UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON MOBIL CORPORATION,	:	
	:	No. 17-CV-2301 (VEC) (SN)
Plaintiff,	:	
	:	
-against-	:	ECF Case
	:	
ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity,	:	**REPLY DECLARATION OF LESLIE B. DUBECK**
Defendants.	:	

Leslie B. Dubeck hereby declares under penalty of perjury, *see* 28 U.S.C. § 1746:

1. I am Counsel to Attorney General Eric T. Schneiderman, Attorney General of the State of New York.

2. I submit this declaration based on personal knowledge, for the limited purpose of providing the Court with the attached appendix of exhibits, cited in the Reply Memorandum of Law in Further Support of the New York Attorney General's Motion to Dismiss the Action Based on Certain Threshold Defenses, that establish the fact of related litigation and statements made therein. *See, e.g.*, *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007); *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991).

3. Attached as Exhibit 1 is a true and correct copy of Exxon Mobil Corp.'s (Exxon's) Brief in Support of Its Motion to Quash and for a Protective Order, filed on May 19, 2017, in *People ex rel. Schneiderman v. PricewaterhouseCoopers LLP & Exxon Mobil Corp.*, Index No. 451962/2016 (Sup. Ct. N.Y. County) (*People v. PwC & Exxon*). (App. 317–347.)

4. Attached as Exhibit 2 is a true and correct copy of a document subpoena, dated May 8, 2017, issued by the New York Office of the Attorney General to Exxon, pursuant to section 352 of New York's General Business Law and section 63(12) of New York's Executive Law, included as Exhibit T to Exxon's above-referenced filing. (App. 348–370.)

5. Attached as Exhibit 3 is a true and correct copy of a Memorandum of Law in Opposition to Exxon's Motion to Quash and in Support of the Office of the Attorney General's Cross-Motion to Compel, filed on June 2, 2017, in *People v. PwC & Exxon*. (App. 371–400.)

6. Attached as Exhibit 4 is a true and correct copy of Exxon's Opposition to the Attorney General's Motion to Compel and Reply in Support of Its Motion to Quash, filed on June 9, 2017, in *People v. PwC & Exxon*. (App. 401–430.)

7. Attached as Exhibit 5 is a true and correct copy of a Reply Memorandum of Law in Further Support of the Office of the Attorney General's Cross-Motion to Compel, filed on June 14, 2017, in *People v. PwC & Exxon*. (App. 431–455.)

8. Attached as Exhibit 6 is a true and correct copy of the so-ordered transcript of a hearing held on June 16, 2017, in *People v. PwC & Exxon*. (App. 456–556.)

9. All non-sealed exhibits to the court filings comprising Exhibits 1, 3, and 4 to this declaration are publicly accessible via the New York State Unified Court System online docket, at https://iappscontent.courts.state.ny.us/NYSCEF/live/unrepresented/HomePage.html.

I declare that the foregoing is true and correct.

Dated: New York, New York
June 30, 2017

Leslie B. Dubeck

Exhibit 1

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

In the Matter of the Application of the PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, Petitioner, -against- PRICEWATERHOUSECOOPERS LLP and EXXON MOBIL CORPORATION, Respondents.	Index No. 451962/2016 IAS Part 61 Hon. Barry R. Ostrager Motion Sequence No. ___

EXXON MOBIL CORPORATION'S BRIEF IN SUPPORT OF ITS MOTION TO QUASH AND FOR A PROTECTIVE ORDER

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Exxon Mobil Corporation ("ExxonMobil") submits this brief in support of its motion to quash or, in the alternative, for a protective order limiting document and testimonial subpoenas issued on May 8, 2017, by the New York Attorney General (the "Attorney General"). The document subpoena requires, among other things, all documents from the last twelve years concerning each and every decision ExxonMobil has made to (i) invest in or decline any oil and gas project; (ii) impair any long-lived assets; or (iii) estimate the oil and gas reserves associated with each of its oil and gas projects, along with a custom-made summary of all that information. The four challenged testimonial subpoenas probe past subpoena compliance, an issue fully covered already in affirmations and depositions.

PRELIMINARY STATEMENT

Less than two months ago, the Attorney General assured this Court of his intention to complete document discovery expeditiously and "mov[e] on to the next stage of the investigation." Taking the Attorney General at his word, the Court set aggressive deadlines for finishing document production, which ExxonMobil worked diligently to meet. ExxonMobil also provided an affidavit and certification of subpoena compliance, as ordered by the Court, and it then furnished the relevant affiants for two day-long depositions. But just as the document phase of his investigation was scheduled to end, the Attorney General served a new subpoena on ExxonMobil, re-opening document discovery with demands even broader and more burdensome than those he made over a year and a half ago. And rather than move on to the "next stage" of his investigation by requesting only substantive testimony on the issues purportedly under investigation, the Attorney General issued four testimonial subpoenas focused backward on the well-

travelled territory of subpoena compliance, which was fully addressed in the affidavit, certification, and depositions this Court had ordered and the Attorney General received. In the context of a year-and-a-half-long investigation, much of it supervised by this Court, the Attorney General cannot unilaterally shift gears, open new fronts, and impose substantial burdens on ExxonMobil without a sound factual basis for these new demands commensurate with and capable of justifying the corresponding burdens.

The Attorney General has come nowhere close to satisfying that standard. Under orders this Court entered to ensure the Attorney General would receive "all the information he could possibly request," ExxonMobil has produced over 2.8 million pages of documents for a climate-change investigation that has long appeared to be more about publicity and politics than the sound administration of justice. The Attorney General has not pointed to a single produced document to justify a further request for information. Nevertheless, he issued a new subpoena demanding that ExxonMobil provide records on every oil and gas investment decision it has made—which, for an energy company like ExxonMobil, is essentially every business decision it has made—over the last 12 years, along with similar requests for the equally central functions of asset impairment and reserves estimation. Compliance with the Attorney General's document request would impose an onerous burden on ExxonMobil to collect mountains of information across multiple business lines and geographic regions. That burden could be justified only by a compelling need well supported by facts.

Having failed to identify any such need or supporting facts, the Attorney General has compounded the impropriety of his subpoena by demanding that ExxonMobil review and synthesize the requested information and compile cumbersome

spreadsheets prepared to the Attorney General's specifications (which includes unclear and nonstandard terminology). That demand is improper in its own right, even if it were not unduly burdensome as well (which it is). No statute or precedent authorizes the Attorney General to conscript subpoena recipients to prepare charts not already in existence or populate spreadsheets for the Attorney General's convenience. Were it otherwise, the Attorney General would be free to outsource his investigations to the unfortunate recipients of his subpoenas.

It is equally improper and contrary to law for the Attorney General to probe areas foreclosed from state inquiry by federal regulation, as he does here. The Securities and Exchange Commission (the "SEC") has spoken definitively on how proved reserves are to be reported and on how assets are to be impaired. It is not the place of the Attorney General to second-guess those determinations by demanding information that supports an alternative way of presenting that information. Precedent and sound policy bar the Attorney General from issuing demands for information to pursue investigative theories preempted by federal law.

The Attorney General's challenged testimonial subpoenas are likewise impermissible.[1] ExxonMobil already provided the Attorney General thorough information about its prior subpoena compliance in a submission that this Court recognized went into "great detail" and fully addressed the questions presented by the Attorney General. That submission was followed, as the Court directed, by an affidavit, a certification of compliance, and depositions. But the Attorney General again demands

[1] ExxonMobil is not challenging in this motion the testimonial subpoenas issued on May 8 for five witnesses alleged to have personal knowledge of matters the Attorney General claims to be relevant to his investigation.

more. Without identifying any substantial deficiency in the affidavit, certification, or corresponding depositions (and without even waiting to complete one of the depositions), the Attorney General issued four more testimonial subpoenas. This request cannot be reconciled with the Court's prior instructions about what information ExxonMobil was to provide to the Attorney General, and it violates well-settled precedent barring cumulative, burdensome depositions that further no legitimate law enforcement purpose.

There is nothing in these new requests that is proportional to the needs of an investigation that has been pending for over a year and a half, particularly where this Court has already struck the appropriate balance between the Attorney General's entitlement to information and the burden imposed on ExxonMobil. It also flies in the face of the efforts this Court and ExxonMobil have made to bring document discovery to a close. Particularly at this stage of the investigation, proportionality and fundamental fairness mandate that the Attorney General's further requests for information have an adequate factual basis and a scope proportional to the demonstrated investigative need. These subpoenas have neither, and therefore should be quashed.

STATEMENT OF FACTS

A. The Attorney General's November 2015 Subpoena Seeks Historical Climate Change Documents.

On November 4, 2015, the Attorney General issued an extraordinarily broad and burdensome subpoena to ExxonMobil that demanded numerous categories of documents concerning global warming and climate change. As set forth in the subpoena and contemporaneous public statements, the Attorney General's investigation was then focused on a purported disconnect between ExxonMobil's past public statements on climate change and its internal views. The subpoena expressly called for "all

communications" since 1977 concerning any research "or other consideration" performed by ExxonMobil regarding "the causes of Climate Change." (Anderson Ex. A at 7-8.)[2] The Attorney General's statements to the press confirmed that his investigation concerned a suspected inconsistency—apparently decades old—between ExxonMobil's public and internal statements. During a November 10, 2015 interview on the *PBS NewsHour*, the Attorney General thus described his investigation as probing ExxonMobil's purported decision to "shift[] [its] point of view" and "change[] tactics" on climate change after conducting scientific studies on climate change "[i]n the 1980s." (Anderson Ex. B at 2.) The Attorney General's public statements also revealed that his investigation was largely and improperly focused on altering public policy and public perception of the risks presented by climate change.

Notwithstanding its misgivings about the transparently political nature of the investigation, ExxonMobil complied with the 2015 subpoena, subject to a reservation of its "right to seek to quash or otherwise object to the subpoena."[3] (Anderson Ex. C at 3.) Over the last year and a half, ExxonMobil has provided the Attorney General with over 2.8 million pages of documents from more than 140 custodians, including many of ExxonMobil's most senior executives. That extensive production, much of it court-supervised, has reflected the shifting priorities established by the Attorney General.

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[2] References to "Anderson Ex." refer to exhibits to the Affirmation of Justin Anderson, filed herewith.

[3] Separate and apart from ExxonMobil's reservation of rights as to conventional challenges to the 2015 subpoena, ExxonMobil filed an action against the Attorney General and another state attorney general in federal court for constitutional torts arising from a conspiracy to restrict ExxonMobil's speech and otherwise to violate its constitutional rights. That action, which pertains to issues not before this Court, was initially filed in federal court in Texas, but was recently transferred to federal court in New York.

B. The Court Rejects the Attorney General's Efforts to Improperly Broaden the November 2015 Subpoena.

On June 24, 2016, the Attorney General requested documents pertaining to "(i) [ExxonMobil's] valuation, accounting, and reporting of its assets and liabilities, including reserves, operational assets, extraction costs, and any impairment charges; and (ii) the impact of climate change and related government action on such valuation, accounting, and reporting." (Anderson Ex. D at 2-3.) ExxonMobil agreed to comply with that request insofar as responsive documents also pertained to climate change, which was consistent not only with the text of the 2015 subpoena, but also with the Attorney General's statements to the press. For example, as reported in a September 2016 *Wall Street Journal* article, the Attorney General's office was "investigat[ing] the company's knowledge of the impact of climate change and how it could affect its future business." (Anderson Ex. F at 1.)

The Attorney General challenged ExxonMobil's position by order to show cause. On November 21, 2016, the Court heard argument and rejected the Attorney General's position that the 2015 subpoena reached accounting documents unrelated to climate change. Explaining its decision, the Court identified "a difference between an inquiry relating to climate change and an entirely different inquiry relating to Exxon's general accounting procedures." (Anderson Ex. H at 23:19-22.)

Next, in December 2016 the Attorney General filed motions with the Court complaining about various aspects of ExxonMobil's production of climate change-related documents under the 2015 subpoena. Among other things, the Attorney General's December 1, 2016 correspondence asked the Court to compel production of documents relating to ExxonMobil's oil and gas reserves, and materials concerning "how [] policies

and procedures [relating to the proxy cost of carbon] have been applied to specific oil and gas projects." (Anderson Ex. I at 2.) The Court declined that request, instead imposing reasonable limits on the Attorney General's demands for documents. For example, the Court refused to order ExxonMobil to perform an exhaustive search of shared network locations across the entire company. Instead, the Court held that the Attorney General's request was disproportionately burdensome, explaining that "it's unreasonable for Exxon to deliver to the New York Attorney General's Office every document that Exxon has in its possession" and admonishing the Attorney General for pursuing a strategy of "throwing darts against the wall." (Anderson Ex. J at 23:19-25.) To ensure that the burden on ExxonMobil would be proportionate to the Attorney General's stated need for information, the Court permitted the Attorney General to identify a "handful of additional search terms and a handful of additional custodians." (*Id.* at 20:14-18.)

When the parties could not agree on the terms and custodians to be used, the Attorney General returned to Court weeks later demanding even more custodians and search terms. (Anderson Ex. L at 12:13-13:10.) After again weighing the burden on ExxonMobil against the Attorney General's need, this Court authorized the addition of nine custodians and "six to eight" search terms. (*Id.* at 12:13-23.) After granting that request, the Court observed that the cumulative total of custodians and search terms "is going to yield . . . all the information [the Attorney General] could possibly request." (*Id.* at 14:12-14.)

Before and during that court appearance, the Attorney General again demanded documents concerning ExxonMobil's oil and gas reserves, as well as the "incorporation of the proxy cost of carbon into specific oil and gas projects." (Anderson

Ex. K at 3.) The Attorney General also requested the production of "gate review packages," which ExxonMobil uses at various points to decide whether to invest in new projects or to expand existing projects. (*Id.* at 3; *see also* Anderson Ex. L at 5:20-6:2.) Rejecting those requests as disproportionately burdensome, this Court observed, "I don't think that [ExxonMobil has] to do any more than I've ordered here for [the Attorney General] to receive all of the documents that [he] require[s]." (Anderson Ex. L at 15:15-17.)

C. ExxonMobil Provides Detailed Sworn Statements About Its Compliance with the November 2015 Subpoena.

On March 13, 2017, the Attorney General formally requested that ExxonMobil provide detailed information about its production of documents from members of ExxonMobil's Management Committee and the secondary email account used by former CEO Rex Tillerson (the "Wayne Tracker" account). (Anderson Ex. M.) In response, ExxonMobil filed a detailed submission explaining the processes used to collect Management Committee documents and providing extensive information about the Wayne Tracker account. (NYSCEF No. 128.) At a March 22, 2017 hearing, this Court observed that ExxonMobil's letter had "addressed each of the items [the Attorney General] . . . requested" except for establishing a production deadline, which the Court set at the hearing. (Anderson Ex. N at 4:15-20.). To assuage any lingering concern the Attorney General may have had, the Court directed ExxonMobil to submit affidavits "from custodians attesting to what counsel has represented in [its] letter" and a certification of compliance. (*Id.* at 14:19–24, 27:25-28:4.) The Court also authorized the Attorney General's office to "cross-examine the affiants" at subsequent depositions. (*Id.* at 14:22-24.)

On March 31, 2017, ExxonMobil provided the Attorney General with a detailed affidavit from Connie Feinstein (the "Feinstein Affidavit"), a senior ExxonMobil Information Technology employee, describing (i) the procedures used to collect responsive documents from members of the Management Committee, and (ii) the Wayne Tracker account and the steps ExxonMobil took to recover documents related to it. (Anderson Ex. O.) On April 10, 2017, Michele Hirshman, outside counsel for ExxonMobil, provided the Attorney General with a certification of compliance with the 2015 subpoena (the "Certification"), which described ExxonMobil's extensive efforts to identify and produce responsive materials. (Anderson Ex. P.) ExxonMobil supplemented both the Feinstein Affidavit and the Certification. (Anderson Exs. Q and R.) Finally, Ms. Feinstein (April 26, 2017) and Ms. Hirshman (May 10, 2017) each appeared separately for day-long depositions at the Attorney General's offices. (Anderson Aff. ¶ 3.)

D. The Attorney General Issues Exceedingly Broad Document and Testimonial Subpoenas.

Throughout his appearances before this Court, the Attorney General has claimed to support the expeditious resolution of document discovery. As early as November 2016, the Attorney General's representative spoke of the need for "finality" in the document production, urging that "the production of documents from a company like Exxon has to have an ending, Judge. We have to have some expectations of the finality." (Anderson Ex. H at 20:19–23.) The Attorney General struck the same chord two months ago, when his representative stated, "[n]o one wants more than the Attorney General to complete the process of obtaining these documents and moving on to the next stage of the investigation." (Anderson Ex. N at 7:3–6).

In direct contradiction of these repeated claims of wanting to bring document discovery to a close, the Attorney General issued ten subpoenas to ExxonMobil on May 8, 2017: one for documents and nine for testimony. The earliest return date of the subpoenas is May 22, 2017. The document subpoena is divided into requests for information and requests for documents. (Anderson Ex. T.) The nine requests for information would require ExxonMobil to collect and analyze the content of records pertaining to a myriad of corporate decisions and specific oil and gas projects over the last 12 years, and then distill that information into lists and tables describing in minute detail ExxonMobil's decision-making process in every instance. (*Id.* at 8-12.) The areas covered by the Attorney General's requests include:

(a) every decision ExxonMobil has made to invest in or decline a particular oil or gas project;

(b) the application of, and assumptions underlying, a proxy cost of carbon and other greenhouse gases to the life of every oil and gas project;

(c) every decision ExxonMobil has made relating to the impairment or write-down of any of its long-lived assets anywhere in the world; and

(d) every estimate of oil and gas reserves, including the application of, and assumptions underlying, any proxy cost of carbon used in that process.

(*Id.*) The Attorney General also asks ExxonMobil to identify every ExxonMobil employee involved with these issues. Needless to say, preparing these analyses, assuming it could even be done, would require a massive and disruptive diversion of company resources.

The document requests only add to this undue burden. (*Id.* at 13.) The materials requested could easily dwarf the production ExxonMobil has already made to the Attorney General, which this Court has observed should provide the investigators all they need to evaluate their case. The requests begin by asking for all documents used to

prepare the responses to the burdensome requests for information, itself an onerous task. (*Id.*) The subpoena then seeks documents responsive to certain of the November 2015 requests, this time up through May 2017, thereby expanding the scope of the prior (backward-looking) subpoena by 18 months. (*Id.*) In addition, the subpoena seeks 12 years' worth of documents (i) relating to the impairment of any of ExxonMobil's long-lived assets, (ii) sent between any ExxonMobil employee and any financial firm that concern climate change or asset impairment, and (iii) from all members of ExxonMobil's internal oil and gas reserves committees. (*Id.*) Finally, the requests also purport to compel the production—for an investigation under *state* law—of all documents ExxonMobil has provided to the SEC in connection with the SEC's inquiry into compliance with *federal* accounting rules. (*Id.*)

The testimonial subpoenas fall into two categories: four seek testimony from ExxonMobil employees involved in responding to the 2015 subpoena, one of whom is in-house counsel for the company (Anderson Exs. U-X.); and five seek testimony from either ExxonMobil or Imperial Oil employees with personal knowledge of matters the Attorney General claims to be relevant to his investigation. ExxonMobil challenges here only the four testimonial subpoenas directed to individuals involved with responding to the 2015 subpoena. Under the Attorney General's own characterization, those subpoenas are directed exclusively at probing the efforts ExxonMobil took to comply with the 2015 subpoena, which have already been documented in affirmations 30 pages long and 15 hours of deposition testimony from Ms. Feinstein and Ms. Hirshman. (Anderson Exs. S and U.)

The Attorney General has provided no grounds that would explain, much

less justify, the intrusive requests contained in these subpoenas.

ARGUMENT

The Attorney General's overreach cries out for court intervention. Flawed on multiple levels, the recently issued subpoenas impose an undue burden on ExxonMobil unjustified by any legitimate need, compel ExxonMobil to generate work product for the Attorney General's benefit, and further an investigation preempted by federal regulation. As in the past, it regrettably falls to this Court to compel the Attorney General to recognize the limits of his power.

I. The Document Subpoena Should Be Quashed for Imposing an Undue Burden, Compelling the Creation of Analysis, and Pursuing a Preempted Investigation.

A. The Document Subpoena Should Be Quashed for Imposing an Onerous Burden Disproportionate to any Legitimate Need.

The document subpoena (Anderson Ex. T) imposes a burden on ExxonMobil that far exceeds even that imposed by the original subpoena, which although broad, was at least limited to documents pertaining to climate change. Unfettered by even that restriction, the new subpoena requires ExxonMobil to retroactively document every investment decision it has made over the last 12 years, provide supporting documentation, and then produce even more documents on other topics. This demand would be eyebrow-raising in its breadth even if it occurred at the outset of an investigation; but coming as it does a year and a half into the Attorney General's investigation, it is indefensible. In the absence of any compelling need that is firmly rooted in an articulable factual basis, the request is unsupportable and must be quashed.

To comply with the requests for information, ExxonMobil must prepare three detailed spreadsheets documenting each time over the past 12 years it has

(i) evaluated an oil and gas project, (ii) considered whether to impair an asset, and (iii) estimated reserves and resources—in other words, nearly every business decision it has made. (Anderson Ex. T at 8-12.) Each of those spreadsheets must describe, for each and every line-entry, whether and how ExxonMobil's proxy cost of carbon, which is meant to capture the potential regulatory costs of emitting greenhouse gases, factored into the relevant decision. (*Id.*) Among other things, each entry must explain (a) the amount of the proxy cost and the basis for setting it at that level; (b) emission intensity and the basis for setting it at that level; (c) the range of emissions against which the proxy cost was applied; (d) the "policies, procedures, or controls" governing the application of the proxy cost; (e) the relative and absolute effect of the proxy cost; and (f) any actual greenhouse gas costs associated with the project. (*Id.*)

In addition to preparing that onerous analysis, ExxonMobil must also produce the documents used to generate the three spreadsheets and prepare a list identifying all individuals with "personal knowledge" of the information recorded on the spreadsheets. (*Id.*) The document subpoena further requires ExxonMobil to provide (i) an "update" to the 2015 subpoena for the time period of November 4, 2015 through May 8, 2017; (ii) 12 years' of documents related to the ExxonMobil and Imperial Oil reserves committees, the impairment of long-lived assets, and communications with the securities industry; and (iii) copies of all materials provided to the SEC. (*Id.* at 13.)

The burden of complying with this new subpoena cannot be overstated. ExxonMobil is in the business of assessing whether to pursue oil and gas projects. Its records on such matters are housed in various locations across regions and business lines. There is no single repository of information that would summarize all of its decisions

across a 12-year period on whether to approve, decline, or defer a project. Creating what is essentially a log of all of ExxonMobil's business activities for the last 12 years would require a staggering investment of resources. ExxonMobil personnel would be required to distill countless records into the voluminous tables and charts the Attorney General seeks. The same is true of the analysis for reserves and asset impairment. For a company in the business of identifying new oil and gas reserves, with more than $300 billion in assets as of December 31, 2016, the volume of materials that would need to be gathered, reviewed, and distilled in order to document all decisions made with respect to estimating reserves and impairing assets is enormous—and that would be so even if the request were for only one year, let alone 12.

The other requests simply add to the already crushing burden that the creation of the spreadsheets would entail. The documents requested by the subpoena cover the same broad territory as the spreadsheets, sweeping in records pertaining to the evaluation of projects, estimation of reserves, and impairment of assets. Such a production would come vanishingly close to impermissibly requiring that "all records" at the company be turned over. *See N.Y. State Comm'n on Judicial Conduct* v. *Doe*, 61 N.Y.2d 56, 62 (1984) (modifying a subpoena which would have required the recipient "to produce virtually all of his financial records" over a ten-year period). These requests also require the re-collection, review, and production of materials for an 18-month period from all 142 custodians and 11 shared drives identified for the 2015 subpoena. The request for communications with securities industry professionals would likely require the addition of new custodians and review of countless documents pertaining to routine communications.

These extraordinarily broad and burdensome requests must be justified by and proportional to the Attorney General's need for the information. While the Attorney General enjoys wide latitude in his investigative authority, that power is not without limits. When reviewing the exercise of the Attorney General's subpoena power, New York courts "weigh[] the scope and basis for the issuance of the subpoena against the factual predicate for the investigation 'lest the powers of investigation, especially in local agencies, become potentially instruments of abuse and harassment.'" *See Airbnb, Inc.* v. *Schneiderman*, 44 Misc. 3d 351, 356 (Sup. Ct. Albany Cnty. 2014) (quoting *Myerson* v. *Lentini Bros. Moving & Storage Co*. 33 N.Y.2d 250, 258 (1973)). The showing the Attorney General must make to sustain a subpoena depends on the "status of the investigation at the time the subpoena issues." *Myerson*, 33 N.Y.2d at 257. Where, as here, the investigation has gone beyond the preliminary stage, the Attorney General "may not rest alone on [the] inference" that some wrongdoing may have occurred. *A'Hearn* v. *Comm. on Unlawful Practice of Law of N.Y. Cty. Lawyers' Ass'n*, 23 N.Y.2d 916, 919 (1969). Instead, as the First Department teaches in *Horn Const. Co.* v. *Fraiman*, "[w]hen a subpoena *duces tecum* is attacked, as here, after an investigation of the scope and extent already had," it must be justified by a "reasonable relationship" between the demand for new information and the investigative need or "at least" present grounds for a court to conclude that the investigator's "efforts would or reasonably might prove fruitful." 34 A.D.2d 131, 133 (1st Dep't 1970). Courts applying principles of reasonableness and proportionality thus put a stop to inquiries where, as here, an investigator "[c]ontinue[s] fishing in otherwise apparently calm waters in the mere hope that some lead or indicia or possible wrongdoing will be uncovered." *Id.*

The Attorney General has failed to show that his burdensome document subpoena bears any reasonable relationship to or is proportionate to the needs of his investigation. According to the Attorney General, the document subpoena will "advance our investigation and promote the efficiency of further proceedings." (Anderson Ex. S at 2.) But that boilerplate, conclusory justification falls well short of the mark. To satisfy the "rule of proportionality in discovery" that this Court has previously recognized and imposed in supervising the Attorney General's investigation (Anderson Ex. N at 23:2-13), and that other New York courts have recognized in other contexts, *see, e.g.*, *Airbnb*, 44 Misc. 3d at 356; *Myerson*, 33 N.Y.2d at 258, the Attorney General must do more. He must provide a factual basis for his need for the broad information requested in the document subpoena, and he must establish that the demand is proportional to the need.

There is good reason to believe that the Attorney General has not made this showing because he cannot do so. For the last year and a half, ExxonMobil has provided the Attorney General with over 2.8 million pages of documents, incurring substantial cost and business distraction in the process. Yet in seeking to inflict a crushing burden on ExxonMobil in the form of these requests, the Attorney General has pointed to nothing ExxonMobil has produced thus far as justifying any continued inquiry at all. That silence speaks volumes.

With particular reference to the Attorney General's evident focus on ExxonMobil's use of a proxy cost of carbon, ExxonMobil has already produced to the Attorney General its internal policies specifying how it applies the proxy cost of carbon in every jurisdiction worldwide, and for each year from the present through 2040. It also has produced numerous documents responsive to the Attorney General's prior requests

that reflect the actual application of the precise figures used in these policies to company-sponsored projects. (Anderson Aff. ¶ 2.) The multitude of "proxy cost" documents ExxonMobil has already produced to the Attorney General—including internal ExxonMobil documents—thus demonstrate that ExxonMobil applies its proxy cost of carbon to its projects in exactly the manner it has described publicly. The Attorney General has identified nothing even suggesting otherwise.

This Court has already cautioned the Attorney General's office that it may not conduct investigations by indiscriminately "throwing darts against the wall." (Anderson Ex. J at 23:25.) Yet the Attorney General has articulated no basis at all to suspect that ExxonMobil has failed to apply its proxy cost of carbon in the manner described in its public statements, let alone one that would justify his intrusive requests. Allowing this subpoena, which appears to be based on nothing more than idle curiosity or groundless suspicion, to stand is contrary to both this Court's prior instructions and the First Department's prohibition on the unjustifiable prolonging of already-advanced investigations. *Horn*, 34 A.D.2d at 133. In the absence of a factual basis demonstrating both reasonableness and proportionality, the document subpoena must be quashed.

B. The Document Subpoena's Requests for Information Should Also Be Quashed for Improperly Compelling ExxonMobil to Generate Custom Analysis.

The Attorney General's requests for information should be quashed for the independent reason that they run afoul of New York law, which prohibits the Attorney General from using a subpoena to commandeer the resources of ExxonMobil to create new documents and analyses not previously in existence.

General Business Law § 352(2) empowers the Attorney General to request production of "books or papers." Executive Law § 63(12) likewise authorizes the

Attorney General "to issue subpoenas in accordance with the civil practice law and rules," which contemplates subpoenas *duces tecum* that seek the "production of books, papers and other things." CPLR § 2301. Construing the "books, papers, and other things" language of § 2301, New York courts have long held that "a party cannot be compelled to create new documents or other tangible items in order to comply with particular discovery applications." *Rosado* v. *Mercedes-Benz of N. Am., Inc.*, 103 A.D.2d 395, 398 (2d Dep't 1984); *see also Sanon* v. *Sanon*, 37 N.Y.S.3d 208, 2016 N.Y. Slip Op. 50657(U), at *2 (Sup. Ct. Monroe Cnty. Jan. 27, 2016); *Heins* v. *Public Storage*, 959 N.Y.S.2d 89, 2012 N.Y. Slip Op. 51374(U), at *7 (Sup. Ct. Suffolk Cnty. July 11, 2012) (collecting cases).

A subpoena *duces tecum* functions only "to compel the person upon whom it is served to produce, under penalty, documents or records in his possession." *Matter of Slipyan (Shapiro)*, 145 N.Y.S.2d 630, 632 (Sup. Ct. N.Y. Cnty. 1955). It has no force beyond that limited mandate and, contrary to the Attorney General's position here, "may not be used to compel a person to do any affirmative act other than the production of such documents or records as they exist at the time of service of the subpoena." *Id.* That simple command is unaffected by any countervailing showing of need by the requesting party because a party "cannot compel the creation of an otherwise nonexistent writing on the theory that its manufacture may constitute material and necessary evidence." *Jonassen* v. *A.M.F., Inc.*, 104 A.D.2d 484, 486 (2d Dep't 1984). And this rule is equally applicable to private parties and the government. *See, e.g.*, *Liberty Mut. Ins. Co.* v. *City of N.Y. Comm'n on Human Rights*, 39 A.D.2d 860, 860 (1st Dep't 1972), *aff'd*, 31 N.Y.2d 1044 (1973).

Applying these principles, courts routinely reject attempts to compel the creation of new documents using a document subpoena. For example, in a medical malpractice case, the Fourth Department held that a medical practice could not be compelled by subpoena to create lists of the number of babies delivered, the number of prior claims against it, the materials viewed by it on a particular topic, and the textbooks in the party's possession. *Orzech ex rel. Orzech* v. *Smith*, 12 A.D.3d 1150, 1151 (4th Dep't 2004). Similarly, in *Durham Medical Search, Inc.* v. *Physicians Int'l Search, Inc.*, the Fourth Department held that a party could not be required to create a list of its customers. 122 A.D.2d 529, 530 (4th Dep't 1986). In *Slavenburg Corp.* v. *North Shore Equities, Inc.*, the First Department reversed an order compelling the creation of a document setting forth the basis for a claim, observing that it is "plain that it is not the function of that section [of the CPLR provision regarding document production] to require a party to create new documents." 76 A.D.2d 769, 770 (1st Dep't 1980).

This well-settled precedent bars the Attorney General's attempt to use the document subpoena to commandeer ExxonMobil's employees to generate analyses that are totally unwarranted. If he wishes to have tables and spreadsheets prepared, he must rely on his own staff to do so. All he may compel ExxonMobil to do is provide documents already in existence pursuant to a reasonably tailored request.

C. The Document Subpoena Should Be Quashed Insofar as It Pursues an Investigation Preempted by Federal Law.

Certain document requests in the subpoena are independently impermissible for improperly attempting to pursue matters preempted by the SEC. Under New York law, a subpoena must be quashed where the "futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly

irrelevant to any proper inquiry." 58A N.Y. Jur. 2d § 816; *see also Anheuser-Busch, Inc.* v. *Abrams*, 71 N.Y.2d 327, 331-32 (1988); *In re Office of Attorney Gen. of State of N.Y.*, 269 A.D.2d 1, 12–14 (1st Dep't 2000). Here, the Attorney General's request for information related to the estimation of proved reserves and impairment of assets falls within the exclusive domain of the SEC. It is not the place of the Attorney General to conduct an investigation that necessarily second-guesses and conflicts with the reasoned judgment of that agency. Requests designed to support such an inquiry must be quashed.

State law is preempted when it conflicts with, or stands as an obstacle to, federal laws and regulations. So-called "conflict preemption" occurs when it is either "impossible for one to act in compliance with both the Federal and State laws" or "state law . . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law. *Guice* v. *Charles Schwab & Co.*, 89 N.Y.2d 31, 39 (1996) (internal brackets, quotations, and ellipsis omitted). Courts find that state law is obstacle-preempted when the law effectively second guesses a federal agency's exercise of its reasoned judgment to balance competing policy interests. For example, in *Geier v. Am. Honda Motor Co.*, the federal regulatory scheme provided car manufacturers with a range of choices among passive restraint devices. 529 U.S. 861, 875 (2000). The petitioner's lawsuit, which claimed that manufacturers had a duty to install airbags, was preempted because a rule of state tort law imposing such a duty would have presented "an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 881. Conflict preemption can arise before litigation has commenced; indeed, a subpoena can be challenged on preemption grounds. *See Gobeille* v. *Liberty Mut. Ins. Co.* 136 S. Ct. 936 (2016) (a subpoena recipient "need not wait to bring a pre-emption claim until confronted

with numerous inconsistent obligations and encumbered with any ensuing costs"); *Cuomo* v. *Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 535-36 (2009).

As relevant here, SEC regulations require energy companies to estimate and report proved reserves in light of "existing . . . government regulations." 17 C.F.R. § 210.4–10(a). The agency issued that regulation after considering how best to provide investors with a "comprehensive understanding of oil and gas reserves, which should help investors evaluate the relative value of oil and gas companies." *Modernization of Oil & Gas Reporting*, SEC Release No. 78, File No. S7-15-08, 2008 WL 5423153, at *1 (Dec. 31, 2008). The SEC likewise exercised its reasoned judgment to adopt as authoritative the accounting standards issued by the Financial Accounting Standards Board (the "FASB"), which govern when, and how, ExxonMobil assesses whether its assets are impaired.[4] Where, as here, "an agency is required to strike a balance between competing statutory objectives," that factor weighs heavily in favor of "a finding of conflict preemption." *Farina* v. *Nokia Inc.*, 625 F.3d 97, 123 (3d Cir. 2010).

Those SEC regulations cover the ground tread upon by the Attorney General. His new subpoena purports to compel the production of (i) documents pertaining to oil and gas reserves, (ii), the impairment of assets, and (iii) all materials produced to the SEC. (Anderson Ex. T at 13.) Those requests are designed largely to support the Attorney General's discredited "stranded asset" theory of fraud. As Attorney General Schneiderman has explained to the press, his investigation concerns whether ExxonMobil has overstated its assets by not accounting for "global efforts to address climate change" that might require it "to leave enormous amounts of oil reserves in the

[4] *See* Commission Statement of Policy Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, 68 Fed. Reg. 23,333–401 (May 1, 2003).

ground." (Anderson Ex. E at 1.) As the Attorney General is well aware, however, federal law requires ExxonMobil to estimate proved reserves in light of *current* regulatory conditions. The Attorney General therefore may not penalize ExxonMobil for failing to estimate its reserves in light of possible *future* government regulations. Nor may he second-guess the SEC's reasoned judgment by requiring additional disclosures beyond those required by federal law. To do so would result in a "re-balancing" of the objectives that the SEC has already considered and weighed in crafting its own regulations. *Farina*, 625 F.3d at 123. The Attorney General's proffered investigative theory related to ExxonMobil's oil and gas reserves is thus preempted, and there is no good faith basis to "investigate" it.

