SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, by Letitia James, Attorney General of the State of New York,

Plaintiff,

-against-

EXXON MOBIL CORPORATION,

Defendant.

Index No. 452044/2018

IAS Part 61

Hon. Barry R. Ostrager

EXXON MOBIL CORPORATION'S POST-TRIAL MEMORANDUM

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

Attorneys for Defendant Exxon Mobil Corporation

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Defendant Exxon Mobil Corporation ("ExxonMobil" or the "Company") respectfully submits this post-trial memorandum in support of a judgment in its favor on all counts.

PRELIMINARY STATEMENT

At the close of trial, the parties agree on at least one thing: ExxonMobil did not commit fraud. Not long ago, the New York Attorney General ("NYAG") promised to unmask "a longstanding fraudulent scheme," amounting to a "Potemkin village" that was allegedly "sanctioned at the highest levels of the company." Compl. ¶¶ 1, 8, 19. Sitting in its office, NYAG crafted a narrative ready-made for the press, bursting with rhetorical flourishes and righteous indignation. Only one thing was missing: evidence. NYAG could not identify a single investor in ExxonMobil stock who actually read the disclosures at issue—let alone an investor who claimed to be deceived. After the evidentiary record had closed, NYAG abruptly and belatedly abandoned its fraud allegations. NYAG's request to drop those counts speaks volumes about the hollowness of its case. It has conceded there was no evidence of fraud.

NYAG should also concede there is no evidence of a Martin Act violation.[1] The Martin Act requires evidence of a material misstatement, but the evidentiary record is devoid of any support for this claim. NYAG would have this Court believe that, when considering potential investments in ExxonMobil stock, reasonable investors assigned significance to whether ExxonMobil set its GHG cost assumptions at $60 per ton in 2030 and $80 per ton in 2040. In NYAG's telling, reasonable investors believed that ExxonMobil applied those cost assumptions mindlessly and mechanically even though the disclosures at issue stated explicitly that GHG costs were applied "where appropriate" based on ExxonMobil's "best assessment," and ExxonMobil

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1 As charged here, NYAG's Executive Law § 63(12) count requires a showing of "repeated" or "persistent" Martin Act violations. If the elements of the Martin Act are not established, there can be no violation of Section 63(12).

expressly stated it does not disclose the "economic bases upon which [it] evaluate[s] investments." PX 001 at 16, 18, 21.[2] Those investors, the story goes, would have assumed (regardless of these qualifications and without any supporting facts) GHG costs were set at the same level as proxy costs and then assigned actual significance to that assumption when deciding whether to invest in ExxonMobil. Assuming arguendo that this theory might be enough to plead a Martin Act violation, NYAG was required at trial to prove its theory. After three weeks, the record is as barren as it was on the first day of trial when NYAG delivered its opening statement and laid out its theory.

The record is clear. Not a single investor claimed to have invested in ExxonMobil stock consistent with NYAG's theory. Even though ExxonMobil has over four billion shares outstanding and hundreds of thousands of shareholders, NYAG did not offer testimony from any investor in ExxonMobil stock, let alone one who claimed GHG cost disclosures purportedly affected his or her investment decisions. While NYAG loosely referred to a number of ExxonMobil's GHG cost disclosures, it has not shown how any of those statements significantly altered the total mix of information available to investors. All of this is unsurprising. The evidence showed that GHG cost assumptions had no impact on ExxonMobil's income statement, balance sheet, or other financial disclosures. And ExxonMobil's independent auditor firmly rebuffed NYAG's contrived effort to show that GHG costs required the impairment of an obscure asset (Mobile Bay) otherwise ignored at trial. It is uncontested that investors did not bid up ExxonMobil's stock price when the GHG cost disclosures were made. And no reliable evidence established that ExxonMobil's stock price dropped when the alleged "corrective" disclosures came to light. Tellingly, research analysts hardly acknowledged the GHG cost disclosures, and none

[2] "DX" refers to a defense exhibit received at trial; "PX" refers to a plaintiff exhibit; "JX" refers to a joint exhibit; and "Tr." refers to the trial transcript.

adjusted their buy/sell recommendation as a result. This record does not establish a material misrepresentation; it refutes it at every turn.

The evidentiary record also makes clear that, over a decade ago, ExxonMobil developed in good faith and for sound business reasons a robust program to address climate risk. Years later, ExxonMobil disclosed that program's existence at a conceptual level and made clear it was not providing granular information about the inputs or assumptions it used. The evidence shows that ExxonMobil did exactly what it told the public: it used two tools, proxy costs and GHG costs, to plan for the potential effects of future climate regulations on demand for its products and costs incurred by potential projects. No reasonable investor expected to know more, none expected to receive proprietary information, and none would have used more detailed information (had it been given) in connection with any investment decision. As with its fraud claims, NYAG has a theory but no evidence. In light of NYAG's utter failure to carry its burden, judgment should be entered for ExxonMobil on all counts of the Complaint.

APPLICABLE LAW

The relevant legal standards are not in dispute.[3] The Martin Act requires NYAG to prove that "the challenged act or practice was misleading in a material way." *People ex rel. Cuomo* v. *Charles Schwab & Co., Inc.*, 2011 WL 5515434, at *7 (Sup. Ct. N.Y. Cty. Oct. 24, 2011). For a statement to be materially misleading, there must be "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976); *see also State* v. *Rachmani Corp.*, 71 N.Y.2d 718, 726 (1988). "The standard of a 'reasonable investor,' like the negligence standard of a 'reasonable man,' is an objective one."

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[3] *Compare* Dkt. No. 403, Pl.'s Pretrial Mem. at 11, *with* Dkt. No. 421, Def.'s Pretrial Mem. at 28.

