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VIA E-FILING AND HAND DELIVERY

The Honorable Barry R. Ostrager  
Supreme Court, New York County  
60 Centre Street, Room 341  
New York, NY 10007

Re: *People of the State of New York, by Eric T. Schneiderman, Attorney General of the State of New York, v. PricewaterhouseCoopers, LLP and Exxon Mobil Corporation,*  
Index No. 451962/2016, Motion Seq. No. 2

Dear Justice Ostrager:

We write to notify the Court that Exxon Mobil Corporation (“Exxon”) has failed to comply in good faith with the subpoena issued by the New York State Office of the Attorney General (“OAG”), and this Court’s previous orders, in connection with OAG’s investigation into Exxon’s potential violations of New York consumer, business, and investor-fraud laws. Exxon has continuously delayed and obstructed the production of documents from its top executives and board members,<sup>1</sup> which are crucial to OAG’s investigation into Exxon’s touted risk-management practices regarding climate change. We respectfully request that the Court now schedule a conference to ensure Exxon’s compliance with OAG’s subpoena.

OAG’s repeated attempts to ensure Exxon’s compliance through conferring with Exxon’s counsel have proved futile. Most recently, after Exxon declared its document production “substantially complete” on February 15, 2017—despite producing fewer than 700 management-committee documents<sup>2</sup> out of over 415,000 documents produced overall—OAG immediately demanded an explanation. OAG questioned the small overall number of management documents produced, and the non-conforming nature of Exxon’s search and collection process

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<sup>1</sup> OAG’s reference to “management documents” herein refers both to documents from eight current and former members of the company’s management committee, including the current and two prior CEOs, its current CFO, three current SVPs, and one former SVP, and to Board documents and those of other relevant high-level executives, which Exxon promised would be produced with the management production.

<sup>2</sup> These 673 documents include only 160 emails from custodial files of all members of the management committee combined, over the decade-long time period of the subpoena. The vast majority of the non-email documents are either duplicative copies of paper reports produced from other custodians and/or from third parties.

for responsive management documents, which conceals the identity of the original source location in Exxon’s files from which the documents were produced.<sup>3</sup>

OAG refrained from immediately raising this matter with the Court only because Exxon assured OAG that Exxon would have a substantive response to OAG’s questions by March 10, 2017. Instead of honoring that promise, Exxon failed to answer OAG’s questions concerning the methodology and content of prior productions, and simply promised additional unspecified numbers of documents from unspecified custodians by March 17, 2017.

OAG is mindful of the Court’s observation at the last conference that Exxon had promised to “move heaven and earth” to comply with the subpoena by January 31, 2017, and the Court’s direction to contact the Court if Exxon failed to meet this standard. OAG makes this application because it has exhausted all other reasonable avenues to ensure Exxon’s compliance.

Moreover, OAG has uncovered new information in the last several days that lends additional urgency to this application.

Specifically, OAG found that Exxon’s former Chairman and CEO, Rex Wayne Tillerson, utilized an alias email address on the Exxon system under the pseudonym “Wayne Tracker” from at least 2008 through 2015. Mr. Tillerson used this secondary email address to send and receive materials regarding important matters, including those concerning to the risk-management issues related to climate change that are the focus of OAG’s investigation. Despite the company’s incidental production of approximately 60 documents bearing the “Wayne Tracker” email address, neither Exxon nor its counsel have ever disclosed that this separate email account was a vehicle for Mr. Tillerson’s relevant communications at Exxon, and no documents appear to have been collected from this email account, which also does not appear on Exxon’s list of preserved custodial sources or its privilege logs.

The same goes for thirty-four additional email accounts specifically assigned to top executives, board members, or their assistants. Documents relating to these email addresses should have been preserved from the outset, and should have been searched and produced prior to January 31, 2017, as part of the promised collection of management documents.

The missing management documents, which were called for by the subpoena and which

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<sup>3</sup> Documents produced from management-committee custodians were not produced in accordance with the subpoena’s specifications, in that Exxon failed to identify the actual electronic folders or physical file locations from which the documents came. Instead the electronic documents collected were produced from newly-created electronic folders, obscuring the source locations of the relevant documents. For example, for those documents that contained metadata (and 347 of them contained none at all), the folder locations stated the following, rather than the actual folder location at Exxon: “\archive.pst\Archives\Inbox\NYAG Climate Change\” (81 documents); “\NYAG Climate Change\” (41 documents); “\NYAG Climate Outlook Search.pst\Outlook Data File\” (15 documents); “\NYAGarchive.pst\NYAG Archive\NYAG Climate Change\” (7 documents); “\NYAGSUPPLEMENT.pst\Archives\NYAGSUPPLEMENT\” (181 documents); “\NYAGSUPPLEMENT.pst\NYAG Climate search2016\01042017 search\” (1 document).

