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December 3, 2019

Catherine O'Hagan Wolfe, Esq.
Clerk of Court
United States Court of Appeals for the Second Circuit
40 Foley Square
New York, NY 10007

Re: *Exxon Mobil Corp. v. Healey*, No. 18-1170

Dear Ms. Wolfe:

Defendant-appellee New York Attorney General Letitia James herewith responds to plaintiff-appellant Exxon Mobil Corp.'s letter of November 15, 2019. Exxon is challenging an investigation by the New York Office of the Attorney General (NYOAG) into whether Exxon misled New York investors and consumers. The district court dismissed Exxon's first amended complaint for failure to state a claim, observing that Exxon's alleged facts showed that NYOAG possessed cause for the investigation and that Exxon's proposed second amended complaint contains the same pleading defect. Special App'x 34–45. Exxon's letter fails to grapple with this point and with other fundamental deficiencies in its arguments.

First, Exxon's letter confirms that Exxon's appeal is moot as to NYOAG.[1] The only relief Exxon seeks against NYOAG is an injunction preventing NYOAG's investigation and a declaration that NYOAG's investigatory subpoenas were improper. *See* Mem. of Law in Supp. of N.Y. Att'y Gen.'s Mot. to Dismiss at 3–4. Exxon's letter highlights the fact that in addition to completing its investigation and terminating its subpoena-enforcement action (*see id.* at 4–6), NYOAG has now completed a trial on the claims that the investigation uncovered. In other words, Exxon's letter further demonstrates that Exxon can no longer obtain meaningful

[1] Exxon also challenges a similar investigation by the Massachusetts Attorney General.

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relief through this appeal. *See id.* at 8–17. This Court should therefore dismiss the appeal as to NYOAG.

Second, Exxon's letter is predicated on the false assertion that at the trial, NYOAG made a "concession that ExxonMobil did not commit fraud." Letter at 1. While NYOAG did dismiss its common-law and equitable fraud claims,[2] it is still pressing two statutory fraud claims against Exxon: a fraud claim under the Martin Act, a New York investor-protection statute that prohibits "Fraudulent Practices in Respect to Stocks, Bonds and Other Securities"; and a second fraud claim under Executive Law § 63(12), which prohibits "repeated fraudulent or illegal acts" and "persistent fraud or illegality."[3] Thus, NYOAG's post-trial dismissal of two redundant nonstatutory claims in no way constitutes the "clear evidence" of misconduct that Exxon must allege to overcome the presumption that NYOAG "has properly discharged [its] official duties," *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quotation marks omitted); *see Hartman v. Moore*, 547 U.S. 250, 263 (2006). Indeed, by failing to move for judgment at the close of evidence, Exxon acknowledged that the evidence presented by the NYOAG was sufficient to demonstrate a prima facie case for each of the counts in the complaint. *See, e.g.*, *Miller v. Miller*, 68 N.Y.2d 871, 873 (1986). That acknowledgment undercuts Exxon's assertion to this Court that NYOAG brought the complaint in bad faith, and shows that Exxon still cannot overcome the presumption of prosecutorial regularity. *See* Br. for N.Y. Att'y Gen. at 29–33, 40–41, 52; *Hartman*, 547 U.S. at 263, 266.

"[T]he time . . . must arrive at some stage of every litigation when [a] plaintiff must be required to stand upon the allegations he is asserting." *Sanders v. Thrall Car Mfg. Co.*, 582 F. Supp. 945, 951 (S.D.N.Y. 1983) (quotation marks omitted), *aff'd on op. below*, 730 F.3d 910 (2d Cir. 1984); *see also TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 506 (2d Cir. 2014) (denying leave to amend complaint a second time). Four years into this litigation, the Court should not grant Exxon another chance to attempt to state a viable claim against the NYOAG, especially when Exxon's allegations remain fatally defective. *See United States ex rel. Bernard v. Casino Magic Corp.*, 293 F.3d 419, 426 (8th Cir. 2002)

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[2] NYOAG dismissed its common-law and equitable fraud claims because, by the time of trial, those claims would not have afforded NYOAG any relief beyond what NYOAG sought under the Martin Act and Executive Law. Legislation enacted after NYOAG filed its complaint made the statute of limitations for NYOAG's Martin Act and Executive Law claims coextensive with the statute of limitations for common-law fraud. *See* N.Y. Civil Practice Law and Rules 213(8)–(9). And although NYOAG was entitled to a jury trial on its common-law fraud claim, it ultimately agreed to a bench trial on that claim.

[3] We attach as Exhibit A NYOAG's post-trial brief, explaining why it should prevail on its Martin Act and Executive Law claims.

(affirming denial of request to amend the complaint "two and a half years into the litigation").

Accordingly, for the reasons stated in this letter and in all papers NYOAG previously submitted, this Court should dismiss Exxon's appeal as moot as to NYOAG or, alternatively, should affirm the judgment below.

Respectfully submitted,

/s/ Scott A. Eisman

Scott A. Eisman
Assistant Solicitor General

EXHIBIT A

Case 18-1170, Document 271, 12/03/2019, 2720278, Page5 of 34

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 **PLAINTIFF'S POST-TRIAL MEMORANDUM**

Case 18-1170, Document 271, 12/03/2019, 2720278, Page6 of 34

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii
PRELIMINARY STATEMENT 1
ARGUMENT 2
1. Causes of Action 2
2. Exxon's Disclosures Concerning Its Use of Carbon Costs Were Misleading 3
3. Exxon's Misleading Representations Were Material to Investors 14
4. Appropriate Relief 21
CONCLUSION 25

TABLE OF AUTHORITIES

Cases

In re Apollo Group, Inc. Securities Litigation, No. CV-10-1735, 2011 WL 5101787 (D. Ariz. Oct. 27, 2011) 24 n.17

In re BHP Billiton Ltd. Securities Litigation, 276 F. Supp. 3d 65 (S.D.N.Y. 2017) 15 n.8

In re BP P.L.C. Securities Litigation, No. 4:12-CV-1256, 2013 WL 6383968 (S.D. Tex. Dec. 5, 2013) 15 n.8

In re Bristol Myers Squibb Co. Securities Litigation, 586 F. Supp. 2d 148 (S.D.N.Y. 2008) 23

In re Chicago Bridge & Iron Co. N.V. Securities Litigation, No. 17-CV-01580, 2019 WL 5287980 (S.D.N.Y. Oct. 18, 2019) 24

In re Gentiva Securities Litigation, 932 F. Supp. 2d 352 (E.D.N.Y. 2013) 24 n.17

In re New Oriental Education & Technology Group Securities Litigation, 988 F. Supp. 2d 406 (S.D.N.Y. 2013) 23

In re Openwave Systems Securities Litigation, 528 F. Supp. 2d 236 (S.D.N.Y. 2007) 24

In re Signet Jewelers Ltd. Securities Litigation, No. 16-CV-6728, 2019 WL 3001084 (S.D.N.Y. July 10, 2019) 24

In re Vivendi, S.A. Securities Litigation, 838 F.3d 223 (2d Cir. 2016) .... 25 & n.19

Kux–Kardos v. VimpelCom, Ltd., 151 F. Supp. 3d 471 (S.D.N.Y. 2016) 23

Litwin v. Blackstone Group, L.P., 634 F.3d 706 (2d Cir. 2011) 14

Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 44 (2011) 19

Monroe County Employees' Retirement System. v. Southern Co., No. 1:17-CV-00241, 2019 WL 3956139 (N.D. Ga. Aug. 22, 2019) 24-25 n.18