United States v. *Litvak*, 889 F.3d 56, 64 (2d Cir. 2018). The total mix of information looks to "the sum of all information reasonably available" to investors, *Koppel* v. *4987 Corp.*, 167 F.3d 125, 132 (2d Cir. 1999) (internal quotation marks omitted), and "may include information already in the public domain," *Garber* v. *Legg Mason Inc.*, 347 F. App'x 665, 668 (2d Cir. 2009) (internal quotation marks omitted). Applying those standards, the New York Court of Appeals concluded that a material misstatement must assume "*actual significance* in the deliberations of the reasonable shareholder." *Rachmani*, 71 N.Y.2d at 726 (quoting *TSC Indus.*, 426 U.S. at 449).

Determining whether a statement is materially misleading presents a mixed question of law and fact. *See People ex rel. Cuomo* v. *Merkin*, 2010 WL 936208, at *4 (Sup. Ct. N.Y. Cty. Feb. 8, 2010). When construing the Martin Act, New York courts "have repeatedly found it appropriate to be guided by the decisions of federal courts." *E. Midtown Plaza Hous. Co.* v. *Cuomo*, 20 N.Y.3d 161, 170 (2012). Under federal law, a misstatement is material to a reasonable investor only if it is "sufficiently specific" to guarantee "some concrete fact or outcome." *City of Pontiac Policemen's & Firemen's Ret. Sys.* v. *UBS AG*, 752 F.3d 173, 185 (2d Cir. 2014). Disclosures containing "open-ended and subjective" language are not material because they do not provide concrete information reasonable investors use when making investment decisions. *Id.* at 186. By the same token, "tentative and generic" statements that "emphasize the complex, evolving regulatory environment" cannot be material. *Singh* v. *Cigna Corp.*, 918 F.3d 57, 64 (2d Cir. 2019).

ARGUMENT

Multiple independent grounds establish that the disclosures were not materially misleading. ExxonMobil's GHG cost disclosures could not have been materially misleading to investors in light of their content and the absence of evidence showing that reasonable investors would have considered the disclosures to have significantly altered the total mix of information available. ExxonMobil's disclosures had no bearing on the Company's financial statements, stock price, or analyst valuation, which provides further, independent grounds to conclude they were not materially misleading. When viewed individually or collectively, the evidence shows reasonable investors would not have considered the disclosures at issue here to have significantly altered the total mix of information available. Accordingly, ExxonMobil urges this Court to conclude that each of these grounds, as a matter of fact and law, provides an independently sufficient and compelling basis to conclude that NYAG failed to prove a material misrepresentation, and, when viewed collectively, they provide overwhelming support for a judgment in ExxonMobil's favor.

I. ExxonMobil's Disclosures, Even Standing Alone, Were Not Materially Misleading.

A. Despite NYAG's Promises, No Investor Testified That ExxonMobil's GHG Cost Disclosures Were Misleading or Significantly Altered the Total Mix of Information.

NYAG promised to prove "the investment community" and a "diverse population of investors" considered ExxonMobil's disclosures about its GHG cost assumptions to be material to their investment decisions. Dkt. No. 403 at 35; Tr. 26:8-11. NYAG failed to deliver on that promise. In the end, not a single witness claimed to have been misled by these disclosures when making an investment decision, or that the disclosures altered the total mix of information available. In fact, no witness even testified that he or she both invested in ExxonMobil stock and read the disclosures at issue. This deficiency in proof is glaring, particularly when contrasted against the grandiose claims NYAG previously made. Tr. 12:16-13:9. NYAG originally identified 25 individuals and seven financial institutions likely to have "discoverable information" in this lawsuit.[4] NYAG subsequently reduced that list to 13 witnesses likely to be called at trial.[5] After depositions revealed that most of those witnesses either contradicted or failed to support NYAG's theories, NYAG called only three witnesses from its list.

[4] Dkt. No. 322, Apr. 5, 2019 Letter from K. Wallace to D. Toal at App. A.
[5] Dkt. No. 302, June 26, 2019 Letter from K. Wallace to D. Toal at 3.

But none of those witnesses provided testimony that supported NYAG's theory. The first witness, Natasha Lamb, did not invest in or recommend ExxonMobil stock. Tr. 134:2-7. Ms. Lamb, the Director of Research and Shareholder Engagement at Arjuna Capital, manages portfolios that exclude ExxonMobil stock, while measuring their performance against benchmarks that include ExxonMobil stock. Tr. 129:11-13, 132:3-7. It is therefore in her financial interest for ExxonMobil's stock price to decrease, so her portfolios do better in comparison. Tr. 132:8-24. Her perspective is directly contrary to that of a reasonable investor in ExxonMobil stock who hopes the price will increase. Even if, contrary to fact, her testimony had some bearing on the views of a reasonable investor, it should nevertheless be set aside because of Ms. Lamb's evident bias against ExxonMobil. Ms. Lamb believes that ExxonMobil's business practices contribute to climate change and has supported efforts to compel ExxonMobil to change its practices. Tr. 134:8-135:1, 138:13-24; DX 842 at 2. In 2016, Ms. Lamb wrote about NYAG's investigation of ExxonMobil and said that "ExxonMobil's day of reckoning is fast approaching." DX 842 at 2. On the stand, she admitted that she considered the trial to be ExxonMobil's "day of reckoning," Tr. 138:13-24, and eagerly provided testimony she believed would hasten judgment against the Company. Her testimony cannot be credited.

NYAG's other two witnesses provided equally irrelevant testimony. The first of these two witnesses, Michael Garland, works in the Office of Corporate Governance and Responsible Investment for the New York City Comptroller. Tr. 173:9-12. While the Comptroller's Office nominally oversees holdings of the New York City pension funds that include ExxonMobil stock, neither that Office nor Mr. Garland makes investment decisions, let alone any regarding whether to buy or sell ExxonMobil stock. Tr. 201:4-15. In addition, Mr. Garland testified that he never read *Managing the Risks* (at best he skimmed it in preparation for his deposition). Tr. 202:1-6, 202:13-15. His testimony offers no insight into the views of a reasonable investor about the claimed misrepresentations at issue in this case.

