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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Exxon Mobil Corporation ("ExxonMobil") submits this brief in opposition to the Attorney General's motion to compel compliance with the May 8, 2017 subpoenas challenged by ExxonMobil and in further support of its motion to quash.

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

[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

[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.

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Respectfully submitted,

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