COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-13211

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff-Appellee,

v.

EXXON MOBIL CORPORATION,

Defendant-Appellant.

ON APPEAL FROM SUFFOLK SUPERIOR COURT
CIVIL ACTION NO. 1984-03333-BLS1

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The Commonwealth does not deny challenging Exxon Mobil Corporation's ("ExxonMobil") petitioning activity. Br. 48-49. Nor could it. The complaint accuses ExxonMobil of deception for allegedly petitioning against "fuel economy and emission standards for passenger vehicles." J.A. I-169-70, I-198-200. While the Commonwealth may disagree with ExxonMobil's alleged advocacy, it cannot dispute that lobbying about the appropriateness of proposed regulations is a core exercise of the right to petition.

The Commonwealth's complaint targets many statements precisely because ExxonMobil allegedly "attempted to influence" energy policy and allegedly "urg[ed] delay in regulatory action." J.A. I-62, I-200. The Commonwealth does not defend the multiple allegations in its complaint that expressly target protected petitioning activity. It instead pivots away from its own allegations by focusing on ExxonMobil's alleged "wholly commercial goals" in speaking to investors and consumers. Br. 44. But that is no answer. Motive is irrelevant at the first stage of the anti-SLAPP inquiry, and for good reason. Virtually all petitioning activity is motivated by some form of self-interest, including financial interest. Focusing on subjective

motives would exempt from coverage any petitioning that allegedly relates to a speaker's business, financial, or other personal interests. The anti-SLAPP statute is not so narrowly circumscribed.

Because the Commonwealth bases its claims on ExxonMobil's petitioning, the complaint should be dismissed in its entirety. But even in denying ExxonMobil's special motion to dismiss, the Superior Court recognized that some of ExxonMobil's statements "constitute protected petitioning." Add-39. That finding alone supports at least partial relief here. The Commonwealth should not be allowed to proceed with claims insofar as they are based on protected petitioning activity.

Recognizing that it cannot defend its actions on the merits, the Commonwealth asks this Court for judicially-created immunity from the anti-SLAPP statute. Nothing in the text or history of the statute supports such a carve out, and Massachusetts courts, including this Court, have long applied the anti-SLAPP statute to state actors. Indeed, the notion that state actors should be less accountable in protecting the right to petition turns the law on its head. The Attorney General's allegations of unwarranted delay caused by the anti-SLAPP motion and appeal are also unsupported. The anti-SLAPP motion in this case was

filed, argued, and decided simultaneously with a Rule 12(b) motion to dismiss.[1]

This Court should conclude that the Commonwealth's claims are based on ExxonMobil's petitioning and remand the case to the Superior Court for further proceedings.

ARGUMENT

I. Each of the Commonwealth's Claims Is Based on ExxonMobil's Petitioning Activity

The Commonwealth's claims are each based solely on ExxonMobil's petitioning activity. The challenged statements were reasonably likely to influence policymakers and the public on energy policy and climate change, and therefore fall within the broad statutory definition of "petitioning."

The anti-SLAPP statute defines "petitioning" broadly to include "any written or oral statement" that, among other things, is "reasonably likely to enlist public participation in an effort to effect" consideration

[1] The Commonwealth also accuses ExxonMobil of delay by not producing documents in response to its civil investigative demand ("CID"). Br. 17. That accusation is meritless. The Attorney General proposed a tolling agreement that relieved ExxonMobil of any obligation to comply with the CID pending appeal, and ExxonMobil accepted those terms. J.A. I-397.

of an issue by government. G.L. c. 231, § 59H.[2] Consistent with the statute's plain language, this Court has construed "petitioning" to "encompass a 'very broad' range of activities." *N. Am. Expositions Co.* v. *Corcoran*, 452 Mass. 852, 861 (2009) (citing *Duracraft Corp.* v. *Holmes Prods. Corp.*, 427 Mass. 156, 161-62 (1998)).

The Commonwealth argues that, because ExxonMobil's statements appear in corporate reports, advertising, and media campaigns, "none of the challenged [] statements can even fairly be described as petitioning." Br. 44. Even the Superior Court did not take such a narrow view of petitioning, recognizing that at least some of ExxonMobil's statements "constitute protected petitioning." Add-39. Yet the Commonwealth now ignores what it emphasized in the complaint: the challenged statements explain ExxonMobil's views on the risks of climate change, advocate for particular energy policies under consideration by government, and were made in response to "increasing calls on governments to declare a climate emergency." J.A. I-36.

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[2] That definition includes ExxonMobil's alleged "omission" from its petitioning of policy positions favored by the Commonwealth. *See* Appellant's Br. 43-49.

First, the Commonwealth argues that its investor deception claim is not based on petitioning activity because it targets "ongoing communications with Massachusetts investors" through corporate reports and in-person discussions about the risks of climate change. Br. 41-42. But the fact that these communications were made in public investor reports does not render such statements unprotected. *See Plante* v. *Wylie*, 63 Mass. App. Ct. 151, 159 (2005). Instead, the relevant inquiry is whether the statements were "made to influence, inform, or at the very least, reach governmental bodies—either directly *or indirectly*." *Corcoran*, 452 Mass. at 862 (emphasis added) (quoting *Global NAPS, Inc.* v. *Verizon New England, Inc.*, 63 Mass. App. Ct. 600, 605 (2005)).

Through these investor communications, ExxonMobil shares its views on energy demand projections, the risks associated with climate change, and regulatory responses to climate change. J.A. I-84-88, I-113-119, I-145-56, I-743-44. The Commonwealth expressly acknowledges that these communications were intended not merely to provide information to investors, but to "proactively engag[e] regulators," "the public," "thought-leaders," and "policy makers" on climate change by sharing "policy positions." J.A. I-148. These

communications were therefore "issued in a manner that was likely to influence or, at the very least, reach" regulators and "members of the public wishing to weigh in" on energy policy. *Blanchard* v. *Steward Carney Hosp., Inc.*, 477 Mass. 141, 151 (2017).

Second, the Commonwealth argues that its consumer deception claim relating to ExxonMobil's Synergy and Mobil 1 products is based only on commercial advertising. Br. 42. But ExxonMobil's statements represent more than just an attempt to market specific products. These statements amplify the company's views regarding the relative environmental benefits of "cleaner" fossil fuel products as an option to balance the rising demand for affordable, reliable energy with the need to reduce greenhouse gas emissions. *See Cardno ChemRisk, LLC* v. *Foytlin*, 476 Mass. 479, 485 (2017) (online statements made as part of "ongoing efforts to influence governmental bodies by increasing the amount and tenor of coverage" around an environmental issue constituted petitioning). These statements are therefore reasonably likely to enlist public participation in the larger public policy debate over the dual challenge of reducing emissions while providing affordable energy.

Third, the Commonwealth claims that its "greenwashing" allegations are based on "brand-marketing campaigns" relating to ExxonMobil's efforts to reduce emissions. Br. 43. But ExxonMobil's statements—including those about its research and development of lower-emission solutions like algae-based biofuels and carbon capture—publicly voice and seek to engage support for alternative energy sources under consideration by various levels of government.[3] These statements are "reasonably likely" to encourage government consideration of lower-emission technologies and galvanize public support to that end. G.L. c. 231, § 59H.

Finally, the Commonwealth contends that its claims are not based "solely" on ExxonMobil's petitioning activity. Br. 44. But careful consideration of ExxonMobil's statements reveals that they all fall within the broad definition of petitioning. The premise of each count is that ExxonMobil has misled consumers and investors by

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[3] For example, in 2019, ExxonMobil signed a $100 million agreement with the Department of Energy to "explore ways to bring biofuels and carbon capture and storage to commercial scale across the power generation, transportation, and manufacturing sectors." U.S. Dep't of Energy, *DOE National Labs Partner with ExxonMobil for $100 Million in Joint Research* (May 8, 2019), https://www.energy.gov/articles/doe-national-labspartner-exxonmobil-100-million-joint-research.

presenting its views on climate policy and not adopting those of the Commonwealth. The claims are therefore based solely on ExxonMobil's petitioning activity.

II. Commercial Motivations for Petitioning Activity Are Neither Relevant Nor Disqualifying

In its opening brief, ExxonMobil established that commercial motivations for petitioning are neither relevant nor disqualifying at the threshold stage. Appellant's Br. 37-41. The Commonwealth counters by arguing—incorrectly—that commercial motivations can disqualify petitioning from protection under the anti-SLAPP statute. Br. 44-45. It is well established that "motivation for engaging in petitioning activity does not factor into whether [ExxonMobil] has met its threshold burden." *477 Harrison Ave., LLC* v. *Jace Boston, LLC*, 477 Mass. 162, 168 (2017).[4]

The Commonwealth nonetheless argues that ExxonMobil's publications like its 2018 *Energy Outlook* are intended only for

[4] The Commonwealth argues that "a commercial motive may provide *evidence* that particular statements" are not petitioning. Br. 45 (citing *Fustolo* v. *Hollander*, 455 Mass. 861, 870 n.11 (2010)). But even the *Fustolo* court recognized that "speech may constitute protected petitioning activity even if it 'involves a commercial motive.'" *Id.* at 870 (quoting *Corcoran*, 452 Mass. at 863).

investors interested in business strategies and investment plans. Br. 46. That is not true. The *Energy Outlook* itself discusses at length how energy policy must "help manage the risks of climate change while also enabling societies to pursue other high-priority goals," including "access to reliable, affordable energy." J.A. II-41. It does not matter that these statements about climate risks and regulation "are communicated to other private citizens rather than directly to the government." *Plante*, 63 Mass. App. Ct. at 159.

Similarly, the Commonwealth takes aim at ExxonMobil's "corporate messaging" on climate change. Br. 47. But many of ExxonMobil's statements—including those about its investments in lower-emission technologies—are meant to publicly advocate for alternative energy sources under consideration by various levels of government. While such statements may conceivably promote ExxonMobil's commercial interests, they constitute petitioning because they are related to the "objective of convincing" regulators to permit operations and endorse new technologies. *Blanchard*, 477 Mass. at 151.

The Commonwealth next urges a "nexus" requirement alien to this Court's precedents. It attempts to distinguish *Blanchard* by noting

that the statements there were linked "in substance and time" to an agency decision to terminate a hospital license. Br. 47-48. But there is no requirement of a nexus between the relevant statement and a specific government proceeding. Petitioning includes "all statements made to influence, inform, or at the very least, reach governmental bodies—either directly *or indirectly*." *Corcoran*, 452 Mass. at 862 (emphasis added) (citation omitted). As this Court has recognized, "[s]tatements made outside any formal governmental proceedings have often been considered petitioning activity." *Id.* In any event, the Commonwealth acknowledges the challenged statements were made in response to growing calls to declare a climate emergency such that any "substance and time" link is easily met.

The Commonwealth's reliance on *Cadle Co.* v. *Schlichtmann*, 448 Mass. 242 (2007), is misplaced. In that case, this Court held that advertising on an attorney's website was clearly designed "to attract clients to his law practice" even if it included references to complaints and other court papers. *Id.* at 250. By contrast, ExxonMobil's statements "proactively engag[e] regulators" and "policy makers" on climate change by sharing "policy positions." J.A. I-148. And many statements—particularly those about lower-emission investments—do

not even purport to sell or market any commercially available products or services. *Cadle* therefore "involved very different circumstances" from ExxonMobil's advocacy, even if such advocacy was also commercially motivated. *Corcoran*, 452 Mass. at 863.

III. The Superior Court's Findings Support at Least a Partial Dismissal of the Claims

For the reasons stated above, the Superior Court should have held that the Commonwealth's claims are based solely on ExxonMobil's petitioning. The Superior Court did not go that far, holding only that some of ExxonMobil's statements "constitute protected petitioning within the scope of § 59H." Add-39. But even that finding supports partial relief. The Commonwealth should not be allowed to proceed with claims insofar as they are based on protected petitioning activity.

The Commonwealth's only defense is to distract this Court from the petitioning activity that forms the basis for its claims. But the complaint alleges that ExxonMobil misleads consumers whenever it says it is seeking to reduce emissions without simultaneously disclosing that it is allegedly "waging a secretive campaign" against "fuel economy and emissions standards." J.A. I-169, I-199-200. The Commonwealth similarly faults ExxonMobil for allegedly "attempt[ing] to influence the European Union Commission to abandon

its strict carbon dioxide emissions standards" and spending approximately $41 million per year to oppose such regulations. J.A. I-200. These factual allegations form the very basis for the Commonwealth's claims.

It is no answer for the Commonwealth to characterize these petitioning activities as mere "evidence of liability" rather than the basis for a claim. Br. 49 (citing *Park* v. *Bd. of Trs. of Cal. State Univ.*, 393 P.3d 905 (Cal. 2017)). In *Park*, a professor alleged discrimination after he had been denied tenure, and the university responded by filing an anti-SLAPP motion. 393 P.3d at 907. The California Supreme Court explained that speech or petitioning provides *evidence* of liability when it leads to the challenged action at issue or evidences "an illicit motive." *Id.* at 911. By contrast, speech or petitioning provides the *basis* for liability when it "suppl[ies] elements of the challenged claim." *Id.* at 909. Based on that distinction, the California Supreme Court held that the professor's discrimination claim arose from "the denial of tenure itself," and prejudicial statements made by the university were mere evidence of discriminatory animus. *Id.* at 912.

Unlike *Park*, the Commonwealth brings this action *because of* ExxonMobil's petitioning which, as alleged, is "yet another example of

ExxonMobil's continuing focus on delaying meaningful policy responses to climate change." J.A. I-200. The complaint alleges that ExxonMobil's statements are misleading precisely because they do not publicly disclose that the company has allegedly lobbied against "fuel economy and emissions standards." J.A. I-169-70, I-199-200. The petitioning activity supplies the very acts (or omissions) on which liability is based.

The Commonwealth further argues that its claims are based on a "course of conduct," suggesting that the Court need not separate the petitioning activity from the non-petitioning activity. Br. 50. But the Commonwealth's cases all involved a course of conduct that had little, if anything, to do with protected petitioning activity. *See 477 Harrison*, 477 Mass. at 170 (false insurance claims "do not bear any apparent relation" to use of process); *Haverhill Stem LLC* v. *Jennings*, 99 Mass. App. Ct. 626, 633 (2021) (threats and coercion "not reasonably related" to zoning opposition); *Reichenbach* v. *Haydock*, 92 Mass. App. Ct. 567, 575 (2017) (same).

Here, by contrast, the Commonwealth's Chapter 93A claims are based on quintessential petitioning activity such as ExxonMobil's lobbying about regulations. The Commonwealth should not be allowed

to base its claims on petitioning activity and then avoid application of the anti-SLAPP statute by including non-petitioning activity as a further basis for the claims.

Finally, the Commonwealth incorrectly claims that ExxonMobil has waived its argument for a partial dismissal. Br. 51. ExxonMobil sought a complete dismissal below because the Commonwealth's claims have no substantial basis apart from petitioning activity. J.A. I-249. It continues to seek that relief on appeal. A partial dismissal is simply a lesser-included version of the relief sought and has been adequately preserved.

IV. The Anti-SLAPP Statute Applies to Civil Claims Brought by the Commonwealth

Seeking to avoid the merits altogether, the Commonwealth claims immunity from the anti-SLAPP statute. Specifically, the Commonwealth attempts to rewrite the statute by adding a provision exempting *all* of its civil actions, including this one, from coverage. But a special carve out for the Commonwealth is inconsistent with the statute's plain language and history. And it would set a dangerous precedent by immunizing the government from a statutory remedy meant to protect the right to petition the *government*. When it comes

to protecting the right to petition, the Commonwealth should be held to a higher standard, not a lesser one or none at all.

A. The Statute's Plain Text Applies to All Civil Cases

By its very terms, the anti-SLAPP statute applies "*[i]n any case* in which a party asserts that the civil claims . . . are based on said party's exercise of its right of petition." G.L. c. 231, § 59H (emphasis added). Recognizing that the "general terms" "any case" and "party" plainly encompass its civil actions, the Commonwealth redefines these terms to mean something other than what they say. Br. 31. But where, as here, "the language of the statute is clear," this Court must "interpret it according to its ordinary meaning." *Guzman* v. *Commonwealth*, 458 Mass. 354, 361 (2010).

The Legislature could have easily inserted language expressly exempting the Commonwealth from anti-SLAPP coverage, as other jurisdictions have done.[5] But the statute's text contains no such exemption. Indeed, by expressly applying in "*any* case" in which a party challenges "*civil* claims," the anti-SLAPP statute creates an exemption for *criminal* prosecutions brought by the Commonwealth,

[5] *See, e.g.*, Cal. Code of Civ. Proc. § 425.16(d); Tex. Civ. Prac. & Rem. Code § 27.010(a)(1).

but not an exemption for the Commonwealth's civil cases. G.L. c. 231, § 59H (emphasis added).

The Commonwealth next relies on the rule of statutory construction that general words in a statute—such as "persons" or "corporations"—are not ordinarily construed to include the State or its political subdivisions unless the Legislature expressly says so. Br. 28-29.[6] But the anti-SLAPP statute does not speak of "persons" or "corporations." It refers to "party," which fairly encompasses the Commonwealth when it appears in civil litigation. *See, e.g.*, G.L. c. 12, § 3 (requiring the Attorney General to "appear for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party").

The Commonwealth then pivots to a separate provision authorizing the Attorney General to intervene in a SLAPP suit. According to the Commonwealth, that provision proves "the Legislature did not intend the general term 'party' to include the

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[6] *See, e.g.*, *Hansen* v. *Commonwealth*, 344 Mass. 214, 219-20 (1962) (Commonwealth not a "person" for purposes of "labor disputes" subject to the Anti-Injunction Act); *Donohue* v. *City of Newburyport*, 211 Mass. 561, 569 (1912) (city not a business "corporation" for purposes of negligence statute).

government." Br. 31. But that provision means what it says: the Attorney General "may" in its discretion "intervene to defend or otherwise support the moving party." G.L. c. 231, § 59H. The provision gives the Attorney General the option to intervene in a case where it otherwise would not be involved. It does not mean, by implication, that the Legislature intended to affirmatively exclude the Commonwealth as a "party."

The Commonwealth next argues that it is not a "party" because the Legislature did not expressly authorize a prevailing party under the statute to recover costs and fees from the Commonwealth. Br. 32. But Mass. R. Civ. P. 54(d) states that costs may be imposed against the Commonwealth "to the extent permitted by law." That permission comes from the anti-SLAPP statute itself, which authorizes an award of costs and fees against the losing party. *See* G.L. c. 231, § 59H. Even assuming the Commonwealth is correct, and the statute does not authorize an award of costs against the government, it does not mean that the Commonwealth is categorically exempt from coverage. It simply means that a prevailing party may be entitled to dismissal of a SLAPP suit brought by the Commonwealth, but not costs and fees.

B. The Legislature Intended for the Statute to Be Construed Broadly

The Commonwealth next argues that the statute reaches only "typical" SLAPP suits: "lawsuits filed by private interests to chill the valid exercise of the constitutional right to petition." Br. 33. Even if the Commonwealth is correct about what a "typical" SLAPP suit looks like, this Court has recognized that "the Legislature intended to go beyond the 'typical' case by enacting 'very broad protection for petitioning activities.'" *Baker* v. *Parsons*, 434 Mass. 543, 549 (2001) (quoting *Duracraft*, 427 Mass. at 161-62). The statute is not constrained to the "typical" SLAPP suit that might have prevailed at the time of enactment in the early 1990s.

The legislative history supports this Court's conclusion. Governor Weld vetoed the bill based on concerns that it "applies to a broad group of potential claims, sweeping in cases that are far beyond the types of lawsuits which the bill's proponents wish to control." Add-44. In the Governor's view, the bill should have applied only to "retaliatory lawsuits brought by developers against citizens who resort to lawful procedures to challenge real estate development." *Id.* But the bill, as written, effectively "covers any statement on a policy issue." *Id.* The Legislature rejected the Governor's concerns about general

applicability, overriding his veto by an overwhelming margin. Add. 46-48. That history provides no basis to artificially limit the statute's reach.