Roger Read, the final witness, is not an investor either. Mr. Read works as an equity research analyst for Wells Fargo Securities and does not manage investment portfolios. As a research analyst, Mr. Read provides information to investors in a timely manner so they can make informed investment decisions. Tr. 1818:3-13, 1827:10-1828:18. Mr. Read considered *Managing the Risks* and *Energy and Climate* so insignificant that he did not even bother to read those disclosures until a year after they were issued, and never wrote about either in his periodic reports to investors. Tr. 893:16-894:5, 895:2-12, 895:18-23, 896:3-5. Indeed, he confirmed that when he eventually read these reports, neither changed his opinion of ExxonMobil. Tr. 894:10-14, 896:14-16. And although he considered ExxonMobil "ahead of the curve" in pricing climate risk, that view did not affect his valuation of ExxonMobil in any way. JX 977 at 1; JX 988 at 134:12-15, 134:21-24. Insofar as Mr. Read's perspective sheds any light on the views of reasonable investors, it simply confirms the alleged misrepresentations at issue here were not material.

Recognizing its inability to elicit supportive testimony from live witnesses, NYAG resorted to snippets of text drawn from various documents, trying to create a mosaic of investor concern. NYAG relied on language from reports by Morgan Stanley and Vanguard as evidence that climate-related risk is a relevant investment consideration in some sectors. Tr. 1354:18-1356:22, 1386:8-1387:25. For example, NYAG invoked a 2013 letter to ExxonMobil signed by representatives of institutional investors such as CalPERS and various municipal entities in an effort to establish the supposed "significance" of "climate change regulatory risks." Tr. 2098:10-15; PX 194 at 13-15. These hearsay statements do not pertain to the disclosures at issue here and they should be assigned minimal, if any, weight. The authors of these stray statements did not appear in Court to explain the context for their statements or to be cross-examined on their meaning. This evidence is far too insubstantial to support the inference that ExxonMobil's GHG cost disclosures significantly altered the total mix of information.

Having failed to show relevance to any investment decision, NYAG belatedly attempted to recast its claims as relating to voting on shareholder proposals. Tr. 2106:5-2107:3. No evidence supports this theory either. Not a single witness (not even Ms. Lamb) testified that ExxonMobil's disclosures about GHG costs specifically induced shareholder proponents to withdraw their proposals. Ms. Lamb testified that she believed ExxonMobil acted in "good faith" and "lived up to the agreement" it had reached. Tr. 170:9-18. She did not testify that she was tricked into withdrawing her shareholder proposal. But even if any record evidence provided a factual basis for this argument, it would fail as a matter of law. Ms. Lamb used her access to ExxonMobil's proxy to pursue an agenda promoting environmental concerns, and one of the co-owners of her company owned ExxonMobil shares solely for the purpose of submitting shareholder proposals. Tr. 130:16-131:19, 131:8-12. Ms. Lamb's agenda-driven advocacy lacks any "nexus" to "the mainstream thinking of investors." *Litvak*, 889 F.3d at 65. It is therefore irrelevant.

B. Reasonable Investors Could Not Have Been Materially Misled By Figures In ExxonMobil's Internal and Undisclosed Cash Flow Models.

NYAG argues that ExxonMobil's claims about its assessments of potential investments were misleading because those assessments included GHG cost assumptions instead of proxy cost assumptions as expense items. Tr. 3:15-4:1, 5:10-21. But no reasonable investor could have been materially misled by figures in internal cash flow models that were never disclosed to the public. As NYAG's own expert admitted on cross-examination, investors "wouldn't have had ExxonMobil's [i]nternal [p]roprietary [c]ash [f]low [m]odels." Tr. 1444:11-19. Mr. Read, the Wells Fargo research analyst, agreed that the investing public would not have "access to any of

[ExxonMobil's] internal cash flow models" or other "internal information." JX 988 at 887:16-22. That testimony was consistent with ExxonMobil's disclosures emphasizing that the Company "do[es] not publish the economic bases upon which [it] evaluate[s] investments, due to competitive considerations." PX 001 at 16. Reasonable investors could not have been misled, much less materially misled, by cash flow models they never saw. Nor did ExxonMobil management have any incentive to deceive itself by lowballing cost assumptions in its internal cash flow models.

Recognizing as much, NYAG resorts to a convoluted chain of causation where adjustments to the internal models would have triggered a cascade of dominos that supposedly would have resulted in ExxonMobil making different public disclosures about its investment decisions. JX 972 at 91-92; Tr. 1485:5-1486:11. In support of this theory, NYAG offered no evidence—only self-serving speculation that altering GHG costs in some unspecified cash flow spreadsheet would have resulted in ExxonMobil changing its behavior. The only evidence about how GHG costs actually affected investment decisions came from former CEO Rex Tillerson, who testified that he could not recall a single instance when GHG costs—or any other projected operating cost—made the difference between investing or not investing in a project. Tr. 1102:11-12. The evidence also showed that none of the cash flow models adjusted by NYAG's expert were reviewed by senior management and fewer than one third of those models produced any outputs that might have even reached senior management. Tr. 1109:2-7, 1925:17-1927:19. The evidentiary record confirms the irrelevance of these internal models to a reasonable investor's investment decisions.

C. Reasonable Investors Could Not Have Been Materially Misled By The Disclosure That ExxonMobil Used GHG Costs Only "Where Appropriate."

ExxonMobil stated in *Managing the Risks* (and elsewhere) that it applied GHG costs only "where appropriate" and used its "best assessment" of the evolving regulatory environment to determine how to apply GHG costs in specific cases. PX 001 at 18, 21.[6] That language was meant to convey—and did convey—a "sense that judgment would be involved by the company." Tr. 1645:24. ExxonMobil did not provide any concrete guidance about when, how, or whether GHG costs would be used. Tr. 1645:25-1646:4. To avoid doubt, ExxonMobil stated in *Managing the Risks* that it "do[es] not publish the economic bases upon which [it] evaluate[s] investments due to competitive considerations." PX 001 at 16. A reasonable investor considering these qualified statements would be unable to predict which potential investments would be burdened with GHG costs and at what level GHG costs would be set, if at all. No reasonable investor could have believed, as NYAG contends, that GHG costs were applied uniformly pursuant to a rigid schedule. The qualifiers "where appropriate" and "best assessment" are inconsistent with uniformity and rigidity. The only thing a reasonable investor could conclude is that ExxonMobil applied GHG costs using its judgment and discretion in a manner undisclosed to the public.