The document requests are also designed to support the Attorney General's theory that energy companies must evaluate assets for impairment using the Attorney General's assumptions about the possible future effects of climate change. Indeed, in an "extensive" *New York Times* interview regarding his investigation, the Attorney General advanced the baseless theory that ExxonMobil may be engaged in a "massive securities fraud" by not utilizing the Attorney General's own assumption that future international efforts to reduce climate change will require ExxonMobil to leave oil in the ground untouched. (Anderson Ex. E at 1.) The FASB's rules, however, require ExxonMobil to "incorporate [its] own assumptions" about future events when deciding whether to impair oil and gas assets.[5] The Attorney General's theory would punish ExxonMobil for complying with accounting standards mandated by the SEC and therefore would create a textbook conflict with federal regulations.

[5] *See* FASB Accounting Standards Codification 360-10-35-30; *see also* Statement of Financial Accounting Standards No. 144 ¶ 17.

This conflict is not an abstract, hypothetical matter. It has been widely reported in the press that the SEC is conducting an inquiry of ExxonMobil on these very matters. As reported by the *Wall Street Journal*, the SEC "is investigating how Exxon Mobil Corp. values its assets in a world of increasing climate-change regulations" and is "homing in on how Exxon calculates the impact to its business . . . including what figures the company uses to account for the future costs of complying with regulations to curb greenhouse gases as it evaluates the economic viability of its projects." (Anderson Ex. G at 1.) This line of inquiry is preempted, and any requests in furtherance of it should be quashed.

II. The Four Testimonial Subpoenas Should Be Quashed for Imposing an Undue Burden.

The four testimonial subpoenas related to ExxonMobil's subpoena compliance (Anderson Exs. U-X) should also be quashed.[6] In response to the Attorney General's inquiry about document production from ExxonMobil's Management Committee and the Wayne Tracker account, ExxonMobil prepared a detailed account of its efforts to identify and produce responsive materials from those custodians. This Court found that ExxonMobil's account "went into great detail explaining ExxonMobil's practice for gathering and producing management and board documents" and directed ExxonMobil to follow up with "affidavits from ExxonMobil people attesting to what's represented by counsel," as well as a certification of completion. (Anderson Ex. N at 6:7-10; 17:17-19; 27:25-28:4.) ExxonMobil provided an affidavit from senior Information Technology Manager Connie Feinstein and a certificate of compliance from its outside

[6] By filing the instant motion, ExxonMobil does not waive the right to designate substitute deponents pursuant to CPLR § 3106(d).

counsel Michele Hirshman, and also made Ms. Feinstein and Ms. Hirshman available for deposition. Ms. Feinstein and Ms. Hirshman both appeared for day-long depositions.

The Attorney General has come forward with no concrete explanation of why the copious information already provided is insufficient for his purposes. *Cf. Hanan v. Corso*, No. CIV.A. 95-0292, 1998 WL 429841, at *7 (D.D.C. Apr. 24, 1998) (rejecting request for "discovery about discovery" where a party had "produced several declarations detailing under oath the efforts made to comply"). Indeed, he did not even wait until the later of the two depositions had been completed before issuing a request for four more depositions. That alone suggests these testimonial subpoenas were issued without a careful balancing of burden and need. It is far too little for the Attorney General to rely on the possibility that one or more of these four witnesses "may possess" some unspecified quantum of "relevant information" about ExxonMobil's subpoena compliance that Ms. Feinstein was purportedly "unable to provide." (Anderson Ex. S at 2.) Such a "bare statement" of a purported need to drag four employees—including an attorney[7]—from Texas to New York for cumulative testimony is insufficient to sustain the subpoenas. *McGrath* v. *State Bd. for Prof'l Med. Conduct*, 88 A.D.2d 906, 906 (2d Dep't 1982).

At this stage, the Attorney General may not "rest alone on [his] inference" but must identify (a) *what* information the prior deponents were unable to provide, (b) *which* of the new witnesses may be able to provide these "missing" pieces of information,

[7] The subpoena directed to ExxonMobil's in-house counsel, Daniel Bolia, should be quashed for the independent reason that the Attorney General has failed to establish "that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." *Dufresne-Simmons* v. *Wingate, Russotti & Shapiro, LLP*, 53 Misc. 3d 598, 606-07 (Sup. Ct. Bronx Cnty. 2016); *see also Q.C.* v. *L.C.*, 47 Misc. 3d 600, 602 (Sup. Ct. Westchester Cnty. 2015). In propounding its abusive subpoenas, the Attorney General has not so much as acknowledged, let alone met, this high burden.

(c) *how* these supposedly-missing facts are relevant to the investigation, and (d) whether this information, if relevant, could be provided in a manner *less* intrusive than compelling *four* witnesses to fly a thousand miles to be deposed. *A'Hearn*, 23 N.Y.2d at 919. In the absence of such an explanation, the subpoenas seeking to compel cumulative testimony appear more as "instruments of abuse and harassment" than bona fide instruments meant to gather information for a legitimate investigative purpose. *Airbnb*, 44 Misc. 3d at 356. They should be quashed as such.

CONCLUSION

After conducting an investigation for the past year and a half and receiving over 2.8 million pages from ExxonMobil, the Attorney General has not "moved on to the next stage of the investigation," as he promised he would. Rather, he has issued new document and testimonial subpoenas that violate multiple provisions of law. The document subpoena imposes a crushing burden on ExxonMobil by demanding records pertaining to nearly every business decision the company made over the last 12 years. Even worse, it impermissibly conscripts ExxonMobil to review, analyze, and distill that information into spreadsheets prepared according to the Attorney General's specifications and probes areas preempted by federal regulations. The four testimonial subpoenas cover the same ground that was previously addressed in the affidavit, certification, and depositions ordered by this Court. The Attorney General has come forward with no compelling justification for imposing this disproportionate burden, and therefore the subpoenas should be quashed.

Dated: May 19, 2017
New York, NY

Respectfully submitted,

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Attorneys for Exxon Mobil Corporation

Exhibit 2

Exhibit T

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

THE PEOPLE OF THE STATE OF NEW YORK
SUBPOENA FOR PRODUCTION OF INFORMATION AND DOCUMENTS

TO: **Exxon Mobil Corporation**
c/o Patrick J. Conlon, Esq.
Corporate Headquarters
5959 Las Colinas Boulevard
Irving, Texas 75039-2298

YOU ARE HEREBY COMMANDED, pursuant General Business Law § 352, Executive Law § 63(12), and § 2302(a) of the New York Civil Practice Law and Rules, to deliver and turn over to Eric T. Schneiderman, the Attorney General of the State of New York, or a designated Assistant Attorney General, on ***the 22nd day of May, 2017, at 9:30 a.m.***, or any agreed upon adjourned date or time, at 120 Broadway, New York, New York 10271, all documents and information requested in the attached Schedule in accordance with the instructions and definitions contained therein.

PLEASE TAKE NOTICE that the Attorney General deems the documents and information commanded by this Subpoena to be relevant and material to an investigation and inquiry undertaken in the public interest.

PLEASE TAKE FURTHER NOTICE that Your disobedience of this Subpoena, by failing to produce documents and information on the date, time and place stated above or on any agreed upon adjourned date or time, may subject You to prosecution for a misdemeanor or penalties and other lawful punishment under General Business Law § 352 and § 2308 of the New York Civil Practice Law, and/or other statutes.

WITNESS, The Honorable Eric T. Schneiderman, Attorney General of the State of New York, this 8th day of May, 2017.

By: _____

John Oleske
Senior Enforcement Counsel
Office of the Attorney General
120 Broadway, 26th Floor
New York, New York 10271
(212) 416-8660 (telephone)
(212) 416-6007 (facsimile)

SCHEDULE

A. General Definitions and Rules of Construction

1. "All" means each and every.

2. "Any" means any and all.

3. "And" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the Subpoena all information or Documents that might otherwise be construed to be outside of its scope.

4. "Communication" means any conversation, discussion, letter, email, memorandum, meeting, note or other transmittal of information or message, whether transmitted in writing, orally, electronically or by any other means, and shall include any Document that abstracts, digests, transcribes, records or reflects any of the foregoing.

5. "Concerning" means, directly or indirectly, in whole or in part, relating to, referring to, describing, evidencing or constituting.

6. "Custodian" means any Person or Entity that, as of the date of this Subpoena, maintained, possessed, or otherwise kept or controlled such Document.

7. "Document" is used herein in the broadest sense of the term and means all records and other tangible media of expression of whatever nature however and wherever created, produced or stored (manually, mechanically, electronically or otherwise), including without limitation all versions whether draft or final, all annotated or nonconforming or other copies, electronic mail ("e-mail"), instant messages, text messages, Blackberry or other wireless device messages, voicemail, calendars, date books, appointment books, diaries, books, papers, work papers, files, desk files, permanent files, temporary files, notes, confirmations, accounts statements, correspondence, memoranda, reports, records, journals, registers, analyses, plans, manuals, policies, telegrams, faxes, telexes, wires, telephone logs, telephone messages, message slips, minutes, notes or records or transcriptions of conversations or Communications or meetings, tape recordings, videotapes, disks, other electronic media, microfilm, microfiche, storage devices, press releases, contracts, agreements, notices, summaries, and written or electronic data, including but not limited to data from the Dataflex and Phoenix databases. Any non-identical version of a Document constitutes a separate Document within this definition, including without limitation drafts or copies bearing any notation, edit, comment, marginalia, underscoring, highlighting, marking, or any other alteration of any kind resulting in any difference between two or more otherwise identical Documents. In the case of Documents bearing any notation or other marking made by highlighting ink, the term Document means the original version bearing the highlighting ink, which original must be produced as opposed to any copy thereof.

8. "Entity" means without limitation any corporation, company, limited liability company or corporation, partnership, limited partnership, association, or other firm or similar body, or any unit, division, agency, department, or similar subdivision thereof.

9. "Identify" or "Identity," as applied to any Document, means the provision in writing of information sufficiently particular to enable the Attorney General to request the Document's production through subpoena or otherwise, including but not limited to: (a) document control number or Bates number, if applicable, (b) Document type (letter, memorandum, etc.); (c) Document subject matter; (d) Document date; and (e) Document author(s), addressee(s) and recipient(s). In lieu of identifying a Document, the Attorney General will accept production of the Document, together with designation of the Document's Custodian, and identification of each Person You believe to have received a copy of the Document.

10. "Identify" or "Identity," as applied to any Entity, means the provision in writing of such Entity's legal name, any d/b/a, former, or other names, any parent, subsidiary, officers, employees, or agents thereof, and any address(es) and any telephone number(s) thereof.

11. "Identify" or "Identity," as applied to any natural person, means and includes the provision in writing of the natural person's name, title(s), any aliases, place(s) of employment, telephone number(s), e-mail address(es), mailing addresses and physical address(es), and (if applicable) employment history at Exxon.

12. "OAG" means the New York State Office of the Attorney General.

13. "Person" means any natural person, or any Entity.

14. "Sent" or "received" as used herein means, in addition to their usual meanings, the transmittal or reception of a Document by physical, electronic or other delivery, whether by direct or indirect means.

15. "Subpoena" means this subpoena and any schedules or attachments thereto.

16. The use of the singular form of any word used herein shall include the plural and vice versa. The use of any tense of any verb includes all other tenses of the verb.

17. The references to Communications, Custodians, Documents, Persons, and Entities in this Subpoena encompass all such relevant ones worldwide.

B. Instructions

1. Preservation of Relevant Documents and Information; Spoliation. You are reminded of Your obligations under law to preserve Documents and information relevant or potentially relevant to this Subpoena from destruction or loss, and of the consequences of, and penalties available for, spoliation of evidence. No agreement, written or otherwise, purporting to modify, limit or otherwise vary the terms of this Subpoena, shall be construed in any way to narrow, qualify, eliminate or otherwise diminish Your aforementioned preservation obligations. Nor shall You act, in reliance upon any such agreement or otherwise, in any manner inconsistent with Your preservation obligations under law. No agreement purporting to modify, limit or otherwise vary Your preservation obligations under law shall be construed as in any way narrowing,

qualifying, eliminating or otherwise diminishing such aforementioned preservation obligations, nor shall You act in reliance upon any such agreement, unless an Assistant Attorney General confirms or acknowledges such agreement in writing, or makes such agreement a matter of record in open court.

2. Possession, Custody, and Control. The Subpoena calls for all responsive Documents or information in Your possession, custody or control. This includes, without limitation, Documents or information possessed or held by any of Your officers, directors, employees, agents, representatives, divisions, affiliates, subsidiaries (including but not limited to Imperial Oil Limited) or Persons from whom You could request Documents or information. If Documents or information responsive to a request in this Subpoena are in Your control, but not in Your possession or custody, You shall promptly Identify the Person with possession or custody.

3. Documents No Longer in Your Possession. If any Document requested herein was formerly in Your possession, custody or control but is no longer available, or no longer exists, You shall submit a statement in writing under oath that: (a) describes in detail the nature of such Document and its contents; (b) Identifies the Person(s) who prepared such Document and its contents; (c) Identifies all Persons who have seen or had possession of such Document; (d) specifies the date(s) on which such Document was prepared, transmitted or received; (e) specifies the date(s) on which such Document became unavailable; (f) specifies the reason why such Document is unavailable, including without limitation whether it was misplaced, lost, destroyed or transferred; and if such Document has been destroyed or transferred, the conditions of and reasons for such destruction or transfer and the Identity of the Person(s) requesting and performing such destruction or transfer; and (g) Identifies all Persons with knowledge of any portion of the contents of the Document.

4. No Documents Responsive to Subpoena Requests. If there are no Documents responsive to any particular Subpoena request, You shall so state in writing under oath in the Affidavit of Compliance attached hereto, identifying the paragraph number(s) of the Subpoena request concerned.

5. Format of Production. You shall produce Documents and information responsive to this Subpoena in the format requested by the OAG. Productions in electronic format shall meet the specifications set out in Attachments 1 and 2.

6. Existing Organization of Documents to be Preserved. Regardless of whether a production is in electronic or paper format, each Document shall be produced in the same form, sequence, organization or other order or layout in which it was maintained before production, including but not limited to production of any Document or other material indicating filing or other organization. Such production shall include without limitation any file folder, file jacket, cover or similar organizational material, as well as any folder bearing any title or legend that contains no Document. Likewise, all Documents that are physically attached to each other in Your files shall remain so attached in any production; or if such production is electronic, shall be accompanied by notation or information sufficient to indicate clearly such physical attachment.

7. Manner of Compliance – Custodians, Search Terms, and Technology-Assisted Review. Prior consultation with the OAG is required concerning selection of custodians for document searches (whether electronic or otherwise) or for use of search term filters, predictive coding or other forms of technology-assisted review. The OAG reserves the right to approve, disapprove, modify or supplement any proposed list of custodians, search terms, and/or review methodology. The selection or use of custodians, search term filters, and/or technology-assisted review in no way relieves You of Your obligation to fully respond to these requests for Documents or information.

8. Document Numbering. All Documents responsive to this Subpoena, regardless of whether produced or withheld on ground of privilege or other legal doctrine, and regardless of whether production is in electronic or paper format, shall be numbered in the lower right corner of each page of such Document, without disrupting or altering the form, sequence, organization or other order or layout in which such Documents were maintained before production. Such number shall comprise a prefix containing the producing Person's name or an abbreviation thereof, followed by a unique, sequential, identifying document control number.

9. Privilege Placeholders. For each Document withheld from production on ground of privilege or other legal doctrine, regardless of whether a production is electronic or in hard copy, You shall insert one or more placeholder page(s) in the production bearing the same document control number(s) borne by the Document withheld, in the sequential place(s) originally occupied by the Document before it was removed from the production.

10. Privilege. If You withhold or redact any Document responsive to this Subpoena on ground of privilege or other legal doctrine, You shall submit with the Documents produced a statement in writing under oath, stating: (a) the document control number(s) of the Document withheld or redacted; (b) the type of Document; (c) the date of the Document; (d) the author(s) and recipient(s) of the Document; (e) the general subject matter of the Document; and (f) the legal ground for withholding or redacting the Document. If the legal ground for withholding or redacting the Document is attorney-client privilege, You shall indicate the name of the attorney(s) whose legal advice is sought or provided in the Document.

11. Cover Letter, Index, and Identifying Information. Accompanying any production(s) made pursuant to this Subpoena, You shall include a cover letter that shall at a minimum provide an index containing the following: (a) a description of the type and content of each Document produced therewith; (b) the paragraph number(s) of the Subpoena request to which each such Document is responsive; (c) the Identity of the Custodian(s) of each such Document; and (d) the document control number(s) of each such Document. As further set forth in Attachment 2, information must also be included in the metadata and load files of each production concerning the identity of each Document's custodian, as well as information identifying the particular Document requests and/or information to which each document is responsive.

12. Affidavit of Compliance. A copy of the Affidavit of Compliance provided herewith shall be completed and executed by all natural persons supervising or participating in

compliance with this Subpoena, and You shall submit such executed Affidavit(s) of Compliance with Your response to this Subpoena.

13. Identification of Persons Preparing Production. In a schedule attached to the Affidavit of Compliance provided herewith, You shall Identify the natural person(s) who prepared or assembled any productions or responses to this Subpoena. You shall further Identify the natural person(s) under whose personal supervision the preparation and assembly of productions and responses to this Subpoena occurred. You shall further Identify all other natural person(s) able competently to testify: (a) that such productions and responses are complete and correct to the best of such person's knowledge and belief; and (b) that any Documents produced are authentic, genuine and what they purport to be.

14. Your Production Instructions to be Produced. You shall produce a copy of all written or otherwise recorded instructions prepared by You concerning the steps taken to respond to this Subpoena. For any unrecorded instructions given, You shall provide a written statement under oath from the Person(s) who gave such instructions that details the specific content of the instructions and any Person(s) to whom the instructions were given.

15. Continuing Obligation to Produce. This Subpoena imposes a continuing obligation to produce the Documents and information requested. Documents located, and information learned or acquired, at any time after Your response is due shall be promptly produced at the place specified in this Subpoena. Documents created after the date of the Subpoena shall also be promptly produced if requested by OAG.

16. No Oral Modifications. No agreement purporting to modify, limit or otherwise vary this Subpoena shall be valid or binding, and You shall not act in reliance upon any such agreement unless an Assistant Attorney General confirms or acknowledges such agreement in writing, or makes such agreement a matter of record in open court.

17. Inflation. For All of Your responses to the below Requests for Information that include dollar amounts, provide those amounts in both nominal and real (inflation-adjusted) terms, if applicable.

18. Time Period. Unless otherwise specified, the time period for information, Documents and Communications requested by this Subpoena is from January 1, 2005 through the date of the production.

C. Particular Definitions

1. "You," "Your," or "Exxon" means Exxon Mobil Corporation, ExxonMobil Oil Corporation, and Any present or former parents, subsidiaries (including but not limited to Imperial Oil Limited), affiliates, directors, officers, partners, employees, agents, representatives, attorneys or other Persons acting on its behalf, and including predecessors or successors or Any affiliates of the foregoing.

2. "Actual GHG Cost" means Any cost, price, fee, or tax on GHG emissions imposed by

Any governmental or regulatory body.

3. "Greenhouse Gases" or "GHGs" means carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

4. "Intensity," as applied to emissions, means any rate, percentage, amount, or formula, whether expressed in mathematical or narrative terms, used to determine the quantity of GHG emissions, actual or projected, to which a Proxy Cost or Actual GHG Cost is applied.

5. "Project" means Any oil, gas, or other hydrocarbon project, and its associated reserves or resource base, in which Exxon has Any working interest.

6. "Proxy Cost" means Any implied, imputed, shadow, or proxy cost, price, fee or tax on GHG emissions, including any such cost, price, fee, or tax applied as a proxy for potential policies that might be adopted by Any government or regulatory body over time to help stem GHG emissions.

7. "PwC" means PricewaterhouseCoopers LLP and Any present or former parents, subsidiaries, affiliates, directors, officers, partners, employees, agents, representatives, attorneys or other Persons acting on its behalf, and including predecessors or successors or Any affiliates of the foregoing.

8. "Scope 1," as applied to emissions, means GHG emissions from sources that are owned or controlled by You. Scope 1 emissions include, but are not limited to, emissions caused by the production of electricity, steam, or heat; manufacture or processing of chemicals; or transportation of people, products, or waste; and include fugitive emissions.

9. Scope 2," as applied to emissions, means GHG emissions associated with the generation of electricity, steam, or heat imported or purchased by You.

10. "Scope 3," as applied to emissions, means GHG emissions caused by Your activities that do not fall under Scope 1 or Scope 2. Scope 3 emissions include, but are not limited to, the use or disposal of products or services generated by You.

11. "Sensitivity Analysis" means Any analysis undertaken to determine the sensitivity of an economic model to variation in certain of its parameters or assumptions.

12. "Trigger" means an event or change in circumstances which indicates that the carrying value of an asset or asset group may not be recoverable.

D. Requests for Information

1. Provide a list that identifies each instance in which Exxon made a decision to approve, defer, or decline the investment, development, funding, expansion, or divestment in or of a Project, with such list separated into two columns:

   (a) Instances where Exxon applied a Proxy Cost to data, projections, forecasts, or models of the cash flow, profit or loss, revenue, capital expenditure, or operating expenditure relating to the relevant Project; and

   (b) Instances where Exxon did not apply a Proxy Cost in such a manner.

   For each such instance, Identify: (i) the name of the Project; (ii) the date of the decision; (iii) the Exxon subsidiary or affiliate associated with the Project, (iv) the individual(s) responsible for making the decision; and (v) the individual(s) responsible for approving the decision.

2. For each instance listed in your response to Request for Information No. 1(a) above, provide the following information (in Excel table format):

   a. The Proxy Cost figure applied by Exxon for each projected year, and the basis, if Any, for that figure;

   b. The Intensity of Greenhouse Gas emissions to which the Proxy Cost was applied by Exxon for each projected year, and the basis, if Any, for that figure;

   c. The scope(s) of Greenhouse Gas emissions to which the Proxy Cost was applied by Exxon for each projected year, including but not limited to (i) which Greenhouse Gases the Proxy Cost was applied to, and (ii) whether the Proxy Cost was applied to Scope 1, Scope 2, and/or Scope 3 emissions; and the basis, if Any, for the scope(s) selected;

   d. The policies, procedures, or controls, if Any, governing the application of a Proxy Cost to each such investment, development, funding, expansion, or divestment decision;

   e. The percentage and total effect of applying a Proxy Cost to the economics of each such investment, development, funding, expansion, or divestment decision, including but not limited to the impact on cash flow, cash flow rate, profit or loss, revenue, capital expenditure, operating expenditure, and demand for oil, gas, or other hydrocarbons;

   f. Exxon's assumptions as to the percentage and amount of the Proxy Cost, if Any, that Exxon will be able to pass on to purchasers in each projected year, and the basis, if Any, for those assumptions;

g. Exxon's assumptions as to the effects on demand for oil, gas, or other hydrocarbons caused by Any such pass-through to purchasers for each projected year, and the basis, if Any, for those assumptions; and

h. With respect to Any Proxy Cost Sensitivity Analysis, the same information requested in (a)-(g) above.

i. Identify Any Actual GHG Cost applicable to the Project at the time of such investment, development, funding, expansion, or divestment decision. To the extent that Any Actual GHG Cost was applicable to the relevant Project, identify the same information requested in (a)-(h) above with respect to such Actual GHG Cost.

3. Provide a list that identifies each instance in which Exxon made a decision as to whether an impairment or write-down as to Any Project should be taken, with such list separated into two columns:

(a) Instances where Exxon applied a Proxy Cost to data, projections, forecasts, or models of the cash flow, profit or loss, revenue, capital expenditure, or operating expenditure relating to the relevant Project; and

(b) Instances where Exxon did not apply a Proxy Cost in such a manner.

For each such instance, Identify: (i) the name of the Project; (ii) the date of the decision; (iii) the Exxon subsidiary or affiliate associated with the Project, (iv) the individual(s) responsible for making the decision; and (v) the individual(s) responsible for approving the decision.

4. Provide a list that identifies each instance in which Exxon made a decision as to whether a Trigger for impairment testing or analysis existed as to Any Project, with such list separated into two columns:

(a) Instances where Exxon applied a Proxy Cost to data, projections, forecasts, or models of the cash flow, profit or loss, revenue, capital expenditure, or operating expenditure relating to the relevant Project; and

(b) Instances where Exxon did not apply a Proxy Cost in such a manner.

For each such instance, Identify: (i) the name of the Project; (ii) the date of the decision; (iii) the Exxon subsidiary or affiliate associated with the Project, (iv) the individual(s) responsible for making the decision; and (v) the individual(s) responsible for approving the decision.

5. For each instance listed in your responses to Requests for Information Nos. 3(a) or 4(a), above, provide the following information (in Excel table format):

a. The Proxy Cost figure applied by Exxon for each projected year, and the basis, if Any, for that figure;

b. The Intensity of Greenhouse Gas emissions to which the Proxy Cost was applied by Exxon for each projected year, and the basis, if Any, for that figure;

c. The scope(s) of Greenhouse Gas emissions to which the Proxy Cost was applied by Exxon for each projected year, including but not limited to (i) which Greenhouse Gases the Proxy Cost was applied to, and (ii) whether the Proxy Cost was applied to Scope 1, Scope 2, and/or Scope 3 emissions; and the basis, if Any, for the scope(s) selected;

d. The policies, procedures, or controls, if Any, governing the application of a Proxy Cost to each such impairment or impairment Trigger-related decision;

e. The percentage and total effect of applying a Proxy Cost to the economics of each such impairment or impairment Trigger-related decision, including but not limited to the impact on cash flow, cash flow rate, profit or loss, revenue, capital expenditure, operating expenditure, and demand for oil, gas, or other hydrocarbons;

f. Exxon's assumptions as to the percentage and amount of the Proxy Cost, if Any, that Exxon will be able to pass onto purchasers in each projected year, and the basis, if Any, for those assumptions;

g. Exxon's assumptions as to the effects on demand for oil, gas, or other hydrocarbons caused by Any such pass-through to purchasers for each projected year, and the basis, if Any, for those assumptions; and

h. With respect to Any Proxy Cost Sensitivity Analysis, the same information requested in (a)-(g) above.

i. Identify Any differences between Exxon and PwC with respect to (a)-(h) above, and explain Any such differences in detail.

j. Identify Any Actual GHG Cost applicable to the Project at the time of such impairment or impairment Trigger-related decision. To the extent that Any Actual GHG Cost was applicable to the relevant Project, identify the same information requested in (a)-(i) above with respect to such Actual GHG Cost.

6. Provide a list that identifies each instance in which Exxon internally estimated its oil, gas, or other hydrocarbon reserves or resource base associated with Any Project (as distinct from the proved reserves calculations mandated by the U.S. Securities and Exchange Commission), with such list separated into two columns:

(a) Instances where Exxon applied a Proxy Cost in connection with such estimates;

(b) Instances where Exxon did not apply a Proxy Cost in such a manner.

For each such instance, Identify: (i) the name of the Project; (ii) the date of the estimate; (iii) the Exxon subsidiary or affiliate associated with the Project, (iv) the individual(s)

responsible for making the estimate; and (v) the individual(s) responsible for approving the estimate.

7. For each instance listed in your response to Request for Information No. 6(a), provide the following information (in Excel table format):

   a. The Proxy Cost figure applied by Exxon for each projected year, and the basis, if Any, for that figure;

   b. The Intensity of Greenhouse Gas emissions to which the Proxy Cost was applied by Exxon for each projected year, and the basis, if Any, for that figure;

   c. The scope(s) of Greenhouse Gas emissions to which the Proxy Cost was applied by Exxon for each projected year, including but not limited to (i) which Greenhouse Gases the Proxy Cost was applied to, and (ii) whether the Proxy Cost was applied to Scope 1, Scope 2, and/or Scope 3 emissions; and the basis, if Any, for the scope(s) selected;

   d. The policies, procedures, or controls, if Any, governing the application of a Proxy Cost to such reserves or resource base estimation;

   e. The percentage and total effect of applying a Proxy Cost to Exxon's such reserves or resource base estimation, including but not limited to the impact on cash flow, cash flow rate, profit or loss, revenue, capital expenditure, operating expenditure, and demand for oil, gas, or other hydrocarbons;

   f. Exxon's assumptions as to the percentage and amount of the Proxy Cost, if Any, that Exxon will be able to pass on to purchasers in each projected year, and the basis, if Any, for those assumptions;

   g. Exxon's assumptions as to the effects on demand for oil, gas, or other hydrocarbons caused by Any such pass-through to purchasers for each projected year, and the basis, if Any, for those assumptions; and

   h. With respect to Any Proxy Cost Sensitivity Analysis, the same information requested in (a)-(g) above.

   i. Identify Any Actual GHG Cost applicable to the Project at the time of such reserves or resource base estimation. To the extent that Any Actual GHG Cost was applicable to the relevant Project, identify the same information requested in (a)-(h) above with respect to such Actual GHG Cost.

8. Identify the individual(s) at Exxon with personal knowledge of the information contained in Your responses to each of the Requests for Information above.

9. Identify the individuals at Exxon, including Any of its subsidiaries (including but not limited to Imperial Oil Limited), who served as members of the Upstream Reserves Committee, the EMPC Reserves Committee, the EMDC Reserves Committee and the

IOL Reserves Management Committee (RMC) throughout the Time Period of this Subpoena, and specify which of these committee(s) each of these individuals served on and during what time period they so served.

E. Requests for Documents

1. Produce, or identify by Bates number to the extent already produced, All Documents supporting Your responses to the Requests for Information above, including but not limited to Any such Documents reflecting the actual implementation of a Proxy Cost in spreadsheets or other formats containing calculations or formulas.

2. All Documents and Communications responsive to Request for Documents Nos. 3, 4, or 5 of OAG's November 4, 2015 subpoena to Exxon, covering the period from November 4, 2015 through the date of production under this Subpoena, including, but not limited to, Documents and Communications relating to:

   (a) *2016 Outlook for Energy: A View to 2040*, dated January 25, 2016;
   (b) 2015 Form 10-K, dated February 24, 2016;
   (c) Notice of 2016 Annual Meeting and Proxy Statement, dated April 13, 2016;
   (d) Annual Shareholders Meeting on May 25, 2016;
   (e) *2017 Outlook for Energy: A View to 2040*, dated December 16, 2016;
   (f) 2016 Form 10-K, dated February 22, 2017;
   (g) Notice of 2017 Annual Meeting and Proxy Statement, dated April 13, 2017; and/or;
   (h) *2016 Energy and Carbon Summary*, dated April 13, 2017.

3. All Documents and Communications of each individual listed in response to Request for Information No. 9 that are responsive to Request for Documents Nos. 3, 4, or 5 of OAG's November 4, 2015 subpoena to Exxon, or that are responsive to Request for Documents No. 2 above.

4. All Documents and Communications Concerning the assessment of Exxon's long-lived assets for impairment or write-down, including but not limited to (a) Documents and Communications Concerning the identification or evaluation of Any actual or potential Triggers for impairment testing or analysis, (b) Documents and Communications associated with Exxon's internal audit function, and (c) All policies, procedures, or controls Concerning the assessment of Exxon's long-lived assets for impairment or write-down.

5. All Documents and Communications provided to the U.S. Securities and Exchange Commission pursuant to its investigation of Exxon's practices relating to climate change, reserve calculations, and impairment.

6. All Documents and Communications consisting of or Concerning Exxon's Communications with Any banks, underwriters, research analysts, or other financial firms or institutions Concerning Any of the topics described in this Subpoena or Request for Documents Nos. 3, 4, or 5 of OAG's November 4, 2015 subpoena to Exxon.

ATTACHMENT 1
Electronic Document Production Specifications

Unless otherwise specified and agreed to by the Office of the Attorney General, all responsive documents must be produced in LexisNexis® Concordance® format in accordance with the following instructions. Any questions regarding electronic document production should be directed to the Assistant Attorney General whose telephone number appears on the subpoena.

1. Concordance Production Components. A Concordance production consists of the following component files, which must be produced in accordance with the specifications set forth below in Section 7.

   A. ***Metadata Load File.*** A delimited text file that lists in columnar format the required metadata for each produced document.

   B. ***Extracted or OCR Text Files.*** Document-level extracted text for each produced document or document-level optical character recognition ("OCR") text where extracted text is not available.

   C. ***Single-Page Image Files.*** Individual petrified page images of the produced documents in tagged image format ("TIF"), with page-level Bates number endorsements.

   D. ***Opticon Load File.*** A delimited text file that lists the single-page TIF files for each produced document and defines (i) the relative location of the TIF files on the production media and (ii) each document break.

   E. ***Native Files.*** Native format versions of produced documents that are not redacted, named by their first Bates number.

2. Production Folder Structure. The production must be organized according to the following standard folder structure:

   - data\ (contains production load files)
   - images\ (contains single-page TIF files, with subfolder organization)

     \0001, \0002, \0003…
   - native_files\ (contains native files, with subfolder organization)

     \0001, \0002, \0003…
   - text\ (contains text files, with subfolder organization)

     \0001, \0002, \0003…

3. De-Duplication. You must perform global de-duplication of stand-alone documents and

email families against any prior productions pursuant to this or previously related subpoenas.

4. Paper or Scanned Documents. Documents that exist only in paper format must be scanned to single-page TIF files and OCR'd. The resulting electronic files should be pursued in Concordance format pursuant to these instructions. You must contact the Assistant Attorney General whose telephone number appears on the subpoena to discuss (i) any documents that cannot be scanned, and (ii) how information for scanned documents should be represented in the metadata load file.

5. Structured Data. Structured data includes but is not limited to relational databases, transactional data, and xml pages. Spreadsheets are not considered structured data. You must first speak to the Assistant Attorney General whose telephone number appears on the subpoena. Spreadsheets are not considered structured data.

6. Media and Encryption. All document sets over 2 GB must be produced on CD, DVD, or hard-drive media. All production media must be encrypted with a strong password, which must be delivered independently from the production media. Document sets under 2 GB may be delivered electronically. The OAG offers a secure cloud storage option that can be set up to receive media on a one-time basis, or the OAG will download media from the providing party's server.

7. Production File Requirements.

A. ***Metadata Load File***

- Required file format:
  - ASCII or UTF-8
  - Windows formatted CR + LF end of line characters, including full CR + LF on last record in file.
  - .dat file extension
  - Field delimiter: (ASCII decimal character 20)
  - Text Qualifier: þ (ASCII decimal character 254). Date and pure numeric value fields do not require qualifiers.
  - Multiple value field delimiter: ; (ASCII decimal character 59)
- The first line of the metadata load file must list all included fields. All required fields are listed in Attachment 2.
- Fields with no values must be represented by empty columns maintaining delimiters and qualifiers.

- ***Note:*** All documents must have page-level Bates numbering (except documents produced only in native format, which must be assigned a document-level Bates number). The metadata load file must list the beginning and ending Bates numbers (BEGDOC and ENDDOC) for each document. For document families, including but not limited to emails and attachments, compound documents, and uncompressed file containers, the metadata load file must also list the Bates range of the entire document family (ATTACHRANGE), beginning with the first Bates number (BEGDOC) of the "parent" document and ending with the last Bates number (ENDDOC) assigned to the last "child" in the document family.

