

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

PEOPLE OF THE STATE OF NEW YORK,
By LETITIA JAMES,
Attorney General of the State of New York,

Plaintiff,

– against –

EXXON MOBIL CORPORATION,

Defendant.

Index No. 452044/2018

IAS Part 61

Hon. Barry R. Ostrager

**PLAINTIFF’S PRETRIAL
MEMORANDUM**

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PRELIMINARY STATEMENT

For years, Exxon Mobil Corporation (“ExxonMobil”) defrauded the public about the impact of carbon regulation on the company’s financial outlook. ExxonMobil repeatedly represented that it expected governments to adopt more costly and stringent climate change regulations over the coming decades, and that it was applying a cost of carbon approaching \$80 per ton across its business to account for that risk. ExxonMobil’s statements would have led a reasonable investor to believe that it used this cost of carbon in projecting the costs associated with the company’s emissions from its investments and operations. But ExxonMobil did no such thing. For many years, ExxonMobil’s undisclosed internal guidance directed its employees to apply a far lower cost of carbon than the company purported to use. When ExxonMobil employees later tried to use the publicly disclosed figures, the company realized that doing so would lead to “large write-downs” and “massive GHG costs” and therefore instructed its employees not to apply those costs.

ExxonMobil’s representations about its exposure to future climate change regulations went directly to the company’s long-term value. The value of ExxonMobil’s stock is based on the company’s ability to identify, develop, and exploit a broad portfolio of long-lived oil and gas assets for decades into the future. In the words of the company’s former CEO Rex Tillerson: “We really are trying to undertake the most attractive opportunities that we see, thinking about them in terms of 30 years. . . . We run the business for people that are going to own these shares a very long time, [and] we hope the shares are in the trust that they leave their children and their grandchildren.” To protect its assets for future generations, ExxonMobil represented to investors that it was accounting for climate-related risks to its business over the coming decades, through 2040 and beyond.

The prospect of government action to reduce carbon emissions and combat climate change is a threat to ExxonMobil’s long-term assets. Beyond the carbon emissions caused when the oil and gas sold by ExxonMobil is burned, the company itself emits more than 120 million tons of

greenhouse gases (GHGs) every year in the course of its operations. Regulations that tax GHG emissions or otherwise increase the price of carbon will have an impact on the company's business and the economic viability of its assets. Indeed, ExxonMobil's Form 10-K filings explicitly recognize that "climate change and greenhouse gas restrictions" are significant risks that could "adversely affect our business, our financial and operating results, or our financial condition."

The investment community agreed with ExxonMobil's risk assessment. By 2013, the company was regularly receiving inquiries from shareholders, institutional investors, and analysts regarding its exposure to risk from future climate change regulation. In particular, investors asked the company to explain how it was managing the risk that its assets would become economically unsound or "stranded" in the face of more exacting carbon regulations.

To address investor concerns, ExxonMobil made numerous public disclosures designed to assure investors that it was taking these risks seriously and that the value of its most prized assets was secure. In publications, presentations, and meetings, ExxonMobil represented that it assumed that government regulation would result in escalating costs for GHG emissions over the coming decades, and that the company already incorporated that cost in its business. ExxonMobil did not just describe a general approach: it laid out a specific set of numbers to convey to the market just how seriously it was taking the risk that governments would adopt more costly climate change regulations. For example, ExxonMobil said that, for investments and operations in the most developed countries, its economic projections reflected a cost of carbon reaching about \$80 per ton of emissions in 2040. ExxonMobil repeatedly touted its "consistent" use of an internal cost of carbon across all of its business operations to account for that risk.

These representations were materially false and misleading. ExxonMobil did not apply these escalating carbon costs in the consistent fashion it had promised. Instead, ExxonMobil

applied substantially lower costs to its projected GHG emissions. When ExxonMobil finally did try to apply its publicly disclosed carbon costs to its projected emissions, after years of using lower costs, the results were disastrous. Employees with responsibility for ExxonMobil's enormous, high-emitting oil sands projects in Canada warned of "massive GHG costs" and "large write-downs." In response, the company made the decision not to apply the escalating carbon costs it had disclosed to the public, and instead applied a fraction of those costs. As a result, ExxonMobil significantly overstated the ability of its assets to withstand an increase in regulatory stringency. Expert testimony will show that ExxonMobil's failure to abide by its public representations had a significant impact on the company's economic projections for specific projects.

At trial, there is likely to be little dispute about the broad outlines of that story. ExxonMobil does not contend that it applied a cost of carbon approaching \$80 per ton to its projected emissions in developed countries. Indeed, ExxonMobil concedes that it applied two different sets of costs: a so-called "proxy cost" – which did reach \$80 per ton in some economic sectors – that was applied for purposes of projecting demand for oil and gas, and a much lower, so-called "GHG cost" that was applied to operating expenses for purposes of project economics.

ExxonMobil contends that investors should have understood this distinction based on its disclosures. The evidence at trial, however, will show that a reasonable investor would not have understood from the plain language of the disclosures that ExxonMobil applied two sets of costs, one of which was significantly lower than the publicly represented figures. Investors who repeatedly met with ExxonMobil and heard its presentations will testify that the company never disclosed that it was applying a separate and lower set of projected costs to its anticipated emissions. To the contrary, ExxonMobil publicly used the terms "GHG cost" and "proxy cost" – and even "GHG proxy cost" – interchangeably, and left investors with the misimpression that the

company was applying the higher, publicly disclosed figures across its business.

To be clear, this case is *not* about whether a cost of carbon approaching \$80 per ton in 2040 in developed countries was the right cost to apply or whether there might have been a rational basis to use lower costs. Rather, this is a case about the disclosures ExxonMobil made about its use of a cost of carbon to hedge against the risk of more exacting regulations and what a reasonable investor would have understood those disclosures to mean.

ExxonMobil misrepresented the projected carbon costs it used in assessing investments and evaluating its ongoing operations. ExxonMobil's purported use of a cost of carbon was important to investors both as a concrete metric of how ExxonMobil was managing the risk of climate change to its business, and as a means for the company to avoid investment decisions that would be economically unsound in a world of increasingly stringent climate change regulation. By representing that it was applying higher projected carbon costs than it was actually using, ExxonMobil made its assets appear significantly more secure than they really were, which had a material impact on its share price. In so doing, ExxonMobil defrauded its investors under the Martin Act, Executive Law § 63(12), equity, and the common law.

SUMMARY OF THE CASE

Over the past decade, investors have become increasingly concerned about ExxonMobil's "carbon asset risk," *i.e.*, the risk that future regulations to mitigate climate change, such as carbon taxes, could cause the company's oil and gas reserves and long-term assets to become economically unsound or "stranded." This risk presents challenges to ExxonMobil in each of its three main business segments: (1) upstream, which involves the exploration, development, and production of oil and gas resources; (2) downstream, which involves the refining, marketing, and distribution of petroleum and derivative products (*e.g.*, gasoline); and (3) chemicals, which

involves the manufacture and sale of petrochemicals (*e.g.*, plastics).

Given the magnitude of this risk, investors sought reassurance that ExxonMobil was taking meaningful action to protect its business. In response, ExxonMobil assured investors, both in public disclosures and meetings, that the company was well-protected because (1) it was operating under the assumption that climate change regulation around the world would grow increasingly stringent over the coming decades, and (2) it was proactively managing that risk by applying an escalating cost of GHG emissions as a proxy for the costs of those future regulations.

ExxonMobil's public representations interchangeably used a number of terms to describe the costs it applied, including "proxy cost," "GHG cost," "cost of carbon," "price of carbon," and "GHG proxy cost" (hereinafter, "GHG proxy cost"). ExxonMobil repeatedly represented to investors, in publications such as its annual *Outlook for Energy* (*i.e.*, *Energy Outlook*) and elsewhere, that it applied a GHG proxy cost reaching about \$60 per ton of emissions by 2030 and \$80 per ton of emissions by 2040 in its investment decision-making and business planning in developed countries in the OECD (Organisation for Economic Co-operation and Development). ExxonMobil also told investors that it applied GHG proxy costs to projects and assets in less developed (*i.e.*, non-OECD) countries.

The evidence at trial will show that ExxonMobil's representations about its use of a GHG proxy cost were false and misleading in four key areas: (1) investment decision-making, the process by which ExxonMobil decides whether to fund major projects such as the construction of new facilities or a significant expansion of existing facilities; (2) business planning, the annual process by which ExxonMobil evaluates the projected cash flows associated with each of its assets, and estimates the oil and gas reserves and resources associated with each of its upstream assets; (3) impairment evaluation, the process by which ExxonMobil determines whether any of its assets

need to be impaired (*i.e.*, written down) on its books; and (4) oil and gas demand forecasts.

For years, with the approval of senior management, ExxonMobil directed employees to apply GHG proxy costs that reached a maximum of only \$40 per ton of emissions in OECD countries, half of the publicly represented cost of \$80 per ton. These figures were contained in ExxonMobil's Corporate Plan Dataguide ("Dataguide"), an internal company document issued annually that set out economic assumptions, such as oil and gas prices and inflation figures, for employees to use for purposes of investment decisions and business planning. In addition, until June 2016, the Dataguide directed employees not to apply any GHG proxy cost in the company's base (*i.e.*, primary) economic projections in non-OECD countries.

When shareholders demanded more detail concerning ExxonMobil's management of climate change risk, the company made additional misrepresentations. On March 31, 2014, in exchange for the withdrawal of two shareholder resolutions seeking information on ExxonMobil's management of climate change risk, ExxonMobil issued two reports entitled *Energy and Carbon – Managing the Risks* ("*Managing the Risks*") and *Energy and Climate*. In those reports, which Mr. Tillerson reviewed and approved, the company told investors that it applied an escalating GHG proxy cost approaching \$80 per ton in developed countries. The reports also included maps setting out the company's purported application of these costs around the world, including a cost of \$20-40 per ton in many non-OECD countries. ExxonMobil further specified how it was applying its GHG proxy cost, stating:

- "We [] address the potential for *future* climate-related controls, including the potential for restriction on emissions, through the use of a proxy cost of carbon."
- "We *require* that investment proposals reflect the climate-related policy decisions we anticipate governments making during the Outlook period and therefore incorporate them as a factor in our *specific investment decisions*."
- "We *rigorously* consider the risk of climate change in our planning bases and investments."