C. Massachusetts Courts Have Long Applied the Statute to State Actors

Massachusetts courts have long applied the anti-SLAPP statute to state actors who are parties in civil litigation. For example, in *Town of Hanover* v. *New Eng. Reg'l Council of Carpenters*, 467 Mass. 587 (2014),[7] the Town of Hanover filed a complaint alleging that a trade association had engaged in abuse of process by supporting a taxpayer litigation, without being named a party, against the town. *Id.* at 589. The trade association responded by filing a special motion to dismiss under the anti-SLAPP statute. *Id.*

On appeal, this Court reversed the denial of the special motion to dismiss, holding that "support of litigation constitutes protected petitioning activity." *Id.* at 588. Applying the statute against a governmental entity, this Court observed that its decision was "in

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[7] *See also* Add-49 (*Healer* v. *Dep't of Env't Prot.*, 2006 WL 4526748, at *5 (Mass. Super. Ct. Dec. 22, 2006) (granting special motion to dismiss counterclaims asserted by town), *vacated in part on other grounds*, 73 Mass. App. Ct. 714 (2009)).

accord with the reasons underlying the statute's enactment" including "to protect the right to petition the government for 'the redress of grievances' guaranteed by the United States Constitution." *Id.* at 594 (quoting *Duracraft*, 427 Mass. at 161).

The Commonwealth does not even attempt to distinguish, much less cite, this precedent. Instead, the Commonwealth relies on several out-of-state cases interpreting different statutes. Br. 34-36. Those cases are not binding and, in any event, are inapposite. For example, in *People* v. *Health Laboratories of North America Inc.*, 87 Cal. App. 4th 442, 445 (2001), a California court rejected a challenge to an express exemption in the text of the California anti-SLAPP statute stating that it "shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor." Cal. Code Civ. Proc. § 425.16(d). As the Commonwealth concedes (Br. 36 n.10), no such exemption exists in the text of the Massachusetts anti-SLAPP statute.

Similarly, in *Town of Madawaska* v. *Cayer*, 103 A.3d 547, 552 (Me. 2014), the Maine Supreme Court declined to apply its anti-SLAPP statute to an enforcement action brought by a town. Here, by contrast,

this Court has already applied the Massachusetts anti-SLAPP statute against a town consistent with the statute's text and history. *See Hanover*, 467 Mass. at 594-97. Even the Maine Supreme Court acknowledged that "extraordinary circumstances" could warrant the application of the anti-SLAPP statute to a government enforcement action. *Madawaska*, 103 A.3d at 552.

Finally, the Commonwealth argues that applying the anti-SLAPP statute to civil law enforcement actions could lead to "widespread abuse" by corporations. Br. 37. But the statute has been on the books since 1994, and the Commonwealth's warning about "harassment, abuse, and wastefulness" has not come to pass in almost thirty years. *Id.* The real potential for abuse would arise from granting the government immunity from a generally applicable statutory remedy that protects the right to petition. When the government threatens fundamental rights, the First Amendment teaches that "the remedy to be applied is more speech, not enforced silence." *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

V. The Commonwealth Prematurely and Unpersuasively Addresses the Second Stage of the Anti-SLAPP Inquiry

For the reasons stated above, ExxonMobil has carried its threshold burden, and this case should be remanded to the Superior

Court to determine whether the suit is a SLAPP. The Commonwealth prematurely asks this Court to reach this second stage of the anti-SLAPP inquiry, even though the issue was not addressed by the Superior Court, and it is not at issue on this appeal.

If this Court were to reach the question, the record demonstrates that this action is a SLAPP. At the second stage, the Commonwealth must demonstrate that (i) the petitioning activity is devoid of any legal or factual support, or (ii) the claims are not a meritless SLAPP brought primarily to chill ExxonMobil's petitioning activity. *See 477 Harrison Ave., LLC* v. *JACE Boston, LLC*, 483 Mass. 514, 518-19 (2019). The Commonwealth concedes that the second—"fair assurance"—test is "more burdensome" than the standard on a motion to dismiss. Br. 35.

The Commonwealth does not argue that ExxonMobil's petitioning activity was devoid of factual or legal support. It instead attempts to meet its heightened burden under the "fair assurance" test by arguing that its claims are "colorable" and not "retaliatory." Br. 52. While the Commonwealth's claims may have survived a motion to dismiss, very similar investor deception claims brought by the New York Attorney General were already found to be "without merit" and the "result of an ill-conceived initiative." Add-55, 73. Even assuming

the Commonwealth's claims are colorable, its lawsuit retaliates against ExxonMobil for exercising its right to petition on issues of climate change and energy policy. Even in announcing its lawsuit, the Attorney General blamed ExxonMobil for delaying "the urgent need to reduce greenhouse gas emissions." J.A. I-405.[8]

The Commonwealth also seeks to circumvent its burden by invoking a "presumption of regularity" ordinarily accorded to criminal prosecutors. Br. 57. In trying to extend this protection to civil enforcement actions, the Attorney General relies on a nearly 90-year old case, which stands only for the proposition that a public works officer is presumed to issue permits legally and in good faith absent contrary evidence. Br. 57 (citing *General Outdoor Advert. Co.* v. *Dep't of Public Works*, 289 Mass. 149, 192 (1935)). The irrelevance of that presumption demonstrates that the Commonwealth's position has no support in law. Even if such a presumption did attach, it is sufficiently rebutted by the Commonwealth's retaliatory motives. *See Hartman* v. *Moore*, 547 U.S. 250, 263-65 (2006).

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[8] ExxonMobil's federal constitutional challenge to the Commonwealth's CID remains pending in the Second Circuit, where oral argument was held nearly two years ago. *See Exxon Mobil Corp.* v. *Healey*, No. 18-1170 (2d Cir. 2020).

CONCLUSION

The Commonwealth's claims are based on ExxonMobil's statements about climate change and energy policy. Those statements constitute protected petitioning activity even if they are made to defend ExxonMobil's reputation or advance its commercial interests. This Court should reject the Commonwealth's efforts to distance itself from the content of its complaint and to seek immunity by rewriting the statute. The Superior Court's decision should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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Dated: January 27, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the rules of court that pertain to the filing of briefs, including Mass. R.A.P. 16(e) (references to the record), Mass. R.A.P. 18 (appendix to the brief), Mass R.A.P. 20 (form and length of briefs, appendices, and other documents), Mass R.A.P. 21 (redaction); and

2. This brief complies with Mass. R.A.P. 20 because the brief was prepared using Microsoft Word with 14-point, Times New Roman font, and this brief consists of 4,482 words, excluding the parts exempted by Mass. R.A.P. 20(a)(2)(D).

Dated: January 27, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on, January 27, 2022, I served Appellant's Reply Brief and Addendum by the Electronic Filing System and electronic mail on:

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ADDENDUM

Decision of the Superior Court

Statute

Legislative History

Miscellaneous

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1984CV03333-BLS1

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COMMONWEALTH OF MASSACHUSETTS

vs.

EXXON MOBIL CORPORATION

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S SPECIAL MOTION TO DISMISS THE AMENDED COMPLAINT

The Commonwealth of Massachusetts, by its Attorney General ("Commonwealth"), sued Exxon Mobil Corporation ("Exxon") for alleged violations of G.L. c. 93A. The Commonwealth claims that Exxon has violated c. 93A by: (1) misrepresenting and failing to disclose material facts regarding systemic climate change risks to Massachusetts investors (Count I); (2) misrepresenting the purported environmental benefit of using its Synergy™ and Mobil 1™ products and failing to disclose the risks of climate change caused by its fossil fuel products to Massachusetts consumers (Count II); and (3) promoting false and misleading "greenwashing" campaigns to Massachusetts consumers (Count III).

The matter is now before me on Exxon's Special Motion to Dismiss pursuant to the anti-SLAPP ("Strategic Litigation against Public Participation") statute, G.L. c. 231, § 59H. After a hearing and for the reasons that follow, Exxon's motion is **DENIED**.

DISCUSSION

The Massachusetts Legislature enacted the anti-SLAPP statute to counteract "SLAPP" suits, defined broadly as "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *Duracraft Corp.* v. *Holmes Prods. Corp.*, 427 Mass. 156, 161 (1998) (objective of SLAPP suit is not to

win, but to use litigation to intimidate opponents' exercise of rights of petitioning and speech). Generally, a SLAPP suit has no merit. See *Cadle Co.* v. *Schlichtmann*, 448 Mass. 242, 248 (2007).

The anti-SLAPP statute protects "a party's exercise of its right of petition." G.L. c. 231, § 59H. In relevant part, it provides:

> In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss.

That definition makes clear that "'the statute is designed to protect overtures to the government by parties petitioning in their status as citizens .... The right of petition contemplated by the Legislature is thus one in which a party seeks some redress from the government.'" *Fustolo* v. *Hollander*, 455 Mass. 861, 866 (2010), quoting *Kobrin* v. *Gastfriend*, 443 Mass. 327, 332-333 (2005). The anti-SLAPP statute defines "a party's exercise of its right to petition" as:

> [1] any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; [2] any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; [3] any statement reasonably likely to encourage consideration or review of an issue by a legislative executive, or judicial body or any other governmental proceeding; [4] any statement reasonably likely to enlist public participation in an effort to effect such consideration; or [5] any other statement falling within constitutional protection of the right to petition government.

G.L. c. 231, § 59H. For the purposes of § 59H, "[p]etitioning includes all 'statements made to influence, inform, or at the very least, reach governmental bodies—either directly or indirectly.'" *North American Expositions Co. Ltd. Partnership* v. *Corcoran*, 452 Mass. 852, 862 (2009), quoting *Global NAPS, Inc.* v. *Verizon New England, Inc.*, 63 Mass. App. Ct. 600, 605 (2005).

As the moving party, Exxon, which alleges it has been the target of a SLAPP suit, first must show, by a preponderance of the evidence, that each claim it challenges is "solely based on

[Exxon's] own petitioning activities." *Blanchard* v. *Steward Carney Hosp., Inc.*, 483 Mass. 200, 203 (2019); *Duracraft Corp.*, 427 Mass. at 167-168 (moving party must show that claims against it are based on its petitioning activities alone and have no substantial basis other than or in addition to petitioning activities); *Blanchard* v. *Steward Carney Hosp., Inc.*, 477 Mass. 141, 148 (2017) (as part of threshold burden, moving party must show that conduct complained of constitutes exercise of its right to petition). If Exxon fails to show that the only conduct about which the Commonwealth complains is petitioning activity, the court must deny the special motion to dismiss. See *Benoit* v. *Frederickson*, 454 Mass. 148, 152 (2009).[1]

If Exxon satisfies its threshold burden, then the burden shifts to the Commonwealth to demonstrate that G.L. c. 231, § 59H does not require dismissal of its claims. See *477 Harrison Ave., LLC* v. *JACE Boston, LLC*, 483 Mass. 514, 516 (2019). The Commonwealth can do so in one of two ways. First, it can establish, by a preponderance of the evidence, that "[Exxon's] exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and ... [its] acts caused actual injury to the [Commonwealth]." G.L. c. 231, § 59H. Alternatively, it can establish, "such that the motion judge can conclude with fair assurance," that each of the Commonwealth's claims is not a "'meritless'" SLAPP suit, *i.e.*, that it is both colorable and non-retaliatory. *477 Harrison Ave., LLC*, 483 Mass. at 516, 518-519, citing *Blanchard*, 477 Mass. at 159-160. If the Commonwealth does not meet its burden, the court must grant the special motion to dismiss. G.L. c. 231, § 59H.

In Count I, the conduct complained of is Exxon's alleged misrepresentation of and failure to disclose material facts regarding systemic climate change risks to Massachusetts investors. In

[1] Contrary to the Commonwealth's suggestion, *see* Commonwealth's Opposition at page 11, I may not "pass over" this threshold inquiry. A court should apply the augmented *Duracraft* framework sequentially. *477 Harrison Ave., LLC* v. *JACE Boston, LLC*, 483 Mass. 514, 515, 519 (2019).

Count II, it is Exxon's alleged misrepresentation of the purported environmental benefit of consumer use of its Synergy™ and Mobil 1™ products and failure to disclose the risks of climate change caused by its fossil fuel products to Massachusetts consumers. Count III complains of Exxon's promotion of allegedly false and misleading "greenwashing" campaigns designed to "convey a false impression that [it] is more environmentally responsible than it really is, and so to induce consumers to purchase its products." Amended Complaint, ¶ 540.

Exxon argues that its statements to investors constitute petitioning activity because they "'were issued in a manner that was likely to influence or, at the very least, reach' regulators and 'members of the public wishing to weigh in' on climate policy." Motion, page 14, quoting *Blanchard*, 477 Mass. at 151. Exxon also contends that its public statements regarding its Synergy™ and Mobil 1™ products constitute petitioning activity because, "at a minimum, this speech was intended and reasonably likely to 'enlist the participation of the public' in the [climate] policy debate at the heart of the Attorney General's lawsuit." Motion, page 15. Finally, Exxon argues that the statements the Commonwealth labels as "greenwashing" are actually its "advocacy of climate policy choices under consideration by various government and regulating bodies." Motion, page 16.[2]

Exxon has failed to meet its threshold burden of showing that the Commonwealth's claims are based *solely* on Exxon's petitioning activities.[3] As an initial matter, Exxon has

[2] Exxon does not specify in its papers which definition of § 59H applies to qualify its statements as "exercise[s] of its right of petition." When asked to do so during the hearing, Exxon responded that it relies on all of them.

[3] The parties disagree whether the anti-SLAPP statute applies to civil enforcement actions brought by the Attorney General on the Commonwealth's behalf. Because Exxon has not met its initial burden of showing that the Commonwealth's claims against it are based solely on its petitioning activities, I need not reach this issue.

entirely failed to explain how any of the omissions alleged by the Commonwealth as violating c. 93A qualify as petitioning protected by § 59H, which applies only to "statements."[4]

With respect to statements on which the Commonwealth relies, the mere fact "[t]hat a statement concerns a topic that has attracted governmental attention, in itself, does not give that statement the [petitioning] character contemplated by the statute." *Global NAPs, Inc.*, 63 Mass. App. Ct. at 605. Further, although a commercial motive may not preclude a finding that speech constitutes protected petitioning activity, it "may provide evidence that particular statements do not constitute petitioning activity." *Fustolo*, 455 Mass. at 870 & n.11, citing *North Am. Expositions Co. Ltd. Partnership*, 452 Mass. at 863. For example, speech that is intended to achieve a purely commercial result, such as increasing demand for one's products or services, is not protected petitioning activity. See *Cadle Co.*, 448 Mass. at 250-254 (defendant lawyer's publication of statements on website, allegedly to share with public information about company's allegedly unlawful business practices, which he previously provided to regulatory officials and courts, did not constitute petitioning activity where he "created the Web site, at least in part, to generate more litigation to profit himself and his law firm"); *Ehrlich* v. *Stern*, 74 Mass. App. Ct. 531, 540-542 (2009). The court considers statements in the context in which they were made in determining whether they are protected petitioning. See *Wynne* v. *Creigle*, 63 Mass. App. Ct. 246, 253 (2005).

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[4] In its complaint, the Commonwealth alleges not only misrepresentations by Exxon, but also failures to disclose information that the Commonwealth contends would be relevant to Massachusetts investors and consumers. For example, ¶ 18 of the Amended Complaint states: "In its communications with investors, including [Exxon's] supposed disclosures about climate change, ... ExxonMobil has failed to disclose the full extent of the risks of climate change to the world's people, the fossil fuel industry, and [Exxon]." Further, "[i]n its marketing and sales of ExxonMobil products to Massachusetts consumers, ... ExxonMobil likewise has failed ... to disclose in those advertisements and promotional materials that the development, refining, and normal consumer use of ExxonMobil fossil fuel products emit large volumes of greenhouse gases, which are causing global average temperatures to rise and destabilizing the global climate system." *Id.* at ¶ 33; see also ¶ 538.

Climate change indisputably is a topic that has attracted governmental attention. And, indeed, some Exxon statements referenced in the complaint constitute protected petitioning within the scope of § 59H because they were made "in connection with an issue under consideration or review by a legislative, executive, or judicial body" and/or "to encourage consideration or review of an issue by a legislative executive, or judicial body or any other governmental proceeding." However, Exxon cannot "obtain dismissal through an anti-SLAPP motion just because *some* of the allegations in the complaint are directed at conduct by the defendants that constitutes petitioning activity." *Haverhill Stem LLC* v. *Jennings*, 99 Mass. App. Ct. 626, 634 (2021). Rather, Exxon must show "that the complaint, fairly read, is based *solely* on petitioning, and to that end the allegations need to be carefully parsed even within a single count." *Id.* (emphasis in original). It is apparent from the context in which they were made that many Exxon statements referenced in the complaint are not protected. See *Cadle Co.*, 448 Mass. at 250 (attorney published statements "not as a member of the public who had been injured by … alleged practices, but as an attorney advertising his legal services").[5]

Review of a just a few of the Commonwealth's allegations suffices to demonstrate that each of its claims is not based *solely* on Exxon's petitioning activities. First, with respect to Count I, the Commonwealth alleges that Exxon has consistently represented *to investors* that it will "face virtually no meaningful transition risks from climate change because aggressive regulatory action is unlikely, renewable energy sources are uncompetitive, and fossil fuel demand and investment will continue to grow." Amended Complaint, ¶ 497. As an example,

[5] As an example, Exxon's "lobbying efforts" are arguably protected petitioning activities. But the anti-SLAPP inquiry produces an all or nothing result as to each count of the complaint. *Ehrlich*, 74 Mass. App. Ct. at 536. "Either [a] count survives the anti-SLAPP inquiry or it does not, and the statute does not create a process for parsing counts to segregate components that can proceed from those that cannot." *Id.* (citations omitted).

the Commonwealth alleges that, in its 2019 Energy and Carbon Summary issued *to investors*, Exxon modeled a scenario where global temperatures would increase by 2 degrees Celsius. Amended Complaint, ¶ 506. Exxon stated:

> [b]ased on currently anticipated production schedules, we estimate that by 2040 a substantial majority of our year-end 2017 proved reserves will have been produced. Since the 2°C scenarios average implies significant use of oil and natural gas through the middle of the century, we believe these reserves face little risk from declining demand.

Amended Complaint, ¶ 510. In the same document, Exxon claimed that its "actions to address the risks of climate change ... position ExxonMobil to meet the demands of an evolving energy system." Amended Complaint, ¶ 606. One of those "actions" is "[p]roviding products to help [Exxon's] customers reduce their emissions," including its Synergy™ fuels, which "yield better gas mileage, reduce emissions and improve engine responsiveness." *Id.*

Second, as to Count II, the Commonwealth alleges that Exxon markets its Synergy™ brand fuels *to consumers*, on *its promotional website*, as being "engineered for [b]etter gas mileage" and "[l]ower emissions." *Id.* at ¶ 595. For example, Exxon promotes its "Synergy Diesel Efficient™" fuel *to consumers* as the "latest breakthrough technology," and the "first diesel fuel widely available in the US" that helps "increase fuel economy" and "[r]educe emissions and burn cleaner," and represents that it "was created to let you drive cleaner, smarter and longer." *Id.* at ¶ 593. Finally, in support of Count III, the Commonwealth alleges that Exxon's "Protect Tomorrow. Today," *marketing campaign* amounts to deceptive "greenwashing" because Exxon falsely states that "Protect Tomorrow. Today" "defines [its] approach to the environment." *Id.* at ¶¶ 633, 639, 643.

Exxon has not shown, by a preponderance of the evidence, that it made any of these statements solely, or even primarily, to influence, inform, or reach any governmental body,

directly or indirectly. Instead, the statements appear to be directed at influencing investors to retain or purchase Exxon's securities or inducing consumers to purchase Exxon's products and thereby increase its profits. Compare *Cadle Co.*, 448 Mass. at 252 ("palpable commercial motivation behind" defendant's creation of website "so definitively undercuts" petitioning character of statements published on website) with *Cardno ChemRisk, LLC* v. *Foytlin*, 476 Mass. 479, 485-486 (2017) (activists' blog highlighting deceptive practices of company that reported on oil spill was protected petitioning activity, "implicit[ly] call[ing] for its readers to take action" to influence government). Because neither such statements nor the omissions alleged by the Commonwealth are protected under G.L. c. 59H, Exxon's special motion to dismiss must be denied.

ORDER

For the reasons stated above, it is hereby **ORDERED** that Exxon's Special Motion to Dismiss the Amended Complaint pursuant to the anti-SLAPP statute, G.L. c. 231, § 59H, is **DENIED**.

/s/ Karen F. Green
Karen F. Green
Associate Justice of the Superior Court

Dated: June 22, 2021

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title II. Actions and Proceedings Therein (Ch. 223-236)
Chapter 231. Pleading and Practice (Refs & Annos)

M.G.L.A. 231 § 59H

§ 59H. Strategic litigation against public participation; special motion to dismiss

Currentness

In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss. The court shall advance any such special motion so that it may be heard and determined as expeditiously as possible. The court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

The attorney general, on his behalf or on behalf of any government agency or subdivision to which the moving party's acts were directed, may intervene to defend or otherwise support the moving party on such special motion.

