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 BARBARA D. UNDERWOOD, 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. 7

EXXON MOBIL CORPORATION'S BRIEF IN OPPOSITION TO THE NEW YORK ATTORNEY GENERAL'S MOTION TO COMPEL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTE

Exxon Mobil Corporation ("ExxonMobil" or the "Company") submits this brief in opposition to the Office of the New York Attorney General's ("OAG") motion to compel (the "Motion").

PRELIMINARY STATEMENT

Since it launched this groundless investigation nearly three years ago, OAG has publicly pursued an ever-shifting array of failed investigative theories in search of one that will stick. As a consequence, ExxonMobil has now produced more than four million pages of documents that, if stacked, would stand higher than the Empire State Building. ExxonMobil has also proffered 18 witnesses for examination, who collectively have testified for nearly 200 hours (or 25 days). If there were ever any doubt, this mountain of evidence makes unmistakably clear that OAG's investigation has met its natural end. But rather than concede that this investigation should not have been pursued, OAG has doubled down on yet another baseless theory.

OAG now seeks (i) innumerable cash flow spreadsheets ("Cash Flows"), input files, and unspecified supporting documentation, and (ii) every document produced to the Securities and Exchange Commission (the "SEC") as part of a distinct accounting probe. Ordering the production of these documents would do nothing more than confirm what OAG already knows: ExxonMobil uses *two* distinct costs to assess the potential impacts of climate policies on certain parts of its business and has never said or implied otherwise.

OAG's first investigative theory, as it widely shared with the public after serving its November 4, 2015 subpoena *duces tecum*, was that ExxonMobil downplayed the risks of climate change publicly, but prepared for those risks internally. Despite its misgivings about the propriety of OAG's purported securities investigation, ExxonMobil complied with the subpoena. By May 2017, ExxonMobil had produced nearly three million pages of documents.

Frustrated by the absence of any evidence of wrongdoing, OAG issued a follow-on subpoena that turned its original investigative theory on its head. This time, OAG falsely alleged that ExxonMobil recognized the gravity of climate change in its public statements, but downplayed those risks internally when making capital investment funding decisions. As OAG is by now fully aware—from internal ExxonMobil documents in its possession and countless hours of witness testimony—ExxonMobil considers two costs when assessing the potential impacts of climate policies on certain parts of its business. "Proxy Costs" assess the potential impacts of a broad mosaic of climate policies and regulations on global demand for oil and gas. By contrast, "GHG Costs" forecast the direct effect of actual and anticipated greenhouse gas ("GHG") related regulations on specific ExxonMobil projects.

Significantly, these exact terms appear and are described in *Managing the Risks* ("*MTR*"), a 2014 publication that, according to OAG, justifies the latest expansion of its investigation. *MTR* states that ExxonMobil uses a "proxy cost of carbon," "which in some areas may approach $80/ton," to depress energy demand, including for oil and gas. These costs seek to reflect "all types of actions and policies that governments may take" to reduce carbon dioxide ("CO_2") emissions, such as efficiency standards, renewable energy subsidies, and carbon taxes imposed on fossil fuel producers and consumers. GHG Costs have a narrower scope. *MTR* states that, "where appropriate," business segments use "GHG costs in their economics when seeking funding for capital investments." The language in *MTR* alone debunks the faulty "bait-and-switch" premise on which OAG's current securities fraud theory is built—that ExxonMobil disclosed "a proxy cost of carbon" to the public, but used a lower GHG Cost instead.

The trove of evidence produced to date overwhelmingly confirms that ExxonMobil uses these two costs in precisely the manner described in *MTR*:

- ***ExxonMobil models the impact of Proxy Costs on overall energy demand***. Proxy Costs are one of several variables considered in developing oil and gas prices used throughout the Company in corporate planning and project economics.

- ***GHG Costs impact the expense profile of a project***. Instructions about how to apply these costs appear in ExxonMobil's internal corporate guidance. In jurisdictions that impose costs on fossil fuel producers or that are expected to do so, business unit project planners apply GHG Costs, where appropriate, as projected expenses when seeking funding for proposed capital investments.

Because each cost serves a unique purpose, each is employed differently in Cash Flows. While Proxy Costs are indirectly reflected in line items associated with a commodity price, GHG Costs are incorporated, where appropriate, in various project economic metrics, including, but not limited to, operating expenses. Notwithstanding its concern that OAG has no intention of closing this investigation, ExxonMobil produced Cash Flows on July 9, 2018. These Cash Flows and others previously produced to OAG are sufficient to show that the Company applies Proxy Costs and GHG Costs in the manner described by *MTR*.

Indeed, ExxonMobil has submitted no fewer than seven letters to OAG identifying more than three dozen documents that show beyond legitimate dispute that the Company applies each cost in accordance with its statements in *MTR*. Moreover, each knowledgeable substantive witness, including four whose testimony OAG conspicuously withholds from this Court, confirmed this fact. The Zweig and Oleske Affirmations fail to engage with this evidence—particularly testimony provided by the ExxonMobil employee primarily responsible for developing and applying Proxy Costs. OAG's willful blindness to evidence in its possession shows the lengths to which it will go in its obsessive quest for a theory to support its prejudgment of ExxonMobil's guilt.

This Court should put an end to OAG's harassment and deny the Motion.

STATEMENT OF FACTS

I. OAG's Shifting Investigative Theories

A. First Theory: ExxonMobil Allegedly Lied About Climate Science

On November 4, 2015, at 9:53 pm, OAG emailed a subpoena *duces tecum* to ExxonMobil. (Toal Ex. 1; Zweig Ex. 1.)[1] By early the following day, the *New York Times* was reporting that OAG had confirmed service of the subpoena. (Toal Ex. 2.) Relying on inside sources from OAG, the *New York Times* reported that the "focus[]" of OAG's investigation was "on whether statements [ExxonMobil] made to investors about climate risks as recently as this year were consistent with the company's own long-running scientific research." (*Id.*) Notwithstanding its misgivings about then-Attorney General Eric Schneiderman's motives and his efforts to publicize his investigation, ExxonMobil opted to comply with OAG's document requests. (Toal Ex. 3, at 2–3.) By December 22, 2015, the parties had agreed to a set of 20 broad search terms designed to identify potentially responsive climate science documents. (Toal Ex. 4, at 1; Toal Ex. 5-1.) These terms included such phrases as "climate" within two words of "chang!" and "extreme" within two words of "weather." (Toal Ex. 5.) Notably, the term "proxy cost," which OAG now claims has always been the focus of its investigation, appeared nowhere on the list of search terms. (*Id.*)

Moving forward, ExxonMobil produced documents and, with OAG, identified additional key custodians. (*See* Toal Ex. 6.) The Company even entered into a tolling agreement to facilitate what it was assured would be a fair, evenhanded, and confidential examination of the facts. (Toal Ex. 7; Toal Ex. 3, at 3.) ExxonMobil was thus taken aback when, on March 29, 2016,

[1] References to "Toal Ex." refer to exhibits to the Affirmation of Daniel J. Toal ("Toal Aff."), filed herewith. References to "Zweig Ex." refer to exhibits to the Affirmation of Jonathan Zweig ("Zweig Aff.") filed in support of OAG's Motion (Dkt. No. 246). References to "Oleske Ex." refer to exhibits to the Affirmation of John Oleske ("Oleske Aff.") filed in support of OAG's Motion (Dkt. No. 280). "OAG Br." refers to OAG's Brief in Support of its Motion (Dkt. No. 335).