- “We [] *require* that *all significant proposed projects* include a cost of carbon – which reflects our best assessment of costs associated with potential GHG regulations over the Outlook period – when being evaluated for investment.”
- “ExxonMobil *requires* that *all business units* use a *consistent corporate planning basis*, including the proxy cost of carbon . . . in evaluating capital expenditures and developing business plans.”
- “This GHG proxy cost is *integral* to ExxonMobil’s planning[.]” (all emphasis added)

However, at that time, ExxonMobil’s internal Dataguide directed employees to apply a GHG proxy cost that did not exceed \$40 per ton, and directed employees to apply no such costs to base economics in non-OECD countries, belying the company’s public representations. Indeed, the company’s Corporate GHG Manager Guy Powell recognized after the fact that these reports were misleading. In a May 2014 presentation that was ultimately delivered to the company’s Management Committee, Mr. Powell urged management to align the internal GHG proxy costs with the company’s public representations. In that presentation, he wrote that, in *Managing the Risks and Energy and Climate*, “we have implied that we use the EO [*Energy Outlook*] basis for proxy cost of carbon when evaluating investments,” while in fact ExxonMobil actually applied the lower GHG proxy cost figures that appeared in the company’s internal Dataguide. Mr. Powell added that the company’s use of lower GHG proxy costs was “non-conservative” (*i.e.*, riskier) compared to the publicly represented costs for projects that created GHG emissions (*i.e.*, the vast majority of ExxonMobil’s projects). In response, and without disclosing its prior misstatements, ExxonMobil revised the internal Dataguide in June 2014 to increase the GHG proxy cost figures for OECD countries to conform to the figures it publicly claimed to be using.

But ExxonMobil did not actually align its internal practices with its public disclosures. Instead, when ExxonMobil attempted to apply the higher, publicly disclosed GHG proxy cost figures, it realized that applying those costs significantly threatened the economics of some of the

company's largest projects. In particular, ExxonMobil discovered that applying these GHG proxy costs would lead to projections of "massive GHG costs" for its oil sands assets in Alberta, Canada, which accounted for as much as 25% of ExxonMobil's total resource base. Oil sands, which are tar deposits that require an immense amount of energy to convert to the equivalent of crude oil, are especially vulnerable to anticipated climate change regulation and, likewise, are especially sensitive to the application of a GHG proxy cost.

Rather than accepting its own findings that these major assets may become stranded in the face of increasingly stringent climate change regulations, the company directed its employees to apply an "alternate methodology." That methodology replaced the escalating GHG proxy cost that ExxonMobil publicly disclosed to investors with a flat cost that was based entirely on existing climate regulation. Accordingly, in 2015 and 2016, ExxonMobil did not apply a GHG proxy cost approaching \$80 per ton by 2040 to its cost projections in Alberta, as it repeatedly and publicly represented. Instead, the company applied a figure that was effectively \$5 per ton – 94% lower than the costs it represented. This figure was based on the undisclosed assumption that Alberta's current climate change regulations would remain frozen at existing levels for decades into the future – directly contrary to the company's representations that its GHG proxy cost would increase over time in anticipation of increasingly stringent future regulations, and directly contrary to the company's representations in *Managing the Risks* and *Energy and Climate* that "all business units" were "require[d]" to apply the GHG proxy cost in a "rigorous[]" and "consistent" manner.

ExxonMobil's fraud also pervaded the company's process for estimating the quantity of oil and gas that it would be able to profitably produce, also known as its company reserves and resource base estimates. Based on the company's assertions that it applied a GHG proxy cost in its business planning, along with related representations, reasonable investors would have expected

ExxonMobil's company reserves and resource base estimates to reflect the application of GHG proxy costs. But when ExxonMobil attempted to apply the publicly disclosed GHG proxy cost figures in its cost projections for its company reserves and resource base evaluations for oil sands assets in Alberta, it discovered that doing so "would result in large write-downs." As a result, in 2015 and 2016, ExxonMobil again applied only the costs set out in existing regulations, and made the assumption, which it did not disclose to investors, that the future climate regulations that the company claimed to be planning for would never actually be implemented.

Additionally, ExxonMobil did not apply its GHG proxy cost to the cost projections it used for purposes of asset impairment evaluations prior to 2016. This violated GAAP (*i.e.*, Generally Accepted Accounting Principles), which requires the application of economic assumptions in impairment testing that are consistent with a company's internal projections and public statements. This also violated ExxonMobil's public representations that it complied with this GAAP requirement. Expert testimony will demonstrate that, had ExxonMobil included GHG proxy costs in its cost projections for its 2015 year-end impairment evaluations, a major asset in the Gulf of Mexico would have been subject to an after-tax impairment loss of \$320 million to \$478 million. ExxonMobil also did not apply the GHG proxy cost in a manner consistent with its public representations when forecasting demand for liquid fuels in the transportation sector, a major source of revenue.

Documents and testimony will show that shareholders, including major financial institutions, paid close attention to ExxonMobil's disclosures of climate change risk, and were in fact misled. Shareholders withdrew requests for enhanced disclosures about carbon asset risk after ExxonMobil falsely represented that it was applying a GHG proxy cost approaching \$80 per ton to its investment decisions and planning, and after ExxonMobil promised to provide further

disclosures that turned out to be fraudulent. Analysts at major financial institutions applauded ExxonMobil for using higher GHG proxy costs than competitors. Sophisticated investors considered ExxonMobil's climate-related risk to be low because ExxonMobil purportedly applied a GHG proxy cost, which seemed to signify that it was already accounting for future climate change regulations. Investors reasonably assumed, based on the company's misrepresentations, that ExxonMobil was applying an escalating GHG proxy cost approaching \$80 per ton to assess the costs the company would face from its projected GHG emissions. They were deceived.

ExxonMobil's misrepresentations about its use of GHG proxy costs caused the market to overvalue its stock price, and investors who purchased ExxonMobil's stock at inflated prices suffered harm when the company's alleged misrepresentations were revealed through corrective disclosures. The evidence will show that when the deception uncovered by the State's investigation and related investigations was revealed, ExxonMobil's stock price fell, injuring investors who must now be made whole. In the aggregate, the damage caused to ExxonMobil's shareholders was approximately \$476 million to \$1.6 billion.

CAUSES OF ACTION

I. Martin Act Fraud

The Martin Act, G.B.L. §§ 352 *et seq.*, prohibits the use of “any device, scheme or artifice . . . deception, misrepresentation, concealment, suppression, fraud, false pretense or false promise” in connection with the “issuance, exchange, purchase, sale, promotion, negotiation, advertisement, investment advice or distribution” of securities. G.B.L. § 352. These provisions are liberally construed, *People v. Federated Radio Corp.*, 244 N.Y. 33, 38 (1926), and extend to “all deceitful practices contrary to the plain rules of common honesty and all acts tending to deceive or mislead the public.” *People v. Sala*, 258 A.D.2d 182, 193 (3d Dep’t 1999), *aff’d*, 95

N.Y.2d 254 (2000).

To establish liability under the Martin Act, the Attorney General need only prove a “misrepresentation of material facts,” *Federated Radio*., 244 N.Y. at 41, or an omission of material facts, *Sala*, 258 A.D.2d at 194. This requires proof of falsity and materiality, *i.e.*, a substantial likelihood an investor would have considered the representation or omission important in light of the total mix of information. *State v. Rachmani Corp.*, 71 N.Y.2d 718, 726-27 (1988). Liability under the Martin Act may be based on representations or omissions that are significant in the context, for example, of investment decisions or shareholder voting. *See id.*

To establish liability under the Martin Act, the Attorney General “need not allege or prove either scienter or intentional fraud.” *Id.* at 725 n.6. Likewise, the Martin Act does not require proof of reliance on fraudulent representations or damages. *State v. Sonifer Realty Corp.*, 212 A.D.2d 366, 367 (1st Dep’t 1995); *see also People v. Electro Process, Inc.*, 284 A.D. 833, 833 (4th Dep’t 1954) (holding that “[t]he fact, if it is a fact, that no sales of stock have resulted from [the misrepresentations] does not permit the escape” from liability under the Martin Act).

Proof of a Martin Act violation requires a preponderance of the evidence. *People v. Silinsky*, 217 A.D. 247, 248, (2d Dep’t 1926); 72 N.Y. Jur. 2d Investment Securities § 256 (last updated Aug. 2019) (“The Attorney General . . . has the burden of proving by a fair preponderance of the evidence that the defendant has engaged in, or was about to engage in, fraudulent practices in violation of the [Martin Act].”).

II. Executive Law § 63(12) Fraud

Fraudulent acts that violate the Martin Act also violate Executive Law § 63(12) when they are repeated or persistent. Executive Law § 63(12) prohibits “repeated fraudulent or illegal acts” and “persistent fraud or illegality in the carrying on, conducting or transaction of business.” The

definitions of fraud under § 63(12) and the Martin Act are “virtually identical.” *Rachmani*, 71 N.Y.2d at 721 n.1. “Repeated” fraud is defined in § 63(12) to include “repetition of any separate and distinct fraudulent . . . act, or conduct which affects more than one person.” “Persistent” fraud is defined by § 63(12) to include the “continuance or carrying on of any fraudulent . . . act, or conduct which affects more than one person.”

Section 63(12) is construed liberally to effectuate its remedial purpose. *State v. Maiorano*, 189 A.D.2d 766, 767 (2d Dep’t 1993). As with the Martin Act, neither intent nor reliance need be proven to establish fraud under § 63(12). *People v. Trump Entrepreneur Initiative LLC*, 137 A.D.3d 409, 417 (1st Dep’t 2016). Ultimately, “the test for fraud” under § 63(12) “is whether the targeted act has the capacity or tendency to deceive or creates an atmosphere conducive to fraud.” *People v. Gen. Elec. Co., Inc.*, 302 A.D.2d 314, 314 (1st Dep’t 2003).

III. Equitable Fraud

Equitable fraud requires (1) a “material misrepresentation of fact” and (2) “justifiable reliance.” *People v. Credit Suisse Sec. (USA) LLC*, 31 N.Y.3d 622, 638 (2018) (Feinman, J., concurring). It does not require scienter, intent to induce reliance, or damages. *Id.* at 641.

IV. Common Law Fraud

Common law fraud requires (1) “a material misrepresentation of fact,” (2) “knowledge of its falsity,” (3) “an intent to induce reliance,” (4) “justifiable reliance,” and (5) damages. *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009). In contrast to the Martin Act, proof of common law fraud requires clear and convincing evidence. *Abrahami v. UPC Const. Co.*, 224 A.D.2d 231, 233 (1st Dep’t 1996).