All discovery proceedings shall be stayed upon the filing of the special motion under this section; provided, however, that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted. The stay of discovery shall remain in effect until notice of entry of the order ruling on the special motion.

Said special motion to dismiss may be filed within sixty days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper.

If the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters. Nothing in this section shall affect or preclude the right of the moving party to any remedy otherwise authorized by law.

As used in this section, the words “a party's exercise of its right of petition” shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

Credits
Added by St.1994, c. 283, § 1. Amended by St.1996, c. 450, § 245.

Notes of Decisions (392)

M.G.L.A. 231 § 59H, MA ST 231 § 59H
Current through Chapter 97 of the 2021 1st Annual Session

End of Document

HOUSE . . . . . No. 5604

The Commonwealth of Massachusetts

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE DEPARTMENT
STATE HOUSE • BOSTON 02133
(617) 727-3600

WILLIAM F. WELD
GOVERNOR

ARGEO PAUL CELLUCCI
LIEUTENANT GOVERNOR

December 23, 1994

To the Honorable House of Representatives:

Pursuant to Part the Second, Chapter I, Section I, Article II of the Constitution of the Commonwealth of Massachusetts, I am returning to you unsigned House Bill No. 1520, "An Act Relative to Limiting Strategic Litigation."

Frivolous lawsuits brought to chill the public's right to petition government - often denominated SLAPP lawsuits - are condemnable and have no place in our judicial system. However, I continue to believe that in large measure the courts now possess the tools to deal with the relatively few instances in which such frivolous lawsuits are brought. The courts may hear motions to dismiss or grant summary judgment on an expedited basis and may award costs and attorney's fees where a lawsuit is frivolous. See G.L. c. 231, §6F. Moreover, victims of SLAPP lawsuits have been able to recover millions of dollars in damages in counter-suits where the SLAPP lawsuit was shown to be meritless. See Nat. Law Journal (Oct 12, 1992), p. 13.

As I outlined in my message to you dated December 9, 1994, as an additional remedy for SLAPP suits, House Bill No. 1520 goes too far. The bill applies to a broad group of potential claims, sweeping in cases that are far beyond the types of lawsuits which the bill's proponents wish to control. The bill's proponents are concerned with retaliatory lawsuits brought by developers against citizens who resort to lawful procedures to challenge real estate development. This bill as written, however, covers any claim even allegedly based in any way on a statement made in connection with or "likely to encourage" or to enlist public support for legislative, executive or judicial action. Effectively, the bill covers any statement on a policy issue. As thus vaguely framed, the bill threatens to alter substantially the balanced and long settled law in such areas as libel, slander and abuse of process.

The bill also sets up a special rule of law and a special procedure different than that in effect for any other type of litigation. Under the bill, any claim allegedly falling within its broad definition must be dismissed unless the person bringing

the suit shows that the "right to petition was devoid of any reasonable factual support or any arguable basis in law." In short, a statement is protected under this bill no matter how outrageous or defamatory, so long as any part of it had "any reasonable factual support" or some "arguable basis in law." The bill, therefore, would not only shift the normal burden of proof, but erect a nearly insurmountable barrier to a suit. This is using a bludgeon when a scalpel would do.

In my message to the House of Representatives of December 9, 1994, I proposed an amendment with a better definition than House Bill No. 1520 as to what is encompassed in the "right of petition." In addition, the amendment I proposed modified current law to allow courts to deal with SLAPP suits quickly (with limited discovery), and to require parties who wrongfully bring such actions to pay their opponents damages, fees and costs. The amendment was appropriately and narrowly tailored to deal with SLAPP lawsuits, without changing substantive and procedural law in unrelated areas. House Bill No. 1520 is not so narrowly tailored, and I conclude it would worsen, not improve, the legal system.

For these reasons, I am returning the bill unsigned.

Respectfully submitted,

William F. Weld

William F. Weld
Governor

The amendment recommended by the committee on Bills in the Third Reading, as amended, then also was adopted; and the bill (House, No. 5588, amended) was passed to be engrossed. Sent to the Senate for concurrence.

Message from the Governor — Veto.

Strategic litigation (SLAPP) lawsuits,— regulate.

A message from His Excellency the Governor returning with his objections thereto in writing the engrossed Bill relative to limiting strategic litigation (see House, No. 1520) (for message, see House, No. 5604) was filed in the Office of the Clerk on Friday, December 23.

The message was read; and, under the provisions of Article II of Section I of Chapter I of the Constitution, the House proceeded to "reconsider" the said bill.

Bill passed over veto,— yea and nay No. 206.

After debate the question on passing the bill, notwithstanding the said objections, was determined by the yeas and nays, as required by Chapter I, Section I, Article II, of the Constitution; and on the roll call 128 members voted in the affirmative and 16 in the negative.

[See Yea and Nay No. 206 in Supplement.]

Therefore the bill was passed, notwithstanding the objections of His Excellency the Governor (more than two-thirds of the members present and voting having voted in the affirmative). Sent to the Senate for its action.

Subsequently Mrs. Cuomo of North Andover asked unanimous consent to make a statement; and, there being no objection, she addressed the House as follows:

Statement of Representative Cuomo of North Andover.

MR. SPEAKER: During the taking of the above yeas and nays, I was present in the House Chamber and voted in the negative. Nevertheless I now find that due to an error in the electronic voting machine, I was recorded as having voted in the affirmative. Had the voting machine been in proper working order, I would have been recorded in the negative.

Mrs. Cuomo then moved that the statement made by her be spread upon the records of the House; and the motion prevailed.

Engrossed Bill.

Bill enacted.

The engrossed Bill prohibiting certain credit card practices involving providers of travel services (see Senate, No. 1889) (which originated in the Senate), having been certified by the Clerk to be rightly and truly prepared for final passage, was passed to be enacted; and it was signed by the Speaker and sent to the Senate.

Recesses.

Recesses.

At nine minutes after two o'clock P.M., on motion of Mr. Cox of Lowell, the House recessed until the hour of three o'clock P.M.; and at five minutes after three o'clock the House was called to order with Mr. Cox of Lowell in the Chair.

The House thereupon, on motion of Mr. Flaherty of Cambridge, took a further recess until half past three o'clock; and at that time the House was called to order with the Speaker in the Chair.

A Bill amending the laws regarding the operation of certain watercraft (House, No. 4013, amended,— on petition),— came from the House passed to be engrossed by that branch. Watercraft,— regulate.

The bill was read, the rules were suspended, on motion of Mr. Bertonazzi, and, there being no objection, the bill was read a second time and ordered to a third reading.

The bill was read a third time. Mr. Norton, for the committee on Bills in the Third Reading, reported, recommending that the bill be amended in section 4, by striking out lines 43 to 67, inclusive, and inserting in place thereof the following words:— "secretary of human services or at any other facility so sanctioned or regulated as may be established by the commonwealth or any political subdivision thereof for the purpose of alcohol or drug treatment or rehabilitation, and comply with all conditions of said residential alcohol treatment program. Such condition of probation shall specify a date before which such residential alcohol treatment program shall be attended and completed.

Failure of the defendant to comply with said conditions and any other terms of probation as imposed under this section shall be reported forthwith to the court and proceedings under the provisions of section three of chapter two hundred and seventy-nine shall be commenced. In such proceedings, such defendant shall be taken before the court and if the court finds that he has failed to attend or complete the residential alcohol treatment program before the date specified in the conditions of probation, the court shall forthwith specify a second date before which such defendant shall attend or complete such program and, unless such defendant shows extraordinary and compelling reasons for such failure, shall forthwith sentence him to imprisonment for not less than two days; provided, however, that such sentence shall not be reduced to less than two days, nor suspended, nor".

This amendment was adopted.

The bill, as amended, was then passed to be engrossed, in concurrence, with the amendment.

Sent to the House for concurrence in the amendment.

Engrossed Bill Returned to House by Governor With His Objections Thereto.

The engrossed Bill relative to limiting strategic litigation (see House, No. 1520), which, on Monday, December 19, 1994, had been laid before His Excellency the Governor for his approbation,— came from the House, the same having been returned by His Excellency, under Article II of Section I of Chapter I of Part the Second of the Constitution, to the House, the branch in which it originated, with his objections thereto in writing, and having passed that branch, notwithstanding said objections. Strategic litigation.

The message (House, No. 5570) was read and the Senate proceeded to reconsider the bill, in accordance with the provisions of the Constitution.

After remarks, the question on passing the bill, the objections of His Excellency the Governor to the contrary notwithstanding, was

Strategic litigation.

then determined by a call of the yeas and nays, at twenty minutes past three o'clock P.M., as follows, to wit (yeas 33 — nays 1):

YEAS.

Amorello, Matthew J.	Montigny, Mark C.
Barrett, Michael J.	Morrissey, Michael W.
Berry, Frederick E.	Murray, Therese
Bertonazzi, Louis P.	Norton, Thomas C.
Birmingham, Thomas F.	O'Brien, John D.
Boverini, Walter J.	O'Brien, Shannon P.
Durand, Robert A.	Rauschenbach, Henri S.
Havern, Robert A.	Rosenberg, Stanley C.
Hicks, Lucile P.	Shannon, Charles E.
Jacques, Cheryl A.	Swift, Jane M.
Jajuga, James P.	Tisei, Richard R.
Keating, William R.	Travaglini, Robert E.
Leahy, Daniel P.	Walsh, Marian
Lees, Brian P.	Wetmore, Robert D.
Magnani, David P.	White, W. Paul
McDonald, Brian J.	Wilkerson, Dianne — 33.
Melconian, Linda J.	

NAY.

Chase, Arthur E. — 1.

PAIRED.

YEA.	NAY.
Marc R. Pacheco,	Robert A. Antonioni (present) — 2.

ABSENT OR NOT VOTING.

Buell, Robert C.	Pines, Lois G. — 3.
Creedon, Michael C.	

The yeas and nays having been completed at twenty-nine minutes past three o'clock P.M., the bill was passed by the Senate, notwithstanding the objections of His Excellency the Governor, two-thirds of the members present having agreed to pass the same.

The bill was sent to the Secretary of the Commonwealth endorsed accordingly.

Engrossed Bills — Land Taking for Conservation, Etc.

Dartmouth,— land easements.

An engrossed Bill authorizing the Division of Capital Planning and Operations to grant certain easements over certain parcels of land in the town of Dartmouth (see Senate, No. 1810, amended) (which originated in the Senate), having been certified by the Senate Clerk to be rightly and truly prepared for final passage,— was put upon its final passage; and, this being a bill providing for the taking of land or other easements used for conservation purposes, etc., as defined by Article XCVII of the Amendments to the Constitution, the ques-

22 Mass.L.Rptr. 438
Superior Court of Massachusetts,
Suffolk County.

Richard L. HEALER et al. [1]
v.
DEPARTMENT OF ENVIRONMENTAL PROTECTION et al. [2]

No. 200600700.
|
Dec. 22, 2006.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT TOWN OF FALMOUTH'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT AND PLAINTIFFS' SPECIAL MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS

GERALDINE S. HINES, Justice.

***1** The plaintiffs filed this action pursuant to G.L.c. 30A, § 14 on February 17, 2006, seeking review of a Final Decision of the Commissioner of the Department of Environmental Protection ("DEP"). This DEP decision established that a parcel of land situated in Falmouth, Massachusetts, which was determined to be a vernal pool, [3] does not meet the definition of isolated land subject to flooding [4] and, therefore, is not protected under the Wetlands Protection Act, G.L.c. 131, § 40, and attendant regulations. Defendant Town of Falmouth ("the Town") filed an answer on May 15, 2006, asserting counterclaims of malicious prosecution and abuse of process. Defendant DEP filed an answer on May 23, 2006. The Town then filed a motion to dismiss on June 13, 2006, and Plaintiffs filed a special motion to dismiss the Town's counterclaims on June 14, 2006. For the following reasons, the Town's motion to dismiss is *ALLOWED* and Plaintiffs' special motion to dismiss is *ALLOWED*.

BACKGROUND

This dispute arose out of the Town of Falmouth's plan to construct the New Silver Beach Sewer Collection and Treatment System, a public sewer system in the New Silver Beach section of Falmouth, Massachusetts. The new system would collect sewer effluent from 210 homes in the area, transport it to a 5,000 square foot treatment facility to be situated on a one-acre parcel owned by the Town, and then discharge it onto an adjacent leaching field. These 210 homes had private sewer systems, many of which had failed, and the area had been declared a public health emergency. On January 9, 2002, the Town filed a Notice of Intent for the project with the Falmouth Conservation Commission ("CC") pursuant to G.L.c. 131, § 40 and local wetlands by-laws. On June 17, 2002, the CC issued an Order of Conditions approving the project and concluded that the parcel designated as a vernal pool did not qualify as isolated land subject to flooding.

On August 15, 2002, a group called Falmouth Residents for Fair Sewage Treatment ("FRFST") filed an appeal of the CC Order of Conditions in Barnstable Superior Court. The Court initially allowed the stay requested by FRFST, but it was subsequently vacated by the Massachusetts Appeals Court. On January 28, 2004, the Barnstable Superior Court (Cannon, J.) upheld the CC's decision concerning the project, and specifically noted in dicta that there was no evidence before the CC conclusively demonstrating that the parcel qualified as isolated land subject to flooding. FRFST appealed the Superior Court decision. On June 6, 2005, the Appeals Court affirmed the Superior Court decision, and in dicta specifically upheld the CC's conclusion that the parcel did not qualify as isolated land subject to flooding.

After the CC issued its Order of Conditions, FRFST requested that the DEP issue a Superceding Order of Conditions. On December 22, 2002, the DEP issued a Superceding Order of Conditions approving the construction of the sewer line and a Superseding Determination of Applicability for construction of the treatment facility. The DEP also concluded that the parcel did not qualify as wetland resources subject to state protection. On January 2, 2003, FRFST appealed the DEP decision to the Office of Administrative Appeals. On July 1, 2003 an Administrative Magistrate conducted a hearing, and issued a Recommended Final Decision on October 17, 2005 affirming the DEP's decision. On November 11, 2005, the Commissioner of the DEP adopted the Magistrate's decision, and FRFST subsequently filed a Motion for Reconsideration.

The Commissioner denied this motion on January 26, 2006, and the FRFST then filed the present action pursuant to G.L.c. 30A, § 14.

DISCUSSION

A. The Town's Motion to Dismiss

***2** A motion to dismiss pursuant to Mass.R.Civ.P. 12(b)(6) should be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *General Motors Acceptance Corp. v. Abington Caves Ins. Co.,* 413 Mass. 583, 584 (1992), quoting *Nader v. Citron,* 372 Mass. 96, 98 (1977), quoting *Coney v. Gibson,* 355 U.S. 41, 45-46 (1957). For purposes of a motion to dismiss, all allegations in the plaintiff's complaint must be taken as true and the court must draw all reasonable inferences therefrom in favor of the plaintiff. *Whitinsville Plaza, Inc. v. Kotseas,* 378 Mass. 85, 87 (1979), quoting *Nader,* 372 Mass. at 98. A complaint is not subject to dismissal if it could support relief under any theory. *Id.* at 89.

The Town argues in its motion to dismiss that res judicata prevents this court from reviewing the DEP decision because the claims and issues asserted by the Plaintiffs have already been adjudicated in the Massachusetts Appeals Court. The Plaintiffs argue in opposition that res judicata does not apply because the Appeals Court reviewed the CC decision, and the claim before this court seeks review of the DEP decision. The CC and the DEP are two separate administrative agencies, and each issued a separate and distinct decision pursuant to its own wetlands protections scheme. The Plaintiffs correctly assert that the Appeals Court's review of the CC decision does not address the same claims or issues as the claims and issues in the current action seeking review of the DEP decision. Thus, res judicata does not bar the present action.

The Town also alleges that the Plaintiffs' claims pursuant to G.L .c. 30A, § 14 are moot because the local by-laws protecting wetlands are more stringent than state protections pursuant to G.L.c. 131, § 40, particularly regarding isolated land subject to flooding and vernal pools. [5] Specifically, the Town argues that the DEP lacks the power to supercede the CC decision because it was based on more stringent local by-laws, and thus this court cannot review the DEP decision because the CC decision governs. The earlier decisions in the Barnstable Superior Court and the Massachusetts Appeals Court regarding this parcel of land noted that the CC permissibly relied on Falmouth's local by-laws in its evaluation. Additionally, according to Massachusetts case law, "[i]f a local wetlands protection by-law is more stringent than G.L.c. 131, § 40, and the conservation commission operates thereunder, the DEP appears to lack the power to supersede the commission's decision on a notice of intent to do work altering wetlands ... *Conservation Comm'n of Falmouth v. Pacheco,* 49 Mass.App.Ct. 737, 741 n. 4 (2000), citing *Hamilton v. Conservation Comm'n of Orleans,* 12 Mass.App.Ct. 359, 367-70 (1981). See also *Hobbs Brook Farm Prop. Co., LLP v. Conservation Comm'n of Lincoln,* 65 Mass.App.Ct. 142, 149 (2005) ("when a local conservation commission rests its decision on a wetlands by-law that provides greater protection than the act, its decision cannot be preempted by a DEP superseding order"); *DeGrace v. Conservation Comm'n of Harwich,* 31 Mass.App.Ct. 132, 135 (1991), citing *Golden v. Selectmen of Falmouth,* 358 Mass. 519, 525-26 (1970) ("local authorities do have final power ... where they are acting pursuant to an ordinance or by-law which is consistent with the act, but which permissibly imposes 'more stringent controls' than the minimum Statewide standards set by the Legislature").

***3** A comparison of the Falmouth by-laws c. 235 and attendant regulations, and G.L.c. 131, § 40 and attendant regulations, reveals that the local by-laws and regulations are in fact more stringent. See G.L.c. 131, § 40; Town of Falmouth by-laws c. 235; 310 C.M.R. § 10.57; F.W.R. §§ 10.57, 10.58; *Hobbs Brook,* 65 Mass.App.Ct. at 149-52. First, although the state statute and the local by-law have the same general purpose to protect resource area values, the local by-law provides broader protection that includes erosion and sedimentation. G.L.c. 131, § 40; Town of Falmouth by-laws c. 235, § 235-1. In addition, the DEP regulation defines isolated land subject to flooding as an area confining standing water to a volume of at least 1/4-acre feet which is equivalent to 10,890 cubic feet, while the Falmouth regulation defines it as an area confining standing water to a volume of at least 5,000 cubic feet. 310 C.M.R. § 10.57(2)(b)(1); F.W.R. § 10.57(2)(b). Therefore, more land would be subject to protection under the local regulation as isolated land subject to flooding. The Falmouth regulations also provide greater protection for vernal pools, with a provision specifically governing vernal pools that would allow more land to be identified as a vernal pool and more protection for this type of wetland resource. F.W.R. § 10.58. The DEP regulation only mentions vernal pools within the provisions governing isolated land subject

to flooding. 310 C.M.R. §§ 10.57(1)(b)(4), 10.57(2)(b)(5), 10.57(3)(b)(4).

Thus, the broader protection under the local by-law against erosion and sedimentation, and the broader protections under the local regulations for vernal pools and isolated land subject to flooding "impose a more rigorous local regulatory scheme." *Hobbs Brook,* 65 Mass.App.Ct. at 149. Consequently, the CC decision cannot be superseded by any DEP decision because the CC decision was based on more stringent local by-laws. See *Hobbs Brook,* 65 Mass.App.Ct. at 152-53; *Pacheco,* 49 Mass.App.Ct. at 741 n. 4; *DeGrace,* 31 Mass.App.Ct. at 135. Plaintiffs' claim seeking review of the DEP Final Decision is moot. [6]

B. Plaintiffs' Special Motion to Dismiss Pursuant to G.L.c. 231, § 59H

General Laws c. 231, § 59H (the state anti-SLAPP statute) states, "[i]n any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right to petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss." In addition, "[t]he court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party." G.L.c., 231, § 59H.

Thus, in order to prevail on a claim pursuant to G.L.c. 231, § 59H, the moving party "must make a threshold showing through pleadings and affidavits that the claims against it are 'based on' its protected petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities." *Wynne v. Creigle,* 63 Mass.App.Ct. 246, 252-53 (2005), citing *Duracraft Corp. v. Holmes Prods. Corp.,* 427 Mass. 156, 167-68 (1998). The Legislature "intended to enact very broad protection for petitioning activities" under this statute. *Duracraft,* 427 Mass. at 162. Petitioning activities include:

> ***4** [1] any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; [2] any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; [3] any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; [4] any statement reasonably likely to enlist public participation in an effort to effect such consideration; or [5] any other statement falling within constitutional protection of the right to petition government. G.L.c. 231, § 59H.