N.J. Carpenters Vacation Fund v. Royal Bank of Scotland, 720 F. Supp. 2d 254 (S.D.N.Y. 2010) 12 n.5

People v. Electro Process, Inc., 284 A.D. 833 (4th Dep't 1954) 2-3

People v. Federated Radio Corp., 244 N.Y. 33 (1926) 2

People v. Silinsky, 217 A.D. 247 (2d Dep't 1926) 2

People v. Trump Entrepreneur Initiative LLC, 137 A.D.3d 409 (1st Dep't 2016) 3

Pirnik v. Fiat Chrysler Automobiles, N.V., 327 F.R.D. 38 (S.D.N.Y. 2018)........................ 24 n.17

Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp., 632 F.3d 762 (1st Cir. 2011) 12

Ramirez v. Exxon Mobil Corp., 334 F. Supp. 3d 832 (N.D. Tex. 2018)..................................... 16

S.E.C. v. Reyes, 491 F. Supp. 2d 906 (N.D. Cal. 2007).. 14-15

State v. Maiorano, 189 A.D.2d 766 (2d Dep't 1993) 3

State v. Rachmani Corp., 71 N.Y.2d 718 (1988).. 2, 3, 14

State v. Sonifer Realty Corp., 212 A.D.2d 366 (1st Dep't 1995).. 2

United Paperworkers International Union v. International Paper Company, 985 F.2d 1190 (2d Cir. 1993)... 15

United States v. Ferguson, 553 F. Supp. 2d 145 (D. Conn. 2008) 15 n.7

Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991).. 14

Statutes

Executive Law § 63(12).. 3

General Business Law § 352... 2

General Business Law § 353... 2

Case 18-1170, Document 271, 12/03/2019, 2720278, Page9 of 34

PRELIMINARY STATEMENT

At trial, the Office of the Attorney General ("OAG") proved, by a preponderance of the evidence, that Exxon Mobil Corporation ("Exxon") violated the Martin Act and Executive Law § 63(12) by making materially misleading representations to its investors concerning its use of an internal cost of carbon to account for the likelihood of increasingly stringent climate regulations.

Most of the underlying facts are undisputed. There is no dispute that Exxon did not use the carbon cost figures it publicly disclosed, reaching $80 per ton by 2040 in developed countries, in projecting future costs associated with its GHG emissions from its investments and operations. Instead, Exxon used the publicly disclosed costs in its demand projections only, and used significantly lower figures, or none at all, in its cost projections. For example, Exxon applied only existing legislated costs, held flat indefinitely into the future, at an effective rate of less than $5 per ton, to the emissions from its massive, GHG-intensive oil sands projects in Alberta, Canada. And there is no genuine dispute that the figures that Exxon applied – or failed to apply – in its cost projections affected its long-term cash flow projections across a host of decision-making and planning functions, impacting both existing projects and projects in the development pipeline.

Only three significant issues remain the subject of dispute. *First*, did Exxon mislead its investors by representing that it was using the escalating carbon costs it publicly disclosed for purposes of projecting costs associated with its emissions from its investments and operations? The evidence demonstrates that this is exactly what Exxon did. All of the evidence adduced at trial shows that investors and other third parties understood that Exxon was representing that it applied the rising costs of carbon in assessing investments and business planning, not simply as one of many factors that might suppress demand for oil and gas in the future. That is inconsistent with the company's actual practice of applying only existing legislated carbon costs, held flat for decades into the future, in its cost projections. *Second*, were Exxon's representations regarding its

use of a carbon cost material? The evidence shows that Exxon's investors cared about the risks the company faced from climate change and climate change regulation, that investors cared about Exxon's representations on that topic, and that those representations were material. And *third*, if Exxon is liable under the Martin Act and Executive Law § 63(12), what is the appropriate relief? The evidence demonstrates that equitable relief, including restitution, is justified.

ARGUMENT

1. Causes of Action

The Martin Act prohibits the use of any "deception, misrepresentation, concealment, suppression, fraud, false pretense or false promise" in connection with the "issuance, exchange, purchase, sale, promotion, negotiation, advertisement, investment advice or distribution" of securities. G.B.L. §§ 352, 353. To establish a Martin Act violation, the OAG must demonstrate by a preponderance of the evidence that the defendant's statements or omissions were materially misleading. *State v. Rachmani Corp.*, 71 N.Y.2d 718, 726-27 (1988); *People v. Silinsky*, 217 A.D. 247, 248 (2d Dep't 1926). Representations or omissions are considered material if there is a substantial likelihood a reasonable investor would have considered them important in light of the "total mix of information." *Rachmani*, 71 N.Y.2d at 726.

The Martin Act is "given a wide meaning to include all acts, although not originating in any actual evil design or contrivance to perpetrate fraud or injury upon others, which do by their tendency to deceive or mislead the purchasing public come within the purpose of the law." *People v. Federated Radio Corp.,* 244 N.Y. 33, 38-39 (1926). No showing of intent is required. *Id.*; *see also Rachmani*, 71 N.Y.2d at 725 n.6. Nor does the Martin Act require a showing of reliance or damages. *State v. Sonifer Realty Corp.*, 212 A.D.2d 366, 367 (1st Dep't 1995); *see also People v. Electro Process, Inc.*, 284 A.D. 833, 833 (4th Dep't 1954) ("[t]he fact . . . that no sales of stock

have resulted from [the misrepresentations] does not permit the escape" from Martin Act liability).

Fraudulent acts that violate the Martin Act also violate Executive Law § 63(12) when they are repeated or persistent. *Rachmani,* 71 N.Y.2d at 721 n.1 (definitions of fraud under these statutes are "virtually identical"). Executive Law § 63(12) prohibits "repeated fraudulent or illegal acts" and "persistent fraud or illegality in the carrying on, conducting or transaction of business." Executive Law § 63(12) states that "persistent" fraud includes the "continuance or carrying on of any fraudulent . . . act or conduct," and "repeated" fraud includes the "repetition of any separate and distinct fraudulent . . . act, or conduct which affects more than one person." Section 63(12) is construed liberally to effectuate its remedial purpose. *State v. Maiorano,* 189 A.D.2d 766, 767 (2d Dep't 1993). No showing of intent or reliance is required. *People v. Trump Entrepreneur Initiative LLC*, 137 A.D.3d 409, 417 (1st Dep't 2016).[1]

2. Exxon's Disclosures Concerning Its Use of Carbon Costs Were Misleading

Between December 2013 and the end of 2016, Exxon misleadingly represented that the company used its publicly disclosed carbon costs in projecting costs associated with its emissions from its investments and operations, not just in projecting demand for oil and gas. The key disclosures stretched across Exxon's March 2014 *Managing the Risks* and *Energy and Climate* reports, its December 2013 and December 2014 investor presentations in New York City, its Carbon Disclosure Project responses and Corporate Citizenship Reports, and Mr. Tillerson's statement at the 2016 shareholder meeting.

Exxon made these statements in response to shareholder concerns that the company's assets could become stranded in a future with increasingly stringent climate change regulation.

[1] This brief does not address the OAG's equitable and common law fraud claims (counts 3 and 4 of the Complaint) because they were dismissed with prejudice. (Tr. 2117:9-13, 2118:3-9, 2121:22-2122:2.)