Mr. Schneiderman made statements at a press conference that indicated the investigation was intended as a response to perceived gridlock in Washington, for which Mr. Schneiderman appeared to blame ExxonMobil. (*See* Toal Ex. 8, at 2–4.) Neither Mr. Schneiderman, nor any other speaker at the press conference, mentioned any interest in ExxonMobil's "proxy cost of carbon." (*Id.*)

By June 2016, after OAG had reviewed hundreds of thousands of pages of ExxonMobil documents, many from custodians who monitored developments in climate science (Toal Ex. 9, at 2), OAG's investigation regarding climate science had reached a dead end. In fact, by November 2016, OAG directed ExxonMobil to discontinue production of documents related to its internal climate science research. (*See* Toal Ex. 10.)

B. Second Theory: ExxonMobil Allegedly Lied About Stranded Assets

On June 24, 2016, OAG shifted its focus to matters relating to "valuation, accounting, and reporting" of "assets and liabilities" ("Accounting"). (Toal Ex. 11, at 2–3.) In interviews with the *New York Times* and the *Wall Street Journal* in the fall of 2016, Mr. Schneiderman confirmed he had abandoned his investigation into ExxonMobil's "historic climate change research," and was now probing whether it had failed to disclose the supposed risk it would need to "leave enormous amounts of oil reserves in the ground as so-called 'stranded assets.'" (Toal Exs. 12–13.)

Surprised by this abrupt change in direction, ExxonMobil protested the unjustified expansion of the subpoena. (Toal Ex. 14, at 2–3.) When ExxonMobil agreed to produce only Accounting documents with a climate change nexus, OAG sought judicial intervention. (Dkt. No. 49.) On November 21, 2016, the Court denied OAG's Motion. (Zweig Ex. 2, at 25:25–26:4.) To that end, the Court identified "a difference between an inquiry relating to climate change and an entirely different inquiry relating to Exxon's general accounting procedures." (*Id.* at 23:19–22.) The Court also agreed with OAG's acknowledgment that "the production of documents from

a company like Exxon ha[d] to have an ending." (*Id.* at 20:17–23; 25:15–18.)

Undaunted, OAG sought alternative avenues to improperly broaden the scope of the subpoena. Thus, in December 2016, OAG filed a letter with the Court complaining about ExxonMobil's subpoena compliance. (Dkt. No. 98.) Among other things, OAG asked the Court to order the production of documents related to ExxonMobil's oil and gas reserves and, for the first time, asked for materials concerning how "policies and procedures [relating to Proxy Costs] have been applied to specific oil and gas projects." (*Id.* at 2.) Echoing its prior ruling, and admonishing OAG for "throwing darts against the wall," the Court held that it would be "unreasonable for Exxon to deliver to [OAG] every document that Exxon has in its possession." (Toal Ex. 15, at 23:19–25.) Given the disproportionate scope of OAG's request, the Court restricted OAG to only a "handful of additional" search terms and custodians. (*Id.* at 20:12–18.)

Ultimately, OAG's stranded assets theory also proved a nonstarter. OAG was unable to identify any evidence that ExxonMobil allegedly lied to the public about the risk that climate change regulations posed to its assets.

C. Third Theory: ExxonMobil Allegedly Lied About Its Use of Proxy Costs

Having hit a second dead end, on May 8, 2017, OAG issued an enormously burdensome follow-on subpoena. (Zweig Ex. 9.) OAG's investigation now lurched to how ExxonMobil used GHG Costs and Proxy Costs in business planning. (*Id.* at 8–11.) When OAG issued the follow-on subpoena, it understood these terms and the distinct nature of each cost. Echoing *MTR*, the subpoena defined the terms as follows: (i) "'Actual GHG Cost' means Any cost, price, fee, or tax on GHG emissions imposed by Any governmental or regulatory body," and (ii) "'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." (*Id.* at 6–7.)

The follow-on subpoena sought, *inter alia*, records concerning every oil and gas investment decision ExxonMobil had made over the prior 12 years, along with requests for information relating to asset impairment and reserves estimation. (*Id.* at 8–10.) It also demanded the production of all documents ExxonMobil had produced to the SEC in connection with an inquiry regarding compliance with *federal* disclosure requirements. (*Id.* at 13.) Given the unjustified and unreasonable burden of the subpoena, ExxonMobil moved to quash it. (Dkt. No. 129.)

Pressed to articulate some legitimate basis for its ever-expanding investigation, OAG concocted a new theory wholly untethered to reality. In an about-face from the definitions provided in the follow-on subpoena, OAG asserted that Proxy Costs and GHG Costs are not, in fact, distinct and therefore should always be treated in the same manner. (Dkt. No. 168.) Because GHG Costs are at times lower than Proxy Costs, OAG accused ExxonMobil of concealing "secret, internal figures [that] understated the degree to which [it] was taking into account the risks of climate change regulations." (*Id.* at 6.) This alleged concealment, OAG proclaimed, had allowed ExxonMobil to "perpetrat[e] an ongoing fraudulent scheme on investors and the public." (*Id.* at 3.)

The Court saw through OAG's blatant overreach. Characterizing the follow-on subpoena as "unreasonable on its face," the Court held that ExxonMobil need not "produc[e] any more documents" beyond "undertaking to update [its] production" through the end of 2016. (Zweig Ex. 10, at 9:22–24, 12:11–14, 77:14–23.) Moreover, the Court warned OAG that it was not authorized to "start round two of producing documents," and unequivocally instructed the parties to move the investigation from the "document phase[] into the deposition phase." (*Id.* at 24:24–25:6, 33:19–34:1.) ExxonMobil complied with the Court's directive. To date, 18 Company witnesses have testified for nearly 200 hours in total. (Zweig Ex. 26, at 1.) The Company has now produced more

than four million pages of documents from 143 custodians and 11 shared drives, all of which refute OAG's past and present theories. (Toal Ex. 16 at ¶ 22; Toal Ex. 17.) Unsatisfied with these results, OAG now returns to this Court in a last-ditch attempt to breathe life into its failed investigation. However, as explained below, its efforts are unavailing.

