



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

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*Via NYSCEF and Hand Delivery*

March 4, 2019

The Honorable Barry R. Ostrager  
Supreme Court, New York County  
60 Centre Street, Room 232  
New York, NY 10007

Re: *People of the State of New York v. Exxon Mobil Corporation*, Index No.  
452044/2018 (Sup. Ct. N.Y. Cnty.)

Dear Justice Ostrager:

The Office of the Attorney General (“OAG”) submits this letter requesting enforcement of four requests in two key categories from Plaintiff’s First Request for Production of Documents (the “Requests”) (Exhibit A), which the OAG served on Exxon Mobil Corporation (“ExxonMobil”) on December 14, 2018. ExxonMobil declined to produce these documents in its January 14, 2019 Responses and Objections (the “Responses”) (Exhibit B), and while the parties have met and conferred and were able to narrow their disagreements, they were not able to reach any agreement on these four items.

The OAG is seeking detailed information about the use of carbon costs in ExxonMobil’s investment decisions and business planning contained in certain cash flow models. Those cash flow models are material and necessary to establish the scope and extent of the misrepresentations alleged in the Complaint and to the analysis of the financial impact of those misrepresentations by plaintiff’s experts. ExxonMobil opposes those requests on the grounds that its public representations did not implicate those specific costs. As a result, ExxonMobil contends that the requested cash flow models are not relevant and that providing them is unduly burdensome given the prior productions in the underlying investigation.<sup>1</sup>

ExxonMobil’s position on the relevance of the information sought by the OAG, however, turns on the central question at the heart of this dispute: whether the inconsistencies between

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<sup>1</sup> See 1/22/2019 ltr. from the OAG to ExxonMobil (Exhibit C); 1/25/2019 ltr. from ExxonMobil to the OAG (Exhibit D); 2/11/2019 ltr. from the OAG to ExxonMobil (Exhibit E); 2/13/2019 ltr. from ExxonMobil to the OAG (Exhibit F).

ExxonMobil's internal cost calculations and its public statements render those disclosures misleading. If so, then the degree to which the internal calculations differ from the public statements is critical to understanding the impact of those misleading statements.

The OAG's complaint focuses on ExxonMobil's representations in a host of disclosures and presentations that "we use cost of carbon as a proxy to model a wide variety of potential policies that might be adopted by governments to help stem GHG emissions. For example, in the OECD nations, we apply a proxy cost that is about \$80 per ton in 2040." Complaint (Exhibit G) at ¶ 86. This disclosure and others like it, concerning both OECD and non-OECD countries, assured investors that ExxonMobil was applying this cost to the emissions it created in its own activities, such as exploration and extraction. *Id.* at ¶ 92 ("The proxy cost seeks to reflect all types of actions and policies that governments may take over the Outlook period relating to exploration, development, production, transportation or use of carbon-based fuels.") The context of these disclosures is significant in that ExxonMobil made these statements in response to several shareholder proposals seeking information as to whether and how ExxonMobil was addressing the long-term economic consequences of increasingly stringent prospective climate change regulations. *Id.* at ¶ 71-72.

ExxonMobil contends that the "proxy costs" referenced in the company's public disclosures only referred to a cost incorporated into the company's oil and gas demand calculations, and were not a factor in the company's calculation of its own costs. Instead, the company contends that it applied a distinct "GHG cost" to calculate potential costs to ExxonMobil with respect to its own emissions. By contrast, the OAG contends that ExxonMobil failed to publicly disclose its use of two different costs and publicly described the "proxy cost" as a single concept applying broadly across its business. Consistent with this interpretation, ExxonMobil's GHG Manager admitted in an internal document that the company's representations were inconsistent with its use of two different costs. Ultimately, ExxonMobil's use of a cost of carbon in its internal projections varied substantially from the publicly disclosed proxy cost, rendering ExxonMobil's public disclosures misleading.

This difference over the meaning, understanding and implications of ExxonMobil's representations represents a threshold dispute. In sum, the OAG contends that ExxonMobil made false and misleading representations concerning the application of proxy costs to its projected emissions, while ExxonMobil contends that its disclosures were accurate regardless of the costs it applied to its projected emissions, due to the distinction it purportedly disclosed between "proxy costs" and "GHG costs." The resolution of this dispute is at the core of whether ExxonMobil's disclosures would have deceived or misled investors.

