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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 61

-----X
PEOPLE OF THE STATE OF NEW YORK BY ERIC T.
SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF
NEW YORK,

PLAINTIFF,

-against-

Index No:
451962/2016

PRICEWATERHOUSECOOPERS LLP, et al.,

DEFENDANTS.
-----X

60 Centre Street
New York, New York
August 29, 2018

B E F O R E:

THE HONORABLE BARRY OSTRAGER
J U S T I C E

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VANESSA MILLER
Senior Court Reporter

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THE COURT: Now, as a preliminary matter, this is a 2016 case. You've been before me a number of times on discovery issues. There's been multiple actions in multiple fora which overlap the issues in this case. And before you leave today, I want to have a schedule for the filing of the note of issue and a schedule for any dispositive motions that are going to be made, and a trial date, because this cannot go on interminably.

MS. SHETH: Good morning.

Manisha Sheth on behalf of the Office of the Attorney General.

We are here on a investigatory subpoena. So there has been no case or no complaint filed as of yet, so we are still in the investigative --

THE COURT: Yes. But you've been investigating for two years. So you're either going to file a case or you're not going to file a case.

MS. SHETH: That's exactly right, your Honor.

We are nearing the end of our investigation. We have been appearing before you for a number of times. We have taken testimony, I think pursuant to your Honor's suggestion --

THE COURT: Yes. You've taken a lot of depositions.

MS. SHETH: Right.

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THE COURT: You've received millions of documents, you've had access to discovery in overlapping related cases, you want more discovery in arguably related proceedings. And it's not my case to tell you when an investigation ends, but it is my place to put an end date on the requests for information and the filing of a complaint.

MS. SHETH: Absolutely, your Honor. And we are coming to an end to our investigation. And we're here today on two very discrete categories of documents.

So the OAG's motion concerns two categories: One, cash flow spreadsheets for a limited subset of 26 projects across Exxon's portfolio assets; and, two, the documents that Exxon has previously produced to the SEC --

THE COURT: I understand. I've read the voluminous submissions.

Let me ask counsel for Exxon, as I understand the papers, of the 26 sets of spreadsheets that they are seeking, something, more than half of them exist in easily-produceable form, and the balance will require, according to you, a very significant expenditure of resources to create those spreadsheets. Would it be acceptable to you to produce the spreadsheets that are, if not readily available, easily produceable if you

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didn't have to produce the balance of the spreadsheets?

MR. WELLS: Can we just confer, your Honor?

(Pause in proceedings.)

MR. WELLS: Your Honor, based on your statement that the case -- or the investigation just cannot go on forever, and at some point today or soon, the AG's Office will have to make a decision either to charge or not to charge, we accept the compromised proposal put forth by your Honor; that we will produce the cash flow sheets that are easily accessible.

THE COURT: Now, is there any objection by the AG's Office to that compromise that Exxon has indicated he's prepared to accept?

MS. SHETH: Your Honor, we appreciate that Exxon has agreed to produce that limited subset. We'd ask that they do it in an expeditious manner, within the 20 days that we set forth in our proposed order, and with a metadata. What I would like to add, though, is that it is not sufficient, and if I can explain to your Honor why it's not sufficient. If we turn -- and, your Honor, I handed up, through the court officer, a copy of our slide deck, and if your Honor would turn to Page 6 of that slide deck, I'd like to explain why those particular subsets, 14 out of the 26, is not sufficient.

All of those 14 spreadsheets come from one

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2 company, one Exxon company, and that is the EMDC company.
3 What we have seen in our investigation is that Exxon has
4 engaged in conduct that is inconsistent with its
5 representations to investors, and we need the
6 spreadsheets to confirm how widespread this conduct was.
7 So it would not be sufficient to get them from just one
8 of Exxon's subsidiaries, rather, we need to know did this
9 conduct exist for other assets. And Slide 6 outlines
10 those other assets; that would be Downstream, Chemical,
11 Exploration, Production.