- Date and Time metadata must be provided in separate columns.

- Accepted date formats:
    - mm/dd/yyyy
    - yyyy/mm/dd
    - yyyymmdd

- Accepted time formats:
    - hh:mm:ss (if not in 24-hour format, you must indicate am/pm)
    - hh:mm:ss:mmm

- Accepted FROM, TO, CC, and BCC formats:
    - Fully qualified domain name RF 821 (name@domain.com)
    - Fully qualified domain name RF 822 (Alias <name@domain.com>)
    - Qualified LDAP address (/O=ORG/OU=ORG UNIT/CN=RECIPIENTS/CN=NAME)

B. ***Extracted or OCR Text Files***

- You must produce individual document-level text files containing the full extracted text for each produced document.

- When extracted text is not available (for instance, for image-only documents) you must provide individual document-level text files containing the document's full OCR text.

- The filename for each text file must match the document's beginning Bates number (BEGDOC) listed in the metadata load file.

- Text files must be divided into subfolders containing no more than 500 to 1000 files.

C. ***Single-Page Image Files (Petrified Page Images)***

- Where possible, all produced documents must be converted into single-page tagged image format ("TIF") files. See Section 7.E below for instructions on producing native versions of documents you are unable to convert.
- Image documents that exist only in non-TIF formats must be converted into TIF files. The original image format must be produced as a native file as described in Section 7.E below.
- For documents produced only in native format, you may provide a single, TIF placeholder that states "Document produced only in native format."
- Each single-page TIF file must be endorsed with a unique Bates number.
- The filename for each single-page TIF file must match the unique page-level Bates number (or document-level Bates number for documents produced only in native format).
- Required image file format:
  - CCITT Group 4 compression
  - 2-Bit black and white
  - 300 dpi
  - Either .tif or .tiff file extension.
- TIF files must be divided into subfolders containing no more than 500 to 1000 files. Where possible documents should not span multiple subfolders.

D. ***Opticon Load File***

- Required file format:
  - ASCII
  - Windows formatted CR + LF end of line characters
  - Field delimiter: , (ASCII decimal character 44)
  - No Text Qualifier
  - .opt file extension

- The comma-delimited Opticon load file must contain the following seven fields (as indicated below, values for certain fields may be left blank):
    - ALIAS or IMAGEKEY – the unique Bates number assigned to each page of the production.
    - VOLUME – this value is optional and may be left blank.
    - RELATIVE PATH – the file path to each single-page image file on the production media.
    - DOCUMENT BREAK – defines the first page of a document. The only possible values for this field are "Y" or blank.
    - FOLDER BREAK – defines the first page of a folder. The only possible values for this field are "Y" or blank.
    - BOX BREAK – defines the first page of a box. The only possible values for this field are "Y" or blank.
    - PAGE COUNT – this value is optional and may be left blank.
- ***Example*:**

ABC00001,,IMAGES\0001\ABC00001.tif,Y,,,2

ABC00002,,IMAGES\0001\ABC00002.tif,,,,

ABC00003,,IMAGES\0002\ABC00003.tif,Y,,,1

ABC00004,,IMAGES\0002\ABC00004.tif,Y,,,1

E. ***Native Files***

- Non-printable or non–print friendly documents (including but not limited to spreadsheets, audio files, video files and documents for which color has significance to document fidelity) must be produced in their native format.
- The filename of each native file must match the document's beginning Bates number (BEGDOC) in the metadata load file and retain the original file extension.
- For documents produced only in native format, and not additionally as single-page image files, you must assign a single document-level Bates number and optionally provide an image file placeholder that states "Document produced only in native format."
- The relative paths to all native files on the production media must be listed in

the NATIVEFILE field of the metadata load file.

- Native files that are password-protected must be decrypted prior to conversion and produced in decrypted form. In cases where this cannot be achieved the document's password must be listed in the metadata load file. The password should be placed in the COMMENTS field with the format Password: <PASSWORD>.

- You may be required to supply a software license for proprietary documents produced only in native format.

ATTACHMENTS	List of filenames of all attachments, delimited by ";" when field has multiple values.	AttachmentFileName.; AttachmentFileName.docx; AttachmentFileName.pdf;…
NUMATTACH	Number of attachments.	
RECORDTYPE	General type of record.	IMAGE; LOOSE E-MAIL; E-MAIL; E-DOC; IMAGE ATTACHMENT; LOOSE E-MAIL ATTACHMENT; E-MAIL ATTACHMENT; E-DOC ATTACHMENT
FOLDERLOC	Original folder path of the produced document.	Drive:\Folder\...\...\
FILENAME	Original filename of the produced document.	Filename.ext
DOCEXT	Original file extension.	html, xls, pdf
DOCTYPE	Name of the program that created the produced document.	Adobe Acrobat, Microsoft Word, Microsoft Excel, Corel WordPerfect…
TITLE	Document title (if entered).	
AUTHOR	Name of the document author.	
REVISION	Number of revisions to a document.	18
DATECREATED	Date and time that a document was created.	mm/dd/yyyy, yyyy/mm/dd, or yyyymmdd
TIMECREATED	Time that a document was created.	hh:mm:ss AM/PM or hh:mm:ss
DATEMOD	Date and time that a document was last modified.	mm/dd/yyyy, yyyy/mm/dd, or yyyymmdd
TIMEMOD	Time that a document was last modified.	hh:mm:ss AM/PM or hh:mm:ss
FILESIZE	Original file size in bytes.	
PGCOUNT	Number of pages per document.	
IMPORTANCE	Email priority level if set.	Low, Normal, High

AFFIDAVIT OF COMPLIANCE WITH SUBPOENA

State of _____}

County of _____}

I, _____, being duly sworn, state as follows:

1. I am employed by Respondent in the position of _____;

2. Respondent's productions and responses to the Subpoena of the Attorney General of the State of New York, dated _____, 20____ (the "Subpoena") were prepared and assembled under my personal supervision;

3. I made or caused to be made a diligent, complete and comprehensive search for all Documents and information requested by the Subpoena, in full accordance with the instructions and definitions set forth in the Subpoena;

4. Respondent's productions and responses to the Subpoena are complete and correct to the best of my knowledge and belief;

5. No Documents or information responsive to the Subpoena have been withheld from Respondent's production and response, other than responsive Documents or information withheld on the basis of a legal privilege or doctrine;

6. All responsive Documents or information withheld on the basis of a legal privilege or doctrine have been identified on a privilege log composed and produced in accordance with the instructions in the Subpoena;

7. The Documents contained in Respondent's productions and responses to the Subpoena are authentic, genuine and what they purport to be;

8. Attached is a true and accurate record of all persons who prepared and assembled any productions and responses to the Subpoena, all persons under whose personal supervision the preparation and assembly of productions and responses to the Subpoena occurred, and all persons able competently to testify: (a) that such productions and responses are complete and correct to the best of such person's knowledge and belief; and (b) that any Documents produced are authentic, genuine and what they purport to be; and

9. Attached is a true and accurate statement of those requests under the Subpoena as to which no responsive Documents were located in the course of the aforementioned search.

_____ _____

Signature of Affiant Date

_____

Printed Name of Affiant

* * *

Subscribed and sworn to before me this _____ day of _____, 20____.

_____, Notary Public

My commission expires: _____

Exhibit 3

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

In the Matter of the Application of the PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, Petitioner, - against – PRICEWATERHOUSECOOPERS LLP and EXXON MOBIL CORPORATION, Respondents.	Index No. 451962/2016 IAS Part 61 Hon. Barry R. Ostrager Motion Sequence No. 4

MEMORANDUM OF LAW IN OPPOSITION TO EXXON'S MOTION TO QUASH AND IN SUPPORT OF THE OFFICE OF THE ATTORNEY GENERAL'S CROSS-MOTION TO COMPEL

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PRELIMINARY STATEMENT

The Office of the Attorney General ("OAG") respectfully submits this memorandum of law in opposition to Exxon Mobil Corporation's ("Exxon") motion to quash and in support of OAG's cross-motion to compel compliance with its subpoena duces tecum dated May 8, 2017, its testimonial subpoena to a fact witness from Exxon's majority-owned subsidiary, Imperial Oil Limited ("Imperial"), and four records witnesses.

OAG is investigating whether Exxon has been making false and misleading statements about specific safeguards it purports to have put in place to protect the company from risks posed by future climate change-related regulations. Specifically, Exxon has repeatedly represented to investors that the company applies a "proxy cost" to greenhouse gas emissions ("GHGs") when it makes investment decisions and performs asset valuations, and that because it does so, it can assure investors that none of Exxon's projects or assets will be materially impacted by future climate change-related regulations. Contrary to Exxon's unsupported assertion that nothing in its production to date justifies OAG's continued investigation into the accuracy of such representations, OAG has uncovered significant evidence of potential materially false and misleading statements by Exxon about its application of a proxy cost of GHGs to its investment and impairment[1] decisions, suggesting that the exercise described to investors may be a sham.

OAG's present subpoenas, which Exxon now seeks to quash, are highly relevant to determining whether Exxon has in fact been misleading investors, as its own documents suggest. The subpoena duces tecum seeks targeted information and documents needed to fill the gaps in the existing document productions concerning Exxon's risk-management practices related to the company's investments and asset valuations. The testimony of the records witnesses is critical to

[1] An impairment is a reduction in the recoverable amount of an asset below its book value. Affirmation of John Oleske, dated June 1, 2017 ("Oleske Aff. ¶ __" or "¶ __") ¶¶ 42-47.

understanding and potentially remedying Exxon's still-unaccounted-for destruction of documents from key custodians, including the company's former Chairman and CEO. The testimony of the fact witness from Imperial is highly relevant to OAG's investigation given that Exxon's documents reflect that he was directed by Exxon not to apply a proxy cost of GHGs to its Canadian oil sands projects. As such, OAG's subpoenas easily meet the well-established legal standard in that they are reasonably related to OAG's investigation. *See Am. Dental Coop., Inc. v. Attorney-General*, 514 N.Y.S.2d 228, 232 (1st Dep't 1987).

Unable to contest the authority of the Attorney General, the factual basis for his investigation, or the relevance of the documents and information sought by the subpoena duces tecum, Exxon resorts to arguing that the subpoenas are unduly burdensome, make improper demands for information, and are preempted by federal law. None of these arguments has merit. Exxon does not even try to make the required showing to establish undue burden, OAG's requests for information are explicitly authorized by statute,[2] and none of OAG's prospective enforcement actions against Exxon under New York's anti-fraud laws are subject to federal preemption. Thus, Exxon falls far short of meeting the legal standard required to quash a subpoena. *See Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 332 (1988) (holding "[a]n application to quash a subpoena [issued by OAG] should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry.").

Exxon's motion to quash is the latest maneuver in its longstanding strategy to avoid and delay the production of documents, information, and testimony directly relevant to OAG's

[2] Gen. Bus. Law. § 352(1) (OAG "may . . . require such other data and information as [it] may deem relevant[.]"); *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 330 (1988) (holding that OAG's interrogatories were valid).

investigation.[3] Despite Exxon's obstruction and obfuscation, OAG's investigation has persisted, and based on the evidence that Exxon *has* produced, the investigation has gained urgency. That evidence suggests not only that Exxon's public statements about its risk management practices were false and misleading, but also that Exxon may *still* be in the midst of perpetrating an ongoing fraudulent scheme on investors and the public. Accordingly, OAG's cross-motion to compel should be granted and Exxon's motion to quash should be denied in its entirety.

FACTUAL BACKGROUND

A. OAG's Investigation Concerns Exxon's Representations To Its Investors

1. *Exxon's Representations To Investors Regarding Its Proxy Cost Analysis*

OAG is investigating the accuracy of Exxon's representations concerning its risk management practices that purport to address the impact of climate change and climate change regulations on its business and financial reporting. One aspect of OAG's investigation concerns Exxon's numerous representations to investors that in its economic decision-making, including its investment decisions and asset valuations, the company applies a "proxy cost" of GHG emissions that reasonably approximates the range of potential future government actions with respect to climate change. Although the specific language Exxon has used has changed over time, the overall message has remained the same: because Exxon incorporates the added proxy

[3] Since November 2015, Exxon has (i) stonewalled the collection and production of relevant and responsive documents, requiring OAG to seek relief from this Court on five separate occasions; (ii) failed to preserve and consequently destroyed years of responsive documents from more than a dozen key management witnesses, including Exxon's former CEO; (iii) proffered witnesses for testimony who lacked basic knowledge about Exxon's preservation, collection, review, production, and recovery of relevant documents; (iv) commenced an unprecedented lawsuit in federal court to enjoin OAG's enforcement of its original subpoena on the grounds that it violates Exxon's constitutional rights; and (v) obstructed the production of documents from its independent auditor on the grounds of a non-existent privilege.
With respect to the latter, on May 23, 2017, the First Department affirmed this Court's order compelling subpoena compliance by Exxon and its independent auditor on the ground that New York law, which does not recognize any accountant-client privilege, governed the enforcement proceeding. Continuing in its effort to avoid production of these documents from its independent auditor, Exxon has moved for reargument from the First Department and leave to appeal its decision to the Court of Appeals, and has obtained an emergency stay of enforcement during the motion's pendency.

costs of GHGs in its decisions to undertake exploration and development projects, and incorporates these added costs in the valuation of its existing assets, the company can assure investors that none of Exxon's projects or assets will be materially affected by future climate change-related regulations.

Exxon has represented that it has been applying a proxy cost of GHGs to its business decisions since 2007. ¶ 13. Exxon further represents that its proxy cost of GHGs increases substantially over time, reaching as high as $80/ton of carbon dioxide equivalent (*i.e.*, CO2 or other GHGs) by 2040. ¶¶ 13-14. Because Exxon's major oil and gas projects often span decades, the proxy cost of GHGs can have a material effect on the long-term profitability of Exxon's projects and the value of its assets. ¶ 20.

On March 31, 2014, Exxon published a report entitled *Energy and Carbon—Managing the Risks* (the "MTR Report") in response to shareholder demands that the company assess the vulnerability of its assets to future climate regulation. Indeed, a shareholder group withdrew a proposed resolution that it intended to submit at the company's 2014 annual shareholders meeting in exchange for Exxon's commitment to publish such a report. ¶ 7. In the MTR Report, Exxon explained its purported use of proxy-cost analysis as follows:

> 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 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 specific investment decisions*.

¶ 10, Ex. 1 (emphasis added). After explaining this purported risk management practice, Exxon claimed that "[b]ased on this analysis, we are confident that none of our hydrocarbon reserves are now or will become 'stranded'" and that "the company does not believe current investments in new reserves are exposed to the risk of stranded assets[.]" ¶ 9, Ex. 1.

Since it published the MTR Report, Exxon has continued to represent to investors in various public filings, publications, and statements that it employs the proxy cost analysis in evaluating investment decisions. ¶¶ 12-17. Even after the issuance of OAG's initial subpoena in November 2015 (the "2015 Subpoena"), which specifically requested documents relating to the MTR Report, Exxon has continued to make such representations to the public and investors. For example, former Chairman and CEO Rex Tillerson told attendees of the company's May 25, 2016 annual shareholders meeting that "everything gets tested" against the purported proxy cost analysis. ¶ 16, Ex. 2. The official notice to shareholders for the same meeting stated that Exxon has been applying the proxy cost analysis to safeguard the company's value since 2007. ¶ 15. Exxon has repeated its proxy cost representations in multiple 10-Ks, multiple submissions to the Carbon Disclosure Project,[4] its annual *Outlook for Energy* public reports, a recent report it issued in March 2017 entitled *2016 Energy and Carbon Summary*, and in materials and statements

[4] The Carbon Disclosure Project ("CDP") is a United Kingdom-based nongovernmental organization that runs a global disclosure system that enables companies and governments to measure and manage their environmental impacts. CDP's data enables its network of investors, supply chain purchasers and policy makers to link environmental integrity, fiduciary duty and public interest to make better-informed decisions on climate action. Thousands of corporations voluntarily report their GHG emissions to the CDP. Each year Exxon submits answers to questions about climate change posed by the CDP.

provided to investors in connection with the company's annual shareholder meeting held on May 31, 2017.[5] ¶¶ 17, 19.

Moreover, Exxon has also represented that, as required by Generally Accepted Accounting Principles ("GAAP"), the company applies the same assumptions when it evaluates its reserves and other assets for impairment as it does in the rest of its business determinations, including decisions on potential investments. ¶ 45, Ex. 12.

2. Exxon's Internal Documents Do Not Support Its Public Representations

OAG's ongoing review of evidence, including the documents produced by Exxon in response to the 2015 Subpoena, has revealed that those documents contradict Exxon's representations about the application of a proxy cost of GHGs to the company's investment and asset valuation decisions may be false and misleading. ¶¶ 20-59.

Internal documents produced by Exxon reveal that from at least 2010 through approximately June 2014, Exxon told its investors it used one set of proxy-cost figures, when in fact the company's internal policies set forth a second set of lower proxy costs (and therefore a less risk-sensitive version) for use in its internal business planning. ¶¶ 21-27. Exxon actually recognized that its secret, internal figures understated the degree to which Exxon was taking into account the risks of climate change regulations, and thus, were not as conservative as its representations to investors suggested when applied to the vast majority of projects emitting GHGs. ¶¶ 23-25, Exs. 3-5. Nonetheless, as it admitted in an internal presentation in May 2014, Exxon continued to represent to investors and the public that it used the higher proxy cost reflected in its public disclosures. ¶ 25, Ex. 5. Exxon's documents show that former Chairman

[5] At the May 31, 2017 shareholder meeting, despite opposition from Exxon's management, the New York Comptroller's shareholder resolution seeking to require the company to publish an annual assessment of the long-term financial impacts of technological advances and climate change policies consistent with the globally agreed upon 2-degree Celsius target passed with a vote of 62.3% for and 37.7% against. ¶ 18.

and CEO Rex Tillerson was specifically informed of, and approved of, this inconsistency. ¶ 24, Ex. 4. Although Exxon ended this practice in 2014, and transitioned to using the publicly-stated proxy cost figures for internal analyses, ¶ 25, Ex. 5, Exxon did not tell investors about its secret internal set of proxy cost formulas when it represented in 2016 that it had been applying the proxy cost analysis since 2007, ¶ 27.

Moreover, it appears that Exxon did not even follow its deficient internal policies. OAG has not identified any documents in Exxon's production reflecting the consistent application of a proxy cost of GHGs to its investment and asset valuation decisions, whether in conformity with Exxon's publicly-stated representations or with its secret internal versions of proxy costs.[6] Rather, as to most such decisions, there appear to be no documents reflecting a proxy cost analysis at all. Indeed, despite OAG specifically asking for such information for nearly a year, Exxon has identified only a single, anomalous example. ¶ 37, Exs. 7-8.[7] In other instances, Exxon applied GHG costs that were a small fraction of the company's publicly disclosed proxy cost figures. For example, with regard to Exxon's oil sands investments in Alberta, Canada, documents show that instead of applying its publicly-stated proxy cost that rises to an endpoint as high as $80/ton in 2040, Exxon applied the much lower GHG taxes then in place in Alberta and held those figures flat indefinitely into the future. This substitution resulted in the alleged proxy cost of GHGs being reduced to a small fraction of what Exxon told investors would be applicable. ¶¶ 29-33. Exxon's use of the lower GHG taxes instead of its publicly-stated proxy costs is particularly telling because Exxon's own documents suggest that if Exxon had applied

[6] Exxon's assertion that it "has produced numerous documents responsive to the Attorney General's prior requests that reflect the actual application of the precise figures used in the policies to company-sponsored projects," Anderson Aff. ¶ 2, is unsupported by a cite to a single document.

[7] In that instance, Exxon applied a proxy cost to a project where Exxon was selling carbon dioxide to other operators, and thus, the application of the proxy cost increased the project's projected profitability. ¶ ¶ 37, Exs. 7-8.

the proxy cost it promised to shareholders, at least one substantial oil sands project may have projected a financial loss, rather than a profit, over the course of the project's original timeline. ¶ 29.[8]

As to Exxon's general policies, OAG has located only one internal summary document published annually that reflects a company mandate to apply a proxy cost analysis to investment and valuation decisions.[9] ¶ 36 (two pages in the company's annual Corporate Plan Dataguide Appendix that does little more than list the purportedly-applicable proxy costs across geographic regions and timeframes). OAG has not located any specific documents in Exxon's production that provide any guidance on the application of this proxy cost policy. Indeed, the evidence indicates a widespread lack of awareness among employees of the proxy cost policy, or how it should be applied. *Id.*

Similarly, although Exxon represents that it applies the same assumptions to impairment decisions as it does with respect to other business decisions, including investment decisions, in accordance with GAAP, the few documents Exxon has produced to date do not reflect any attempt at all to apply a proxy cost analysis to impairment decisions, including as to oil and gas reserves. ¶ 49. Documents produced by Exxon's independent auditor, PricewaterhouseCoopers LLP ("PwC") suggest that Exxon simply did not do what it told investors – it did not apply a proxy cost to its valuation or impairment analyses, including to its evaluation of its reserves and other hydrocarbon assets, prior to 2016. ¶ 50.

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[8] In addition, despite representing to investors that the proxy-cost analysis included prospective regulations on emissions caused by the "use" of fossil fuels such as electricity generation or motor-fuel combustion, also known as "Scope 3" emissions, ¶ 38, Exxon's documents indicate that even in the few instances where employees applied some form of a proxy cost analysis, the proxy-cost calculation omitted Scope 3 emissions. *Id.*, Ex. 10. These emissions account for 90% of all fossil-fuel greenhouse gases. ¶ 39.

[9] This is the same document that Exxon references in its motion to quash. Exxon's Brief in Support of Its Motion to Quash and For a Protective Order ("Exxon Br.") at 16.

B. OAG's Additional Subpoenas

On May 8, 2017, OAG issued a second subpoena duces tecum and nine testimonial subpoenas. ¶¶ 107, 117-19.

1. OAG's Second Subpoena Duces Tecum

The subpoena duces tecum includes requests for information ("Interrogatories") and for documents. ¶ 107. The Interrogatories seek details about Exxon's purported application of its proxy cost analysis to its investment decisions and evaluation of assets, along with an identification of individuals assigned to various committees overseeing the company's reserves. ¶ 108. The Interrogatories are targeted to elicit specific information relevant to Exxon's purported application of proxy costs to all of its investment, valuation, and impairment decisions. ¶ 109 (Interrogatory Nos. 1, 3, 4, and 6.) Exxon either took the risk of climate change regulations into account or it didn't. If, as OAG's investigation to date suggests, Exxon did not apply a proxy cost in most instances, there will be no additional details for Exxon to provide in response to these Interrogatories. ¶¶ 109-116. If Exxon did in fact apply a proxy cost analysis to any of these decisions, OAG is entitled to information that would reveal details about whether, for example, Exxon: (i) applied a lower proxy cost than it publicly represented to investors; (ii) applied a proxy cost to only a fraction of GHG emissions from a given project; (iii) applied a proxy cost to only certain GHGs and not others; (iv) applied a proxy cost to only direct emissions as opposed to emissions stemming from end use of the oil and gas; and/or (v) assumed that it could pass-through most or all of the proxy cost to its customers, while unreasonably assuming that such pass-through would have no effect on demand for its products. The documents Exxon has produced to date appear to reflect each of these practices, any one of which could render Exxon's purported proxy-cost analysis a meaningless sham. ¶ 34. OAG's

interrogatories call for information and data that would identify which of these practices were used with respect to any decisions for which Exxon claims that it applied a proxy cost of GHGs. ¶ 110 (Interrogatory Nos. 2, 5, & 7.)

The document requests seek four major categories of documents. First, OAG seeks documents relating to the use and application of a proxy cost of GHGs from the post-November 2015 period. Such documents are relevant to Exxon's continuing proxy-cost-related representations, and any related changes in the company's practices. ¶ 113. Second, OAG seeks documents that Exxon previously produced to the Securities and Exchange Commission ("SEC") relating to impairment decisions, reserves calculations, and climate change, a request that imposes no appreciable burden on Exxon. ¶ 114. Third, OAG seeks documents that were exchanged between Exxon and financial institutions relating to impairment decisions, reserves calculations, and climate change. Such documents would include communications with equity research departments that would form the basis for analyst reports and other information considered by investors in their investment decisions. ¶ 115. Finally, OAG seeks documents related to the company's asset valuation and impairment practices for its long lived assets,[10] particularly its hydrocarbon assets.[11] ¶ 115.

2. OAG's Testimonial Subpoenas

Five of the nine testimonial subpoenas seek testimony from fact witnesses. Four of these are for fact witnesses employed directly by Exxon, ¶ 118, and one is for a fact witness employed

[10] A long lived or fixed asset is any asset that a business expects to retain for at least one year. *See generally* N.Y. State Fin. Law § 2(6-a).

[11] Although PwC produced certain documents on these topics, it is necessary to obtain the requested documents from Exxon because the documents produced to date show that (1) Exxon does not share with PwC all relevant documents on this topic, including many of the cash flow models Exxon uses for impairment-related purposes; (2) in other cases, PwC was shown such documents, but Exxon did not permit PwC to retain them; (3) PwC does not possess drafts of relevant Exxon documents such as impairment memoranda and asset recoverability reviews; and (4) PwC does not possess related internal Exxon communications. ¶¶ 53-54.

by Exxon's majority-owned subsidiary, Imperial Oil Limited ("Imperial") in Canada. ¶ 119. The remaining four testimonial subpoenas are for document custodians.

Confronted with Exxon's failure to preserve subpoenaed documents and the resulting destruction of untold numbers of documents from over a dozen key custodians, this Court ordered Exxon to produce an affidavit from a records custodian detailing Exxon's preservation, collection, production, and recovery of documents from Exxon's Management Committee and other sources of management documents. ¶ 57. Pursuant to this Court's March 23, 2017 order, a senior Exxon Information Technology employee, Connie Feinstein, submitted an affidavit describing the steps taken to preserve and search for Exxon's management documents, the failure to preserve such documents, the consequent destruction of those documents, and data-recovery efforts. *Id.* Exxon also offered the testimony of its outside counsel, Michele Hirshman, in response to an OAG subpoena concenring compliance with the 2015 Subpoena. *Id.*

The testimony of Ms. Feinstein and Ms. Hirshman made clear that Exxon failed to take the required steps to locate, preserve, and recover critical electronically-stored information from key custodians, including former Chairman and CEO Rex Tillerson. ¶¶ 55-65, 72-86, 99-106. For example, during Ms. Hirshman's testimony, she testified that she knew in "early 2016" about the second email address for Rex Tillerson – the Wayne Tracker email address –and that she did not disclose that email address to OAG, stating that it would "be an *interesting test* of whether the Attorney General's office is reading the documents." ¶ 76, Ex. 16 (Hirshman Tr.) at 134 (emphasis added). Ms. Hirshman further testified that neither she nor her firm made any attempt to look further into the preservation, collection or production of documents of the Wayne Tracker email address at that time. The consequence of this failure was months of automatic destruction of relevant correspondence involving Mr. Tillerson. *Id*. at 141-42.

When OAG took the testimony of Ms. Feinstein about the information in her affidavit, it quickly became apparent that she knew little about Exxon's preservation, collection, production, and recovery of the management documents. ¶¶ 99-105. However, during the course of her testimony, she identified four records witnesses who were likely to have information relevant to OAG's questions. *Id.*[12] These four witnesses are the subject of four of OAG's nine testimonial subpoenas.

C. Exxon's Motion to Quash

After serving these subpoenas, OAG attempted to engage in a meet-and-confer call with Exxon's counsel to discuss the company's compliance with the subpoenas. ¶ 121. During that meet-and-confer, Exxon refused to discuss complying with *any* of the requests in the subpoena duces tecum. ¶ 125.[13] When OAG asked whether Exxon would consider responding to narrowed requests, Exxon stated that it would only discuss production on more limited requests if OAG withdrew its subpoena. ¶ 128. Exxon also stated that the records witness subpoenas were unnecessary because the testimony of Ms. Feinstein and Ms. Hirshman provided sufficient information about Exxon's subpoena compliance, despite the fact that the testimony of both

[12] Ms. Feinstein was unable to provide any specifics for any of six of the topics in the subpoena and for which Exxon proffered her as a witness. Instead, in response to almost every request for specific information on the six topics, Ms. Feinstein identified other individuals as responsible for those areas. She testified that (i) Ms. Helble was responsible for the creation of the Wayne Tracker alias account; (ii) Mr. Lauck was responsible for the identification and preservation of Management Committee documents, and the completely different manner Exxon used to collect those documents; (iii) Ms. Leong was responsible for the automatic deletion "file sweep" tool, as well as the email servers and back up locations needed for forensic recovery of Wayne Tracker emails; and (iv) Mr. Bolia has personal knowledge of the matters set out in 29 of the 60 paragraphs in Ms. Feinstein's affidavit, including those concerning the implementation of the different search protocols employed for Management Committee custodians, implementation of the first, second, third, and fourth searches of Management Committee records, the discovery of Exxon's failure to exempt the Wayne Tracker email account from the "file sweep" tool, and attempts to remediate the loss of Wayne Tracker emails. ¶¶ 99-105.

[13] When OAG pointed out that Interrogatory No. 9 asked only for a list of names of individuals on indisputably relevant internal committees, Exxon refused to discuss complying with even that request, citing "overarching fundamental concerns." ¶ 126. When OAG also pointed out that document request No. 5 would require Exxon to do nothing more than provide OAG with a copy of a previous production made to the SEC, Exxon again declined, on the same basis. ¶ 127.

revealed their lack of knowledge of key aspects of the preservation, collection, and production process, and Ms. Feinstein identified other individuals who were more directly involved in the process. ¶ 129.

Rather than engage in a good faith effort to address any objections relating to undue burden, over breadth, or relevance, Exxon instead filed its motion to quash the subpoena duces tecum and the four records witness subpoenas. Since filing its motion, Exxon has also asserted that it will not comply with the subpoena for testimony of the witness from Imperial on the purported ground that it lacks sufficient control over Imperial to compel the witness's attendance – despite the fact that Exxon produced documents from Imperial and this witness, many of which are highly relevant to whether Exxon applied a lower GHG tax as compared to the higher, publicly-stated, proxy cost of GHGs to its Canadian oil sands projects. ¶¶ 29-33.

ARGUMENT

The Court of Appeals has held that "[a]n application to quash a subpoena [issued by OAG] should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is *utterly irrelevant* to any proper inquiry." *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 332 (1988) (emphasis added) (internal citations, quotation marks, and brackets omitted); *see also id.* (where there is uncertainty about the legality of the conduct being investigated, the Attorney General has authority to issue a subpoena "unless the legality of the . . . practice is so well established . . . as to be free from doubt."); *Hogan v. Cuomo*, 888 N.Y.S.2d 665, 668 (3d Dep't 2009) (even "where legality of

underlying conduct is arguable, [Attorney General's] power to investigate possible violations must be sustained").[14] Exxon falls far short of meeting this standard.[15]

A. Exxon Should Be Compelled To Comply With OAG's Second Subpoena *Duces Tecum*

OAG's subpoena duces tecum was carefully tailored to obtain the information and documents relevant to the apparent contradictions between Exxon's public representations concerning its risk-management practices and its actual internal practices. Exxon's conclusory arguments that OAG's requests for information and documents have no factual basis, are unduly burdensome and disproportionate, and are preempted by federal law are meritless.

1. OAG's Subpoena Is Reasonably Related To Its Investigation

Courts apply a presumption that the Attorney General is acting in good faith when commencing an investigation and issuing a subpoena. *See, e.g.*, *Anheuser-Busch*, 71 N.Y.2d at 332; *Roemer v. Cuomo*, 888 N.Y.S.2d 669, 671 (3d Dep't 2009); *Abrams v. Thruway Food Mkt. & Shopping Ctr., Inc.*, 541 N.Y.S.2d 856, 858 (2d Dep't 1989); *Am. Dental Coop., Inc. v. Attorney-General*, 514 N.Y.S.2d 228, 232 (1st Dep't 1987). "[A]ll that the Attorney-General

[14] This standard, rather than any rule of proportionality, governs the enforceability of OAG's subpoenas, and the cases cited by Exxon, *see* Exxon Br. at 15, are not to the contrary. *See Airbnb, Inc. v. Schneiderman*, 44 Misc. 3d 351, 356 (Sup. Ct. Albany Cnty. 2014) (New York courts will limit a subpoena only to the extent requests are unrelated to the statute under which State was investigating); *Myerson v. Lentini Bros. Moving & Storage Co.,* 33 N.Y.2d 250, 258 (1973) (agency issuing subpoena is not "required to establish a strong and probative basis for investigation, let alone probable cause"); *A'Hearn v. Comm. on Unlawful Practice of Law*, 23 N.Y.2d 916, 919 (1969) (subpoena enforceable if there is "reasonable ground to believe that there was illegal" conduct); *Horn Constr. Co. v. Fraiman*, 309 N.Y.S.2d 377, 379 (1st Dep't 1970) (even "after extensive examination of witnesses," State need only show a "reasonable relationship" between subsequent document requests and objective of investigation). Here, the subpoena *duces tecum* is reasonably related to determining whether Exxon, consistent with its public statements, applied a proxy cost of GHGs to its investment and impairment decisions and its internal reserve estimates.

[15] All that is required to grant OAG's cross-motion to compel and deny Exxon's motion to quash is an OAG affirmation regarding its ongoing investigation, Here, OAG additionally presents certain of its investigative findings in this memorandum and accompanying affirmation to demonstrate the extent to which Exxon's assertion that there is no basis for OAG's investigation is entirely baseless. In fact, Exxon's own documents make clear that there is good reason for OAG to continue to investigate whether Exxon is engaged in an ongoing fraud.

need show in support of his subpoena . . . is his authority, the relevance of the items sought, and some factual basis for his investigation." *Id.*[16]

Here, there can be no question that the Attorney General has the authority to investigate violations of New York law,[17] and that misrepresentations by Exxon to the public and investors about Exxon's application of a proxy cost analysis may violate New York law, including the Martin Act and the Executive Law. Moreover, the subpoena duces tecum is reasonably related to OAG's investigation. OAG's investigation of Exxon, which was initiated as a result of Exxon's representations to the investing public about how it is managing the risks posed by climate change-related regulations to its business, has revealed substantial inconsistencies between Exxon's public statements and its internal practices. OAG's requests were carefully crafted to obtain specific information and documents relevant to those inconsistencies.

The fact that OAG has already obtained documents from Exxon and others does not alter this standard, as New York courts continue to apply the same principles in evaluating follow-on subpoenas issued in ongoing investigations. For example, in *Mustaphalli Capital Partners Fund, LP v. People*, Index No. 650845/14, 2014 WL 2417523 (Sup. Ct. N.Y. Cnty. May 23, 2014), the court applied this standard and enforced a second subpoena for documents in an ongoing Martin Act investigation, notwithstanding the recipient's claim that OAG already had sufficient information to determine whether there had been any actionable violations.[18]

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[16] Notably, probable cause that an illegal act was committed is not required. *See, e.g.*, *Roemer*, 888 N.Y.S.2d at 670 (Attorney General need only show "some factual basis for his investigation"); *Thruway Food Mkt.*, 541 N.Y.S.2d at 858 (Attorney General "is not required to establish the existence of probable cause" to issue a subpoena).

[17] Exxon does not dispute OAG's authority to issue the subpoenas.

[18] *See also City of Albany Indus. Dev. Agency v. N.Y. State Comm'n on Gov't Integrity,* 144 Misc. 2d 342, 344-45 (Sup. Ct. Albany Cnty. 1989) (refusing to quash State commission's subpoena, which required "searching through 'hundreds of thousands' of documents," with respect to an investigation that was already "well underway"; holding that the State had "satisfactorily established that the documents sought in each of the challenged paragraphs are reasonable in breadth and relevant and material to the issues under inquiry").