Investors wanted to understand the steps the company was taking to minimize that long-term risk. For example, in a September 2013 letter, 72 institutional investors with nearly $3 trillion in assets asked Exxon to assess how anticipated climate policies would affect its "[c]apital expenditure plans for finding and developing new reserves," and how "factors such as carbon pricing" may create "risks to unproved reserves." (PX194-12.) Similarly, the shareholder request from Arjuna Capital that resulted in the publication of *Managing the Risks* asked Exxon to report on its "strategy to address the risk of stranded assets presented by global climate change, including analysis of long and short term financial and operational risks to the company." (PX382-2.)

In response, Exxon emphasized that it recognized that governments will respond to climate change by imposing increasingly stringent carbon costs over the coming decades. For example, in *Managing the Risks*, Exxon stated: "Governments' constraints on use of carbon-based energy sources and limits on greenhouse gas emissions are expected to increase throughout the Outlook period." (PX001-15.) In *Energy and Climate*, Exxon asserted: "Today there are policies in effect that are designed to limit GHG growth, and we anticipate additional policies developing over time. We expect OECD nations to continue to lead the way in adopting these policies, with developing nations gradually following, led by countries like China and Mexico." (PX002-5.) And in its 2014 Corporate Citizenship Report, Exxon announced that it was not making "business as usual" assumptions on climate policy. (PX007-37.) In each of these reports, Exxon stated that it used a cost of carbon, reaching $80 per ton of emissions in 2040 in developed countries and $20-$40 per ton in many non-OECD countries, in its investment decision-making and business planning.

In these statements, Exxon never disclosed that its internal Dataguide included significantly lower figures, reaching only $40 in developed countries, and included no cost at all in base economics for non-OECD countries. And Exxon certainly never disclosed that it was

Case 18-1170, Document 271, 12/03/2019, 2720278, Page13 of 34

assuming that existing legislated carbon costs, however low they may be, were going to remain in place, with no increase, for decades into the future. Exxon also never disclosed that in developed countries without existing legislated costs, it was going to assume that no such costs would be imposed in the coming decades. Nor did Exxon disclose that in its impairment evaluations, it was assuming that no costs associated with GHG emissions will be imposed in the future. Such assumptions are fundamentally contrary to Exxon's representations that it believed that governments will impose increasingly stringent climate policies, and that it applied a cost of carbon to incorporate that risk into its investment decision-making and business planning.

But there is no dispute that in its cost projections, Exxon applied an assumption that the status quo – *e.g.*, low costs in Canada, and no costs in most of the United States – would remain in place, with no cost increases, for decades. These cost projections were used for investments in new projects as well as corporate planning and impairment evaluations for existing projects. For example, at its enormous, GHG-intensive oil sands projects in Alberta,[2] Exxon initially tried to apply the escalating carbon cost assumptions it publicly disclosed, but then recognized internally that doing so led to projections of "massive GHG costs" (JX928-1) and "warnings" of "large write-downs" of reserves (PX059-1). As a result, Exxon decided to instead use an "alternate methodology" (JX928-1) in which it applied only the existing "legislated price of carbon" to the "legislated intensity" of emissions (JX927-6), which reduced the impact of these costs on its oil sands projects "significantly" (PX048-1). Likewise, in projecting operating costs associated with a nearly $850 million expansion of a chemical facility in Beaumont, Texas, Exxon applied no carbon costs at all, on the ground that emissions projections were not required under existing law. (PX080-3.) And in projecting costs in its impairment evaluations in 2015 and earlier, Exxon

[2] Oil sands accounted for a significant portion of Exxon's total resource base. (Tr. 692:18-693:13; PX245-20.)

Case 18-1170, Document 271, 12/03/2019, 2720278, Page14 of 34

applied no carbon costs to its emissions, relying once again on the lack of existing regulation rather than incorporating costs associated with the increasingly stringent regulation it publicly claimed to be anticipating. (Tr. 255:18-256:15; JX989 at 42-43; JX973 ¶ 38.) Exxon's use of existing carbon costs or none at all, held flat over time, rendered its representations false and misleading.

Exxon has argued that its disclosures about its "proxy cost" referred only to the costs it used for purposes of projecting demand for oil and gas, while disclosures about its "GHG cost" referred only to the costs it used in projecting costs from its own emissions. That distinction may appear self-evident from the perspective of certain Exxon insiders who were already aware of the company's separate internal processes for projecting demand and costs. But it was certainly not evident to reasonable investors who did not have the insiders' benefit of that knowledge. Far from clearly distinguishing between "proxy costs" and "GHG costs," Exxon represented that it was using the publicly disclosed cost figures approaching $80 per ton in projecting the costs associated with its investments and operations, not just in its demand projections.

Mr. Tillerson's own words from Exxon's 2016 annual shareholder meeting were perhaps the strongest indication to investors that the publicly disclosed cost figures applied to the company's cost projections. At that meeting, Mr. Tillerson stated:

> We have, unlike many of our competitors, we have for many years included a price of carbon in our outlook, and that price of carbon gets put into all of our economic models when we make investment decisions as well. *It's a proxy*. We don't know how else to model what future policy impacts might be, but *whatever policies are, ultimately they come back to either your revenues or your cost. So we choose to put it in as a cost*. So we have accommodated that uncertainty in the future, and everything gets tested against it. (JX918-29, emphasis added; *see also* Tr. 1054:25-1055:13 (Tillerson testimony).)

The statement that Exxon applied its "proxy" cost "as a cost," rather than in projecting its revenues, directly contradicts Exxon's current position that its "proxy cost" was *not* applied as a cost, but rather influenced its demand projections, which influenced oil and gas prices, which influenced its

Case 18-1170, Document 271, 12/03/2019, 2720278, Page15 of 34

projected revenues. Exxon cannot square Mr. Tillerson's statement with its position in this case.

Exxon emphasizes its use of two purportedly distinct terms – "proxy cost" and "GHG cost" – in *Managing the Risks*, but those terms do not actually denote any distinction. It is not disputed that both types of costs are a *proxy*, or stand-in, for the effects of future regulations concerning *GHGs*. To all appearances, Exxon was using the terms "proxy cost" and "GHG cost" interchangeably. That is particularly evident in *Energy and Climate* and Exxon's December 17, 2013 presentation to shareholders, in which Exxon identified the costs that it was applying to account for the risk of increasingly stringent climate change policies as "GHG proxy costs." (PX002-6; PX130-4.)[3] Exxon's use of the hybrid term "GHG proxy cost" is not compatible with its argument that it clearly distinguished the terms "proxy cost" and "GHG cost" in its disclosures.

In fact, at least two Exxon insiders believed that "GHG costs" referred to the same concept as "proxy costs." In a 2008 presentation, Tom Eizember, Exxon's planning manager, described the cost in Exxon's Outlook for Energy as the "GHG cost," which he contrasted with the costs in the Dataguide. (PX064-33.) This is contrary to Exxon's current position that the costs in the Outlook are identified only as "proxy costs," which contrast with the "GHG costs" in the Dataguide. Further, Mr. Eizember testified that "[t]he idea of Greenhouse Gas cost is a pretty generic term," and "it's not a specific term of art." (Tr. 1764:13-1765:1.) Likewise, Richard Auter of PwC, who had audited Exxon for ten years and met with Corporate GHG Manager Guy Powell twice on this topic, testified that he used the terms proxy cost and GHG cost "interchangeably" in a 2017 memorandum. (Tr. 1584:9-1587:22.) Mr. Auter did not become aware of any distinction between these terms until at least a year later. (Tr. 1590:23-1591:8.) If Mr. Auter and Mr. Eizember did not

[3] The interchangeable nature of these terms is reinforced by internal planning guidance drafted by Corporate Planning Manager Mark Shores, in which he used the term "GHG proxy cost" to describe the costs in the Outlook, and "proxy GHG costs" to describe the costs in the Dataguide. (PX089-3; Tr. 283:12-284:13.)

understand there to be a distinction between "proxy cost" and "GHG cost," and if "GHG cost" was, as Mr. Eizember testified, a "generic term" that could be applied to any cost relating to GHGs, then it is unrealistic to expect a reasonable investor to have appreciated the purported distinction between these terms.