12 And what we have done with our list of 26 is try
13 to cull the universe of Exxon's assets. Exxon is
14 probably the second largest company in the world. It has
15 global operations. We are not seeking thousands of
16 spreadsheets for thousands of assets. We have picked 26
17 out of the thousands of Exxon's assets. We have tried to
18 have a diversity, or a representative sample. We've
19 ensured that we covered different geographic areas,
20 because one of the issues with the current production is
21 that it's largely limited to assets in Alberta, Canada in
22 Canada; second, we want to ensure that we have OECD
23 countries as well as non-OECD countries. We want to make
24 sure we have both sets; and the third, those spreadsheets
25 need to cover multiple aspects of Exxon's business blend,
26 not just its investment decisions, but also corporate

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planning, impairment investments and reserve estimates.

So we've identified what we believe is an irreducible subset. And although Exxon has put in the affidavit of Mr. Brant Edwards, I would want to address that affidavit. You know, it's very interesting that the affidavit quickly concedes two points, which your Honor has honed in on; that these spreadsheets at the EMDC company are maintained in a shared drive, and that they're organized by country and by project. So there's really no burden associated with producing those. But then Mr. Edwards goes onto say that it would take 200 hours, or it took him 200 hours to produce a mere five spreadsheets for four assets. Now, if we look carefully at Mr. Edwards' affidavit, specifically Paragraph 16 of his affidavit, what he notes is that what took so long was this so-called validation process, not the identification and the collection process; that is relatively easy. And the testimony has been clear from Exxon's witnesses that these spreadsheets are maintained in a centralized manner.

And, in fact, if your Honor turns to Page 56 of our deck, when Exxon wants these spreadsheets, these are the cash flow spreadsheets that show exactly how it applied a proxy cost or a GHG cost as they now maintain, when Exxon wants these spreadsheets for business

1 Proceedings

2 purposes, it can produce them in a few days. When PwC
3 asks for the cash flow models, Exxon provided them in a
4 few days. If Exxon's management, if Exxon's CEO asks for
5 these cash flow spreadsheets, there's no doubt that they
6 would be provided when needed. But when OAG, when the
7 law enforcement agency asked for these same cash flow
8 nets, Exxon is claiming that it takes 200 hours to gather
9 five models. But what they're talking about is this
10 validation process. We do not need Exxon to validate the
11 spreadsheets. What we need is for Exxon to simply
12 identify, collect and produce them. So there shouldn't
13 be a burden even as to the remaining 16 spreadsheets.

14 THE COURT: Look, I'm really not persuaded,
15 after all these depositions and after the production of
16 millions and millions of documents, that Exxon needs to
17 produce all 26 of these spreadsheets. If you find a
18 smoking gun in the spreadsheets that are reflected in the
19 compromise that Exxon should agree to, you'll come back
20 here and I'll order them to produce the balance. If you
21 don't find the smoking gun in those spreadsheets, then
22 I'm not going to order them to produce --

23 MS. SHETH: Your Honor, as to the smoking gun,
24 we have found smoking guns. And if I may, I would like
25 to put up a slide that describes some of the smoking guns
26 we have found.

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So what we know is that Exxon itself recognized having these proxy costs. Your Honor is familiar with the external publicly-disclosed Outlook reports and the proxy costs contained in those reports. Meanwhile, Exxon's maintained a second set of proxy costs, which is now GHG costs, and these are in the corporate plan. Now, Exxon's own employees, its GHG manager, recognized that the internal proxy costs were low and that the external, or the publically-disclosed proxy costs, were more realistic, but Exxon did not reconcile the two numbers. It let that discrepancy stand for a period of four years, from April 2010 to June of 2014. And the reason it let those discrepancies stand is because Exxon's then-CEO, Rex Tillerson, quote, "seemed happy with the discrepancy between the internal and external proxy costs."

And, in fact -- and these are the exhibit numbers so your Honor has the corresponding documents. But even in May of 2014, another GHG manager recognized that Exxon's disclosures to its investors had implied that it used an external proxy cost on its investment decisions. And in the few spreadsheets that Exxon has produced, we have seen that Exxon did not apply the proxy costs that it told investors would apply on the cost projections, but, rather, it applied this internal corporate plan proxy cost.