2. OAG's Subpoena Is Not Unduly Burdensome

Unable to challenge the authority of the Attorney General, the factual basis for his investigation, or the relevance of the documents and information sought by the subpoena, Exxon resorts to objecting to the subpoena on the ground that it imposes an undue burden, without setting forth any facts supporting such objection. The cases are clear that a subpoena recipient cannot simply make general claims that the subpoena is unduly burdensome, but rather must substantiate these claims. *Alfred E. Mann Living Tr. v. ETIRC Aviation S.a.r.L*, Misc. 3d 1211(A), 2010 N.Y. Slip Op. 52476(U), at *5 (Sup. Ct. N.Y. Cnty. June 24, 2010) (motion to quash denied where petitioner's "vague and conclusory assertions that the Subpoena is vastly overbroad and burdensome is not persuasive."); *N.Y. State Joint Comm'n on Pub. Ethics v. Campaign for One N.Y., Inc.*, 53 Misc. 3d 983, 1000 (Sup. Ct. Albany Cnty. 2016) ("Notwithstanding [petitioner's] complaints about the breadth of the subpoena, it has not made any showing compliance would present to [petitioner] an undue burden of time or money."); *Airbnb, Inc. v. Schneiderman*, 44 Misc. 3d 351, 359 (Sup. Ct. Albany Cnty. 2014) (holding that petitioner "failed to demonstrate that the subpoena is unduly burdensome" because it "failed to establish, other than via conclusory assertion, that [requested] information is not collected by petitioner or readily accessible by petitioner").[19]

Similarly, here, Exxon has made only conclusory allegations that the subpoena is overly broad and unduly burdensome, without providing any factual support for such allegations. Moreover, contrary to Exxon's claim that OAG is seeking records for "every oil and gas investment decision it has made over the last 12 years," OAG has limited its request to instances

[19] "The judicial remedy for an attack upon an overly broad subpoena . . . is not to quash the subpoena in its entirety, but to modify it so that the materials demanded are reasonably within the agency's subpoena power." *N.Y. State Comm'n on Gov't Integrity v. Congel*, 142 Misc. 2d 9, 16 (Sup. Ct. N.Y. Cnty. 1988).

relating to Exxon's decision to apply proxy costs to its investment and impairment decisions. OAG expects that Exxon's responses to the Interrogatories will narrow, rather than expand, the need for additional documents because OAG's investigation to date indicates that there are few instances in which Exxon actually applied proxy costs to its investment or impairment decisions. ¶ 28. In any event, OAG has conveyed to Exxon that it is willing to narrow its document requests if Exxon identifies a more efficient means of responding to the subpoena. Accordingly, Exxon should be compelled to comply with OAG's subpoena duces tecum.[20]

3. OAG Is Authorized To Issue Requests For Information or Interrogatories

Exxon's claim that OAG lacks the authority to issue interrogatories is unavailing. OAG has the express statutory authority to request information from subpoena recipients. The Martin Act provides that, in addition to the Attorney General's power to require testimony and the production of books and records, OAG "may . . . require such other data and information as [it] may deem relevant[.]" Gen. Bus. Law § 352(1). It further provides that OAG may require a potential violator to file "a statement in writing . . . as to all the facts and circumstances concerning the subject matter, and for that purpose may prescribe forms upon which such statements shall be made."[21] *Id.* Executive Law § 63(12) likewise authorizes OAG to "take proof and make a determination of the relevant facts." In *Am. Dental Co-op., Inc. v. Attorney General*, the First Department, citing Executive Law § 63(12) and General Business Law § 343 (the "Donnelly Act"), confirmed that OAG's "investigatory power includes the right to issue

[20] Recognizing that it cannot satisfy the high legal standard for quashing OAG's subpoenas, Exxon moves, in the alternative, for a protective order limiting the subpoenas. Exxon's request for such relief also should be denied because it has failed to put forth any facts that support its claim of undue burden and it has failed to meet-and-confer in good faith to attempt to narrow the scope of the Subpoena.

[21] Whether Exxon's prospective responses are considered written testimony or responses to interrogatories, the result is the same: Exxon is legally obligated under the Martin Act to answer in writing the questions posed by OAG.

subpoenas and serve interrogatories." 514 N.Y.S.2d at 279.[22] The court in *People v. Thain* reached the same conclusion with respect to a Martin Act subpoena. 24 Misc. 3d 377, 389-90 (Sup. Ct. N.Y. Cnty. 2009) (holding that recipient of subpoena was required to compile and provide a list containing employee bonus-related information to OAG).

Courts have long upheld OAG's authority to issue interrogatories under its investigative powers, including subpoenas that include interrogatories with specific instructions designed to elicit written responses that address precisely the matter that OAG is investigating. *See, e.g., Anheuser-Busch*, 71 N.Y.2d at 330 (holding that OAG's interrogatories were valid); *Grandview Dairy, Inc. v. Lefkowitz*, 76 A.D.2d 776, 777 (1st Dep't 1980) (holding that detailed instructions accompanying Donnelly Act interrogatories were "essential if interrogatories are to serve as a useful tool for gathering evidence against a corporate entity" and noting that "[w]ithout the instructions the interrogatories might well be stripped of all efficacy through evasiveness and nonresponsiveness by the corporate officer answering the interrogatories"); *Airbnb*, 44 Misc. 3d at 359 (holding that OAG's interrogatories, issued pursuant to Executive Law § 63(12), about numerous Airbnb hosts and specific rentals were not unduly burdensome); *In re Kushner*, 108

[22] The Donnelly Act, which sets out OAG's antitrust investigatory authority, includes the same language as the Martin Act authorizing OAG to require the production of "a statement in writing . . . as to all the facts and circumstances concerning the subject matter" and "such other data and information as he may deem relevant[.]" This language first appeared in the Martin Act when it was enacted in 1921, and was added to the Donnelly Act in 1933 for the express purpose of enlarging OAG's subpoena power to the extent provided for in the Martin Act. The Martin Act is thus at least as broad as the Donnelly Act in this respect. *See* Public Papers of Governor Lehman, Aug. 15, 1933, at 160-61 (¶ 136, Ex. 29) (including recommendation by Governor Lehman to the Legislature that the Donnelly Act be amended "to enlarge the power of subpoena, examination and prosecution by the Attorney-General in the same manner as now provided in the Martin Act," to enable OAG "to conduct adequate investigations to ascertain the underlying facts concerning violations of the Donnelly Act"); Annual Report of the Attorney-General, 1934, at 51 (*Id*., Ex. 30) (noting that the Donnelly Act amendment of the prior year "was patterned after the Martin Act").

Misc. 2d 329, 332 (Sup. Ct. N.Y. Cnty. 1981) (upholding the validity of OAG subpoena with interrogatories, which are "a useful tool for gathering evidence against a corporate entity").[23]

Exxon ignores this overwhelming authority and instead argues that it cannot be compelled to create new documents to comply with the subpoena. However, all but two of the cases it cites in support of this proposition (Exxon Br. at 18-19) pertain to civil discovery obligations and do not involve investigative subpoenas from government agencies. In the remaining two cases, the statute pursuant to which the subpoena was issued did not specifically authorize interrogatories and requests for information at the time the subpoena was issued.[24]

4. OAG's Subpoena Is Not Preempted By Federal Law

Contrary to Exxon's contention, OAG's subpoena is not preempted by federal law. Any preemption analysis is "guided by the starting presumption that Congress does not intend to supplant state law unless its intent to do so is clear and manifest." *People v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 113 (2008) (internal quotation marks omitted). This presumption is particularly strong with respect to state blue-sky laws such as the Martin Act, because federal securities laws "presuppose an important role for state Attorneys General in investigating fraud and bringing civil actions to enjoin wrongful conduct, vindicate the rights of those injured thereby, deter future fraud, and maintain the public trust." *People v. Greenberg*, 946 N.Y.S.2d 1, 5 (1st Dep't 2012).

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[23] *See also All-Waste Sys., Inc. v. Abrams*, 547 N.Y.S.2d 77, 78 (2d Dep't 1989) (holding that OAG's interrogatories were valid under the Donnelly Act).

[24] *Liberty Mut. Ins. Co. v. N.Y. Comm'n on Human Rights*, 332 N.Y.S.2d 971 (1st Dep't 1972) (decision concerning authority of City of New York Commission on Human Rights under former N.Y.C. Admin. Code § B1-5.0, *see* ¶ 137, Ex. 31); *Application of Slipyan*, 208 Misc. 515 (Sup. Ct. N.Y. Cnty. 1955) (decision concerning authority of Commissioner of Investigation under former Executive Law § 11, *see* ¶ 138, Ex. 32).

Any potential claims by OAG, including those related to asset impairment, do not come close to conflicting with the federal regulations that Exxon cites, which concern the calculation and disclosure of proved reserves under a formula specified by the SEC. As Exxon's own spokesperson highlighted in a recent earnings call, reserves reporting pursuant to SEC rules is distinct from evaluation of assets for potential impairment.[25] Notably, although SEC rules require companies to report proved reserves in light of existing conditions (*see* 17 C.F.R. §§ 210.4-10, 229.1202), estimates of future cash flows for purposes of impairment testing "shall incorporate the entity's own assumptions . . . and shall consider all available evidence." ¶ 47, Ex. 11 (Financial Accounting Standards Board, Accounting Standards Codification 360-10-35-30).

Exxon represents to investors and to the public that it follows this rule of consistency in evaluating whether its assets are impaired.[26] But as set forth above, it appears that Exxon's impairment evaluations did not incorporate its publicly-touted assumptions about a proxy cost of GHGs prior to 2016. Any claims stemming from Exxon's inconsistency in this respect would have little or nothing to do with SEC reserve reporting regulations, let alone conflict with such regulations.[27] Indeed, the subpoena duces tecum specifies that OAG is not requesting

[25] *See* ¶ 139, Ex. 33 (Transcript of Earnings Call, Exxon Mobil Corp. Q4 2016 Results), at 23 ("I want to make sure that everybody's very clear that there is a separation between proved reserves reporting under the SEC rules and then the whole issue of asset impairments.") (remarks of Jeff Woodbury, Vice President of Investor Relations, Exxon).

[26] *See*, *e.g.*, ¶ 44, Ex. 12 (Exxon Mobil Corp., Form 10-K, 2015), at 57 ("Cash flows used in recoverability assessments are based on the Corporation's assumptions which are developed in the annual planning and budgeting process, and are consistent with the criteria management uses to evaluate investment opportunities.").

[27] Moreover, state and federal law on this point could not conflict even in theory, because the federal regulations that Exxon cites make clear that companies may disclose estimates of oil and gas resources other than the reserves calculations mandated by those regulations if such disclosure is required by state law. Instruction to 17 C.F.R. § 229.1202 (Item 1202).

information about Exxon's SEC reserves reporting process. (Anderson Aff. Ex. T at Interrogatory Nos. 6 & 7).[28]

Furthermore, OAG has not filed a complaint; thus far, it has only issued subpoenas, rendering Exxon's preemption argument premature in any event. *See Oncor Commc'ns v. State*, 636 N.Y.S.2d 176, 178 (3d Dep't 1996) (holding that, absent claims asserted in a complaint, "there can be no meaningful consideration of the preemption issue"); *Cuomo v. Dreamland Amusements, Inc.*, No. 08 Civ. 7100 (JGK), 2008 WL 4369270, at *8 (S.D.N.Y. Sep. 22, 2008) (holding that preemption issue could not be resolved because the potential claim that may have been preempted was "only one of several bases" for OAG's investigation); *Cuomo v. Dreamland Amusements, Inc.*, 22 Misc. 3d 1107(A), 2009 N.Y. Slip. Op. 50062(U), at *6-7 (Sup. Ct. N.Y. Cnty. Jan. 6, 2009) (same).[29]

B. This Court Should Compel the Testimony of the Records Witnesses

There can be no question that OAG has the right to ensure that responsive documents are preserved, collected, and produced in the course of the its investigation, and furthermore, to investigate any failures in that process as well as obstruction or frustration of its investigation.[30] Here, Exxon and its outside counsel have failed to observe basic requirements for the preservation, collection, production, and recovery of electronically-stored information.

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[28] These requests concern Exxon's *internal* reserves estimates, which are not based on the SEC formula, but rather on Exxon's own assumptions, and which feed into its impairment decisions.

[29] The cases Exxon cites with respect to raising preemption as a defense to a subpoena (*see* Exxon Br. at 20-21) are inapposite. *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936 (2016), did not involve investigatory subpoenas at all, but rather concerned reporting requirements in addition to those specified by ERISA. In *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 535-36 (2009), the Court addressed whether state authority to issue subpoenas was preempted by federal law limiting visitorial powers over national banks. By contrast, Exxon does not assert a general immunity from state subpoenas, but only that OAG's potential claims may be preempted.

[30] *See* Gen. Bus. Law § 352(4); *see also People v. Forsyth*, 109 Misc. 2d 234, 237 (Sup. Ct. N.Y. Cnty. 1981) (upholding jury verdict that failing to obey a Martin Act subpoena violated § 352(4) because, inter alia, defense of impossibility is not a reasonable cause for failure to obey a subpoena "[w]here the defendant is responsible for his inability to comply").

¶¶ 57-106. These failures directly resulted in the destruction of months, and in many cases, more than a year's worth, of emails and other electronic documents belonging to key custodians including the company's top management and reserves analysts. ¶¶ 72-92. The testimony of Ms. Feinstein and Ms. Hirshman has revealed that, despite being proffered by Exxon as knowledgeable on these topics, they lack knowledge about many of the relevant details, including, crucially, information about Exxon's data-backup processes and its recovery efforts to date. ¶¶ 101-06. Despite being proffered as a witness on the six topics in OAG's subpoena, on almost 200 occasions, Ms. Feinstein testified that she did not know the requested details, and nothing in Ms. Hirshman's testimony provides further elucidation on these points. ¶¶ 103, 106. Thus, OAG subpoenaed the four Exxon witnesses identified by Ms. Feinstein as being knowledgeable on such details. ¶ 117.

Unable to contest the relevance of the testimony of these witnesses, Exxon contends that their testimony is cumulative, speculative, and unduly burdensome. None of these objections has merit given that Ms. Feinstein did not know the answers to many of OAG's questions, and identified these four record custodians as likely to know the answers to such questions. ¶¶ 99-105. Moreover, any undue burden to Exxon is outweighed by OAG's need for this relevant information about the full scope of Exxon's document destruction and ensuring the recovery of the destroyed documents. Because OAG has established that (i) Ms. Feinstein was unable to provide certain information; (ii) the four newly-noticed witnesses are likely to provide the information that Ms. Feinstein was unable to provide; and (iii) the testimony of such witnesses is relevant to the investigation, this Court should compel Exxon to produce these witnesses for testimony.

C. This Court Should Compel the Testimony of Jason Iwanika, An Imperial Oil Limited Witness

Despite having produced over 670 documents from the custody of Jason Iwanika, an employee of Exxon's majority-owned subsidiary, Imperial, based in Canada, Exxon now refuses to produce Mr. Iwanika for testimony in this investigation, contending for the first time that it lacks control over its majority-owned subsidiary from which it has been producing documents for months. ¶¶ 84, 120, 132-33. Mr. Iwanika's testimony is highly relevant to OAG's investigation given that documents produced by Exxon indicate that he was directed by Exxon not to apply a proxy cost to Exxon's Canadian oil sands projects. ¶¶ 29-33.

Under New York law, a parent corporation can be required to produce documents or testimony from subsidiaries. For example, in *Grande Prairie Energy LLC v. Alstom Power, Inc.*, the court held that "a parent company . . . can be compelled to produce for deposition an employee of its foreign subsidiary," and required an American company to produce for testimony an employee of a Swiss affiliate. 5 Misc. 3d 1002(A), 2004 N.Y. Slip Op. 51156(U), at *3 (Sup. Ct. N.Y. Cnty. Oct. 4, 2004). Likewise, in *Bank of Tokyo–Mitsubishi, New York Branch v. Kvaerner*, the court held that "if a [company] subject to the court's *in personam* jurisdiction controls a foreign corporate entity the [company], by virtue of its control, should be obligated to produce any and all appropriate discovery under its aegis, including that under the control of its subsidiary, wherever the subsidiary may be located." 175 Misc. 2d 408, 411 (Sup. Ct. N.Y. Cnty. 1998) (requiring defendant to produce documents in the possession of its wholly-owned foreign subsidiary).[31]

[31] This principle applies equally to a majority-owned subsidiary that is, for relevant purposes, under the control of the parent corporation. *See Standard Fruit & S.S. Co. v. Waterfront Comm'n of N.Y. Harbor*, 43 N.Y.2d 11, 15 (1977) ("[s]o long as the person who participated in the questioned corporate activity is an officer or employee of the corporation, or is under its control or direction, it is the corporation's responsibility to produce that person pursuant to a subpoena served upon the corporation" even if that person is located in a foreign jurisdiction).

Having spent months producing Mr. Iwanika's documents, Exxon now claims, implausibly, that it has no control over Imperial or Mr. Iwanika. Exxon's baseless assertion is refuted by Exxon's own documents, including those produced from Mr. Iwanika's files. Exxon's Corporate Plan documents, in which the company sets out corporate-level assumptions for the proxy cost of GHGs, include sub-sections for the Canadian provinces where Imperial operates. ¶¶ 33, 36. Numerous documents reflect that Mr. Iwanika sought direction and guidance from Exxon employees concerning how to apply this portion of the Exxon Corporate Plan in the course of his work. *See, e.g.*, ¶ 26, Ex. 6; ¶¶ 29-33. In certain instances, those Exxon employees advised Mr. Iwanika not to apply the proxy cost of GHGs that appears in the Corporate Plan, and instead, to apply only the much lower actual cost of carbon under existing Alberta law. ¶ 33. The documents produced by Exxon reveal that Mr. Iwanika pushed back and questioned those instructions, expressing his belief that he was bound to follow Exxon's Corporate Plan guidance. *Id*. Nonetheless, it appears that Mr. Iwanika relented and complied with Exxon's instructions to deviate from the company's internal policies. *Id*. These and other documents confirm that Exxon controls Imperial[32] and Mr. Iwanika with respect to matters at the core of OAG's investigation, and as such, Exxon cannot now refuse to produce Mr. Iwanika for testimony simply because he is located outside New York.

Additionally, Mr. Iwanika appears on Exxon's privilege logs, including for a communication he sent that purportedly contained legal advice. ¶ 133. Other Imperial employees appear on Exxon's privilege logs as well. *Id*.[33] Exxon's apparent contention that Mr.

[32] Besides this substantial document production, other indicia of Exxon's control over Imperial include the following: (i) Exxon produced documents from a second Imperial employee, Susan Swan, Oleske Aff. ¶ 133; (ii) Exxon's Law Department conducted custodial interviews of both Ms. Swan and Mr. Iwanika, *id.*; and (iii) at least 28 Imperial employees were placed on litigation hold by Exxon's Law Department, *id*.

[33] In addition to Iwanika, 27 other Imperial employees have been placed on preservation hold by Exxon's Law Department. ¶ 133.

Iwanika's presence on a document does not break privilege is an implicit acknowledgment that he is under Exxon's control. *Grande Prairie Energy*, 5 Misc. 3d 1002(A), 2004 N.Y. Slip Op. 51156(U), at *3 (holding that party "cannot have it both ways" in this respect).

Accordingly, this Court should compel Exxon to produce Mr. Iwanika for testimony in response to OAG's subpoena.

CONCLUSION

For the reasons set forth above, Exxon's motion to quash should be denied in its entirety, and OAG's cross-motion to compel compliance with OAG's subpoena duces tecum, its four subpoenas for the testimony of record custodians, and its subpoena for the testimony of Mr. Iwanika should be granted in its entirety.

Dated: New York, New York
June 2, 2017

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Exhibit 4

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

In the Matter of the Application of the PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, Petitioner, -against- PRICEWATERHOUSECOOPERS LLP and EXXON MOBIL CORPORATION, Respondents.	Index No. 451962/2016 IAS Part 61 Hon. Barry R. Ostrager Motion Sequence Nos. 4 and 5

EXXON MOBIL CORPORATION'S OPPOSITION TO THE ATTORNEY GENERAL'S MOTION TO COMPEL AND REPLY IN SUPPORT OF ITS MOTION TO QUASH

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PRELIMINARY STATEMENT

Prepared for the press rather than this Court, the Attorney General's brief amply demonstrates why the challenged subpoenas should be quashed. Filled with inflammatory, reckless, and false allegations of an "ongoing fraudulent scheme" and "sham" business practices, the Attorney General's brief was filed with this Court minutes before detailed press accounts appeared describing his baseless claims. This rapid and widespread media coverage was the intended consequence of the Attorney General's providing advance copies of the brief to the media days before filing it with the Court, a troubling fact confirmed by members of the media. Providing a brief to the press in advance of filing is textbook pandering.

No further evidence is required to establish the political motivation of the Attorney General's fruitless year-and-a-half long investigation pursuing his ever-shifting and unraveling investigative theories. It is an abuse of the powers of his office and the court system itself, furthering only the Attorney General's transparent political ambitions and ultimately bound to taint a prospective jury pool, thereby depriving ExxonMobil of a fair trial in the event this political witch hunt were to reach that unlikely stage. As the Supreme Court so aptly stated eighty years ago, a government attorney's interest "is not that it shall win a case, but that justice shall be done. . . . [W]hile he may strike hard blows, he is not at liberty to strike foul ones." *Berger* v. *United States*, 295 U.S. 78, 88 (1935).

In addition to the "foul" blows included in his brief, the Attorney General has unilaterally released ExxonMobil's confidential and proprietary records about its commercially sensitive

business operations without first providing ExxonMobil the opportunity to request sealing.[1] Whether this amounts to intentional graymail or was an oversight due to haste in meeting a press deadline need not be resolved here. Whatever the cause, the Attorney General's actions only highlight the important role this Court plays in ensuring that the Attorney General exercises his power lawfully and makes demands proportionate to a legitimate need.

And a legitimate law enforcement need is absent here. In the latest of many shifts in his investigative theory, the Attorney General now claims there is a disconnect between ExxonMobil's public statements about carbon pricing and its internal practices. Nothing of any substance in the Attorney General's brief supports this claim.[2] ExxonMobil has for years told the public that, when projecting the global demand for energy, it assesses potential macro impacts of future aggregate greenhouse gas ("GHG") policy by using a proxy cost of carbon. That approach assists ExxonMobil in assessing potential energy demand over time in many sectors where future policy actions are unclear, or may involve a significantly broad suite of policy initiatives. In other demand sectors where the direction of policies and related targets are more clear, a more direct approach reflecting assessments of targeted policies is used, as appropriate, and as an alternative to a proxy cost. Overall, the use of a proxy cost and targeted policy assessments have the result of dampening energy demand over time. These demand projections are ultimately reflected in ExxonMobil's overall energy outlook and its pricing outlook, which are used to assess investment opportunities. ExxonMobil's assessment of energy demand, made available to the public on an annual basis, has informed its investment decisions

[1] In light of the commercially sensitive nature of the information, it is not surprising that ExxonMobil has not published it, and it is improper for the Attorney General to have unilaterally disclosed it. The Attorney General should be directed to provide notice to ExxonMobil prior to filing any further documents that he has received in this investigation so that ExxonMobil may seek sealing where appropriate.

[2] It is unsurprising that the Attorney General is proceeding in this misguided fashion since he did not bother to conduct depositions of those who possess knowledge on this matter before issuing the challenged document subpoena.

for years.

Separate from assessing the impacts of aggregate carbon policy at a macro level in terms of global energy demand and prices, ExxonMobil also takes into account, where appropriate, the impacts of current and reasonably anticipated GHG regulations related to capital projects. It does this by estimating the potential project-specific costs associated with GHG emissions and including them in the project's economics.

The Attorney General would like this Court to believe that ExxonMobil's practices are not aligned with its public statements, but he offers no credible support for that false claim. Instead, he points to ExxonMobil's use of (i) proxy carbon cost estimates when assessing the impact of aggregate GHG policy on global energy demand that were different, at times, from (ii) GHG cost estimates used to assess the potential effect of regulations on the economics of specific projects. Considering the different purposes of those two exercises (assessing potential global energy demand over time on the one hand, and evaluating likely economics of specific projects on the other), it is unsurprising that different figures would be used. ExxonMobil has not said that it relied on one set of figures for all purposes, and a reasonable investor would not draw such a conclusion from ExxonMobil's public statements.

The Attorney General's other purported justifications are even less persuasive. He complains about finding no evidence of the "consistent application of a proxy cost" in the 2.8 million pages of ExxonMobil documents already produced in this case, but points to no instance where a cost of carbon was not applied but should have been. For a prosecutor proceeding in good faith, the absence of any evidence of wrongdoing is grounds for closing an investigation, not expanding it. Even more frivolous is the Attorney General's claim that it was inappropriate to use the actual cost of carbon in Alberta, Canada when assessing overall project economics,

rather than hypothetical figures. There is no basis in law or logic to find fault for relying on actual costs when available. And the idea that ExxonMobil was obligated to apply hypothetical costs of possible future policies when estimating reserves finds no support in, and would in fact contradict, relevant SEC policies. Moreover, GAAP standards for reviewing assets for impairment contain no reference to costs associated with potential future GHG regulations.

To justify further depositions, the Attorney General falsely submits that ExxonMobil has somehow not accounted for the purported "destruction of documents from key custodians." Nothing could be further from the truth. As this Court recognized months ago, ExxonMobil provided the Attorney General with a full accounting of its preservation and collection efforts both as to Mr. Tillerson and more broadly in this matter. ExxonMobil has now provided multiple sworn statements and two witnesses for separate day-long depositions on the issue. If more testimony is required, the Attorney General must explain what he needs and make a request proportional to that need. Demanding that another four witnesses travel to New York City for further depositions on the Attorney General's say-so falls well short of satisfying that standard. The Attorney General's conclusory assertion of ExxonMobil's control of an independent Canadian energy company is equally insufficient to meet the burden of proof necessary to compel ExxonMobil to produce a witness from that company.

From the outset of this investigation, it has been clear that the Attorney General is working backwards from an assumption of ExxonMobil's guilt, searching in vain for some theory to support his prejudgment. These subpoenas are just the latest gambit in the Attorney General's pursuit of favorable press and harassment of ExxonMobil. They should be quashed.

ARGUMENT

I. The Attorney General Has Failed to Demonstrate a Legitimate Need for, or the Proportionality of, His Document Subpoena.

The Attorney General would relegate this Court to a mere rubber stamp on his subpoena power.[3] Unsurprisingly, the law says otherwise. As ExxonMobil established in its opening brief, where, as here, an investigation has proceeded beyond a "preliminary or tentative inquiry," a showing of "some factual basis" for an investigation is not enough to safeguard against the investigation "be[ing] causelessly broadened into an unlimited examination of the business affairs of an enterprise." *Myerson* v. *Lentini Brothers Moving and Storage Co.*, 33 N.Y.2d 250, 258–260 (1973). Reining in executive overreach, courts halt inquiries where they have become "unduly protracted, unduly intrusive into the affairs of the witness without some showing of utility in its further prosecution." *A'Hearn* v. *Comm. on Unlawful Practice of Law*, 23 N.Y.2d 916, 918 (1969). To justify the substantial widening of a long-running investigation, the Attorney General must demonstrate that continued investigative "efforts would or reasonably might prove fruitful." *Horn Const. Co.* v. *Fraiman*, 34 A.D.2d 131, 133 (1st Dep't 1970). And it is not enough for the Attorney General to do what he has done here, pointing to "minimal, equivocal documentary proof . . . with no other proof of any sort to support suspicion of illegality." *Matter of Napatco, Inc.* v. *Lefkowitz*, 43 N.Y.2d 884, 885–86 (1978).

Rejecting this well-established law, the Attorney General claims that "New York courts continue to apply [his preferred, more deferential] principles in evaluating follow-on subpoenas."[4] But that claim is not supported by precedent, including those referenced in the

[3] Opp. 14–15 & n.14. "Opp." refers to the Attorney General's brief in opposition to ExxonMobil's motion to quash and in support of his cross-motion to compel compliance with the challenged subpoenas (NYSCEF No. 168); "Oleske" refers to the affirmation filed by John Oleske in support of the Attorney General's cross-motion to compel (NYSCEF No. 169) and the exhibits thereto; and "Br." refers to ExxonMobil's brief in support of its motion to quash (NYSCEF No. 130).

[4] Opp. 15.

Attorney General's brief. While it is true that *City of Albany Indus. Dev. Agency* v. *N.Y. State Comm'n on Gov't Integrity* upheld a follow-on subpoena,[5] that decision did not address, as here, a request for documents minimally relevant to an ongoing inquiry. 144 Misc. 2d 342, 344–45 (Sup. Ct. Albany Cnty. 1989). To the contrary, the state commission in that case carried its burden of establishing that the document request was "both reasonable in breadth and relevant *and material* to the issues under inquiry." *Id.* at 344 (emphasis added). The Attorney General should be held to the same standard here—and found wanting.

The Attorney General's reliance on *Mustaphalli Capital Partners Fund, LP* v. *People*, Index No. 650845/14, 2014 WL 2417523 (Sup. Ct. N.Y. Cnty. May 23, 2014), is equally unfounded.[6] That decision examined a follow-on Martin Act subpoena issued less than one month after the first. 2014 WL 2417523, at *1 (addressing a subpoena served April 2, 2014, following an original subpoena served March 3, 2014). That is a far cry from the case here, where the Attorney General has investigated ExxonMobil for eighteen months and counting, receiving more than 2.8 million pages of documents in response to an already expansive request.

Under the precedent identified by the Attorney General and ExxonMobil, the rules are clear: the Attorney General must provide something more than "minimal, equivocal documentary proof" to obtain further documents in this long-running, intrusive inquiry. *Napatco*, 43 N.Y.2d at 885. If that threshold hurdle is cleared, then the Court must "weigh[] the scope and basis for the issuance of the subpoena against the factual predicate for the investigation 'lest the powers of investigation . . . become potentially instruments of abuse and harassment.'" *Airbnb, Inc.* v. *Schneiderman*, 44 Misc. 3d 351, 356 (Sup. Ct. Albany Cnty. 2014) (quoting *Myerson*, 33 N.Y.2d at 258). This standard mandates that the document subpoena be quashed.

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[5] Opp. 15 n.18.
[6] Opp. 15.

A. The Attorney General Has Failed to Provide a Factual Basis for the Document Subpoena.

The Attorney General offers one justification for his new document subpoena: rank speculation that ExxonMobil's public statements about a proxy cost of carbon were false or misleading. Despite having 2.8 million pages of ExxonMobil's documents and eighteen months to review them, the Attorney General has found no valid basis for believing misrepresentations have taken place. Nothing in the Attorney General's brief remotely supports that claim.

1. Using Distinct Carbon-Related Costs for Distinct Purposes Is Proper.

ExxonMobil has truthfully and consistently told the public that, when projecting the global demand for energy, it addresses potential impacts of future climate-related policies, including the potential for restrictions on emissions, through the use of a proxy cost of carbon."[7] This approach assists the company in assessing potential energy demand over time in many sectors where future policy actions are unclear or may involve a significantly broad suite of policy initiatives. In other demand sectors, for example the light duty vehicle sector, where the direction of policies and related targets are more clear (e.g., fuel economy standards), a more direct approach reflecting assessments of targeted policies is used, as appropriate, and as an alternative to a proxy cost. Overall, the use of a proxy cost and targeted policy assessments have the result of dampening energy demand over time. In this manner, ExxonMobil takes a comprehensive account of potential effects of future GHG policies on energy demand. In its annual *Outlook for Energy* report, ExxonMobil (like other energy companies) provides its estimates of future demand for energy, reflecting the potential impact of future carbon policies.

The proxy cost of carbon reflects a macro global impact of potential government policy on future global oil and gas demand.

ExxonMobil considers the potential impact of GHG-related policies on its individual

[7] Oleske Ex. 1 at 17.

projects in two ways. First, as noted above, the demand for energy projected in the *Outlook for Energy*—which forms a critical part of ExxonMobil's project planning process—utilizes a proxy cost of carbon as well as targeted policy assessments to comprehensively reflect potential policies governments may employ related to managing the risks of climate change, which can, in turn, impact future oil and gas demand. This rigorous assessment of the potential impact of future emissions policies is central to the development of ExxonMobil's *Outlook for Energy* and is therefore baked into ExxonMobil's macro demand and price outlooks, which are considered when evaluating the economics of ExxonMobil's potential projects.[8]

The separate GHG cost reflects the potential direct financial impact of regulations affecting ExxonMobil's projects.

Second, ExxonMobil also evaluates the direct financial impact of existing and potential future GHG regulation on potential investments on a project-by-project basis, as appropriate. This GHG cost examines those existing and reasonably anticipated regulations that may have an impact on the economics of the project in question, as opposed to those policies that might have an effect on global demand. Additionally, to stress test potential investments, ExxonMobil considers many variables, including, among other things, potential wide swings in oil and gas prices, geopolitical risks, and potential changes in sales markets. The application of a GHG cost, over and above the projected macro impact of climate change policy factored into ExxonMobil's energy outlook, is thus in keeping with ExxonMobil's disciplined approach to evaluating potential investments and projects across a wide range of economic conditions and commodity

[8] While these macro demand and price outlooks reflect supply and demand assumptions consistent with the *Outlook for Energy*, the pricing may not fully contemplate the potential for local and regional market impacts, or other offsetting policy factors. For example, to the extent GHG emission costs increase the marginal cost of production in a region, depending on circumstances, some or all of these costs may be recovered in the market through higher prices. ExxonMobil assesses these situations, as appropriate, on a case-by-case basis and develops specific policy and market assumptions for business decisions or assessments that could be impacted.

prices. Indeed, as set out by the documents referenced in the Attorney General's brief,[9] the proxy cost used in the *Outlook for Energy* and the GHG cost used for project planning "serve two different purposes."[10]

The market has already acknowledged that, as a general matter, "ExxonMobil's carbon price is invisible to consumers" and is not publicly disclosed.[11] Nevertheless, ExxonMobil has projected in its *Outlook for Energy* an implied cost of carbon reaching $60 per ton of CO_2 emissions by 2030 for OECD countries and has noted that its proxy cost of carbon "in some geographies may approach $80/ton by 2040."[12] Aside from these broad ranges, ExxonMobil has not released a detailed set of the figures it uses to assess global energy demand or in project planning.

The Attorney General suggests there is something improper or misleading in ExxonMobil's use of a proxy cost of carbon when estimating the aggregate global demand for energy and a conceptually distinct GHG cost when evaluating project economics.[13] Why that would be so is not obvious and has not been explained by the Attorney General.

GHG costs are tools for assessing potential future investments, not concrete costs governed by GAAP.

The Attorney General suggests that GAAP and SEC regulations require ExxonMobil to use the same cost of GHG emissions regardless of context or purpose, whether for estimating

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9 Oleske Exs. 3–5.

10 Oleske Ex. 4. The documents reflect, and the Attorney General acknowledges, that ExxonMobil's proxy cost and GHG costs converge in 2030, as ExxonMobil believes policies will evolve from a patchwork of approaches (sometimes affecting producers and other times affecting end users) into a more comprehensive regime, e.g., a carbon tax. Oleske Ex. 5. This demonstrates that, consistent with responsible business practice, ExxonMobil has continued to evolve and mature its processes for assessing future GHG policy when evaluating projects.