POINT ONE:**EXXONMOBIL VIOLATED THE MARTIN ACT AND EXECUTIVE LAW § 63(12)****I. ExxonMobil's GHG Proxy Cost Representations Were False**

ExxonMobil made numerous false and misleading representations to the investment community concerning its use of a GHG proxy cost to manage the risk of climate change regulations. As set forth below, ExxonMobil did not abide by these representations in the context of: (1) investment decisions and business planning, including company reserves and resource base estimates; (2) impairment evaluations; and (3) oil and gas demand forecasts.

A. ExxonMobil's Misrepresentations Concerning Investment Decisions and Business Planning

For years, ExxonMobil represented to investors that it believed that governments would impose increasingly stringent climate change regulations in the coming decades, and that it was managing the risk of future regulations by applying a GHG proxy cost in its investment decision-making and business planning. However, ExxonMobil's representations about its application of a GHG proxy cost in these areas were misleading in several ways. First, from 2010 to 2016, ExxonMobil's internal Dataguide directed employees to apply GHG proxy costs that were lower than the figures the company represented to the public. The figures for OECD countries were not aligned with public representations until June 2014, and the figures for non-OECD countries were not aligned until June 2016. Second, in 2015 and 2016, after ExxonMobil aligned the Dataguide figures for OECD countries with its public representations, the company discovered that applying the publicly represented GHG proxy cost to its oil sands assets in Alberta would lead to "large write-downs" and "massive GHG costs" that would make these investments look significantly less profitable. [Affirmation of Kim Berger ("Aff.") Exs. A, B] In response, the company decided to employ an "alternate methodology" with cost inputs that were 94% lower than the publicly

represented GHG proxy cost. [*Id.*] This “alternate methodology” assumed, contrary to ExxonMobil’s public representations, that existing regulations would remain frozen in place indefinitely. Third, in other areas of its business, as late as 2016, ExxonMobil did not apply GHG proxy costs in its cost projections at all.

1. *2010-2016: ExxonMobil’s Dataguide Directed Employees to Apply GHG Proxy Costs that Were Far Lower than Publicly Represented Costs*

For years, for purposes of investment decisions and business planning, ExxonMobil used a set of GHG proxy costs contained in the company’s internal Dataguide that were significantly lower than the costs it publicly claimed to be expecting. For example, in its 2010 *Outlook for Energy* report, ExxonMobil represented that it expected regulatory costs to reach \$60 per ton of emissions in the OECD in 2030; internally, the 2010 Dataguide set out a GHG proxy cost of only \$40 per ton in 2030. [JX910; JX919.]¹ In 2012, ExxonMobil represented that it expected costs to reach \$60 per ton in 2030 and \$80 in 2040 in the OECD; the 2012 Dataguide set out a GHG proxy cost of only \$40 per ton in 2030, and did not provide any guidance for 2040. [JX911; JX920.]

In its *Outlook for Energy* report for 2013, ExxonMobil’s GHG proxy cost representations grew more specific. The company stated that it “assumes a cost of carbon as a proxy for a wide variety of potential policies that might be adopted by governments over time to help stem GHG emissions,” and that “in most OECD nations, ExxonMobil expects the implied cost of CO2 emissions to reach about \$80 per ton in 2040,” and “about \$60 per ton” in 2030. [Aff. Ex. C at 30, 34.] The report also included a map, which indicated that ExxonMobil was applying a projected “CO2 ‘Proxy’ Cost” of \$20-40 per ton in 2040 in numerous non-OECD countries, such as China and Mexico. [*Id.* at 34] However, at that time, ExxonMobil’s internal Dataguide set out a GHG

¹ Because the joint appendix is not yet finalized or stamped, citations to it are subject to change.

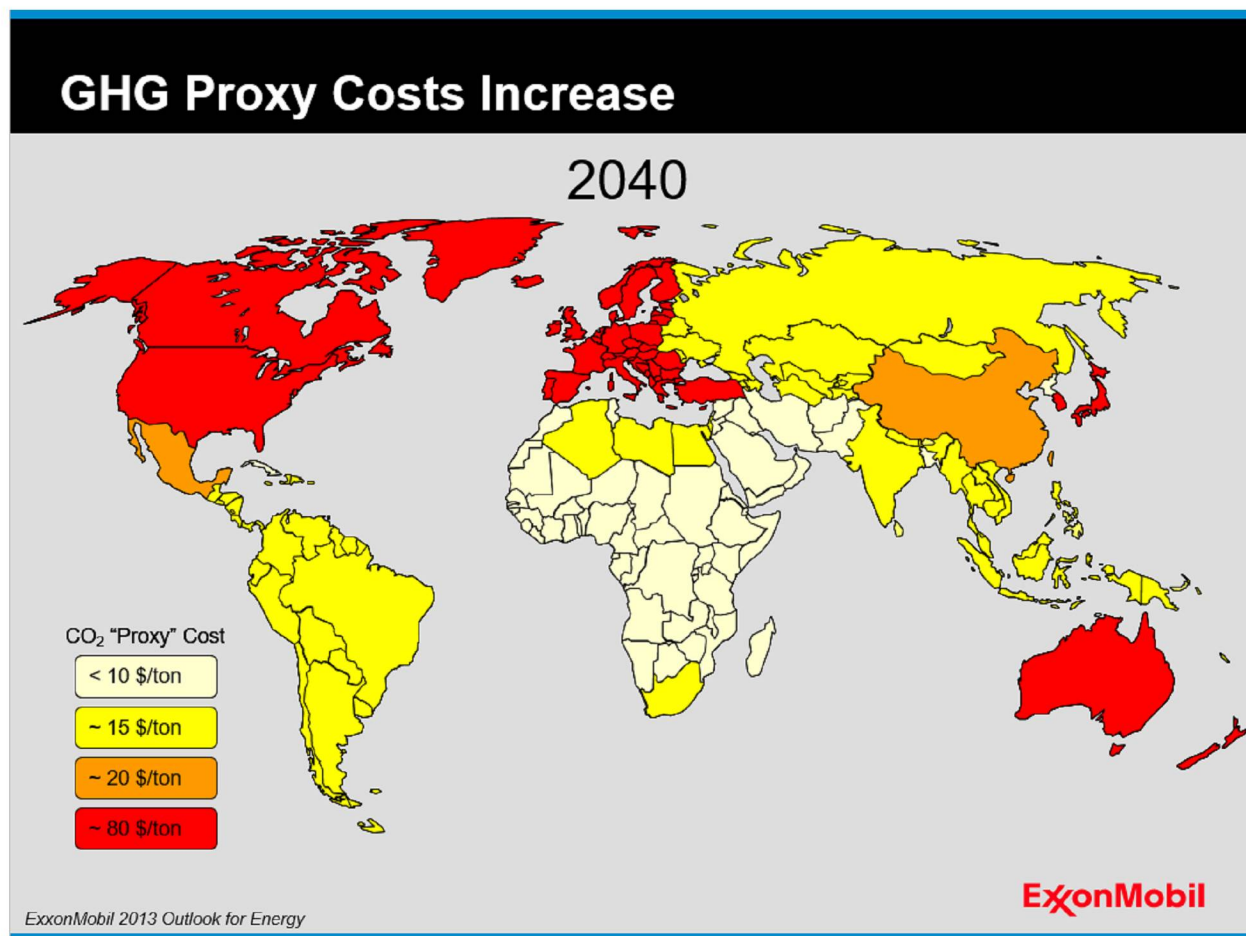
proxy cost of only \$40 per ton in the OECD in 2030, and did not provide any guidance for the year 2040. [JX920; Aff. Ex. D at 31.] The internal guidance also directed employees not to apply *any* GHG proxy cost to base (*i.e.*, primary) economic projections in non-OECD countries. [*Id.*]²

The company's misrepresentations became even more explicit under pressure from shareholders to disclose more details about the company's management of carbon asset risk. In early December 2013, two groups of ExxonMobil investors – one led by Arjuna Capital, an investment advisory firm with a focus on sustainable investing, and the other led by the Christopher Reynolds Foundation (“CRF”), a nonprofit organization and ExxonMobil shareholder – filed proposals requesting information concerning the company's management of climate change risk, including carbon asset risk, for ExxonMobil's 2014 proxy statement. In particular, the proposal filed by Arjuna Capital explained that “investors are concerned that global actions to significantly address climate change, either through carbon regulation, market forces, or socioeconomic pressure, could reduce the value of ExxonMobil's oil and gas reserves and/or related infrastructure before the end of their useful life.” [Aff. Ex. E.] Arjuna Capital called for ExxonMobil to issue a report that would “address the risk of stranded assets presented by global climate change, including analysis of the long and short term financial and operational risks to the company.” [*Id.*]

At a meeting in New York on December 17, 2013 with the shareholder proponents and other investors, including the New York City Office of the Comptroller, ExxonMobil presented a slideshow entitled “The Outlook for Energy and GHG's: A View to 2040.” The presentation included a slide entitled “GHG Proxy Costs Increase,” which featured a color-coded map setting out the GHG proxy costs that ExxonMobil purportedly applied to projects and assets around the

² The Dataguide instructed employees to apply GHG proxy costs in non-OECD countries only for purposes of “sensitivity analyses” (*i.e.*, alternative economic projections) in limited circumstances. [Aff. Ex. D at 31.]

world. [Aff. Ex. F at 4.] That map, which is reproduced here, depicted ExxonMobil's GHG proxy cost for 2040 as being approximately \$80 per ton in most OECD countries, approximately \$20 per ton in China and Mexico, and approximately \$15 per ton in many other non-OECD countries:



However, at the time, ExxonMobil's Dataguide directed employees to apply GHG proxy costs of only \$40 per ton in the OECD, and \$0 per ton for base economics in all non-OECD countries.