In addition to establishing that ExxonMobil's disclosures were misleading, the OAG will need to establish the impact these misstatements had on the risk profile ExxonMobil presented to its investors. In its public statements, ExxonMobil claimed it estimated costs in OECD countries approaching \$80 per ton of GHG emissions by 2040, but the limited internal calculations provided to the OAG demonstrate that ExxonMobil applied substantially lower costs in certain instances. For example, with respect to projects in Canada, an OECD country, ExxonMobil's projected carbon costs in the few models it produced generally reached only \$40 per ton of emissions or less. For Exxon's largest upstream asset in North America, ExxonMobil's projected

cost of carbon only reached \$24.30 per ton, and that cost was only applied to a limited percentage of emissions through 2040 and beyond. Overall, ExxonMobil produces over 120 million tons of GHG emissions per year, so a variance of even \$10 to \$20 (much less over \$50) per ton over the twenty-plus year period of the company's forecasts would translate into billions of dollars in additional costs. In order to calculate the actual variance and the impact that would have had on ExxonMobil and its investors, the OAG needs access to the specific projected costs utilized by the company.

The documents requested relate directly to that proof. First, the OAG has requested that ExxonMobil produce the cash flow models used in an important aspect of ExxonMobil's business planning: its company oil and gas reserves and resource base evaluations. The OAG has further requested documents sufficient to show ExxonMobil's methodology, if any, for applying proxy costs in its cost projections in those evaluations. (*See* Ex. A, Requests 19 and 24.) The OAG has alleged that ExxonMobil failed to abide by its public representations concerning the incorporation of proxy costs into these evaluations. (Ex. G, ¶¶ 191-224.) The cash flow models that the OAG has requested are the means by which ExxonMobil performed these evaluations and thus are crucial to quantifying the difference between the proxy costs ExxonMobil said it was going to apply and those it actually applied with respect to the company as a whole.<sup>2</sup> Per witness testimony, ExxonMobil's collection and production of cash flow models used for company reserves and resource base evaluations would not be unduly burdensome.<sup>3</sup>

In response, ExxonMobil has stated that it will produce no documents concerning its company oil and gas reserves or resource base evaluations because, under ExxonMobil's interpretation of the relevant representations (*see* Ex. G, ¶¶ 196-205), the company did not purport to apply proxy costs when conducting those evaluations. This discovery dispute is not the appropriate juncture to argue the merits of one interpretation or another, and ExxonMobil's merits-based argument is no basis to withhold production—particularly given that ExxonMobil did not move to dismiss any portion of the OAG's claims.

As the Court is aware, ExxonMobil produced a limited set of cash flow models pursuant to the Court's August 2018 order. Those models, however, are insufficient for this stage in the litigation process, given the OAG's evidentiary burden and the upcoming deadline for expert reports in this matter. While illuminating and demonstrative of the fact that ExxonMobil's representations were misleading, the cash flow models provided pursuant to that order cover only a discrete set of investments at fourteen ExxonMobil assets. They are not comprehensive, nor do

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<sup>2</sup> In particular, cash flow models used in company reserves and resource base evaluations concern ExxonMobil's upstream segment (i.e. oil and gas exploration, development, and production). ExxonMobil has agreed to produce documents in response to requests concerning the application of carbon costs outside of the upstream segment, such as with respect to refineries, and the OAG reserves the right to seek cash flow models if they are not among the documents ExxonMobil produces in response to those requests.

<sup>3</sup> Norma Fisk, a development planning supervisor at ExxonMobil, testified that these spreadsheets are saved in a "specific centralized location," and that she "would have been able to find" particular models "by looking at the folder structure." (Fisk Tr. (Exhibit H) at 224-25.) Further, in her testimony, Ms. Fisk agreed that "there is no way to know how an asset's field life and resulting associated reserves might change until you see the details of the costs that are being put into the economic models[.]" (*Id.* at 396-97.) The OAG has filed Exhibit H under seal, but has no objection to an entirely unredacted version being made publicly available.

they purport to be a representative sample, and they are therefore insufficient for purposes of calculating the impact of ExxonMobil's misstatements at a company-wide level.

Likewise, the information ExxonMobil submitted in response to the OAG's interrogatories during the investigation are insufficient to calculate the impact of ExxonMobil's deviations from its misrepresentations on a company-wide basis. While those interrogatory responses indicated that proxy costs were applied in certain cost projections and not in others, the cash flow models themselves are crucial to an expert's analysis of how applying carbon costs in accordance with ExxonMobil's representations would have affected the company's revenues and profitability.