Indeed, every trial witness who was not an Exxon insider testified that they understood Exxon's representations about a cost of carbon approaching $80 per ton to apply to Exxon's cost projections, not just demand projections. This included Roger Read, the Wells Fargo equity research analyst who met with Exxon about these topics in May 2016. (JX977, PX073, PX074.) Mr. Read testified by video that he "definitely" understood that Exxon applied these costs in its cost projections, not just in its demand projections, and that cost projections were particularly important because costs, unlike demand, are "controllable." (JX988-25.) Natasha Lamb of Arjuna Capital, who filed on behalf of her investor clients the proposal that was withdrawn in exchange for Exxon's publication of *Managing the Risks*, also understood that Exxon used these figures in its cost projections. (Tr. 128:22-24.) Likewise, Michael Garland of the New York City Comptroller's Office, which owned approximately $1 billion of Exxon stock, gained the same understanding at a December 2014 meeting that Exxon held with shareholders. (Tr. 194:12-15.)

Further, an internal presentation in May 2014, prepared for the Management Committee, recognized that Exxon had "implied" that it used the publicly disclosed figures in its cost projections. The presentation recommended that Exxon increase the costs in the Dataguide to align with the publicly disclosed figures, because: "In recent reports released by EM [ExxonMobil] ('Energy and Climate' and 'Energy and Carbon – Managing the risk') we have implied that we use the EO [Energy Outlook] basis for proxy cost of carbon when evaluating investments."

(PX044, PX154, PX156.)[4] Mark Shores, the planning manager who delivered this presentation, testified that the notes containing this text were written by Guy Powell, Exxon's Corporate GHG Manager. (Tr. 279:2-18, 280:13-281:13.) Indeed, the chronology makes clear that Mr. Powell wrote these notes, and that they were included in the presentation to the Management Committee. (Tr. 602:7-629:6.) But regardless of authorship, these notes are a key internal admission that Exxon had implied, contrary to reality, that the company was using the publicly disclosed carbon cost figures when evaluating investments, not just in projecting demand for oil and gas.

A review of *Managing the Risks* and *Energy and Climate* confirms that Exxon represented that it was using the publicly disclosed figures in projecting the cost of emissions from its investments and operations, and not only in projecting demand for oil and gas. For example, in *Managing the Risks*, Exxon stated that the proxy cost reflected potential policies concerning "the exploration, development, production, transportation or use of carbon-based fuels." (PX001-17.) While policies concerning the "use" of fuel would influence *demand* for Exxon's products, "exploration, development, production, [and] transportation" are the stages of an oil and gas company's *operations*. Exxon's statement strongly indicated that the company was applying the proxy cost to emissions from its operations, not just in its projections of demand.

Additionally, in *Managing the Risks*, Exxon stated that its proxy cost was "simply our effort to quantify what we believe government policies over the Outlook period could <u>cost</u> to our investment opportunities." (PX001-18, emphasis added.) Exxon's entire argument is that the "proxy cost" affected only demand projections, which influence the company's oil and gas price assumptions, which influence the company's revenues, while "GHG costs" were used to assess

[4] The other stated reason for the proposal was that the lower costs in the Dataguide were "non-conservative . . . for evaluating capacity growth investments that involve GHG emission creation[.]" *Id.* Indeed, Mr. Eizember recognized this as early as 2011, when Mr. Bailes proposed aligning these costs. (JX926.) This is significant because, as Mr. Tillerson testified, the "vast majority" of Exxon's projects create GHG emissions. (Tr. 1038:10-14.)

what government policies could cost the company's investment opportunities. But here, Exxon stated that "proxy costs" – not "GHG costs" – quantified what government policies could "cost" the company's investment opportunities.

Exxon then stated that it "require[s] that investment proposals reflect the climate-related policy decisions we anticipate governments making during the *Outlook* period and therefore incorporate them as a factor in our specific investment decisions." (PX001-18, emphasis added.) David Rosenthal testified that this sentence referred to GHG costs, not proxy costs, as demonstrated by the reference to "specific investment decisions." (Tr. 370:24-371:19.) But this sentence also references the "Outlook," and Exxon has argued that any reference to the "Outlook" would signal that only demand projections, and therefore "proxy costs," were being discussed. (*See, e.g.*, Tr. 50:19-24.) That argument is belied by Mr. Rosenthal's testimony that this sentence, referencing the "Outlook," concerns "GHG costs."

Exxon's employees testified that page 18 of *Managing the Risks* was the first time the company ever disclosed the "GHG costs" it used for purposes of its cost projections. (Tr. 369:22-370:2, 1117:2-8; PX001-18.) But a reasonable investor would not have understood that an entirely new "GHG cost" was being revealed in the middle of a paragraph about the "proxy cost," without any indication that "GHG costs" were something different. The phrase "perhaps most importantly," which starts the sentence, is most naturally read as emphasizing an important application of the proxy cost, not transitioning to an entirely new topic. By contrast, earlier in the same paragraph, Exxon clearly distinguished between proxy costs and a "social cost of carbon" by stating that the proxy cost is "not the same as a 'social cost of carbon.'" (PX001-18.) No such language appeared in Exxon's discussion of "GHG costs." When Mr. Tillerson was asked at trial to explain this sentence, he stated: "so now, we're going to give you a new thought. 'Perhaps most

importantly, we also require business segments . . . .'" (Tr. 1024:22-1025:5, emphasis added.) But neither the word "also" nor other distinguishing language appears in the report.

Additionally, in *Energy and Climate*, Exxon stated that it "requires that all business units use a consistent corporate planning basis, including the proxy cost of carbon discussed above, in evaluating capital expenditures and developing business plans." (PX002-20.) There is no dispute that when this report was published, the GHG planning basis in the Dataguide was *not* consistent with Exxon's publicly disclosed cost figures. Exxon's witnesses attempted to explain this sentence by testifying that "consistent corporate planning basis" referred only to oil and gas price bases. (Tr. 355:3-356:7; 453:9-454:10; 471:16-472:11; 1009:9-1010:24) But that limitation does not appear in the report, and investors would have had every reason to believe that Exxon had one "consistent" set of carbon costs – not two separate sets of costs.

Exxon also contends that its use of the phrase "where appropriate" in a statement discussing the application of "GHG costs" (PX001-18) means that it was not making any representation to investors about its use of those costs at all. But Exxon's statement that it required all business segments to include GHG costs "where appropriate" did not alert investors that the company may exclude those costs from significant business and investment decisions. That language must be read in the context of the complete report, including the map on the prior page displaying exactly where Exxon purportedly thought it appropriate to apply various cost figures. (PX001-17.) Further, Exxon clearly stated in the report's summary: "We also require that *all significant proposed projects* include a cost of carbon – which reflects our best assessment of costs associated with potential GHG regulations over the Outlook period – when being evaluated for investment." (*Id*. at 21 (emphasis added).) Accordingly, Exxon's statement requiring the use of GHG costs "where appropriate" plainly encompassed at least *all significant proposed projects*. (*See* Tr.