II. OAG's Motion to Compel

An entire calendar year has now passed since this Court refused to order compliance with OAG's onerous and disproportionate May 2017 document requests. (*See* Zweig Ex. 10, at 77:14–23.) Since that time, ExxonMobil has attempted to work with OAG to find an acceptable compromise to its unwieldy and unjustified investigative demands. (*See, e.g.*, Zweig Ex. 18, at 3–4; Zweig Ex. 23, at 2–3.)[2] To this end, in July 2017, ExxonMobil offered to provide OAG with Cash Flows for various ExxonMobil Development Company ("EMDC") projects from a list that the parties jointly developed (the "Original Project List"). (Zweig Ex. 14, at 1 & App. A.) OAG initially agreed to this approach, but in September 2017, inexplicably backtracked, claiming it needed Cash Flows for a host of projects outside the scope of the Original Project List (the "Expanded Project List"). (*See* Zweig Ex. 19, at 1–3 & App. A.) After nearly four months of silence, on June 1, 2018, OAG sent ExxonMobil a letter again requesting all documents from the Expanded Project List. (Zweig Ex. 24.) On June 19, 2018, before ExxonMobil could respond, and without satisfying its meet-and-confer obligation (Toal Exs. 18–19), OAG filed this Motion.

OAG seeks to compel the production of all documents that ExxonMobil produced in response to the SEC accounting probe, as well as innumerable Cash Flows and unspecified supporting documentation for a six-year period (the "Cash Flow Request"). (OAG Br. at 1.) With respect to the Cash Flow Request, OAG claims that it intends to determine whether, and to what

[2] *See also, e.g.*, Zweig Ex. 14, at 1–2; Zweig Ex. 18, at 2–6; Zweig Ex. 20, at 9; Zweig Ex. 23, at 4 & Ex. A; Toal Ex. 18, at 7.

extent, 24 assets, the Syncrude joint venture (the "JV"), and ExxonMobil's corporate acquisition of XTO incorporated Proxy Costs and GHG Costs in (i) hundreds of funding requests for capital investments, (ii) planning and budgeting submissions, (iii) Company reserves estimations, and (iv) impairment evaluations. (OAG Br. at 1–7; Zweig Ex. 24.)

OAG purports to justify these burdensome requests by misrepresenting key facts, documents, and testimony. In its effort to conflate Proxy Costs and GHG Costs, OAG goes so far as to invent entirely new terms—"Outlook Proxy Costs" and "Corporate Plan Proxy Costs"—for these clearly distinct concepts. (OAG Br. at 11.) Particularly in light of OAG's earlier subpoena that correctly distinguished between the two concepts, these newly minted terms seem designed for no purpose other than to mislead. OAG also incorrectly argues that, according to ExxonMobil's public statements, these two costs are one and the same. (*Id.* at 11–12.)

The Motion is merely the latest example of improper conduct on the part of OAG. Its prior filings before this Court contained the same false statements parroted here. (Dkts. 168, 169.) If OAG did not know those statements were false in June 2017, it unquestionably knows better by now. (Toal Ex. 20.) Although ExxonMobil has alerted OAG that its misrepresentations run afoul of its ethical obligations (*see, e.g.*, *id.*; Toal Exs. 21–22), OAG persists in distorting key facts.

As of today, pursuant to its June 20, 2018 letter, ExxonMobil has produced additional Cash Flows, prepared between 2014 and 2016, in connection with full funding investment decisions associated with specific assets on the Expanded Project List. (Toal Ex. 18, at 7.)[3] These Cash Flows complement at least eight others previously produced during the normal course of discovery. (*See* Toal Ex. 25.)

[3] OAG asks for Cash Flows relating to 24 assets, the JV, and the XTO acquisition. *Id.* But the JV and the XTO acquisition are not relevant to OAG's request. The JV is not operated by ExxonMobil. *See* Toal Ex. 23. And the only statements ExxonMobil has made regarding its inclusion of GHG Costs postdate the XTO acquisition and relate to "funding for capital investments," not corporate acquisitions. Toal Ex. 24, at 18.

ARGUMENT

OAG's Motion should be denied in its entirety. *First*, the evidence proffered to date confirms that ExxonMobil applies *both* Proxy Costs and GHG Costs to project economics, undermining the entire premise for OAG's investigation. *Second*, the materials sought by OAG are utterly irrelevant to its baseless investigative theory. *Third*, because the investigation itself is based on knowing misrepresentations and intentional mischaracterizations, it lacks the factual predicate necessary for it to continue. *Fourth*, OAG's request for Cash Flows and unspecified supporting documentation is unduly burdensome. *Finally*, OAG is not entitled to the documents produced to the SEC because OAG's investigation is preempted by that inquiry.

I. ExxonMobil Applies *Both* Proxy Costs and GHG Costs

ExxonMobil published *MTR* on March 31, 2014. (Toal Ex. 26.) That report explained that ExxonMobil applies two related—but distinct—metrics to account for the impact of GHG regulations in business and investment decisions: Proxy Costs and GHG Costs. (Toal Ex. 24, at 17.) According to *MTR*, Proxy Costs seek to "reflect all types of actions and policies that governments may take . . . relating to the exploration, development, production, transportation, and use of carbon-based fuels." (*Id*.) They are used to help gauge "the potential for future climate-related controls" to depress global demand for fossil fuels. (*Id.*) These demand projections are published annually in the *Outlook for Energy* ("*EO*") and provide "the foundation" for ExxonMobil's "business and investment planning" opportunities. (*Id.* at 3.)

Separately, and *in addition* to Proxy Costs, *MTR* clarified that ExxonMobil "require[s] that all [its] business segments include, where appropriate, GHG costs in their economics when seeking funding for capital investments." (*Id.* at 18.) GHG Costs directly affect the projected expense profiles of specific ExxonMobil projects. Thus, as witnesses have emphasized in their testimony, "the proxy cost and the greenhouse gas cost[] both impact project economics. One through demand

in prices and the other through pricing direct emissions." (Oleske Ex. 25, at 346:5–10.)[4]

A. Proxy Costs Are "Baked In" to Company-Wide Price Assumptions

ExxonMobil has produced a wealth of documents and testimony that demonstrate precisely how Proxy Costs are applied in modeling energy demand. These models, among others, contribute directly to the demand projections in the *EO*, which are then used to help generate Company-wide oil and gas price assumptions. (Oleske Ex. 25, at 344:23–345:11.) As the former Vice President of Corporate Strategic Planning ("CSP") testified, Proxy Costs are the Company's effort to quantify how the "wide variety of policies and approaches" related to GHG emissions will impact demand on a broad scale. (*Id.* at 59:3–12.) Proxy Costs, as the name implies, "stand in the place" of future energy policies likely to be imposed on both energy producers and energy consumers.[5]

As OAG is well aware, the impetus for developing Proxy Costs was grounded in "[c]oncerns about climate change and rising GHG emissions [that were] prompting increasing focus on public policies" designed to "mitigate CO2 emissions growth." (Toal Ex. 28, at 2.) Acknowledging that carbon policies were gaining a foothold in some economies, ExxonMobil decided in 2007 to start factoring these policies into the energy demand projections foundational to the *EO*. (*Id.*; Toal Exs. 29–31.)