Following the December 17, 2013 meeting, ExxonMobil convinced the Arjuna Capital and CRF shareholder groups to withdraw their proposals in exchange for the company's agreement to publish reports addressing their concerns. [PX146; PX265.] For example, in an agreement with Arjuna Capital, ExxonMobil promised to address "[w]hy the Company believes current investments in new reserves are not particularly exposed to the risk of stranded assets" and "how

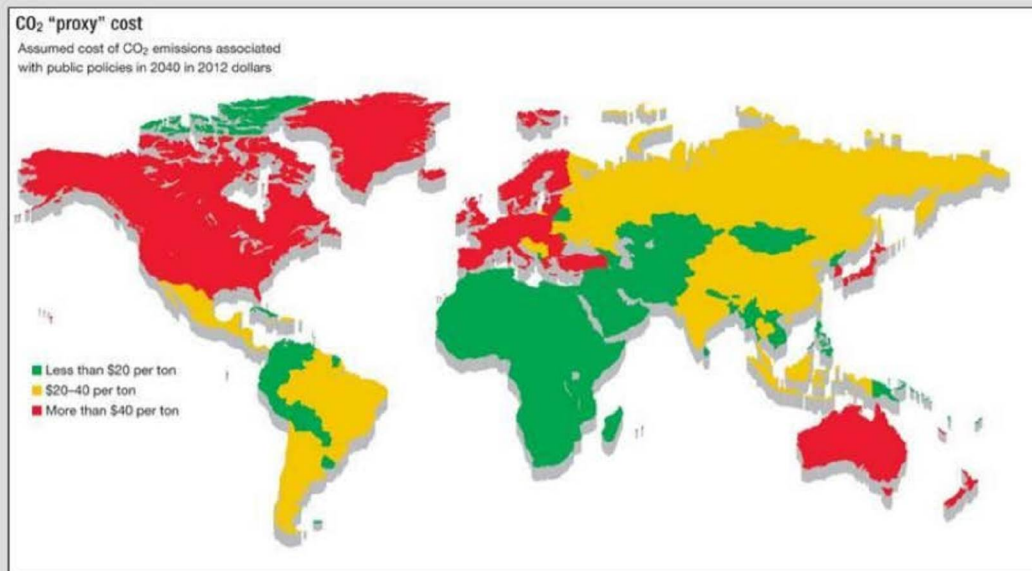
current capital expenditure is affected by any considerations the company makes with regards to future short-to-long term risk of stranded assets.” [Id.]

As a result of its agreements with the shareholder groups, ExxonMobil published two reports entitled *Energy and Climate* and *Managing the Risks* on March 31, 2014. These reports (1) restated the company’s expectation that increasingly stringent climate regulations would be adopted by governments around the world over the coming decades, and (2) explained in detail that ExxonMobil applied a GHG proxy cost in its investment decision-making and business planning to protect the company against the risk of such regulations.

Energy and Climate and *Managing the Risks* specified that ExxonMobil applied a GHG proxy cost of about \$80 per ton in 2040 in OECD countries. For example, in *Energy and Climate*, ExxonMobil stated that, “in the OECD nations, we apply a proxy cost that is about \$80 per ton in 2040,” whereas “[i]n the developing world, we apply a range of proxy costs with the more wealthy countries, like China and Mexico, reaching about \$30/ton in 2040.” [Aff. Ex. H at 6.] However, at the time, the Dataguide directed employees to apply a GHG proxy cost of only \$40 per ton in 2040 in OECD countries, and \$0 per ton to base economic projections in non-OECD countries.

Both *Energy and Climate* and *Managing the Risks* also included the map below, setting out the GHG proxy costs ExxonMobil purported to apply to projects and assets around the world:

CO₂ Policies



ExxonMobil 2014 Outlook for Energy

ExxonMobil

[Aff. Ex. G at 17; Aff. Ex. H at 6.]

In both reports, ExxonMobil described in detail how it purportedly applied this GHG proxy cost in its investment decision-making and business planning. In *Energy and Climate*, ExxonMobil emphasized that the company “*requires* that all business units use a *consistent corporate planning basis*, including the proxy cost of carbon discussed above, in evaluating capital expenditures and developing business plans,” as part of a “*robust* process for evaluating investment opportunities and managing [its] portfolio of operating assets.” [Aff. Ex. H at 20 (emphasis added).] ExxonMobil added that “[t]his GHG proxy cost is *integral* to ExxonMobil’s planning.” [*Id.* at 6 (emphasis added).] Likewise, in *Managing the Risks*, ExxonMobil stated:

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

carbon. This proxy cost of carbon is embedded in our current *Outlook for Energy*, and has been a feature of the report for several years. The proxy cost seeks to reflect all types of actions and policies that governments may take over the Outlook period relating to the exploration, development, production, transportation or use of carbon-based fuels. Our proxy cost, which in some areas **may approach \$80/ton over the Outlook period**, is not a suggestion that governments should apply specific taxes. . . . It is simply our effort to quantify what we believe government policies over the Outlook period could cost to our investment opportunities. Perhaps most importantly, **we require that all our business segments include, where appropriate, GHG costs in their economics when seeking funding for capital investments. We require that investment proposals reflect the climate-related policy decisions we anticipate governments making during the Outlook period and therefore incorporate them as a factor in our specific investment decisions.** [Aff. Ex. G at 17-18 (emphasis added).]

ExxonMobil further represented in *Managing the Risks* that “[w]e *rigorously* consider the risk of climate change in our planning bases and investments” and “*require that all significant proposed projects* include a cost of carbon – which reflects our best assessment of costs associated with potential GHG regulations over the Outlook period – when being evaluated for investment.” [Aff. Ex. G at 21 (emphasis added).] ExxonMobil concluded that “we are confident that none of our hydrocarbon reserves are now or will become “stranded,” and that it “does not believe current investments in new reserves are exposed to the risk of stranded assets.” [*Id.* at 1, 19.]

While ExxonMobil noted that it applied different GHG proxy cost values in different geographic regions, the company did not disclose that it applied lower GHG proxy costs – or, in some cases, no GHG proxy cost at all – to its GHG emissions in its cost projections. To the contrary, the company represented again and again that it applied the publicly represented GHG proxy costs in its investment decisions and business planning.

ExxonMobil also made similar representations in its annual *Outlook for Energy* reports, Corporate Citizenship Reports, responses to questionnaires from CDP (formerly known as the Carbon Disclosure Project), shareholder proxy statements, and postings in the “Perspectives” section of its corporate website. For example, in its 2014 and 2015 Corporate Citizenship Reports

and its 2015 and 2016 CDP questionnaire responses, ExxonMobil specified that it was applying a GHG proxy cost approaching \$80 per ton by 2040 in developed countries, and added: “We believe our view on the potential for future policy action is realistic and, by no means represents a ‘business as usual’ case.” [PX007; PX008; PX013; PX014.] Likewise, at a December 2, 2014 meeting with investors in New York, ExxonMobil presented a slide that was nearly identical to the map in *Energy and Climate* and *Managing the Risks* reproduced above.

Additionally, in a 2016 posting on its website entitled “Meeting Global Needs – Managing Climate Change Business Risks,” ExxonMobil stated: “We use a simple cost of carbon as a proxy mechanism to help model the potential impacts of a broad mosaic of future GHG policies. For example, in most OECD nations, we assume an implied cost of CO2 emissions that will reach about USD \$80 per metric ton in 2040. Developing nations will have a wide range of policy costs with the wealthiest ones reaching about \$35 per metric ton. This GHG proxy cost is integral to ExxonMobil’s planning[.]” [PX023.] ExxonMobil also frequently emphasized the “key point” that it had applied its GHG proxy cost “since 2007,” as noted in a December 2015 posting on its website entitled “ExxonMobil and the carbon tax.” [PX024.]

Moreover, Mr. Tillerson specifically assured investors at the company’s May 2016 annual shareholder meeting that ExxonMobil was applying the GHG proxy cost in its cost projections:

We have, unlike many of our competitors, we have for many years included a price of carbon in our outlook. And **that price of carbon gets put into all of our economic models when we make investment decisions** as well. **It’s a proxy.** We don’t know how else to model what future policy impacts might be. **But whatever policies are, ultimately they come back to either your revenues or your cost. So we choose to put it in as a cost. So we have accommodated that uncertainty in the future, and everything gets tested against it.** [Aff. Ex. I at 29 (emphasis added).]

A reasonable ExxonMobil shareholder would have understood from these representations that ExxonMobil applied a consistent GHG proxy cost in its cost projections for its investment

decision-making and business planning across the company's business units. A reasonable shareholder would not have understood that the company only applied the publicly disclosed GHG proxy cost figures for purposes of projecting demand for oil and gas, nor that it used a lower GHG proxy cost in projecting climate regulatory costs associated with its own emissions.

These misrepresentations and omissions plainly meet the standard of fraud under the Martin Act by "tending to deceive or mislead the public," *Sala*, 258 A.D.2d at 193, and constitute repeated and persistent fraud for purposes of Executive Law § 63(12). Moreover, at trial, investors will testify that they understood ExxonMobil to be applying the publicly disclosed GHG proxy costs to the costs associated with the company's own emissions – which in fact was not the case.

Indeed, ExxonMobil internally recognized that the company's representations in *Energy and Climate* and *Managing the Risks* were false and misleading. In a May 2014 presentation prepared for Mr. Tillerson and other executives on ExxonMobil's Management Committee, ExxonMobil's new Corporate GHG Manager Guy Powell recommended aligning the figures in the internal Dataguide with the publicly disclosed figures on the grounds that (i) the Dataguide figures were "non-conservative" (*i.e.*, riskier) compared to the publicly disclosed figures for projects that created GHG emissions, and (ii) ExxonMobil's March 2014 reports had "implied" that the company used the publicly disclosed figures "when evaluating investments," when in fact the company applied much lower figures in its cost projections. [Aff. Ex. J at 4.] Below is the text of Mr. Powell's recommendation:

- Over the past several years, the Corporate Plan and Energy Outlook GHG emissions costs basis have been disconnected (CP \$40/T and EO \$60/T in 2030). The likely rationale for this was to provide a conservative CP basis for evaluating energy conservation / emissions reductions projects. We propose to bring these prices together in 2014 for the following reasons:
 1. While using a lower cost basis in the CP provides a conservative view for evaluating energy conservation / emissions reduction investments, it provides a non-conservative view for evaluating capacity growth investments that involve GHG emission creation (combustion / venting / flaring etc.)
 2. In recent reports released by EM ("Energy and Climate" and "Energy and Carbon – Managing the risk") we have implied that we use the EO basis for proxy cost of carbon when evaluating investments.

In June 2014, ExxonMobil adopted Mr. Powell's recommendation and increased the long-term GHG proxy cost assumptions for OECD countries in the Dataguide to align with the company's public representations. [Aff. Ex. K at 31-32.] ExxonMobil did not align the Dataguide with its GHG proxy cost representations for non-OECD countries, however, until June 2016. [PX031.] Before then, ExxonMobil generally omitted GHG proxy costs from its base economic cost projections in non-OECD countries, contrary to the representations set out above.

2. *2015-2016: ExxonMobil Failed to Apply Publicly Represented GHG Proxy Costs in the Alberta Oil Sands*

After ExxonMobil increased the GHG proxy cost figures in the Dataguide for OECD countries in 2014, the company discovered that applying those figures to its cost projections would make certain aspects of its business appear less profitable and more risky. This was particularly the case for its assets in the Alberta oil sands, which are highly GHG-intensive. As a result, instead of applying the escalating GHG proxy costs that it publicly represented, ExxonMobil applied an effective cost that plateaued around \$5 per ton. This "alternate methodology" was based on the undisclosed assumption – contrary to the company's public representations – that Alberta's existing climate change regulations would remain frozen in place indefinitely. [Aff. Ex. B at 1.]