373:14-374:4 (Rosenthal testimony that the sentence referencing "all significant proposed projects" concerned GHG costs).) The "where appropriate" language simply indicated that Exxon could exclude these costs where they were *insignificant*. This was precisely the meaning attributed to this language by Rex Tillerson, who testified that the term "where appropriate" was meant to exclude situations where GHG emissions were "de minimis." (Tr. 1093:18-21; 1115:5-15.) Mr. Tillerson further testified that costs should be applied under this language "if they're significant and meaningful." (Tr. 1030:1-9.)

Given the context of the report and Mr. Tillerson's testimony, it is absurd for Exxon to argue that "where appropriate" signified that it could ignore the publicly disclosed costs reaching $80/ton, and instead use *current* legislated costs of less than $5/ton to consider the risk of *future* climate change regulation to significant projected projects. The "where appropriate" language did not inform investors that in lieu of applying the publicly disclosed costs to "all significant proposed projects," Exxon was applying much lower costs *held flat for decades into the future* to emissions from its major assets. In short, Exxon did not disclose that the exception would swallow the rule. *See Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 773 (1st Cir. 2011) ("Neither being 'less stringent' than Fannie Mae nor saying that exceptions occur when borrowers demonstrate other 'compensating factors' reveals what plaintiffs allege, namely, a wholesale abandonment of underwriting standards.").[5]

Exxon's argument that its representations were not misleading because the proxy cost affected its demand projections and thus its oil and gas price bases fails because, as discussed above, the company represented that it was using the publicly disclosed figures in projecting costs

[5] *See also N.J. Carpenters Vacation Fund v. Royal Bank of Scotland*, 720 F. Supp. 2d 254, 270 (S.D.N.Y. 2010) ("Disclosures that described lenient, but nonetheless existing guidelines about risky loan collateral, would not lead a reasonable investor to conclude that the mortgage originators could entirely disregard or ignore those loan guidelines.").

from its emissions. Moreover, the chain linking proxy costs to demand projections to oil and gas prices bases to revenue projections is too tenuous to support the representation that "[t]his GHG proxy cost is integral to ExxonMobil's planning." (PX002-6.) Exxon's business units did not use the proxy costs themselves; rather, as Bill Colton testified, proxy costs were just one of many factors influencing demand projections, except in the transportation sector where proxy costs were not used at all. (Tr. 1637:9-1638:4, 1671:20-1672:13.) And Mr. Colton testified that, in turn, demand projections were just one of many factors influencing the company's oil and gas price bases. (Tr. 1674:9-1675:24.) As a memorandum by Mr. Eizember made clear, the price bases that Mr. Tillerson chose had more to do with the "signal that he wants to send the organization than with what we think the market will actually do." (PX231-1.) Exxon's decision to override market factors like demand in setting oil and gas price bases is significant because it breaks the link between proxy costs and Exxon's oil and gas price bases. No witness testified that Exxon's price bases would have changed if there had not been a proxy cost, and Mr. Eizember testified that he "couldn't point to a specific link from one number to another." (Tr. 1756:3-23.) And even as Exxon's proxy costs rose in real terms to $80 per ton in 2040, its oil and gas price bases stayed flat indefinitely into the future. (Tr. 1756:24-1757:13; DX619-7.) Thus, any effect that the proxy cost had on Exxon's oil and gas price bases was so attenuated that it had no discernable impact.

Thus, the link between Exxon's proxy costs and its oil and gas price bases does not bear scrutiny. Nonetheless, regardless of any limited impact of proxy costs on the revenue side of its projections, Exxon publicly represented that it used those costs in projecting expenses associated with emissions from its investments and operations, which the company now admits it did not do. Exxon's representations were therefore false and misleading.[6]

[6] Exxon has repeatedly argued that it had "no incentive to cheat itself by underestimating the potential impact of climate risk." (Tr. 2044:17-2044:19). In a Martin Act case, motive is not a critical issue. But in any event, Exxon

3. Exxon's Misleading Representations Were Material to Investors

Climate change regulatory risk is a critical risk in the oil and gas industry, and as a consequence, Exxon's misleading statements about its management of that risk are clearly material to investors. The applicable standard is whether there is a substantial likelihood that a reasonable investor would have considered Exxon's representations significant in light of the "total mix of information." *Rachmani*, 71 N.Y.2d at 726. Representations or omissions are material if there is a "substantial likelihood" that accurate information "would have assumed actual significance in the deliberations of the reasonable investor" in the context, for example, of investment decisions or shareholder voting, regardless of whether an accurate disclosure "would have caused the reasonable investor to change" his or her decision. *See id.* The presence of some truthful content does not render a misrepresentation non-deceptive, and "[i]f it would take a financial analyst to spot the tension between the one and the other, whatever is misleading will remain materially so, and liability should follow." *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097 (1991). A "misstatement or omission [that] relates to a segment that plays a significant role in the [] business" can be material even if the effect on the company as a whole is limited. *Litwin v. Blackstone Group, L.P.*, 634 F.3d 706, 720 (2d Cir. 2011) (internal quotation marks omitted).

There is no requirement that the topic of a company's disclosure be the *most* important factor to investors, or that the disclosure have a specific effect on the company's books and records, to be considered material. For example, in *S.E.C. v. Reyes*, 491 F. Supp. 2d 906 (N.D. Cal. 2007), the court assessed whether backdating stock options was material. The court acknowledged that "[i]nvestors may consider stock option expenses, or other items excluded from 'pro forma' or

had a clear incentive to maintain a public posture that it used an aggressive cost of carbon: Exxon convinced shareholders to withdraw their proposals during the 2014 proxy season (*supra* at 8), and benefited from an enhanced reputation with "real investors" that it was "ahead of the curve on pricing in climate risk" (*infra* at 18-19).

'non-GAAP' statements, less significant than other financial facts," such as "revenues and cash flow." *Id.* at 910. Yet the court denied the defendant's motion for summary judgment, holding: "Investors may care most that a company is profitable, but they may also find it significant that a profitable company is meanwhile giving away assets in the form of discounted treasury stock. However inchoate such expenses may be, the Court cannot conclude that they are necessarily unimportant to investors. To hold that such non-cash or non-GAAP expenses are immaterial as a matter of law would provide amnesty for companies to deceive shareholders about any items or expenses that do not appear on 'pro forma' or 'non-GAAP' earnings statements." *Id.* at 910-11.[7]

Likewise, in this case, the fact that climate change risks to Exxon's business have not yet been fully realized, and that some investors may consider other factors to be more important, are no indication that those risks are immaterial. To the contrary, misleading statements about significant environmental risks are material regardless of whether they have a particular impact on a line item in a company's books and records. For example, in *United Paperworkers International Union v. International Paper Company*, 985 F.2d 1190 (2d Cir. 1993), a company responded to a shareholder proposal asking the company to adopt environmental stewardship principles by claiming it was already addressing environmental matters "in an appropriate and timely manner," and that it was at the "forefront" of environmental protection. *Id.* at 1193-94. The court held that these representations were materially misleading because they "conveyed an impression that was entirely false" in light of the company's poor environmental record. *Id.* at 1200.[8]

[7] *See also United States v. Ferguson*, 553 F. Supp. 2d 145, 155 & n.13 (D. Conn. 2008) ("a misstatement is material so long as investors would consider the misstated facts significant in making investment decisions, even if investors would consider other information to be more important").