The Massachusetts Supreme Judicial Court has interpreted this statute to include activities that involve "seeking from the government any form of redress for a grievance of [one's] own or otherwise petitioning on [one's] own behalf." *Kobrin v. Gastfriend,* 443 Mass. 327, 330 (2005).

The Town alleges that the Plaintiffs' appeals of the CC and DEP decisions demonstrate an ulterior motive and delaying tactic, rather than petitioning activity. The Plaintiffs' appeals of the administrative decisions qualify as protected petitioning activities according to the first and third statutorily-defined categories and case law. In fact, the legislature aimed "to protect 'citizen protest in the area of land development,' " which is precisely the situation in which Plaintiffs find themselves. *Plante v. Wylie,* 63 Mass.App.Ct. 151, 158 (2005), quoting *Kobrin,* 443 Mass. at 336.

In their appeals of the DEP decision to administrative agencies and the Superior Court, Plaintiffs were seeking redress from executive and judicial bodies of their grievances stemming from the decisions made by the DEP. See *Kobrin,* 443 Mass. at 330. As this court explained above, review of the CC decision and review of the DEP decision are not the same claim nor the same issue, so Plaintiffs' activities in the present action are legitimately in furtherance of their statutory right pursuant to G.L.c. 30A, § 14 to seek judicial review of an administrative decision by the DEP. The Plaintiffs' appeals constitute protected petitioning activity because they are "written or oral statement[s] made before or submitted to a legislative, executive, or judicial body,

or any other governmental proceeding" and "statement[s] reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding." G.L.c. 231, § 59H.

Plaintiffs' prior appeals of the CC decision to administrative agencies and the Superior and Appeals Courts also qualify as protected petitioning activities for the same reasons as the appeals of the DEP decision. The Plaintiffs were seeking redress from executive and judicial bodies of their grievances stemming from the decisions made by the CC. See *Kobrin,* 443 Mass. at 330. The prior appeals constitute protected petitioning activities because they were "written or oral statement[s] made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding" and "statement[s] reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding." G.L.c. 231, § 59H.

***5** The Town also alleges that comments made by the Plaintiff Richard Healer to the Falmouth Enterprise about the project demonstrate an ulterior motive and delaying tactic, rather than petitioning activity. Those comments were made "in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding." G.L.c. 231, § 59H. Healer's statements reflected the Plaintiffs' position as to their petitioning activity before the administrative agencies and the courts, and were "sufficiently tied to" and "in conjunction with" the petitioning so as to qualify as protected petitioning activity. Compare *Wynne,* 63 Mass.App.Ct. at 253-54 (finding that statements made to the media that were mirror images of protected statements and were made about an issue already under review were sufficiently "in connection with" a pending review as to be protected under the anti-SLAPP statute) with *Kalter v. Wood,* 2006 WL 2959514, at *3 (Mass.App.Ct. Oct. 19, 2006) (finding that a letter to a health insurer which was identical to letters sent to government agencies requesting review of a doctor's activities was not made "in connection with" any on-going investigation or review, and thus was not protected under the anti-SLAPP statute).

Finally, the pleadings also demonstrate that the Town's claims are based on the Plaintiffs' protected petitioning activities alone because no activity is mentioned as the basis for the Town's claims other than the Plaintiffs' petitioning for review of administrative decisions and Healer's comments connected to and made in conjunction with the petitioning activity. See *Fabre v. Walton,* 436 Mass. 517, 524 (2002). The Plaintiffs have therefore met the threshold showing required by G.L.c. 231, § 59H. See *Kobrin,* 443 Mass. at 330; *Wynne,* 63 Mass.App.Ct. at 253-54.

Once the moving party makes the threshold showing, the burden shifts to the non-moving party "to show by a preponderance of the evidence that the petitioning activity was 'devoid of any reasonable factual support or any arguable basis in law and [that] the moving party's acts caused actual injury.' " *Wynne,* 63 Mass.App.Ct. at 254-55, quoting G.L.c. 231, § 59H. The Plaintiffs' petitioning activity did have factual support from the expert evidence they provided to the administrative agencies and the courts which supported their position and contradicted the Town's evidence as to whether the parcel qualified as wetlands subject to state and local protection. In addition, the Plaintiffs had a basis in law to pursue their appeals under the internal appeals processes for the CC and the DEP, and the state statutes permitting judicial review of administrative decisions. G.L.c. 249, § 4; G.L.c. 30A, § 14. The Town has failed to show that the Plaintiffs had no reasonable factual support and no arguable basis in law to support their petitioning activity, and thus cannot meet their burden regardless of whether there was any injury caused. Plaintiffs therefore prevail on their special motion to dismiss pursuant to G.L.c. 231, § 59H.

ORDER FOR JUDGMENT

***6** For the reasons set forth above, it is hereby *ORDERED* that Defendants' motion to dismiss is *ALLOWED* and Plaintiffs' special motion to dismiss is *ALLOWED.*

All Citations

Not Reported in N.E.2d, 22 Mass.L.Rptr. 438, 2006 WL 4526748

Footnotes

1 Warren C. Healer, H. Janet Healer, Harry J. Healer, Jr., individually and as Co-Trustees of the Healer Nominee Trust, Richard L. Healer and Harry J. Healer, Jr., as Trustees of the Trust under the Will of Harry J. Healer, Eleanor Maurer, Michael Spellman, Tracey Spellman, Paul J. Byrne, Steven M. Cross, Kenneth S. Johnson, Rosemary Johnson, Carolyn Tarr, Helen Patenaude, Marion Skelskie, Carla H. Healer, Lionel Barry Evans, Eleanor M. Evans, John J. Maurer, Frances Maurer, Johnathan L. Snyder, Marjorie Freeman, John V. Hanscom, Executor of the Will of Helen F. Hanscom, on behalf of themselves and as members of the Falmouth Residents for Fair Sewage Treatment.

2 Executive Office of Environmental Affairs and Town of Falmouth.

3 The pertinent state regulation defines a vernal pool habitat as: “confined basin depressions which, at least in most years, hold water for a minimum of two continuous months during the spring and/or summer, and which are free of adult fish populations, as well as the area within 100 feet of the mean annual boundaries of such depressions, to the extent that such habitat is within an Area Subject to Protection Under G.L.c. 131, § 40 as specified in 310 CAR 10.02(1).” 310 CAR § 10.04.

4 The pertinent state regulation defines isolated land subject to flooding as: “an isolated depression or closed basin without an inlet or an outlet ... which at least once a year confines standing water to a volume of at least 1/4 acre-feet and to an average depth of at least six inches.” 310 CAR § 10.57(2)(b)(1).

5 Falmouth Wetlands Regulations § 10.57(2)(b)(1) (1998) defines isolated land subject to flooding as: “an isolated depression or closed basin without an inlet or an outlet ... which at least once a year confines standing water to a volume of at least five thousand (5,000) cubic feet and to an average depth of at least six inches.” Falmouth Wetlands Regulations § 10.57(4)(b)(1998) sets out the requirements for projects that would affect isolated land subject to flooding. Falmouth Wetlands Regulation § 10.58(2)(a)(1998) defines a vernal pool as: “a confined basin depression which, at least in most years, holds water for a minimum of two continuous months during the spring and/or summer, and which are free of adult fish populations.” Falmouth Wetlands Regulation §§ 10.58(1) and (3)-(7)(1998) set out the requirements for projects that would affect a vernal pool habitat.

6 Contrary to the Plaintiffs' assertion, because the claim pursuant to G.L.c. 30A, § 14 is moot, this court does not need to review the administrative record before ruling on the motion to dismiss.

65 Misc.3d 1233(A)
Unreported Disposition
(The decision is referenced in
the New York Supplement.)
This opinion is uncorrected and will not be
published in the printed Official Reports.
Supreme Court, New York County, New York.

PEOPLE of the State of New York,
BY Letitia JAMES, Attorney General
of the State of New York, Plaintiff,
v.
EXXON MOBIL CORPORATION, Defendant.

452044/2018
|
Decided on December 10, 2019

Attorneys and Law Firms

Plaintiff was represented by the Office of the Attorney General of the State of New York, 28 Liberty Street, New York, NY 10005: Kevin Wallace, Deputy Bureau Chief Investor Protection Bureau, (212) 416-6376, Kevin.Wallace@ag.ny.gov, Jonathan C. Zweig, Assistant Attorney General, Investor Protection Bureau, (212) 416-8954, Jonathan.Zweig@ag.ny.gov, Kim A. Berger, Bureau Chief, Bureau of Internet & Technology, (212) 416-8456, Kim.Berger@ag.ny.gov

Defendant was represented by Paul, Weiss, Rifkind, Wharton & Garrison LLP, 1285 Avenue of the Americas, New York, NY 10019, Theodore V. Wells, Jr., (212) 373-3089, twells@paulweiss.com, Daniel J. Toal, (212) 373-3869, dtoal@paulweiss.com, Justin Anderson, (202) 223-7321, janderson@paulweiss.com, Nora Ahmed, (212) 373-3986, nahmed@paulweiss.com

Opinion

Barry Ostrager, J.

***1** Following twelve days of trial and testimony from eighteen witnesses, the Court finds that the Office of the Attorney General has failed to establish by a preponderance of the evidence that ExxonMobil either violated the Martin Act or Executive Law § 63(12) in connection with its public disclosures concerning how ExxonMobil accounted for past, present and future climate change risks.

The trial was the culmination of three and one-half years of investigation and pre-trial discovery that required ExxonMobil to produce millions of pages of documents and dozens of witnesses for interviews and depositions. During the investigation and pre-trial discovery phase of the case, ExxonMobil produced, voluntarily and at the Court's direction, reams of proprietary information relating to its historic and contemplated investments. In addition, multiple non-parties, including various financial institutions, were interviewed or deposed.

At the trial, the Office of the Attorney General made public scores of proprietary internal models and memoranda ExxonMobil used in connection with the planning and operation of its business. It is undisputed that ExxonMobil does not publish the details or the economic bases upon which ExxonMobil evaluates investment opportunities due to competitive considerations (PX001 — "*Energy and Carbon — Managing the Risks*" p. 16) [1] . Significantly, many of the internal models published at trial related to projects that ExxonMobil either has not yet pursued or may never pursue.

The Complaint in this action asserted four claims for relief prefaced by allegations asserting, *inter alia*, that ExxonMobil engaged in a "longstanding fraudulent scheme" "sanctioned at the highest levels of the company," "effect[ively] erect[ing] a Potemkin village to create the illusion that it had fully considered the risks of climate change regulation and had factored those risks into its business operations." The Complaint further alleges that "in reality [ExxonMobil] knew that its representations were not supported by the facts and were contrary to its internal business practices" (NYSCEF Doc. No. 1, Complaint ¶ 1, 8, and 9).

The events leading up to the filing of the Complaint were detailed at length during the trial, including certain politically motivated statements by former New York Attorney General Eric Schneiderman. In 2013, ExxonMobil received various inquiries and shareholder proposals requesting more information about how ExxonMobil factored climate change risks and regulations into its business decisions. Thereafter, ExxonMobil held a meeting on December 17, 2013 with representatives of the sponsors of the inquiries and shareholder proposals. Ultimately, in exchange for the withdrawal of two shareholder proposals, ExxonMobil agreed to publish two reports with additional information about the manner in which ExxonMobil addresses the evolving policies and regulations governments may implement to reduce the

emissions of greenhouse gases in a rapidly growing world population. Those reports, entitled *Managing the Risks* and *Energy and Climate*, were published on March 31, 2014. The Office of the Attorney General asserted at trial that beginning with the December 2013 meeting, continuing with the publication of the two March 2014 reports, and continuing further through 2016, ExxonMobil made various material written and oral misrepresentations and omissions that tended to mislead the public in violation of the Martin Act and Executive Law § 63(12). The Court finds these allegations to be without merit.

***2** Nothing in this opinion is intended to absolve ExxonMobil from responsibility for contributing to climate change through the emission of greenhouse gases in the production of its fossil fuel products. ExxonMobil does not dispute either that its operations produce greenhouse gases or that greenhouse gases contribute to climate change. But ExxonMobil is in the business of producing energy, and this is a securities fraud case, not a climate change case. Applying the applicable legal standards, the Court finds that the Office of the Attorney General failed to prove by a preponderance of the evidence that ExxonMobil made any material misrepresentations that "would have been viewed by a reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976).

A. ***The Attorney General's First and Second Causes of Action***

At the conclusion of the presentation of the evidence, but before the completion of summations, the Office of the Attorney General withdrew its claims of equitable fraud and common law fraud contained in the third and fourth causes of action in its hyperbolic Complaint. *See* Complaint ¶¶ 320 — 329. The Office of the Attorney General relied exclusively on its claims that ExxonMobil has made materially false and material disclosures to the public in violation of the Martin Act and Executive Law § 63(12). ExxonMobil, which did not move for a directed verdict on the two fraud claims, objected to the Court's decision to grant the Office of the Attorney General's application to have those claims discontinued with prejudice (Tr. 2117-24), and the Court, in response, granted ExxonMobil leave to file a motion requiring the Court to enter judgment on the fraud counts on the merits. On November 18, 2019 ExxonMobil filed a post-trial motion (seq. no. 009) "opposing the Attorney General's request to discontinue its fraud counts."

For the following reasons, and as noted above, the Court finds that the Office of the Attorney General failed to prove by a preponderance of the evidence the allegations against ExxonMobil contained in the first and second causes of action in the Complaint, the only causes of action for which the Office of the Attorney General now seeks relief. Since the Office of the Attorney General failed to establish any liability on the part of ExxonMobil for causes of action that do not require proof of scienter and reliance — essential elements of equitable and common law fraud — the decision in this case, perforce, establishes that ExxonMobil would not have been held liable on any fraud-related claims which the Office of the Attorney General discontinued with prejudice. [2]

3 B.** ***The Office Attorney General is Not Entitled to Any Relief.

The Court also finds that the Office of the Attorney General is not entitled to any monetary damages or injunctive relief because the Office of the Attorney General did not prevail on its first and second causes of action. If the Court had reached the issues of damages, the Court would have found that the Office of the Attorney General failed to prove any damages by a preponderance of the evidence for the reasons stated *infra.*

C. ***The Martin Act***

The Martin Act, General Business Law § 352 *et seq.*, prohibits the use of "any device, scheme or artifice ... 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. These provisions are liberally construed, *People v. Federated Radio Corp.*, 244 NY 33, 38 — 39. (1926) and extend to "all deceitful practices contrary to the plain rules of common honesty and all acts tending to deceive or mislead the public." *People v. Sala*, 258 AD2d 182, 193 (3d Dep't 1999), *aff'd*, 95 NY2d 254 (2000); *see also* *Federated Radio Corp.*, 244 NY 33, 38 (1926).

To establish liability under the Martin Act, the Office of the Attorney General must prove a "misrepresentation of material facts," *Federated Radio Corp.*, 244 NY at 41, or an omission of material facts, *Sala*, 258 AD2d at 194. Thus,

in addition to falsity, a Martin Act claim requires proof of materiality. Proof of a Martin Act violation requires proof by a preponderance of the evidence. *People v. Silinsky*, 217 A.D. 248 (2d Dep't 1926).

New York has adopted the federal standard of materiality in securities fraud cases. *State v. Rachmani Corp.*, 71 NY2d 718, 727 (1988); *see also IBEW Local Union No. 58* v. *RBS*. 783 F.3d 383, 389 (2d Cir. 2015). Under that standard, "[a] statement or omission is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to act." *Id.* (internal quotation marks omitted). In other words, courts must determine whether there is "a substantial likelihood that the [misrepresentation or 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 Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *see also ECA, Local 134 IBEW Joint Pension Tr. of Chicago* v. *JP Morgan Chase Co.*, 553 F.3d 187, 198 (2d Cir. 2009). "The standard of a 'reasonable investor,' like the negligence standard of a 'reasonable man,' is an objective one." *United States v. Litvak*, 889 F.3d 56, 64 (2d Cir. 2009). 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).

Applying these standards, the New York Court of Appeals has held that a material misstatement must assume "actual significance in the deliberations of the reasonable shareholder." *Rachmani Corp.*, 71 NY2d 726 (*quoting TSC Indus. v. Northway, supra*, 426 U.S. at 449). However, actual reliance need not be established. *State v. Sonifer Realty Corp.*, 212 AD2d 366, 367 (1st Dep't 1995).

4 D. *Executive Law § 63(12)

Fraudulent acts that violate the Martin Act also violate Executive Law § 63(12) when they are repeated or persistent. Executive Law § 63(12) prohibits "repeated fraudulent or illegal acts" and "persistent fraud or illegality in the carrying on, conducting or transaction of business." The definitions of fraud under § 63(12) and the Martin Act are "virtually identical." *Rachmani,* 71 NY2d at 721 n.1. "Repeated" fraud or illegality is defined in § 63(12) to include "repetition of any separate and distinct fraudulent ... act, or conduct which affects more than one person." "Persistent" fraud is defined by § 63(12) to include the "continuance or carrying on of any fraudulent act."

Section 63(12) is construed liberally to effectuate its remedial purpose. *State v. Maiorano,* 189 AD2d 766, 767 (2d Dep't 1993). As with the Martin Act, neither intent nor reliance need be proven to establish fraud under § 63(12). *People v. Trump Entrepreneur Initiative LLC*, 137 AD3d 409, 417 (1st Dep't 2016), *citing People v. American Motor Club* 179 AD2d. 277, 283 (1st Dep't 1992). Ultimately, "the test for fraud" under § 63(12) "is whether the targeted act has the capacity or tendency to deceive or creates an atmosphere conducive to fraud." *People v. General. Elec. Co., Inc.*, 302 AD2d 314 (1st Dep't 2003).

I. *The Office of the Attorney General's Allegations*

The core allegation sponsored by the Office of the Attorney General is that ExxonMobil made misrepresentations and omissions, material to investors, during the period from late 2013 through 2016, about how ExxonMobil managed the risks of climate change and increasing regulations. The alleged misrepresentations are principally contained in two thirty-plus page publications dated March 31, 2014 titled "*Energy and Carbon - Managing the Risks*" ("*Managing the Risks*") and "*Energy & Climate*" (together, the "March 2014 Reports") (PX001 and PX002). Portions of the March 2014 Reports are repeated almost verbatim in other ExxonMobil sponsored publications and presentations. *See e.g.* PX130 (Presentation "The Outlook for Energy and GHG's: A View to 2040"); JX912 p. 36 (2013 *Outlook for Energy: A View to 2040*); PX006 p.54 (2013 Corporate Citizenship Report); PX007 p.27 (2014 Corporate Citizenship Report); PX008 p.54 (2015 Corporate Citizenship Report). The March 2014 Reports make extensive references to another publication that ExxonMobil publishes annually entitled *"Outlook for Energy*."

The Office of the Attorney General also alleges that misrepresentations were made at two investor presentations in New York City in December 2013 and December 2014, in ExxonMobil's Carbon Disclosure Project ("CDP")

Responses, in ExxonMobil's Corporate Citizenship Reports, and by former ExxonMobil CEO Rex Tillerson at the March 25, 2016 ExxonMobil shareholder meeting. (PX130 Presentation "The Outlook for Energy and GHG's: A View to 2040"; PX010 ExxonMobil 2011 CDP Submission; PX014 ExxonMobil 2016 CDP submission; PX005 2012 Corporate Citizenship Report; PX006 2013 Corporate Citizenship Report; PX007 2014 Corporate Citizenship Report; PX008 2015 Corporate Citizenship Report; JX918 Transcript of ExxonMobil Annual Shareholder Meeting). Complaint ¶ 52, 54, 75 and 272. The Office of the Attorney General submitted into evidence the Carbon Disclosure Project Responses and Corporate Citizenship Reports without significant accompanying testimony.

***5** As discussed *infra,* there was no evidence adduced at trial that the publication of the March 2014 Reports had any market impact at the time they were published or that investment analysts took note of the contents of these documents which were widely disseminated on ExxonMobil's website and otherwise. *See e.g.* Tr. 1233:6-13; Tr. 1849; Tr. 1967; JX988 57:3 and 59:16.

It is undisputed that ExxonMobil recognized more than a decade ago that climate policies and regulations could affect its business by reducing the demand for its products and by increasing the costs of bringing those products to market.

At least as early as 2007, separate teams in ExxonMobil's Corporate Strategic Planning group developed planning assumptions for different contexts. Tr.1615- 1616. [3] The team that worked exclusively on the *Outlook* developed a proxy cost of carbon assumption for use in assessing demand for ExxonMobil products. Tr. 1615:7-13. A separate team, the Corporate Planning Group, developed GHG cost assumptions that could be applied as direct expense items in evaluations of specific investments which, *if funded*, would emit greenhouse gases. Tr. 1614, 1706. The proprietary and undisclosed results of the work that the Corporate Planning Group did were circulated internally in ExxonMobil's Corporate Planning DataGuide which, of course, remained non-public until this trial except to the extent it was reported in the *Outlook* and in the March 2014 Reports and related presentations and publications.