Second, the OAG has requested that ExxonMobil produce its GHG emissions forecasts for its projects and assets, which are also material and necessary to calculating the company-wide impact of the alleged misrepresentations. (*See* Ex. A, Requests 37 and 38.) To the extent that ExxonMobil did not apply proxy costs in the manner that it publicly represented, the impact of the fraud may be calculated by multiplying (a) the difference in dollars per ton between the proxy costs ExxonMobil said it was applying and those it actually applied, by (b) ExxonMobil's projected GHG emissions. ExxonMobil has offered to "explore the possibility" of providing these projections with respect to just three of ExxonMobil's assets (*see* Ex. F at 5-6), which is not adequate to establish the company-wide impact of ExxonMobil's misrepresentations.

While both categories of documents are relevant to the question of liability, they are of irreplaceable utility to experts in calculating the impact of the misrepresentations alleged, and provide a means for measuring harm to investors. Given the aggressive trial schedule in this matter, that expert work is currently ongoing, and the OAG is obligated to issue its reports a little over two months from now on May 8, 2019. If the OAG is precluded from obtaining critical information regarding the costs actually applied by ExxonMobil and the impact of not applying the represented costs on ExxonMobil's revenues and profitability, it would make a fulsome and accurate analysis by the OAG's experts virtually impossible.

The OAG's requests are consistent with the well-established expectation that government agencies will have a need and an opportunity to obtain additional discovery in preparation for trial beyond that which was gathered and appropriate for the determination of whether to file suit. The OAG is entitled to "full disclosure of all matter material and necessary in the prosecution or defense of an action." CPLR 3101(a). The mere fact that similar documents were requested and produced during the OAG's underlying Martin Act investigation does not preclude discovery here. Even after an extensive regulatory investigation, once "the complaint has been filed and the defendants have answered, the issues requiring resolution have been clarified, and all parties must be afforded the opportunity to conduct discovery and prepare for trial with those issues in mind." *SEC v. Saul*, 133 F.R.D. 115, 119 (N.D. Ill. 1990). Forcing the OAG to rely on the record developed during a law enforcement investigation "would transform those inquiries into discovery or trials." *SEC v. Softpoint, Inc.*, 958 F.Supp. 846, 857 (S.D.N.Y. 1997) (Sotomayor, J.), *aff'd* 159 F.3d 1348 (2d Cir. 1998). Now that the OAG has filed suit based on information received during the investigation, it is entitled to the production of evidence necessary to support its burden of proof at trial.

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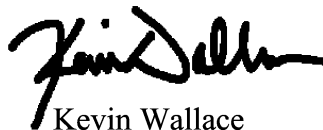
As set forth above, the OAG is seeking documents that are material and necessary to establishing the company-wide impact of ExxonMobil's misrepresentations. To the extent, however, the Court denies the OAG discovery on these issues, the OAG intends to file a motion, pursuant to CPLR § 603, to sever the discovery and ultimate resolution of issues concerning the scope and impact of any misstatements until after a finding on liability. *See, e.g., McGuire Children LLC. v. Huntress*, 24 Misc.3d 1202(A) at \*3 (Sup. Ct. Erie Cty. 2009) ("For the reasons explained on the record, the Court on its own motion bifurcated the trial and proceeded solely on liability issues.").

Severance would preserve the OAG's right to full discovery of its claims while providing sufficient protection to ExxonMobil's resources, as well as the Court's resources. CPLR § 603 (severance may be ordered "[i]n furtherance of convenience or to avoid prejudice"); *Marine Midland N.A. v. Berley*, 90 A.D.2d 646, 647 (3d Dept. 1982) (severance appropriate where it leads to a "quicker disposition" without prejudice to the opposing party); *Ellingson Timber Co. v. Great. N. Ry. Co.*, 424 F.2d 497, 499 (9th Cir. 1970) (bifurcation appropriate to avoid costly discovery).

If the OAG establishes Martin Act liability against ExxonMobil – that its representations were misleading and material to investors – then the scope of the misstatement and amount by which the company's projected costs were understated becomes critical. Moreover, severance would be consistent with one measure of relief sought by the OAG in the Complaint, which asked for a "comprehensive review of Exxon's failure to apply a proxy cost consistent with its representations, and the economic and financial consequences of that failure." (Ex. G at 89.) In short, if the Court determines that the OAG is not presently entitled to documentation of the specific application of carbon costs in ExxonMobil's business operations, then severance would preserve the OAG's right to obtain full discovery of the wrongdoing alleged and the full relief to which the State is entitled.

We respectfully request that the Court schedule a conference to address these issues.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kevin Wallace", written in a cursive style.

Kevin Wallace