[8] *See also In re BHP Billiton Ltd. Sec. Litig.*, 276 F. Supp. 3d 65, 79-80 (S.D.N.Y. 2017) (company's representations concerning its commitment to health and safety were adequately alleged to be materially misleading where "safety was obviously a major concern to [defendants] and investors, as indicated by defendants' extensive, frequent, and prominent discussions of the topic in their disclosures to investors"); *In re BP P.L.C. Sec. Litig.*, No. 4:12-CV-1256, 2013 WL 6383968, at *23, *27 (S.D. Tex. Dec. 5, 2013) (oil company's representations that "standardized [safety]

Here, the evidence established a substantial likelihood that accurate information about Exxon's use of carbon costs would have been significant to a reasonable investor. *See Ramirez*, 334 F. Supp. 3d at 846 (holding that "[a] reasonable investor would likely find it significant that ExxonMobil allegedly applied a lower proxy cost of carbon than it publicly disclosed"). For example, Roger Read of Wells Fargo testified that he "definitely" understood from Exxon's representations that it was applying a carbon cost reaching $80 per ton to its expenses, not just in demand projections. (JX988-25.) Mr. Read testified that applying these costs to expenses is "important," because a company can "control[]" its own costs, unlike oil and gas demand. *Id.* Likewise, in a May 2016 report, Mr. Read wrote that Exxon applies a proxy cost ranging from $20 to $80 per ton by 2040, "[d]epending on the project and its location," (PX074-2), which only makes sense if those costs were applied to emissions from Exxon's projects. Mr. Read also observed that applying the proxy cost "incentivizes Exxon to reduce overall emissions of all future projects," which "helps [Exxon] avoid the risk of stranded investments." (*Id.*) A proxy cost only incentivizes a company to reduce its own emissions if the cost is actually applied to those emissions; a cost applied only to demand projections would have no such effect. Further, Mr. Read testified that he asked Exxon about climate risks because he was "receiving increased interest, concern, questions from investors" about this topic, and "not exclusively" from investors focused on environmental, social, and governance issues. (JX988-23.)

Accurate disclosures would have also been significant to the shareholder groups who sought disclosures about Exxon's management of carbon asset risk in December 2013, and who withdrew their proposals in exchange for the publication of *Managing the Risks* and *Energy and Climate*. For example, in September 2013, 72 institutional investors with nearly $3 trillion in assets

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processes were being rolled out successfully throughout the company" and "cover[] all aspects of our operations" adequately alleged as materially misleading when it did not disclose that those processes did not apply to certain sites).

signed a letter to Exxon seeking specific disclosures concerning, among other things, "[t]he risks to unproduced reserves, due to factors such as carbon pricing" and "[t]he potential GHG emissions associated with the production of all unproduced reserves." (PX194-12.) Likewise, the Arjuna Capital proposal that resulted in the publication of *Managing the Risks* explained that "investors are concerned that global actions to significantly address climate change, either through carbon regulation, market forces, or socioeconomic pressure, could reduce the value of ExxonMobil's oil and gas reserves and/or related infrastructure before the end of their useful life." (PX382-2.) Accordingly, Arjuna Capital asked Exxon to issue a report that would "address the risk of stranded assets presented by global climate change, including analysis of the long and short term financial and operational risks to the company." (*Id.*) In response, Exxon promised to address "[w]hy the Company believes current investments in new reserves are not particularly exposed to the risk of stranded assets" and "how current capital expenditure is affected by any considerations the company makes with regards to future short-to-long term risk of stranded assets." (PX265-1.)

At trial, Natasha Lamb of Arjuna Capital testified that her firm was concerned about Exxon's allocation of capital to high cost, GHG-intensive assets like oil sands, which "would be the first to be stranded in a low-carbon future." (Tr. 90:14-20.) Ms. Lamb testified that it would have been "very material" to know that Exxon was only using this cost to project demand, not to project Exxon's costs, because the Arjuna Capital proposal was focused on the "resiliency of [Exxon's] assets, their investment decisionmaking, the choice to invest more in unconventional higher cost higher carbon assets." (Tr. 97:19-98:8.) Indeed, Arjuna Capital specifically sought information about whether Exxon's own assets may become stranded due to prospective climate policies. It would have been important to know that Exxon was not applying its publicly disclosed carbon costs to assess whether oil sands projects will grow so costly that they become stranded,

but instead was assuming that existing legislated costs will remain frozen in place.

Michael Garland, Assistant Comptroller for Corporate Governance and Responsible Investment at the New York City Comptroller's Office, also testified to the materiality of Exxon's representations. Mr. Garland, whose office manages over $200 billion (Tr. 174:13-15), including about $1 billion of Exxon stock (Tr. 181:17-182:8), testified that, because the New York City funds use index strategies and cannot easily sell shares, they rely on engagement and proxy voting to protect long-term value. (Tr. 175:11-176:3.) As to his engagement with Exxon, Mr. Garland testified that his office was "most concerned about higher-cost sources of oil" such as "tar sands," because these assets would be the "least economically viable" if governments impose higher carbon taxes. (Tr. 191:2-17.) Mr. Garland had a "vivid memory" of the "CO2 proxy cost" map that Exxon presented at a December 2014 meeting (Tr. 191:19-22, 192:22-194:8; PX046-9), and understood that Exxon "integrated" the costs depicted on the map "into [its] business decision-making and planning." (Tr. 194:12-15.) He further testified that Exxon's representation that it was using an internal cost of carbon in its business decision-making was a "source of comfort," given the risks posed to Exxon's business by future climate change regulation. (Tr. 199:12-19.)

Major financial firms have also emphasized the importance of climate regulatory risk and have called for companies to disclose information about their management of such risks, including through the use of an internal price of carbon. *See, e.g.*, PX113-7 (Morgan Stanley); PX122-2 (State Street), PX125-3 (Vanguard); and JX975-7 (Standard & Poor's). In fact, in a June 2014 email, David Rosenthal, Exxon's head of investor relations, observed that "real investors" cared about Exxon's disclosures on this topic. (PX248-1.) He noted that two Goldman Sachs analysts were "complimentary of the Energy Outlook, the [Corporate Citizenship Report], and the two environment related reports we produced during Proxy season [*Managing the Risks* and *Energy*

and Climate]." He added: "All of the folks we talked to said these types of efforts have enhanced our reputation within the investment community and encouraged ExxonMobil to continue." (*Id.*)

Exxon has presented no good reason to doubt Mr. Rosenthal's conclusion that "real investors" cared about the company's disclosures concerning its management of climate change risk, or Mr. Read's conclusion that Exxon's use of carbon costs in its cost projections was "very important."[9] (PX073-2.) Marc Zenner, Exxon's expert, focused exclusively on a selection of equity research reports, but ignored the substantial evidence of materiality described above, as well as the investor statements, shareholder proposals, and other evidence described by Mr. Boukouzis. (JX972 §§ IV-V.)[10] Ultimately, assessing materiality requires a "contextual inquiry," not a mere counting of reports. *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011); *see also id.* at 30-31 ("the materiality of adverse event reports cannot be reduced to a bright-line rule").

Exxon also observes that nobody knows what carbon costs governments will impose in 2030 or 2040, but that is precisely why Exxon's disclosures about the assumptions it was making were so important. Many investors believe that oil and gas assets may become stranded, not under existing legislation, but under prospective climate legislation over the coming decades, and that companies' decisions and plans today will determine how they fare in the long term. Exxon's management of long-term climate change risks was significant enough for the company to publish two substantial reports on the topic, *Managing the Risks* and *Energy and Climate*, edited and approved by the company's CEO. (Tr. 995:6-12; 1000:9-24; 1003:5-15.) In short, investors were asking Exxon how it was managing long-term climate regulatory risks, and Exxon responded with

[9] *See* PX073-2 (stating that Exxon's use of an "internal carbon tax . . . to take into account carbon intensity" for "all" its projects 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); JX977-1 (concluding that Exxon was "ahead of the curve on pricing in climate risk" due to its use of a cost of carbon).