II. *ExxonMobil's Public Disclosures*

The Office of the Attorney General had the burden to prove that ExxonMobil made misrepresentations and that ExxonMobil investors would have considered any alleged misrepresentations important in light of the "total mix of information" available to them. *TSC Industries, Inc. v. Northway, Inc.,* 426 U.S. 438, 449 (1976). The Court finds there was no proof offered at trial that established *material* misrepresentations or omissions contained in any of ExxonMobil's public disclosures that satisfy the applicable legal standard. The total mix of information available to ExxonMobil investors during the relevant period included an annual, publicly-filed report called the *Outlook for Energy*, the two March 2014 Reports, ExxonMobil's Form 10-Ks, ExxonMobil's annual Corporate Citizenship Reports, and a host of other publicly available information that was not the subject of testimony at trial (including ExxonMobil's Annual Shareholder reports).

A. *The Outlook for Energy*

The *Outlook for Energy* (the "*Outlook*") is a document that ExxonMobil has published annually since about 2007. Tr. 1086:11-13; *see e.g.* JX910 2010 *Outlook for Energy* and JX912 2013 *Outlook for Energy*. The *Outlook* is available to ExxonMobil's investors and the public. In 2010 the *Outlook* was subtitled "A View to 2030" and in 2013 it was subtitled: "A View to 2040." The 2010 and 2013 *Outlooks*, the only versions of the *Outlook* offered in evidence, are over fifty pages long and contain numerous forward-looking statements about how ExxonMobil expects the energy industry and the world to look in the future. ExxonMobil has no obligation to issue the *Outlook* to the public but does so to help guide ExxonMobil's investment decisions and in recognition of ExxonMobil's status as an industry leader. The foreword to the 2010 *Outlook* (JX910 p. 3) by then-CEO Rex Tillerson states:

> ***6** Prepared by a team of experts using both publicly available and propriety information, *Outlook for Energy: A View to 2030* helps guide ExxonMobil's global investment decisions. We [ExxonMobil] share it publicly to encourage broader understanding about energy issues.

The introduction to the 2013 *Outlook* (JX912 p. 3) states:

> The *Outlook for Energy* is ExxonMobil's long-term view of our shared energy future. We [ExxonMobil] develop the *Outlook* annually *to assess future trends in energy supply, demand and technology to help guide the long-term investments that underpin our business strategy*. (Emphasis added).

The *Outlook* expressly states: "The Outlook for Energy is ExxonMobil's long-term global view of our shared energy future. [ExxonMobil] develops the Outlook annually to assess future trends in *energy supply, demand,* and technology to help guide the long-term investments that underpin our business strategy." (emphasis added) PX912 p.3.

The 2010 *Outlook* further provides that its purpose is to answer questions such as "In 2030, what types of energy will the world use and how much? How will demand patterns and sources of supply evolve in countries around the world? What will be the role of new technologies in affecting the energy mix and overall effect? How much progress will have been made in curbing carbon dioxide (CO2) emissions?" JX910 p. 4.

The 2010 *Outlook* is broken down into sections on residential and commercial energy, transportation energy, and industrial energy. It also includes sections specifically about power generation, greenhouse gas emissions, energy supply, and natural gas. JX910 p. 2.[4] A significant assertion in both the 2010 and 2013 *Outlooks* is ExxonMobil's assessment that the global demand for energy will continue to rise significantly along with the global population. *See generally* JX910 p. 8-9. and JX912 p. 5.

The 2013 *Outlook* (JX-912 p. 36) states:

> Policies related to GHG emissions, and carbon emissions in particular, remain uncertain. But, for purposes of the outlook to 2040, ExxonMobil *assumes a cost of carbon as a proxy for a wide variety of potential policies that might be adopted by governments over time* to help stem GHG emissions such as carbon emissions standards, renewable portfolio standards and others.

For example, in most [Organisation for Economic Co-operation and Development ("OECD")] nations, ExxonMobil expects the implied cost of CO2 emissions to reach about $80 per ton in 2040. OECD nations will continue to lead the way in adopting these policies, with developing nations gradually following, led by China.

***7** The introduction of rising CO2 costs will have a variety of impacts on the economy and energy use in every sector and region within any given country. Therefore, the exact nature and pace of the GHG policy initiatives will likely be affected by their impact on the economy, economic competitiveness, energy security and the ability of individuals to pay the related costs. (emphasis added).

Robert Bailes, a former ExxonMobil Greenhouse Gas Manager from 2009 to 2014, testified at trial (Tr. 534:12-25):

> [T]he Energy Outlook is looking across the entire global energy system and projecting that policymakers will impose a cost on the entire energy system for greenhouse gas emissions. We [ExxonMobil] don't know exactly what form that will take. It might be a carbon tax. It might be cap and trade. It might be renewal portfolio standard. It might be a low carbon fuel standard. There's a lot of different instruments they could use, but, but, it's — it's our [ExxonMobil's] effort to quantify a cost that we [ExxonMobil] believe[s] regulators will impose across the energy system on society.

The *Outlooks* also contain color coded maps depicting estimates of potential future costs associated with fossil fuel emissions in various areas of the world in 2030 and 2040. PX001 p. 17 and PX002 p.6.[5] The *Outlook* maps provide no information for years other than 2030 and 2040.

B. ***The March 2014 Reports***

At trial, the Office of the Attorney General examined as an adverse witness David Rosenthal, who was Vice President of Investor Relations at ExxonMobil from 2008 to 2017. Tr. 298:17-20. In this role, Mr. Rosenthal was responsible for corresponding with ExxonMobil's shareholders and responding to shareholder proposals. Tr. 300:1-8. As noted above, and as Mr. Rosenthal testified, in late 2013 ExxonMobil began receiving inquiries from certain investors asking for more information about how ExxonMobil manages the risks of climate change and increasing regulations.

In September 2013, ExxonMobil received a letter from Ceres, an international group of institutional investors collectively representing nearly three trillion dollars in assets at the time. Tr. 303:3-8; Tr. 304:10-13; PX194; PX194 p. 9; PX194-N-13; Tr. 310:7-13. Ceres indicated that it was specifically interested in how ExxonMobil managed risks related to carbon capture and storage as well as the possibility of stranded assets. Tr. 306:10-23 and Tr. 307:5-21. In an email addressed to Mr. Rosenthal, Ceres wrote (Tr. 305:1-5; PX 194:9):

> ***8** Our goal is obviously not to attempt to convince ExxonMobil to get out of the fossil fuel business, but instead to help long-term investors understand how their company is addressing climate change in its business planning and comparable allegation processes.

That same month, ExxonMobil received a letter from Walden Asset Management. Tr. 311:19-20. PX 150. At the time, Walden Asset Management was a longtime shareholder in ExxonMobil. Tr. 312:407. Walden Asset Management requested information about a variety of topics, including the subjects of the Ceres request. Tr. 313:17-20.

In December 2013, ExxonMobil received a letter from the Christopher Reynolds Foundation. PX149; Tr. 314:16-20. The Christopher Reynolds Foundation letter, signed by Stephen Viederman, included a shareholder proposal for inclusion in ExxonMobil's 2014 proxy statement ("Christopher Reynolds Foundation Proposal"). Tr. 315: 4 — 19. The proposal requested that ExxonMobil release a report that "describes the company's strategic plan in the context of" "[p]rojections of global temperature increases over the next 35 years and resulting impacts of climate change that our company is using in its strategic planning" and "[r]isk management steps [the] company is taking or planning to take to address climate change." PX149; Tr. 316:4 — 15. Shortly thereafter, ExxonMobil received a letter from Arjuna Capital which also contained a proposed shareholder resolution ("Arjuna Proposal"), signed by Natasha Lamb (who testified at trial). PX382; Tr. 82; Tr. 317:10-19. The Arjuna Proposal requested that ExxonMobil prepare a report "on the company's 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. Tr. 318:12-17. The Arjuna Proposal was co-signed by Danielle Furgere from the organization As You Sow. Tr. 319:25-3:20:4.

In response to these various shareholder proposals and inquiries, ExxonMobil hosted a meeting in New York City in December 2013. Mr. Rosenthal testified that about 25 people attended the meeting, including representatives from the organizations described above and others. Tr. 326: 7-16. At this meeting, Pete Trelenberg, a senior member of ExxonMobil's Corporate Strategic Planning Group, presented a slideshow. PX130-N; Tr. 94; Tr. 326:20-23. The slideshow contained information about the proxy cost of carbon similar to the information in ExxonMobil's 2013 *Outlook*.

The Christopher Reynolds Foundation and Arjuna Capital ultimately agreed to withdraw their proposed shareholder resolutions based on the information shared at the December 2013 meeting and ExxonMobil's undertaking to address the concerns contained in the inquiries and shareholder proposals ExxonMobil had received. Tr. 114. Mr. Rosenthal testified that the Arjuna Proposal led to the publication of *Managing the Risks* and that *Energy and Carbon* addressed the issues identified in both the Ceres Letter and the Arjuna Proposal. Tr. 319: 4- 8. *Managing the Risks* and *Energy and Climate* are discussed in detail in Section III. A, *infra.*

C. ***ExxonMobil's Form 10-K***

ExxonMobil annually submits a Form 10-K to the Securities Exchange Commission, disclosing detailed financial information about its earnings, expenses, reserves, profits and all the other disclosures required by the Securities and Exchange Commission ("SEC"). ExxonMobil's Form 10-Ks for calendar years 2010, 2014, 2015 and 2016 were

introduced as trial exhibits (JX901 ExxonMobil's 2010 Form 10-K; JX905 2014 Form 10-K; JX906 2015 Form 10-K; JX907 2016 Form 10-K). A section about the risks to the business of ExxonMobil is contained in each Form 10-K, together with more than 100 pages of detailed financial information and related disclosure. For example, the "Business Environment and Risk Assessment: Long-Term Business Outlook" section of ExxonMobil's 2014 10-K (JX905 p. 43) states:

***9** By 2040, the world's population is projected to grow to approximately 9 billion people, or about 2 billion more than in 2010. Coincident with this population increase, the Corporation expects worldwide economic growth to average close to 3 percent per year. As economies and populations grow, and as living standards improve for billions of people, the need for energy will continue to rise. Even with significant efficiency gains, global energy demand is projected to rise by about 35 percent from 2010 to 2040. This demand increase is expected to be concentrated in developing nations (*i.e.* those that are not members of nations of the Organisation for Economic Co-operation and Development).

As expanding prosperity drives global energy demand higher, increasing use of energy-efficient and lower-emission fuels, technologies, and practices will continue to help significantly reduce energy consumption and emissions per unit of economic output over time. Substantial energy efficiency gains are likely in all key aspects of the world's economy through 2040, affecting energy requirements for transportation, power generation, industrial applications, and residential and commercial needs.

Likewise, the "Risk Factors" Section of the 2015 10-K (JX906 p. 5) states:

> **Climate change and greenhouse gas restrictions**. Due to concern over the risk of climate change, a number of countries have adopted, or are considering the adoption of, regulatory frameworks to reduce greenhouse gas emissions. These include adoption of cap and trade regimes, carbon taxes, restrictive permitting, increased efficiency standards, and incentives or mandates for renewable energy. These requirements could make our products more expensive, lengthen project implementation times, and reduce demand for hydrocarbons, as well as shift hydrocarbon demand toward relatively lower-carbon sources such as natural gas. Current and pending greenhouse gas regulations may also increase our compliance costs, such as for monitoring or sequestering emissions.

In addition, the "Business Environment and Risk Assessment" section of the 2016 10-K (JX907 p. 42) states:

> International accords and underlying regional and national regulations covering greenhouse gas emissions continue to evolve with uncertain timing and outcome, making it difficult to predict their business impact. For many years, the Corporation has taken into account policies established to reduce energy-related greenhouse gas emissions in its long-term *Outlook* for Energy, which is used as a foundation for assessing the business environment and business strategies and investments. The climate accord reached at the recent Conference of the Parties (COP 21) in Paris set many new goals, and many related policies are still emerging. Our *Outlook* reflects increasingly stringent climate policies and is consistent with the aggregation of Nationally Determined Contributions which were submitted by signatories to the United Nations Framework Convention on Climate Change (UNFCC) 2015 Paris Agreement. Our *Outlook* seeks to identify potential impacts of climate related policies, which often target specific sectors, by using various assumptions and tools *including application of a proxy cost of carbon to estimate potential impacts on consumer demands For purposes of*

> *the Outlook, a proxy cost on energy-related CO2 emissions is assumed to reach about $80 per tonne on average in 2040 in OECD nations*. China and other leading non-OECD nations are expected to trail OECD policy initiatives. Nevertheless, as people and nations look for ways to reduce risks of global climate change, they will continue to need practical solutions that do not jeopardize the affordability or reliability of the energy they need. Thus, all practical and economically viable energy sources, both conventional and unconventional, will need to be pursued to continue meeting global energy demand, recognizing the scale and variety of worldwide energy needs as well as the importance of expanding access to modem energy to promote better standards of living for billions of people.

***10** The information provided in the Long-Term Business *Outlook* includes ExxonMobil's internal estimates and forecasts based upon internal data and analyses as well as publicly available information from external sources including the International Energy Agency. (Emphasis added.)

The "Risk Factors" section of the 2016 10-K (JX907 p. 7) states:

> **Climate change and greenhouse gas restrictions**. Due to concern over the risk of climate change, a number of countries have adopted, or are considering the adoption of, regulatory frameworks to reduce greenhouse gas emissions. These include adoption of cap and trade regimes, carbon taxes, restrictive permitting, increased efficiency standards, and incentives or mandates for renewable energy. These requirements could make our products more expensive, lengthen project implementation times, and reduce demand for hydrocarbons, as well as shift hydrocarbon demand toward relatively lower-carbon sources such as natural gas. Current and pending greenhouse gas regulations may also increase our compliance costs, such as for monitoring or sequestering emissions.
>
> **Government sponsorship of alternative energy**. Many governments are providing tax advantages and other subsidies to support alternative energy sources or are mandating the use of specific fuels or technologies. Governments and others are also promoting research into new technologies to reduce the cost and increase the scalability of alternative energy sources. We are conducting our own research both in-house and by working with more than 80 leading universities around the world, including the Massachusetts Institute of Technology, Princeton University, the University of Texas, and Stanford University. Our research projects focus on developing algae-based biofuels, carbon capture and storage, breakthrough energy efficiency processes, advanced energy-saving materials and other technologies. For example, ExxonMobil is working with Fuel Cell Energy Inc. to explore carbonate fuel cells to economically capture CO2 emissions from gas-fired power plants. Our future results may depend in part on the success of our research efforts and on our ability to adapt and apply the strengths of our current business model to providing the energy products of the future in a cost-effective manner.

There is no claim in this case that the disclosures in any of ExxonMobil's Form 10-K's or books and records are in any way false or misleading. Previously, the SEC investigated the propriety of ExxonMobil's Form 10-K filings, and it is undisputed that the SEC subsequently dropped that investigation without requiring ExxonMobil to restate or amend any of ExxonMobil's financial disclosure.

D. ExxonMobil's Corporate Citizenship Reports

ExxonMobil's Public and Government Affairs group annually publishes a Corporate Citizenship Report. Tr. 528:4-13. Mr. Rosenthal testified that the report covers a "broad swath of corporate citizenship activities" ranging from corporate giving, to sustainability, to what ExxonMobil is doing to help local economies. Tr.423:21-424:3. ExxonMobil has an External Citizenship Advisory Panel, a group of knowledgeable experts from academic and socially responsible groups, that gives ExxonMobil feedback on its Corporate Citizenship Reports. Tr. 528:18-25.

***11** ExxonMobil's annual Corporate Citizenship Reports expressly refer to the proxy cost of carbon. *See e.g.* PX007 2014 Corporate Citizenship Report; PX008 2015 Corporate

Citizenship Report. For example, both ExxonMobil's 2014 (PX007 p.37) and 2015 Corporate Citizenship Reports (PX008 p. 38) provide:

> [ExxonMobil] addresses the potential for future climate change policy, including the potential for restrictions on emissions, *by estimating a proxy cost of carbon. This cost, which is in some geographies, may approach $80 per ton by 2040* has been included in our *Outlook* for several years. This approach seeks to reflect potential policies governments may employ related to the exploration, development, production, transportation or use of carbon-based fuels. We believe our view on the potential for future policy action is realistic and by no means represents a business-as-usual case. ***We require all of our business lines to include, where appropriate, an estimate of greenhouse gas related emissions costs in their economics and when seeking funding for capital investments.*** (emphasis added).

The greenhouse gas related emissions costs referenced in ExxonMobil's Corporate Citizenship Reports is clearly a separate and distinct metric than ExxonMobil's proxy costs, and the reports are clearly part of the total mix of information available to investors.

Significantly, while ExxonMobil's Corporate Citizenship were offered in evidence at trial, the Office of the Attorney General did not call any witness who claimed to have been misled by the information contained in these documents.

ExxonMobil's Carbon Disclosure Project Responses

As noted above, ExxonMobil's 2011 and 2016 Carbon Disclosure Project ("CDP") Responses were offered into evidence without meaningful commentary. However, the Court notes that the 2016 CDP Response makes the same distinction between proxy costs and GHG costs that is made in the March 2014 Reports (discussed in detail *infra*). In response to the question "Does your company use an internal price of carbon?" ExxonMobil writes "Yes." And in response to the direction "Please provide details and examples of how your company uses an internal price of carbon" ExxonMobil states (PX014 p. 3):

ExxonMobil's long-range forecast, *The Outlook for Energy*, examines energy supply and demand trends for approximately 100 countries, 15 demand sectors, and 20 different energy types. The *Outlook* forms the foundation for the company's business strategies and helps guide our investment decisions. In response to projected increases in global fuel and electricity demand, our 2016 *Outlook* estimate that global energy-related CO2 emissions will peak around 2030 and then begin to decline. A host of trends contribute to this downturn — including the slowing population growth, maturing economics and a shift to cleaner fuels like natural gas and renewables — some voluntary and some the result of policy.

ExxonMobil address the potential for future climate change policy, including the potential for restrictions on emissions, by estimating **the proxy cost of carbon. This cost, which in some geographies may approach $80 per ton by 2040, has been included in the *Outlook* for several years**. This approach seeks to reflect potential policies governments may employ related to exploration, development, production, transportation or use of carbon-based fuels. We believe our view on the potential for future policies action is realistic by and no means a "business-as-usual" case. ***We require all of our business unites to include, where appropriate, an estimate of greenhouse gas-related emissions costs in their economics when seeking funding for capital investments***. (emphasis added).

12** ***ExxonMobil's Disclosures Regarding "Proxy Costs" of Carbon

Prior to 2013, the primary public disclosure ExxonMobil made related to modeling for future demand for its fossil fuel products was in the *Outlook*. In the *Outlook*, ExxonMobil informed the public and its competitors that in assessing the future *demand* for oil, decades into the future, ExxonMobil utilized a "proxy cost of carbon." ExxonMobil's proxy cost of carbon is one of several metrics used by ExxonMobil to assess future demand for fossil fuels in order to make reasoned decisions on what the demand for its products might be in the future. The proxy cost of carbon is one of the drivers of the internal analyses ExxonMobil uses for planning and budgeting purposes. Tr. 535:15-17.

The testimony at the trial confirmed that the proxy cost of carbon is an attempt to make provision for all the possible regulations and policies that all of the countries of the world may enact to suppress the use of oil and gas, and it reflects anticipated technological innovations that would also suppress the need for oil and gas. Tr. 1004, 1054 and PX918 p. 29. *See also* Tr. 1778:12. These unquantifiable impacts of innumerable potential *future* climate change policies and regulations are developed annually by a group of scientists and engineers in a department called the Economics and Energy Outlook Group that is completely divorced from the unit at ExxonMobil that evaluates investment opportunities. Tr. 1615:5-24.

At the time relevant to this trial, the Economics and Energy Outlook Group was headed by ExxonMobil's Rob Gardner. William Colton, who served as ExxonMobil's Executive Vice President of Corporate Strategic Planning until his retirement in 2017, testified at trial that Mr. Gardner and other engineers and scientists in the Economics and Energy Outlook Group did nothing other than prepare the *Outlook* on an annual basis.