Where, as here, statements lack sufficient specificity to guarantee "some concrete fact or outcome," they cannot be materially misleading. *City of Pontiac*, 752 F.3d at 185. In *City of Pontiac*, UBS represented that, as part of its risk-management strategy, it prioritized "*adequate* diversification of risk" and "avoidance of *undue* concentrations" in the residential mortgage-backed securities market. *Id.* The Second Circuit held that UBS's statements were "too open-ended and subjective to constitute a guarantee" and nothing like "*specific* risk limits" that could be found to have been violated. *Id.* at 186. The terms "where appropriate" and "best assessment" are similarly too subjective to guarantee that the Company would apply GHG costs in every

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[6] ExxonMobil continued to use "where appropriate" in subsequent disclosures. *See, e.g.*, PX 008 at 38; PX 009 at 24; PX 014 at 7.

instance. As with the statements in *City of Pontiac*, the GHG disclosures at issue here cannot have been materially misleading.

Similarly, in *Singh* v. *Cigna Corp.*, the Second Circuit held that indefinite statements emphasizing a "complex, evolving regulatory environment" cannot be materially misleading. 918 F.3d at 64. In its annual report, Cigna made statements about allocating "significant resources" to regulatory compliance, but qualified those statements by noting "the difficulty of compliance given the regulatory uncertainty surrounding legislation and implementation of national healthcare reform." *Id.* at 61. Those qualifiers "suggest[ed] caution (rather than confidence)" and therefore were not materially misleading. *Id.* at 64. Likewise, ExxonMobil's description of its "best assessment of costs associated with *potential* GHG regulations" reflects uncertainty about the evolving regulatory environment. PX 001 at 21 (emphasis added). As in *Singh*, the inclusion of qualifiers in ExxonMobil's statements could not have significantly altered the total mix of information available to investors.

Consistent with these precedents, ExxonMobil's use of the qualifiers "where appropriate" and "best assessment" put reasonable investors on notice that ExxonMobil was not guaranteeing a particular outcome for any particular case. That is why NYAG's attempt to analogize between GHG costs and an insurance policy could not be more inapt. Tr. 2079:14-16. An insurance policy guarantees a specific outcome if a condition is met. ExxonMobil's disclosures about GHG costs provided no such guarantees about any outcome. These disclosures could not have materially misled any investor about where, when, or how GHG costs were applied.

II. ExxonMobil's GHG Cost Disclosures, Placed In The Context Of The Company's Financial Statements, And Market Reaction, Were Not Materially Misleading.

A. No Evidence Showed ExxonMobil's Financial Statements To Be Misstated.

NYAG has not offered any evidence showing that ExxonMobil's disclosures about GHG cost assumptions had any effect whatsoever on the Company's income statement, balance sheet, or any other financial statement disclosed to investors. In an effort to conjure materiality, NYAG asserts that GHG costs impacted ExxonMobil's existing projects in the context of corporate planning, internal reserves estimates, and impairments. Tr. 2107:13-2111:5. But NYAG willfully ignores that ExxonMobil made no disclosures about whether and how it incorporates GHG costs in those settings. Tr. 1117:13-1118:7. Rather, ExxonMobil's GHG cost disclosures related only to decisions about "funding for capital investments." PX 001 at 18. Cost assumptions applied to internal analyses evaluating the projected financial performance of potential projects are hypothetical in nature and are not governed by GAAP accounting. They do not—and cannot—affect the books and records of a publicly traded company.

David Rosenthal, ExxonMobil's controller, confirmed that potential "capital investments" are unfunded projects that "aren't in existence yet" because they are merely being considered for potential investment. Tr. 295:18-19, 421:10-16. The economic models used to evaluate those projects, and the GHG cost assumptions incorporated therein, do not impact the Company's financials. Those models necessarily contain forward-looking projections, whereas financial statements reflect actual *historical* results. "Only when a project is funded and you are starting to spend money does it go on to your financial statements," Mr. Rosenthal explained.[7] Tr. 421:8-9. The models used to evaluate potential projects therefore have no direct or indirect link to the income statement or balance sheet.

[7] Actual costs arising from GHG regulations appear in the operating results of the Company. Tr. 419:4-8.

In an effort to tie GHG cost assumptions to some figure ExxonMobil disclosed to the public, NYAG raises vague questions about the accuracy of ExxonMobil's disclosures about oil and gas reserves and resources. There is no evidentiary basis to question the accuracy of ExxonMobil's disclosures. ExxonMobil reports its proved reserves pursuant to SEC regulations, which mandate the use of "*existing* economic conditions, operating methods, and government regulations." 17 C.F.R. § 210.4-10(a)(22) (emphasis added). Assumptions about future GHG costs are excluded by those regulations and do not impact the estimation or reporting of proved reserves. Tr. 736:22-737:19. GHG costs are likewise irrelevant to the estimation of ExxonMobil's total resource base, which includes sub-commercial quantities of oil and gas. Tr. 740:11-25, 727:3-11. Classifications within the sub-commercial components of the resource base thus are not affected by GHG costs. Tr. 740:16-17. NYAG is left to raise questions about how ExxonMobil estimated its so-called company reserves, but ExxonMobil does not disclose its internal reserves estimates or how it calculates them. Tr. 736:15-16. No reasonable investor could have formed a belief about whether and how ExxonMobil accounts for GHG costs in its internal reserves.

NYAG also searched high and low for an asset it could claim would have been impaired if GHG costs had been applied. It pursued this claim even though ExxonMobil never told investors that it used GHG cost assumptions in its impairment testing, and PricewaterhouseCoopers ("PwC"), ExxonMobil's independent auditor, considered the cost assumptions too "speculative" to be required in an impairment assessment. Tr. 1569:16-1570:10. Nevertheless, NYAG claims to have found an asset, Mobile Bay, where applying GHG costs at step two of the three-step impairment assessment in 2015 might have made a difference to the outcome. Tr. 1149:21-24.