Due to their GHG-intensive operations and low margins, oil sands assets are particularly vulnerable to carbon asset risk. Investors have repeatedly expressed concern that oil sands assets may become stranded as climate change regulations become increasingly stringent. For example, in an April 2015 report, HSBC Global Research wrote that "[f]ossil fuel companies, or some of their assets, may become economically non-viable in the future" due to climate change regulation, among other factors, and noted that "oil sands face the greatest stranding risks, in our view, given the combination of high breakeven price and higher carbon intensity of production." [PX098.]

ExxonMobil's oil sands assets in Alberta include major facilities at Cold Lake, Syncrude,

and Kearn. ExxonMobil has invested tens of billions of dollars in Kearn alone through subsidiaries and affiliates, including ExxonMobil Canada, a wholly-owned subsidiary of ExxonMobil, and Imperial Oil Limited (“Imperial”), a Canadian company in which ExxonMobil owns a controlling interest of 69.6%. While ExxonMobil was repeatedly representing to investors that it was actively managing the risk of future GHG regulations, it invested billions of dollars in these oil sands assets without accounting for that risk in the manner it had publicly represented. By February 2016, the Alberta oil sands accounted for roughly 25% of ExxonMobil’s total resource base. [PX238.]

After ExxonMobil revised its internal Dataguide in June 2014, employees found that applying the publicly disclosed GHG proxy costs would have had a major impact on cost projections for its oil sands projects. For example, in a July 4, 2016 email, a planning supervisor named Dan Hoy reported that applying these GHG proxy costs would have led to projections of “massive GHG costs” in the company’s oil sands assets in Alberta. [Aff. Ex. B at 1.] Rather than squarely addressing those economic realities (or revising the company’s public disclosures), in 2015 and 2016, ExxonMobil management privately instructed employees to apply what Mr. Hoy referred to as an “alternate methodology.” [*Id.*] Under that methodology, ExxonMobil applied lower costs reflecting only the limited impact of existing climate change regulations, rather than the impact of the more stringent future regulations that ExxonMobil purported to anticipate. ExxonMobil instructed employees not only to apply lower cost figures (*i.e.*, the “legislated price of carbon”) than those it publicly represented, but also incorporated into its model a provision in the existing Alberta regulations that allowed it to apply those costs to only a small percentage of projected emissions (*i.e.*, the “legislated intensity”). [JX927.] In other words, ExxonMobil directed employees to assume that existing climate legislation in Alberta would not grow more stringent in the coming decades, but rather would remain unchanged indefinitely. This was

directly contrary to ExxonMobil's public representations that it expected costs associated with climate regulation to grow in the future, including in Canada, and that it accounted for those growing costs through its application of GHG proxy costs at the levels it publicly disclosed.

For example, ExxonMobil did not apply its publicly represented GHG proxy costs in its cost projections for Kearl. In its 2015 economic model for Kearl, ExxonMobil (i) applied existing legislated costs of \$24 USD per ton, rather than the publicly represented GHG proxy cost approaching \$80 per ton; (ii) held that cost flat through the end of the asset's projected life in 2065; and (iii) applied that cost to only 15% to 20% of ExxonMobil's emissions through the end of the asset's projected life. [PX096.] This projection may have been consistent with the regulations in place in 2015, but by assuming that those regulations would not grow more stringent over the next 50 years, it was inconsistent with the company's public representations. In total, ExxonMobil applied an effective cost of less than \$5 per ton of GHG emissions in 2040 – approximately 94% less than the \$80 per ton figure that ExxonMobil publicly represented for 2040 in that jurisdiction.

ExxonMobil's decision to apply existing legislated costs in Alberta in lieu of the GHG proxy costs it publicly disclosed affected its company oil and gas reserves and resource base estimates in much the same way. Company reserves and resource base estimates are an important element of ExxonMobil's annual business planning process. ExxonMobil's resource base – the source of the company's future profits – includes “quantities of oil and gas that are not yet classified as proved reserves under SEC definitions, but that [ExxonMobil] believe[s] will ultimately be developed.” [See, e.g., PX037.] To determine whether oil and gas “will ultimately be developed,” the company must assess the likelihood that such resources can be produced profitably – a determination that would be influenced by factors like GHG proxy costs.

ExxonMobil touted the size of its resource base in *Managing the Risks*, its 2016 *Energy &*

Carbon Summary, its annual *Financial & Operating Reviews*, and presentations by Rex Tillerson. For example, in a March 2011 meeting with equity research analysts in New York, Mr. Tillerson highlighted ExxonMobil's "enormously large resource base" as being crucial to the company's "selective investment process." [PX015.] Likewise, at a March 2015 meeting with equity research analysts in New York, Mr. Tillerson represented:

The lifeblood of our business relies upon capturing the highest quality resources. . . . These resource captures add to our high-quality 92 billion oil-equivalent barrel resource base, which is the largest and most diverse resource base in the industry. . . . Simply put, our large resource base affords us the flexibility to select and develop the most attractive opportunities. [PX017.]

Based on the company's representations, reasonable investors would have expected these estimates to reflect the application of ExxonMobil's publicly represented GHG proxy cost. Indeed, ExxonMobil explicitly represented to the SEC and shareholders in a February 2016 letter that the company applied GHG proxy costs in its reserves estimates. ExxonMobil also represented in *Energy and Climate* that all of its business units applied GHG proxy costs in the planning and budgeting process, which involves estimating company reserves and resources.³ ExxonMobil further represented in its 2016 *Energy & Carbon Summary* that its company reserves and resource base estimates were aligned with accounting practices – namely, the Petroleum Resources Management System (PRMS) guidelines – that require the consistent application of long-term cost assumptions, including environmental costs (such as GHG proxy costs), across the company. [JX916.]

³ As stated in ExxonMobil's internal training materials, (1) "Reserves and Resources are a key element that underpins the value of the Corporation" [PX250]; (2) ExxonMobil's resource base "represents [its] future production" [PX245]; (3) a "[c]lear quantification" of resources "aids in allocating appropriate resources to projects, including people, capital, and new technology" [*id.*]; (4) it is "[i]mportant to get probable [non-proved] reserves correct for planning and budgeting purposes" [PX054]; and (5) a "good understanding" of ExxonMobil's resource base is "important as it is a prime source of future Opportunity Generation and Asset value enhancement," which enables ExxonMobil to "maximize value" and "economic recovery from all reservoirs" [*id.*].

However, when ExxonMobil attempted to apply the publicly represented GHG proxy costs in the cost projections underpinning its company reserves and resource base estimates for oil sands assets in Alberta, it discovered that doing so “would result in large write-downs.” [Aff. Ex. A.] For example, ExxonMobil determined in September 2015 that applying those costs at Cold Lake would “result in enough additional opex [operating expenses] to shorten asset life and reduce gross reserves.” [PX049.]

As a result, in 2015 and 2016, ExxonMobil did not apply the GHG proxy costs it had publicly represented in its cost projections for reserves and resource base evaluations for oil sands assets in Alberta. Instead, ExxonMobil applied only the far lower cost of existing regulation, held flat into the future. For example, Kirsten Bannister, an ExxonMobil reserves coordinator, stated in an October 2015 email that “[c]orporate planning has weighed in” and “recommend[ed] using AB [Alberta] legislated price and intensity” at Cold Lake, which “will reduce the EOFL [end of field life] impact significantly.” [PX048.] In other words, using the publicly represented GHG proxy cost would cut short ExxonMobil’s ability to profitably extract resources from Cold Lake. Jason Iwanika, an Imperial development planning supervisor, sent an email the same month asserting that the company’s costs were “misaligned” as a result of ExxonMobil’s decision to apply existing legislated costs in lieu of the GHG proxy costs set out in the Dataguide. [PX051.] In the same email thread, Mr. Iwanika asked, “Just between ourselves Why is it necessary to deviate from CP15 [2015 Dataguide] GHG assumptions?” [*Id.*] Ultimately, in a July 2016 internal analysis, ExxonMobil calculated that the GHG proxy costs it applied in its cost projections in Alberta in 2015 and 2016 were approximately 94% lower than those it publicly represented (the equivalent of \$4 per barrel versus \$0.25 per barrel). [PX058.]

3. *2010-2016: ExxonMobil Also Failed to Apply Publicly Represented GHG Proxy Costs in Other Jurisdictions*

ExxonMobil also did not apply its publicly represented GHG proxy costs in its cost projections for many projects outside of the Alberta oil sands. In particular, ExxonMobil frequently did not apply *any* GHG proxy costs in its cost projections in jurisdictions where there was no established carbon price. This practice extended across ExxonMobil's business, including upstream assets, refineries, and chemical plants.

In 2016, for example, ExxonMobil approved over \$800 million in funding for a major expansion at its chemical plant in Beaumont, Texas. [PX076.] In its cost projections for purposes of that expansion, ExxonMobil did not apply the publicly disclosed GHG proxy costs approaching \$80 per ton. Instead, it applied a GHG proxy cost of \$0 per ton. [*Id.*] The company's purported basis for not applying those costs, as ExxonMobil revealed in a letter to the OAG, was that emissions associated with the project's *construction* fell below a permitting threshold under existing law. [PX080.] ExxonMobil funded the project and began construction without even preparing GHG emissions forecasts for the project's operations, much less applying GHG proxy costs to any projected emissions to account for the risk of future regulations. [*Id.*]

Likewise, in 2016 and earlier, ExxonMobil failed to apply GHG proxy costs to its cost projections for other major assets on the U.S. Gulf Coast, as well as for projects in Alaska (such as the 2012 funding of over \$1 billion of the initial production system at the Point Thomson gas field) [PX079; Aff. Ex. N at ¶ 113], the Northwest Territories in Canada (Norman Wells oil field) [PX069], and Singapore (ExxonMobil's largest integrated refinery and chemical plant) [PX093]. By failing to apply its publicly represented GHG proxy costs in these diverse areas of its business, ExxonMobil failed to abide by its representations to investors.

B. ExxonMobil's Misrepresentations Concerning Impairment Evaluations

Until year-end 2016, ExxonMobil did not apply GHG proxy costs in its cost projections in evaluating whether it needed to impair (*i.e.*, write down) any long-lived assets (*i.e.*, assets that it expects to retain for at least one year) on its books. This not only violated GAAP accounting rules, but also violated ExxonMobil's representations to its investors and the public.