The *Outlook* quantified this CO2 cost to approach $60 per ton of emissions in the 36-member OECD countries by 2030 and $80 per ton in 2040. The 2013 *Outlook* also identifies proxy costs for 2030 and 2040 for less developed countries. Critically, these quantifications relate only to the years 2030 and 2040. There is no publicly disclosed information about the proxy cost of carbon utilized by ExxonMobil for any years other than 2030 and 2040.

The evidence adduced at trial, including the testimony of former ExxonMobil CEO Rex Tillerson, confirmed that for planning and budgeting purposes, ExxonMobil incorporates proxy costs with its assessment of future energy demand, and the proxy cost is therefore embedded in the price bases that are used to evaluate new investment opportunities. Tr. 417, 1010, 1030. The price bases are calculated by matching future estimates of demand and supply. As David Rosenthal testified:

> So the proxy cost is what feeds into the demand model, which then when you add supply, comes out with what that crude oil price is going to be in a particular year, that becomes our price bases. So that price bases directly reflects the proxy cost of carbon as it is pushing down demand.

***13** Tr. 410:130-18; *see also* Tr. 507-08 (Bailes); Tr. 262-63 (Shores); Tr. 411 (Rosenthal).

Mr. Colton explained that other considerations relating to demand include: world population, global living standards, economic growth, and developments in technology that facilitate alternate sources of energy like battery technology and nuclear power. Tr. 1621, 1672. ExxonMobil's internal planning and budgeting analyses are, of course, planning tools that cannot be depended upon to reflect what will actually happen in the distant future. ExxonMobil's internal planning and budgeting information is, of course, confidential and proprietary, except to the extent it was made public.

As Mr. Colton testified, "[w]hat really happens" in the year 2040 "is something nobody can know sitting here today." Tr. 1699:6-15. There is no public information with respect to the proxy cost of carbon utilized by ExxonMobil in any year prior to 2030.

ExxonMobil's Proxy Costs and GHG Costs in its Internal DataGuide

Among the non-public internal documents ExxonMobil generates that were referenced at trial is ExxonMobil's annual Corporate Plan DataGuide ("DataGuide"). (JX919, JX919-N 2010 DataGuide Appendices, JX-921; JX 921-N 2013 DataGuide Appendices- Rev 3; JX029, JX029-N 2014 Corporate Plan Appendices to the DataGuide Rev 3; DX800, DX800-N, 2015 DataGuide Appendices — Rev 0; PX031, PX031-N 2016 Corporate Plan DataGuide and Appendices rev 3 and Cover Email). The DataGuide is distributed to about 150 ExxonMobil business units. Tr. 1751. The DataGuide is a document that provides the planning basis by which the various ExxonMobil business units should prepare their annual planning budgets. Tr. 256.The DataGuide contains a variety of guidance information, including the proxy cost of carbon, pricing information, as well as guidance about projected GHG costs that might relate to specific projects in particular jurisdictions.

Tom Eizember, who was the head of the Corporate Planning Group for ten years before he retired in 2013, testified: "the DataGuide is the assembly of all of the assumptions that businesses need to complete their plan." Tr. 1715.

The DataGuide instructs project planners to consider whether and how GHG costs might impact the operating expenses of specific potential long-lived capital investments. The DataGuide provides default assumptions for GHG costs that are a starting point for analysis, but it also instructs planners to use their judgment about whether those default assumptions are appropriate in a particular case. *See* PX 800 p. 31 2015 DataGuide Appendices — Rev 0. Mr. Eizember testified that GHG costs were included in the DataGuide during the entirety of his tenure as head of the Corporate Planning Group. *See* Tr. 1722, *et seq*.

The proxy costs of carbon in the DataGuide were generally higher than the GHG costs in the DataGuide, because the proxy costs of carbon anticipated the cost of all climate-related policies, while GHG costs, on the other hand, capture only the subset of climate regulatory costs that might relate to future potential projects in specific jurisdictions. Tr. 244, 246, 1750. The DataGuide specifically provides that, where more precise information is available in specific geographic areas, more accurate information could be substituted for the default GHG guidance numbers contained in the DataGuide. Tr. 525:18-23; Tr. 1729.

***14** The circumstance that ExxonMobil anticipates that energy demand will grow as the world's population grows highlights the complexity of projecting GHG costs with respect to specific projects in various parts of the world. Robert Bailes, a former ExxonMobil Corporate Greenhouse Gas Manager, explained that when countries impose direct greenhouse gas costs, business sectors in particular countries may move out of the country to a country with more favorable regulations. Mr. Bailes referred to this phenomenon as "off shoring your emissions." Tr. 544:5.

Thus, the ever evolving GHG country-by-country guidance contained in scores of pages of appendices to ExxonMobil's annual DataGuide, is no more than just that — guidance by corporate planners with the express caveat that where local specifics can be ascertained, those specifics should be substituted for the guidance. Tr. 545:18-546:24.

This point is exemplified by ExxonMobil's operations in Alberta, Canada, which was a significant focus of the Office of the Attorney General's trial presentation. As former ExxonMobil CEO Rex Tillerson explained, during the period covered by the Complaint, Alberta had specific legislation in place that taxed only a percentage of GHG emissions and did so at levels below the guidance provided in the Corporate Plan DataGuide. Tr. 1048:2-19. For the period covered by the Complaint, ExxonMobil's internal models used the local specific legislation in Alberta for the years 2015 to 2017. Tr. 918. Dan Hoy, a planner in Alberta, responded in the affirmative to the Court's observation following 50 transcript pages of cross-examination by the Office of the Attorney General (Tr. 951-52):

> Look, what I am taking away from your testimony — and tell me if I'm incorrect — that you as a planner run multiple, multiple models based on information that you received from various sources; and that ultimately, someone who is in charge tells you what to use with the GHG costs; is that a fair summary?

The Office of the Attorney General's misrepresentation claim is purportedly bolstered by the fact that, for certain projects in Canada, ExxonMobil's internal corporate models incorporated GHG costs that did not conform either to the proxy cost of carbon or to the expense guide for GHG costs contained in the DataGuide. ExxonMobil's simple rejoinder is that these internal models *did* include proxy costs of carbon. For example, Robert Bailes testified (Tr. 535:15-17) that

> [T]he price bases for oil and gas are established from our *Outlook* on global demand and global energy supply sources. So, that [proxy costs of carbon] gets baked in, okay, to investment proposals. [6]

ExxonMobil further establishes that if the default assumptions in the DataGuide were not the best information available, it would hardly serve ExxonMobil's interests (or those of its shareholders) to use those assumptions uniformly. Tr. 746-47.

Rex Tillerson testified on this issue as follows:

> [W]e purposely left [the business units] flexibility to get the best answer that they thought represented their circumstances in their location for their project.

Tr. 1096:19-20.

> The DataGuide very explicitly gives to the local organization — in fact, we encourage the local organization to go become informed about your regulatory environment; particularly, on projects where it could be important, and use your best assessment of what is this investment really going to experience over its life.

***15** Tr. 1048 2-7.
He further testified with respect to the regulatory scheme in Alberta, Canada,

> What I do know is the Alberta government doesn't want to put the oil sands out of business. It's important to them from a jobs, economic, tax revenue. And they always — in Alberta, the industry has always had a very kind of healthy dialogue with them, and they listened. And they don't want to put us out of business.

Tr. 1050:14-19.

In short, the nonpublic DataGuide expressly contemplates that the GHG cost assumptions in the DataGuide should not be uniformly applied by ExxonMobil's planners in a mindlessly consistent fashion if better information is available. Robert Bailes also testified (Tr. 525:18-23):

> [W]e expect - we require that our investment proposals include specific costs, specific operating costs that might be imposed in their specific jurisdiction for that specific investment and the specific greenhouse gas emission sources increases or decreases that might occur from that project.

See also Tr. 914. It would be manifestly inappropriate for this Court to rule either that ExxonMobil's default GHG assumptions for *future projects* (none of which were ever disclosed to the public) should have been applied uniformly, or that they should have had the same values assigned to the proxy cost of carbon which were used for an entirely different purpose and which were not disclosed with any specificity, other than to indicate variation by time in the distant future and by region.

The Office of the Attorney General also claims that even if ExxonMobil used ascertainable and current GHG costs in its planning for specific projects with GHG, it is misleading for ExxonMobil to project those costs into the future in its internal models without accounting for future escalation. But, if ExxonMobil proceeded with the projects it was internally modeling that were referred to during the trial (a majority of which ExxonMobil has yet to pursue (*see* Tr. 858-63 (Iwanika)) and if ExxonMobil's GHG projections proved to be inaccurate at some future time, any discrepancy between projected and actual costs would be reflected in ExxonMobil's future financial disclosure. Tr. 1132 (Tillerson: “Once the project starts up ... you only include what [costs] you are actually incurring.”)

The internal economic models used to evaluate future projects, and the GHG assumptions incorporated in those models, do not impact ExxonMobil's financial statements and other corporate books and records. The internal models, for the most part, contain forward looking projections, whereas the ExxonMobil's financial statements reflect historical results. Critically, as the Office of the Attorney General stated in its opening statement, “this case is about what Exxon told its investors it was doing for projects out to 2030 and 2040.” Tr. 36.

Alignment of the Proxy Costs and GHG Costs

The Office of the Attorney attaches significance to the fact that there came a time when ExxonMobil partially aligned its proxy cost assumptions in the *Outlook* with the GHG guidelines in the DataGuide for OECD countries and argues that this is probative of the Office of the Attorney General's material misrepresentation claim.

***16** On June 13, 2014, ExxonMobil made the considered policy judgment to partially align its planning assumptions *beginning in 2030 for OECD countries*. Tr 527:5-12. Mr. Colton explained that there was no alignment for the years 2014 — 2029, and during those years there was a difference between the DataGuide schedule for GHG costs and the DataGuide schedule for proxy costs. Tr. 1655. Every witness with knowledge of the decision to align the metrics 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. 620:8-21; Tr. 1653:23-1654:14; JX 990 (Deposition Transcript of M. Shores 372:3-15)). Most importantly, the limited modification that was made in ExxonMobil's internal guidance for 2030 was never disclosed to the public. As Guy Powell, who was ExxonMobil's Corporate GHG Manager during the relevant time period, explained:

[I]f you have a view of the world that [in] the longer term the governments ... would get together and take coordinated action on climate change, a price on carbon would likely be the most sufficient and the best way to do that and that would supercede other regulations and the like. (Tr. 601:13-17).

So with that world view at some point in the future, the proxy costs and the GHG costs should come together (Tr. 601:17-19).

* * *

The discussion we were having about merging these two costs in the 2030 timeframe and beyond timeframe. It was much more a philosophical discussion around as we think about governments of the world coming together, take action on climate change, we had this view — at least myself and Bob Bailes had this view — that they'll take collective action. It needs to be very efficient action and the best way to do that is to impose a price on carbon, and that price on carbon would supercede other things like standards and mandates and tax subsidies and that type of thing. (Tr. 620:8-17).

That scenario at that point in time, the proxy costs becomes one in the same as the Greenhouse gas costs. (Tr. 620:18-19).

That was the discussion we were having in terms of why these things should come together. (Tr. 620:20-21).

Not a single witness supported the Office of the Attorney General's apparent contention that the partial alignment was motivated by concern about a lack of clarity in the March 2014 Reports. *See, e.g.*, Tr. 1653. The evidence shows that ExxonMobil had been considering aligning its proxy cost and GHG cost assumptions for periods decades in the future for at least four years prior to publication of the March 2014 Reports. Tr. 518, 526-71, 573:14-574:3.

ExxonMobil's Public Disclosures Were Not Misleading.

The March 2014 Reports Were Not Misleading.

As discussed above in section II B, in 2013, as a result of a dialogue with both institutional and activist investors, including Natasha Lamb [7], the Director of Research and Shareholder Engagement at Arjuna Capital, ExxonMobil agreed to make additional disclosure about its planning for the impact of climate change risks and regulations in consideration for the withdrawal of certain shareholder proposals. The Arjuna Proposal (PX 382 p. 2 Letter from N. Lamb to D. Rosenthal) requested a shareholder vote concerning the Company's 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

***17** The Christopher Reynolds Foundation Proposal shareholder proposal (PX 149 EMC 0000538032 Letter from S. Viederman to D. Rosenthal) requested that ExxonMobil report on its "strategic plans to address climate change and its impacts." Toward that end, ExxonMobil issued the two March 2014 Reports. *See* Tr. 1000.

In *Managing the Risks* ExxonMobil stated (PX001 p. 17 — 18):

> We also address the potential for future climate-related controls, including the potential for restriction on emissions, through the use of a proxy cost of carbon. This proxy cost of carbon is

embedded in our current *Outlook for Energy*, and has been a feature of the report for several years. The proxy cost seeks to reflect all types of actions and policies that governments may take over the Outlook period relating to the exploration, development, production, transportation or use of carbon-based fuels. Our proxy cost, which in some areas may approach $80/ton over the Outlook period, is not a suggestion that governments should apply specific taxes. It is also not the same as the "social cost of carbon," which we believe involves countless more assumptions and subjective speculation on future climate impacts. It is simply our effort to quantify what we believe government policies over the Outlook period could cost to our investment opportunities. ***Perhaps most importantly, we require that all our business segments include, where appropriate, GHG costs in their economics when seeking funding for capital investments.*** We require 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 investment decisions. (Footnote omitted; emphasis added).

* * *

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.

A specific response to the Arjuna Capital's shareholder proposal appears on page 1 of *Managing the Risks*:

> As detailed below, ExxonMobil makes long-term investment decisions based in part on our rigorous, comprehensive analysis of the Global Energy Outlook .... ***Based on this analysis, we are confident that none of our hydrocarbon reserves are now or will become "stranded."*** (Emphasis added.)

ExxonMobil predicated its confidence that its resources would not become stranded on its consistently expressed view that the world's need for energy will continue to rise. Tr. 449-51 (Rosenthal).

In *Energy and Climate* ExxonMobil stated (PX002 p. 6-7):

> A key factor in assessing the world's energy outlook is the impact of public policies. One area of significant interest in recent years relates to the policies enacted to reduce greenhouse gas emissions.

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 and adopting these policies, with developing nations gradually following, led by countries like China and Mexico. Future policies related to limiting GHG emissions remain uncertain and likely will vary over time and from country to country. However, for our Outlook we use a cost of carbon as a proxy to model a wide variety of potential policies that might be adopted by governments to help stem GHG emissions. For example, in the OECD nations we apply a proxy cost that is *about* $80 per ton in 2040. In the developing world, we apply a range of proxy costs with the more wealthy countries, like China and Mexico, *reaching about* $30 per ton in 2040.

***18** The exact nature and pace of future GHG policy initiatives will likely be affected by their impact on the economy, economic competitiveness, energy security, and the ability of society, including those less fortunate, to pay related costs.

This GHG cost is integral to ExxonMobil's planning and we believe the policies it reflects will increase the pace of efficiency gains and the adoption by society of lower-carbon technologies through the Outlook period, as well as accelerate growth of lower carbon sources of energy like natural gas and renewables while suppressing the global use of coal.

* * *

The language in *Managing the Risks* identifying the proxy costs of carbon and GHG costs as distinct and separate metrics was drafted and edited by William Colton (Tr. 1642 — 1649:23) for the purpose of making the disclosure "more precise in how we talk about applying CO2 costs in project evaluations." DX 637; Tr. 1644-46.

As described *supra,* these publications extensively cross-reference the proxy cost of carbon disclosures contained in the *Outlook***.** These publications referenced ExxonMobil's nearly decade-old disclosure about its proxy cost of carbon, together with the charts reproduced from the *Outlook* identifying by geographic area ExxonMobil's proxy cost of carbon for 2030 and 2040. *Managing the Risks* confirms that ExxonMobil does "not publish the economic bases upon which [it] evaluate[s] investments due to competitive considerations." PX 001 p.16.

Critically, page 18 of *Managing the Risks* (PX 001) stated:

> Perhaps, most importantly, we require that all our business segments include, where appropriate, GHG costs in their economics when seeking funding for capital investments.

On this topic, Mr. Tillerson testified (Tr.1023:10-16):

> That — so, when we dealt with this issue, as we thought about it, we wanted to capture the broadest strategic impacts at a macro level by incorporating the proxy cost of carbon into the Energy Outlook from which flows all of our views of demand, supply balances, which then impacts our view of the prices.

But at the — at the local level, when you get down to a specific investment opportunity being consistent, then there's going to be — our expectation was there would be a cost to carbon emissions potentially put on investments that we might consider making. [8]

The reference to the utilization of GHG costs in connection with ExxonMobil's consideration of future projects was the first widely disseminated public disclosure by ExxonMobil of its consideration of identifiable, project-specific GHG costs in connection with ExxonMobil's consideration of future capital investments. Tr. 1117:2-8.

***19** Significantly, in his correspondence with Ms. Lamb, Mr. Rosenthal stated that ExxonMobil would, in the forthcoming March 2014 reports, disclose "why our proxy cost of carbon is not the only factor we consider in assessing investment opportunities." JX 982 p. 2 Presentation "2014 Proxy Statement Review." Ms. Lamb testified that she believed ExxonMobil acted in "good faith" in publishing the March 2014 Reports and "lived up to the agreement" it had reached. Tr. 170:9-18. [9]

Kristen Bannister's Testimony Shows ExxonMobil's Disclosures Were Not Misleading with Respect to ExxonMobil's Reserves and Resources

In its case in chief, the Office of the Attorney General called Kristen Bannister, ExxonMobil's Technical Team Leader and Senior Technical Professional Analyst for the Global Reserves and Resources Group ("GRG"). Ms. Bannister has worked at ExxonMobil since 2001 and was previously the Global Reserves Coordinator in ExxonMobil's Research Group from 2013 to 2019. Tr. 676:10-17. The GRG is responsible for assisting all of ExxonMobil's business units with the classification of ExxonMobil's Reserves and Resources. Tr. 676:17-20.

Ms. Bannister explained how ExxonMobil classifies its Reserves and Resources. ExxonMobil's resource base is comprised of proved developed reserves, proved undeveloped

reserves, probable reserves and contingent resources. Tr. 681:21-25. Proved reserves, both developed and undeveloped, are the oil and gas resources that ExxonMobil is reasonably certain it will be able to economically produce under existing operating conditions and existing government and regulatory approvals. Tr. 682:1-6. Probable reserves represent a business estimate of what ExxonMobil would be able to economically produce. Tr. 682:8-12. Contingent resources are resources that are not yet commercially matured but are expected to become economically viable in the future. Tr. 682:24-683:3. In classifying reserves, ExxonMobil utilizes the "company plan price outlook" which is contained in the DataGuide. Tr. 689.

Ms. Bannister testified that all classifications of Reserves and Resource are used in ExxonMobil's planning and decision making, but, for public disclosure purpose, ExxonMobil is only required to report proved reserves to the SEC. Tr. 684:8-21. SEC regulations mandate the use of "existing economic conditions, operating methods, and government regulations in reporting proved reserves." 17 C.F.R. § 210.4-10(a)(22). Ms. Bannister testified that the total size of ExxonMobil's proved reserves is reflected in ExxonMobil's Form 10-K submissions. Tr. 733:15. Most significantly, Ms. Bannister testified that technological, regulatory, and economic circumstances may require the reclassification of reserves which are, of course, one of ExxonMobil's largest publicly reported assets. Tr. 739-40; Tr. 748:4-5.

As discussed *supra*, the Office of the Attorney General has the burden to prove that a *reasonable* investor would be misled by ExxonMobil's representations "in light of the total mix of information available." Form 10-K disclosures are, perhaps, the most important part of the "total mix of information" publicly available to ExxonMobil investors. *See e.g.* *In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1421 (3d Cir. 1997)(finding that "earnings reports are among the pieces of data that investors find most relevant to their investment decisions" and "likely to be highly material" to investors (internal quotation marks omitted); *see also* *In re Kidder Peabody Sec. Litig., 10 F. Supp. 2d 398, 410 (S.D.NY 1998)* (noting that profit statements and financial reports are of particular interest to investors). As Ms. Bannister testified, the purpose of reporting proved reserves in a Form 10-K is to "ensure that the public and potential stockholders can compare on an apples-to-apples basis across the portfolios of oil and gas companies." Tr. 734:15-20. As noted *supra,* there is no claim in this case that any disclosure in ExxonMobil's Form 10-K is misleading, and Ms. Bannister's credible testimony demonstrates that ExxonMobil's public disclosures in its Form 10-K submissions were true and correct with respect to ExxonMobil's proved reserves.

20 *The Office of the Attorney General Failed to Establish Any Alleged Misrepresentation was Material to Investors.