NYAG failed to show, however, that a step-two analysis was required for Mobile Bay in 2015. Its expert simply and improperly "assumed" step one was satisfied. Tr. 1255:14-17. The uncontroverted documentary and testimonial evidence (from all fact witnesses) shows that there was no step one impairment trigger for Mobile Bay in 2015. Tr. 1539:24-1540:15, 1557:14-1558:17; JX 906 at 59. Thus, no impairment was required in 2015. Even if one had been required, and it was not, the size of the impairment NYAG contends needed to be taken (between $320 million and $478 million) falls well below the relevant materiality thresholds PwC established. Tr. 1580:3-1582:16. The auditor testified that PwC could have issued an unqualified opinion in 2015—the gold standard—even if such an impairment was required but not taken, Tr. 1582:17-25, and Dr. Bartov conceded that the impairment would be "much less than one percent" of ExxonMobil's market capitalization. Tr. 1345:16-1346:8.[8] The impairment of Mobile Bay in 2015 therefore was not required, but even if it had been, it would have been immaterial.

B. ExxonMobil's Stock Price Did Not React To ExxonMobil's Climate-Risk Disclosures Or To NYAG's Allegations Of Fraud.

NYAG's half-million-dollar event study failed to establish that ExxonMobil's disclosures about proxy costs and GHG costs impacted the Company's stock price. Initially, NYAG cited its event study as confirmatory evidence of "quantitative materiality." Dkt. No. 403 at 39. But NYAG abandoned the study on the eve of trial and claimed it pertained only to damages. Dkt. No. 497 at 1. NYAG's decision to distance itself from its event study is powerful proof of its failure to establish a material misrepresentation.

Event studies are the time-tested manner of establishing the materiality of an alleged misstatement. *See United States* v. *Martoma*, 993 F. Supp. 2d 452, 457 (S.D.N.Y. 2014). Materially misleading statements can be expected to drive a stock price up to an artificially high level, which then drops when the truth comes out. The record contains no evidence that

[8] ExxonMobil's market capitalization was approximately $336 billion in 2015. JX 906 at 38, 41. Even assuming an impairment of $320 to $478 million, it represented between 0.09 and 0.14 percent of ExxonMobil's total market capitalization.

ExxonMobil's stock price was ever inflated by the GHG disclosures at issue here. The undisputed evidence shows that ExxonMobil's stock price saw no statistically significant increase on April 1, 2014, the day after the disclosures at issue were released. When confronted with the absence of proof that ExxonMobil's stock price was inflated, NYAG's expert, Dr. Eli Bartov, deflected by claiming "[t]his analysis is irrelevant to the assignment that I received." Tr. 1309:4-13. But using Dr. Bartov's own regression model, ExxonMobil's expert, Dr. Alan Ferrell, established that there was "[c]learly . . . no increase" in ExxonMobil's stock price the day after the two reports were issued. Tr. 1966:10-1967:10. The absence of any stock price reaction to the GHG disclosures contradicts NYAG's theory that reasonable investors considered the disclosures material.

Assuming (but not proving) that ExxonMobil's stock price was artificially high because of the GHG cost disclosures, Dr. Bartov then cherry-picked what he called "corrective disclosures" that allegedly alerted the public to fraud. That is not how an event study works, as Dr. Ferrell explained. "You don't shoot an arrow and then paint a bullseye around it." Tr. 1969:17-18. In any event, none of Dr. Bartov's alleged corrective disclosures establish that investors considered ExxonMobil's GHG cost disclosures relevant, let alone material, to their investment decisions. As an initial matter, two of the three alleged corrective disclosures concededly did not trigger a stock price decline at the accepted five-percent level of statistical significance, and none were statistically significant after correcting for Dr. Bartov's methodological errors. Tr. 1970:3-14, 1977:15-1981:5. Moreover, none of Dr. Bartov's corrective disclosures contain any statements from the Company acknowledging an error or correcting a previous disclosure. They all pertain to regulatory investigations of ExxonMobil announced in the mainstream press. Courts have recognized that the announcement of a government investigation, "without more, is insufficient to constitute a corrective disclosure." *See Meyer* v. *Greene*, 710 F.3d 1189, 1201 (11th Cir. 2013).

That is because the announcement may have a "negative effect on stock prices, but not a *corrective* effect." *In re Initial Pub. Offering Sec. Litig.*, 399 F. Supp. 2d 261, 266 (S.D.N.Y. 2005).[9] As even Dr. Bartov conceded, "[i]t is not good news" when "it is reported in the financial press that the SEC is investigating you." Tr. 1314:13-16. The "corrective" nature of such reporting is further undermined when an investigation is subsequently closed without any charges being filed, *see Meyer*, 710 F.3d at 1201, as happened with the SEC's investigation. DX 702; Tr. 2027:1-4.

NYAG's purported "corrective" disclosures did not provide the market any new or corrective information. When discussing what constituted a corrective disclosure, Dr. Bartov conceded that information "[a]bsolutely" needs to be new for it to be relevant. Tr. 1319:4-6. But the so-called corrective disclosure of the California Attorney General's ("CAAG") investigation indicated that the investigation covered the same ground as NYAG's. *Compare* JX 970 at 1, *with* DX 695 at 1. At the time, both investigations focused on whether ExxonMobil had suppressed climate science research. *See* JX 970 at 1; DX 695 at 1. The alleged fraud here, by contrast, concerns the Company's representations about two planning tools, meaning that the article about the CAAG investigation "on its face [is] obviously not a corrective disclosure." Tr. 1976:1-24; *see also In re Omnicom Grp.*, 597 F.3d 501, 511 (2d Cir. 2010). Likewise, reporting on the SEC investigation simply placed it within the context of other investigations that had been pending for months and did not suggest the SEC was breaking new ground. *See* DX 698. The same is true of news reports of NYAG's June 2017 filing in this case, which referenced the SEC investigation in

