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March 15, 2019

By NYSCEF and Hand Delivery

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

Re: People of the State of New York v. Exxon Mobil Corporation, No. 452044/2018

Dear Justice Ostrager:

We write on behalf of Exxon Mobil Corporation ("ExxonMobil") in response to the Office of Attorney General's ("OAG") March 4, 2019 letter (the "Letter"). After we discuss the context for this dispute, we explain why OAG's document demands and alternative request to bifurcate the liability and damages phase of the upcoming trial are unfounded.

Context for Current Dispute

On October 24, 2018, OAG announced to the world that ExxonMobil "claimed to be factoring the risk of increasing climate change into its business decisions," and that its investigation revealed that "Exxon often did no such thing." OAG, Press Release, *A.G. Underwood Files Lawsuit Against ExxonMobil For Defrauding Investors Regarding Financial Risk The Company Faces From Climate Change Regulation* (Oct. 24, 2018). Having purportedly found sufficient evidence of wrongdoing during its investigation, OAG's current requests for innumerable additional cash flow models and greenhouse gas ("GHG") emissions forecasts make little sense.

OAG's investigation of ExxonMobil and later lawsuit reveal a basic theme: OAG cannot find a plausible theory of liability. But, rather than concede defeat, OAG continues to manufacture theory after theory, and its most recent letter to the Court is a case in point. No longer does OAG claim, as it did in its Complaint, that ExxonMobil's proxy cost of carbon ("Proxy Costs") and its GHG costs ("GHG Costs") are one and the same. *See* Compl. ¶ 92. Instead, OAG now argues that the question "at the heart of this dispute" is whether disclosures concerning these *distinct* metrics may have been "misleading." Letter at 1-2. This theory does not entitle OAG to additional damages-related discovery, as OAG insists. *Id.* at 2. OAG cannot invent a new theory each time it seeks to riffle through ExxonMobil's files anew.

Initially, in late 2015, OAG sought to demonstrate that ExxonMobil's public statements about climate science were out-of-step with the Company's internal research. *See* Justin Gillis & Clifford Krauss, *Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General*, N.Y. Times (Nov. 5, 2015). But when the evidence showed the exact opposite, OAG shifted to an accounting fraud theory. *See, e.g.*, Bradley Olson, *Exxon's Accounting Practices Are Investigated*, Wall St. J. (Sept. 16, 2016). By mid-2017, when that theory also hit a dead end, OAG simply pivoted to another: that the Company misrepresented how it was incorporating *future* climate policies into its business decisions. *See* OAG Mem. of Law in Opp'n to Exxon's Mot. to Quash and in Supp. of the Att'y General's Cross Mot. to Compel, *People of the State of New York v. PwC*, No. 451692/2016, at 3–8 (Sup. Ct., N.Y. Cty., June 2, 2017) (NYSCEF No. 168).

All the while, ExxonMobil cooperated with OAG. More than a year before OAG filed its Complaint, this Court recognized that ExxonMobil's document production had extended "way beyond proportionality." June 16, 2017 Hr'g Tr. at 55:10–11. By the end of the investigation, ExxonMobil produced more than four million pages of documents from 161 custodians, and made available 18 witnesses who testified collectively for nearly 200 hours. The record establishes that, on the day the Complaint was filed, OAG had already obtained discovery far beyond what is "material and necessary" to the claims alleged in the Complaint. *See* CPLR 3101(a). But ExxonMobil has agreed to do even more. It is in the process of reviewing and producing documents from 11 additional custodians and has agreed to make four additional witnesses available for depositions. ExxonMobil has also committed to producing GHG emissions forecasts for three projects of particular interest to OAG. *See* Ex. A at 5–6. Against this backdrop, we address OAG's arguments regarding the enforcement of four requests in its First Request for Production of Documents.

Response to OAG's March 4 Letter

OAG is not entitled to *additional* "detailed information about the use of carbon costs in ExxonMobil's investment decisions and business planning contained in certain cash flow models." Letter at 1. Right before OAG filed its Complaint, ExxonMobil produced numerous cash flows requested by OAG and a 21-page response to OAG's interrogatories, which addressed themselves to "any and all final cash flow projections for purposes of . . . company reserves or resource base estimates." *See* Ex. B at 2. OAG's Letter to the Court ignores the contents of this interrogatory response, *see* Letter at 3, attempting to end-run this Court's definitive prior rulings.