As discussed *infra,* this Court rejects the contention that reasonable investors would attach material significance to the fact that ExxonMobil *internally* determines when it *is appropriate* to apply GHG costs with respect to specific projects. An alleged 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 (2d Cir. 2014). ExxonMobil investors had no insight into the criteria ExxonMobil used to determine when or whether ExxonMobil would consider it appropriate to apply GHG costs to a specific project.

Significantly, there is no allegation in this case, and there was no proof adduced at trial, that anything ExxonMobil is alleged to have done or failed to have done affected ExxonMobil's balance sheet, income statement, or any other financial disclosure. More importantly, the Office of the Attorney General's case is largely focused on projections of proxy costs and GHG costs in 2030 and 2040. No reasonable investor during the period from 2013 to 2016 would make investment decisions based on speculative assumptions of costs that may be incurred 20+ or 30+ years in the future with respect to unidentified future projects. *See* *Singh v. Cigna Corp.,* 918 F.3d 57, 65 (2d Cir. 2019) (holding that reasonable investors would not rely on "tentative and generic" disclosures that "emphasize [a] complex, evolving regulatory environment").

As particularized *infra*, 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 p.16. Tellingly, *Managing the Risks* contains no information about the dollar amounts assigned to GHG costs or what factors ExxonMobil uses in determining whether it is appropriate to apply GHG costs. Notwithstanding the Office of the Attorney General's claim to the contrary, *Managing the Risks* introduced the

GHG cost metric at a conceptual level to let investors know about a second way, in addition to the proxy cost of carbon, that ExxonMobil addresses climate regulatory risk. The GHG cost metric was also disclosed in ExxonMobil's Corporate Citizenship Reports. PX-007 p. 37 and PX-008 p. 38.

Referring to the publication of the March 2014 Reports, William Colton explained that (Tr. 1693:1-11):

> It 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. It was really about concepts of how we would think about these things and how we would include these important concepts in our evaluations, but not in a discreet kind of numerical sort of way.

Publishing ExxonMobil'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. This is precisely why *Managing the Risks* expressly states, "we do not publish the economic basis upon which we evaluate investments due to competitive considerations." PX001 p.16.

***21** ExxonMobil's disclosures were not intended to enable investors to conduct meaningful economic analyses of ExxonMobil's internal planning assumptions, and no reasonable investor would have viewed speculative assumptions about hypothetical regulatory costs projected decades into the future as "significantly alter[ing] the total mix of information made available." *Singh v. Cigna Corp.*, 918 3d 57, 64 (2d Cir. 2019). This is why the Second Circuit held in *Singh* that "tentative and generic" statements that emphasize the complex, evolving regulatory environment faced by a corporation cannot be material. *Id.* Finally, disclosures containing "generalizations" about a company's business practices cannot amount to material misrepresentations. *See* *ECA & Local 134 IBEW Pension Tr. Of Chi. v. JP Morgan Chase Co.*, 553 F. 3rd 187, 206 (2d Cir. 2009). Indeed, as the Office of the Attorney General's first witness Natasha Lamb admitted, she was interested in ExxonMobil's "big-picture approach to handling the risks of climate change." Tr. 168:8-10.

At bottom, the case presented by the Office of the Attorney General is largely predicated upon the proposition, which this Court rejects, that during the period of time covered by the Complaint, ExxonMobil's disclosures led the public to believe that its GHG cost assumptions for future projects had the same values assigned to its proxy cost of carbon. The existence of ExxonMobil's DataGuide with separate sections and appendices for proxy costs and GHG costs is corroborative of ExxonMobil's assertion that proxy cost of carbon and GHG costs are different metrics, a proposition of the Office of the Attorney General conceded before any testimony was presented at trial. Explicit statements in various publications confirmed this to be the case.

The Office of the Attorney General attaches enormous significance to the circumstance that certain documents prepared by ExxonMobil employees loosely characterized the proxy cost of carbon and GHG concepts, including by using the term "GHG proxy costs." But, as Mr. Eizember testified, the term GHG is a generic term. Tr. 1764:17-23. Both the proxy cost and GHG metrics relate to greenhouse gases. And precisely because the Economics and Energy Outlook Group is purposely separated from other groups in the Corporate Strategic Planning Group it is hardly surprising that internal documents from the different groups do not use identical terminology.

What the evidence at trial revealed is that ExxonMobil executives and employees were uniformly committed to rigorously discharging their duties in the most comprehensive and meticulous manner possible. More than half of the current and former ExxonMobil executives and employees who testified at trial have worked for ExxonMobil for the entirety of their careers. The testimony of these witnesses demonstrated that ExxonMobil has a culture of disciplined analysis, planning, accounting, and reporting.

The Court heard testimony from ten present and former ExxonMobil employees [10], most of whom were called by the Office of the Attorney General as adverse witnesses. There was not a single ExxonMobil employee whose testimony the Court found to be anything other than truthful. Each ExxonMobil and Imperial Oil [11] employee who testified in person at trial swore under oath that he or she was unaware of any scheme at ExxonMobil to mislead investors about the manner in which ExxonMobil managed climate risk.

See e.g. Tr. 459:2-20 (Rosenthal); Tr. 579:1-10 (Bailes); Tr. 662:15-19 (Powell); Tr. 864:23-865:5 (Iwanika); Tr. 748:23-749:6 (Bannister); Tr. 983:1-11 (Hoy); Tr. 1061-63 (Tillerson); Tr. 1659-60 (Colton); Tr. 1754:12-21 (Eizember); Tr. 1805:6- 1806:2 (Onderdonk). The Court has no reason to discredit the testimony of these witnesses.

22 *Rodger Reed's Testimony Shows ExxonMobil's Alleged Misrepresentations Were Not Material to Research Analysts

The Office of the Attorney General presented video designations from the deposition testimony of Rodger Reed in its case in chief, to which ExxonMobil made counter-designations. The ostensible purpose of the Office of the Attorney General's advancement of Reed's testimony in its case in chief was to support the thesis that ExxonMobil's alleged misrepresentations were material and important to research analysts and the investing public. The Office of the Attorney General offered no testimony from any investor who claims to have been misled. Reed is the only analyst the Office of the Attorney General presented at trial, and at all relevant times Reed's investment evaluation of ExxonMobil was "outperform." As explained *infra*, Reed's testimony establishes the exact opposite of what the Office of the Attorney General attempted to prove.

Reed serves as a managing director and senior energy analyst at Wells Fargo. JX988 14:16-19 (Deposition Transcript of Rodger Reed). Reed provides equity research coverage of eighteen integrated oil companies, including ExxonMobil. JX988 14:23—15:4. Reed monitors news relating to ExxonMobil as part of his job, including anything issued by ExxonMobil. JX988 8:3-10.

In his role as senior energy analyst at Wells Fargo, Reed publishes equity research reports. JX088 16: 1- 11. Specifically, Reed issues flash comments, which are reactive notes to specific events as they relate to a particular company. Flash comments are issued to inform investors of developments that Wells Fargo regards as significant. Reed further testified that if he became aware of information he thought was relevant to the valuation of a company he covered, then he would include that information in his research reports. JX988 29:8-18. Reed also testified that he believes that the most important concern about a company to any investor is cash flow. JX988 27:22-24.

As discussed *supra*, the Office of the Attorney General alleges that ExxonMobil investors were misled by information contained in *Managing the Risks* and *Energy and Climate*. Undercutting this argument is the fact that Reed testified that he did not read *Managing the Risks* and *Energy and Climate* until approximately one year after the March 2014 Reports were published. JX988 p. 57:3 and p. 59:16. Reed further testified that when he did read the March 2014 Reports, he did not recall learning anything new about ExxonMobil and the reports did not change his view of ExxonMobil. JX988 134:12-24. In addition, Reed testified that reviewing the reports did not cause him to issue a flash report. JX988 58:14 — 56:6. Reed also testified that he never referenced either of the March 2014 Reports in any research report including one that he published shortly after reading them. JX988 58:10-19.

Reed's testimony that he did not find the representations in *Managing the Risks* and *Energy and Climate* significant is important in light of his interest in how ExxonMobil managed the risks of climate change and regulation. Reed testified (JX 988 11:21-12:6):

> ***23** It is clearly an issue in the investing world what potential impacts may be on future hydrocarbon demand as a result of climate change initiatives. And we have investors that within a board what we call ESG — environmental, social, governance — you know, questions such as this come up. So that's why we have an interest in it. That's why we pay attention to it.

In addition, Reed testified that he became aware of a reported California Attorney General investigation into ExxonMobil around January 20, 2016. JX 988 61:23-15. Reed did not publish a flash comment concerning the California Attorney General's investigation of ExxonMobil. JX 988 61:1-5. Reed did not adjust his stock rating of ExxonMobil after media reports about the California Attorney General's investigation were released, nor did he adjust his target price for ExxonMobil. JX988 63: 8-16.

Reed further testified that he became aware that the SEC had announced an investigation into ExxonMobil around September 20, 2016. JX988 90:14-16. Reed issued a report around that time concerning ExxonMobil due to the "headline risk" associated with the investigation. JX977 p. 1 Wells Fargo Equity Research — "Some Smoke But Likely No

Fire; Lowering Valuation Range." Reed noted (correctly as it turned out) that he not believe the SEC would take any action against ExxonMobil. [12] *Id.* While Reed did reduce his target price for ExxonMobil to take account for the "headline risk" of the SEC investigation, Reed continued to evaluate ExxonMobil as an "outperform" investment. *Id.*

Finally, Reed testified that he became aware of the New York Attorney General's lawsuit against ExxonMobil in 2018. JX 988 9:4-6. Reed did not adjust his target price for ExxonMobil as a result of the Attorney General's investigation. JX 988 63:4-8.

The Court finds that Reed's credible and unbiased testimony undercuts the assertion that information contained in the March 2014 Reports was material to investors. *Reed's job is to monitor and report on developments related to the valuation of ExxonMobil*. Reed testified that environmental risks were important to investors and that he paid attention to developments in this area. As Reed's professional analysis of ExxonMobil was unaffected by the publication of the March 2014 Reports or by any event to which the Office of the Attorney General attaches significance, Reed's testimony provides no support for the Office of the Attorney General's theory of the case. [13]

24 *The Office of the Attorney General's Expert Witnesses Fail to Establish Materiality

In support of its contention that the alleged misrepresentations were material to ExxonMobil investors, the Office of the Attorney General offered two expert witnesses, Dr. Eli Bartov and Mr. Peter Boukouzis.

Dr. Bartov's Event Study Does Not Demonstrate Materiality

Event studies are a well-recognized manner of establishing the materiality of an alleged misstatement. *See United States v. Martoma*, 993 F. Supp. 2d 452, 457 (S.D.NY 2014). An event study showing that disclosure of a company's alleged fraud had an impact on that company's stock price is a method of establishing materiality in an efficient securities market. *See* *Oran v. Stafford,* 226 F.3d 275,282 (3d Cir. 2000) (holding that "when a stock is traded in an efficient market, the materiality of disclosed information may be measured post hoc by looking at the movement, in the period immediately following the disclosure, of the price of the firm's stock"). Passing the issue of whether disclosures such as those in the March 2014 Reports were "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) — which they were not - the parties agree that the market for ExxonMobil securities is efficient and, perforce, any material information released to the market should be reflected in its stock price. *See* *Oran,* 226 F.3d at 282.

To support its theory that the alleged misstatements in the March 31, 2014 publications were material, the Office of the Attorney General offered the expert testimony and expert report of Dr. Eli Bartov who concluded that there was inflation on the stock price of ExxonMobil from April 1, 2014 to June 1, 2017. Tr. 1149:25-1150:4. Dr. Bartov posited that the inflation period began after the alleged affirmative misrepresentations contained in the two March 31, 2014 publications. Significantly, the Office of the Attorney General offered no proof that there was any increase in the stock price of ExxonMobil immediately following the publication of *Managing the Risk* and *Energy and Climate* and Dr. Bartov perplexingly testified that he did not conduct an analysis of whether or not ExxonMobil's stock increased as a result of the alleged misrepresentations in the March 31, 2014 publications "because it was completely unrelated to my analysis." Tr. 1233:8-13. By contrast, ExxonMobil's expert, Dr. Frank Allen Ferrell, [14] determined that there was no increase in ExxonMobil stock on April 1, 2014. Tr. 1967. In short, there is no evidence that any misleading statements in these publications inflated the price of ExxonMobil stock. *See* DX711 ¶ 15 Expert Report of Allen Ferrell.

**25 So, without any fact witness to establish that the alleged misrepresentations in these publications were material to any investment decision by any investor, and without establishing that any alleged misrepresentations drove up the stock of ExxonMobil after March 31, 2014, the Office of the Attorney General presented an event study performed by Dr. Bartov who hypothesized that there were three events subsequent to March 31, 2014 that constituted "corrective disclosures" which operated to depress the inflated stock of ExxonMobil. [15]

A corrective disclosure "is an announcement or series of announcements that reveals to the market the falsity of a prior statement." *Arkansas Teachers Ret. Sys. V. Goldman Sachs Group, Inc.,* 879 F. 3d 474, 480 n.3 (2d Cir. 2018). 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. Dr. Bartov's theory is that (Tr.1119):

> [S]tock price will change only when there is new information that is relevant to the value of the company. In other words, this information has to change the view of investors about the future cash flows that the company will be generating.

Dr. Bartov posited that there were three corrective disclosures, the most significant of which for purposes of this case was a news report in the *Los Angeles Times* on January 20, 2016 (*i.e.*, a year and a half after the March 2014 Reports) that the California Attorney General was investigating whether ExxonMobil "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 p. 2. (Ivan Penn, "California to investigate whether Exxon Mobil lied about climate change risks.") Significantly, as Dr. Ferrell testified, the news report is about an investigation about climate change and the corrective disclosure that is the subject of Dr. Bartov's event study is about alleged misrepresentations concerning proxy costs of carbon and GHG costs. Tr. 1976. As Dr. Ferrell noted:

> I do want to emphasize so it's not lost in the shuffle, that January 20th, 2016 when you read the article, it's about the science of climate change. I just, for the life of me, do not see how that is a corrective disclosure of the alleged misrepresentation that he identifies, Dr. Bartov identifies in the — in his report.

Tr. 1986.

The other two "corrective disclosures" identified by Dr. Bartov are the September 20, 2016 news report of an SEC investigation of ExxonMobil and the June 2, 2017 filing of the Office of the Attorney General's Complaint in this action. The evidence showed that there was a statistically significant decline in ExxonMobil stock on January 21, 2016, following the report in the *Los Angeles Times*, using the generally accepted "market close to market close" window to measure the decline of a stock after a corrective disclosure. [16]

***26** However, the news report of the California Attorney General investigation came months after a front-page November 5, 2015 *New York Times* story that the Office of the Attorney General was investigating "whether the company lied to the public about the risks of climate change or to investors about how such risks might hurt the oil business". There was no statistically significant market reaction at the five percent statistical level to the earlier announcement of the New York Attorney General's investigation (which the Office of the Attorney General does not contend was a corrective disclosure) and there was no statistically significant stock movement at the five percent statistical level after the subsequent news report of an SEC investigation on September 20, 2016, or the filing of the Office of the Attorney General's Complaint in this action on June 2, 2017. [17] Dr. Bartov conceded that there was no movement in ExxonMobil stock when the SEC dropped its probe of ExxonMobil on August 3, 2019. Tr.1203. Dr. Ferrell went further and asserts that the circumstance that there was no market reaction to the termination of the SEC investigation undermines the theory that the announcement of the SEC investigation constituted corrective disclosure. Tr. 1973.

None of Dr. Bartov's corrective disclosures contain any statements from ExxonMobil acknowledging a misstatement or correcting a previous disclosure. Tr. 1208. They all pertain to regulatory investigations of ExxonMobil announced in the mainstream press. In short, the news of the California Attorney General's reported investigation is precisely the kind of news that the Office of Attorney General's witness Rodger Reed characterized as "headline risk." Additionally, as ExxonMobil's highly credentialed expert, Dr. Ferrell, testified, there is something circular about claiming that a stock drop precipitated by the announcement of an investigation constitutes evidence of wrongdoing. Indeed, by Dr. Bartov's reasoning, any decline in the value of ExxonMobil stock after the June 2, 2017 filing of the Office of the Attorney General's complaint is the result of an ill-conceived initiative of the Office of the Attorney General.

Courts have held 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); *see also* *Loos v. Immersion Corp.*, 762 F.3d 880, 890 (9th Cir. 2014), as amended (Sept. 11, 2014). Common sense dictates that the announcement of a government investigation may have a negative, but not necessarily corrective, effect on stock prices. As Dr. Bartov conceded, "[i]t is not good news" when "it is reported in the financial press that a regulatory [agency] is investigating you." Tr. 1314-16. In short, a regulatory investigation is "bad news" for a company regardless of whether, as in this case, there is a successful outcome for the company of the regulatory investigation.

Significantly, there has apparently been no reported progress in the reported California Attorney General's investigation; it is undisputed that the SEC dropped its investigation without requiring ExxonMobil to restate anything or amend any disclosure; and this Court has found in ExxonMobil's favor.

As with Dr. Bartov's testimony about the alleged materiality of an alleged impairment in 2015 of an ExxonMobil facility in Mobile Bay, in the Gulf of Mexico, discussed *infra*, the Court rejects Dr. Bartov's expert testimony as unpersuasive and, in the case of his testimony about the Mobile Bay facility, finds Dr. Bartov's testimony to be flatly contradicted by the weight of the evidence.

2. Mr. Peter Boukouzis' Analysis Did Not Demonstrate Materiality or Damages

The Office of the Attorney General also attempted to establish materiality through its expert Peter Boukouzis. Among other aspects of his work for the Office of the Attorney General, Mr. Boukouzis, replaced ExxonMobil's GHG cost assumptions in certain internal models used by ExxonMobil in its planning and investment process with values ExxonMobil assigned to the proxy cost of carbon. Tr. 1412. Part of his analysis consisted of selecting a sample of 27 internal economic models and replacing the GHG cost assumptions in those models with proxy cost of carbon assumptions. JX 972 ¶ 120-21; Tr.1407. The remarkably extensive data and stress tests contained in these models actually confirms ExxonMobil's assertion in *Energy and Climate* that ExxonMobil "tests investment opportunities against a broad set of economic assumptions, including low price scenarios that could be representative of a carbon-constrained environment, to help ensure that the investment will perform acceptably across a broad range of economic circumstances during its lifetime." PX 002 p. 20.

***27** Mr. Boukouzis uniformly applied proxy cost of carbon assumptions to 100 percent of emissions, in five models for which ExxonMobil determined that only a fraction of emissions would be taxed under local regulations. *Id.* ¶ 122; Tr. 1413. *See also* Tr. 1908. Mr. Boukouzis then concluded that, leaving "[a]ll other input parameters in the models unchanged," his adjustments reduce certain financial metrics for these projects. *Id.* ¶ 121. Mr. Boukouzis performed no assessment of whether any of ExxonMobil's disclosures affected the value of ExxonMobil stock. Tr. 1426:6-10.

In Mr. Boukouzis' report (JX972 ¶ 20), he writes "based on my experience analyzing and evaluating oil and gas companies, the investment community would likely interpret ExxonMobil's public disclosures to mean that it was consistently applying the publicly disclosed GHG emission proxy costs." This was apparently Mr. Boukousis' rationale for substituting ExxonMobil's proxy cost of carbon for ExxonMobil's GHG costs for specific projects. Passing whether Mr. Boukouzis had any basis for this assumption, ExxonMobil's credentialed expert, Dr. Marc Zenner, actually tracked S & P and Moody's and found that virtually no analysts' reports mentioned proxy costs, GHG costs, or the Office of the Attorney General's Complaint. Tr. 1849.

As a preliminary matter, no investor would have been able to perform the analysis Mr. Boukouzis performed because, as ExxonMobil explained in *Managing the Risks*, ExxonMobil does "not publish the economic bases upon which [it] evaluate[s] investments due to competitive considerations." PX 001 p.16. No investors had any insight into the evaluations ExxonMobil performed of potential investments, and no investor could have made an investment decision based on any assumption contained in those evaluations. Tr. 1444; Tr. 1854. Consequently, any purported deviations in applying assumptions in internal investment evaluations could not have altered the total mix of information available to the public. Indeed, Mr. Boukouzis conceded that the models themselves, along with their inputs and outputs, were proprietary and never publicly disclosed. *Id.* at 201:13-202:10, 204:20-205:3; *see also* DX712 ¶102. [18]

***28** Mr. Boukouzis' analysis is more fundamentally flawed. First, Jason Iwanika, a development planner for Imperial Oil, demonstrated that Mr. Boukouzis did not understand how some of ExxonMobil's internal models actually worked, thereby resulting in Mr. Boukouzis doubling and tripling some of his outputs. Tr. 1933-1940. Mr. Boukouzis admitted that he did not understand some of the models. Tr. 1467.

