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

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| PEOPLE OF THE STATE OF NEW YORK,<br>By LETITIA JAMES,<br>Attorney General of the State of New York,<br><br>Plaintiff,<br><br>– against –<br><br>EXXON MOBIL CORPORATION,<br><br>Defendant. | Index No. 452044/2018<br><br>IAS Part 61<br>Hon. Barry R. Ostrager<br><br>**PLAINTIFF'S PROPOSED FINDINGS OF FACT** |

Plaintiff respectfully submits these proposed findings of fact pursuant to the Court's direction at the conclusion of the trial herein:

## I. Exxon's Representations Concerning Its Management of Climate Change Regulatory Risk.

1. Between 2013 and 2016, in various public statements and disclosures, Exxon represented to investors that it anticipated that governments will impose increasingly stringent climate regulations in the coming decades, and that the company applied an escalating set of carbon costs, reaching $80 per ton in 2040 in developed countries, as a proxy for the anticipated effects of future climate change regulations.[1]

2. Exxon represented that the company applied its publicly disclosed carbon costs in making investment decisions and conducting business planning, both in projecting demand for

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[1] *See* JX912-36 (2013 *Outlook for Energy*); PX001-15 to -18, -21 (*Energy and Carbon -- Managing the Risks*); PX002-5 to -7, -20 (*Energy and Climate*); PX130-4; PX046-9 (December 2013 and December 2014 shareholder presentations); PX007-37 and PX008-38 (2014 and 2015 *Corporate Citizenship Reports*); JX918-29 (2016 Annual Shareholder Meeting transcript); Tr. 124:5-12, 128:22-24 (Lamb testimony); Tr. 194:14-15, 198:23-199:7 (Garland testimony); JX988-25 (Read testimony).

oil and gas, and in projecting the costs associated with its own emissions from its investments and operations.[2]

3. Exxon neither distinguished nor separately defined the terms "proxy cost" and "GHG cost" in its various public statements and disclosures,[3] and instead often used those terms interchangeably, even using the term "GHG proxy cost."[4]

4. Exxon's disclosures about its use of a cost of carbon came the context of engagement between the company and its shareholders on the topic of climate change regulatory risk. In particular, Arjuna Capital and the Christopher Reynolds Foundation ("CRF") withdrew proposals seeking information about Exxon's management of that risk in exchange for Exxon's agreement to publish reports addressing their concerns.[5]

5. As a result of its agreements with the Arjuna Capital and CRF shareholder groups, on March 31, 2014, Exxon published reports entitled *Energy and Climate* and *Energy and Carbon -- Managing the Risks* ("*Managing the Risks*"). Those reports included, *inter alia*, representations regarding Exxon's application of escalating carbon costs to its investment decisions and business planning, including the application of those costs to "all significant proposed projects," and featured a color-coded map setting out the carbon costs that Exxon purportedly applied to projects and assets around the world.[6]

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[2] *See supra* note 1.

[3] *See* JX918-29 (2016 Annual Shareholder Meeting transcript); PX064-33 (2008 Corporate Plan Guidance presentation); Tr, 1764:13-1765:1 (Eizember testimony); Tr. 1584:9-1587:22 (Auter testimony).

[4] PX002-6 (*Energy and Climate*); PX130-4 (Dec. 17, 2013 presentation slide, "GHG Proxy Costs Increase").

[5] *See* Tr. 333:23-334:1, 343:17-23, 358:6-14 (Rosenthal testimony); PX382 (Arjuna Capital proposal); PX149 (Christopher Reynolds Foundation proposal); PX130-4 (December 2013 shareholder presentation); PX378 (list of topics Exxon agreed to address in *Managing the Risks*); PX192 (list of topics Exxon agreed to address in *Energy and Climate*).

[6] PX001-17 to -18, -21 (*Managing the Risks*); PX002-5 to -6, -20 (*Energy and Climate*).

6. The statement in *Managing the Risks* that Exxon required "all [its] business segments" to use GHG costs "where appropriate" conveyed to investors, in the context of the full report, that those costs would be applied to all significant proposed projects, as the report explicitly stated that Exxon required that "all significant proposed projects include a cost of carbon . . . when being evaluated for investment"; the "where appropriate" language did not convey that Exxon would apply far lower costs, or none at all, in its cost projections.[7]

7. Exxon made similar representations regarding its use of carbon costs throughout the next few years.[8] For example, Exxon's CEO Rex Tillerson represented at the May 2016 annual shareholder meeting that Exxon applied its proxy cost "as a cost" in "all of [its] economic models."[9]

## II. Exxon's Representations Were Misleading.

8. Exxon's public disclosures about its use of carbon costs were misleading. A reasonable investor would not have understood from Exxon's disclosures that the company only applied the publicly disclosed carbon costs for purposes of projecting demand for oil and gas, or that it used lower costs or none at all in projecting climate regulatory costs associated the emissions from its investments and operations. Rather, a reasonable investor would have understood that Exxon used consistent carbon costs in its investment decision-making and business planning across the company's business units.[10]

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[7] PX001-18 (*Managing the Risks*); Tr. 1030:1-9, 1093:18-21, 1115:5-15 (Tillerson testimony); Tr. 373:14-374:4 (Rosenthal testimony).

