COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION NO.: 16-1888F

IN RE CIVIL INVESTIGATIVE DEMAND NO. 2016-EPD-36, ISSUED BY THE OFFICE OF THE ATTORNEY GENERAL	)

THE COMMONWEALTH'S CONSOLIDATED MEMORANDUM OPPOSING EXXON'S MOTION TO SET ASIDE OR MODIFY THE CIVIL INVESTIGATIVE DEMAND OR FOR A PROTECTIVE ORDER AND SUPPORTING THE COMMONWEALTH'S CROSS-MOTION TO COMPEL EXXON TO COMPLY WITH THE CIVIL INVESTIGATIVE DEMAND

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I. INTRODUCTION

The Commonwealth of Massachusetts (the "Commonwealth"), by and through Attorney General Maura Healey, hereby opposes the so-called emergency motion of Exxon Mobil Corporation ("Exxon" or the "Company") to set aside or modify the Attorney General's Civil Investigative Demand No. 2016-EPD-36 (the "CID") or for a protective order.

The Attorney General's Office ("AGO" or the "Office") issued the CID to Exxon pursuant to the Massachusetts Consumer Protection Act ("Chapter 93A"), G.L. c. 93A, § 6, as part of the Attorney General's pending investigation of Exxon's potential violations of G.L. c. 93A, § 2, and the regulations promulgated thereunder, for unfair and deceptive acts or practices in its marketing and/or sale of energy and other fossil fuel derived products to consumers in Massachusetts, and its marketing and/or sale of securities, as defined by G.L. c. 110A, § 401(k), to Massachusetts investors.

The CID seeks information related to *what Exxon knew* about the impacts of burning fossils fuels (its primary product) on climate change and climate-driven risk to Exxon's own businesses and assets; *when Exxon knew those facts*; and *what Exxon told the world, including investors and consumers in Massachusetts*, about climate change over time. The Attorney General is seeking this information because it appears that, based on Exxon and other documents made public in 2015 by investigative journalists, Exxon had extensive knowledge of what one of Exxon's scientists described as the potentially "catastrophic" impacts of climate change. Based on Exxon's own state-of-the-art scientific climate change research program launched in the 1970s, Exxon knew those impacts could significantly affect its assets and businesses, and knew that there was a short window of opportunity to put in place efforts to reduce reliance on fossil fuels to help avert future climate disruption. Specifically, based on the Office's review of the recently disclosed Exxon documents and Exxon's public statements, the Attorney General

believes that Exxon appears to have engaged in conduct that included statements to investors and consumers that falsely downplayed, obfuscated, and otherwise did not fully disclose Exxon's knowledge of the extent of climate-driven risk to its assets—including the valuation of its fossil fuel reserves, the viability of new Exxon fossil fuel development projects, and risks to its operations.

For example, in the early 1980s, Exxon's scientists were predicting significant increases in global temperature as a result of the combustion of fossil fuels, and that a two to three degree Celsius increase could lead to melting of polar ice, rising sea levels, "redistribution of rainfall," "accelerated growth of pests and weeds," "detrimental health effects," and "population migration."[1] Exxon understood then that warming in excess of two degrees Celsius (about 3.6 degrees Fahrenheit) would pose a significant threat, and it is widely recognized today that, to avoid the most severe impacts of climate change, carbon dioxide emissions must be reduced to ensure global average temperature increase does not exceed two degrees Celsius above preindustrial levels; that objective formed the basis for the recent Paris Agreement of the parties, including the United States, to the United Nations Framework Convention on Climate Change.[2] In its 2012 World Energy Outlook, the International Energy Agency reported that "[n]o more than one-third of proven reserves of fossil fuels can be consumed prior to 2050 if the world is to achieve the 2 degree Celsius goal."[3] If substantial portions of Exxon's vast fossil fuel reserves are unable to be burned due to carbon dioxide emissions limits put in place to stabilize global average temperature, those assets—valued in the billions—will be stranded, placing shareholder

[1] *See* Appendix ("App.") Exhibit ("Ex.") 1, App. 286 (Henry Shaw, *CO_2 Greenhouse and Climate Issues* (March 28, 1984)).

[2] *See* Ex. 2, App. 301, at art. 2 § 1(a) (Paris Agreement). As of August 3, 2016, 180 countries have signed the agreement, and 22 of those countries have formally ratified it.