[10] Further, many of the firms whose reports Dr. Zenner analyzed, including BMO Harris, Société Géneralé, and Wells Fargo, included climate risks among the risks facing Exxon. (Tr. 1882:2-1883:25, 1888:17-1890:1.)

multiple, substantial public disclosures. For Exxon to now assert that no one cared is absurd.

Further, the difference between the carbon costs that Exxon publicly disclosed and those it actually applied in its internal cost projections was significant. Exxon's ongoing operations emit over 120 million tons of GHGs every year (PX008-90), and its new investments will also result in substantial emissions. Exxon's decision not to apply escalating costs reaching $80/ton to those emissions had an impact across the company's business functions, including in evaluating unfunded projects, deciding whether to fund capital investments, and planning and accounting with respect to Exxon's ongoing operations. (*See* Tr. 1755:2-16 (Eizember testimony that costs in the Dataguide are applicable to both investment decisions and planning for existing assets).)

For example, Jason Iwanika described the difference between the long-term Outlook and Dataguide costs in developed countries as "very material" (PX052-1), and a senior planner described the June 2014 alignment of those costs as a "huge change" (PX053-3). Mr. Iwanika's analysis included not only unfunded projects, but also the Aspen oil sands project, where Exxon has spent over $300 million in advance commitments. (Tr. 837:3-14, 866:3-867:4; PX052.) Then, after the June 2014 alignment, employees tried to apply the higher costs in Alberta, but that resulted in "massive GHG costs" (JX928-1),[11] "significant" end of field life impacts (PX048-1),[12] and "large write-downs" to company reserves (PX059-1).[13] These projections were so stark that Exxon

[11] *See also* PX103 (June 2016 email from Dan Hoy explaining that long-term GHG costs affect the corporate planning process for existing assets in Alberta because they "will have an impact on long term opex and earnings").

[12] *See also* PX049-3 (applying escalating carbon costs to the Cold Lake oil sands asset would have "result[ed] in enough additional opex to shorten asset life and reduce gross reserves"); PX061-13 ("Corporate GHG tax price forecast drives the reduced cash flow that shortens end of life").

[13] Based on Exxon's representations, reasonable investors would have expected Exxon's company oil and gas reserves and resource estimates to reflect the publicly disclosed carbon costs. Exxon's company reserves and resource estimates are "part of [its] annual planning and budget exercise" (JX989-77), and are used "to make decisions about forward plans in the corporation." (Tr. 684:1-13; *see also* PX245-12.) Exxon's decision not to apply the publicly disclosed carbon costs to these estimates in Alberta was a sharp deviation from its representations that it consistently applied escalating carbon costs in its planning. This was significant: Mr. Tillerson described Exxon's publicly disclosed oil and gas resource volumes as the "lifeblood" of its business because they represent future production.

decided to change course and apply existing costs instead, held flat indefinitely into the future. For one cash flow model for Kearl, an oil sands asset where Exxon has invested tens of billions of dollars (Tr. 1045:7-20), the undiscounted difference between the publicly disclosed costs, reaching $80/ton, and the costs Exxon applied, held flat at less than $5/ton, was over $11.5 billion. (Tr. 1414:23-1415:2; JX972-181; PX096.)[14] In addition, Dr. Bartov found that applying the publicly disclosed carbon costs in the impairment evaluation for the Mobile Bay asset in 2015 would have resulted in an impairment on Exxon's books of $320-478 million. (JX973 ¶ 51, Tr. 1192:2-21.)[15]

These examples highlight the difference between Exxon's representations and its actions concerning its use of a cost of carbon. Exxon's misleading statements impacted numerous aspects of the company's investment and business planning functions, for both funded and unfunded projects. These are exactly the kinds of impacts that were the focus of the investor inquiries that led to Exxon making the relevant representations in the first place. Considering all the evidence, Exxon's misleading statements about its use of carbon costs were material to a reasonable investor.

4. Appropriate Relief

Equitable relief, including restitution, is appropriate in light of Exxon's violation of the

(PX017-9; Tr. 1041:14-1044:14; *see also* Tr. 698:23-701:23.) Notably, company reserves and resources are distinct from SEC proved reserves, which are based on existing cost levels. (Tr. 689:17-690:11; PX245-113.)

[14] Exxon applied a rate of $24.30 to 20% of projected GHG emissions through the year 2065, producing an effective rate of $4.86. (Tr. 1410:13-1411:3.) While Exxon's cash flow models (such as this 2015 model for the Kearl Initial Development, Expansion Project, and Plant Debottleneck) were not available to investors, they illustrate the impact on the company's business of the difference between the costs Exxon said it was applying and those it actually applied. Any limited impact that Exxon's use of proxy costs in its demand forecasts had on this model was highly attenuated (*supra* at 12-13), and in any event, Exxon represented that it applied those costs in its cost projections (*supra* at 3-12).

[15] Dr. Bartov also explained that Exxon's attempt to categorize its recoverability testing for Mobile Bay as a step 1 "trigger" analysis does not excuse its failure to apply assumptions in its impairment testing that were reasonable in relation to those it used in its internal projections, budgets, and statements to investors. (Tr. 1260:21-1264:14, 1299:10-1300:5; *see also* JX968-15 (setting out relevant GAAP guidance at ASC 360-10-35-30).) In addition, Richard Auter testified that, to his knowledge, PwC never analyzed whether Exxon's failure to include carbon cost assumptions in its cost projections in its 2015 impairment testing complied with GAAP, or whether including those costs would have resulted in any asset becoming impaired. (Tr. 1587:25-1590:22, 1595:25-1596:4.)

Martin Act and Executive Law § 63(12). Because the full impact of Exxon's failure to apply the publicly disclosed carbon costs was never revealed to investors, Exxon should be required to disclose the range of costs used every year since 2014, as well as those it uses over the next four years, overseen by an independent monitor who will publish annual reports.

Restitution is also appropriate because, as Dr. Bartov's event study found,[16] Exxon's stock price was inflated as a result of its misrepresentations, and then declined when there was a series of corrective disclosures. Dr. Bartov and Dr. Ferrell agree that there was a statistically significant decline in Exxon's stock price at market close following the announcement, in a January 20, 2016 article in the *Los Angeles Times*, of the California Attorney General's investigation into Exxon's climate risk practices. (Tr. 1203:2-17, 1212:14-18, 2005:12-17; JX973 ¶ 65; DX711-17.) Dr. Bartov concluded that the revelation implicit in this article – that Exxon may have misrepresented its exposure to future climate regulations – caused the stock price decline.

Dr. Ferrell's argument that the stock drop was not caused by this news is flawed. First, Dr. Ferrell improperly used a close-to-open window instead of the standard close-to-close window. In doing so, Dr. Ferrell assumed that all relevant information was assimilated by the market between the article's 6:00 a.m. publication and the opening bell at 9:30 a.m. As Dr. Bartov testified, even highly efficient markets need time to assess new information, and close-to-close is therefore the "minimum length of window" supported by academic research. (Tr. 1230:5-1231:25.) Moreover, to support his deviation from the industry standard, Dr. Ferrell relied entirely on a single unpublished article that has not been peer reviewed. (Tr. 2007:4-12.) Second, Dr. Ferrell admitted that he had no alternate explanation for Exxon's price movement on January 20, 2016, leaving Dr. Bartov's conclusion as the only reasoned explanation for the stock drop. (Tr. 2010:22-2011:1,

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[16] It is undisputed that event studies are the standard method for determining whether a company's stock was artificially inflated as a result of alleged misrepresentations. (Tr. 1957:19-23, 2001:7-10 (testimony of Dr. Ferrell).)