[8] *See* PX007-37 and PX008-38 (2014 and 2015 *Corporate Citizenship Reports*); PX014-3 at CC2.2c-2.2d (2016 Carbon Disclosure Project questionnaire response); PX046-9 (December 2014 shareholder presentation).

[9] JX918-29.

[10] *See supra* notes 1-4.

9. Until June 2014, in projecting costs associated with the emissions from its investments and operations, Exxon internally applied a set of carbon costs in developed countries that was significantly lower than the proxy costs it publicly disclosed. While Exxon publicly represented that it applied carbon costs reaching $60 per ton of emissions by 2030 and $80 per ton by 2040, Exxon's internal Corporate Plan Dataguide set out lower costs for purposes of projecting the cost of the company's own emissions from its investments and operations, which reached only $40 per ton in 2030, and did not extend to 2040.[11] For many lesser-developed countries, Exxon publicly represented that it applied carbon costs reaching $20-40, but prior to June 2016, Exxon omitted those costs from its cost projections for its base economics for projects and assets in those countries.[12]

10. Exxon recognized internally, as early as 2010, that the lower cost figures set out in its internal Dataguide were less "realistic" than the publicly represented carbon cost figures,[13] and recognized as early as 2011 that the internal costs were "not conservative" (*i.e.* less protective against risk) with respect to projects and assets that created GHG emissions.[14] By 2014, in connection with a proposal to align internal costs used for cost projections with the publicly disclosed figures, Exxon internally recognized that it had "implied" in its representations to investors that it used the publicly disclosed proxy cost figures "when evaluating investments."[15]

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[11] JX926-1 (Apr. 22, 2011 email); DX851 (GHG sections of 2005-2013 Dataguide Appendices); PX044-4 (May 2014 draft presentation); PX029-31 to -32 (2014 Dataguide Appendices); PX053-3 (Oct. 28-30, 2014 emails).

[12] Tr. 661:10-19 (Powell testimony); Tr. 1094:5-12 (Tillerson testimony); DX851 (GHG sections of 2005-2013 Dataguide Appendices); PX029-31 to -32 (2014 Dataguide Appendices); PX030-32 to -33 (2015 Dataguide Appendices); PX031-57 to -59 (2016 Dataguide Appendices).

[13] JX923-1 (Apr. 30, 2010 email).

[14] JX926-1 (Apr. 22, 2011 email).

[15] PX044-4; PX154-8; PX156-4.

11. In 2015 and 2016, contrary to its public representations, Exxon applied an "alternate methodology" in which, instead of using its publicly disclosed carbon costs in projecting costs associated with the emissions from its enormous, GHG-intensive oil sands assets in Alberta, Canada, Exxon applied far lower costs reflecting only the limited impact of existing climate change regulations, held flat indefinitely into the future. This entailed applying the existing legislated price of carbon to only a small percentage of projected emissions (*i.e.* "legislated intensity"), under the assumption that carbon legislation in Alberta would remain the same indefinitely.[16] In doing so, Exxon avoided internal projections of "massive GHG costs," "large write-downs," and "significant[]" impacts on projected end of field life.[17]

12. Exxon also did not apply its publicly disclosed carbon costs in its cost projections: (1) in estimating its company oil and gas reserves and resource base with respect to its oil sands assets in Alberta;[18] (2) in conducting impairment evaluations in 2015 and earlier, including in assessing its Mobile Bay asset in 2015 (thus avoiding an after-tax impairment loss of $320 million to $478 million in that year);[19] and (3) in making certain investment decisions in jurisdictions where there was no established GHG emissions pricing regulation, such as its nearly $850 million investment in a chemical facility in Beaumont, Texas in 2016.[20]

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[16] *See* JX927-6 (Oct. 16, 2015 email); JX989-38 to -41 (Rule 11-f testimony).

[17] *See* JX928-1 (July 4, 2016 email); PX059-1 (Aug. 11, 2016 calendar appointment); PX048-1 (Oct. 9, 2015 email).

[18] *See* PX056-1 (July 14, 2016 email); PX059-1 (Aug. 11, 2016 calendar appointment); JX989-80 to -82 (Rule 11-f testimony).

[19] Tr. 255:18-256:15 (Shores testimony); JX989-42 to -43 (Rule 11-f testimony); JX973 ¶¶ 38, 51 (Bartov Report), Tr. 1192:2-21 (Bartov testimony).

