

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP  
1285 AVENUE OF THE AMERICAS  
TELEPHONE (212) 373-3000

NEW YORK, NEW YORK 10019-6064

UNIT 5201, FORTUNE FINANCIAL CENTER  
5 DONGSANHUAN ZHONGLU  
CHAORYANG DISTRICT, BEIJING 100020, CHINA  
TELEPHONE (86-10) 5828-6300

HONG KONG CLUB BUILDING, 12TH FLOOR  
3A CHATER ROAD, CENTRAL  
HONG KONG  
TELEPHONE (852) 2846-0300

ALDER CASTLE  
10 NOBLE STREET  
LONDON EC2V 7JU, UNITED KINGDOM  
TELEPHONE (44 20) 7367 1600

FUKOKU SEIMEI BUILDING  
2-2 UCHISAIWAICHO 2-CHOME  
CHIYODA-KU, TOKYO 100-0011, JAPAN  
TELEPHONE (81-3) 3597-8101

TORONTO-DOMINION CENTRE  
77 KING STREET WEST, SUITE 3100  
P.O. BOX 226  
TORONTO, ONTARIO M5K 1J3  
TELEPHONE (416) 504-0520

2001 K STREET, NW  
WASHINGTON, DC 20006-1047  
TELEPHONE (202) 223-7300

500 DELAWARE AVENUE, SUITE 200  
POST OFFICE BOX 32  
WILMINGTON, DE 19899-0032  
TELEPHONE (302) 655-4410

WRITER'S DIRECT DIAL NUMBER

(212) 373-3089

WRITER'S DIRECT FACSIMILE

(212) 492-0089

WRITER'S DIRECT E-MAIL ADDRESS

twells@paulweiss.com

May 2, 2019

*By NYSCEF and Hand Delivery*

The Hon. 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, No. 452044/2018*

Dear Justice Ostrager:

We write on behalf of Exxon Mobil Corporation (“ExxonMobil”) in response to the Office of the Attorney General’s (“OAG”) April 26, 2019 letter to the Court (NYSCEF Dkt. No. 174, the “Letter”). OAG seeks a Court order that ExxonMobil either (i) produce, for 25 assets, “cash flow models” used in annual corporate planning and Company Reserves and resource base evaluations; or (ii) affirm that 15 assets OAG identifies “constitute a representative sample of [ExxonMobil’s] overall business.” Letter at 3. In either case, OAG asks that ExxonMobil also provide an “appropriate scaling factor” to allow OAG to draw conclusions about the entire Company from this limited pool of assets. *Id.*

OAG’s requests are conceptually confused and divorced from the Court’s instructions at the March 21, 2019 discovery conference. The Court directed the parties to “meet and confer and agree on appropriate samples of the categories of documents that [OAG] want[s].” Ex. A (Corrected Mar. 21, 2019 Hr’g Tr.) at 24:19–21. ExxonMobil did exactly this. Accounting for recent productions, OAG now has in its possession a diverse array of full funding project economic models and over 7,000 Excel spreadsheets responsive to cash flow-related terms. These models constitute far more than the “reasonable sample” to which OAG is entitled, especially because OAG seeks to use this sample to substantiate a dubious damages theory. *Id.* at 22:22.

Further, at OAG’s request, ExxonMobil provided OAG an interrogatory response yesterday that contains a detailed analysis of 63 cash flow spreadsheets. *See* Def.’s Resps. & Objs. to Pl.’s Contention Interrogs. at App. A. In that response, the Company painstakingly laid out where GHG-related figures exist within these 63 voluminous spreadsheets. ExxonMobil expended nearly 75 hours tracking down these figures, demonstrating the Company’s good faith efforts to provide OAG with the information it seeks. ExxonMobil has fully complied with the Court’s directive and respectfully asks this Court to deny OAG’s requests for relief.