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But then, things get very interesting. So in June of 2014, Exxon decides to align the two numbers once the GHG manager makes that presentation to senior management. But, when Exxon reconciles the two numbers, its planners for various projects realized that if they applied the higher number that they had disclosed to investors, the projects would suffer massive GHG costs and large write-downs. And what do they do? They then identify those financial consequences to management, and management directs them to apply what they call, and they quote, "an alternate methodology". And what is this alternate methodology? This alternate methodology don't apply to proxy costs at all. Instead, applies an existing legislated cost and hold that existing cost constant for decades into the future during the Outlook period. And why is that a problem? Because Exxon told investors, Don't worry, we're going to use the proxy costs, we're going to use it in our investment decisions, we're going to use it in our business planning, and we're going to use that proxy cost and we're going to increase it over time because there is a risk that regulations are going to become more and more stringent, thereby that cost is going to rise.

So when Exxon sees these effects, it tells its planners, Okay, don't use proxy costs, use existing

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costs. And what we now have is one spreadsheet from Exxon that shows this directive was actually followed for one asset; that is in Alberta, Canada. Now, what we need is the remaining spreadsheets for the assets that we've identified to see was this directive followed more broadly across the company, across the different businesses and across different assets.

THE COURT: Isn't this something that a simple interrogatory would address? I mean, if you're right and you have this smoking gun, then you'll initiate an action against Exxon and they'll defend it.

MS. SHETH: Your Honor, we could do that, but what we need to know is was this limited to the one asset or was it more widespread.

THE COURT: Then you just ask them in an interrogatory.

MS. SHETH: We have done that, your Honor, and --

THE COURT: And if they haven't responded to the interrogatory, I'm going to compel them to respond to the interrogatory.

MR. TOAL: Your Honor, there is no interrogatory that was posed to us on this subject --

MS. SHETH: Actually, there was an interrogatory --

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THE COURT: I don't want to hear anymore. I don't want to hear anymore about the spreadsheet.

If you know that there's a problem, you have recourse. If you want more information that is binary, you'll ask them and they'll say yay or nay to your interrogatory with respect to each business unit that you're concerned about. You've already made them produce millions and millions of documents. And in a few moments, you're going to ask me to order them to produce four million documents that they produced to the SEC.

So I think we're finished with the spreadsheets.

MS. SHETH: Your Honor, if I may, on one more point on the interrogatory, we did specifically ask them that interrogatory in the second --

THE COURT: Right. I am compelling them to respond to the interrogatory or interrogatories that would elicit exactly the information that you want to secure by pouring through the huge number of documents.

MS. SHETH: But, your Honor, if I may one last time, that interrogatory could take them a very long time to respond to; right? Because they're going to have to -- they're going to claim that per Mr. Edwards' affidavit, it's going to take them time to validate --

THE COURT: I think the business units know what they are doing.

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MS. SHETH: But they're going to have a long time to respond to that interrogatory. If they just produce the documents, it will be much faster. We've been at this for years. We have faced obstruction from Exxon at every step. We are nearing the end of our investigation. We need these few cash flow spreadsheets to figure out how widespread it was, what the financial consequences were.

And I will add one more point, which is that Exxon has refused to expend the tolling agreement. So we are coming upon a decision point, and this limited number of the additional 16 spreadsheets will get us there.

THE COURT: Can you respond to this interrogatory in 30 days?

MR. TOAL: Your Honor, first of all, let me say --

THE COURT: I know you have an alternate explanation for everything she just said.

MR. TOAL: And I won't --

THE COURT: I understand that.

MR. TOAL: But this interrogatory has not been posed to us, this specific interrogatory --

THE COURT: Let's assume that they propound the interrogatory before the sun goes down on Friday, can you respond to it in 30 days?