And, of the 27 economic models Mr. Boukouzis reviewed, he conceded that 24 of the 27 related to Alberta, Canada (which has a regulatory regime for GHG emissions) (Tr. 1441 and 1925) and he admitted that at least 19 were not "investment decision models." JX 972 ¶ 125 and n.282; Tr. 1447; 1456; 1925. At trial, Mr. Boukouzis conceded he did not know whether a model he adjusted was merely a draft model or an exploratory internal working model, or if any of the models were actually funded projects. Tr. 1447; 1449-50. Critically, Mr. Boukouzis conceded that he did not know whether any of these cash flow models were presented to senior management at ExxonMobil. Tr. 1486.

Second, Mr. Boukouzis failed to establish that his adjustments would have rendered any project unprofitable. Key financial metrics that were positive before his adjustments remained positive even after his adjustments. JX 972 at Ex. 11; Tr. 1440. Indeed, on average, *after* all the adjustments Mr. Boukouzis made, the average internal rate of return for the projects Mr. Boukouzis manipulated was 12.7 percent. Tr. 1440. *Cf.* Tr. 1910. And, all of the models had positive undiscounted cash flow *after* the adjustment Mr. Boukouzis made. Tr. 1458. *See also* Tr. 1909. As ExxonMobil's expert witness, Dr. Marc Zenner, explained "the Boukouzis Report itself demonstrated that no financial decisions regarding project viability based on net present value would have been affected by Mr. Boukouzis' model adjustments." DX712 ¶ 99 Expert Report of Marc Zenner. *See also* Tr. 1853-54.

Third, Mr. Boukouzis did not demonstrate how ExxonMobil would have "presented less optimistic business projections" to the investing public had its internal models reflected Mr. Boukouzis' adjustments. DX 972 ¶ 22 Expert Report of Peter Boukouzi). Mr. Boukouzis did not identify any communications from ExxonMobil to investors that would have been different if ExxonMobil had applied its proxy cost of carbon assumptions in economic models rather than GHG costs. Tr. 1489.

Mr. Boukouzis also used the calculations from Dr. Bartov's event study and attempted to determine "damages" by estimating changes in shareholdings by institutional investors in periods correlated to Dr. Bartov's event study (which assumed that ExxonMobil stock was artificially inflated) (Tr. 1149:25-1150:4) by examining quarterly Form 13F filings institutional investors made with the SEC. Mr. Boukouzis claims to have determined the total number of impacted shares using a "last in first out" ("LIFO") methodology and then applying the inflation per share from Dr. Bartov's calculation. Mr. Boukouzis calculated damages in the range of $460 million using the one date in which Dr. Bartov identified a decline in the price of ExxonMobil's shares due to corrective disclosure with a 95 percent confidence level. He calculated damages of $1.6 billion using all three of Dr. Bartov's event study dates. Tr. 1420.

Passing other critiques of Mr. Boukouzis' methodology and the accuracy of these calculations as explained in Dr. Ferrell's expert report, any calculations based upon an event study that the Court totally rejects for the reasons particularized *supra*, do not constitute credible evidence. Indeed, Mr. Boukouzis agreed that if Dr. Bartov's event study is flawed, Mr. Boukouzis' aggregate damage analysis is necessarily flawed as well ("if the input is flawed, yes, the results will be flawed. That's correct.") Tr. 1507; *see also* Tr. 1993 (Dr. Ferrell). But Dr. Ferrell had a harsher critique of Mr. Boukouzis' damage calculations (Tr.1991:12-23):

> [L]et's assume that there's inflation in the stock price. Let's assume that to be true. In order to calculate damages to shareholders you have to know when shareholders that actually own the shares, when they purchased, and when they sold. If you don't know when shareholders purchased and when they sold, but you're just going to make that up, that is, you're just going to make an assumption about that, then it's going to be — those numbers are going to be meaningless. So — and whether you're using the 13F Data which is what Mr. Boukouzis uses or other approaches that are not being used here, they are totally, completely unreliable because one simply does not know who purchased and when their shares were sold.

***29** Finally, as previously indicated, Dr. Zenner and ExxonMobil's cross-examination of Mr. Boukouzis, convincingly undercut Mr. Boukouzis' opinion that investment analysts either wrote about or were concerned about ExxonMobil's treatment of GHG costs, although investment analysts did report on industrywide climate

change regulatory risk. Tr. 1489-1504 (*passim*). The Court therefore gives no weight to Mr. Boukouzis' expert testimony.

Mobile Bay

The Office of the Attorney General alleges that ExxonMobil did not take impairments when required by Generally Accepted Accounting Principles ("GAAP") (Complaint ¶ 225, 236). After a four-year review of ExxonMobil's impairment disclosures, the Office of the Attorney General and its expert identified a single asset, Mobile Bay, that the Office of the Attorney General claims was impaired in 2015. JX 973 ¶ 17 Expert Report of Eli Bartov. The Office of the Attorney General's expert, Dr. Bartov, makes no specific claims about any other asset or any other year. In his view, GHG cost assumptions in the non-publicly disclosed DataGuide should have been applied to ExxonMobil's impairment assessment of Mobile Bay in 2015, and if those assumptions had been applied there would have been an impairment. Complaint ¶ 254. Significantly, there were no actual GHG costs associated with Mobile Bay in 2015 and so ExxonMobil surely had the discretion to determine that it was *not appropriate* to add a GHG cost assumption to Mobile Bay for 2015.

As established by the uncontradicted testimony of Richard Auter, a senior director of PricewaterhouseCoopers who has worked on the ExxonMobil audit for thirteen years, GAAP establishes a three-step approach to asset impairments.

First, a company must determine whether an impairment "trigger" exists for a given asset (Complaint ¶ 228; JX968 at ASC 360-10-35-1 FASB [19] Accounting Standards Codification: ASC 360). Absent a trigger, a company need not conduct any further analysis.

Second, if a trigger exists, a company must assess whether an asset's current book value can be recovered through its future undiscounted cash flows. *Id.* at ASC 360-10-35-17. The accounting standards require that the impairment cash flow models created at this step use assumptions that are "reasonable in relation to" those a company uses in other aspects of its business planning. *Id.* at ASC 360-35-30.

Third, if the impairment cash flow analysis reveals that an asset's book value cannot be recovered through future cash flows, ExxonMobil must calculate the asset's fair value so it can determine the size of the required impairment. *Id.* at ASC 360-10-35-17. *See* Tr. 1537-1558. ExxonMobil did not report any impairment of the Mobile Bay Facility in its 2015 Form 10-K, and PricewaterhouseCoopers issued a "clean" opinion on ExxonMobil's 2015 Form 10-K report.

The Office of the Attorney General failed to demonstrate that ExxonMobil's impairment disclosures and accounting practices in 2015 were inconsistent with GAAP. As reported in ExxonMobil's 2015 Form 10-K (JX 906 p. 70.):

If there were a trigger event, [ExxonMobil] estimates the future undiscounted cash flows of the affected properties to judge the recoverability of carrying amounts .... These evaluations make use of the Corporation's price, margin, volume, and cost assumptions developed in the annual planning and budgeting process, and are consistent with the criteria management uses to evaluate investment opportunities.

***30** Dr. Bartov *assumed* that there was a trigger event (Tr. 1257) and proceeded to do an impairment analysis incorporating GHG costs for an extended period into the future.

Contrary to Dr. Bartov's testimony, ExxonMobil and its auditor PricewaterhouseCoopers, determined, as ExxonMobil's 2015 Form 10-K reflects, that there was *no trigger* event with respect to the Mobile Bay plant in 2015. JX958 p. 5 PwC Memorandum: U.S. Production - Long-lived Asset Impairment Assessment; Tr. 1540-41; 1545; 1551. As Mr. Auter explained, the Mobile Bay plant had positive cash flows in the remaining years of the asset's life. Tr. 1551. Mr. Auter testified that even though there was no trigger event and no requirement for ExxonMobil to do anything further with respect to Mobile Bay, ExxonMobil confirmed the absence of a trigger by doing more analysis than was required under the applicable accounting standard. ASC at 360; Tr. 1546, 1552. In addition, neither ExxonMobil nor PricewaterhouseCoopers believed it was "appropriate" to include GHG costs on the Mobile Bay plant in 2015. Tr. 1569. And, PricewaterhouseCoopers determined that it was not necessary to expense GHG costs in 2015. Tr. 1569, 1571; DX672 Memorandum re GHG Assumptions in ExxonMobil's 2016 asset recoverability assessments.

Significantly, the Mobile Bay facility was not impaired in 2016 when ExxonMobil *did include* GHG costs in its impairment analysis. Tr. 1556, 1567, 1171. And, equally significant, in 2017 when ExxonMobil determined that Mobile Bay was impaired, PriceWaterhouseCoopers wrote:

"GHG is not considered a significant assumption. The inclusion of this assumption reflects conservatism on the part of management ...." DX673 PwC Memorandum: 2017 Corporate Plan Dataguide and Controls over Key Assumptions.

In all events, accepting as true all of the Office of the Attorney General's vigorously disputed calculations of impairment of the Mobile Bay facility in 2015, the purported impairment would have been less than one percent of ExxonMobil's market capitalization and therefore not material. Tr. 1345:16-1346:8.

Conclusion

In sum, the Office of the Attorney General failed to prove, by a preponderance of the evidence, that ExxonMobil made any material misstatements or omissions about its practices and procedures that misled any reasonable investor. The Office of the Attorney General produced no testimony either from any investor who claimed to have been misled by any disclosure, even though the Office of the Attorney General had previously represented it would call such individuals as trial witnesses. ExxonMobil disclosed its use of both the proxy cost and the GHG metrics no later than 2014. Perhaps, the 2014 paragraph in *Managing the Risks* which indicated that ExxonMobil applied a GHG cost "where appropriate" and which was the subject of questioning of virtually every witness in the case could have been written in bold type, but the sentence was consistent with other ExxonMobil disclosures and ExxonMobil's business practices. The publication of *Managing the Risks* had no market impact and was, as far as the evidence adduced at trial reflected, essentially ignored by the investment community.

***31** The testimony of all the present and former ExxonMobil employees who were called either as adverse witnesses by the Office of the Attorney General or as defense witnesses by ExxonMobil was uniformly favorable to ExxonMobil, and the Court credited the testimony of each of those witnesses. The testimony of the expert witnesses called by the Office of the Attorney General was eviscerated on cross-examination and by ExxonMobil's expert witnesses. Confronted with the disclosures in ExxonMobil's Corporate Citizenship Reports, Form 10-K's, and ExxonMobil's annually published *Outlook*, the Office of the Attorney General failed to prove by a preponderance of the evidence that any alleged misrepresentation in *Managing the Risks* and *Energy and Climate* (or any other disclosure by ExxonMobil) was false and material in the context of the total mix of information available to the public.

For all of these reasons, the claims asserted by the Office of the Attorney General under the Martin Act and Executive Law § 63(12) are denied, and the action is dismissed with prejudice.

All Citations

Slip Copy, 65 Misc.3d 1233(A), 119 N.Y.S.3d 829 (Table), 2019 WL 6795771, Blue Sky L. Rep. P 75,277, 2019 N.Y. Slip Op. 51990(U)

Footnotes

1 "PX" denotes plaintiff's exhibit admitted into evidence at trial; "DX" denotes defendant's exhibit admitted into evidence at trial; and "JX" denotes joint exhibits admitted into evidence at trial. "Tr." refers to the transcript of the proceedings followed by the page and line.

2 The Court recognizes that once a defendant has filed a responsive pleading, the plaintiff cannot unilaterally discontinue its claims without permission of the Court, *see* CPLR 3217(b), and that the Court's discretion to issue such an order is not unlimited. The apparent purpose of this rule is to prevent a discontinuance for the sole purpose of warding off an adverse decision. Nevertheless, here, ExxonMobil chose to forego the opportunity to seek a directed verdict at the close of the trial which, as explained in detail in this opinion, necessarily would have ultimately been granted. The adverse decision against the Office of the Attorney General on the Martin Act and Executive Law claims establishes that the Office of the Attorney General could not have prevailed against ExxonMobil on the fraud claims, and the Court finds it unnecessary to further

address ExxonMobil's motion opposing the Office of the Attorney General's decision to discontinue its fraud claims with prejudice, as the issue is moot. *Cf. Bremhouse v. Anthony Indus. Inc.*, 156 AD2d 411, 412 (1st Dep't 1989). In short, ExxonMobil, as the prevailing party on the Martin Act and Executive Law claims, has not been prejudiced by the discontinuance of the fraud counts with prejudice.

3 Prior to the commencement of any testimony, the Office of the Attorney General acknowledged that ExxonMobil utilized a proxy cost of carbon for purposes of projecting the demand for its products and separate GHG calculations for the purpose of projecting costs on specific projects. Tr. 74. The Office of the Attorney General thus framed the issue to be decided in this case as "how that was portrayed to investors." Tr. 74-75.

4 Todd Onderdonk, a Senior Energy Advisor in the Corporate Strategic Planning Department, noted in his trial testimony that the *Outlook* also talks about "migration of people from rural areas and cities and the impact that has on the infrastructure required to build these cities; steel, cement, glass, roads, bridges, and its impact on energy demand. We've talked about demographics within the population and their impact. Most recently we talked about the growing middle class and how people in many developing countries can now afford for the first time to get a motorcycle, a car, get access to electricity. So we try to bring more clarity to some of these challenges through our reports."

5 Todd Onderdonk described the *Outlook* as follows:

> Well, the *Energy Outlook* is something the corporation did annually. It was our view of how energy markets would unfold around the world. In detail I was looking at about 100 countries or country regions for the world. Approximately 15 different demand sectors within those countries. And then looking at all the different types of energy that could be used, roughly 20 different types of energy. So, oil products, natural gas, coal, nuclear, renewables. Tr. 1776:9-16.
>
> *We're trying to forecast demand. We're trying to look at, based on fundamentals of population growth, economic growth, how we see technologies unfolding, government policies and how they might influence the view to the future*, exactly what demand would be in different parts of the world for oil, for gas, for the different types of oil products and how things like nuclear and renewables may come into play as well as coal. That was then a foundation for how we saw opportunities to the business. Areas where we saw markets growing. Areas where we saw demand for certain products decreasing over time. And that would help inform our decisions. Tr. 1777:4-14 (emphasis added).

6 Ms. Lamb recognized that ExxonMobil's projected revenues on a proposed project are based on price bases "and those price bases are influenced by the proxy costs of carbon through the Energy Outlook process." Tr. 149:22-150:4

7 Ms. Lamb believes that ExxonMobil's business practices contribute to climate change and has supported efforts to change ExxonMobil's practices through, *inter alia*, shareholder proposals. In 2016, Ms. Lamb, who does not invest in or recommend ExxonMobil stock, Tr. 134:2-7, wrote about the Office of the Attorney General's investigation of ExxonMobil that "ExxonMobil's day of reckoning is fast approaching." DX 842 at 2. *See also* Tr. 138:13-24. Ms. Lam is manifestly biased against ExxonMobil, having co-authored an article that read in part: "Despite it's disingenuous head fake in Paris, Exxon's narrative of preferring and even encouraging inaction in the face of climate change is the oil giants well established modus operandi. As recent news accounts have show Exxon has funded organizations for decades but denied the risks of climate change despite the company's own internal research confirming those very risks." Tr. 137:11-19.

8 The office of the Attorney General seizes upon the following portion of Mr. Tillerson's statement at ExxonMobil's 2016 shareholder meeting:

> 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. JX 918-29.

In the context of discussing the *Outlook* which ExxonMobil has published annual since 2007, Mr. Tillerson's 2016 remarks easily square with his trial testimony quoted above.

9 Michael Garland, the Assistant Comptroller for Corporate Governance and Responsible Investment, was another witness who testified in the Office of the Attorney General's case in chief. Mr. Garland attended the December 13, 2013 meeting, but had no recollection of anything about that meeting. Tr. 216. He did not read the March 31, 2014 publications when they were published (Tr. 201-02) and he makes no investment decision on behalf of the City of New York. Tr. 201. It is unclear why he was asked to testify in this case.

10 Robert Bailes, Kirsten Bannister, William Colton, Brant Edwards (by video deposition), Thomas Eizember, Todd Onderdonk, Guy Powell, David Rosenthal, Mark Shores (by deposition), and Rex Tillerson.

11 ExxonMobil is the majority shareholder of Imperial Oil.

12 The report (JX977 p. 1) states: “We rate the likelihood of a negative outcome from a reported SEC investigation into ExxonMobil's accounting/climate practices as very slight. However, in our view the headline risks associate with an SEC investigation create enough investor angst to damage ExxonMobil's reputation and impact its share prince performance during the investigation.”

13 Peter Boukouzis, one of the experts called by the Office of the Attorney General, attached significance to the portion of one of Mr. Reed's reports that states “Exxon places a proxy costs of carbon on all its future developments. Depending on the project and it location, the proxy cost of carbon ranges from $20 to $80 per ton by 2040. This approach reduces the risks associated with future CO2 emissions and incentivizes Exxon to reduce overall emission on all future projects. Thus we believe ExxonMobil is ahead of the curve on pricing in climate risk.” PX074. Mr. Reed apparently believed that ExxonMobil's proxy cost of carbon was included on the operational or expense side of its business. Tr. 1890. Whether the specific conclusion Mr. Reed drew from his understanding of the proxy cost of carbon is correct should not have affected his overall analysis of ExxonMobil stock as ExxonMobil's expert witness Marc Zenner's testimony confirms. Tr. 1853-54.

14 Dr. Ferrell is Greenfield Professor of Securities Law at Harvard Law School. He is also a faculty associate at the Kennedy School of Government, chairman of the Harvard Advisory Committee on Shareholder Responsibility, and a research associate at the European Corporate Governance Institute. He was previously on the Board of Economic Advisors to the Financial Industry Regulatory Authority (FINRA), a research fellow at FINRA, and a member of the ABA Task Force on Corporate Governance. He holds a law degree from Harvard Law School and a Ph.D. from the Massachusetts Institute of Technology. Early in his career, he served as a law clerk to Justice Kennedy of the United States Supreme Court. Tr. 1951.

15 Dr. Ferrell ran an alternate event study model which has an industry control in it because in Dr. Ferrell's view stocks can move because of the industry they are in. “So industry controls, as a general matter are typically used in event study analysis, particularly when you're talking about a single firm event study, where you really want to try to identify the firm specific price movement for this particular stock.” Tr. 1960

16 Dr. Bartov explained that on January 20, 2016 he “found that there [was] a statistically significant response to the information at the *five percent statistical level, which is as I explained detailed in my report, this is the standard benchmark that is used in academia*.” (emphasis added) Tr. 1212. Dr. Ferrell was emphatic that the standard is five percent. Tr. 1968. When asked whether in science and academia findings that come close to five percent are statistically significant, Dr. Ferrell stated:

> So, I want to back up and talk about what does the standard mean. You don't shoot an arrow and then paint a bullseye around it. You either meet the standard or you don't. If you change the standard, it means you don't have a standard. Tr. 1969.

17 Dr. Ferrell calculated that using an alternative model with an industry control, the June 2, 2017 date could not be viewed as a corrective disclosure even using a ten percent standard.

18 Mr. Boukouzis also flagged the fact that in the transportation sector, instead of applying a proxy cost of carbon for both heavy and light duty vehicles in analyzing demand, ExxonMobil used what is known as a “CAFE standard” (Corporate Average Fuel Economy) which is the fuel efficiency standard “meaning vehicles will have better mileage” thereby suppressing demand. Tr. 1399. The Court does not find this omitted disclosure in some ExxonMobil publications to be material. Manifestly, ExxonMobil's determination to use a proxy cost

as one element in assessing demand for its products is entirely consistent with using a CAFE standard projected government-mandated fuel efficiency standards in part of the transportation sector. Mr. Boukouzis' unsupported opinion that use of a CAFE standard inflated demand is counter-intuitive and the Court rejects it. Indeed, Mr. Boukouzis does not know whether if ExxonMobil had used its proxy cost of carbon instead of using increased fuel efficiency standards it would have had a bigger effect on depressing demand for oil and gas in the transportation sector. Tr. 1514. In the latter connection, Mr. Boukouzis conceded that ExxonMobil did not have any incentive to direct its project planners to understate expected expenses. Tr. 1516. And, Mr. Colton, the longtime President of Corporate Strategic Planning at ExxonMobil, testified - using projected government-mandated fuel efficiency standards was “almost universally” more aggressive than using a proxy cost. Tr. 1638. Mr. Colton's testimony was confirmed in Exhibit DX826-N.

19 Financial Accounting Standards Board