2013:12-19.) It is undisputed that, using a close-to-close window, the January 20, 2016 disclosure caused a stock drop of 2.14%, with 98% certainty. (JX973-45; Tr. 1207:19-1208:7, 2021:3-8.)

Exxon's argument that announcements of investigations are not "corrective" because they do not contain the company's own admissions misses the mark. Announcements of investigations into an aspect of a company's business have been found to constitute corrective disclosures as to the company's practices in that area. *See, e.g.*, *Kux–Kardos v. VimpelCom, Ltd.*, 151 F. Supp. 3d 471, 477 (S.D.N.Y. 2016) ("as various courts have found, the announcement of . . . investigations may qualify as partial disclosures for purposes of loss causation" (internal quotation marks omitted)). The announcement of an investigation constitutes a corrective disclosure when it "reveal[s] to the market a potential problem . . . that had previously been concealed by the defendant['s] alleged misstatements." *In re New Oriental Educ. & Tech. Grp. Secs. Litig.*, 988 F. Supp. 2d 406, 428 (S.D.N.Y. 2013). Here, the January 2016 article included new information, including that the California Attorney General had opened an investigation into whether Exxon "repeatedly lied to the public and its shareholders about the risk to its business from climate change—and whether such actions could amount to securities fraud." (JX970-1.) By identifying the area of Exxon's business under investigation, the article provided ample information for the market to "link[] the announcement of the investigation to the purportedly fraudulent misconduct." *In re Bristol Myers Squibb Co. Sec. Litig.*, 586 F. Supp. 2d 148, 164 (S.D.N.Y. 2008).

That the *New York Times*, on November 5, 2015, had previously announced an investigation by the *New York* Attorney General is immaterial. To the contrary, "[i]t is . . . clear that a corrective disclosure need not take the form of a single announcement, but rather, can occur through a series of disclosing events." *Bristol Myers*, 586 F. Supp. 2d at 165. The November 2015 and January 2016 articles were "different phenomena that may exert different influences" on

Exxon's stock price. *In re Openwave Sys. Sec. Litig.*, 528 F. Supp. 2d 236, 253 (S.D.N.Y. 2007).[17] In fact, a federal court recently rejected Dr. Ferrell's argument that allegations described in a news article were "already known to the market" from information in earlier articles. *In re Signet Jewelers Ltd. Sec. Litig.*, No. 16-CV-6728, 2019 WL 3001084, *16 (S.D.N.Y. July 10, 2019) ("Professor Ferrell's contention that the market was fully apprised of all material facts contained in the *Washington Post* article prior to that article's publication is simply not correct."). The court also rejected Dr. Ferrell's claim that a stock price decline was due to "bad publicity," as that possibility did not negate the impact of the underlying misstatements. *Id.* at *17.

While a 5% confidence level, which the January 2016 disclosure clearly meets, is the general standard for statistical significance, there is support for considering two other corrective disclosures that are significant at a 10% level. These disclosures are: (1) the announcement of an SEC investigation on September 20, 2016, which caused, with 91.8% certainty, a stock drop of 1.72%; and (2) news of the New York Attorney General's June 2, 2017 filing in this Court, which caused, with 94.9% certainty, a stock drop of 1.43%. (JX973 ¶¶ 67-68; *id.* at Ex. 5, p. 45.) As one federal court recently observed, "while a return at the 5.01% level allows for a weaker inference of price impact than a return at the 4.99% level, it still allows for *some* inference." *In re Chicago Bridge & Iron Co. N.V. Secs. Litig.*, No. 17-CV-01580, 2019 WL 5287980, at *13 (S.D.N.Y. Oct. 18, 2019). Here, the June 2, 2017 event fell just one-tenth of one percent short of the 5% significance level. Given the applicable preponderance of the evidence standard, there is no compelling reason to ignore a finding so close to the threshold for statistical significance.[18]

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[17] *See also Pirnik v. Fiat Chrysler Automobiles, N.V.*, 327 F.R.D. 38, 45-46 (S.D.N.Y. 2018) (crediting reports of investigations as corrective disclosures); *In re Gentiva Sec. Litig.*, 932 F. Supp. 2d 352, 388 (E.D.N.Y. 2013); *In re Apollo Group, Inc. Sec. Litig.*, No. CV-10-1735, 2011 WL 5101787, *17 (D. Ariz. Oct. 27, 2011) (same).

[18] In addition, Dr. Bartov and Dr. Ferrell both identified an abnormal negative return in Exxon's stock price when the New York Attorney General's investigation was announced on November 5, 2015, albeit at a statistically insignificant level. (JX973-45; DX711-17.) Because absence of evidence is not evidence of absence, no conclusion

Case 18-1170, Document 271, 12/03/2019, 2720278, Page33 of 34

Dr. Ferrell also claims that the absence of a statistically significant price response to the release of the March 31, 2014 reports is "inconsistent" with Dr. Bartov's conclusion that Exxon's stock price was artificially inflated as a result of the alleged misrepresentations. (Tr. 1965:25-1967:13.) But "securities-fraud defendants cannot avoid liability for an alleged misstatement merely because the misstatement is not associated with an uptick in inflation." *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 259 (2d Cir. 2016).[19] For example, the misstatement may be consistent with what the company had stated previously, or with what investors assumed in the absence of a specific statement from the company. *Id.* Here, Dr. Ferrell acknowledged that he did not analyze whether *Managing the Risks* and *Energy and Climate* were consistent with Exxon's earlier disclosures. (Tr. 2024:7-18.) And notably, Exxon's 2013 *Outlook for Energy* report included the same proxy cost map featured in the later reports. (JX912-36.) Ultimately, as Dr. Bartov explained (Tr. 1233:8-1235:3, 1338:25-1339:16), assessing potential stock price movement when *Managing the Risks* and *Energy and Climate* were published is not relevant to the inflation analysis.

Finally, based on the stock price inflation that Dr. Bartov analyzed, Mr. Boukouzis estimated aggregate shareholder losses of $476 million to $1.6 billion. (JX972 § VII.) Because that is an aggregate estimate, we agree with Dr. Ferrell that a shareholder claims process would be the most equitable way to administer restitution in this matter. (Tr. 2026:8-13; DX711-29.)

CONCLUSION

The OAG respectfully submits that it has established at trial Exxon's liability under the Martin Act and Executive Law § 63(12), along with the appropriateness of the requested relief.

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either way as to price inflation can be drawn from that result. *See Monroe Cnty. Employees' Ret. Sys. v. S. Co.*, No. 1:17-CV-00241, 2019 WL 3956139, at *20 (N.D. Ga. Aug. 22, 2019).

[19] *See also id.* at 259-60 ("This method of measuring actual inflation, without reference to the timing or nature of a defendant's alleged misstatements, is commonly employed by experts who provide testimony on loss causation and/or damages in securities-fraud cases.") (collecting cases).

Case 18-1170, Document 271, 12/03/2019, 2720278, Page34 of 34

Dated: New York, New York
November 18, 2019

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