 N.Y.S.2d 450, 455 (1st Dep't 1997), is unavailing. (*See* Exxon Opp. at 24.) Setting aside the fact that *Reuters* involved a subpoena issued in a private action rather than in the context of a government investigation, OAG's request for a limited set of cash flow spreadsheets, which are readily accessible, is not "patently overbroad, burdensome and oppressive." *Id.*

<sup>45</sup> Toal Aff., Ex. 54-1, Affidavit of Brant Edwards ¶¶ 10-11.

<sup>46</sup> Zweig Aff. ¶¶ 52-53, Exs. 28-29.

technician, who archived them in this shared folder.<sup>47</sup> Exxon has absolutely no basis to withhold any cash flow spreadsheets from the Milestone Library that are responsive to OAG's requests, and should produce them immediately.

Testimony from Exxon's own employees makes clear that cash flow spreadsheets are readily accessible from other Exxon business units as well. For example, ██████ testified that Exxon's Gas and Power Marketing business maintains final cash flow spreadsheets that are used for investment and other purposes at a managerial level in a "centralized" location called the "Economics Consistency Folder."<sup>48</sup> She also testified that cash flow spreadsheets used for corporate planning purposes can be found in project-specific folders, and that she "would know how to find them."<sup>49</sup> Similarly, ██████ testified that cash flow spreadsheets used for reserves estimation purposes are also saved in a "specific centralized location," and that she "would have been able to find" particular models "by looking at the folder structure."<sup>50</sup> Cash flow spreadsheets associated with Exxon's impairment evaluations are likewise straightforward to collect, as accounting manager ██████ testified that he could obtain these documents by calling certain individuals in the relevant business line controller's groups.<sup>51</sup>

Moreover, the Edwards Affidavit makes clear that the purported burden of producing these cash flow spreadsheets is largely self-imposed. Exxon contends that it took "approximately 40 hours," on average, for Exxon to identify and "validate" each of the five cash flow spreadsheets the company produced on July 9, 2018.<sup>52</sup> Mr. Edwards claims, based on this

<sup>47</sup> Zweig Aff. ¶ 50, citing Oleske Aff., Ex. 51, ██████ Tr. 66-67.

<sup>48</sup> Zweig Aff. ¶ 51, citing Oleske Aff., Ex. 26, ██████ Tr. 94-97, 99-100, 105, 118, 130-32, 136-37.

<sup>49</sup> Zweig Aff. ¶ 56, citing Oleske Aff., Ex. 26, ██████ Tr. 199.

<sup>50</sup> Zweig Aff. ¶ 56, citing Oleske Aff., Ex. 26, ██████ Tr. 224-25.

<sup>51</sup> Zweig Aff. ¶ 57, citing Oleske Aff., Ex. 14, ██████ Tr. 88, 94-95, 262-65. Also, a PwC manager testified that Exxon has always provided cash flow spreadsheets requested by PwC in a matter of days, and could not recall a single instance in which Exxon was unable to locate a requested cash flow spreadsheet. Zweig Aff. ¶ 58, Ex. 31.

<sup>52</sup> Toal Aff., Ex. 54-1, Affidavit of Brant Edwards ¶ 16.



limited data set, that it would take 1,200 hours to produce 31 investment-related spreadsheets relating to full-funding decisions for non-EMDC projects, not to mention spreadsheets related to corporate planning, impairment, or reserves.<sup>53</sup> It appears, however, that the purported burdens stem mainly from Exxon's effort to pre-screen and scrub its production. In attempting to explain why it took 200 hours to produce five cash flow spreadsheets, Edwards asserted that his team specifically "validated the inclusion of GHG Costs within each model," noting that this took time as "GHG Cost calculations are not always located in the same place in each Cash Flow."<sup>54</sup> But OAG never requested that Exxon engage in an elaborate "validation" exercise, much less that it spend 200 hours attempting (but failing, *see supra* at 4-5) to cherry-pick instances in which the company applied proxy costs in the manner it represented.