Impairment evaluations involve an assessment of whether the carrying amount of an asset on a company's books is recoverable in light of the asset's projected cash flows. Projecting such cash flows requires the use of economic assumptions, including long-term cost assumptions. GAAP accounting standards, and specifically Accounting Standards Codification (ASC) 360, require that a company incorporate its "own assumptions" when estimating future cash flows to test the recoverability of its assets. [JX968.] ASC 360 further requires that those assumptions be "reasonable in relation to the assumptions used in developing other information used by the entity for comparable periods, such as internal budgets and projections . . . or information communicated to others." [*Id.*] Compliance with GAAP therefore requires that ExxonMobil use in its impairment evaluations the same GHG proxy cost assumptions that it purportedly used in other parts of its business, and which it frequently communicated to investors and the public.

By failing to include GHG proxy costs in its cost projections for purposes of its impairment assessments in 2015 and earlier, ExxonMobil violated ASC 360. In doing so, ExxonMobil acted contrary to its representations, including the statement in its 2015 Form 10-K that "[c]ash flows used in impairment evaluations . . . make use of the Corporation's price, margin, volume, and cost assumptions developed in the annual planning and budgeting process, and are consistent with the criteria management uses to evaluate investment opportunities." [JX906.]

ExxonMobil frequently highlighted that it took fewer asset impairments than other oil and gas companies. For example, in a March 2016 meeting with analysts in New York, Mr. Tillerson

stated that “[t]he quality of ExxonMobil’s portfolio is also evident relative to significant, recent asset impairments by our competitor group.” [PX018.] However, Dr. Eli Bartov, an accounting professor, will testify that if ExxonMobil had included GHG proxy costs in its cost projections for its 2015 year-end impairment evaluations, as it represented, at least one major asset – a gas and NGL (natural gas liquids) field called Mobile Bay in the Gulf of Mexico off the coast of Alabama – would have been subject to a significant after-tax impairment loss of \$320 million to \$478 million. [Aff. Ex. M at ¶ 16.] Dr. Bartov will further testify that ExxonMobil violated GAAP by failing to apply GHG proxy costs in its 2015 cost projections at Mobile Bay. [*Id.* at ¶¶ 43-44.]

C. ExxonMobil’s Misrepresentations Concerning Demand Forecasts

Even with respect to its oil and gas demand projections – where ExxonMobil did apply the publicly represented GHG proxy costs in certain economic sectors – it failed to do so consistently across economic sectors. Critically, ExxonMobil failed to use the GHG proxy cost as publicly represented when assessing demand in the transportation sector, a major driver of demand for oil. Rather, ExxonMobil made the undisclosed assumption that existing climate regulations in the transportation sector, such as regulations related to fuel efficiency, would simply remain in effect. ExxonMobil’s failure to apply its GHG proxy cost to the transportation sector when evaluating demand was not disclosed to investors, and contradicted the company’s statement in *Managing the Risks* and elsewhere that the GHG proxy cost “seeks to reflect all types of actions and policies that governments may take over the Outlook period relating to the exploration, development, production, transportation or use of carbon-based fuels.” [Aff. Ex. G at 17.] Had ExxonMobil applied its publicly represented GHG proxy costs in addition to existing regulations in the transportation sector, it would have forecast less demand for its products.

D. ExxonMobil's Counter-Arguments Lack Merit

ExxonMobil has constructed various after-the-fact arguments to explain away its misrepresentations, but none are compelling or consistent with the company's public statements.

ExxonMobil's first set of arguments is rooted in its position that it had a valid business justification for using lower costs than the GHG proxy costs it publicly disclosed. That reasoning, however, does not make its public representations any less false. For example, ExxonMobil has argued that if a jurisdiction, such as Alberta, had existing climate change regulations, then it would be more reasonable to apply the cost of existing regulations, rather than the publicly represented GHG proxy cost, even when projecting the cost of emissions decades into the future. However, applying carbon costs based solely on existing regulations, and holding those costs flat for decades into the future, is directly at odds with ExxonMobil's repeated representations to its shareholders that it was planning for a world with increasingly stringent climate change regulation.

ExxonMobil has also argued that, if a jurisdiction had no climate change regulations in place, then the application of a GHG proxy cost was also unnecessary. For example, as explained above, ExxonMobil approved a major expansion of a chemical plant in Beaumont, Texas in 2016 without any assessment of the impact of a GHG proxy cost on the company's operations, because no such assessment was required under existing legislation. This was equally contrary to ExxonMobil's public representations that it expected carbon costs to be imposed in the future, and that it incorporated such costs in its investment decision-making and business planning.

ExxonMobil's second set of arguments parse the syntax of its public disclosures in a strained manner to claim that the company put investors on notice that it was applying a cost of carbon that was dramatically different from its publicly represented GHG proxy costs. These arguments, however, ignore the total mix of information that must be considered in assessing whether ExxonMobil's public statements were false or misleading.

Specifically, ExxonMobil has argued that its employees had broad discretion to ignore the publicly represented GHG proxy costs, and that investors were apprised of this discretion by a single sentence in *Managing the Risks* in 2014: “Perhaps most importantly, we require that all our business segments include, where appropriate, GHG costs in their economics when seeking funding for capital investments.” [Aff. Ex. G at 18.] However, this “where appropriate” language appears in conjunction with a map specifying GHG proxy costs for different geographical regions – the very regions where ExxonMobil purportedly believed it *was* appropriate to apply such costs. The phrase “where appropriate” did not disclose that ExxonMobil used much lower GHG proxy costs than it publicly represented – particularly for the GHG-intensive assets most exposed to carbon asset risk. Further, this language must be read in the context of the rest of the report, which specified that GHG proxy costs were used for “all significant proposed projects.”⁴ [*Id.* at 21.]

Further, ExxonMobil has employed verbal gymnastics to claim that it never made any representations to investors about the value of the GHG proxy cost it applied in its cost projections. The company has argued (1) that when it used the term “proxy costs,” it was referring only to costs used for purposes of its projections of oil and gas demand, which affect the company’s expectations of future oil and gas prices and thus projected revenues, and (2) that when it used a slightly different term, “GHG costs,” it was referring only to its projections of future costs associated with its GHG emissions (*i.e.*, the costs set out in the Dataguide).

The evidence will show that a reasonable investor would not have understood this tortured reading of ExxonMobil’s public representations. Most importantly, no such distinction was disclosed. ExxonMobil used the terms “proxy cost” and “GHG cost” interchangeably, and even

⁴ ExxonMobil has also argued that the phrase “[p]erhaps most importantly” signaled a transition from one concept, the “proxy cost,” to another, the “GHG cost.” However, that phrase more readily signals emphasis – *i.e.*, an important *application* of the cost of carbon discussed throughout the paragraph.

used the hybrid term “GHG proxy costs” in its *Energy and Climate* report and its December 17, 2013 presentation to investors. [Aff. Ex. H at 6, Ex. F at 4.] And far from disclosing its use of two different costs, ExxonMobil highlighted the consistency of its approach, stating in *Energy and Climate* that “all business units use a consistent corporate planning basis, including the proxy cost of carbon . . . in evaluating capital expenditures and developing business plans.” [Aff. Ex. H at 20.] Likewise, ExxonMobil stated in *Managing the Risks* that it “require[s] that all significant proposed projects include a cost of carbon – which reflects our best assessment of costs associated with potential GHG regulations over the Outlook period – when being evaluated for investment.” [Aff. Ex. G at 21.]

Indeed, contrary to ExxonMobil’s current claim to have disclosed that “proxy costs” were *not* being applied to cost projections, Rex Tillerson specifically assured investors at the company’s 2016 shareholder meeting that the “*proxy*” cost described in the company’s public statements was applied “*as a cost*” in “economic models when we make investment decisions.” [Aff. Ex. I at 29.] Moreover, Mr. Tillerson specified that the proxy cost was not applied to “revenues” (*i.e.*, revenues associated with demand for ExxonMobil’s products). A reasonable investor would have concluded that ExxonMobil’s representations about a cost approaching \$80 per ton – whether termed a “proxy cost,” “GHG proxy cost,” or “GHG cost” – applied to the company’s cost projections.

ExxonMobil even used these terms interchangeably in the course of the Office of the Attorney General’s (“OAG”) investigation until realizing the implications to its liability. In a March 16, 2017 letter to this Court, ExxonMobil argued that it need not produce to the OAG documents evidencing how it incorporated a proxy cost into its business, because ExxonMobil had already produced its “Dataguide Appendices, *i.e.*, internal policy documents that specify precisely how ExxonMobil applies its *proxy cost* of carbon in every jurisdiction worldwide through the year

2040.” [Aff. Ex. L at 4 (emphasis added).] This argument, which ExxonMobil made in four separate filings to the Court and letters to the OAG, contradicts its current position that the costs in the Dataguide are “GHG costs” that contrast with the “proxy cost” figures it publicly disclosed.

Lastly, ExxonMobil’s argument that it disclosed that it only applied “proxy costs” in the area of demand forecasting does not even hold water on its own terms; as described above, ExxonMobil did not apply such a cost in the key sector of transportation.

II. ExxonMobil’s Misrepresentations Were Material

At trial, the OAG will call investors who will testify that climate change risk was a serious financial concern for them, and that ExxonMobil’s representations concerning its management of that risk were important to them. A representation or omission is material if there is “a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.” *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); accord *Rachmani Corp.*, 71 N.Y.2d at 726-27.⁵

In assessing whether a misrepresentation is materially misleading, the U.S. Supreme Court has held that the presence of some truthful content does not render a misrepresentation non-deceptive, and “[i]f it would take a financial analyst to spot the tension between the one and the other, whatever is misleading will remain materially so, and liability should follow.” *Virginia*

⁵ An expert witness for ExxonMobil has erroneously submitted that the OAG must meet a heightened standard of materiality by establishing that climate change regulatory risk was a “key driver of market participants’ valuations of ExxonMobil” and a “primary concern” to analysts, and that analysts’ evaluations of ExxonMobil were “heavily influenced by climate change regulatory risk.” [DX712 ¶ 64-65 (emphasis added)]. None of that is required. The standard is simply that the information misrepresented or omitted would have been “important” to a reasonable investor in light of the “total mix” of information available.

Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1097 (1991).⁶ In addition, a “misstatement or omission [that] relates to a segment that plays a significant role in the [company’s] business” can be material, even if the effect on the company as a whole is limited. *Litwin v. Blackstone Group, L.P.*, 634 F.3d 706, 720 (2d Cir. 2011) (internal citations and quotation marks omitted).