First, OAG's letter states that its Complaint "focuses on ExxonMobil's representations in a host of disclosures and presentations." Letter at 2. But the selective disclosures OAG identifies—in *Energy and Climate* (2014) and *Managing the Risks* (2014)—concern *energy demand* projections and in no way justify a request for particular cash flow models. The Company's statements in these documents are clearly tied to ExxonMobil's use of a "proxy cost of carbon" in its *Outlook for Energy* ("OE")—the annual report that ExxonMobil publishes detailing its prospective views on global energy demand. OAG is correct that the "context of these disclosures is significant." Letter at 2. Indeed, the portions of the disclosures OAG excises, which we highlight in bold italics below, underscore that the only models to which OAG is entitled are

OE demand models. And, in fact, OAG already has these models in its possession. *See, e.g.*, Ex. C at 11–12.

Energy and Climate does not state that, in a vacuum, ExxonMobil applies a Proxy Cost to investment decisions. Nor does it make any statement whatsoever about how the Proxy Cost appears in “cash flows.” Instead, *Energy and Climate* highlights that the Proxy Cost is used for the *OE*: “**for our Outlook**, we use a 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.” Ex. D at 5–6. OAG’s distortion of *Managing the Risks* fares no better. OAG omits wholesale the sentence that precedes the one it chooses to call out, which makes unmistakably clear that the modeling done with respect to the Proxy Cost is used in the *OE*: “**This proxy cost of carbon is embedded in our current Outlook for Energy, and has been a feature of the report for several years.**” Ex. E at 17. OAG’s patent distortion of ExxonMobil’s public statements does not justify additional discovery. OAG knows—and ExxonMobil agrees—that Proxy Costs are not included as expenses in cash flow models. *See* Ex. C at 22. ExxonMobil is willing to stipulate to this fact. Producing documents that reaffirm this fact serves no purpose.

Second, OAG’s request for cash flow spreadsheets associated with Company reserves and resource base evaluations fails CPLR 3101(a)’s “material and necessary” requirement. ExxonMobil has never made public representations about whether it applies Proxy Costs and GHG Costs to Company reserves and resource base evaluations. ExxonMobil has not disclosed the size, composition, or calculation of its Company reserves since 2009, well outside the limitations period for OAG’s claims. *See People v. Credit Suisse Sec.*, 31 N.Y.3d 622, 632 (2018). Similarly, OAG cannot demand more cash flow models simply because ExxonMobil has stated that its resource base estimates align with the Petroleum Resources Management System. *See* Compl. ¶ 203. These guidelines make clear that a company’s total resources contain petroleum quantities not yet mature enough for commercial development and for which commerciality assessments are not yet possible. ExxonMobil therefore need not—and in many cases cannot—conduct cash flows to assess which quantities of petroleum qualify as resources.

This Court already addressed OAG’s request for reserves-related documents, recognizing the “fairly substantial burden” OAG had already imposed on ExxonMobil. Aug. 29, 2018 Hr’g Tr. at 14:25–15:4. Now, OAG renews its request, citing only *federal* securities cases suggesting it should get a second bite at the apple now that it has filed a Complaint. Letter at 4. Yet none of these cases involved an investigation under the Martin Act, which provides the Attorney General with “the broadest and most easily triggered investigative and prosecutorial powers of any securities regulatory, state or federal.” *State v. 7040 Colonial Rd. Assoc. Co.*, 176 Misc.2d 367, 370 (Sup. Ct., N.Y. Cty. 1998) (citation omitted). OAG’s demand for these documents is a naked attempt to circumvent this Court’s prior rulings. Such gamesmanship should not stand.

Third, OAG fails to articulate how it could calculate any supposed damages attributable to its securities fraud theories with (i) internal GHG emissions forecasts, or (ii) proprietary and undisclosed cash flow spreadsheets. New York Courts calculate fraud damages according to the out-of-pocket rule. *See Starr Found. v. Am. Intl. Grp., Inc.*, 76 A.D.3d 25, 27 (1st Dep’t 2010). In the securities context, damages under the out-of-pocket rule “consist of the difference between

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the price paid and the value of the stock when bought.” *Acticon AG v. China Ne. Petroleum Holdings Ltd.*, 692 F.3d 34, 38 (2d Cir. 2012) (citation and internal quotation marks omitted). OAG instead seeks to calculate the magnitude of the costs the Company allegedly should have applied, but did not apply, in evaluating its projects and assets. Letter at 4. But OAG fails to explain how determining the GHG Costs ExxonMobil allegedly did not apply to projects in which it considered investing could be used to reliably assess “the value of [ExxonMobil’s] stock when bought.” *Acticon*, 692 F.3d at 38. ExxonMobil’s stock price is affected by innumerable factors other than hypothetical projected regulatory costs. Because OAG cannot use these documents to reliably calculate actual out-of-pocket loss, providing these documents to OAG is unnecessary.

Fourth, bifurcating the issue of damages from liability is inappropriate where, as here, OAG cannot articulate—let alone identify documents in support of—a plausible damages theory.

Respectfully submitted,

/s/ Theodore V. Wells, Jr.
Theodore V. Wells, Jr.

cc: All counsel of Record (by NYSCEF)