11 *See* Affirmation of Justin Anderson in Opposition to the Attorney General's Motion to Compel and in Further Support of Exxon Mobil Corporation's Motion to Quash and for a Protective Order ("Anderson") Ex. A. While it has been publicly stated that ExxonMobil does not disclose the full details of its projected costs of future climate change policy, it has *also* been publicly stated that ExxonMobil's internal projections are not static, and are subject to review and revision based on continuing events. (*See id.*)

12 Oleske Ex. 1 at 17–18. The Center for American Progress recognized the latter figure as among the highest of any American company. *See* Anderson Ex. B.

13 Opp. 6–7.

global aggregate demand, making "impairment decisions," or estimating "oil and gas reserves."[14] But GAAP requires no such thing. To the contrary, except to the extent actual GHG policies are in effect in a relevant jurisdiction, GHG costs are tools for assessing potential future investments, not concrete costs governed by GAAP. GAAP standards regarding impairment make no reference to such costs, requiring only that assumptions used in developing estimates of future cash flows be "reasonable" in relation to assumptions used in developing other information used by the entity. *See* FASB Accounting Standards Codification 360-10-35-30. For their part, the relevant SEC regulations on the estimation of reserves expressly bar consideration of the hypothetical impact of future policies, which is a key purpose of the proxy cost.

ExxonMobil's use of different metrics, in different circumstances, to accomplish different goals evinces prudent financial stewardship, applying appropriate assumptions in appropriate cases. There is nothing untoward or surprising about any of this.

What is surprising is how far the Attorney General's latest theory lurches from those originally used to justify this investigation. The Attorney General's November 2015 subpoena was supposedly born of the thesis that ExxonMobil downplayed the risks of climate change, but secretly took the effects of climate change into account in its business decisions. That original theory has been turned on its head, as the Attorney General now claims that ExxonMobil recognized publicly the gravity of climate change in its *Outlook for Energy*, but ignored these risks when considering particular oil or gas projects. This is just another example of the "heads I win, tails you lose" approach to investigating employed by the Attorney General. While it might be too much to expect consistency from the Attorney General, his failure to present a coherent

[14] Opp. 8.

rationale for further investigation is fatal to his current plea to this Court.[15]

2. Incorporating Actual Carbon Costs into Project Economics Is Proper.

Grasping for justifications that might conceivably support the document subpoena, the Attorney General alleges that ExxonMobil improperly "advised" an employee of a partially owned affiliate, Imperial Oil Limited ("Imperial"), "not to apply the proxy cost of GHGs" and to hold flat an alternative cost indefinitely into the future.[16] That is not true, and the document the Attorney General references for support rebuts the allegation. In that document, an Imperial employee asked for "clarity" on whether the "guidance is to follow the new EU GHG costs" for a heavy oil project in Canada.[17] ExxonMobil's Corporate GHG Manager confirmed that understanding, noting that "[b]eginning in 2020, the price is $24.30/T then increases to $100/T by 2050."[18] Far from suggesting fraud, this email demonstrates that ExxonMobil's actions lived up to its words. Indeed, the GHG costs referenced in the email exactly track ExxonMobil's guidance and price tables, which use actual costs through 2020, and then escalate GHG costs to $100 per ton in 2050.[19]

The Attorney General also does not explain how ExxonMobil can be faulted for advising that the actual cost of carbon then imposed by law be considered, rather than a projected cost of carbon.[20] Indeed, as stated in its public disclosures, ExxonMobil applies a GHG cost to project economics "where appropriate."[21] When an actual cost is known, it serves no legitimate purpose to ignore that cost and replace it with one that is hypothetical. The operative ExxonMobil policy

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15 In this vein, the Attorney General makes a baseless allegation about ExxonMobil's purported failure to meet and confer. (Opp. 12–13.) Even setting aside the irony that the Attorney General routinely ignored his own obligation to meet and confer in advance of his numerous applications to this Court, this charge is utterly false, as detailed in ExxonMobil's letter to the Attorney General, dated May 25, 2017. (Anderson Ex. C.)

16 Oleske ¶ 33; Opp. 7–8, 24.

17 Oleske Ex. 6.

18 *Id*.

19 *See* Anderson Ex. G.

20 *Id*.

21 Oleske Ex. 1 at 18.

at the time recommended that users in Western Canada "include . . . local specifics if known to differ" from projections.[22] It speaks volumes about the flimsiness of the Attorney General's investigation, and his willingness to misrepresent the very documents upon which he relies, that he would fault ExxonMobil for following both company policy and Canadian law.

3. The Attorney General Cannot Justify the Document Subpoena by Pointing to a Lack of Evidence.

Next, the Attorney General makes the counterintuitive claim that ExxonMobil must be misleading the public about its use of a proxy cost of carbon because the Attorney General has not identified the documents he would expect to see if ExxonMobil had been applying the proxy cost or the GHG cost in its corporate planning, reserves estimation, and asset impairment analyses.[23] In other words, the Attorney General stakes his entire investigation on the logical fallacy that the absence of evidence constitutes evidence of absence. But ExxonMobil's production has been made based on a protocol agreed to by the Attorney General, as supervised and approved by this Court. Indeed, as this Court stated during the January 9, 2017 hearing, the production it ordered—which ExxonMobil has now completed—should provide the Attorney General "all of the documents that [he] require[s]" to conduct his inquiry.[24]

After having received "all of the documents that [he] require[s],"[25] the Attorney General's claim that he has seen nothing to support ExxonMobil's public statements cannot obscure the fact that he cites not a single document that undercuts ExxonMobil's long-standing, public commitment to incorporating both a proxy cost of carbon (to gauge demand) and a GHG cost (as an added layer of financial discipline) into its business decisions. And aside from being unpersuasive as a matter of logic, the Attorney General's claim grossly distorts the record.

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22 *See* Anderson Ex. G.
23 Opp. 7; Oleske ¶ 34.
24 Jan. 9, 2017 Tr. at 15:15-17.
25 *Id.*

Contrary to the Attorney General's suggestion that ExxonMobil's production is "devoid of evidence that Exxon applied any consistent proxy-cost analysis,"[26] ExxonMobil has produced many years' worth of "Dataguide Appendices" setting forth the corporate policy requiring that business segments take GHG emission costs into account when assessing project economics.[27] The Attorney General has not provided a shred of evidence indicating—or even suggesting—that ExxonMobil business units or employees were ignoring this policy. Other internal documents, written when neither the sender nor the recipient would have any incentive to mislead, demonstrate that ExxonMobil in fact applied a GHG cost to its projects.[28]

Moreover, the record includes management presentations making clear that GHG costs were a part of the equation when determining the financial viability of projects.[29] ExxonMobil's production also contains numerous documents demonstrating that ExxonMobil incorporates an estimate of the cost of GHG regulation in its project planning in full accordance with its public statements.[30] If the Attorney General's implausible theory were correct, ExxonMobil employees have for years prepared internal and proprietary Dataguides, presentations, analyses, and other documents for the sole purpose of maintaining a false pretense of doing something (evaluating the future regulatory costs of carbon emissions) that no law or policy requires them to do. To describe the Attorney General's theory is to debunk it. Simply put, the assembled record supplies no basis to doubt ExxonMobil's truthful public statements that it has utilized both a proxy cost of carbon and GHG costs for corporate planning purposes.

Largely relegated to a footnote in his brief, the Attorney General claims that ExxonMobil

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[26] Oleske ¶ 35.

[27] *See, e.g.*, Anderson Ex. D (for 2011); Anderson Ex. E (for 2012); Anderson Ex. F (for 2013); Anderson Ex. G (for 2014); Anderson Ex. H (for 2015).

[28] *See, e.g.*, Anderson Exs. I, J, K.

[29] *See, e.g.*, Anderson Ex. L.

[30] *See, e.g.*, Anderson Ex. M (planning for a facility in La Barge, Wyoming); Anderson Ex. N (planning for U.S. refinery operations); Anderson Ex. O (planning for Baton Rouge refinery operations).

failed to apply a proxy or GHG cost for "emissions stemming from end use of . . . oil and gas," an apparent reference to so-called "Scope 3" emissions, which are generated by the end users of ExxonMobil's products, not ExxonMobil.[31] The Attorney General has identified no public statement where ExxonMobil claimed that its proxy cost of carbon or GHG costs included Scope 3 emissions. The only statement offered by the Attorney General to support this claim amounts to little more than a red herring.[32] In 2014's *Managing the Risks* report, ExxonMobil stated that it applies a proxy cost of carbon to the "use" of fossil fuels, and that application occurs when ExxonMobil assesses how carbon-related policies might affect the macro demand for energy.[33] ExxonMobil has not suggested that the GHG cost applied when evaluating its projects follows each barrel of oil ExxonMobil removes from the ground through its end use.

A clear-eyed analysis of the "evidence" mischaracterized in the Attorney General's headline-grabbing brief thus shows it is not indicative of the misconduct he so desperately wishes to uncover. Instead, it actually confirms that ExxonMobil is doing what it says it is doing: incorporating a proxy cost of carbon into its energy demand outlook and GHG costs into its project economics. The Attorney General's deficient and inaccurate showing—particularly after eighteen months and 2.8 million documents—is woefully insufficient to support his crushingly burdensome document subpoena.

B. Lacking Any Sense of Proportionality, the Attorney General's Document Subpoena Should Also Be Quashed as Unduly Burdensome and Oppressive.

With no basis in fact, the document subpoena should be quashed at the threshold. But even if the Attorney General were able to clear that initial hurdle, his subpoena should nevertheless be quashed for its disproportional breadth and burden. *See, e.g.*, *Airbnb*, 44 Misc.

[31] Opp. 8 n.8, 9.
[32] Oleske Ex. 1.
[33] *Id.* at 17–18.

3d at 356 (recognizing need for courts to weigh "the scope and basis for the issuance of the subpoena against the factual predicate for the investigation 'lest the powers of investigation . . . become potentially instruments of abuse and harassment.'" (quoting *Myerson*, 33 N.Y.2d at 258)). Nothing about the document subpoena is proportional to the alleged investigative need.

The Attorney General first tries to sidestep this fact by denying that his subpoenas are subject to any rule of proportionality at all.[34] But John Oleske—the same Assistant Attorney General who signed the brief making this argument—previously stood before this Court and agreed that the Attorney General's investigation is, in fact, governed by the rule of proportionality this Court endorsed, but which the Attorney General now disclaims.[35]

The Attorney General next claims that "a subpoena recipient cannot simply make general claims that the subpoena is unduly burdensome, but rather must substantiate th[o]se claims."[36] The law is clear, however, that a subpoena will be quashed whenever it is "patently overbroad, burdensome and oppressive"—characteristics that are self-evident from a bare review of the document subpoena issued in this case. *Reuters Ltd.* v. *Dow Jones Telerate, Inc.*, 231 A.D.2d 337, 344 (1st Dep't 1997). Specificity is the watchword: A subpoena cannot seek information beyond "limited or specifically defined subjects" so as to turn an investigation into "the proverbial 'fishing expedition.'" *Id.* at 342, 344; *see also D'Alimonte* v. *Kuriansky*, 144 A.D.2d 737, 739 (3d Dep't 1988) (quashing the Attorney General's subpoena, which "require[d] production of any and all payment records," when there was "no limitation as to time or client"). Yet that is exactly what the document subpoena does here.

As set forth in ExxonMobil's opening brief, by its terms, the subpoena sweeps in an

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[34] Opp. 14 n.14.

[35] *See* NYSCEF No. 146 (Mar. 22, 2017 Hr'g Tr.) at 23:13–14 (responding to the Court's statement that "there's a rule of proportionality here," Mr. Oleske said "that's true").

[36] Opp. 16.

undifferentiated quantum of information that resides in multiple departments of the company and across varied regions. The Attorney General erroneously characterizes the burden as modest, claiming that the subpoena "limit[s] its request to instances relating to Exxon's decision to apply proxy costs to its investment and impairment decisions."[37] But, as explained above, that analysis (using the GHG cost) can occur for any investment decision, when appropriate. Were ExxonMobil to comply, it would need to document *each instance* in the past dozen years that it has (i) evaluated an oil and gas project, (ii) considered whether to impair an asset, and (iii) estimated reserves and resources.[38] The subpoena then demands that ExxonMobil create separate spreadsheets providing detailed information and analysis about how the GHG cost has factored into each decision. It does not take a background in oil and gas to ascertain that this analysis would touch on nearly all of ExxonMobil's business decisions.[39]

Were that all, the burden of compliance would be staggering; but the subpoena also requires that ExxonMobil produce a sweeping array of documents, including (i) all documents relied upon in creating these spreadsheets; (ii) documents produced from 142 custodians and 11 shared locations from the date of the 2015 subpoena through the date of the new subpoena; (iii) twelve years of documents related to the ExxonMobil and Imperial reserves committees, the impairment of long-lived assets, and all communications with the securities industry; and (iv) copies of all materials provided to the SEC.[40] These demands dwarf those of the 2015 subpoena, in response to which ExxonMobil has already produced over 2.8 million pages. *See N.Y. State Comm'n on Judicial Conduct* v. *Doe*, 61 N.Y.2d 56, 62 (1984); *Smith* v. *Russo-Asiatic Bank*, 170 Misc. 408, 411 (Sup. Ct. Albany Cnty. 1939) (noting that a document subpoena may not

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37 Opp. 16–17.
38 Anderson ¶ 3.
39 Anderson ¶ 2.
40 Anderson ¶ 4.

require "production of all the books and papers of a party so that it is universal in its operation").

None of the precedents identified by the Attorney General have compelled compliance with a subpoena that imposes such an onerous burden. *Alfred E. Mann Living Trust* v. *ETIRC Aviation S.a.r.L.*, for example, upheld a subpoena seeking only limited documents necessary to determine "the nature and whereabouts of . . . income, property, and other assets" to satisfy a judgment already issued against the defendant. 55 Misc. 3d 1211(A), at *2 (Sup. Ct. N.Y. Cnty. 2010). In *N.Y. State Joint Comm'n on Pub. Ethics* v. *Campaign for One N.Y., Inc.*, the public ethics commission, as part of an investigation into improper lobbying, sought only a few years' worth of communications that a political nonprofit had exchanged with donors. 53 Misc. 3d 983, 997 (Sup. Ct. Albany Cnty. 2016). In *Airbnb*, the Attorney General's much more modest subpoena demanded only limited electronically stored information that was "readily accessible" to the subject of the investigation. 44 Misc. 3d at 359. None of those subpoenas came close to requiring the recipients to produce documents related to entire swaths of their business over a twelve year period, let alone demanding the creation of detailed analyses.

Instead, the Attorney General's demands align with those courts have quashed or modified as improperly burdensome. For example, the court in *Reuters* found a subpoena overly burdensome because it "would require at least preliminary review of all files of all persons at Dow who have dealt with [a particular issue]" to determine responsiveness. 231 A.D.2d at 344. Much in the same way, the Attorney General's subpoena here, by its own terms, would require that ExxonMobil perform at least a preliminary review of each of its oil and gas investment decisions for the last twelve years to determine the application of GHG costs. Even if the Attorney General's wrongheaded declaration that "there are few instances in which Exxon

actually applied proxy costs [sic] to its investment or impairment decisions" were correct[41]—which it is not—the subpoena still would be unduly burdensome because it demands such a preliminary investigation. It therefore should also be quashed on that basis.

II. The Attorney General's Request that ExxonMobil Prepare New Analyses Cannot Be Salvaged by Relabeling Them "Interrogatories."

In an attempt to salvage his "requests for information" ("RFIs") that seek to conscript ExxonMobil to do his work for him, the Attorney General attempts to simply relabel them as "interrogatories." But it is no answer for the Attorney General to claim that he has the power to issue interrogatories and that RFIs are a rare sub-species of interrogatory. That is because the RFIs here go so far beyond any reasonable limits on the proper purpose and scope of an interrogatory as to be unworthy of the name. Indeed, as New York courts have held, such overbroad but detailed interrogatories would "not [be] the proper vehicle for pursuing information on these points because they do not pinpoint the critical areas" of the Attorney General's investigation. *Litemore Elec. Co.* v. *City of N.Y.*, 96 A.D.2d 1022, 1023 (1st Dep't 1983); *see also Mijatovic* v. *Noonan*, 172 A.D.2d 806, 806 (2d Dep't 1991). If styled as interrogatories, RFIs would thus be both overbroad and procedurally improper.

But these RFIs are not interrogatories; they are part of a subpoena *duces tecum*. And, as explained in ExxonMobil's opening brief,[42] a subpoena *duces tecum*—whether issued by a government investigator, or a private party—may not compel the creation of new documents.[43] That is exactly what the Attorney General's improper RFIs would seek to do by conscripting ExxonMobil to manufacture prolix spreadsheets and tables not currently in existence from data not currently organized in the manner the Attorney General prefers. These requests amount to

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41 Opp. 17.
42 Br. 17–19.
43 *Id.*

nothing more than an improper demand that ExxonMobil prepare an analysis of its business for the sole purpose of supporting the Attorney General's litigation position.

III. The Probe of ExxonMobil's Proved Reserves and Asset Impairments Is Preempted.

Notwithstanding the Attorney General's claim to have abandoned his inquiry into ExxonMobil's proved reserves—which are estimated in accordance with SEC regulations—he nevertheless attempts to leave the door ajar to tread on exclusively federal turf. Indeed, the Attorney General's brief inexplicably claims that ExxonMobil did not appropriately "apply" a *prospective* "proxy cost" of carbon during "evaluation of its reserves" notwithstanding its concession that, under binding SEC regulations, reserves are estimated in accordance with *retrospective* oil prices.[44] This Court should shut the door once and for all. For the reasons set forth in ExxonMobil's opening brief,[45] the Attorney General may not seek to punish ExxonMobil for declining to consider possible future climate change policies in estimating its proved reserves, nor may the Attorney General compel ExxonMobil to adopt his preferred assumptions about the potential impact of future climate change policies when determining whether assets are impaired. The Attorney General's investigative requests probing ExxonMobil's reserves estimates and asset impairment analyses should therefore be quashed.

IV. ExxonMobil Does Not Control Imperial.

As the proponent of the deposition of Jason Iwanika, a Canadian citizen working for a separately incorporated Canadian company, the Attorney General bears the burden of demonstrating Mr. Iwanika is subject to his jurisdiction. *People ex rel. Spitzer* v. *H & R Block, Inc.*, 847 N.Y.S.2d 903 (Sup. Ct. N.Y. Cnty. 2007). The Attorney General asserts repeatedly that "a parent corporation *can* be required" to produce testimony from employees of controlled

[44] Opp. 8.
[45] Br. 19–23.

subsidiaries, which is not in dispute.[46] The relevant issue, left unaddressed by the Attorney General's brief, is the standard under New York law for establishing that one company controls another. That exacting standard makes clear that ExxonMobil does not control Imperial, and thus cannot be compelled to produce an Imperial employee for a deposition.

The Court of Appeals established the modern standard for determining corporate control over a subsidiary in *Delagi* v. *Volkswagenwerk A.G. of Wolfsburg, Germany,* 29 N.Y.2d 426 (1972). There, the court considered whether jurisdiction was properly acquired over a foreign corporation by reason of its control of New York corporate entities. The court found it lacked jurisdiction, noting that it had "never held a foreign corporation present on the basis of control, unless there was in existence at least a parent-subsidiary relationship." *Id.* at 432. Even then, the control over the subsidiary's activities "must be so complete that the subsidiary is, in fact, merely a department of the parent." *Id.* This broad principle applies whether courts seek to assert jurisdiction over a foreign parent company through a subsidiary, as discussed in *Delagi*, or a foreign subsidiary through a parent company, as in *Public Administrator of New York County* v. *Royal Bank of Canada*, 19 N.Y.2d 127, 132 (1967).

The Attorney General fails here to address, much less satisfy, the "mere department" test. In applying that test, "[t]he essential factor is common ownership"—namely, that "nearly identical ownership interests must exist before one corporation can be considered a department of another corporation for jurisdictional purposes." *Volkswagenwerk Aktiengesellschaft* v. *Beech Aircraft Corp.*, 751 F.2d 117, 120 (2d Cir. 1984); *see also FIA Leveraged Fund Ltd.* v. *Grant Thornton LLP*, 2017 WL 2110774, at *1 (1st Dep't May 16, 2017) (stating First Department adopted factors set out in *Volkswagenwerk*). Thus, even where, as here, one corporation owns a majority interest in another, courts decline to assert jurisdiction where control is less than total.

[46] Opp. 23 (emphasis added).

OneBeacon Am. Ins. Co. v. *Newmont Mining Corp.*, 82 A.D.3d 554, 554–55 (1st Dep't 2011).

Similarly, the Attorney General has offered scant evidence in support of other factors considered under the "mere department" test. These additional factors include: (1) financial dependency of the subsidiary on the parent; (2) the degree to which the parent interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities; and (3) the degree of the parent's control of the subsidiary's marketing and operational policies. *Volkswagenwerk*, 751 F.2d at 120–122.

The Attorney General presents no evidence in support of the first factor, an effective concession of the reality that Imperial, a publicly traded company in its own right, is financially independent. As for corporate separateness, the Attorney General points to Imperial's cooperation with ExxonMobil in accommodating the Attorney General's requests for documents from Imperial employees. But nothing in the record suggests that Imperial's past accommodation has been anything other than gratuitous and voluntary. ExxonMobil has no ability to compel further accommodations if Imperial declines to extend them, and the Attorney General has no evidence to the contrary. Finally, the Attorney General offers nothing more than a single email exchange to demonstrate ExxonMobil's control over Imperial's operational policies, but that email shows Mr. Iwanika seeking "guidance," not instructions, and would be too slender a reed in any event to find that Imperial is a mere department.[47] Nor does Mr. Iwanika's appearance on an ExxonMobil privilege log counsel a different result,[48] as a common interest between ExxonMobil and Imperial in responding to the Attorney General's subpoena provides a complete explanation for that.

Far from being a "mere department," Imperial is an independent affiliate of ExxonMobil.

[47] Oleske Ex. 6.
[48] Opp. 24–25.

Imperial is a publicly traded company—30% of its shares are widely held.[49] Furthermore, five of Imperial's seven directors are outside directors with no prior history of employment at ExxonMobil.[50] These directors have legal responsibility to all shareholders, not only to ExxonMobil.[51] By the same token, the day-to-day relationship between the two companies also reinforces their separateness. ExxonMobil employees cannot (i) hire, fire, or discipline Imperial employees; (ii) approve Imperial employee expenses; or (iii) sign agreements on behalf of Imperial.[52] And ExxonMobil's recommendations regarding policies and guidelines to Imperial do not automatically take effect as they must first be reviewed and adopted by Imperial's management.[53] The "mere department" test forecloses the Attorney General from asserting jurisdiction over Imperial.

Rather than addressing the "mere department" test, however, the Attorney General relies on two decisions addressing facts far different from those at issue here. First, *Bank of Tokyo–Mitsubishi, New York Branch* v. *Kvaerner* examined the relationship between a parent and its wholly owned subsidiary, which is not at issue here. 671 N.Y.S.2d 90 (Sup. Ct. N.Y. Cnty. 1998). Second, *Grande Prairie Energy LLC* v. *Alstom Power, Inc.* examined a fact pattern where, unlike here, (i) the two companies shared the same name; (ii) the requested witness from the subsidiary was a principal participant in the transaction that precipitated the dispute with the plaintiff; and (iii) a member of the defendant's negotiating team sent an email to the plaintiff that described the parent and subsidiary companies as "one organization, coordinated, and not working in a vacuum." 798 N.Y.S.2d 709 (Sup. Ct. N.Y. Cnty. 2004). Nothing in these

[49] Anderson ¶¶ 11, 12.
[50] *Id.* ¶ 13.
[51] *Id.*
[52] *Id.* ¶ 14.
[53] *Id.* ¶ 15.

decisions questions the applicability of the "mere department" test, just as nothing in the Attorney General's brief suggests that the test has been satisfied.

V. The Court Should Not Allow the Attorney General to Create a Sideshow of Discovery about Discovery.

Seeking controversy and headlines, the Attorney General accuses ExxonMobil of destroying documents from purportedly "key custodians."[54] The claim is baseless, following eighteen months of document production from 142 custodians, yielding 2.8 million pages of documents.

When the Attorney General first raised questions about ExxonMobil's document collection and production, ExxonMobil filed a detailed submission explaining the processes used to collect Management Committee documents and providing extensive information about the Wayne Tracker account,[55] which the Court found at a March 22, 2017 hearing to have "addressed each of the items [the Attorney General] . . . requested."[56] To ensure that the Attorney General received all he was entitled to review on this point, the Court directed ExxonMobil to attest to the facts set forth in its thorough submission, and authorized the Attorney General's office to "cross-examine the affiants" at subsequent depositions.[57] ExxonMobil has complied with those instructions. Through these appropriate means, the Attorney General could address all outstanding questions about ExxonMobil's discovery.

The Attorney General now complains, however, that the ample remedies offered by the Court are not enough, and further suggests that ExxonMobil failed to place a number of

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54 Opp. 22.
55 NYSCEF No. 128.
56 NYSCEF No. 146 (Mar. 22, 2017 Hr'g Tr.) at 4:15–20. An analysis of all produced Wayne Tracker emails reveals that each was to, from, copying, or blind copying another custodian from whom ExxonMobil produced documents, or was found in the files of another produced custodian.
57 *Id.* at 14:21–24.

additional, and supposedly "key," custodians on hold in November 2015.[58] That claim holds no water. Sixteen of the claimed "key" custodians are executive assistants or perform administrative functions for senior management (the "Custodians"). ExxonMobil had no reasonable basis to believe that any of these Custodians possessed unique responsive documents—and analysis of ExxonMobil's recent production confirms that belief was accurate.

- As an initial matter, two of the Custodians were placed on hold by ExxonMobil in November 2015, as ExxonMobil informed the Attorney General on May 3, 2017.[59]
- Only 863 of the 2,184 documents produced from the remaining fourteen Custodians were actually responsive—the remaining documents were non-responsive document family members ExxonMobil included in its production.
- Many of the documents are duplicates of documents in the possession of other custodians or of each other, or they come from periods when the Custodians did not support senior management. With those documents excluded, only 43 of the 863 responsive documents were unique and not privileged.
- Of the 43 responsive documents, 12 were emails reasonably likely to have appeared in the files of the key custodians from whom ExxonMobil produced documents—indeed, other custodians' names appear in those documents' from, to, copy, or blind copy lines.
- Of the remaining 31 documents, 26 are purely logistical, 2 contain a stray, non-substantive reference to climate change, 1 is clerical, 1 is a public document, and 1 is a non-ExxonMobil document.

ExxonMobil's recent productions thus bear out the Company's long-standing belief that the 16 Custodians about whom the Attorney General so loudly complains were not, and are not, reasonably likely to possess uniquely responsive documents.

Setting aside these custodians, the Attorney General alleges that yet another custodian was not placed on hold in November 2015: Donald Humphreys, who retired in 2013, two years

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[58] Opp. 21–22. Although only obliquely referenced in the Attorney General's brief, the Oleske Affirmation suggests that ExxonMobil failed to properly preserve documents relating to ExxonMobil's oil and gas reserves. (Oleske ¶¶ 87–90). After the Attorney General evinced an investigative interest in ExxonMobil's reserves on June 24, 2016, ExxonMobil placed 37 reserves-related custodians on hold, a fact of which the Attorney General was informed in a September 8, 2016 letter. (Anderson Ex. P.) Subsequently, of course, this Court held—as ExxonMobil contended—that the Attorney General's November 2015 subpoena did not call for documents relating to ExxonMobil's reserves except as related to climate change.

[59] Oleske Ex. 17.

before the Attorney General issued the original subpoena. ExxonMobil has produced to the Attorney General all responsive documents retained by Humphreys at the time of his retirement. Accordingly, the Attorney General's lamentations about ExxonMobil's supposed "document destruction" are as unfounded as they are irresponsible and provide no legitimate basis to delve deeper into ExxonMobil's robust subpoena compliance.

CONCLUSION

As with so much else in his investigation, the Attorney General's justification for his abusive new subpoenas overpromises and under-delivers. Rather than supply a legitimate basis for his continued investigation, the Attorney General offers only a paltry few documents buried under a mountain of distortions and self-serving characterizations. Such "minimal, equivocal documentary proof" is insufficient to support further investigation. *Napatco,* 43 N.Y.2d at 885–86. The Attorney General's subpoena *duces tecum* should also be quashed for the independent reason that it imposes a burden far out of proportion to the non-existent evidentiary record claimed to support it. Nor should the Attorney General be permitted to engage in investigative sleight of hand by shifting the focus of his inquiry to ExxonMobil's subpoena compliance, an area of well-trodden ground where the Court has already determined that ExxonMobil has responded to each of the Attorney General's stated concerns. Finally, the Attorney General cannot compel ExxonMobil to produce an employee of a separate, independent corporation for a deposition. Lacking any basis in the facts or in proportionality, these subpoenas cannot be allowed to stand. Accordingly, the Attorney General's cross-motion to compel should be denied, and ExxonMobil's motion to quash should be granted.

Dated: June 9, 2017
New York, NY

Respectfully submitted,

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Exhibit 5

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

In the Matter of the Application of the PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, Petitioner, - against – PRICEWATERHOUSECOOPERS LLP and EXXON MOBIL CORPORATION, Respondents.	IAS Part 61 Hon. Barry R. Ostrager Index No. 451962/2016 Motion Sequence No. 5

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE OFFICE OF THE ATTORNEY GENERAL'S CROSS-MOTION TO COMPEL

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Other Authorities

PRELIMINARY STATEMENT

In response to the Office of the Attorney General's ("OAG") papers detailing the factual basis for its subpoenas, Exxon Mobil Corporation ("Exxon") has now effectively admitted that, for years, the company did not apply a proxy cost of greenhouse gas emissions ("GHGs") in the manner that it repeatedly touted to its investors and the public. Rather, Exxon: (1) applied a separate internal proxy cost to investment decisions; (2) did not apply a proxy cost to its vulnerable Canadian oil sands projects; (3) excluded 90% of relevant emissions from its proxy-cost computations; and (4) did not apply a proxy cost to asset-impairment reviews.

Unable to dispute these facts as documented in its own files, Exxon resorts to an elaborate, unsupported discourse on the propriety of its now-admitted use of "different figures" for "different purposes." Exxon's rationalizations contradict a decade's worth of its public statements to investors about a "rigorous" and "consistent" risk management practice against which "everything gets tested." In doing so, Exxon has further inculpated itself—and strengthened the factual basis for OAG's ongoing investigation.

Exxon also complains about the purported burden of OAG's continuing law enforcement investigation, but does not even try to meet the applicable standard requiring evidence that compliance would seriously interfere with the operation of its business. In fact, OAG's subpoena duces tecum requests specific, targeted documents and information, and flows directly from the facts already unearthed concerning Exxon's potential fraud. This would be enough to preclude Exxon's burdensomeness argument, even if the company had not forfeited its credibility through its bad-faith violation of compliance obligations, its consequent and still-unaccounted-for document destruction, and its unprecedented and wasteful attempt to enjoin OAG's investigation in an improper federal venue.

Exxon also makes a variety of demonstrably false legal arguments, including that OAG lacks the authority to request information in the form called for by the subpoena. As chief enforcer of the State's securities and business fraud laws, OAG is authorized by the plain language of the relevant statutes to make these information requests, and no court has ever limited that authority by importing the inapposite civil-discovery case law cited by Exxon.

Likewise, Exxon's refusal to tender an employee of Imperial Oil Limited ("Imperial"), its majority-owned subsidiary, relies on an inapplicable legal standard used to assess long-arm jurisdiction in *alter ego* litigation. Exxon ignores the on-point authority that focuses on a company's practical ability to comply with a subpoena. Exxon's own documents confirm that it has the practical ability to control relevant Imperial employees, belying Exxon's assertions to the contrary in its brief.

Exxon also fails to sustain its preemption argument, which continues to conflate its valuation of long-lived assets for impairment purposes—which requires cost projections like the proxy cost of GHGs—with reporting of proved reserves as per SEC regulations. Exxon's asserted compliance with SEC regulations is not a defense if Exxon committed fraud as to its separate, repeated, affirmative promises to investors indicating that proxy costs are used in valuing assets for impairment purposes.

Finally, Exxon brazenly argues that the company has already accounted for its disturbing failure to preserve documents, and their consequent destruction, by producing a witness who knew almost nothing about the relevant facts. Under OAG questioning, this witness pled ignorance almost 200 times—and deferred specifically to the four witnesses OAG has now subpoenaed for testimony. Exxon's argument makes a mockery of the Court's March 22, 2017 order that Exxon substantiate its claimed preservation and recovery efforts.

Exxon has not tempered its resistance to OAG's investigation in light of the now-documented factual basis indicating potential fraud. To the contrary, Exxon continues to use every means that one of the largest companies in the world can afford to delay and obstruct disclosures it has no legal basis to avoid.[1] The Court should reject Exxon's tactics, deny its motion to quash, and grant OAG's cross-motion to compel.[2]

ARGUMENT

A. OAG Has Set Forth a Clear Factual Basis for the Subpoena Duces Tecum

OAG has far exceeded what is required and shown a strong a factual basis for its subpoena duces tecum by setting forth the details of how Exxon's own documents contradict its representations to its investors and to the public. In response, Exxon does not demonstrate, as it must, that the material OAG seeks is "utterly irrelevant to any proper inquiry," or that the legality of Exxon's practices is "so well established . . . as to be free from doubt." *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 332 (1988).[3] Rather, Exxon provides only attorney argument that its now-admitted use of "different figures" for "different purposes" (Exxon Memorandum, June 9, 2017, NYSCEF No. 205 ("Exxon Memo.") at 3) can be defended as somehow consistent with its plainly contradictory representations. But motions to quash or

[1] One prong of Exxon's strategy has been its facile refrain about OAG's purportedly "shifting" investigative theories, but OAG's original subpoena, issued some 17 months ago, focused specifically on the same matter at issue now—Exxon's integration of climate change-related risks into its business.

[2] The Court should also deny Exxon's request, made in a footnote without motion or support, for a retroactive protective order that would oblige OAG to provide notice before filing any document produced by Exxon. Exxon has not cited any authority that would support such a restriction. Nor has Exxon established that it would have had any basis to request that the documents attached to OAG's June 2 papers be sealed. It is not sufficient that Exxon may have preferred that documentary evidence of its suspected fraud be kept confidential, especially in the context of these motions, where Exxon challenged OAG to identify evidence of Exxon's suspected fraud in order to justify its subpoenas. "Confidentiality is clearly the exception, not the rule, and the party seeking to seal court records has the burden to demonstrate compelling circumstances to justify restricting public access." *Mosallem v. Berenson*, 905 N.Y.S.2d 575, 579 (1st Dep't 2010) (internal citation and quotation marks omitted).

[3] *See also Hogan v. Cuomo*, 888 N.Y.S.2d 665, 667 (3d Dep't 2009) ("The person challenging a subpoena bears the burden of demonstrating a lack of authority, relevancy or factual basis for its issuance.").

compel the enforcement of an investigative subpoena are not the appropriate vehicles to resolve the merits of such disputes. *See Nicholson v. State Comm'n on Judicial Conduct*, 50 N.Y.2d 597, 611 (1980) (holding that recipient of subpoena may not "avoid compliance by attacking the specific allegations upon which the investigation is based").[4]

That these subpoenas were not the first ones issued in this investigation does not change the fundamental principle that OAG need only show "some factual basis for [the] investigation" and "the relevance of the items sought." *Am. Dental Coop., Inc. v. Attorney-General*, 514 N.Y.S.2d 228, 232 (1st Dep't 1987); *see also* OAG Memorandum, June 2, 2017, NYSCEF No. 168 ("OAG Memo.") at 15 & n.18 (citing cases); *N.Y. State Joint Comm'n on Pub. Ethics v. Campaign for One N.Y., Inc.*, 53 Misc. 3d 983, 998 (Sup. Ct. Albany Cnty. 2016) (enforcing follow-on subpoena with "sufficient" factual basis; refusing to decide factual and legal disputes that would be at issue if a proceeding were ultimately filed).