[9] Arguing that news reports of investigations can be corrective disclosures, NYAG relies on precedent addressing the *pleadings* stage of litigation. In *In re Gentiva Securities Litigation*, the relevant question was whether "announcements of investigations are sufficient to *plead* loss causation." 932 F. Supp. 2d 352, 385 (E.D.N.Y. 2013) (emphasis added). The court's conclusion in that case that news of a governmental investigation "may qualify" as a partial corrective disclosure assumes that, at the motion-to-dismiss stage, the court "must accept" the underlying allegations of fraudulent conduct. *See id.* at 387-88; *see also In re Apollo Group, Inc. Sec. Litig.*, 2011 WL 5101787, *17 (D. Ariz. Oct. 27, 2011) (SEC inquiry could qualify as a corrective disclosure "at this stage in the litigation" assuming the plaintiff could allege the underlying fraudulent conduct.).

the context of discussing the filing. *See* PX 311. Information about these regulatory inquiries was known to the market months before the alleged corrective disclosure dates. NYAG's inability to show any stock price impact following the disclosures at issue, or NYAG's allegations, demonstrates the absence of materiality.

C. Equity Research Analysts Did Not React To ExxonMobil's Climate-Risk Disclosures Or NYAG's Allegations Of Fraud When Valuing the Company.

NYAG was also unable to show any market interest in ExxonMobil's GHG cost disclosures through a review of equity analyst reports. Equity research analysts track developments relevant to a company's prospects (so called "value-relevant information") to provide their clients—portfolio managers and other investors—recommendations on whether to buy or sell stock. Tr. 882:3-8, 884:15-885-6, 1818:3-13, 1827:10-1828:18. Equity research analysts are judged based on their ability to timely provide value-relevant information to investors. Tr. 1827:15-21. If something matters to investors, equity research analysts include it in their reports. Tr. 1829:3-15.

Using an unknown methodology to select analyst reports, NYAG's expert Peter Boukouzis found 99 equity research reports that he believed showed analyst interest in what he termed "Climate Change Regulatory Risk." Tr. 1489:18-24, 1491:6-15; JX 972 at 64. None of these reports discussed ExxonMobil's GHG cost disclosures in connection with a recommendation to buy or sell the stock. Indeed, Mr. Boukouzis identified only one research analyst—Roger Read—who even mentioned climate risk in connection with ExxonMobil's valuation. Even in that case, Mr. Read did not change his recommendation and continued to rate the stock as "[o]utperform." JX 977 at 1. Mr. Read adjusted the valuation range for ExxonMobil because of the "headline risks" associated with the now-closed SEC investigation. *Id.* In fact, Mr. Read expressly noted in the report that his team viewed the risk of a "negative outcome" from the investigation as "very slight." *Id.* Mr. Read also confirmed that ExxonMobil's GHG cost disclosures had no impact on his assessment of the Company. JX 988 at 134:12-15, 134:21-24.

ExxonMobil's expert, Dr. Marc Zenner, established that ExxonMobil's disclosures about proxy costs and GHG costs were not considered value-relevant, nor were NYAG's allegations of fraud. Dr. Zenner reviewed nearly 500 analyst reports between February 2014 and 2017. DX 712 at 23-24. Only six percent of the reports contained one of a handful of climate-related keywords, such as "emissions," "greenhouse," and "climate change," and none showed that GHG cost disclosures affected valuation or a buy/sell recommendation. Tr. 1826:18-1845:7. Dr. Zenner also reviewed research reports issued in the wake of NYAG's filing of its Complaint. Tr. 1848:11-1849:8. None of the 27 equity analyst and credit rating agency reports he reviewed after NYAG filed its Complaint mentioned "proxy cost, GHG cost, the New York Attorney General's complaint[,] or being misled by ExxonMobil." Tr. 1849:4-8. He added that "[i]f it were relevant to the valuation of the company," then he would have expected the analyst "to actually discuss it." Tr. 1849:9-22. Nor did any analyst reference the announcement of the CAAG investigation, let alone consider it value relevant. Tr. 1989:23-1990:24; JX 988 at 62:2-5, 64:3-16. The absence of any such discussion confirms that the disclosures did not significantly alter the total mix of information available to investors.

III. ExxonMobil's GHG Cost Disclosures, Placed In The Context Of The Information Investors Requested, Were Not Materially Misleading.

A. ExxonMobil's Disclosures Provided Conceptual Information About Climate Risk, Not Proprietary Or Technical Detail About Business Planning.

ExxonMobil provided only conceptual information about how it managed the risks of climate change in its business planning. *Managing the Risks* made clear that ExxonMobil did "not publish the economic bases upon which [it] evaluate[s] investments due to competitive considerations." PX 001 at 16. Tellingly, the report contains no information about the dollar amounts assigned to GHG costs or what factors the Company uses in determining whether to apply GHG costs. The report merely introduces the GHG cost metric at a conceptual level to let readers know about a second way, in addition to proxy costs, that ExxonMobil addresses climate regulatory risk. William Colton, then-head of Corporate Strategic Planning, explained that "[i]t was never our intention to give detailed numbers year by year to give people exactly the numbers we used to do our proprietary internal evaluations." Tr. 1693:1-11. Publishing the Company's "economic bases" would give competitors an advantage in a world where "all of the oil and gas companies are competing against each other for access to resources." Tr. 438:10-12. ExxonMobil's disclosures were not intended to enable investors to conduct meaningful economic analyses of the Company's internal planning assumptions.

Shareholders were well aware that ExxonMobil did not provide granular information about valuing investment opportunities. Both shareholder proposals that culminated in *Managing the Risks* and *Energy and Climate* specifically asked ExxonMobil to issue reports "omitting proprietary information." PX 042 at 53, 56. At trial, Natasha Lamb agreed that her concern centered on ExxonMobil's "big-picture approach to handling the risks associated with climate change" rather than its "specific assumptions" used in business planning. Tr. 168:8-14. Michael Garland explained that the fact that ExxonMobil "actually represented that they were using an internal cost of carbon was a source of comfort." Tr. 199:15-16. What mattered to him was that the Company was "*taking steps* to integrate the . . . regulatory risks of climate change [into] business decision-making." Tr. 199:16-19 (emphasis added). The record is clear that shareholder advocates were merely concerned about whether ExxonMobil considered climate risks in its business planning.