***ExxonMobil Has Already Produced Voluminous Documents Possibly Relevant to OAG's Ever Shifting Theories***

Almost two years ago, this Court recognized that ExxonMobil's document production had extended "way beyond proportionality." June 16, 2017 Hr'g Tr., NYSCEF Dkt. No. 236, Index No. 451962/2016, at 55:10–11 (June 21, 2017). ExxonMobil has spent millions of dollars and thousands of hours responding to OAG's never-ending demands. Now, at the eleventh hour, OAG comes rushing to the Court asking it to order ExxonMobil to produce even more cash flow models. Yet ExxonMobil has given OAG everything it could possibly need.

Before OAG even filed its Complaint, ExxonMobil had produced a substantial number of full funding economic models<sup>1</sup> associated with 25 assets selected by OAG. These models were prepared by ExxonMobil's Development Company ("EMDC") between 2010 and 2016. After the March 21 conference, ExxonMobil compromised on its position that it would produce only models prepared by EMDC. *See* Ex. B (Apr. 12, 2019 Letter from J. Anderson to K. Wallace) at 1–2. Its follow-up productions included additional full funding models from ExxonMobil's Refining & Supply and Chemical companies, drawn from the same group of 25 assets and 2010–2016 time frame. Furthermore, ExxonMobil directed OAG to acquire five additional models from Imperial Oil Limited. *See id.* at 2 n.1. All told, OAG now has 33 full funding models associated with projects operated across the globe—from Beaumont, USA, to Cepu, Indonesia—and the Company's various business lines.

These recent productions of full funding models sit atop a pile of previous productions. ExxonMobil produced over four million pages of documents during OAG's investigation. *See* ExxonMobil's Br. in Opp'n to OAG's Mot. to Compel, NYSCEF Dkt. No. 338, Index No. 451962/2016, at 7–8 (July 9, 2018). Among these documents are 63 cash flow spreadsheets already in OAG's possession and about which ExxonMobil has provided interrogatory responses. *See* Def.'s Resps. & Objs. to Pl.'s Contention Interrogs. at App. A. The spreadsheets correspond not only to full funding investment decisions, but also those related to advance commitments, Company Reserves,<sup>2</sup> and corporate planning. *See id.* Further, since OAG filed its Complaint last

---

<sup>1</sup> Full funding models, to be clear, are the only models remotely relevant to the analysis OAG seeks to perform. By way of background, the Company makes capital investment decisions at various stages of a project's maturity. For example, the Company may make an "advance commitment" in a project's nascent stages, which commits only an initial, relatively minor exploratory investment. But the Company's ultimate decision to fully fund a project commits significant resources to move that project from concept to reality. Full funding models, therefore, are the only models OAG could possibly need to understand the costs ExxonMobil considers when making investment decisions.

<sup>2</sup> To the extent OAG seeks additional cash flow models relating to ExxonMobil's Company Reserves evaluations, ExxonMobil has not disclosed the size, composition, or estimation 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, 632–33 (2018), and has never publicly stated that it uses GHG costs to estimate Company Reserves. Likewise, OAG is not entitled to cash flow models related to resource base evaluations. In fact, ExxonMobil need not—and in many cases cannot—develop cash flow models to assess the commerciality of its resource base. This is because, under the Petroleum Resources Management System guidelines, a fossil fuel producer's resource base includes petroleum quantities *not yet mature enough for commercial development*. *See* ExxonMobil's Br. in Opp'n to OAG's Mot. to Compel, NYSCEF Dkt. No. 338, Index No. 451962/2016, at 23–24 (July 9, 2018). Finally,

October, ExxonMobil and Imperial Oil Limited have together produced over 7,000 Excel spreadsheets that contain the keywords “DCF” (discounted cash flow) or “cash flow.” OAG cannot reasonably demand *more* models given the abundant information it clearly already possesses. See Ex. A. at 24:18–19 (“[D]iscovery has to be proportionate and not unreasonably overbroad . . . .”); *c.f.* *United States ex rel Martinez Assocs., Inc. v. Acmat Corp.*, 1988 WL 113352, at \*5 (D.N.J. Oct. 24, 1988) (“Parties in an adversarial posture cannot be required to assist the opposition in bringing and maintaining claims against them.”).