The authorities cited by Exxon (Exxon Memo. at 5) do not counsel otherwise. This is not a case like *Myerson v. Lentini Bros. Moving & Storage Co.*, in which a bare reference to "numerous complaints" was insufficient to justify requiring the production of "all books and records" of a company. 33 N.Y.2d 250, 259-60 (1973); *see also id.* at 258 (making clear that a "strong and probative basis for investigation" was not required). Nor is this a case like *Napatco, Inc. v. Lefkowitz*, in which the only evidence of wrongdoing was a single advertisement and form letter. 43 N.Y.2d 884, 885-86 (1978).[5] OAG's detailed recitation of its factual findings to date provides a more than sufficient basis to justify its narrowly-targeted subpoena duces tecum.

[4] *See also F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 879 (D.C. Cir. 1977) ("[S]ubstantive issues which may be raised in defense against an administrative complaint are premature in an enforcement proceeding . . . . [I]f a formal complaint is issued, subpoenaed parties may assert their defenses.").

[5] *See also* OAG Memo. at 14 n.14 (discussing additional cases cited by Exxon).

In any event, Exxon's new, unsupported assertions about its internal practices, and its tortured interpretation of its prior representations, do not survive even minimal scrutiny, let alone provide a basis to conclude that the legality of Exxon's conduct is "well established."[6] Indeed, Exxon now admits that for years it maintained two separate proxy cost figures—one that it represented to its investors and to the public, and a second, secret, lower figure, that Exxon applied in its internal planning and budgeting. Exxon attempts to justify this inconsistency by asserting that it used its public "proxy cost" figures to forecast global demand for energy, while using a "separate GHG cost" to evaluate the impact of potential climate change-related regulations on investments in specific projects. (Exxon Memo. at 8.) This explanation, however, appears nowhere in Exxon's public disclosures, which plainly state just the opposite.

As just one example, in its 2014 *Energy and Climate* report, Exxon refers not to a separate "proxy cost" for demand projections and a "GHG cost" for investment evaluations, but to "*this GHG proxy cost*."[7] Exxon then boasts of its "robust process for evaluating investment opportunities and managing our portfolio of operating assets," and specifically states that it "requires that all business units use a *consistent corporate planning basis, including the proxy cost of carbon discussed above*, in evaluating capital expenditures and developing business plans."[8] Indeed, Exxon's new interpretation of its prior disclosures is contradicted by its own Greenhouse Gas Manager, who specifically acknowledged that "*we have implied that we use the*

[6] While Exxon has set out its version of the facts in a memorandum of law, signed by an attorney, the company was required to provide actual, competent evidence to the extent it intended to present a factual dispute on the merits.

[7] Exxon Mobil Corp., *Energy and Climate* (2014), at 6 (emphasis added), *available at* http://cdn.exxonmobil.com/~/media/global/files/energy-and-environment/report---energy-and-climate.pdf.

[8] *Id.* at 20 (emphasis added); *see also* Oleske Aff. ¶¶ 10-19; Ex. 1 at 17-18.

[publicly-disclosed] basis for proxy cost of carbon when evaluating investments." (Affirmation of John Oleske, June 2, 2017, NYSCEF No. 169 ("Oleske Aff."), Ex. 5, at 3) (emphasis added).[9]

This evidence alone is more than enough to provide a sufficient factual basis for the subpoena—but there is considerably more. The investigation to date has also revealed three significant areas in which Exxon appears not to have applied a proxy cost of GHGs at all, in direct contradiction of its representations to investors and the public.

First, Exxon represented to investors that it was assuming rising GHG costs over time, reaching certain milestones such as $60/ton of CO2-equivalent in 2030, and $80/ton in 2040, and applying those assumptions to safeguard Exxon's business for the long term. Such projections of future GHG costs were intended to "reflect all types of actions and policies that governments may take" over a multi-decade period. (Oleske Aff., Ex. 1, at 17-18.) However, in 2015, Exxon directed planners at Imperial, its majority-owned subsidiary, not to apply a proxy cost of GHGs to the company's oil sands projects, and instead to apply indefinitely into the future the much lower GHG tax under existing Alberta law. (Oleske Aff. ¶¶ 29-33; *see also infra* at 12.) Exxon's response that "[w]hen an actual cost is known, it serves no legitimate purpose to ignore that cost and replace it with one that is hypothetical" (Exxon Memo. at 11) is completely at odds with what Exxon told investors it was doing, and why. Projecting and applying future GHG costs, which Exxon now dismisses as "hypothetical" and not even "legitimate," is exactly what Exxon told investors and the public it was doing.[10] Exxon's approach to its Alberta oil sands

[9] Given that a GHG cost that affects global demand would also affect the profitability of Exxon's oil and gas projects, there is no sound basis for applying different proxy cost figures for demand projection purposes and planning and budgeting purposes, and any such distinction would not have been apparent to Exxon's investors.

[10] *See also* Exxon Mobil Corp., *Corp. Citizenship Report 2014*, at 37, *available at* http://cdn.exxonmobil.com/~/media/global/files/corporate-citizenship-report/2014_ccr_full_digital_approved.pdf ("We believe our view on the potential for future [climate-related] policy action is realistic and, by no means represents a 'business as usual' case.").

projects suggests that Exxon may have fraudulently disregarded its claimed proxy-cost analysis when it produced less profitable results.

Second, Exxon represented in public filings that, as required by GAAP, its "[c]ash flows used in impairment 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." (Oleske Aff. ¶ 47) (emphasis added). However, documents produced by Exxon's independent auditor PricewaterhouseCoopers LLP ("PwC") indicate that prior to 2016, Exxon did not apply a proxy cost of GHGs when estimating future cash flows for purposes of determining whether to take an impairment charge on its long-lived assets, such as oil and gas reserves and resources. (*Id.* ¶¶ 41-54.) Exxon does not dispute this fact; instead, the company defends its past practices by making incorrect statements about GAAP requirements that are directly contradicted by its own public statements. (Exxon Memo. at 10.) GAAP specifically requires that companies consider projected cash flows in making impairment evaluations, and Exxon represents that it follows these requirements. (Oleske Aff. ¶¶ 44-46.)[11]

Third, Exxon publicly represented that "[t]he proxy cost seeks to reflect all types of actions and policies that governments may take over the Outlook period relating to the . . . *use* of carbon-based fuels." (Oleske Aff. ¶ 38) (emphasis added). However, documents produced by Exxon indicate, and Exxon does not deny, that it did not apply a proxy cost of GHGs to so-called "Scope 3" emissions caused by the "use" of fossil fuels. (*Id.* ¶ 40.) Such emissions constitute approximately 90% of fossil-fuel-related GHGs. (*Id.* ¶ 39.)

[11] *See also* SEC Staff Guidance on Accounting Standards Codification 360, *available at* https://www.sec.gov/interps/account/sabcodet5.htm (stating that "forecasts made for purposes of applying FASB ASC Topic 360 [must] be consistent with other forward-looking information prepared by the company, such as that used for internal budgets").

These inconsistencies between Exxon's statements to its investors and its documented internal practices make the absence of documents reflecting the actual application of the proxy cost of GHGs all the more alarming. Exxon cites only to a handful of stray mentions of GHG costs (Exxon Memo. at 13),[12] none of which consists of or even discusses actual cash flow models or other key documents necessary for investment or impairment evaluations—much less one that includes a proxy cost of GHGs.

Finally, Exxon's refrain that "no law or policy" required it to apply a proxy cost of GHGs is simply false in light of Exxon's representations. (Exxon Memo. at 13.) New York's anti-fraud laws require that Exxon make accurate representations to investors and the public. It was shareholder demands for more robust reporting concerning the company's response to the financial risks posed by climate change, rather than any pre-existing legal requirement, that apparently led Exxon to make many of its representations concerning proxy costs. (Oleske Aff. ¶¶ 6-8.) Exxon cannot now escape scrutiny simply because its choice to make these false representations was unforced.

B. <u>The Subpoena Duces Tecum Does Not Pose Undue Burdens</u>

OAG's May 8, 2017 subpoena duces tecum to Exxon[13] flows directly from the facts described above. Specifically, the subpoena requires Exxon to state whether it applied a proxy cost of GHGs as part of its economic decision-making process for the very decisions for which it

[12] Specifically, these documents consist of mentions of GHG costs to an executive of another company (Affirmation of Justin Anderson, June 9, 2017, NYSCEF No. 206, Ex. I) and to a university professor (*id.* Ex. J), a general environmental policy that is not specific to proxy costs (*id.* Ex. L), a document concerning an anomalous project in which Exxon generated GHG credits by selling CO2 to other operators (*id.* Ex. M), and a document concerning Exxon's compliance with the EPA's Mandatory Greenhouse Gas Reporting Rule (*id.* Ex. N). Exxon places great emphasis on excerpts from the two-page insert in Exxon's Corporate Plan Dataguide Appendix (*id.* Exs. K and O), but that document only describes certain parameters concerning what Exxon *promised* to do, and does not provide any evidence of what it actually did.

[13] Affirmation of Justin Anderson, May 19, 2017, NYSCEF No. 132, Exhibit T.

publicly represented that it was doing so. To the extent that Exxon did apply a proxy cost, the subpoena requests specific information about the price, intensity, scope, and pass-through assumptions that Exxon applied, as evidence reviewed by OAG indicates that Exxon has in many cases adjusted those assumptions to make its proxy-cost analysis all but meaningless.[14] These requests are designed to focus further investigation by separating projects for which Exxon applied proxy costs from those for which it did not. The subpoena also requests documents that are highly relevant to these questions.[15] Exxon does not, and cannot, contest the relevance of OAG's requests to the investigation.

Instead, Exxon asserts, without any factual support, that complying with the subpoena would be unduly burdensome. "Relevancy, and not quantity, is the test of the validity of a subpoena," *Am. Dental Coop., Inc. v. Attorney-General*, 514 N.Y.S.2d 228, 234 (1st Dep't 1987) (internal brackets and citation omitted), and "courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business." *N.L.R.B. v. Am. Med. Response, Inc.*, 438 F.3d 188, 193 n.4 (2d Cir. 2006). Establishing that "the cost of gathering this information is unduly burdensome *in light of the company's normal operating costs*" is a "difficult burden" to meet. *E.E.O.C. v. Sterling Jewelers Inc.*, No. 11-CV-938A, 2013 WL 5653445, at *9–10 (W.D.N.Y. Oct. 16, 2013) (emphasis in original) (citing cases; holding that although the subpoena recipient's "cost estimate for complying with the [subpoena] is substantial, it fails to identify how this cost would present an

[14] For example, there is evidence that Exxon has (i) applied a lower proxy cost than it publicly represented to investors; (ii) applied a proxy cost to only a fraction (i.e. limited intensity) of GHG emissions from a given project; (iii) applied a proxy cost to only certain GHGs and not others; (iv) applied a proxy cost to only direct emissions as opposed to emissions stemming from end use of the oil and gas (i.e. "Scope 3" emissions); and (v) assumed that it could pass-through most or all of the proxy cost to its customers, while unreasonably assuming that such pass-through would have no effect on demand for its products. (Oleske Aff. ¶ 110.)

[15] The relevance of these documents, which Exxon does not dispute in more than a cursory fashion, is set out at OAG Memo. at 10 and Oleske Aff. ¶¶ 113-16.

undue burden for a retailer of its size"); *see also F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (enforcing investigative subpoena concerning hundreds of gas fields when "the breadth complained of is in large part attributable to the magnitude of the producers' business operations" which were the legitimate subject of investigation; noting that burdens were mitigated through negotiations with investigating agency); *Gelb v. Kuriansky*, 118 Misc. 2d 960, 962 (Sup. Ct. Kings Cnty. 1983) ("[t]he problem of volume" is "inherent to investigations involving . . . extensive business operations"; parties operating "extensive" businesses "cannot complain of the magnitude of their own operation as a basis for resisting compliance with otherwise lawful subpoenas.").[16] Exxon has presented no evidence of such a significant disruption here.[17]

Rather than meeting and conferring with OAG in good faith to determine whether there is a narrowed subset of documents or information that would meet OAG's legitimate investigative interests, Exxon has chosen to engage in hyperbole concerning the burdens of compliance.[18] In fact, the answers to most of OAG's requests are likely found in Exxon's projections and models used in making investment or impairment decisions. OAG has not located in Exxon's productions, and Exxon has not identified, any such projections or models that include a proxy

[16] *See also* OAG Memo. at 16 (citing cases).

[17] The cases Exxon cites (Exxon Memo. at 15-17) do not support its position. *See Reuters Ltd. v. Dow Jones Telerate, Inc.*, 662 N.Y.S.2d 450, 454 (1st Dep't 1997) (declining to enforce subpoena issued to a non-party in private litigation; noting that a "broader view of relevance may be applied when the subpoena is issued by an administrative or legislative investigatory body, since the relevance of such an 'office subpoena' depends on the authorized breadth of the investigation itself"); *D'Alimonte v. Kuriansky*, 535 N.Y.S.2d 151, 152 (3d Dep't 1988) (subpoena sought "materials that clearly are irrelevant to the matter at hand"); *Smith v. Russo-Asiatic Bank*, 170 Misc. 408, 411 (Sup. Ct. Albany Cnty. 1939) (compelling production of "a mass of papers" so long as they do not constitute "all the books and papers of a party" and thereby "completely put[] a stop to business of a corporation"); *N.Y. State Comm'n on Judicial Conduct v. Doe*, 61 N.Y.2d 56, 62 (1984) (modifying subpoena to exclude only documents "having no relation to the matters presently under investigation").

[18] Additionally, Exxon's repeated invocation of the number of pages it has produced rings hollow, as most of the documents it produced were not responsive to the production priorities that OAG repeatedly made clear to Exxon, duplicative, or both.

cost of GHGs. But given Exxon's public statements that it "*rigorously* consider[s] the risk of climate change in [its] planning bases and investments,"[19] engages in "*structured* management processes across an asset's life cycle,"[20] and has established "*common* worldwide expectations for addressing risks inherent in [its] business,"[21] all of this information should be readily available to the company.

Contrary to Exxon's assertion that the subpoena requires Exxon to produce information about every investment decision ever made at the company for the past 12 years, OAG remains willing to consider the prioritization of the requested information for a subset of representative projects that meet particular criteria (such as geography, dollar value, or GHG emission levels), or as to which OAG has significant unanswered questions.

C. Exxon Continues to Ignore OAG's Express Statutory Authority to Request Information

Exxon does not, and cannot, contest OAG's express statutory authority to request data and information as part of its investigations, or the clear case law upholding such authority. (OAG Memo. at 17-19.)[22] Instead, Exxon makes an unsupported semantic argument that only "interrogatories," not requests for information, are permitted, ignoring OAG's authority to "require such other *data and information* as [it] may deem relevant[.]" Gen. Bus. Law § 352(1)

[19] Oleske Aff., Ex. 1, at 21 (emphasis added).

[20] Exxon Mobil Corp., *Environmental Management* (emphasis added), *available at* http://corporate.exxonmobil.com/en/environment/environmental-performance/environmental-stewardship/overview.

[21] Exxon Mobil Corp., *Operations Integrity Management System* (emphasis added), *available at* http://corporate.exxonmobil.com/en/company/about-us/safety-and-health/operations-integrity-management-system.

[22] Once again, Exxon's citations (Exxon Memo. at 18) are to inapposite decisions in the civil litigation context that do not concern OAG's statutory authority. In *Litemore Elec. Co.* v. *City of N.Y.*, 467 N.Y.S.2d 200, 202 (1st Dep't 1983), a civil contract dispute, the interrogatories did not "pinpoint the critical areas of contest," and in *Mijatovic* v. *Noonan*, 569 N.Y.S.2d 176, 177 (2d Dep't 1991), the court struck only interrogatories that sought "opinions or conclusions of law, rather than relevant facts." Those are not the circumstances here.

(emphasis added).[23] Further, as described above, the subpoena calls for existing "data and information," not "analysis" as Exxon incorrectly asserts. (Exxon Memo. at 18-19.)

D. OAG's Investigation Is Not Preempted

Exxon's preemption argument is premature, as no complaint has been filed. (OAG Memo. at 21.) It is also misguided, as Exxon's internal long-lived asset valuations, and the impairment decisions they feed into, are entirely separate from the SEC-mandated proved reserve estimates upon which Exxon inexplicably continues to focus. (*Id.* at 19-21.) Unlike proved reserve reporting under the SEC formula, under which retroactive oil and gas prices and existing costs are applied, impairment evaluations require consideration of projected costs (such as proxy costs) over time. (*See supra* at 7.) If Exxon misrepresented its own impairment-valuation practices, OAG cannot be preempted from enforcing classic securities-fraud claims that flow from those misrepresentations.[24]

E. Exxon Should Be Required to Produce Mr. Iwanika for Testimony

Exxon concedes that under New York law, a parent company subject to New York jurisdiction can be compelled to produce for testimony employees of a foreign subsidiary under that parent's control. (Exxon Memo. at 19-20.) But Exxon sets out the wrong test for determining whether it controls its majority-owned subsidiary, Imperial, for purposes of requiring Exxon to produce Imperial employee Jason Iwanika for testimony. The "mere

[23] Were Exxon's prospective responses to be deemed written testimony, the result would be the same, as "OAG may require a potential violator to file "a statement in writing . . . as to all the facts and circumstances concerning the subject matter . . . and for that purpose may prescribe forms upon which such statements shall be made." Gen. Bus. Law § 352(1). In any event, if Exxon were questioning nothing more than the subpoena's formal header, it should not have occupied the Court's time, but should have simply requested that a replacement subpoena be issued.

[24] Exxon's argument that OAG's investigation represents an attempt to compel Exxon "to adopt [OAG's] preferred assumptions about the potential impact of future climate change policies" (Exxon Memo. at 19) is simply false, and bears no relation to the potential fraud claims OAG has described.

department" test that Exxon cites (*id.* at 20-21) applies to establishing jurisdiction over a foreign entity based on an *alter ego* theory of liability.[25] Jurisdiction, however, is not at issue here.

Rather, the question is whether Exxon has the "practical ability" to produce the requested witness. *Commonwealth of N. Mariana Is. v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 62-63 (2013). Under applicable case law, majority ownership of a foreign subsidiary, particularly when combined with practical control over the subsidiary as to matters at issue in the case, is sufficient to meet this standard as to production of both documents and testimony. *See Bank of Tokyo-Mitsubishi, N.Y. v. Kvaerner, A.S.*, 175 Misc. 2d 408, 411 (Sup. Ct. N.Y. Cnty. 1998) (parent company must "produce any and all appropriate discovery under its aegis, including that under the control of its subsidiary"); *Grande Prairie Energy LLC v. Alstom Power, Inc.*, 5 Misc. 3d 1002(A), 2004 N.Y. Slip Op. 51156(U), at *3 (Sup. Ct. N.Y. Cnty. Oct. 4, 2004) ("a parent company . . . can be compelled to produce for deposition an employee of its foreign subsidiary"; holding that "significant ties" between company and employee of affiliate as to matters at issue were sufficient to require deposition).

Imperial's status as a majority-owned, rather than wholly-owned, subsidiary of Exxon does not alter this conclusion. In *Krasinski v. Polimeni Org. LLC*, the court, applying *Bank of Tokyo*, held that a parent company subject to jurisdiction in New York was required to produce

[25] Specifically, *Delagi v. Volkswagenwerk A.G. of Wolfsburg, Germany*, 29 N.Y.2d 426 (1972) and *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117 (2d Cir. 1984), address whether foreign corporate manufacturers can be subject to New York's jurisdiction by virtue of sales of their product by a subsidiary in New York. In *People v. H & R Block, Inc.*, 16 Misc. 3d 1124(A), 2007 N.Y. Slip Op. 51562(U) (Sup. Ct. N.Y. Cnty. July 9, 2007), the court held that it lacked personal jurisdiction over a non-resident corporation with no presence in or contacts with New York. In *OneBeacon Am. Ins. Co. v. Newmont Mining Corp.*, 918 N.Y.S.2d 470 (1st Dep't 2011), the court dismissed a complaint against foreign companies on the grounds of lack of personal jurisdiction and *forum non conveniens*.

documents of its majority-owned foreign affiliate, even though the court lacked jurisdiction over the affiliate. N.Y.L.J., Jun. 19, 2003, p. 23, col. 5 (Sup. Ct. Nassau Cnty. 2003, Austin, J.).[26]

Documents produced by Exxon demonstrate its practical control over Imperial in connection with the proxy cost analysis. (Oleske Aff. ¶¶ 33 & 120.) These documents show that Mr. Iwanika believed that he and his team were "held" to Exxon's Corporate Plan guidance specific to Alberta, regardless of contradictory instructions from his colleagues at Imperial. Mr. Iwanika then followed Exxon's instructions to abandon the Corporate Plan guidance on proxy cost and instead hold flat into future years the much lower actual GHG tax under existing Alberta law. Having produced these documents, Exxon should not be permitted to change course and withhold Mr. Iwanika's testimony on the very topic as to which it exercised control over him and over Imperial.[27]

F. <u>Exxon Should Be Required to Produce the Four Employees that Exxon's Own Witness Identified as Having Relevant Knowledge of Exxon's Apparent Spoliation</u>

Exxon does not deny that years' worth of emails from key custodians, including the company's former Chairman and CEO, Rex Tillerson, have been destroyed. Exxon also does not deny that the witness it proffered in purported compliance with the Court's prior order was unable to explain the company's identification, preservation, collection, destruction, or reclamation of the destroyed documents, and instead repeatedly referred to the four witnesses

[26] *See id.* (holding that "[a] party, which is subject to the in personam jurisdiction of the New York courts and controls a foreign business entity, should be obligated to produce, in New York, all appropriate discovery including documents and records in the control of the foreign entity wherever the foreign entity may be located.") (attached as Exhibit 1).

[27] Additionally, Exxon's listing of Mr. Iwanika (and other Imperial employees) on its privilege log evinces Exxon's control over Mr. Iwanika and over Imperial. Exxon's assertion that privilege was not broken because Exxon and Imperial share a common interest in responding to OAG's subpoena is unavailing, as the common interest doctrine "extend[s] no further than communications related to pending or reasonably anticipated litigation." *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 630 (2016). Exxon does not assert that these communications bear any such relationship to litigation. Thus, it is only because of Exxon's control over Mr. Iwanika that his inclusion in a communication does not break privilege.

OAG has subpoenaed. Instead, Exxon principally argues that because it produced a witness with a very limited amount of second-hand knowledge, it cannot be compelled to produce the individuals with first-hand information. (Exxon Memo. at 23.) This is simply absurd.[28]

Exxon also argues that its admitted document destruction is unlikely to have eliminated evidence relevant to the OAG's investigation. Exxon bases its argument on the documents that were *not* destroyed—not the communications that *were* destroyed, such as those between the Wayne Tracker email account and any individuals not on litigation hold, including any of Mr. Tillerson's several assistants, on which no one else may have been copied. In any event, whether "unique" responsive documents were actually lost is not at issue at this stage, where OAG is simply attempting to determine the basic facts of Exxon's document destruction and recovery efforts. If OAG ultimately seeks a remedy for this document destruction, Exxon can make these arguments then, in the context of full disclosure and a complete record.

CONCLUSION

For the reasons set forth above and in OAG's prior memorandum, Exxon's motion to quash should be denied in its entirety, and OAG's cross-motion to compel compliance with OAG's subpoena duces tecum, its four subpoenas for the testimony of record custodians, and its subpoena for the testimony of Mr. Iwanika should be granted in its entirety.

[28] Incredibly, Exxon claims that "the Court has already determined that ExxonMobil has responded to each of the Attorney General's concerns" relating to subpoena compliance (Exxon Memo. at 25), as if the Court's prior order compelling Exxon to produce a spoliation witness contained a pre-determination that no further witnesses would be required, even if Exxon proffered an unknowledgeable witness in bad faith, as it did here.

Dated: New York, New York
June 14, 2017

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Exhibit 1

DECISION OF INTEREST; Supreme Court; DOI

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Supreme Court

Nassau County

Krasinski v. The ***Polimeni*** Organization LLC - Defendant, ***Polimeni*** International, appeals from the Order of Special Referee Frank Schellace appointed by this Court to oversee the conduct of the accounting in this action claiming that he exceeded his authority in directing discovery and to clarify the judgment which directed the accounting.

Background

Plaintiff commenced this action seeking declaratory relief and injunctive relief, specific performance of an agreement, an accounting, money damages based upon breach of contract, breach of fiduciary duty, fraud and unjust enrichment.

Plaintiff had entered into an agreement with Defendant Polimeni Organization LLC (Organization), whereby Plaintiff agreed to assist Organization in developing commercial property in Poland. Upon the performance of his services, Plaintiff would be entitled to receive a percentage of Defendant Polimeni International LLC (International). The percentage of the interest that Plaintiff would receive in International would depend upon Plaintiff's level of participation in the transactions.

After trial, a judgment was entered in this action declaring that Plaintiff was entitled to a 5 percent interest in International and two other limited liability companies to be formed by International with regard to owning and operating shopping centers in Gniezno and Gliwice, Poland. This action was then referred to Special Referee Frank Schellace to conduct the accounting and to determine the amount owed to Plaintiff pursuant to the fifth and sixth decretal paragraphs of the judgment.

One of the entities in which Plaintiff claims to have an interest is Polimeni International Konin entity Sp. zo. o. (Konin entity). The Konin entity is a limited liability company formed in Poland which operates a shopping center in Konin, Poland. International owns 89 percent of the Konin entity and is the controlling member of the Konin entity.

The Konin entity was named as a Defendant in this action. By decision and order of this Court dated August 20, 2002, summary judgment was granted dismissing the action against the Konin entity on the grounds that the court lacked long arm jurisdiction over it. Nevertheless, Plaintiff's claim for an interest in that entity remained viable.

At a conference held before Special Referee Schellace on January 28, 2003, counsel for International furnished to counsel for Plaintiff copies International's 2001 income tax return and preliminary financial statement dated December 31, 2002. At this conference, counsel for the Plaintiff requested the underlying financial records of the Konin entity and copies of the leases for the shopping center. After argument, Special Referee Schellace directed that the financial records of Konin entity and the leases be produced.

The motion before the court is, in essence, an appeal from this ruling pursuant to CPLR 3104 (d).

Discussion

International, as movant/appellant herein, argues that the non-party Konin entity is a Polish entity which is not subject to the jurisdiction of this Court. Thus, International contends that discovery, as provided in the Hague Convention, is mandatory. This Court disagrees.

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Convention) is not the exclusive or necessarily primary method for obtaining document discovery from a foreign entity. Societe Nationale Industrielle Aerospatiale v. United States District Court., 482 U.S. 522, 535 (1987). See also, Kreinerman v. Casa Vearkamp, S.A. de C.V., 22 F. 3d 634, 640 (5th Cir. 1994). The procedures of the Hague Convention apply to discovery sought from a non-party in a foreign jurisdiction. Orlich v. Helm Bros., Inc., 160 A.D. 2d 135 (2nd Dept.1990). See also, Carmody-Wait 2d, New York Practice 42.39. As the United States Supreme Court held in Societe Nationale:

[T]he text of the Convention draws no distinction between evidence obtained from third parties and that obtained from the litigants themselves; nor does it purport to draw any sharp line between evidence that is 'abroad and evidence that is within the control of a party subject to the jurisdiction of the requesting court. Thus, it appears clear to us that the optional Convention procedures are available whenever they will facilitate the gathering of evidence by the means authorized in the Convention. Although these procedures are not mandatory, the Hague Convention does 'apply' to the production of evidence in a litigant's possession in the sense that it is one method of seeking evidence that a court may elect to employ. Supra at 541.

Here, Plaintiff has attempted to employ discovery procedures available under the CPLR against a party litigant which does not deny having access to the documents and records sought by virtue of its majority status and control thereof.

The party asserting that the provisions of the Hague Convention are applicable has the burden of establishing the reasons for employing the procedures of the Convention. See, Scarminach v. Goldwell GmbH, 140 Misc. 2d 103, 107 (Sup.Ct. Monroe Co. 1988), where Special Term held that in doing so, that party must establish * * * that resort to the Convention is required, given the particular fact of this case, the sovereign interests involved, and the effectiveness of such procedures. See also, In re Anschuetz & Company, GmbH, 838 F. 2d 1362 (5th Cir. 1988); and In re Benton Graphics v. Uddeholm Corp., 118 F.R.D. 386 (D.N.J., 1987).

In this case, the Defendants have failed to make an adequate showing as to the privacy of the Hague Convention over competing, available state discovery procedure. The affidavit of counsel submitted in support of International's motion/appeal fails to establish or even hint as to how production of these documents would be an affront to Polish sovereignty inasmuch as they do not assert that the documents would not be discoverable under the provisions of the Hague Convention had Plaintiff sought discovery of these documents pursuant to those procedures. A party should not be required to use the costly and cumbersome procedures of the Hague Convention where discoverable documents can be obtained through the discovery procedures established by the CPLR. See, Wilson v. Lufthansa German Airlines, 108 A.D. 2d 393 (2nd Dept. 1983).

A party, which is subject to the in personam jurisdiction of the New York courts and controls a foreign business entity, should be obligated to produce, in New York, all appropriate discovery including documents and records in the control of the foreign entity wherever the foreign entity may be located. Bank of Tokyo-Mitsubishi, Ltd., v. Kvaerner, 175 Misc.2d 408, (Sup.Ct., N.Y. Co. 1998). See also, Carmody-Wait 2d, New York Practice 42.39.

DECISION OF INTEREST; Supreme Court; DOI

In this case, it is undisputed that International owns an 89 percent interest in Konin entity and is the controlling member of the Konin entity. Under these circumstances, the Court finds no basis for requiring Plaintiff to resort to the provisions of the Hague Convention. Special Referee Schellace properly concluded that International should produce these documents.

Contrary to International's assertion, the Court is not compelling the Konin entity to account. The Court is simply directing International to provide documents which will aid the Special Referee in determining the value of Plaintiff's 5 percent interest in the Konin entity. Utilizing the records and documents of the 89 percent owner of Konin entity - International - is a fair, reasonable and cost effective means to accomplish that goal.

This is consistent with CPLR 3101 (a) (1) which provides for full discovery of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof from a party to an action. The provisions of CPLR 3101(a)(1) are to be liberally interpreted. The term material and necessary requires disclosure of * * * any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test should be one of usefulness and reason. Allen v. Crowell-Collier Publishing Co., 21 N.Y. 2d 403, 406 (1968).

In lieu of utilizing the cumbersome process of the Hague Convention, CPLR 3120 (a) (1) (i) provides for discovery against a party of any designated documents * * * which are in the possession, custody or control of the party served; * * * . In order to obtain disclosure of a document, the party seeking its disclosure must demonstrate that the document exists and is in the possession, custody or control of the party served. Corriel v. Volkswagen of America, Inc., 127 A.D. 2d 729 (2nd Dept.1987); Linton v. Lehigh Valley Railroad Co., 25 A.D.2d 334 (3rd Dept. 1966); and Avila Fabrics, Inc. v. 152 West 36th Street Corp., 22 A.D.2d 238 (1st Dept. 1964). The only basis for avoiding such disclosure from a party is for the party opposing disclosure to establish that the demanded material is subject to privilege, an evidentiary privilege, established pursuant to CPLR 3101 or that the demanded document does not exist. Corriel v. Volkswagen of America, Inc., supra. See also, Rosado v. Mercedes-Benz of North America, Inc., 103 A.D.2d 395 (2nd Dept. 1984); and Caveney v. Sorrano, 84 A.D.2d 557 (2nd Dept.1981). In order to assert that the documents do not exist or are not in the party's possession, custody or control, the party opposing disclosure must submit an affidavit from the party or someone with knowledge indicating that the documents do not exist or are not in the party's possession, custody or control. See, Fugazy v. Time, Inc., 24 A.D. 2d 443 (1st Dept.1965).

In this case, International does not assert that discovery of the requested documents is subject to any legally recognized privilege. In addition, and more importantly, the Defendant does not assert that the demanded documents are not in its possession, custody or control or are not obtainable. In this circumstance, Plaintiff is demanding production of specifically identified documents which are in the possession, custody and control of International, a party to this action and which is subject to the jurisdiction of this Court. The Hague Convention does not apply to discovery sought in New York from an entity subject to the jurisdiction of the New York courts. The source of the documents is irrelevant to the issue of whether they can be obtained in discovery. See, Wilson v. Lufthansa German Airlines, supra, and Bank of Tokyo-Mitsubishi v. Kvaerner, supra.

This Court will not force Plaintiff to resort to the costly Hague Convention procedure which would be tantamount to denying discovery against a party which is subject to this Court's jurisdiction and which undisputedly has control of the foreign entities which possess the demanded documents. Bank of Tokyo-Mitsubishi v. Kvaerner, supra.

Finally, with regard to the scope of discovery to be permitted herein, this Court specifically found that Plaintiff is entitled to five percent of International and the Konin entity as well as the entities to be formed upon the development in Gniezno and Gliwice, Poland. As a result, Plaintiff is entitled to an accounting of the finances of International and the Konin entity. International must thus produce all documents relating to its business and its finances and those of the Konin entity in its possession and which it can obtain in its role of majority shareholder.

Accordingly, it is,

ORDERED, that Defendant's motion declaring that the Special Referee appointed to supervise the accounting in this matter exceeded his authority or clarifying the judgment with respect to discovery is denied; and it is further

ORDERED, that the Order of Special Referee Frank Schellace which directed production of documents and records of Konin entity is hereby confirmed and the stay thereof is hereby vacated; and it is further,

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ORDERED, that Defendant Polimeni International LLC, shall produce said documents and records within 30 days of the date of this order; and it is further,

ORDERED, that parties shall appear for a conference in the within matter before Special Referee Frank Schellace on July 16, 2003 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Load-Date: August 6, 2011

End of Document

Exhibit 6

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: TRIAL TERM PART 61

- X

In the Matter of the Application of the
PEOPLE OF THE STATE OF NEW YORK
by ERIC T. SCHNEIDERMAN,
Attorney General of the State of New York,

Petitioner,

For an order pursuant to CPLR Section 2308(b)
to compel compliance with a subpoena issued
by the Attorney General

- against -

PRICEWATERHOUSECOOPERS LLP and
EXXON MOBIL CORPORATION,

Respondents .

- X

Index No. 451962/2014

June 16, 2017
60 Centre Street
New York, New York 10007

B E F O R E: THE HONORABLE BARRY R. OSTRAGER, Justice.

A P P E A R A N C E S:

STATE OF NEW YORK OFFICE OF THE
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New York, New York 10271-0332
BY: JOHN OLESKE, ESQ.
MANISHA M. SHETH, ESQ.
MANDY DeROCHE, ESQ.

(Continued on next page for certification.)

Proceedings

A P P E A R A N C E S (Continuing):

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Attorneys at Law
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BY: THEODORE V. WELLS, JR., ESQ.
DANIEL J. TOAL, ESQ.
JUSTIN ANDERSON, ESQ.

Terry-Ann Volberg, CSR, CRR
Official Court Reporter.

Proceedings

THE COURT: Normally ExxonMobil is outnumbered in the courtroom, but not today.

I have orders to show cause which contain ExxonMobil's motion to quash, and for a protective order, and the Attorney General's motion to compel.