The information provided by ExxonMobil accurately described its practices at a high level. ExxonMobil developed two metrics—the proxy cost and GHG costs—to address the impact climate change regulations might have on its business. "This proxy cost of carbon," as stated in *Managing the Risks*, "is embedded in our current Outlook for Energy," which provides "the foundation for [ExxonMobil's] business and investment planning." PX 001 at 17, 3. ExxonMobil also disclosed that, to the extent appropriate, costs associated with GHG emissions were applied directly to "economics when seeking funding for capital investments." *Id.* at 18. These disclosures were entirely consistent with ExxonMobil's internal practices. Todd Onderdonk, a former Senior Energy Advisor, explained that the proxy cost is used in the *Outlook for Energy* to model "a broad mosaic of policies" that might suppress demand for energy. Tr. 1778:12. By contrast, GHG costs represent "specific operating costs that might be imposed" for "specific greenhouse gas emission sources" in a particular jurisdiction. Tr. 535:18-23. After falsely portraying these metrics as a "Potemkin Village," Compl. ¶ 19, NYAG eventually conceded that ExxonMobil applies one set of assumptions "to the demand side" and the other "to the operational side." Tr. 10:18-19, 2115.

There is no dispute that ExxonMobil provided these disclosures in good faith when responding to the shareholder proposals. *Managing the Risks* was the first ExxonMobil publication that disclosed the Company's use of GHG costs to evaluate potential investments. In his correspondence with Ms. Lamb, David Rosenthal, then-head of investor relations, stated that ExxonMobil would disclose in *Managing the Risks* "why our proxy cost of carbon is not the only factor we consider in assessing investment opportunities." JX 982 at 2. When it came time to discuss GHG costs publicly, William Colton "thought it was particularly important" to include the "where appropriate" language "because a lot of judgment was involved in each project to decide what was the appropriate level of greenhouse gas cost to be included." Tr. 1645:3-24. ExxonMobil's disclosures emphasized the context-dependent nature of these metrics.

NYAG claims that ExxonMobil recognized an error in its GHG cost disclosures and, instead of correcting it, elected to overhaul its business planning processes to conform to the allegedly erroneous disclosures. That theory is absurd and contradicted by the evidence. The evidence shows that ExxonMobil had been considering aligning its proxy cost and GHG cost assumptions for at least four years prior to publication of *Managing the Risks* and *Energy and Climate*. Tr. 573:14-574:3. On June 13, 2014, ExxonMobil made the considered policy judgment to partially align its planning assumptions beginning in 2030 for OECD countries. Every witness with knowledge of this decision testified that it was based on a policy assumption that developed countries would adopt a carbon tax on producers and consumers by the year 2030. Tr. 585:21-586:14; Tr. 620:8-21; Tr. 1653:23-1654:14; JX 990 at 372:3-15. Not a single witness supported NYAG's interpretation that the partial alignment was motivated by concern about a lack of clarity in *Managing the Risks* and *Energy and Climate*. If ExxonMobil thought its disclosures were unclear, unchallenged testimony and common sense dictate that the Company would have amended the disclosures instead of changing its global planning guidance. Tr. 1700:5-15.

B. NYAG Falsely Equates Investor Concern About Climate Risk With Investor Concern About Highly Speculative GHG Costs.

NYAG alleged that ExxonMobil made material misrepresentations about the dollar value assigned to GHG cost assumptions used to evaluate potential investments. It is therefore NYAG's burden to show that investors considered those specific disclosures material to their investment decisions. Having failed to do that, NYAG deployed a classic bait and switch, arguing that investor concern about climate change generally shows that investors were concerned specifically about ExxonMobil's proxy and GHG cost disclosures. That gambit should be rejected. NYAG must show that investors considered the specific disclosures at issue to be material, not that some abstract category of information might have been material to investors. *See City of Pontiac*, 752 F.3d at 185. In *City of Pontiac*, plaintiffs asserted that UBS's representations regarding asset concentrations were "material" because UBS claimed that "avoidance of asset concentrations was vital to [its] business and success." *Id.* As the Second Circuit explained, "while importance is undoubtedly a *necessary* element of materiality, importance and materiality are not synonymous." *Id.* A topic's general "importance" to investors "does not render a particular statement [regarding that topic] per se material." *ECA, Local 134 IBEW Joint Pension Trust of Chicago* v. *JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009). Here, the overall "importance" to investors of managing climate change risk does not mean that the specific representations about ExxonMobil's proxy and GHG costs were material to investors.

In summation and throughout trial, NYAG pointed to evidence (mostly in the form of hearsay statements) that investors were concerned on some level with risks posed by climate change or, at most, regulations addressing climate change. During Mr. Boukouzis's examination, for example, NYAG displayed snippets from reports by Vanguard, Oppenheimer, State Street Global Advisors, and BlackRock. Tr. 1372:23-1376:18, 1386:8-1387:25; PDX-1; PDX-2. The snippet from the BlackRock report contains no reference to climate regulatory risk and makes the generic point that "[t]he trigger for engagement on a particular extra-financial concern is our assessment that there is potential for material economic ramifications for shareholders." PX 334 at 6. During its summation, NYAG quoted a report from Morgan Stanley's "Institute for Sustainable Investing," which stated that "mainstream companies and investors are increasingly recognizing climate change and [its] economic and financial implication[s]." Tr. 2099:20-22; PX 113 at 1. Even if NYAG established that reasonable investors had a generalized concern about climate change, that would not satisfy NYAG's burden to prove that reasonable investors considered the disclosures alleged in the Complaint to be material to their investment decisions.