This case involves ExxonMobil’s misrepresentations regarding its management of a key business risk – a core concern of securities law. But even in cases less specifically tied to business risks, disclosures concerning a company’s social, ethical, or environmental impact may be material if the issue is important to investors and the representations are sufficiently concrete. For example, a company’s representations concerning its commitment to health and safety were adequately alleged to be materially misleading where “safety was obviously a major concern to [defendants] and investors, as indicated by defendants’ extensive, frequent, and prominent discussions of the topic in their disclosures to investors.” *In re BHP Billiton Ltd. Sec. Litig.*, 276 F. Supp. 3d 65, 79-80 (S.D.N.Y. 2017). Similarly, an oil company’s representations that “standardized [safety] processes were being rolled out successfully throughout the company” and “cover[] all aspects of our operations” were adequately alleged as materially misleading when the company failed to disclose that those safety processes did not apply to contractor-owned sites. *In re BP P.L.C. Sec. Litig.*, No. 4:12-CV-1256, 2013 WL 6383968, at *23, 27 (S.D. Tex. Dec. 5, 2013). Courts have found representations about environmental concerns to be materially misleading even when the representations were far less specific than those at issue here. *See United Paperworkers Int’l Union v. Int’l Paper Co.*, 985 F.2d 1190 (2d Cir. 1993) (holding that a company’s representations that it had a “longstanding commitment” to protecting the environment and was a “leader” in

⁶ See also *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1297 (2d Cir. 1973) (“While corporations are not required to address their stockholders as if they were children in kindergarten, . . . it is not sufficient that overtones might have been picked up by the sensitive antennae of investment analysts.” (internal citations omitted)).

environmental protection were material to investors because they “conveyed an impression that was entirely false,” as the company failed to disclose the full extent of its environmental liabilities).

Here, the evidence will show that climate-related disclosures were important to the investment community, and that ExxonMobil’s representations regarding the way in which it was managing the risk of climate change through the use of its GHG proxy cost were material. Moreover, the evidence will show that both qualitative and quantitative factors support the materiality of ExxonMobil’s representations.

A. ExxonMobil’s Representations Concerning Its Management of Carbon Asset Risk Were Important to Investors

ExxonMobil has actively solicited long-term investors and reassured them that its goal was to maximize long-term shareholder value. For example, then-CEO Rex Tillerson told investors at a March 2016 meeting with analysts in New York:

We really are trying to undertake the most attractive opportunities that we see, thinking about them in terms of 30 years. Are we going to be happy with this over the next three decades? Not, are we going to be happy with it over the next three or four years

You’ve heard me say many times, we are not for the short term shareholder, necessarily. That’s not what we build the business around. It’s not how we run the business. We run the business for people that are going to own these shares a very long time, that we hope the shares are in the trust that they leave their children and their grandchildren. Whenever we run into challenges and I have to think about how am I going to pay the dividend? I think about those people. [PX018.]

ExxonMobil’s projects often require hundreds of millions or even billions of dollars in investment and are often intended to operate for decades, making them vulnerable to long-term risks such as carbon asset risk. It is thus important to long-term investors that the company’s representations concerning its management of climate change risks be accurate. For example, Vanguard noted in a May 2017 analysis that “climate change poses risks to investors in certain sectors, such as oil and gas, and . . . these risks are most prominently skewed towards long-term asset owners like

Vanguard.” [PX125.] Further, a January 2016 Morgan Stanley report observed that “climate change is increasingly recognized as a material investment consideration that investors cannot ignore” [PX113]; that increased GHG regulation “could dramatically impair the profitability of higher-carbon energy sources” [*id.*]; and that these risk factors “could strand assets in a range of sectors, resulting in unanticipated or premature write-downs, devaluations or conversion to liabilities” [*id.*]. Morgan Stanley concluded that climate change risk is a “critical investment issue,” both for the significant number of investors who are explicitly focused on sustainability, and for “mainstream” investors, including “the world’s largest investors.” [*Id.*]

ExxonMobil’s representations concerning the application of its GHG proxy cost were significant to its investors, who viewed the company’s stock more favorably as a result. Indeed, these representations were sufficiently meaningful that, in March 2014, shareholder groups agreed to withdraw their proposals in exchange for the release of *Energy and Climate* and *Managing the Risks*, which provided more detail on the company’s use of a GHG proxy cost. [PX146; PX265.] Further, Michael Garland, the Assistant Comptroller for Corporate Governance and Responsible Investment at the New York City Office of the Comptroller, a major ExxonMobil shareholder, testified at his deposition that “certainly climate change is the fundamental risk that we are concerned with respect to Exxon,” and that he understood the GHG proxy cost to be ExxonMobil’s “way of giving investors some sense of confidence that they were integrating the risks of global action to address climate change into their business planning.”

Equity research analysts also highlighted ExxonMobil’s disclosures concerning carbon asset risk. In May 2016, Wells Fargo equity research analysts hosted a group of investors at ExxonMobil’s corporate headquarters to discuss “climate risks including stranded assets.” [JX977.] Wells Fargo summarized ExxonMobil’s (*i.e.*, “XOM”) presentation as follows:

XOM places a proxy cost of carbon on all of its future developments. Depending on the project and its location, the proxy cost of carbon ranges from \$20 to \$80 per ton by 2040. This approach reduces the risks associated with future CO2 emissions and incentivizes XOM to reduce overall emissions of all future projects. Thus we believe ExxonMobil is ahead of the curve on pricing in climate risks. [Id.]

In another equity research report in August 2017, Wells Fargo added: “All XOM projects are assessed an internal carbon tax (on a per-ton basis) to take into account carbon intensity. This is very important for long-lived projects to ensure full-cycle returns are fairly evaluated on an environmental basis as well as financial and operational.” [PX073.]

Investors considered ExxonMobil’s statements concerning its GHG proxy cost in assessing the extent to which the company faced carbon asset risk. For example, in a 2016 internal analysis, Vanguard evaluated the risk that ExxonMobil’s future costs associated with climate change regulations may include fines for non-compliance, and ultimately rated this risk as “low” based on its understanding, derived from ExxonMobil’s public statements, that ExxonMobil “anticipates that policies will add rising costs (est. \$80/ton by 2040).” [PX123.]

ExxonMobil was aware of the importance to investors of carbon asset risk and the company’s disclosures on that topic. For example, in a February 2014 email, ExxonMobil’s then-Corporate GHG Manager Robert Bailes stated that the GHG proxy cost “is important to stakeholders as I have found repeatedly on recent shareholder proponent calls,” and is “an important piece of [ExxonMobil’s] climate risk management.” [PX047.] Likewise, in a June 2014 email, ExxonMobil’s then-head of investor relations David Rosenthal stated that “real investors,” including Goldman Sachs analysts, expressed interest in *Energy and Climate* and *Managing the Risks*. [PX248.] Mr. Rosenthal observed that, in meetings he held in New York, shareholders had discussed “the growing importance of ESG (environmental, social, governance) issues to their clients.” [Id.] He added: “All of the folks we talked to said these types of efforts have enhanced

our reputation within the investment community and encouraged ExxonMobil to continue. Apparently ‘reputational risk’ has moved into the upper tier of risks that investors are concerned about and expect companies to manage.” [Id.]

To that end, from 2014 through 2017, ExxonMobil held a series of meetings in New York and elsewhere with investors, including major financial firms, to present information from *Energy and Climate* and *Managing the Risks*. ExxonMobil sought to reassure investors in these meetings that it was effectively managing climate change regulatory risk, including by applying a GHG proxy cost. ExxonMobil also acknowledged the significance of climate change and GHG restrictions to its investors by including that topic as a risk factor in its annual Form 10-K.

B. Quantitative Factors Confirm the Materiality of the Misrepresentations

The evidence will also show that ExxonMobil’s misrepresentations were significant from a quantitative perspective. For example, in October 2014, a development planning manager described the alignment of certain GHG proxy cost figures in the 2014 Dataguide with the figures ExxonMobil had publicly disclosed as a “huge change.” [PX053.] In response, Jason Iwanika, a development planning supervisor, conducted an analysis which concluded that the difference between the publicly disclosed GHG proxy costs and the lower figures the company had in fact been using was “very material” to the outlook on the company’s oil sands projects. [PX052.]

ExxonMobil’s economic models demonstrate that the company’s financial outlook was significantly inflated as a result of its failure to apply the publicly disclosed GHG proxy costs to its cost projections. Twenty-seven of the models produced by ExxonMobil from the 2010-2016 period contain sufficient information to conduct an analysis concerning the effect of ExxonMobil’s exclusion of the publicly represented GHG proxy costs from its cost projections. Peter Boukouzis, a former oil and gas banker, analyzed these models and will testify that if the publicly disclosed

GHG proxy costs had been used, the projected total undiscounted cash flows would have been reduced by \$70 billion (*i.e.*, 7.2%), net present value would have been reduced by \$5 billion (*i.e.*, 3.9%), and internal rate of return would have been reduced by 0.6%. [Aff. Ex. N ¶ 122.] These figures are highly significant in the context of ExxonMobil's investment decisions and business planning. Indeed, the impact that Mr. Iwanika described as "very material" corresponded to a 0.5-1% reduction in expected rate of return (*e.g.*, a reduction in expected rate of return from 12.1% to 11.4% for a particular project). [PX052.]

The quantitative materiality of ExxonMobil's misrepresentations is also confirmed by the fact that the company's stock price dropped when the truth was revealed, as set forth below.

III. ExxonMobil's Misrepresentations Caused Damages

Damages are not required for injunctive relief under the Martin Act or Executive Law § 63(12). However, expert witnesses will testify that ExxonMobil's misrepresentations regarding its use of GHG proxy costs inflated ExxonMobil's stock price. Investors who purchased ExxonMobil's stock at inflated prices suffered harm when the alleged misrepresentations were revealed. These misrepresentations became known to market participants through a series of corrective disclosures, and when the substance of investigations by the OAG and others was revealed to investors over time, ExxonMobil's stock price dropped.

As the expert report of Dr. Eli Bartov lays out in detail, there are three days when the public disclosure of information relating to the misrepresentations had a statistically significant negative effect on the stock price: January 20, 2016; September 20, 2016; and June 2, 2017.

- On January 20, 2016, the Los Angeles Times announced that California Attorney General Kamala Harris was investigating whether "Exxon Mobil Corp. repeatedly lied to the public and its shareholders about the risk to its business from climate change—and whether such actions could amount to securities fraud and violations of environmental laws." [JX970.] The underperformance in ExxonMobil's stock return on this day was **2.14%**.