OAG has repeatedly attempted to obtain over the past fifteen months,<sup>4</sup> are relevant to OAG’s investigation, which is focused, *inter alia*, on determining the accuracy of Exxon’s claims that it has engaged in specific, data-driven risk-management practices concerning the potential impact of climate change and global climate-change-related regulation on the company’s financial reporting, and business operations. Exxon has claimed that the company manages the risks posed by such regulation through the application of a “proxy cost of carbon” to investment decisions, and that specific analysis of the impact of a “low carbon scenario” is unnecessary, because a purportedly data-driven analysis shows that such a scenario is “highly unlikely.”<sup>5</sup>

Exxon’s top executives, and in particular, Mr. Tillerson, have made multiple representations that are at the center of OAG’s investigation of potentially false or misleading statements to investors and the public in regard to these purported internal safeguards.<sup>6</sup> As the investigation has progressed, documents Exxon has produced from other custodians have confirmed the close involvement of these key management individuals in the company’s development and implementation (or lack thereof) of its claimed risk-management policies. This has only increased OAG’s need for complete and transparent disclosure of relevant documents reflecting the role of these top managers, as OAG determines which witnesses to seek testimony from as the investigation proceeds to its next logical phase.

OAG is deeply concerned by the inability or unwillingness of Exxon to provide any explanation at all as to why documents from top executives and Board members have not been produced, by the non-disclosure of Mr. Tillerson’s alias email account, and by the apparent failure to preserve and/or search other sources of managerial documents, despite the fact that these individuals have been centrally involved in approving and publicizing company policies that are a

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<sup>4</sup> OAG followed up on its requests for these documents by letters, emails, telephone calls and in-person meet and confer sessions in, for example, December 2015, February 2016, March 2016, June 2016, July 2016, September 2016 and November 2016. It was during the in-person meet-and-confer sessions in November 2016 that Exxon acknowledged that it “owed” OAG the management documents, and pledged that Board-related documents would be produced as part of the management production. In a subsequent letter, Exxon claimed that it intended to produce all of these documents by January 31, 2017, a commitment memorialized by the Court at the most recent conference with the parties.

<sup>5</sup> In a 2014 report called *Energy and Carbon – Managing the Risks*, Exxon purported to respond to shareholder demands for analysis of the company’s financial security under a “low carbon scenario.” But rather than actually stress-test the company’s reserves and other assets by engaging in such scenario planning, Exxon instead insisted that such planning was unnecessary because a “low carbon scenario” was “highly unlikely,” based on claims that third-party data indicated that such a scenario would impose unacceptably high costs to U.S. households. *Managing the Risks* went on to claim that Exxon used an alternative stress-testing method for its investments, the application of a “proxy cost of carbon,” which the company claims “seeks to reflect all types of actions and policies that governments may take over the Outlook period relating to the exploration, development, production, transportation or use of carbon-based fuels.” Exxon’s executives have repeated the company’s claims regarding the application of a “proxy cost of carbon” to test the company’s prospective investments in its annual reports and annual *Outlook for Energy* publication.

<sup>6</sup> For example, in May 2016, the company issued a notice of the upcoming annual shareholders’ meeting, over Mr. Tillerson’s signature, stating explicitly that the company has employed “proxy cost of carbon” analysis to test investment decisions since 2007. At the annual meeting itself, Mr. Tillerson is on record as having stated that “everything gets tested” against the “proxy cost of carbon” analysis.

core subject matter of OAG's investigation.

OAG respectfully requests that the Court schedule a compliance conference at the earliest possible date. At that conference, the Court should order Exxon to:

- (1) explain its past practices for gathering and producing management and Board documents, including the reasons for the small volume of prior productions and the differences in the collection process as compared to other documents;
- (2) explain whether documents from Mr. Tillerson's secondary email account and the other 34 management-related sources which were not previously listed for preservation have in fact been preserved, collected, and/or reviewed for production;
- (3) identify whether any other relevant Exxon custodians utilized secondary email accounts, and whether Mr. Tillerson utilized any additional email accounts, and if so, whether documents relating to those accounts have been preserved, collected, and/or reviewed for production;
- (4) search for and produce documents from any of the above sources, to the extent the company has not previously done so; and
- (5) establish a firm deadline for production of all management-and-Board-related documents responsive to the subpoena.

Respectfully submitted,

/s

John Oleske

*Carbon copy by electronic mail:*

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