As has been the case with respect to all of our many prior proceedings, I have read all of the papers, and I have some historical experience with respect to these kinds of issues and disputes. So what I would like to do is take as the point of departure the orders that were issued in connection with the March 22nd transcript which I've reviewed in anticipation of this morning's proceedings, and passing the issue of what depositions and what interrogatories the Attorney General may seek, I want to start today's discussion about documents because it was my understanding that everybody agreed that after 16 months of document production, and after complete agreement on search terms and custodians and additional search terms and additional custodians, that there would be a certification within ten days after March 31st that ExxonMobil had fully complied with its obligations to produce documents, and that the Attorney General would have the opportunity to depose affiants who would attest to ExxonMobil's compliance with the

court orders of March 22nd, and with the agreements that were reached at the March 22nd hearing.

Now if the affidavits were insufficient or the depositions of the affiants were not satisfactory and additional deponents are required with respect to compliance with the orders issued on March 22nd and the agreements reached on March 22nd, that seems like a reasonable thing for the Attorney General to seek and request although I understand ExxonMobil has a different view. With respect to interrogatories, it seems to me that the Attorney General is entitled to ask non-burdensome, non-overbroad, non-abusive interrogatories.

Let's start with the issue of the Attorney General's request for additional documents and correspondence, the motion to quash that request.

So who wants to go first?

MR. WELLS: I will go first.

THE COURT: Mr. Wells has grabbed the floor.

MR. WELLS: Your Honor, I asked your staff if next time I can bring a computer and use a PowerPoint instead of these somewhat archaic boards.

THE COURT: We love the old-fashioned paper presentations.

MR. WELLS: For much of my life and yours

Proceedings

this is how we used to do it, so I am comfortable doing it this way.

My first line is consistent with the comments by your Honor because I think we need to start with what happened on March 22nd.

I note, and we go back --

MR. OLESKE: We can't see.

THE COURT: The attorney cannot see your charts.

MR. WELLS: I can hand a copy of the slides to your Honor.

THE COURT: I am happy to take it.

(Handing.)

MR. WELLS: We will mark that as Exxon Exhibit Number One.

(Exxon Exhibit Number 1 marked in evidence.)

MR. WELLS: On November 21, 2016, the New York AG stated, "The production of documents from a company like Exxon has to have an end date. We have to have some expectation of the finality." Then on March 22nd the New York AG stated, "No one wants more than the Attorney General to complete the process of obtaining these documents and moving on to the next stage of the investigation."

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We understood the next stage of the investigation would be where they would begin taking substantive depositions of the witnesses who they had identified based on the production of almost three million pages of documents. We have no objection to them going to that next stage and taking those depositions. I want to be clear.

Now what happened after that -- also, what happened that day, again consistent with your Honor's comments, I stood up and I said, here's what I understand I am supposed to do. I am supposed to give certain documents to them by the 31st. I am supposed to get a certification by April the 10th.

We moved heaven and earth to finish the document production. We got them the certification on time as required, and they were even permitted, as indicated by the court, to depose my partner, Michele Hirshman, with respect to certification, but the whole purpose of the certification was that it was to certify that the process was over. Again, we did that.

I even talked about, I said, I will do that with this final certification which usually comes at the end of process. You tried to ask me to get it by March 31, you gave me ten extra days, but everyone was on the same page. We knew what we were talking about,

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we would end the document production and move to depositions.

Now what happened thereafter is that on May 8th we were served with a new subpoena requesting depositions and requesting documents. Now the depositions they requested, which we have no objection to involve depositions, that would be part of the next stage, the substantive witnesses. These witnesses are very important because they asked for five substantive witnesses. One we don't control, we can deal with that later, but the other four people who we agreed to immediately were Bill Colton, vice president of Corporate Strategic Planning. His deposition is scheduled for June 27. That's the date they asked for. We didn't negotiate with them about extending it. They asked for June 27. We said that he is happy to testify, we will produce him, and we plan to produce him on June 27. They asked for Robert Bailes, he is scheduled for July 19, Pete Trelenberg, he is scheduled for July 25, and Guy Powell, he is scheduled for July 28.

What is important about these four people is that all of them are involved in identifying what the proxy costs are, and how it's developed, and also how -- what GHG costs are, and how they are developed.

They are two very different concepts, but in their papers what they talk about is, they seem to say there's a difference between proxy costs and GHG costs, and they suggest someone -- we have two sets of books. The fact of the matter is, proxy cost is a different concept than GHG cost, and they are used for different purposes.

The important thing is that Mr. Colton is the author of the Energy Outlook, and he is also the head of corporate planning which deals with the budgeting part, and they asked for him first, and we told them that's the right person to talk to because he can explain all of the role of the proxy cost to you, he can explain how those costs are used with respect to budgeting, he can explain GHG, how all of this is done. They just waited to take the deposition of Mr. Colton because he really is the boss, so to speak, he is the author of the Energy Outlook, and because he heads the budgeting process on the corporate planning side, he brings the two things together.

So they waited to take this deposition. They wanted to see if it would be necessary. They asked for all these documents. It would be unnecessary to file these outrageous allegations about sham accounting, and double books, and two numbers. It was just wrong, what

they did.

I want to be clear: All of these people are scheduled to be deposed, and we didn't fight them. We said, happy to bring them in, and this is the first date they asked for, and he will be produced.

Now turning to what else they did do on the 8th, they served a subpoena which we contend is contrary to the agreements reached on March 22nd, is unnecessary, is overly burdensome, which is grounded in some notion of sham transactions that if they bothered to take the deps first, we wouldn't have to be here and spend all of this time on all of these papers. What they did, they asked for the deps which we agreed to, but yet they asked for us to put together 12 years of analysis involving every business decision in terms of oil and gas exploration that Exxon has made over 12 years. This is not pushing some button. There is no pushing a button. This would take a year, two years to do. It would take a long time. Nobody really knows. Nobody has ever engaged in that type of exercise.

THE COURT: Subject to what the Attorney General is going to say, that seems unreasonable on its face.

Now let me be clear: The four people who are being deposed, those were custodians from whom

documents were previously requested?

MR. WELLS: Yes, that's how they know their names, and they identified -- they have had hundreds of pages of documents on proxy costs and the Outlook, and based on their review of the documents they knew exactly who they asked for.

They set up Mr. Colton first. We agreed, he is the boss. He is the one that can tell you everything. He is the author of the Energy Outlook. He is --

THE COURT: Look, subject to what the Attorney General says, it seems to me that these deponents were previously identified as custodians, and you produced all the documents in their files that were called for by the search terms that were expanded at prior, at a prior hearing that we had, and that there shouldn't be any more documents produced because over 16 months the Attorney General has made multiple motions to compel, revised the number of custodians, revised the search terms, and they are going to get a lot more information from the depositions than they are going to get from these documents.

MR. WELLS: Yes, it's not like they would even have these documents by June 27 because this would take an enormous amount of manpower to even produce.

Proceedings

It's not like we are taking a dep June 27, and we need this particular piece of paper next week. There is a complete disconnect, in fact.

THE COURT: Let me ask you this, Mr. Wells, because I know that you have a dozen more boards.

MR. WELLS: I wish it was only a dozen.

THE COURT: At the rate we are going, we will be here until 4:00 o'clock.

You would agree that the Attorney General can supplement its document requests with tailored interrogatories requesting responses to certain questions that arise from the content of the documents that you already produced?

MR. WELLS: I agree that they have the statutory power to pose interrogatories that are reasonable. I would argue if they are taking the deps of 14 people, that they will take the deps first before people start running around engaging in interrogatories, but the concept, I agree, that they have the statutory power to request an interrogatory. I agree that they have that power. Whether they -- whether it makes any sense given that they are producing witnesses is something, I guess, you have to see is it a targeted interrogatory or not. You would have to look at the interrogatory. But do they have

the power? I agree they have the power.

THE COURT: Okay, because I believe they have the power to propound interrogatories as long as the interrogatories are not excessively burdensome, unreasonable and abusive.

I'm sorry. I interrupted you.

MR. WELLS: I thought you were going to interrupt me in the way you wanted us to short circuit --

THE COURT: I am comfortable that you should be producing witnesses, responding to interrogatories, and not producing any more documents subject to what the AG says.

MR. WELLS: May I have one second, your Honor?

THE COURT: Yes.

(Discussion off the record.)

(The discussion off the record concluded and the following occurred in open court:)

MR. WELLS: I am going to try and cut some of this short.

What I want to do for the court's edification is state for the record that there's a difference between what we call proxy costs and GHG costs,

greenhouse gas costs.

THE COURT: I get it. I get it that if you know exactly how much it costs to take oil out of the ground in Alberta, you don't need to have a proxy cost.

MR. WELLS: That's what I want to clarify. We actually used both. There are two different concepts.

When the Energy Outlook talks about proxy costs, that is the cost of proxy that ExxonMobil uses for purposes of developing what it thinks the demand will be for energy, oil and gas over the years.

THE COURT: Understood, but you start with how much it costs to get it out of the ground, and then you figure out how much you can sell it for.

MR. WELLS: Yes. We actually start with what we think the demand will be before we get to cost. We do both, whether it's a chicken or an egg, but the proxy cost refers to the development of the demand curve.

When you take into consideration a proxy cost, what you are saying is that the actions of governments in the future may be such as to suppress the demand for oil and gas, move people to use other types of energy sources, and that's going to suppress the demand, and that affects our supply and demand

which ultimately affects the price.

THE COURT: I understand. We said the same thing differently.

MR. WELLS: The GHG, those are specific costs for specific projects, and they both come together, but the proxy costs are really baked in to our demand forecast. This is a document that we produced to the New York AG, and what this document in front of it is a GHG Stabilization Challenge and Carbon Asset. This shows that the Energy Outlook takes all sorts of things into consideration: macroeconomics, technology, climate policy, all to ultimately produce, again, a price curve, what's going to be the demand. Then we figure out what the prices are. So the Energy Outlook is one of the most important documents at Exxon, and it's used to analyze every project because that's where we end up getting our prices.

Now I want to show one document that they refer to in their brief, they did not supply it to the court or us, but it's a document from PricewaterhouseCoopers. It's a critical document, four pages. I won't go through all of it, but what this document shows is ExxonMobil having discussions with its accountants about both proxy costs and GHG costs, and how it goes about doing what it does in terms of

taking into consideration climate change issues.

All of this was discussed with our accountants, they know all of this, and how, with knowledge of this document, they can file papers where they wrongly state that we were involved in some kind of sham transaction or had two sets of books, it's just wrong what they did.

I would like to hand the court a copy. I will make this Exxon Exhibit 2.

(Exxon Exhibit Number 2 marked in evidence.)

MR. WELLS: Your Honor, do you have the document?

THE COURT: I do.

I am having a hard time understanding what the dispute is here.

MR. WELLS: They filed -- they filed a brief --

THE COURT: They filed a brief. They said you did terrible things. You're unhappy that they filed the brief that said you did terrible things. You did what you did. The documents that you produce say what they say. The witnesses that you are going to produce are going to testify to what they are going to testify to. The interrogatories that you are going to

answer are going to be admissible against you in any trial proceeding.

I'm having a hard time understanding how it is that the New York AG after receiving all of these millions of documents and deposing all of the witnesses that they have scheduled and are going to schedule in the future are going to be unable to satisfy themselves as to what the true state of facts is here.

MR. WELLS: Well, your Honor, we believe based on documents we have given them, and, for example, this document (indicating), that they should know that the true state of facts is that ExxonMobil has not done anything wrong.

THE COURT: Okay. They have one interpretation of the documents that you've produced. You have a different interpretation of the documents that you've produced. The two briefs that have been submitted here can't be reconciled, and I can't decide who's right and who's wrong on the papers. I suppose I could conduct a trial and hear the witnesses that the AG is going to depose, and review the documents in the context of the testimony and form some very accurate conclusions about whose version of the facts is correct, but we are not here for that. We are here to decide whether or not you have to produce any more

documents, whether or not you have to produce any more witnesses, and whether or not you have to answer any interrogatories, right?

MR. WELLS: That is correct, your Honor.

MR. OLESKE: I think I can help with these points specifically, if I may. I mean, I think I can cut to exactly --

THE COURT: I don't want to interrupt Mr. Wells, but if he does not object --

MR. OLESKE: I mean --

MR. WELLS: I do not object.

THE COURT: He dose not object.

MR. OLESKE: Thank you, your Honor.

I mean, I am prepared to speak to everything Mr. Wells raised, and, obviously, based on what the court said, the Attorney General has its work cut out to make sure it's clear to the court the stakes here, and what's at issue specifically in terms of the document requests that the court has focused on.

But just to come from where the court was just speaking, this is not a merits dispute. The posture we are in on subpoena compliance in a law enforcement investigation does not allow for the weighing of merits disputes.

THE COURT: I complete and totally agree.

Proceedings

MR. OLESKE: And so based on the papers and the record that we have here, the Attorney General has the right to proceed with this investigation. I think your Honor has already pointed to the right to take interrogatories, the right to take witnesses. The key stumbling block it seems for the court is whether or not the Attorney General has the right to get these additional documents to support its investigation, and it appears that there is kind of a dangerous possibility of Exxon managing, through what we view as a contemptible history of compliance, of establishing some new now non-existent legal standard that if a company produces X million documents over X period of time, that's it, you are done.

Going to your Honor's initial point about the last time we were here for compliance and your Honor ordered what your Honor ordered with respect to compliance on the original subpoena, to your Honor's implicit question of time, we are deeply unsatisfied with the information that we got out of Exxon's compliance witness both in the affidavit and in the testimony. There's years worth of destroyed documents that the company still has not accounted for, and that's the four records witness subpoenas that we have issued that Exxon's also contesting and doesn't want to

submit to, to find out where these destroyed documents are and how that happened.

Putting that aside for a moment, it's really not about whether or not Exxon finished its compliance under the first subpoena, which we don't think they did. We have issues there. The real issue is based on what we have learned in fits and starts as Exxon has at every move grudgingly given us information over this extended period of time, lost and destroyed documents along the way, had to redo everything at the end, at the end of that we have. As your Honor suggested in our prior appearances, we focused our investigation on the specific allegations that the evidence Exxon has produced in that first round evidences, are contradictory to Exxon's representations.

I am not getting into everything that Mr. Wells said about what Exxon has disclosed which is unfortunately false. Exxon's disclosure is there was a product that was one price. It was used for both purposes. It's in the record. I will not argue it, but that's the merits question that we won't get to.

The question is, the Attorney General has formulated requests for documents based on the gaps, the missing information, what should be there that we are not getting even though we are using these search

terms, GHG and proxy costs, but all of this stuff that now for the first time in an attorney affirmation Exxon is explaining to us, because in an attorney's brief Exxon is explaining to us about the facts of how they do this. We don't have these documents. The search terms should have caught them, but we don't have these documents.

Exxon has continued to make these same representations after November of 2015 when we issued the subpoena. In fact, their CEO chairman made the most unqualified statements about this process at the annual shareholders meeting in 2016.

Our subpoena's instructions called for Exxon to produce documents up to the date of the production. They didn't finish their management documents until two or three months ago because they did it wrong the first time, they had to redo it, but they refused. They refused to ongoing -- supplement their production by giving us the documents from 2016. They refused to do that even though they are obviously relevant.

We asked for documents relating to Exxon's impairment and write-down of assets because we learned in the course of the investigation, your Honor instructed us to go to Exxon's accounts first to prosecute our subpoena there, get the documents from

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them, before asking, this was in an appearance last year, before asking Exxon in a subsequent subpoena for a broad range of counter-documents.

We listened to the court. We went through PricewaterhouseCoopers' documents. We learned that Exxon, contrary to its representations to the public, never applied the proxy costs when it came to this apparent analysis. We learned it through the PricewaterhouseCoopers documents, but we still don't have Exxon documents.

THE COURT: Look, you told me, Mr. Oleske, that we are not arguing merits here. We are just arguing compliance with discovery.

MR. OLESKE: Your Honor, it's not discovery, it's our investigative subpoenas, and our new investigative subpoenas are focused and have a factual connection, direct factual connection to the factual basis that we have established as the basis for our investigation, and so legally there is no basis to restrict the Attorney General from obtaining additional documents simply because the target argues that they complied in full with a first subpoena. Even if it's millions of pages, even if it takes a long time, the cases we cite in our brief are directly on point about companies exactly like Exxon that say the reason why we

need all of these documents, the reason why we need to look over Exxon's business it because it has a big complex business, and it chose to make the representations that it applies this process all across its business, across its many units for all of its decisions.

So there is no legal basis. It's just a question of whether or not Exxon can talk its way out of it by saying we produced X million documents so far, you should have gotten these documents in what you were looking for so far, but we haven't.

We have not seen -- this is the other thing -- Exxon -- Mr. Wells says they can't push a button to respond to this. In addition to the other ways in which Exxon's new assertions and attorney argument violate, contradict its representations to the public, Exxon has represented to the public that it has a comprehensive, uniform, rigorous system for keeping track of all of this, and now we are hearing Exxon cry that it cannot report to a government investigation, let alone for its own business purposes for shareholders, this very information that Exxon claims in its disclosure should be at its fingerprints about a process that it's applying all over the company in order to satisfy investors concerns about a specific

risk.

So the problem that we have is that we have demonstrated the factual basis. Exxon said X, they did Y, and in response they have come up with Z, attorney admissions of what they did and attorney rewritings of their disclosures. That's not a basis to resist the investigation. It's specifically on the document requests.

We have shown in our papers, I can walk through each one, how these are focused on obtaining additional information that is necessary to follow up on the first feed. That's within our office's power, and the scope or the duration of the prior production does not legally have an effect on that. As to our request for information --

THE COURT: I'm trying to make this simple.

When you were here on March 27 Mr. Toal stood up, and Mr. Toal said properly, it's our obligation as attorneys for ExxonMobil to make a continuing production of documents that come to our attention that are responsive to the requests that have been made that weren't produced, however it is that they come to learn about things. It's a big company, and they have certified that they've complied with the production of all responsive documents from all of the custodians

that you have asked them to produce documents from, using all of the search terms that you've agreed.

You are going to depose multiple witnesses, you are going to propound interrogatories, and it seems to me that during the course of the depositions that you are going to conduct including additional depositions to verify compliance, because I think you've made a showing that their two affiants who they have produced did not satisfy you that they have fully complied with what they undertook to do. So I'm not precluding you from taking further depositions with respect to their compliance.

So I am not precluding you from propounding reasonable interrogatories, I am not precluding you from taking depositions, and I am not precluding you from coming back here and explaining based on what the additional depositions about process by which documents were produced including why documents disappeared, and based on what the witnesses testified to in their depositions as fact witnesses, and what the interrogatories you propound reveal that you need more documents.

What I am saying is that when you have engaged in a 16 month process of requesting and receiving documents from Exxon's auditors, agreeing

with Exxon on custodians whose files you want searched, agreeing with Exxon on what the search terms are that are going to be used to produce documents from the custodians, you can't start round two of producing documents all over again.

MR. OLESKE: Your Honor, a couple of things. I need to discuss each of the items, your Honor. Okay.

We have been in this process for 16 months. Exxon has produced literally three million pages of documents. That process took that long, and we still are without the documents we need because of Exxon's choices. They created this system of dribbling out documents, fighting us at every turn.

We didn't choose the custodians. It's Exxon's job to know where the documents, the relevant documents are, who works with the right information. Based on what we have just heard this last week now there is a whole suite of relevant facts that Mr. Wells is averring to for the first time on Exxon's behalf ever. We have not seen any documents referring to what Mr. Wells has talked about.

But putting aside the compliance with the original subpoena and those issues that do need to be resolved, that is not what we are here about. The Attorney General does have the authority even if --

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THE COURT: I understand you have the authority to ask for additional documents. I get that. I get that.

MR. OLESKE: I will get to why --

THE COURT: You have the authority. You have to make a showing that by taking depositions, and propounding interrogatories, and taking testimony from the people who supervised the production of documents, that they have misled you, and have, you know, failed to be forthcoming.

MR. OLESKE: No, your Honor, I hear that this is the critical issue for your Honor.

There are two issues: There's a legal issue and a practical issues. The legal issue is, no, that is actually not the standard. We are not required to show, to sustain document requests that we are not going to get the information we need through alternative investigative techniques that we are also empowered to use.

On a practical level in this case, your Honor --

THE COURT: You have not shown me that you have not gotten the documents that you claim you need.

MR. OLESKE: We explained that in our papers --

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THE COURT: I read your papers. I read their papers.

MR. OLESKE: The simplest example of all of these, your Honor, is that we have Exxon in our subpoena making one, two, three, four, five, six, seven, eight, eight different public representations in a different language, in different places, and different formats to investors and the public about how they have done this. The witnesses that we are talking -- by the way, they have changed that over the last year.

THE COURT: That's your case on the merits.

MR. OLESKE: My point is, yes, that's what we are investigating. That's what we have a --

THE COURT: Excuse me. Can I ask you a question?

MR. OLESKE: Yes, your Honor. I'm sorry.

THE COURT: Were the words "proxy cost" not one of the search terms that was used in connection with the production of all of these documents?

MR. OLESKE: That proves two things, your Honor, two things. Yes, it and GHG both were search terms. First of all, they refused to search the last year and a half worth of documents for those terms. Second, yes, and it shows us why we need these

interrogatories and these document requests before we decide who else we need to depose, take testimony.

The reason why we need these documents now is because, yes, we did have GHG, and we did have proxy costs as search terms, and somehow the documents that show Exxon applying this in its rigorous way and in this new alternate world that Mr. Wells has described that's never been disclosed before, they have not produced those documents.

So the answer to that is either the documents don't exist, and we will find out when they respond we don't have these documents, or Exxon was responsible for interviewing and finding the right custodians which we know from the outcome of our testimony they did not do properly. They should know where the custodians are who have the documents that substantiate any of what Mr. Wells has said. We don't have that information.

So the point is, them arguing that they complied with the first subpoena, that they executed the search terms, that this is what we have got, that, as a matter of law, cannot preclude our office from following up with additional, more specific, more targeted requests for documents, and it is, in fact, inefficient, it interferes with our ability to progress our investigation, to wait to depose witnesses only to

ask them so what documents are there, and then asking let's just get the documents --

THE COURT: Can I just ask you a question?

Why didn't you ask Exxon 16 months ago or 12 months ago, please, identify individuals at ExxonMobil who have information or knowledge about the application of an implementation and disclosure of proxy costs and greenhouse gas costs?

MR. OLESKE: We did, your Honor. We asked them for that from the very beginning.

THE COURT: Did they respond to that?

MR. OLESKE: They identified some custodians although outside counsel had no part in identifying the outside custodians. ExxonMobil's legal department by itself unsupervised identified the custodians.

THE COURT: I am not precluding you from asking that question right now.

MR. OLESKE: The point is --

THE COURT: And then if it turns out there are people who should have been previously identified and haven't been identified, then they will have to produce the documents that those people have.

MR. OLESKE: I guess the point is, your Honor, that we think it's a waste of your time, the court's time, our time, Exxon's time, for us to be

trying to relitigate the custodian's or search terms under the first subpoena. We have issued these new subpoenas, we have narrowed requests for documents and for information to make sure that we are not wasting everybody's time.

THE COURT: I think you are wasting my time because Mr. Toal said he was going to produce any documents that come into his possession that are responsive to your first subpoena and that would include 2016 and 2017.

MR. OLESKE: They refused, your Honor.

THE COURT: Well, then I am ordering them to produce those documents.

MR. OLESKE: But the other documents we are asking for, your Honor --

THE COURT: So those documents will be produced because those are documents that they had a continuing obligation to produce.

MR. OLESKE: We agree. Your Honor, when we tried to meet and confer over this we pointed that out to them. They refused to meet and confer about any of these requests.

THE COURT: We have solved your problem with respect to those custodians. They are going to honor the undertaking they made in open court on March 22nd.

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MR. OLESKE: I appreciate that. We solved that for one problem, for one of our document requests, document question number two. We appreciate, yes, they had that obligation all along and refused it. That's why we issued this targeted subpoena for that.

THE COURT: They also have an obligation to produce documents that are generally responsive to the issues that you've framed in your search terms that they are aware of.

MR. OLESKE: Right. That's why we thought had they had an obligation to produce this without a second subpoena, your Honor.

THE COURT: That's what they are going to do. That's what they are going to do.

MR. OLESKE: The additional --

THE COURT: You don't need to propound any additional document requests because they know what their obligations are and they are going to comply with their obligations.

MR. OLESKE: The other document requests are not encompassed by their failure to produce on the first subpoena. They are independently, factually-based document requests for new documents. They need to figure out, just like they always had an obligation, the people who have these responsive

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documents for these new requests for subject matters that have grown out of our investigation for which we have demonstrated a factual basis and a connection between that factual basis and these new requests. For example --

THE COURT: Let me ask Mr. Wells two questions.

Mr. Wells, you agree that Exxon has an obligation to produce documents that come to Exxon's attention that are responsive to the original subpoena that was issued, correct?

MR. WELLS: If --

THE COURT: A continuing obligation?

MR. WELLS: I don't think we have -- it's just a definitional issue. I don't think after we have gone out and searched the files, talked to custodians, and produced the documents that every day of the week until this investigation is over --

THE COURT: Not every day of the week, but if a whole year goes by from the time that the original document request was propounded, and the files get filled up with a year's worth of stuff, I am not suggesting you have to mark to market every document that comes, that's generated on a daily or weekly basis, but when a whole year goes by, and there's a

plethora of documents that respond to an outstanding subpoena, you have an obligation to produce those documents.

MR. WELLS: If that's the issue, implicit in what you are saying is if this investigation goes say another three years, G-d forbid, that either every six months or every year we have got to spend it will be millions of dollars to go back and search 142 custodian files on an annual basis. I don't think that's how most subpoenas work. That's not how it's usually done.

We have produced up to the date. Now if I come across something, okay, I don't think I have to produce it, but whether it's civil litigation or an investigatory litigation, I don't think we have, in a big production like this, have to go back and redo it at a cost of millions of dollars every six months. I don't think that's --

THE COURT: What we are trying to accomplish today with no cooperation from either party is to move the investigation from the document phase, into the deposition phase, into the subsequent phase whether that's a trial, whether that's a consensual resolution, whether that's an injunction hearing. We are trying to get beyond, you know, being stuck in a time warp where you come back to court 17 times arguing about

documents.

I suggested 15 times that you meet and confer, and come to some reasonable resolutions, and at least six or seven times we have gotten these competing motions to compel or motions to quash.

MR. WELLS: In terms of cooperation, what we all agreed to, I thought on March 22, is that we would move to the next stage. When they asked to depose the key people with respect to proxy costs, they asked for June 27, I said he will be there. When they asked for the other dates, he will be there. We didn't move to quash the deposition subpoenas, because that's where everybody agreed where we were going.

So in terms of cooperation, they asked for these four people, and we gave them.

THE COURT: I don't think it's a huge concession on the part of ExxonMobil to produce four people who the Attorney General has requested to give deposition testimony after 16 months of document production.

Let me interrupt these proceedings. Everybody stay right where you are. I have one other matter that I need to deal with.

(A recess was taken.)

(After the recess the following

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occurred:)

THE COURT: Mr. Wells, I think you had the floor.

MR. WELLS: Thank you, your Honor.

I will try to be brief.

With respect to the issue of updating the document production aspect, what I want the court to consider is the fact that to update a request of this magnitude with 142 custodians where we are now going to have to go back and interview each custodian to see what additional hard copies he or she may have, we are going to have to go back, get their electronic documents, and load them, and search them, we will have to do a privilege review, we are talking about many months of works, and hundreds and hundreds of thousands of dollars of work. This is not a situation -- I think what Mr. Toal was referring to, if Paul, Weiss comes across a document, someone has a document that we know is responsive, and we have a continuing obligation to produce it, that's a different representation he made than going out and basically redoing this document production that we have been doing for 16 months to update for another year.

With that said, if that is what your Honor wants us to do, we will go out, and we will do it.

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THE COURT: That's what I want you to do.

If you are asking me whether I think that the Attorney General is perpetually investigating things that could and should be conclusively resolved through depositions and interrogatories in a much shorter period of time than the Attorney General has already spent investigating this issue, I would tell you the answer to that question is yes. That's beside the point. They have certain statutory powers that I can't --

MR. WELLS: What we will do with the depositions? That's the next implication.

So what's going to happen is they are going to start taking depositions, these four people. I assume they will keep taking depositions. It's going to take us a number of months to re-update, update this production. Then they are going to come back and say they want to depose all the people again because now they have new documents.

So it would seem if that's what they want, that we just go back to square one and put off the depositions because, otherwise, this thing will be a continuous loop (indicating).

THE COURT: I completely understand, which is why I have encouraged the parties to meet and

confer, and save each other a great deal of time and effort, but I don't think the scope of this investigation is so massive, and that issues that they are investigating are so arcane and require such sleuthing to get to the bottom of that, that ExxonMobil's entire business has to be audited, and every document in ExxonMobil's files has to be produced. I think the answers to their questions reside in the minds of a half dozen or more witnesses who they could depose, and are reflected in some manageable number of documents which is a tiny, tiny, tiny fraction of the documents that you have produced and are going to produce. That's very clear to me.

But, again, the Attorney General has certain statutory powers. They are exercising those powers. I can't interfere with their exercise of those powers except to the extent of preventing abuses. So if they want to spend another 18 months doing what they have done for the last 16 months, I am not in a position to stop them from doing that.

But I'm not ordering you to produce any documents from any custodians that aren't responsive to the search terms that they have already agreed to. I am ordering you to produce the additional witnesses to testify about the completion of the responses to their

document requests that you claim are fully complied with, and I am ordering you to update your document production in accordance with their requests.

MR. WELLS: May we have an understanding that the update will be as of today? We need a date from which we are doing this.

THE COURT: Surely it being June of 2017, and this investigation having been ongoing for 16 months, June of 2016 seems like a reasonable cutoff date to me. You can't keep moving the goal post.

MR. OLESKE: You said June of 2016.

THE COURT: I said June of 2016. You can't keep moving the goal posts.

MR. OLESKE: The subpoena was issued in November of 2015. Okay. The events described in the subpoena run all throughout 2016. We are asking for it to be updated to the date of production. If Mr. Wells wants it for the purposes of this order to be today, that's one thing. We don't understand the basis for them only producing between November 2015 and June of 2016.

THE COURT: What do you think has changed in the last six months?

MR. OLESKE: In our documents we show, in our papers we show Exxon has changed its practices and

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has modified its representations both in, throughout the course of 2016. That's why documents from 2016 are so vital for our investigation.

THE COURT: You want documents through the conclusion of 2016?

MR. OLESKE: We believe we are entitled to them up to the present day, your Honor.

THE COURT: Look, they cannot and no corporation can be required to produce on a daily or weekly or monthly basis every document that is generated by that corporation.

MR. OLESKE: Your Honor, let me, first, go to the purported unfairness of this.

Exxon did not actually finish its collection of management documents until two months ago. It just deliberately left out the documents from the intervening gap as a matter of policy.

Second, Exxon issued two new reports on this very subject presumably involving these same people with new and different language, with new and different internal policies in April of 2017. There is no legal basis to arbitrarily decide the Attorney General cannot investigate and ask for documents about those representations which link up with all of these other representations that Exxon has on the documents we have

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seen so far.

THE COURT: You have those documents.

MR. OLESKE: No, we don't have any documents from 2016 or '17.

THE COURT: You just told me that they changed their practices.

MR. OLESKE: First of all, yes, we know that, for example, in 2016 it appears from what we have seen from PricewaterhouseCoopers, because we did that first as your Honor directed us to do -- your Honor said that these impairment requests, our request number four in your prior order, was not responsive to our first subpoena, that we had to go to Pricewaterhouse and search, which we did, got the documents, we got Pricewaterhouse's documents showing them never doing any of this up to 2016, at least for the PWC documents, and then something changes in 2016, and they start doing something new on this same subject matter.

We don't have any of the documents from Exxon because your Honor told us it wasn't responsive to the first subpoena, and to go to PricewaterhouseCoopers first. We did both of those things. We developed this information inculpating the company. They have continued to make representations to the present day.

We are asking for not just this update, but,

for example, when it comes to impairment, when it comes to Exxon's documents about value, its long-lived assets that were previously ruled not part of the first subpoena, we connected their relevance to our factual basis, we have shown why the subject matter is tied to Exxon's representations and our potential fraud case.

Your Honor had previously precluded us from getting these documents --

THE COURT: I may be obtuse, but it seems to me that you will have these witnesses, and these witnesses have percipient knowledge of Exxon's practices.

MR. OLESKE: They don't have knowledge of that. That's part of the point of these documents. Some of these document requests are not for stuff covered by the first subpoena. They are not -- these witnesses -- this is the other bigger picture, if I can step back for a minute, your Honor.

The standard here for stopping us from any of these requests including the document requests is that it's not going to recover anything, any information that is relevant. In fact, the showing has to be that it's utterly irrelevant to our investigation. Now I understand, your Honor has referred multiple times, so has counsel, to depositions. These are, in fact, not

depositions. These are investigative hearings that the Attorney General has chosen these four witnesses to start with. We have other, many other employees from Exxon --

THE COURT: I am sure you are going to take dozens of --

MR. OLESKE: But we can't decide -- this is the point: Exxon is inviting you into something dangerous here. Exxon is inviting the court to decide how the Attorney General should stage its investigation, and to make judgment calls that we don't really need these documents now to decide what witnesses we will take down the road, we don't need those witnesses now to find out whether or not we heard what we need to hear from these witnesses. One of these document requests is for the documents relevant to the interrogatories that your Honor has already ruled we take.

THE COURT: Look, respectfully, there is a hard way to do things and there is an easy way to do things.

MR. OLESKE: We have been trying --

THE COURT: The easy way to do things, the easy way to do things is to examine witness X, ask witness X, who knows about this, that or the other

thing. Then examine the witnesses who were identified by witness X, and examine each of those witnesses who knows about this, that or the other thing. And if you had done that on day one you would be a thousand yards ahead of where you are today.

MR. OLESKE: Your Honor, with all due respect, that has not been our experience in this investigation. We have examined so far two witnesses in testimony, and, no, it has not been an efficient process, and our discretionary determination during the course of this investigation is that we needed these documents to figure out who to depose, and what questions to ask them, and to be able to evaluate, sorry, to take testimony from and to evaluate their testimony. We still need the documents for the same reason.

There is no legal basis, Exxon has not met any of the legal standards to deny us the factual basis to proceed or to show that these document requests are burdensome in any way. They have not met any of their required factual showings.

THE COURT: You don't think it's burdensome to search 130 custodians?

MR. OLESKE: As a matter of law, your Honor, even if Exxon had come into this with clean hands, as a

matter of law, no. For large companies that are spread all over the world, that have these kinds of operations, and when the allegations of potential fraud cover those operations, the courts have been unified, no, it is not a reason to deny such a request.

Your Honor, more importantly, the fact is, Exxon's hands have not been clean in this. Exxon refused to meet and confer with us about these requests before we came in here. We were happy to talk to Exxon about how these could be staged or prioritized, how they could be narrowed, how the interrogatories could help defer the need for some of the documents. We were happy. They refused, your Honor, and forced us here and now have to substantiate, contrary to the law, each of the bases for our document requests even though in our papers we demonstrated their connection to our factual basis, how they are narrow requests aiming at information that either was improperly withheld the recent documents from the original subpoena or requests that were not covered by the original subpoena that are vital for our continued investigation.

Again, with all respect, this is not a civil discovery dispute where the court has the wide discretion to gauge whether or not in what order it's most efficient for us to obtain discovery. We are

conducting an investigation in which the choice of whether to ask this question or ask for these documents or examine this witness is entrusted to the good faith of our office that we enjoy a presumption of, and that they have not, for all of the sideshow talk, have not overcome that presumption, again, the right way for this to have been done was for them to meet and confer with us, and talk about --

THE COURT: I agree that the parties should have met and conferred, but I believe that I have the inherent authority to assure that there is some degree of proportionality and rationality in the manner in which the investigation is being conducted.