Contrary to Exxon's claims, there is good reason to believe it would not, in fact, take 1,200 hours to produce a reasonable set of responsive documents.<sup>55</sup> As set forth above, Exxon's witnesses testified that the final cash flow spreadsheets that the company actually uses for decision-making purposes are not scattered to the winds, but are archived in specific folders. Were it otherwise, Exxon's routine collection of cash flow spreadsheets for internal evaluation would have been impossible.<sup>56</sup> Rather than adding hours of extra work in a transparent effort to avoid producing key documents, Exxon should simply produce the cash flow spreadsheets contained in these archives. Regarding backup documents, it bears emphasis that OAG has only requested those documents necessary to show what proxy costs, if any, were used in the cost

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<sup>53</sup> *Id.* ¶ 17.

<sup>54</sup> *Id.* ¶ 15.

<sup>55</sup> However, even if it did take a significant number of hours to produce a reasonable cross-section of cash flow spreadsheets, this would not be unduly burdensome to Exxon. This is a highly targeted request in an investigation involving many years of apparent misrepresentations that potentially inflated future cash flows by billions of dollars to the detriment of shareholders. Responding to OAG's requests will not "seriously hinder" operations for a major corporation like Exxon.

<sup>56</sup> Zweig Aff. ¶ 62, Ex. 33 (describing Exxon's 2015 "Enhancements Task Force" exercise).

projections in certain cash flow spreadsheets. To the extent such backup documentation is needed, it can often be found in the same folder as the cash flow spreadsheet itself.<sup>57</sup> OAG has not asked that Exxon chase down all documents potentially related to cash flows, and Exxon's production should not be held hostage by the specter of the most difficult-to-collect document Exxon can imagine.<sup>58</sup>

### III. Exxon Should Produce Relevant Documents Previously Provided to the SEC

The documents Exxon has provided to the SEC in connection with the SEC's investigation of how Exxon incorporates climate change into its reserves and impairment accounting are also reasonably related to OAG's investigation,<sup>59</sup> and Exxon's perfunctory preemption argument is unavailing for all the reasons set forth in OAG's prior briefing.<sup>60</sup>

### CONCLUSION

For these reasons, and those set forth in OAG's opening papers, OAG respectfully requests that the Court compel Exxon to produce (i) the cash flow spreadsheets for the 26 projects and assets identified by OAG, and (ii) the documents Exxon has produced to the SEC relating to impairment evaluations, reserves calculations, and climate change.

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<sup>57</sup> Zweig Aff. ¶¶ 54-55, Exs. 26 and 30.

<sup>58</sup> OAG has certainly not asked Exxon to scrub any metadata as part of "validation," yet Exxon scrubbed all of the metadata from the five cash flow spreadsheets recently produced, including author and date. As produced by Exxon, the metadata state that all of these documents were created on January 1, 1901 and last modified on January 2, 1901, and do not state who created or modified the documents. Reply Zweig Aff. ¶ 8.

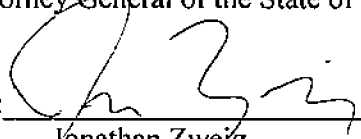
<sup>59</sup> See Oleske Aff. ¶¶ 72-74 (describing SEC investigation).

<sup>60</sup> OAG Memorandum of Law, NYSCEF No. 335, at 23-25. Exxon argues that the federal court's decision that OAG's investigation is not preempted in *Exxon v. Schneiderman*, 2018 U.S. Dist. LEXIS 54027, at \*69-70, does not preclude it from contesting preemption here. (Exxon Opp. at 25 n.30.) But Exxon has identified no distinction between the preemption issues here and in the federal litigation that would prevent the application of issue preclusion. Thus, preclusion applies to the extent that Exxon's preemption argument is based, as it appears, on the purported facts of this particular investigation. In any event, even if the federal court's decision is not preclusive in this respect, its reasoning applies with equal force here.

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Respectfully submitted,

BARBARA D. UNDERWOOD  
Attorney General of the State of New York

By:   
Jonathan Zweig  
Assistant Attorney General

Mandy DeRoche  
Assistant Attorney General

Matthew Eisenson  
Special Assistant Attorney General

28 Liberty Street  
New York, New York 10005  
(212) 416-8954

*Attorneys for Petitioner  
People of the State of New York*

*Of Counsel:*

MANISHA M. SHETH  
Executive Deputy Attorney General, Economic Justice Division

LEMUEL M. SROLOVIC  
Bureau Chief, Environmental Protection Bureau