### ***OAG Lacks a Coherent Theory to Justify Its Requests for Additional Information***

Setting aside that ExxonMobil has already more than fulfilled its production obligations, OAG’s requests for relief rest on infirm predicates. At the March 21 discovery conference, in addressing OAG’s request for additional cash flow models, the Court stressed that “[t]his is a securit[ies] fraud case.” Ex. A at 19:20. It went on to state, in clear terms, the essence of OAG’s claim: “What you’re claiming is that [ExxonMobil] made certain misrepresentations that investors rel[ied] on and as a result of investors relying on these representations, they got something that was worth less than they paid for.” *Id.* at 19:22–20:2. As the Court’s discussion makes clear, any analysis of liability or damages must begin with the Company’s public representations.

The Company has made three representations relevant to this litigation. **First**, in *Managing the Risks* (“MTR”), ExxonMobil disclosed that it uses a “proxy cost of carbon,” which “in some areas may approach \$80/ton” to “address the potential for future climate-related controls.” Ex. C at 17–18. Noting that the “proxy cost of carbon is embedded in our current *Outlook for Energy*,” the Company made clear that it uses proxy costs to model how future climate policies will impact *energy demand*. See *id.* at 17. **Second**, the Company disclosed that, “where appropriate,” its business segments include “GHG costs in their economics *when seeking funding for capital investments*.” *Id.* at 18 (emphasis added). **Third**, ExxonMobil disclosed that it “do[es] not publish the economic bases upon which [it] evaluate[s] investments due to competitive considerations.” *Id.* at 16. This policy makes sense. As the Court rightly observed, ExxonMobil is a “very big company with lots of operation[s] and assets all over the world.” Ex. A at 20:14–15. Disclosing GHG costs and other economic inputs supporting each of the Company’s global investment decisions would impose a crippling administrative burden and be of little use to investors. Context necessarily informs whether and how the Company accounts for potential GHG costs in various jurisdictions. Indeed, it is for this reason that the Company disseminates annual internal GHG cost guidance to its project planners—to account for an ever-shifting political and policy environment.

A moment’s reflection on the Company’s representations reveals the incoherence of OAG’s theory. OAG claims it needs additional “cash flow models” to estimate the “overall economic impact to ExxonMobil’s business of the difference” between the Company’s “publicly represented proxy costs” and the “costs utilized internally at ExxonMobil in its cost projections.” Ex. D (Mar. 28, 2019 Letter from K. Wallace to J. Anderson) at 1. But OAG blatantly conflates

---

*Managing the Risks* (“MTR”) says nothing about whether ExxonMobil uses GHG costs in its short-term planning and budgeting. See generally Ex. C (MTR). Accordingly, OAG is not entitled to cash flow models used in “annual corporate planning.” Letter at 3.

the two metrics *MTR* expressly distinguished: proxy costs and GHG costs. ExxonMobil's employees have explained to OAG on numerous occasions that these two metrics serve separate purposes—a point OAG has itself recognized and that voluminous evidence confirms. *See* ExxonMobil's Br. in Opp'n to OAG's Mot. to Compel, NYSCEF Dkt. No. 338, Index No. 451962/2016, at 17–18 (July 9, 2018).

Even so, OAG incorrectly posits that the Company applied lower GHG costs than it said it would and, from this premise, seeks to calculate the magnitude of the Company's purported understatement of GHG costs. The problem, of course, is that ExxonMobil never disclosed any numeric details about the GHG costs it applies. Indeed, in *MTR*, the Company specifically noted that it does not “publish the economic bases” upon which it evaluates investments. Ex. C at 16. In a securities fraud case, there can be no liability—and thus no damages—absent a relevant representation or omission, neither of which exists here.