1 Proceedings

2 MR. TOAL: So it's difficult without knowing
3 the precise interrogatory, I can commit to you --

4 THE COURT: I think she just told you the
5 information she's seeking to glean from the documents.

6 MR. TOAL: So, first of all, they have the
7 information about GHG costs, which they developed a new
8 name for and pretend it's the same thing as proxy costs.
9 We have told them exactly what we do. They have the
10 instructions that are given to the project planners about
11 how to apply those. And the only thing she's asking
12 about now is, it says in our instruction, if local
13 specifics differ from these default numbers, use the
14 local specifics. In the Alberta example that she gave,
15 there's legislation on the books prescribing what the GHG
16 costs are going to be and our project planners
17 appropriately used that. There's no smoking gun. And we
18 will tell them where to use local specifics.

19 And I just can't commit to a timeframe right now
20 because I don't know how long that will take to provide
21 compromisingly.

22 MS. SHETH: Your Honor, we will inevitably be
23 back before this Court if Exxon is permitted to do this
24 in this fashion, because the interrogatory will not show
25 the financial impact of using a GHG cost or a proxy cost.
26 The spreadsheets that Exxon maintains within its

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2 business, in the course of its business, have this
3 information. There is no better proof of this
4 information than the very documents themselves.

5 MR. TOAL: Your Honor, if I could address this.
6 If you go back to what we said publicly, we never said
7 what GHG costs were using. So, in our view, this entire
8 avenue of investigation is invalid. It's not appropriate
9 to a securities case.

10 We didn't tell people we used \$60 a ton, \$40 a
11 ton. We said we used it in a very specific context when
12 seeking funding for capital investments. And we've
13 provided them with the internal instructions that we
14 used; 11 sets of those going back to 2007, approximately;
15 we provided them with spreadsheets confirming that we
16 actually took that into account; we provided them and
17 pointed them to dozens of documents. So it's not a valid
18 area of inquiry in a securities fraud theory to begin
19 with. And, still, we have been accommodating and
20 providing a wealth of information confirming we actually
21 take this GHG cost into account. So, you know, the idea
22 that they then need to audit and see how well we comply
23 with our internal policies has no bearing on a proper
24 securities fraud theory.

25 THE COURT: I'm trying to deal with this in a
26 practical way and relieve you of some of the burden that

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is being imposed upon you, which is a fairly substantial burden over the course of the two years of this investigation.

So I'll ask you again, if they frame reasonable interrogatories with respect to the different locations and business units, can you respond to those interrogatories in 30 days? And if you can do that, if you can do that, that will be the order of the Court.

MR. TOAL: We will commit to doing that, your Honor.

THE COURT: Okay. Then that takes care of the spreadsheet.

Yes, Mr. Wells?

MR. WELLS: Your Honor, I'll be brief, but I need to say for the record what you said, but I need to say it, in all due respect.

In terms of the prosecutor's statements about the smoking guns and Mr. Tillerson, those statements we disagree with, we do --

THE COURT: And your papers make that clear.

MR. WELLS: I understand.

We want to make it clear for the record that we do not believe Exxon has done anything wrong. If they have a theory, they should bring a case. They should either put up or shut up. They should either bring it or

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2 not bring it. We are ready to confront any complaint
3 they file and proceed to trial. But I said a year ago
4 they cannot ever clear Exxon Mobil because this case,
5 when it was brought, it was brought for political
6 reasons, and they can't back out of it. They're in a
7 corner. So let them bring a case and let's just get it
8 on.

9 THE COURT: That is exactly what I've
10 suggested.

11 I want the discovery of this investigation to
12 conclude. And then there's either going to be a
13 complaint filed and a schedule for a adjudication of
14 allegations in the complaint, or, they'll close their
15 investigation.

16 MR. TOAL: Your Honor, I think implicit on what
17 you said, but, obviously, we committed to a 30-day
18 period, I assume the interrogatories have to be
19 reasonable in scope and it's got to be --

20 THE COURT: Of course they do. And as
21 professionals, I wouldn't expect the AG to propound
22 dozens of interrogatories with respect to a very simple
23 issue.