[20] PX080-3 (Exxon's June 7, 2019 interrogatory responses); *see also* PX076-11 (Exxon's October 1, 2018 interrogatory responses); PX379-10 (Exxon's May 20, 2019 letter to OAG).

## III. Exxon's Misleading Representations Were Material.

13. Exxon's representations concerning the application of its carbon costs to business planning and investment decisions were important to investors, who viewed Exxon stock more favorably as a result, as is evident from both witness testimony[21] and reports of major financial firms.[22]

14. Exxon itself understood the importance to investors of climate change regulatory risk and the company's disclosures concerning carbon costs, as is evident from the risk factors stated its annual Form 10-K,[23] an internal acknowledgement by Exxon's head of investor relations that "real investors" cared about this issue,[24] and internal discussions among Exxon personnel regarding the "massive" and "very material" impacts of applying Exxon's publicly disclosed carbon costs.[25]

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[21] Tr. 90:14-20, 97:19-98:8 (Lamb testimony); Tr. 191:2-17, 194:12-15, 199:12-19 (Garland testimony); JX988-25 (Read testimony that he "definitely" understood that Exxon was applying its proxy cost to its cost projections, and that this was "important" because, unlike oil and gas demand, costs are "controllable").

[22] *See, e.g.*, PX113-1, -7 (January 2016 Morgan Stanley report stating that "mainstream companies and investors are increasingly recognizing climate change and its economic and financial implications," and that "climate change is now seen by many of the world's largest investors as a critical investment issue"); PX122-2 (August 2017 State Street report stating that carbon price assumptions are important" because they "provide insights into how companies account for climate risk in the planning process" and are "key in helping companies identify potential stranded assets and mitigate the risk of investing in assets that may become stranded in the future"); PX125-3 (May 2017 Vanguard memorandum stating that "climate change poses risks to investors in certain sectors, such as oil and gas, and that these risks are most prominently skewed towards long-term asset owners like Vanguard"); JX975-32 (May 2014 Standard & Poor's report stating that Exxon's 2014 agreement to "publish details of its climate risk exposure from stranded assets" was "a sign of the growing acceptance among companies and investors that climate and carbon risks are increasingly material to corporate performance and value"); PX074-2, JX977-1, and PX073-2 (May 2016, September 2016, and August 2017 Wells Fargo equity research reports concluding that Exxon's use of a proxy cost "incentivizes XOM to reduce overall emissions of all future projects" and "helps XOM avoid the risk of stranded investments," which places Exxon "ahead of the curve on pricing in climate risks" and is "very important for long-lived projects to ensure full-cycle returns are fairly evaluated on an environmental basis as well as financial and operational").

[23] JX905-5 (2014 10-K); JX906-5 (2015 10-K); JX 907-7 (2016 10-K).

[24] PX248-1 (June 18, 2014 email).

[25] *See* JX928-1 (July 4, 2016 email describing "massive GHG costs"); PX052-1 (Nov. 10, 2014 email describing "very material" impact of applying escalating carbon costs). For example, in a July 2016 internal analysis, Exxon calculated that the carbon costs it applied in its cost projections for projects and assets in Alberta in 2015 and 2016

## IV. Exxon's Materially Misleading Disclosures Harmed its Investors.

15. Exxon's misleading representations regarding its use of carbon costs harmed investors when the price of its stock dropped upon revelation of the alleged misrepresentations. Based on an event study conducted by plaintiff's expert, Exxon's stock price was inflated by at least $1.64 per share, and as much as $4.25 per share,[26] for a considerable period of time, resulting in estimated aggregate losses of approximately $476 million to $1.6 billion.[27]

were approximately 93% lower than those it publicly represented (the equivalent of $4 per barrel versus $0.25 per barrel). PX058-1 to -2. Moreover, for a single cash flow model for the Kearl oil sands asset in Alberta, where Exxon had invested tens of billions of dollars (Tr. 1045:7-20), the undiscounted difference between applying the publicly disclosed costs, reaching $80 per ton, and the existing legislated costs Exxon actually applied, held flat at an effective cost of less than $5 per ton (*i.e.* costs of $24.30 applied to 20% of emissions), was over $11.5 billion. PX096; *see also* Tr. 1410:13-1411:3 (Boukouzis testimony).

[26] *See* JX973-46 (Bartov Report), Tr. 1240:17-1242:2 (Bartov testimony). The parties' experts were in agreement that there was a 98% likelihood, using the industry standard close-to-close window, that a January 20, 2016 stock drop was due to the disclosure on that date. JX973-45 (Bartov report); Tr. 1207:10-1208:7 (Bartov testimony); Tr. 2021:3-8 (Ferrell testimony).

[27] *See* JX972-93 to -99 (Boukouzis Report). Tr. 1420:8-16, 1510:11-16 (Boukouzis testimony).

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New York, New York

Respectfully submitted,

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