Soon thereafter, ExxonMobil's *EO* group built a CO_2 model for energy sectors where future carbon emissions policies were unclear or were likely to involve a significantly broad suite of policy initiatives. (*See* Toal Ex. 32; *see also* Oleske Ex. 25, at 72:18–78:23.) First, the model estimated demand volume by energy type absent inclusion of Proxy Costs. (*See, e.g.*, Toal Ex. 32,

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[4] *See also* Oleske Ex. 37, at 21 (*EO* "utilizes a proxy cost of carbon as well as targeted policy assessments to reflect potential policies governments may employ related to managing the risks of climate change, which can, in turn, impact future oil and gas demand"); *id.* (Company "evaluates the direct financial impact of existing and future [GHG] regulation on potential investments on a project-by-project basis, as appropriate," with a "GHG cost.").

[5] Former CEO Rex Tillerson explained the function of Proxy Costs at ExxonMobil's May 25, 2016 shareholder meeting. Mr. Tillerson explicitly stated that the "price of carbon gets put into all of our economic models when we make investment decisions . . . . It's a proxy. . . . [W]e choose to put it in as a cost." Toal Ex. 27.

at "Res_Comm Demand Reduction" Tab.) Then, it forecast the impact of Proxy Cost assumptions (developed by the *EO* team for regions and by year) on consumer demand for energy in the residential sector, the commercial sector, and several other industrial sectors over the outlook period. (*Id.; see also id.* at "Industrial Demand Reduction" Tab.) Proxy Costs thereby had the effect of reducing energy demand in the model, including for oil and gas. (*Id.*) ExxonMobil has identified later variations of this model in OAG's possession. (*See, e.g.*, Toal Ex. 33 (2012 model); Toal Ex. 34 (2016 model).) And a Senior Energy Advisor in CSP testified at length about how Proxy Costs are developed and deployed in these models. Notably, OAG has declined to make this examination transcript available to ExxonMobil and the Court.

Nevertheless, OAG is well aware that ExxonMobil's CO_2 model contributes directly to the demand profiles published in the *EO*. (*See* Oleske Ex. 25, at 76:15–23.) It also knows that these same demand projections serve as inputs in the supply and demand models that ExxonMobil uses to develop the price forecasts that are incorporated within the Company Plan ("Price Bases"). (*See id.* at 76:24–77:25.) These Price Bases, which indirectly incorporate Proxy Costs, are thereafter used by business units in their project economics. (*See id.* at 77:18–25.) In a Cash Flow, Proxy Costs are therefore embedded in the Price Basis line item. But, because the Price Basis is pre-adjusted with Proxy Costs, line items including the Price Basis will not expressly reference Proxy Costs. Thus, the Cash Flows and input files sought by OAG will not contain, at least expressly, the information it claims to seek. OAG, of course, knows this because ExxonMobil's witnesses have testified about this very topic. (*See e.g.*, Oleske Ex. 29, at 680:12–20.)

B. GHG Costs Are Operating Expenses Applied to Project Economics

Whereas Proxy Costs help gauge the potential impacts of future climate-related policies on global energy demand, GHG Costs account for the narrower question of how existing or anticipated climate policies affect the operating expenses of a particular project. OAG knows that

ExxonMobil business unit project planners ("Planners") turn to the Dataguide Appendices in the Corporate Plan for GHG Cost guidance ("Dataguide").[6] This document, prepared by CSP, includes jurisdiction-specific cost estimates for GHG regulations that will, or are expected to, impact specific ExxonMobil projects. (*See* Oleske Ex. 29, at 268:7–10.)[7] The Dataguide serves as a "starting point" or "outline" for Planners, who, in consultation with CSP and regional "GHG Issue Managers," determine appropriate GHG Cost assumptions to apply to their project economics. (Oleske Ex. 51, at 48:4–15; 72:19–25.)[8]

Importantly, the Dataguide has long instructed Planners to use "local" GHG Cost "specifics" where regulations are "known to differ" from assumptions in the Dataguide. (*See, e.g.*, Toal Ex. 37, at 31; Oleske Ex. 17, at 37.) As one member of CSP explained to OAG, where "a set of regulations [is] on the books" that reflects a "true cost within [a] jurisdiction," that cost (and not the cost in the Dataguide) should be applied to project economics. (Oleske Ex. 29, at 234:14–18.) The Dataguide has also long advised Planners to consult with CSP when GHG Costs "are material to decision economics." (*See, e.g.*, Toal Ex. 37, at 32.)

ExxonMobil annually updates its Dataguide, which has included GHG Costs since 2007. (*See* Toal Ex. 38, at 1.) Between 2007 and 2015, the Dataguide was largely tailored to projects operating in countries within the Organisation for Economic Co-operation and Development ("OECD"), because those were the jurisdictions that either had imposed, or were expected to

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6 On December 31, 2016, ExxonMobil produced the 2008–2015 Dataguides to OAG. *See* Toal Ex. 35, at 2 n.1. The 2016 Dataguide was produced on August 28, 2017. *See* Toal Ex. 36-2.

7 *Id.* (Dataguides are "intended to try to estimate the cost to our specific businesses for regulations that we anticipate in the future"); Oleske Ex. 21, at 79:8–20 (Dataguide reflects "projected costs for emissions for the various geographic areas of the world").

8 *See also* Toal Ex. 37, at 32 (2015 Dataguide) (listing "regional GHG Issue Managers" and directing questions to CSP); Oleske Ex. 51, at 101:18–104:2 ("[I]f given the right specifics, and we were able to get the right people in the room, we could arrive at what the understanding was for the GHG cost."); *id.* at 259:24–260:9 (Dataguide "provides. . . an outline [of] where to start with GHG Costs which allow consultation with [CSP] . . . and consultation with local advice [from GHG Issue Manager] Susan Swan"); Oleske Ex. 29, at 315:3–22 (describing collaboration with regional GHG Issue Managers to determine appropriate emissions allowances).

impose, costs on GHG emissions. (*See* Toal Exs. 37, 39–40.) GHG Costs were included in base project economics, as expense items, "where there [was] a material possibility of domestic GHG regulation." (*See, e.g.*, Oleske Ex. 17, at 37.) In 2016, in recognition of the Paris Climate Accords ("Paris"), ExxonMobil updated its Dataguide to, among other things, reflect consideration of GHG Costs in 2020 and beyond in both OECD and non-OECD countries. (Toal Ex. 41, at 3.) Shortly thereafter, projects in non-OECD countries started to include GHG Costs as an operating expense in their project economics. (*See id.* at 1–2 (Nigeria); Toal Ex. 42, at 1 (Malaysia); Toal Ex. 43, at 1–3 (Indonesia).)

ExxonMobil witnesses consistently testified that GHG Costs "assess direct cost[s] to individual projects." (*See, e.g.*, Oleske Ex. 29, at 459:12–14.) And they went out of their way to underscore that a Cash Flow created for one project cannot be used in a cookie-cutter fashion and applied wholesale to another project.[9] For each Cash Flow, Planners and CSP must collaborate anew to determine how best to incorporate GHG Costs. (*See* Oleske Ex. 51, at 102:5–15.)[10] While the method by which GHG Costs are incorporated into a Cash Flow may vary depending on how the model is structured, GHG Costs are often reflected as operating expenses. (*See* Oleske Ex. 26, at 280:3–10.)[11] Indeed, ExxonMobil has already produced Cash Flows incorporating GHG Costs in this way. (*See* Toal Ex. 25.)