MR. OLESKE: The issue then is, what is the dispute with the proportionality or connection of these specific requests in addition to the updated documents? I mean, we have heard none of that. Exxon has not even tried to give your Honor that.

THE COURT: Okay. I've indicated that you can propound any interrogatories that you want that are fair and non-burdensome and calculated to advance your investigation. I've ordered Exxon to update its production.

If you've identified potential documents that are relevant to your investigation here in open court,

and Exxon is on notice of the existence of such documents, they have an affirmative obligation to produce them.

MR. OLESKE: Not for documents, your Honor, that you have already ruled were not covered by the first subpoena. That's why we issued these updated and renewed document requests, was to obtain beyond the updated information that they owed us and your Honor already ordered. These other subject areas are areas that were not part of the original subpoena, are not part of some obligation for them to make continuing production. As much as unfortunately this may be distasteful to the court, the fact is, we have met our burden. We have a factual basis for these requests. They are connected and focused on that factual basis.

Exxon had a legal obligation to demonstrate how any one of these requests for new information, new documents that were not covered by the original subpoena, at least they argued so far, why any of those are burdensome in the way that meets the standards of the law or disconnected from our factual basis in the way that meets the standards of the law, and they have not done that.

THE COURT: But you can secure, you can secure the information by interrogatory that will

establish to your complete and total satisfaction in a simple response to interrogatory what would take you a man year to figure out by making them spend millions of dollars to produce, you know, another million documents.

MR. OLESKE: A couple of things.

First of all, that simply is not the case with these facts, these documents, and these witnesses. It shouldn't take -- it should not be a legal standard, any substantial interference with Exxon's business given its virtually unlimited resources which the court and counsel have previously noted.

We are only talking now -- presuming that our document request number two, which is -- this is our subpoena which was Exhibit T to Mr. Anderson's affirmation -- our document request number two is for the update. We have addressed that. Our document request number one is for documents relating to or substantiate the answers to our interrogatories. I assume that's not really -- I assume your Honor is okay with us asking for that.

THE COURT: Absolutely.

MR. OLESKE: All we are dealing with now are four document requests. One of them is for, I've identified in our interrogatory. One of the

interrogatories they refused to answer was for a list of people on a committee that handles their reserves. They refused in the meet and confer to give us the list of people.

THE COURT: They have to give you that.

MR. OLESKE: Number three, document request number three is just to add those people, these people that were on the reserve committees that they didn't previously identify, add those people to the prior list. That's number three. That's consistent with your Honor's --

THE COURT: That's consistent with what I have held.

MR. OLESKE: All we are now talking about is request four, five and six.

Number four are those impairment documents that your Honor previously ruled were not part of the subpoena, told us they are the PWC. We did, we found out there was inculpatory information, and now need to see Exxon's documents about it. We have drawn a clear line --

THE COURT: I don't understand. You have the documents from PWC.

MR. OLESKE: Pricewaterhouse's accounting documents about the process of taking impairments, but

we don't have Exxon's documents about that same process where they represented to investors that they have conducted this analysis, and apparently have now changed their mind in the last year, started doing it. We don't have that because your Honor denied our original attempt to enforce the first subpoena as including that subset of documents. We don't have those documents.

You told us to go to Pricewaterhouse first because we had a subpoena to them. We did. We have gone through that. We have found the inculpatory information there and now we need the connected evidence from Exxon. It's a straight line. There is no basis to restrict us from getting those documents from Exxon. That's number four.

Number five, this is amazing, this is the simplest request of all. Exxon refused this in the meet and confer. They can push a button. We asked in number five for documents they produced to the SEC. They have that on a compact disc. They have a disc sitting in their office that is document request them five. They refused to give it to us.

Document request number six, finally, is communications between Exxon and the banks. Again, Exxon's position's not responsive to the first

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subpoena. That's a very narrowly identified, easily identifiable set of documents which is Exxon's communications of the facts.

It appears that really our document requests one, two and three the court's already agreed we are entitled to, and four, five and six, I am trying to emphasize here, these are narrow requests, not covered by what your Honor was assuming would be covered by counsel's representations or Exxon's ongoing obligation. These are specifically targeted requests for new documents that were not covered, that we have connected to our factual basis, that Exxon has made no showing of burdensomeness, giving us a copy of the CD. That's what they are here opposing, refusing to meet and confer on.

Your Honor, it's clear that the court has seen this go on, seen us come back here, and your Honor said that the court's not had help from either party in moving the investigation forward. With all respect, we beg to differ. We have been trying very, very hard to move this investigation forward. We are moving forward with the testimony. We are moving forward with the questions. We need to move forward with the documents.

The fact that we are asking to fill in the gaps of our document collection with known relevant

evidence that should be easy get, that we had every legal entitlement to get, it's simply not on Exxon to come into court and say the Attorney General should not run their investigation this way, the Attorney General should wait another two or three months to ask witnesses, and then, oh, yes, of course, you need those documents. That's not from our perspective an efficient way to stage our investigation.

With due respect, it's not a civil discovery proceeding. This is a subpoena compliance proceeding. We demonstrated our legal authority to demand these documents, specifics ones, all of them that we ran through, and, frankly, we don't see how there is a legal basis as opposed to an understandable desire. We share that desire to conclude this investigation, but we have to be able to conclude the investigation within the ambit of our authority that's been properly exercised and exercised with good faith.

THE COURT: Mr. Wells.

MR. WELLS: Well, I thought he was going to try to be practical and propose some type of practical solution. I was wrong. It seems we are back to the very beginning because if you listen to him, he is suggesting that your Honor has now ordered us to engage in months and months of preparing spreadsheets for 12

years of projects, all the underlying documents, because that's what he said. He said, okay, number one is done, number two is done. He is checking boxes like the court ordered something. I told him, I am confused --

THE COURT: I have made it very clear. We are not going for 12 years at every project. I have made that very, very, very clear.

MR. WELLS: Thank you.

So at the moment he checked so many things off. I am not sure what is being ordered and what is not.

I started trying to be cooperative saying we would update. We understand it adds costs, it will take months, and what I hear them saying is no matter how much updating we do, there is always going to be more because we do an Energy Outlook every year. So I guess we are going to be updating for three years, four years. Look, there has got to be a stop date. I believe that there is supposed to be a stop date, and I don't have to go out and redo a multimillion dollar production, multiple times. I don't think that's the law. Listening to him it is clear, whatever we do, we are going to be back arguing about updating again because he does not want any end date.

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Maybe what we should do is have your Honor rule, we will go to the Appellate Division, see what the updating rules are, because I don't think they can do what they are saying they can do which is continually make us spend millions and millions of dollars, whether it's a monthly basis or every six months, ad infinitum into the future. I don't think that's rational. I don't think that's proportional.

I tried to be reasonable. Every time that you try to be reasonable, with all due respect with them, you get back because they -- look, this is not a normal investigation. It is a political witch hunt. That's what it is. They cannot clear Exxon. The Attorney General cannot be in a position of clearing the largest fossil fuel oil company in the world. They know it. I know it. So our documents show that we have not done anything wrong, anything.

This investigation started in November 2015. What they said was Exxon knew about secrete science, Exxon was keeping the secret science buried, and going out and being climate deniers. Then after months of looking at our scientific documents they said, oh, we don't want any scientific documents, stop giving us the science because our science shows that Exxon is totally innocent.

Then in August they changed the theory. They went to a stranded asset theory, and we read about it the newspaper. Every time they do something, they go right to the press. We read in the newspaper. Now we will do a stranded asset theory. That goes away.

Now we have a new theory. It's exactly opposite than the first theory. The new theory is, we say in our documents how serious climate change is, but internally we don't pay that much attention to it.

So they totally flip-flopped the theories. We are on the third theory now. There is nothing there. That's why that document that I wanted to go through with your Honor, I won't burden you with it, it's a PricewaterhouseCoopers internal document. It says with respect to proxy costs that that's what is used for projecting demand and ultimately the prices. It says with respect to GHG costs, how we apply them in specific locations, it says Exxon has one of the more conservative proxy costs of any oil company, and Exxon does this in the most conservative fashion.

All of that is in the document I wanted to walk you through. It puts the lie to all of his statements, that they are inculpatory, it's a sham. I mean, they just stand up here as officers of the court and say whatever comes to their minds even if they have

documents that contradict. At the end of the day, I am quite sure, they can't clear us. They can never clear us as innocent as we may be because it's politically unacceptable for them to do it. So we will end up continuing to produce, produce, produce.

THE COURT: Look, the best suggestion that I've heard is the one that you just made, Mr. Wells, which is you can take this to the Appellate Division. Take this to the Appellate Division because we are way beyond proportionality, and in my judgment no reasonable court could conclude that if you are searching for the search terms that they agreed to, and which were subsequently supplemented in the files of 134 people, and you have agreed to update that search through 2016, and they can propound interrogatories, and they can conduct the examination of the four people that they want to conduct to verify that you've fully complied through 2015 with all of their demands, that that isn't reasonable under all the circumstances. And if the Appellate Division decides that they can spend the next three years changing their theory, and imposing additional documentary burdens on you when they are free to depose anybody in their corporation that they choose to for the benefit of several million pages of documents that you have already produced and

the additional documents that you are going to produce, then so be it.

MR. OLESKE: Your Honor, --

THE COURT: That's the ruling of the court.

MR. OLESKE: -- may I respond to this issue of --

THE COURT: Look, you each have the obligation to zealously represent your clients. You have a different view of the world than Mr. Well's client has a view of the world. I'm just trying to call balls and strikes.

MR. OLESKE: Your Honor, I guess my -- part of my point is, I want to clarify first what exactly your Honor's ruling is because my understanding is that your Honor is saying they have to give us the documents that are responsive to our requests, one, two and three which --

THE COURT: No. If your request is that they have to give you information about every project that they have been involved in for the last 12 years, the answer is I absolutely, positively, definitely never intimated, suggested or ruled that that's what they have to do.

MR. OLESKE: I guess what we are a little tied up on is the distinction between our requests for

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information and our document requests because your Honor has made it clear that we have the right to ask interrogatories.

THE COURT: Yes, you can ask all the interrogatories you want, and they will respond to those interrogatories. If they fail to respond to those interrogatories reasonably you will be back here, and I am going to sanction them for failing to answer interrogatories to which they have no proper objection.

MR. OLESKE: Does that mean -- we are talking about the interrogatories we have. Does that mean the court is --

THE COURT: To the extent that they have interposed objections, we will have to rule on the objections.

MR. OLESKE: That's not how -- there is no process for objecting to subpoena requests, your Honor. The process is for them to move to quash on a specific basis that they have. We should have met and conferred about it, and they refused.

THE COURT: Yes, you should have met and conferred --

MR. OLESKE: They refused --

THE COURT OFFICER: Counsel.

THE COURT: If they don't want to meet and

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confer about it, then we will have to go interrogatory by interrogatory and ascertain whether they should be quashed or not.

MR. OLESKE: Your Honor, it's their burden to do that on their motion to quash, and they didn't, just like they didn't do any of the other things.

The document requests your Honor is talking about quashing here are document requests that are not covered by original subpoena, that we have met all of the legal requirements to show. It's just not that they are not utterly irrelevant, which is the actual standard. We have shown their incredible probative value, how they were not part of the first subpoena, how we need them for our investigation --

THE COURT: We are talking passed each other.

I've granted you the ability to propound any interrogatories you wish that conform to reasonable standards of what an interrogatory can properly request under these circumstances. I've granted you the ability to take the nine depositions that you are seeking, several of which relate to the appropriateness of their compliance with your prior document requests. I've granted you the ability to depose anybody in the Exxon mobile organization whom you need or want to

depose.

MR. OLESKE: One note on the testimony, your Honor. Your Honor mentioned nine witnesses. We should point out that it's been unresolved, but Exxon is resisting producing one of those witnesses for testimony who is a secundate -- I'm sorry -- an employee of Imperial Oil.

THE COURT: I have overruled that. I granted you the depositions of all of these people. All nine of these people, I have granted you the right to propound any interrogatories you wish to propound.

They have undertaken to update the document production pursuant to the original subpoena.

MR. OLESKE: Yes, your Honor.

THE COURT: I believe that that is all you can reasonably ask for, and all you're reasonably entitled to, and if the Appellate Division disagrees, the Appellate Division disagrees.

MR. OLESKE: Can I ask your Honor to consider one thing, to begin with, on the specific request?

Our request number five that your Honor was just talking about quashing is for them to give us a copy of the CD they already have that they produced to the SEC. That's our document request number five.

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There is no years of identifying anything. It's pushing a button, giving us a copy. We don't see what the basis for quashing that is given that it's pushing a button.

The other key request here though, what I guess the Attorney General is asking for guidance on, what the basis is for so we know what to do, is these documents that we have been hunting down for impairment purposes, that we, as the court directed because they were not part of the first appeal, went to the PWC, found this inculpatory stuff, and now are going to Exxon looking for those documents. What is the basis for us -- these witnesses will not answer those questions. This is a different subject matter. Why is it -- at what point are we able to get those documents because we feel like we have done what the court asked you us to do to get them. Now we are here, we have made our showing, and there is no legal basis to deny it, except that it's too much.

THE COURT: I think the information is going to be disclosed in response to a properly framed interrogatory.

MR. WELLS: Your Honor, we would like, we would like to be heard on these before you rule in terms of a Canadian employee. We would like to have

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argument on that.

THE COURT: All right.

MR. WELLS: We would like to have argument on Dan Bolia who is the internal Exxon lawyer with respect to the compliance because we think that raises attorney-client privilege issues different from the --

THE COURT: I am not overruling any privilege claims that you have which would be asserted in any deposition. I am of the view, which may be one that the AG disagrees with, that the deposition process in this case and interrogatory process in this case is a much more productive, efficient and cost-effective means of securing information that the Attorney General is legitimately entitled to pursue in its investigation. I'm sympathetic to the fact that the document demands are disproportionate to the years in terms of advancing the investigation, but I will hear you.

MR. WELLS: With respect to what was an offer of compromise, I offered to update through 2016.

THE COURT: Yes.

MR. WELLS: I understand they have rejected the offer because they want to be able to get through 2017 and continually --

THE COURT: I am not allowing that. I think

your offer is reasonable. I don't believe that it is your obligation to produce documents as they are generated on a rolling basis. I don't believe that at all.

MR. WELLS: It appears we are on that issue heading to the Appellate Division. I am trying to figure how it's couched. I am being somewhat --

THE COURT: Apparently you are heading to the Appellate Division, and I think I have been very clear that I don't believe that in an investigation that started in 2015 in which you produced millions of pages you have an obligation on a rolling basis to produce documents as they are generated internally in the conduct of ExxonMobil's business. I do believe that you have an obligation to make a continuing production of any relevant documents that they have previously inquired about or come to your attention, and you've voluntarily agreed to produce, to update your production in response to the original subpoena through the end of 2016.

MR. WELLS: Which offer they rejected.

THE COURT: Well, that's the order of the court. That's what will go up to the Appellate Division, the reasonableness of your offer which the court has found to be reasonable.

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MR. WELLS: On that -- I don't plan to go out spending money until we figure out what the new dates are.

THE COURT: Nothing is precluding the parties from meeting and conferring and coming to other and different things that have been discussed and ordered this morning.

MR. WELLS: Mr. Toal would like to address the question of the witness who lives in Canada, and also Dan Bolia.

MR. TOAL: Your Honor, starting with the issue of Dan Bolia, this is one of the four depositions the AG requested on the topic called discovery, about our discovery process. Now we think the witnesses who were already provided, Connie Feinstein, a 20 year veteran of Exxon's IT Department, was in charge of implementing holds, and Michele Hirshman, who is my partner, senior partner at Paul, Weiss, who had oversight over the entire discovery process, and signed the affidavit of completion, we think those are more than adequate. They have fully addressed the topics in our submission to the court.

The AG said they were not satisfied with our submission to the court. You found it very detailed. You agreed they should get an affidavit, they should

have the opportunity to test the assertions in the affidavit in the deposition. That's exactly what happened. So those witnesses were able to testify competently about the subjects of the respective affidavits or certifications.

THE COURT: If that's true, Mr. Toal, then these other witnesses are simply going to come in and say everything that the two prior witnesses have testified to is correct, and the AG will have wasted some of its time and a lot of your time.

MR. TOAL: That's part of the problem, your Honor.

THE COURT: I understand. That's what they are seeking. That's what I am granting.

MR. TOAL: So I understand the ruling generally.

Mr. Bolia, is in-house counsel for ExxonMobil. He has day-to-day responsibility for the management of this case. There is a special standard that applies when the opposing part is seeking to depose in-house counsel.

THE COURT: Agreed.

MR. TOAL: That's one that the AG did not even take on in this case. They have to show they have no other means to obtain the information they are

seeking. They have not shown that. They have to show the information sought is relevant and not privileged. They have not shown that. They have to show that the information is crucial to the preparation of its case. They have not shown any of those things.

THE COURT: Nobody is precluding an attorney from asserting attorney-client privilege. Normally that wouldn't attach to knowledge that the attorney has about how documents are being assembled, but we can deal with it on a question-by-question basis if necessary.

MR. TOAL: Thank you, your Honor.

If I could turn to the issue --

THE COURT: I think that the one thing that ExxonMobil wants to nail down here is that you have fully and completely complied with the subpoena. That's the one thing that I would think you would want to have nailed down here, and if it takes seven witnesses for the AG to be satisfied that you have fully complied with the subpoena, the AG is doing you a favor.

MR. TOAL: I don't think the AG has been doing us any favors. I don't think the AG will ever be satisfied. I think part of the game is to impose a burden here. I do think we established through the

affidavits and certifications that we have complied fully with our discovery obligations, and the types of questions that the AG points to that the witness identified somebody else have to do with details. There's been no showing that that information is in any way critical to their evaluation of our compliance with our obligations in the subpoena, and many of them have to do with the internal searches of the management committee custodians which is entirely irrelevant at this point because we redid the entire production of management committee custodians in precisely the way they say it shouldn't have been done.

I don't think these are good faith depositions that have a reasonable basis.

THE COURT: If you are asking me whether this is being handled in a proper, proportional manner, I would tell you I don't think so, but they are entitled to do this.

MR. TOAL: As to the witness from Imperial, one of the witnesses they have sought, one of the substantive witnesses, is a gentleman named Jason Iwanika. Mr. Iwanika is a resident of Canada. He is employed by Imperial Oil, not employed by ExxonMobil. Imperial is a Canadian company. It does business exclusively in Canada. Exxon owns about 69 percent of

its stock. The AG is of the view that ExxonMobil controls Imperial, and, therefore, controls Mr. Iwanika.

The standard for establishing corporate control requires that a subsidiary be operated as a mere department of a parent organization, and in that circumstance the companies have t to have merely identical ownership interest before one corporation is deemed to be a mere department of another. Imperial is not a department of ExxonMobil. It's a separate corporation. Thirty percent of its shares are owned widely on the market. Five of the seven directors have no connection with Exxon, no prior employment history. Exxon does not have the ability to hire, fire or discipline Imperial employees, which is important because that deprives us of any way of compelling Mr. Iwanika to appear.

We can't -- Exxon can't approve Imperial employee expenses and can't enter into agreements on behalf of Imperial. ExxonMobil's policy guidance takes effect at Imperial if and only if Imperial, Imperial's management approves those policies. So the AG has not carried its burden of demonstrating here that Imperial is a mere department of ExxonMobil.

The thing the AG does point to is that Exxon

produced certain documents from Mr. Iwanika. That was pursuant to a request we made for Imperial to make those documents available to us. They did it. At the time they did they said we are doing this as an accommodation both to Exxon and to the New York Attorney General, but this is not going to compel us to make any further productions or to do anything else. They made their determination when the Attorney General requested the presence of Mr. Iwanika in New York for examination. They weren't willing to do that, they weren't willing to make that accommodation, and Exxon does not have the ability to compel an employee of a separate organization to appear. So that's one I just don't think we have the ability to comply with.

MR. OLESKE: Your Honor, I appreciate your Honor's perspective that this has gone on for so long, and seems to the court to be thwarted. Obviously, that's obviously not our belief. We believe we have been as efficient as possible. The difficulty has been in dealing with representations about prior compliance or about matters before the court.

I have got -- counsel testified, like they did in their affidavit and they did in their brief, they have given you attorney attestations to facts. This is Imperial Oil's 10-K (indicating). "By virtue

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of majority stock ownership of the company by ExxonMobil, the company's considered to be an entity not controlled by Canadians." The company -- the company is a controlled company for purposes of the New York Stock Exchange and the Toronto Stock Exchange, and Exxon mentions that only two of the seven directors are employees of ExxonMobil. The president of Imperial Oil is not an employee of Imperial Oil. He is an employee of ExxonMobil Corporation. The president of Imperial's salary is paid by ExxonMobil Corporation.

That's kind of a big picture.

THE COURT: You don't have to say any more. I ordered these depositions to proceed.

MR. OLESKE: Thank you, your Honor.

But, your Honor, if I could, I just -- if we dealt with all of the depositions, if we have dealt with -- I presume, and I don't want to presume, I want to clarify with the court, we've propounded these interrogatories. We think they should have met and conferred with us in the first place. Our understanding is that you are ordering, as we asked, for compliance with these interrogatories, but, that, of course, we are going to talk to them about fulfilling those interrogatories. I am asking for guidance on that point.

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As to the document requests themselves, I guess I am trying to drill down on, it appears that we have got the court's okay for the ones that we previously discussed, and I'm just getting to these three other ones, the one that's a copy of the SEC documents. I am asking, I guess, is it the court's order that we are not entitled to get that? We are not going to get that information from witnesses. That's a disc of information that they have previously given to another regulator that they have copied.

And the documents, the impairment documents, we have gone through all the other routes the court sent us through to get what we need, that these witnesses are not about, and that we could theoretically could be waiting months and months to depose, to take testimony from witnesses about that in the blind without these documents.

So, again, I understand the court's perspective about the overall duration, millions of pages, although many of these pages are duplicative as you would expect. Putting that aside, these requests are not for everything. It's for copies of a compact disc and for a range of documents that PWC has already produced on, and we have been looking for now for seven months. They refused to give to us when we asked.

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Your Honor told us to go somewhere else to look, and we did. Your Honor said you can issue another subpoena, and we did.

So I guess the question is, can we ask the court to reconsider, in addition to the other ones, ordering the reproduction of that one disc or that set of documents given to the SEC, and the production of the documents that we have been trying to get, and that we followed the steps that the court said to follow to get. Now, I mean, based on what the court is saying about we have to stage our investigation a certain way, now we will have to figure out how to identify the witnesses at Exxon for the testimony you are talking about on this impairment issue that weren't covered by the first subpoena because we don't have Exxon's documents from -- we working from PWC's documents.

It doesn't make sense in terms of the very issues that your Honor has talked about. There is no basis to restrict us from getting responses to that request. While at first I understand it seemed, based on Exxon's presentation, we are asking for everything in the world. We have asked for very narrow categories, and we don't see a basis to quash them.

MR. TOAL: Your Honor, I find it difficult to understand how these sets of interrogatories and

these sets of document requests can be characterized as targeted or specific as they attest in their brief. I found that difficult to understand. They seek documents for 12 years concerning virtually every project Exxon has not only pursued, but even considered, every impairment decision, every reserve decision. It's difficult to imagine. If you were trying to come up with a broader subpoena you would be hard-pressed to beat this one.

THE COURT: I agree. I agree.

So what I haven't done is, I haven't ruled interrogatory by interrogatory to the scope of the interrogatories. I have ruled that the AG has broad powers to propound reasonable interrogatories that are relevant and not excessively burdensome. Clearly an interrogatory that asks for information about every project that Exxon has considered and every project that Exxon has pursued in a 12 year period is unreasonable on its face, and such an interrogatory would be quashed. If we are going to have further proceedings about the scope of interrogatories, if you can't work out a meet and confer process, we will have another meeting and I will rule interrogatory by interrogatory.

It's the court's view, right or wrong, you're

free to get guidance from a higher court, that by propounding interrogatories, taking depositions, and obtaining full compliance with the prior subpoena with the search terms that address all of the issues that you are concerned about, you are in a position to get any information that you need. If you disagree, you have recourse.

MR. OLESKE: Your Honor, I guess it's not so much that I disagree. Your Honor keeps pointing out that we have these search terms with the original subpoena. The point is, these requests are for documents not covered by the first subpoena. Your Honor already ruled that --

THE COURT: I just can't believe that you don't have major amounts of information about this subject based on the search terms that you utilized and 134 custodians.

MR. OLESKE: Two things: We are surprised too, although after --

THE COURT: That's why I am giving you leave to conduct the deposition of five people about the appropriateness of the compliance that Exxon has made in terms of your original subpoena.

MR. OLESKE: Right, your Honor.

THE COURT: So if you come back here and you

say we just deposed X, and X has indicated that Exxon wrongfully discarded all of the relevant documents, well, then we will have a different discussion than we are having today.

MR. OLESKE: I apologize, your Honor.

I guess what I am getting at is, you are right, we got that remedy, and we appreciate that, for potential spoliation or noncompliance with the original subpoena. The issue is, these are subject matters that are relevant to our investigation that we have connected and met our legal burden to connect with our investigation that are not covered by, would not be satisfied by the process your Honor is talking about, and one of them is copying the compact disc, and the other is giving us a production that we moved for a year ago, and your Honor gave us instructions on how to get these documents, and we have done that, and are not covered by the process your Honor was talking about is what the basis for us not being able to get those documents. There is -- Exxon has not made any showing that it's not legally required nor to resist these.

In terms of the interrogatories the fact is that it is Exxon that chose to represent to the investors and to the public that it does this for all of its decision. It applies this across its -- and

they represented further that they have a comprehensive computerized system to manage all of this information responding to requests that ask them to give us the data and information for something that we tell the public to do and you tell the public you keep track of vigorously cannot be on its face burdensome.

THE COURT: I agree with that.

As I have said, I have not ruled on any specific interrogatory and I am prepared to rule on interrogatories. Everything that you have just said about, you know, what you might ask in interrogatories or have asked in interrogatories sounds reasonable to me.

MR. OLESKE: The question then on the court's ruling on the interrogatories, is the court denying the motion to quash, granting our motion to compel, and, as we would expect, leaving it to us hopefully this time to meet and confer?

THE COURT: I am leaving it to you to meet and confer with the understanding that if you cannot come to a resolution on interrogatories, we will have and all day session, and I will go through the interrogatories with you one by one and rule on any interrogatory and any subpart. So I am not precluding you from asking by interrogatory anything you want to

ask, and I am not precluding them from moving to quash some, most or all of the interrogatories that you propound.

MR. OLESKE: Understood, your Honor.

THE COURT: I am just ruling that you have an absolute right to propose reasonable interrogatories.

MR. OLESKE: Understood, your Honor.

I guess my question for these document requests is, could I suggest to the court, respectfully, that your Honor at least not quash these requests for these documents?

THE COURT: I am going to leave it to the two of you to have a further meet and confer informed by what we have spent the last two and a half hours discussing. I think you have specific rulings by the court which either party is free to appeal, and general observations by the court which you hopefully take into consideration as you meet and confer.

MR. OLESKE: Your Honor, I don't know what's going to happen with the Appellate Division, but for those purposes, because I hear that at least that will happen, I just want to clarify what the court's rulings are. My understanding is that your Honor has granted our motion to compel on document request number two

which is about the updated documents, but not through the current date, through the end of 2016.

MR. TOAL: Your Honor, this is about the fifth time Mr. Oleske has tried to reframe your ruling.

THE COURT: My rulings are all reflected in the transcript of the proceedings, and it won't be difficult to read the transcript and distill the rulings. I understand that Mr. Oleske is persistent.

MR. OLESKE: I was asking for a question of clarity to determine which issues your Honor has actually made a ruling on as opposed to which issues have been deferred and not ripe for appeal.

THE COURT: What I have ruled is that you are entitled to take nine depositions. I have ruled that you are entitled to propound interrogatories. I have not ruled on any motion to quash any portion of any interrogatory that you ask. That's what you meet and confer on. And I have ruled that Mr. Wells' undertaking to update the production through the end of 2016 of your original subpoena with the search terms that have been used is a reasonable concession by Exxon and is being adopted by order of the court.

MR. OLESKE: Understood, your Honor.

We previously discussed -- that is a modification of our document request number two which

is the updating one that your Honor limited to 2016.

Our document question number three which, I believe, your Honor previously granted was for the updating of the production for the individuals to be listed in response to our interrogatory number nine which asks for a list of people who worked on reserve committees which they have not previously disclosed to us.

THE COURT: I think that's an interrogatory, and I think, maybe I am wrong, I thought Exxon agreed to do that.

MR. OLESKE: The interrogatory asked them to identify the people who served on these committees that they have not identified to us yet, and to produce their documents.

THE COURT: I think that those people need to be identified.

MR. OLESKE: Document request number three is for their responsive documents, for them to tell us who they are, and give us their responsive documents.

THE COURT: That's something you will meet and confer about.

MR. OLESKE: I guess the remaining ones, it's really not a large list --

THE COURT: We will not go through this, the

six items, for the eighth time. I just recited everything that I have ruled. I am not going to do it again.

MR. OLESKE: All I am looking for is whether or not requests four, five and six are being quashed.

THE COURT: They are not being ruled on today in the manner that you want them to be ruled on.

MR. OLESKE: I assume your Honor is directing us to meet and confer about four, five and six.

THE COURT: Yes.

MR. TOAL: We did ask in our motion for a protective order. We have now produced 2.8 million pages of documents. The AG is trying to get production of even more. Your Honor's ruling that we will update the production certainly will result in more documents.

This is highly sensitive corporate information. Each of our production letters expressly advises the New York Lieutenant Attorney General that this is confidential commercial information. It is to the benefit of ExxonMobil's competitors. We invoke the legal protections under New York law for that material to be treated confidentially, and we also reference in each production letter the agreement of the parties that produced documents not be publicly released and

disseminated or publicized.

THE COURT: They have agreed to what you are seeking?

MR. TOAL: They have not. When they filed their opposition brief they appended confidential business information of Exxon to their submission without conferring with us in advance, without giving us any notice, without giving us any opportunity to object and to seek the sealing of these documents which are sensitive.

THE COURT: Mr. Oleske, do you object to this? You agree to keep this information confidential?

MR. OLESKE: Your Honor, okay, we agreed not to disclose documents outside of our investigation to third parties unless we were required to for legal purposes. Exxon came in here and challenged the Attorney General's factual basis for its investigation in a public proceeding. We responded by attaching documents that are not trade secrets, that are simply evidence of Exxon's prospective fraud. Going forward, it is not appropriate to put a blanket seal --

THE COURT: I agree with that.

MR. OLESKE: -- on a case-by-case basis. If Exxon wants to say this particular document is a trade secret and so it should be sealed when it goes into

court, they can make that on a case-by-case basis. If going forward they don't trust us to know what is a trade secret -- now they have not actually moved to seal any of the stuff we did disclose on the basis that it was a trade secret because it wasn't.

The question is, if going forward they want protocol where they have the opportunity to seal documents because they are actually genuine trade secrets as opposed to embarrassing or evidence of fraud, it's going to be hard for us to oppose a mechanism for them to preemptive protect the trade secrets.

MR. TOAL: That's what we are asking for, a mechanism, a ground rule, so we can protect our confidential business information.

MR. OLESKE: There is a big difference between those two things.

THE COURT: I'm assuming, despite the gulf between the parties, that the attorneys are going to act in a professional manner, and if you, Mr. Oleske, have agreed that you are not going to disclose trade secrets of Exxon, I would expect that AG's Office to, at a minimum, advise counsel for ExxonMobil in advance if you are planning to file something that you have any reason to believe Exxon might consider to be a trade

secret.

MR. OLESKE: Understood. If we are talking about --

THE COURT: With respect to what has already been filed, the cat's out of the bag, Mr. Toal.

MR. TOAL: I agree. That's why -- there is nothing we can do. I think this concept is not limited to trade secrets. This is not just the formula for Coca-Cola. This is competitively sensitive information that can be used by a competitors.

THE COURT: I agree with that.

Your agreement with the New York AG seems to cover, you know, any commercially sensitive information and I thought I heard Mr. Oleske say that at a minimum before he files anything in court which is going to be released to the newspapers, before you come to court, that he give you the opportunity to object.

MR. TOAL: Thank you, your Honor, that's what we were looking for.

With respect to the depositions that are upcoming, we would ask --

THE COURT: The same rules apply.

MR. TOAL: Beyond --

THE COURT: The same rules apply. If they elicit testimony that represents trade secrets or

sensitive commercial information, I think Mr. Oleske agreed before he publishes that to the public or files a report, he will extend the courtesy to you to give you the opportunity to seek judicial intervention to prevent that from happening.

MR. TOAL: Thank you, your Honor.

With respect to the length of the depositions, we have depositions coming up. We would ask that depositions presumptively be a day long. We are having witnesses for the most part coming in from Texas. We would agree that the AG --

THE COURT: I don't think he will agree to that. I am not going to order that, but I think you can meet and confer and come to some understanding. Certainly I am not going to allow the AG to depose your witnesses for a week or two weeks.

Again, there is going to be proportionality, and I can't rule in advance that a particular witness is being examined for any excessively long period of time because some of your witnesses may have information on a multitude of subjects, and it may take more than a day to depose them about their knowledge of those subjects.

MR. WELLS: Your Honor, a housekeeping matter. I want to make sure for the record in case

either side goes to the Appellate Division that the slides that I handed to the court and the Pricewaterhouse documents I handed to the court were marked as Exxon exhibits for the purposes of the file.

THE COURT: They have been marked.

MR. OLESKE: And the 10-K from Imperial Oil Ltd. that I referenced, I would like to hand up and have marked, as well.

THE COURT: Okay. You can check with the court reporter before you leave to be sure that everything that you want in the record is in the record.

MS. SHETH: Your Honor, Manisha Sheth, Executive Deputy Attorney General, Economic Justice Division of the AG's Office.

Very briefly, Mr. Wells referred to this as a politically motivated witch hunt. I would like to correct the record on that.

THE COURT: The AG does not agree with that at all.

MS. SHETH: The AG does not agree with that at all. To the contrary, Exxon's behavior in this case has not been consistent with good faith compliance with the subpoena. What we have seen is a slow roll production of responsive documents. The documents that

were produced, many of them do not have anything to do with this investigation.

They withheld and continue to this day to withhold documents on the basis of a purported accountant-client privilege that your Honor as well as the First Department found is improper, and they have now appealed that to the Court of Appeals.

They have sued us in an unprecedented maneuver in a Texas federal court to enjoin our investigation.

One of their counsel has failed to disclose the existence of an e-mail of their CEO, the former CEO, and then joked about it at her deposition saying that she thought it was a test to see if the Attorney General would find those documents interesting, and whether the Attorney General was even reviewing the documents they produced. As a result, documents of the CEO were destroyed, and they have not put forth a witness who can discuss fully the destruction of these documents.

THE COURT: This is why you are taking these other five depositions.

If you're asking me to state on the record that Exxon has behaved in an exemplary manner, I decline to do so. If Exxon is asking me to state on

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the record that the New York AG has pursued in an exemplary manner, I decline to do that also.

MS. SHETH: Thank you, your Honor. I do want to put that on the record.

MR. WELLS: Can we stipulate that Exxon totally disagrees with all of her comments?

THE COURT: All right.

Thank you very much. I always enjoy seeing you. Have a nice day and nice weekend.

(Received and marked Attorney General Exhibit Number 1 marked in evidence)

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C E R T I F I C A T E

I, Terry-Ann Volberg, C.S.R., an official court reporter of the State of New York, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes.

Terry-Ann Volberg, CSR, CRR
Official Court Reporter.

SO ORDERED

BARRY R. OSTRAGER, J.S.C.

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