- On September 20, 2016, news broke that ExxonMobil was being investigated by the SEC concerning how the company was accounting for the future costs of complying with climate change regulations when assessing its future asset values. The underperformance in ExxonMobil's stock return on this day was **1.72%**. [PX305.]
- On June 2, 2017, the New York State Office of the Attorney General stated in a court filing that it "had evidence of 'potential materially false and misleading statements by Exxon' that could have led investors to think the U.S. oil giant company properly assessed the risks when it actually ignored a formula to estimate the impact of future environmental regulation on new deals." The underperformance in ExxonMobil's stock return on this day was **1.43%**. [PX311.]

The first of these dates, January 20, 2016, had a statistically significant abnormal return at a 5% significance level (*i.e.*, there is only a 5% chance that the drop can be explained by something other than the corrective disclosures), while the other two dates had a statistically significant abnormal return at a 10% significance level. On each of these three days, ExxonMobil's stock price dropped as a result of revelations about the company's misrepresentations. [Aff. Ex. M ¶ 64.] Dr. Bartov has calculated the inflation in ExxonMobil's stock price and market capitalization as a result of its misrepresentations.⁷ Peter Boukouzis then built on Dr. Bartov's work to calculate the potential aggregate damages to ExxonMobil's shareholders by multiplying a conservative estimate of the number of impacted shares by the per-share inflation in ExxonMobil's stock price, resulting in a figure of approximately \$476 million to \$1.6 billion. [Aff. Ex. N. at 90-96.]

⁷ Using a corrective disclosure and stock drop date of January 20, 2016 alone, ExxonMobil's misrepresentations inflated its stock price by \$1.64 on a per-share basis between April 1, 2014 and January 19, 2016. When all three dates are included, the per-share inflation in ExxonMobil's stock price was \$4.25 between April 1, 2014 and January 19, 2016; \$2.61 between January 20, 2016 and September 19, 2016; and \$1.16 between September 20, 2016 and June 1, 2017. [Aff. Ex. M ¶ 70.] The per-share stock price inflation was then used to calculate the inflation in ExxonMobil's market capitalization. Using a corrective disclosure and stock drop date of January 20, 2016 alone, ExxonMobil's market capitalization was inflated by \$6.9 billion between April 1, 2014 and January 19, 2016. [*Id.* ¶ 71.] When all three dates are included, the inflation in ExxonMobil's market capitalization was \$17.9 billion between April 1, 2014 and January 19, 2016; \$10.9 billion between January 20, 2016 and September 19, 2016; and \$4.9 billion between September 20 and June 1, 2017. [*Id.*]

POINT TWO:**EXXONMOBIL IS ALSO LIABLE FOR EQUITABLE FRAUD AND COMMON LAW FRAUD**

In addition to proving a misrepresentation of material fact, equitable fraud and common law fraud require proof of justifiable reliance. *Credit Suisse*, 31 N.Y.3d at 638-39. Common law fraud further requires knowledge of falsity, intent to induce reliance, and damages (addressed above). *Id.* at 638. The evidence will show that these additional elements are satisfied.

I. ExxonMobil Was Aware of the Falsity of Its Misrepresentations

ExxonMobil knew that its representations were misleading. Senior management, including Mr. Tillerson, reviewed and approved *Energy and Climate* and *Managing the Risks* prior to publication. As the company recognized internally in May 2014, those reports falsely “implied” that the company was using the publicly represented GHG proxy cost in investment decisions and business planning when, in fact, it was applying much lower figures. [Aff. Ex. J at 4.]

Moreover, the evidence will show that senior management, including Mr. Tillerson, was aware that these reports were misleading at the time of publication. Year after year, Mr. Tillerson approved the use of lower GHG proxy cost figures for internal purposes than those set out in the company’s public statements. As early as April 2010, ExxonMobil’s then-Corporate GHG Manager Robert Bailes recognized that the “2030 cost of \$40 [per ton]” in the Corporate Plan was a “low” estimate of costs likely to be incurred, and that the publicly represented “assumption of \$60 is likely more realistic.” [JX923.] In April 2011, ExxonMobil’s former planning manager Thomas Eizember wrote that he had pointed out the difference to Mr. Tillerson several times, and that “Rex has seemed happy with the difference,” even though the costs in the Dataguide were “not conservative vs EO [the costs stated in the *Energy Outlook*] from the perspective of debiting actions that increase emissions.” [JX926.]

But despite knowing that the company used different GHG proxy costs than those it

publicly disclosed, and despite knowing that the figures used internally offered less protection from carbon asset risk, Mr. Tillerson sanctioned the release of two misleading reports in March 2014. Mr. Tillerson also approved the alignment of the internal and publicly represented costs for OECD countries later that year without issuing any correction to the March 2014 reports.

Finally, even after the GHG proxy costs in the Dataguide were increased to align more closely with public representations, ExxonMobil continued to knowingly approve practices that were inconsistent with its public representations. For example, ExxonMobil headquarters directed employees to apply existing legislated costs in Alberta in lieu of the publicly represented GHG proxy costs. As an Imperial planning supervisor wrote in October 2015, this guidance came straight from “Dallas” – the location of ExxonMobil’s headquarters. [JX927.]

II. ExxonMobil Made Misrepresentations with the Intent Induce Reliance, and Investors Justifiably Relied on ExxonMobil’s Misrepresentations

The evidence will show that ExxonMobil sought to exclude from its proxy statement shareholder proposals seeking enhanced disclosure on climate risk.⁸ To that end, ExxonMobil made numerous misrepresentations to induce shareholders to withdraw their proposals, including by presenting the misleading map reproduced above at page 16.

Moreover, the Arjuna Capital and CRF shareholder proponents justifiably relied on these misrepresentations in deciding to withdraw their proposals. After being presented with the misrepresentations described above, these shareholders withdrew proposals seeking disclosures concerning the company’s management of climate change risk in reliance on the company’s

⁸ Specifically, while it was negotiating with the Arjuna Capital and CRF shareholder groups, ExxonMobil requested the SEC’s permission to exclude their proposals from its 2014 proxy statement. The SEC denied ExxonMobil’s request as to the Arjuna Capital proposal. ExxonMobil’s request as to the CRF proposal became moot when CRF agreed to withdraw its proposal in exchange for a report from ExxonMobil addressing its concerns.

promise to truthfully explain its approach to managing such risk in the *Managing the Risks* and *Energy and Climate* reports. [PX146; PX265.]

RELIEF

I. The State Is Entitled to Injunctive Relief

Courts have the equitable power to order broad relief for violations of the Martin Act. See G.B.L. § 353(1) (authorizing “an order or a judgment . . . awarding the relief applied for or so much thereof as the court may deem proper”); *People v. Lexington Sixty-First Assoc.*, 38 N.Y.2d 588, 596-97 (1976) (affirming broad equitable relief). An application for injunctive relief under § 63(12) is likewise “addressed to the sound judicial discretion of the trial court.” *State v. Princess Prestige Co.*, 42 N.Y.2d 104, 108 (1977). Injunctive relief is inherent in a court’s “broad equitable power” to “fashion appropriate relief for violations of . . . securities laws.” *SEC v. Posner*, 16 F.3d 520, 521 (2d Cir. 1994). This may include an injunction prohibiting a defendant from violating the Martin Act and Executive Law § 63(12). See G.B.L. § 353 (authorizing Attorney General to bring action to enjoin defendant “from continuing such fraudulent practices or engaging therein or doing any act or acts in furtherance thereof”); Exec. Law § 63(12) (authorizing Attorney General to apply “for an order enjoining the continuance of . . . any fraudulent or illegal acts”). Courts have routinely issued such orders even after the underlying fraud has ceased. *Gen. Elec. Co.*, 302 A.D.2d at 316 (“Even though GE voluntarily ceased its deceptive practices, the IAS court . . . nonetheless retained the power to grant injunctive relief”); *State v. Midland Equities*, 117 Misc. 2d 203, 206-07 (Sup. Ct. N.Y. Cnty. 1982); *People v. Ludwig Baumann & Co.*, 56 Misc. 2d 153, 159 (Sup. Ct. N.Y. Cnty. 1968) (finding that the injunction would serve as a deterrent to the respondents and any others who may be inclined to “prey upon a gullible and unwary public”).

The OAG therefore requests injunctive relief consisting of at least:

- (1) a prohibition on further violations of the Martin Act and Executive Law § 63(12);
- (2) a forensic audit by an independent auditor to calculate the actual GHG proxy costs utilized by ExxonMobil during the fiscal years 2014-2018;
- (3) disclosure to the public of the GHG proxy costs utilized by ExxonMobil in each jurisdiction during the fiscal years 2014-2018;
- (4) for the next four fiscal years, disclosure to the public of the GHG proxy costs utilized by ExxonMobil in each jurisdiction;
- (5) sworn certification by the Chief Executive Officer and Chief Financial Officer of ExxonMobil that the disclosures directed by items (3) and (4) are true and accurate;
- (6) an independent monitor to supervise compliance with the above items; and
- (7) for the next four fiscal years, an annual report to the OAG from the independent monitor identified in item (6) concerning compliance with the injunctive relief.

II. The State Is Entitled to Monetary Relief

The Martin Act and Executive Law § 63(12) explicitly authorize an award of restitution to victims of fraud. G.B.L. § 353(3); Exec. Law § 63(12). Restitution may be granted for all who are injured, including those known and unknown at the time of the order. *State v. Scottish-Am. Ass'n*, 52 A.D.2d 528, 529 (1st Dep't 1976). Damages and disgorgement are also available under both statutes. *People v. Greenberg*, 27 N.Y.3d 490, 497 (2016) (disgorgement); *Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. P'ship*, 12 N.Y.3d 236, 244 (2009) (damages).

As detailed above at pages 39-40, ExxonMobil's misrepresentations regarding its use of GHG proxy costs caused the market to overvalue ExxonMobil's stock. Investors who purchased ExxonMobil's stock at inflated prices suffered harm when ExxonMobil's alleged misrepresentations were made public through corrective disclosures. When the deception was revealed, ExxonMobil's stock price fell, injuring investors who must now be made whole. In the aggregate, the damage to shareholders was approximately \$476 million to \$1.6 billion.

The precise distribution of damages, however, need not be resolved at this trial. The OAG agrees with the statement in the report by ExxonMobil's expert witness Allen Ferrell that such

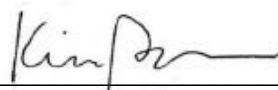
questions are “best addressed during the post-trial claims process.”

CONCLUSION

The evidence at trial will establish that ExxonMobil repeatedly made false and misleading representations about its use of a GHG proxy cost, which constitutes fraud under the Martin Act, Executive Law § 63(12), equity, and the common law. As a result, the State is entitled to the injunctive and monetary relief requested herein.

Dated: New York, New York
October 7, 2019

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