II. The Documents Sought Are Not Remotely Related to Any Proper Inquiry

Notwithstanding OAG's expansive authority, "there is a limit to the exercise" of its power. *Carlisle* v. *Bennett*, 268 N.Y. 212, 218 (1935). Notably, a demand for the production

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9 *See supra* n.8.

10 *Id.* (economic model "end result of all those discussions and all that hard work to get the appropriate costs, GHG and all other costs into the model").

11 *Id.* (where GHG Costs are in Cash Flows "depends on how the model was structured"); Oleske Ex. 29, at 89:21–90:8 (GHG Costs may be "separate line item" or "vary within the operating expense line").

of documents in response to an investigative subpoena will be denied where the (i) information sought is "utterly irrelevant to any proper inquiry," or (ii) the "futility of the process to uncover anything legitimate is inevitable or obvious." *Anheuser Busch, Inc.* v. *Abrams*, 525 N.Y.S.2d 816, 818 (1988); *see also Napatco, Inc.* v. *Lefkowitz*, 394 N.Y.S.2d 11, 12 (1st Dep't 1977), *aff'd*, 43 N.Y. 2d 884 (1978) ("subpoena was apparently issued on the basis of mere suspicion"). That result should follow here.

OAG argues that its request for Cash Flows and input files is narrowly tailored to resolving whether ExxonMobil "adhered to its public, contemporaneous representations that it in fact applied the only proxy costs it described publicly—the Outlook Proxy Costs [*i.e.*, Proxy Costs]—in its investment decision-making, business planning, and financial reporting." (OAG Br. at 3.) But, as explained above, OAG knows that, by function and definition, Proxy Costs are not expressly reflected in the Cash Flows and input files sought. Rather, these costs are incorporated in a CO_2 model, a number of which OAG already has in its possession, and indirectly in ExxonMobil's projected Price Bases. The documents sought are thus "utterly irrelevant to any proper inquiry." *Busch*, 525 N.Y.S. 2d at 818.

Moreover, because OAG possesses evidence that conclusively refutes its theory that ExxonMobil allegedly lied to the market about its use of Proxy Costs and GHG Costs (Part I),[12] the production of any additional documents will inevitably fail to "uncover anything legitimate." *Busch*, 525 N.Y.S. 2d at 818. Ordering the production of Cash Flows and input files would serve no purpose other than to provide OAG with a platform to see whether ExxonMobil

[12] *See also, e.g.*, Toal Ex. 44, at 3 (outlining the alignment of the Corporate Plan and *EO* cost bases); Toal Ex. 45, at -52 ("Outlook CO2 price reflects global policy action"); Toal Ex. 46, at 1 ("We estimate end-user prices for oil, gas, coal and electricity in the covered sectors at a regional/country level . . . before and after CO2 costs are applied. Based then on the incremental price impact of adding CO2 costs to end-user prices, we then approximate the impact on demand based on price elasticity factors.").

comprehensively complied with its own internal guidance, which has never been publicly released outside of this litigation.[13] Whether ExxonMobil acted on internal guidance never released to the public is not the proper subject of a securities investigation because the public could not have been deceived. *See People* v. *Wells Fargo Ins. Servs., Inc.*, 879 N.Y.S.2d 398, 399 (1st Dep't 2009), *aff'd*, 16 N.Y.3d 166 (2011) (enforcement action dismissed where defendant not required to disclose contingent commissions).[14] It provides no basis for requesting further documents.

III. OAG's "Factual Bases" Are Premised on Grave Misrepresentations and Omissions

Investigations that have proceeded beyond a "preliminary or tentative inquiry" may be halted. *Myerson* v. *Lentini Bros. Moving and Storage Co.*, 33 N.Y.2d 250, 258–60 (1973). "[U]nduly protracted" and/or "unduly intrusive" investigations are ripe for judicial intervention. *A'Hearn* v. *Comm. on Unlawful Practice of Law*, 23 N.Y.2d 916, 918 (1969). Because OAG has engaged in "extensive discovery" for nearly three years, it can no longer "[c]ontinue fishing in otherwise apparently calm waters in the mere hope that some lead or indicia of possible wrongdoing will be uncovered." *Horn Const. Co.* v. *Fraiman*, 309 N.Y.S.2d 377, 380 (1st Dep't 1970). To grant OAG's request for further documents in this long-running and intrusive inquiry, the Court must "weigh[] the scope and basis for the [request] against the factual predicate for the investigation lest the powers of the investigation . . . become potential[] instruments of abuse and harassment." *Airbnb, Inc.* v. *Schneiderman*, 44 Misc.3d 351, 356 (Sup. Ct. Albany Cty. 2014).

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[13] In any event, OAG's document requests disregard this Court's June 16, 2017 directive, precluding OAG from initiating a second round of document production. *See* Zweig Ex. 10, at 25:5–6.

[14] The vast majority of the documents that OAG requests fall outside the scope of any tenable securities fraud investigation. ExxonMobil's first public statement concerning GHG Costs occurred in March 2014. That statement focused exclusively on Cash Flows used to "seek[] funding for capital investments," and made clear that GHG Costs were applied only "where appropriate." Toal Ex. 24, at 18. At the very least, OAG's request should be limited to documents created after *MTR* was published. *See New York State Comm'n on Judicial Conduct* v. *Doe*, 61 N.Y.2d 56, 62–63 (1984) (modifying investigative subpoena that sought documents beyond temporal scope of contested conduct). Furthermore, because the Martin Act is subject to a three-year statute of limitations, OAG is not entitled to documents that predate January 19, 2013. *See People* v. *Credit Suisse Secs. (USA) LLC*, 2018 WL 2899299, at *5 (N.Y. June 12, 2018).

As the factual predicates for this investigation rest on a debunked premise—the false claim that Proxy Costs and GHG Costs are a "single concept"—they cannot support the scope and basis of OAG's latest request.

A. ExxonMobil Applied Proxy Costs and GHG Costs Precisely as Disclosed

OAG asserts that ExxonMobil "concealed from the public" that its GHG Costs "deviated from its publicly disclosed Outlook Proxy Costs." (OAG Br. at 15.) Not so. ExxonMobil has consistently maintained in public disclosures that Proxy Costs and GHG Costs are distinct metrics. (Part I.) Indeed, when OAG issued its May 8, 2017 subpoena, OAG itself provided distinct definitions for "Proxy Cost" and "Actual GHG Cost" that distinguished between these two concepts. (Zweig Ex. 9, at 6–7.) Internal documents and witness testimony confirm that ExxonMobil's application of Proxy Costs and GHG Costs align precisely with representations made in *MTR*. (Part I.)