The evidentiary record shows that reasonable investors did not consider the specific dollar amounts assigned to highly speculative GHG cost assumptions relevant to their investment decisions. No one, including NYAG, claims to be able to estimate future carbon prices with any degree of precision. NYAG conceded in its opening statement it is "not telling Exxon that its carbon cost was too high or too low" or that it "should use different costs in its business planning." Tr. 9:17-20. As William Colton put it, "[w]hat really happens" in the year 2040 "is something nobody can know sitting here today." Tr. 1699:6-15. Even Natasha Lamb testified that "nobody knows" what the appropriate carbon cost should be in 2040. Tr. 144:4-6. And ExxonMobil's independent auditor PwC concluded that a cost of carbon represents "a speculative cost, rather than a known or likely cost." DX 672 at 5. Nevertheless, NYAG has confirmed that assumptions used in the years 2030 and 2040 are the focal point of its case. Tr. 1686:21-25. The evidence at trial shows that investors had no ability to evaluate the dollar amounts ExxonMobil assigned its GHG cost assumptions and did not factor any such assumptions into their investment decisions. Having alleged a fraud regarding disclosures related to that speculative cost assumption, NYAG had to show that the disclosures themselves were material to reasonable investors in connection with a decision about a contemplated investment in ExxonMobil stock. Evidence of a general concern for climate risks is no substitute for that required showing.

C. No Reasonable Investor Would Have Been Deceived By ExxonMobil's Use Of Legislated GHG Costs In Alberta, Canada.

NYAG attempted to prove that Imperial Oil (a Canadian company with a majority of its stock held by ExxonMobil) used impermissibly low GHG cost assumptions that were somehow inconsistent with ExxonMobil's public statements. This theory ignores the plain language of

ExxonMobil's disclosures and fundamentally misunderstands the judgment involved in business planning. A reasonable investor would expect ExxonMobil and its affiliates to use their judgment and expertise when evaluating potential impact of climate regulations. That is precisely what the terms "where appropriate" and "best assessment" signaled to investors. Tr. 1645:3-7, 1647:19-1648:2.

Consistent with its public disclosures, ExxonMobil encouraged employees to consider "local specifics" when evaluating projects operating in jurisdictions with existing regulatory regimes. *See, e.g.*, JX 921 at 31. The default GHG cost assumptions in the Corporate Plan Dataguide are merely "a starting point for capital project evaluation," and the Company expected its business units "to use local specifics" where they had "local knowledge of the regulatory framework." Tr. 489:17, 499:15-16. In Alberta, local specifics took on greater importance because the government had promulgated a regulation taxing only a percentage of emissions above a certain threshold. Tr. 545:12-17, 553:25-554:24. Thus, consistent with its representations, ExxonMobil applied GHG cost assumptions in light of local circumstances.

Ignoring these sound business reasons for using local expertise, NYAG concocts an argument based on soundbites devoid of context. For instance, NYAG accuses Imperial Oil of applying an "alternate methodology" once it realized that applying default assumptions would result in "massive GHG costs." JX 928 at 1. Dan Hoy, Imperial Oil's Upstream Planning Supervisor, testified that "alternate methodology" simply meant "reaching out to those local policy experts and getting their input on the percentages to apply." Tr. 944:17-20. Tellingly, NYAG did not depose or call at trial any local experts who provided guidance on how to apply "local specifics" in Alberta based on the existing regulatory regime. NYAG therefore has no basis to second guess the decision to use legislated GHG costs in Alberta. There is nothing remotely improper about using legislated GHG costs that provide a more accurate assessment of the regulatory environment than baseline assumptions.

Similarly, NYAG claims that ExxonMobil realized applying GHG costs to its reserves and resource base estimates for the Alberta oil sands "would result in large write-downs." PX 59 at 1. Kirsten Bannister, a Global Reserves Coordinator, clarified that these email conversations were in the context of "company reserves," an internal metric that is not publicly reported, as discussed above. Tr. 733:11-24. The conversations had nothing to do with writing down the financial value of an asset. Tr. 743:3-7. No reasonable investor would have considered the application of proprietary cost assumptions to an unreported metric to have significantly altered the total mix of information about a potential investment in ExxonMobil stock.

CONCLUSION

Multiple independent grounds establish separately and collectively that ExxonMobil made no material misrepresentations. The qualifiers "where appropriate" and "best assessment" in the relevant disclosures rendered them not materially misleading. No investor came forward to say that ExxonMobil's GHG cost disclosures assumed actual significance in any decision to buy or sell ExxonMobil stock. NYAG offered no evidence that speculative GHG costs had an impact on ExxonMobil's income statement, balance sheet, or other financial disclosures. And no evidence established that investors expected to receive or ExxonMobil promised to provide proprietary, granular information about how it addressed climate regulatory risk. In good faith, and for sound business reasons, ExxonMobil developed a system to manage the risks posed by future climate regulations and made truthful disclosures to the public about it. NYAG's attempt to penalize ExxonMobil for such conduct should be rejected.

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Respectfully submitted,

**PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP**

<u>/s/ Theodore V. Wells, Jr.</u>
Theodore V. Wells, Jr.
twells@paulweiss.com
Daniel J. Toal
dtoal@paulweiss.com
Nora Ahmed
nahmed@paulweiss.com
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

Justin Anderson
janderson@paulweiss.com
2001 K Street, NW
Washington, DC 20006-1047
(202) 223-7300
Fax: (202) 223-7420

EXXON MOBIL CORPORATION

Patrick J. Conlon
patrick.j.conlon@exxonmobil.com
22777 Springwoods Village Parkway
Spring, TX 77389
(832) 624-6336

Attorneys for Exxon Mobil Corporation

Certification of Compliance

Pursuant to the October 8, 2019 Court Notice (NYSCEF Dkt. 423), I hereby certify that this brief is no longer than 25 pages, exclusive of the caption, table of contents, table of authorities, and signature block.

Dated: November 18, 2019
New York, New York

By: *_/s/ Theodore V. Wells, Jr._*
Theodore V. Wells, Jr.