OAG's latest theory reveals yet another significant conceptual flaw. At the discovery conference, the Court pressed OAG to “explain” how the models OAG seeks “establish the [d]elta between what the investors paid and what they actually received.” Ex. A at 20:5, 7–9. OAG offered a tortuous, incoherent explanation, and then essentially retreated, emphasizing that “under the Martin Act we don't have to prove an investor loss.” *See id.* at 20–21. OAG has failed to provide any clarity since then. GHG costs represent projected *future* costs that the Company considers, “where appropriate,” in one aspect of its business planning. These costs do not, therefore, impact the Company's present financial results, which *are* disclosed to the market in SEC filings. The notion that investors are aware of and react to ExxonMobil's internal, undisclosed GHG cost metrics defies logic and lacks even a shred of factual support. OAG's attempt to calculate the purported delta between the GHG costs ExxonMobil applied and those OAG contends ExxonMobil should have applied is thus an exercise in futility.

### ***ExxonMobil Is Not Obligated to Handhold OAG's Experts***

The relief OAG seeks from the Court, is, essentially, to have ExxonMobil perform the work of OAG's experts. OAG wants ExxonMobil to assemble a statistically valid, representative sample of the Company's assets and provide a “scaling factor” its experts can use to calculate the purported economic impact of the Company's alleged misrepresentations. *See* Letter at 3. Even setting aside that OAG's proposed analysis is conceptually flawed and nonsensical, the fact remains that it is not ExxonMobil's job to assist OAG with its experts' analyses. Indeed, as OAG represented to the Court in a recent brief, “[d]etermining the proper methodology for establishing the figures on which damages are based is a matter for expert discovery.” *See* OAG's Br. in Supp. of its Mot. for a Protective Order, NYSCEF Dkt. No. 164, Index No. 452044/2018, at 8 (Apr. 24, 2019) (internal quotation marks and alterations omitted).

At the March 21 discovery conference, the Court did not order ExxonMobil to develop or validate OAG's methodology for its purported economic impact analysis. Instead, recognizing the scope of ExxonMobil's production of cash flow models to date, the Court simply ordered ExxonMobil to produce a “reasonable sample” of the models *sought by OAG*. *See* Ex. A at 22:21–23 (“I'm [going to] direct [ExxonMobil] to . . . provide [OAG] with a reasonable sample of what it is that [OAG] want[s].”). ExxonMobil has done exactly that and more, producing, along with

Hon. Barry R. Ostrager

5

Imperial Oil Limited, 10 additional full funding models. The Court did *not* suggest that ExxonMobil must ensure that the models it produces constitute a scientifically valid, “representative sample” of the Company’s vast operations. Letter at 3. In fact, common sense dictates that models associated with the 25 assets OAG handpicked do not constitute an objective—much less representative—sample of the Company’s operations. Filings in connection with OAG’s June 2018 Motion to Compel confirm as much. OAG affirmed that these 25 assets are “notable for generating (or being forecasted to generate) significant GHG emissions.” *See* Affirmation of J. Oleske in Supp. of OAG’s Mot. to Compel, NYSCEF Dkt. No. 280, Index No. 451962/2016, at 22 (June 19, 2018). ExxonMobil does not endorse that these assets, or the further subset of 15 assets OAG identified in its Letter, represent a statistically valid sample.

ExxonMobil is also under no obligation to provide OAG with a “scaling factor” to assist OAG with its flawed attempt to extrapolate conclusions from a limited, unrepresentative pool of assets. The Court expressly indicated that *OAG’s* expert—not ExxonMobil—would decide how to use these models for any purported economic impact analysis. *See* Ex. A at 22:23–25. (“And then [OAG’s] expert can say[,] extrapolating from [ExxonMobil’s] sample, [‘]I have this view.[’]”). Likewise, the Court acknowledged that ExxonMobil is “not [going to] agree to how they are [going to] cross examine your expert,” further confirming that the mechanics of any extrapolation exercise would be the subject of expert analysis. *Id.* at 22:19–20. It is not ExxonMobil’s burden to explain to OAG how it should attempt to prove its fundamentally flawed claims.

\* \* \*

For these reasons, we respectfully request that the Court deny OAG’s requests for relief.

Respectfully submitted,

/s/ Theodore V. Wells, Jr.

Theodore V. Wells, Jr.

cc: All counsel of Record (by NYSCEF)