The record rebuts OAG's claim that ExxonMobil pitched both costs to the public as a "single concept." (OAG Br. at 2.) Indeed, one of the drafters of *MTR*—whose testimony OAG has withheld from this Court—confirmed that *MTR* consciously distinguished between Proxy Costs and GHG Costs. During that employee's examination, OAG presented a March 2014 email that showed the Head of CSP actually replacing the term "proxy costs" with "GHG costs" in a draft of *MTR*. (Toal Ex. 47.) In explaining the change, the Head of CSP wrote that ExxonMobil needs to be "precise in how we talk about applying CO2 costs in project evaluations." (*Id.* at 1–2.) In a separate unrelated exchange from April 2011, ExxonMobil's former GHG Manager (whose testimony OAG also failed to provide to this Court) noted that he "recognize[s]" that the two costs rely on different baseline "assumptions" and thus "serve two different purposes." (Oleske Ex. 24.) Numerous witnesses examined by OAG corroborated this fact, emphasizing that Proxy Costs and GHG Costs are "totally different things" used for "totally different purposes."

(Oleske Ex. 21, at 547:6–548:19; Oleske Ex. 25, at 195:13–19; Oleske Ex. 29, at 292:7–13.)

Contrary to OAG's suggestion, internal discussions that led to the alignment of both costs are not suspect, but rather further confirm that the costs are distinct. (*See, e.g.*, Oleske Aff. ¶ 25.) In particular, that the costs are currently projected to align in 2030, and not immediately, belies OAG's claim that the two costs intend to capture a single measure. (*See* Toal Ex. 36-1, at 29.) In fact, documents in OAG's possession explain that the rationale for aligning these costs is premised on an internal planning assumption that developed economies will eventually begin to "establish generally consistent emissions pricing." (Toal Ex. 45, at -56.)[15] As reflected in the 2014–2016 Dataguides, ExxonMobil assumed that emissions-related policies would reach alignment around 2030. (Toal Exs. 40; 37; 36-1.)

OAG is drowning in evidence that establishes the distinct nature of Proxy Costs and GHG Costs, and shows how each cost is applied. (Part I.) The record proves that ExxonMobil applied both costs to investment decisions long before it published *MTR* and well before OAG opened this investigation. (*Id.*) By applying *both* Proxy Costs and GHG Costs, ExxonMobil effectively *double counts* the impact that climate policies may have on certain parts of its business. This "belt and suspenders" approach should be lauded, not castigated. Asking ExxonMobil to provide more documents on this issue almost three years into its protracted probe is unreasonable and abusive.

B. Project Economics Embed Proxy Costs in Price Bases and, Where Appropriate, Include GHG Costs

OAG falsely claims that, through 2016, ExxonMobil "directed planners not to use *any* proxy costs in base economic cost projections" for projects in non-OECD countries. (OAG Br. at 16; Oleske Aff. ¶ 29.) This argument fails because Proxy Costs necessarily form part of OECD

[15] *See also, e.g.*, *id.* at -53 (2014 Dataguide "aligned with long term Energy Outlook," which "reflects global policy action"); Toal Ex. 48, at -51 ("[2016] Plan basis reflects anticipated policy action to support Paris commitments").

and non-OECD countries' project economics. (Part I.A.) Indeed, a senior CSP employee provided thorough testimony to this effect. (*Id.*) In choosing to conceal this testimony and ExxonMobil's CO_2 models from the Court, OAG gravely misrepresents the record.

To the extent OAG's claim intends to refer to GHG Costs, ExxonMobil did not anticipate these costs in non-OECD countries before Paris, and had no reason to do so. (*See, e.g.*, Oleske Ex. 29, at 321:18–322:16.)[16] Nevertheless, as OAG well knows, if a "non-OECD country . . . ha[d] a potential of implementing some kind of carbon cost system," ExxonMobil's guidance was clear "to incorporate these costs as a sensitivity" case. (*Id.* at 197:15–198:7.) In fact, the 2013 Dataguide specifically called for a sensitivity case in Kazakhstan and China, two non-OECD countries where the Company anticipated a material possibility of domestic GHG regulations. (Toal Ex. 39.) When it came time to develop the 2016 Dataguide, the Planning Manager in CSP said that, post-Paris, the "collective view" of CSP and the *EO* group was that a "more comprehensive shift in the [GHG Cost] Guidance" was warranted. (Oleske Ex. 21, at 120:9–18.)[17]

Producing additional Cash Flows and input files would only provide OAG with a platform to test how comprehensively ExxonMobil complied with its undisclosed internal guidance. But undisclosed internal guidance cannot possibly mislead the public. *Cf., e.g.*, *Wells Fargo*, 879 N.Y.S.2d at 399. To suggest otherwise would turn securities laws on their head.

C. Project Planners in Canada Properly Applied GHG Costs Imposed by Law

Grasping for any justification to support its Motion, OAG faults Alberta Planners for

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[16] *Id.* (After Paris, "it became clearer to us that there would be united action to address the risk of Climate Change. And so we felt like it was the appropriate time to expand our Corporate Plan [GHG] Guidance beyond just OECD countries . . . ."); Toal Ex. 36-1, at 29 ("2016 Corporate Plan approach is consistent with effects of future policy action . . . such as the commitments made at COP-21.").

[17] *See also* Oleske Ex. 27, at 29 ("In prior years plans, GHG costs were included in base economics for OECD countries, and as economic sensitivities for non-OECD countries."); Toal Ex. 41, at 3 (July 2016 email noting update to Dataguide and application of GHG Costs to base economics in "all countries 2020+").

applying carbon taxes imposed by law. (*See* OAG Br. at 3, 16–17.)[18] But there is no basis in law, logic, or ExxonMobil's public statements for Planners to have done otherwise. When an actual tax is known, it defies common sense to ignore that cost and replace it with one that is hypothetical.

The very documents that OAG relies on confirm that Alberta Planners applied GHG Costs consistent with the law. In June 2015, the Alberta government enacted new legislation that set the cost per ton of carbon emissions at (i) $15 for 2015; (ii) $20 for 2016, and (iii) $30 in 2017. (*See* Oleske Ex. 45.) Anticipating this announcement, on June 26, 2015, Planners received an updated Dataguide reflecting these "known regulatory changes." (Toal Ex. 49-1, at 1; Oleske Ex. 43, at 3.) Documents cited by OAG show Planners applying precisely these figures. For example, in an October 2015 email, an Alberta Planner asked his colleague to run an economic analysis using GHG Costs of $15/ton in 2015, $20/ton in 2016, and $30/ton in 2017. (*See* Oleske Ex. 43, at 3.)