24 So if they can propound the interrogatories by
25 the end of the week and you've committed to respond to
26 them within 30 days. You'll also produce the files that

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we've agreed that you're going to turn over, including the metadata; and that's the resolution of this portion of the motion.

Now, with respect to the four million documents that have been produced to the SEC, I will hear you.

MS. SHETH: Thank you, your Honor --

MR. TOAL: Your Honor, if I could short-circuit this, we will agree to provide the SEC production, much of what the SEC production is or the documents that we've produced to the New York State Attorney General previously. Any documents that were produced only to the SEC, we will agree to produce to the New York Attorney General.

THE COURT: Okay. That's what I was going to order anyway.

MR. TOAL: Okay.

THE COURT: But there's no burden on you to do that.

So I think we've concluded our business this morning.

MS. SHETH: Thank you, your Honor.

May I just ask, for the 14 spreadsheets that your Honor's ordering Exxon to produce, if they could be produced within the 30 days -- 20 days as well? That would be --

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MR. TOAL: First, I think we talked about spreadsheets that are readily available or close to readily available.

THE COURT: Yes.

MR. TOAL: I don't know that that's 14, but we will produce the ones that are readily available or close to readily available.

MS. SHETH: Your Honor, I think you had ruled --

THE COURT: I think the papers reflect --

MS. SHETH: Right.

THE COURT: -- that number.

MS. SHETH: Those are the 14 spreadsheets from the EMDC shared Milestone Library.

THE COURT: Yes. The papers reflect that you have had them, in readily-produceable form, 14 sets of spreadsheets.

MR. TOAL: Well, that's the AG's assertion based on where those spreadsheets are located. It doesn't mean it's readily available to identify the spreadsheet as being the spreadsheet to support the full funding.

THE COURT: You can't possibly need more than 20 or 30 days to produce them. We want to get this on.

MR. TOAL: I agree, your Honor.

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MS. SHETH: Your Honor, those are the same spreadsheets that Exxon's own witness identified as being in the Milestone Library.

THE COURT: I understand.

MS. SHETH: So there should be no dispute.

MR. TOAL: Your Honor, can I propose that we determine, with the people who actually control these spreadsheets, which are readily available? If the 14 are, in fact, readily available, we have no issue. Otherwise, we'll promptly report to the AG and the Court on our view on which ones are readily available, and we'll commit to producing those within 30 days.

THE COURT: All right.

MS. SHETH: Your Honor, I think we're creating a situation where we're going to come back before your Honor, which we do not want to do.

THE COURT: I don't think you're going to come back. I think they're going to produce the 14 spreadsheets.

MS. SHETH: Maybe we can get some clarity that you're going to order them to produce the 14 that are referenced in the Brant Edwards affidavit as coming from the EMDC corporation.

THE COURT: Let's not belabor this any further. I'm highly confident that within 20 or 30 days, Exxon

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Mobil is going to produce 14 sets of spreadsheets. I'm highly confident that in 35 days, you'll have the answers to the interrogatories you have. And if you choose to bring a formal complaint, this is going to be a 2019 trial.

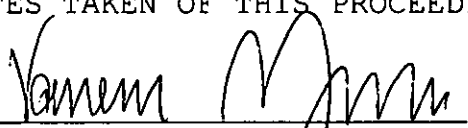
MS. SHETH: Thank you, your Honor.

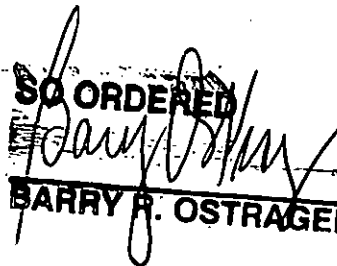
THE COURT: Have a nice day.

MR. TOAL: Thank you, your Honor.

MR. WELLS: Thank you.

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE ORIGINAL STENOGRAPHIC MINUTES TAKEN OF THIS PROCEEDING.


VANESSA MILLER
Senior Court Reporter


SO ORDERED
BARRY R. OSTRAGER, J.S.C.