Likewise, Alberta Planners properly assumed that 20% of facility emissions would be taxed under the new law. Under that enacted legislation, starting in 2017, a facility in its ninth year or more of operation was limited to emitting 80% of its historical emissions intensity levels. (*See* Toal Ex. 50, at 9 (Specific Gas Emitters Regulation ("SGER")).) Accordingly, a facility of that vintage could avoid paying GHG Costs entirely if it reduced its emissions by 20%. Thus, in conformity with SGER, and assuming the worst case scenario, a Reserves Team Lead instructed planners to "utilize legislated intensity *i.e.* [apply GHG Costs] to 20% [of emissions] by 2017 and hold flat." (Oleske Ex. 42, at 2.) OAG simply cannot claim that ExxonMobil "undercounted the applicable long-term operating expenses expected to be imposed by future regulation by as much as 93%" with respect to projects in Alberta (Oleske Aff. at ¶ 55)—particularly when OAG knows

[18] OAG's theory falsely assumes that ExxonMobil's business lines were bound to the specific GHG Cost estimates provided in the Dataguide. *See id.* But this flawed assumption has been directly contradicted by witnesses who testified that GHG Cost estimates provide a "starting point" from which Planners derive appropriate GHG Cost assumptions. Part I.A.

that Proxy Costs were embedded into the Price Bases used by all Alberta Planners, and the GHG Costs used were based on existing law.[19]

The above instructions were also entirely consistent with ExxonMobil's public statements. As stated in *MTR*, the Company applies a GHG Cost to funding requests for capital investments "where appropriate." (Toal Ex. 24, at 18.) And, as OAG knows, the Dataguide instructs Planners to apply "local specifics" and consult with CSP where GHG Costs are likely to have a "material" impact on project economics. (*See, e.g.*, Toal Ex. 37.) The documents OAG presents to this Court confirm that Planners did just that. They followed the flexible and collaborative process of arriving at an appropriate GHG Cost assumption as advised by the Dataguide, and consulted with CSP where those assumptions had a notable impact on their projects. (*See, e.g.*, Oleske Ex. 39.)[20] OAG's attempt to color careful deliberation as suspect is improper.[21]

OAG has at least eight Alberta-related Cash Flows in its possession, and each shows appropriate application of GHG Costs. (*See* Toal Ex. 25.) No additional production on this point is required at this stage of the investigation. *Horn*, 309 N.Y.S.2d at 379–80.

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[19] Based on a single Cash Flow, which it concedes may be a "draft," *see* Zweig Aff. at ¶ 63, OAG argues that Alberta Planners "held [GHG Costs] flat through the end of the project in 2065," Oleske Aff. at ¶ 49. But OAG fails to mention at least eight related Cash Flows showing application of ever-increasing GHG Costs. *See* Toal Ex. 25.

[20] *See id.* (July 2016 email chain in which Planners consult with CSP regarding GHG Cost assumptions); Oleske Ex. 41 (August 2016 invitation to a meeting seeking guidance on GHG Cost assumptions); Oleske Ex. 48 (October 2015 email chain seeking guidance on appropriate GHG Cost assumptions); Oleske Ex. 49 (follow-up to same chain in Oleske Ex. 48, stating that CSP had "weighed in" and found application of SGER appropriate).

[21] Analyzing multiple cost scenarios is not suggestive of wrongdoing. And OAG is surely not suggesting that, had the law prescribed a *higher* carbon tax than the Dataguide, ExxonMobil should have imposed the *lower* cost listed in the Dataguide. In the end, qualitatively describing high GHG Costs as "massive" or potential "write downs" under a particular scenario as "large" does not allude to foul play. OAG Br. at 3–4, 16; *see* Oleske Aff. at ¶¶ 47, 50, 55, 57. OAG's claim about an October 2015 email is illustrative of its numerous attempts to misrepresent documentary evidence. *See, e.g.*, Oleske Aff. at ¶ 51 (citing Oleske Ex. 42) ("Just between ourselves…why is it necessary to deviate from CP 15 GHG assumptions?"). In this document, an Alberta Planner asked a colleague why he was told "to deviate from CP15 GHG assumptions." Clinging to the word "deviate," OAG argues that management ignored this Planner's "concerns." Oleske Aff. at ¶¶ 51–52. All the while, OAG neglects to mention that, in a subsequent email, the same Planner said that he "now understand[s] the sensitivity and significance of the GHG cost and intensity long-term." Toal Ex. 51; *see also* Oleske Ex. 51, at 371:18–372:3 (employee received an answer to this question after he and others copied on email chain "continued to have conversations as a team and . . . got the input from knowledgeable others . . . [The team] aligned on the appropriate GHG costs and we applied [them] accordingly").

D. OAG's Request for Impairment-Related Documents Is Moot

OAG correctly states that "proxy costs were not included in Exxon's cost projections relating to impairment evaluations prior to 2016." (OAG Br. at 18.) Proxy Costs, as OAG knows well by now, are not included as expenses in Cash Flows. They are, however, included in the Price Bases used in Cash Flows, and therefore would have been included in any impairment evaluation both before and after 2016.

As ExxonMobil already explained in a detailed interrogatory response provided to OAG, the Company did not identify any price-related impairment triggers between 2010 and 2015. (Zweig Ex. 14, at App. B-2.) In 2016, ExxonMobil included GHG Costs in its impairment assessment. (*Id.*) As exemplified by Paris, the Company considered it appropriate to do so due to a strengthening commitment among nations to adopt regulations responding to climate change. (*Id.*)[22] Indeed, according to ExxonMobil's outside auditor PricewaterhouseCoopers ("PwC"), Generally Accepted Accounting Principles did not require the Company to include GHG Costs in its 2016 impairment assessment because the costs were too speculative. (*Id.* App. B-3 & Ex. 4, at 5.) Nonetheless, PwC did "not take exception" to ExxonMobil's inclusion of GHG Costs because they did not affect the impairment analysis. (*Id*.) Accordingly, OAG cannot possibly justify a request for Cash Flows to "investigate" practices that have already been fully disclosed, and about which there appear to be no disagreement between the parties.[23]

E. Resource Base and Company Reserves Estimates Follow Relevant Guidelines

OAG next complains that ExxonMobil may have failed to incorporate Proxy Costs and

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[22] *See also id.* at B-3 (not necessarily "appropriate to always consider GHG costs" in impairment testing).

[23] OAG mischaracterizes the Assistant Controller's testimony by claiming that he testified to the fact "that proxy costs were not used in the company's 2015 impairment evaluations." Oleske Aff.¶ 62. But the term "proxy cost" was not used in that testimony. Rather, when asked whether ExxonMobil "include[d] the Greenhouse Gas costs set out in the Corporate Plan Dataguide," he responded: "The Greenhouse Gas costs that would have been included in 2015 would have been the ones related to regulations in place." Oleske Ex. 50, at 128:13–25.

GHG Costs into estimates of its petroleum resource base and internal Company reserves. (*See* OAG Br. at 13–14.) But ExxonMobil has never made any public statements about Proxy Costs or GHG Costs in the context of either estimate. (*See* Oleske Ex. 9, at 2.) OAG thus has no valid basis to investigate whether ExxonMobil applied Proxy Costs and GHG Costs in these contexts.

Crucially, OAG fails to cite any ExxonMobil public statements that justify production of additional Company reserves or resource base documents. ExxonMobil has not released disclosures about the size, composition, or calculation of its internal Company reserves since its fiscal year 2009 disclosures; after that point, the SEC's updated oil and gas reporting requirements came into effect. (*See* Toal Exs. 52–53.) All of ExxonMobil's Company reserves disclosures therefore fall outside the limitations period for OAG's investigation. *See Credit Suisse Securities,* 2018 WL 2899299 at *5. Similarly, OAG cannot demand more Cash Flows simply because ExxonMobil has stated that its resource base estimates align with the Petroleum Resources Management System guidelines ("PRMS").[24] These guidelines make clear that a company's "total resources"[25] contain quantities of petroleum that "are not yet considered mature enough for commercial development," and for which commerciality assessments are not yet possible.[26] (Oleske Ex. 10, § 1.1.) ExxonMobil therefore does not need to—and in many cases cannot—

[24] Moreover, the record demonstrates that ExxonMobil applied both Proxy Costs and GHG Costs to its Company reserves in accordance with PRMS guidelines. *See, e.g.*, Oleske Ex. 25, at 346:2–10 (Proxy Costs contained in *EO* are applied to all project economics "through demand in prices"); Oleske Ex. 12, at 76:23–77:16 (same). During one Planner's examination, OAG specifically discussed an email regarding "GHG pricing and intensity assumptions for corporate reserves." Toal Ex. 51, at 1; Oleske Ex. 51, at 354:15–17. And a Planning Supervisor confirmed that "GHG Costs from the DataGuide do go into Company Plan Reserves." *See* Oleske Ex. 26, at 425:7–14, 430:6–18; Oleske Ex. 29, at 631:17–632:18.

[25] PRMS guidelines define a company's "total resources" as "that quantity of petroleum that is estimated to exist originally in naturally occurring accumulations," including quantities that are estimated "to be contained in known accumulations prior to production," and "those estimated quantities in accumulations yet to be discovered." Oleske Ex. 10, at 3. The guidelines define "resources" to "encompass all quantities of petroleum naturally occurring on or within the Earth's crust, discovered and undiscovered (recoverable and unrecoverable), plus those quantities already produced." *Id.* at 2.

[26] *Id.* at 3 (defining "contingent resources"); *see also id.* at 2, Figure 1-1 (similar).

conduct cash flow analyses to determine which quantities of petroleum qualify as resources.[27]

At this stage of the investigation, ordering the production of Cash Flows concerning ExxonMobil's resource base and Company reserves would constitute harassment. *See Airbnb*, 44 Misc. 3d at 358–59. This Court should reign in OAG's overreach.

IV. OAG's Request for Cash Flows and Input Files Is Unduly Burdensome

At the last hearing, this Court recognized its "inherent authority to assure that there is some degree of proportionality and rationality in the manner in which [OAG's] investigation is being conducted." (Zweig Ex. 10, at 45:11–14.) Exercising that authority, the Court refused to enforce the follow-on subpoena. (*See id.* at 24:24–25:6.) The law is clear that subpoena compliance will not be ordered where the requests are "patently overbroad, burdensome, and oppressive." *Reuters Ltd.* v. *Dow Jones Telerate, Inc.*, 662 N.Y.S.2d 450, 455 (1st Dep't 1997).

In addition to at least eight Cash Flows produced in the normal course of discovery, ExxonMobil has now produced additional Cash Flows requested by OAG. ExxonMobil's July 9, 2018 document production, which included final investment decision ("FID") Cash Flows associated with four of the 24 ExxonMobil-operated assets on OAG's list,[28] was the result of nearly 200 hours of work involving approximately a dozen employees. (Toal Ex. 54-1, at ¶ 16.) Despite OAG's assertions to the contrary, a number of these documents were not available in a centralized location.[29] (*Id.* at ¶¶ 7, 13.) Collecting the July 9 production alone required a team of ExxonMobil employees to confer with numerous colleagues spread across the Company. (*Id.* at ¶¶ 12–13.)

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[27] OAG's investigative theory ultimately fails because it relies on invented hypotheticals. "*If* Exxon failed" to apply Proxy Costs to Company reserves, OAG contends, "then Exxon *potentially* misled investors about the size of its total resource base." Oleske Aff. ¶ 19 (emphasis added).

[28] OAG's list is associated with 415 unique budget actions taken across 10 ExxonMobil Companies between 2010 and 2016. (*See* Toal Ex. 54-1, at ¶ 6.)

[29] OAG's insistence that there is a "centralized" database of Cash Flows is wrong. OAG Br. at 21–22. In truth, no witness testified to this. One examinee answered OAG's questions about where documents related to her projects might be stored. *See, e.g.*, Oleske Ex. 26, at 93:3–101:2. Another testified that he had access to a SharePoint that could store economic models. *See* Oleske Ex. 51, at 119:19–23.

Individuals knowledgeable about specific assets assisted in the identification and collection of relevant Cash Flows. (*Id.*) Next, each Cash Flow was validated as final against dozens of others. (*Id.* at ¶ 14.) This process involved manually analyzing hundreds of formulas and cells and reviewing supporting documentation. (*See id.* at ¶ 15.) On average, it took 40 hours to identify, collect, and validate a single Cash Flow. (*Id.* at ¶ 16.) Considering the stage of this nearly three-year-old investigation and ExxonMobil's more than four million page production, ordering the production of additional Cash Flows would be unduly burdensome. *See Myerson*, 33 N.Y.2d at 258–60; *Reuters*, 662 N.Y.S.2d at 455. As this Court recognized last June, ExxonMobil's size may not be used as an excuse to demand endless discovery. (*See* Zweig Ex. 10, at 23:17–25:6.)

V. Requests Concerning Proved Reserves and Asset Impairments Are Preempted

As set forth in ExxonMobil's briefing before this Court last spring, OAG is not entitled to the documents produced to the SEC on preemption grounds. (Dkt. No. 130 at 19–23; Dkt. No. 205 at 19.) OAG may not second guess the SEC's ongoing investigation (which represents that agency's reasoned judgment and balancing of competing policy interests) by seeking documents produced to that agency. *See Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 881–82 (2000).[30]

CONCLUSION

OAG's nearly three-year-old abusive investigation is based on a fabricated theory, has lurched from one dead-end rationale to another, has uncovered no wrongdoing, and far exceeds the bounds of proportionality and reason. OAG's Motion should be denied.

[30] Nor is issue preclusion applicable. The dismissal of *ExxonMobil* v. *Schneiderman*, No. 17-CV-2301 slip op., at 47–48 (S.D.N.Y. Mar. 29, 2018) does not bind this Court. *First*, issue preclusion does not apply to preemption, a pure question of law. *See McGrath* v. *Gold*, 36 N.Y.2d 406, 411 (1975); *Cattaraugus Cty. Dep't of Soc. Servs.* v. *Keller*, 1998 WL 214764 (W.D.N.Y. Apr. 22, 1998). *Second*, issue preclusion only applies where (i) the "same issue" was decided "in [a] prior action and is decisive to the present action," and (ii) "the parties had a full and fair opportunity to contest the decision." *Buechel* v. *Bain*, 97 N.Y.2d 295, 303–304 (2001). *ExxonMobil* did not address whether OAG's request for documents produced to the SEC is preempted by federal law, but rather whether SEC regulations regarding "reserves [reporting] preempts any inquiry into [a] 'stranded assets theory.'" *ExxonMobil,* slip op. at 47–48. Thus, the preemption issue before this Court has not yet been decided.

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