[3] *See* Ex. 3, App. 328 (executive summary).

value at risk.[4] Over three decades ago, Exxon understood that climate-driven risk to its businesses, recognizing in 1982, in a memorandum widely distributed to Exxon management, that "[m]itigation of the 'greenhouse effect' would require major reductions in fossil fuel combustion,"[5] and, in 1984, that "[w]e can either adapt our civilization to a warmer planet or avoid the problem by sharply curtailing the use of fossil fuels."[6] Despite those facts, Exxon continues to maintain that the future is bright for its investors, representing in a 2014 report Exxon prepared for shareholders that "[w]e are confident that none of our hydrocarbon reserves are now or will become stranded"[7] and projecting in 2016 that "[o]il will provide one third of the world's energy in 2040, remaining the No. 1 source of fuel, and natural gas will move into second place."[8] And, notwithstanding Exxon's sophisticated understanding in the early 1980s of

[4] Indeed, one financial services provider in New England bluntly concluded that "there are fundamental questions about whether fossil fuel companies like ExxonMobil have a long-term future in the marketplace." *See* Ex. 4, App. 341 (IW Financial, *Managing the Risks of Exposure to Fossil Fuel Companies*) ("Fossil fuel companies' proven reserves of coal, oil and gas are valued at approximately $20 trillion. However, multiple scientific studies have looked at the current climate situation and concluded that the vast majority of these resources must not be burned for the international community to retain even a reasonable chance of limiting climate change to 2 degrees Celsius — a goal recognized by virtually every national government and many prominent international organizations. According to the Carbon Tracker Initiative, the industry's current reserves contain almost 2,800 gigatons of carbon dioxide — roughly five times the amount that can be added to the atmosphere without completely discarding the 2-degree target. If 80 percent of these reserves — approximately $16 trillion in assets — become 'stranded,' what impact will it have on fossil fuel companies' share price? This question is driving a wide range of stakeholders to reconsider their investments in the fossil fuel industry.").

[5] Ex. 5, App. 347 (memorandum from M.B. Glaser to a broad distribution list of Exxon management, attaching document, "CO_2 'Greenhouse Effect' Summary").

[6] Ex. 1, App. 286 (Henry Shaw, *CO_2 Greenhouse and Climate Issues* (March 28, 1984)).

[7] Ex. 6, App. 352 (Exxon, *Energy and Carbon—Managing the Risks* (2014)). The 2014 report was prepared, according to Exxon, "in connection with the withdrawal of a prior shareholder proposal" seeking "an analysis of the potential for the Company's oil and gas assets to become stranded as a result of global public policy regarding climate change." Ex. 7, App. 383 (Feb. 29, 2016, letter from Exxon counsel Louis L. Goldberg, Esq., to Office of Chief Counsel, U.S. Securities and Exchange Commission).

[8] Ex. 8, App. 391 (Exxon press release, "ExxonMobil's Energy Outlook Projects Energy Demand Increase and Decline in Carbon Intensity," dated Jan. 25, 2016).

the relatively near-term timeframe for significant climate change impacts if carbon dioxide emissions were unabated and atmospheric carbon dioxide doubled, significantly increasing global average temperature,[9] Exxon in 2016 continues to tell investors and consumers that "current scientific understanding provides limited guidance on the likelihood, magnitude, or time frame of these events."[10]

In addition to Exxon's failure to fully disclose the risks posed by climate change to investors, consumers, and the public, it appears that Exxon also played a key role in concerted efforts with other fossil fuel interests and non-governmental entities, to create doubt about the credibility of scientific findings demonstrating the risk of climate change in order to thwart proposed policies that would reduce greenhouse gas emissions, thereby distorting investor, consumer, and public perception of the risk, and likely affecting the choices that both investors and consumers have made in the marketplace.

Exxon's apparent course of conduct, over more than 40 years, in connection with climate change does not appear substantially different from the now-exposed efforts of the tobacco industry to deceive the public for decades about the cancer risks posed by cigarettes, and this link between the deceptive marketing efforts of big tobacco and of big oil is now beginning to come into sharp focus.[11] Over the course of twenty years of litigation, courts around the country and here in Massachusetts have repeatedly found that the tobacco industry's conduct violated laws against unfair and deceptive trade practices and have ordered a variety of relief to redress the harms that the industry caused the public. As in the tobacco and countless other investigations

[9] Ex. 1, App. 286 (Henry Shaw, *CO_2 Greenhouse and Climate Issues* (March 28, 1984)).

[10] Ex. 9, App. 398 (Exxon webpage, *Meeting global needs—managing climate change business risks*).

[11] *See* Ex. 10, App. 405 (*Document trove details links between tobacco, oil industries*, ClimateWire, July 20, 2016) ("Both [the tobacco and oil] industries hired public relations company Hill & Knowlton Inc., an influential New York firm, for outreach as early as 1956.").

into consumer and investor practices of national companies, the Attorney General has communicated with similarly situated state attorneys general and received information from interested members of the public. Contrary to Exxon's suggestion that this multi-state coordination is a nefarious conspiracy against its political speech, it is no more than the customary work of the involved attorneys general's offices.

Exxon now seeks to avoid scrutiny of its conduct, and has filed the pending petition and emergency motion to set aside or modify the CID, accompanied by its "hurry up and wait" request for stay. However, Exxon has failed to meet its heavy burden to establish that the Attorney General has acted arbitrarily and capriciously in issuing the CID or that the documents sought by the CID are irrelevant to Exxon's potential violations of Chapter 93A.

Moreover, in a thinly veiled effort to forum shop, Exxon—the day before filing its petition with this Court—filed a parallel action against the Attorney General in a Texas federal district court under 42 U.S.C. § 1983,[12] claiming violations of its constitutional rights and seeking to enjoin the Attorney General's investigation. The Attorney General today has moved to dismiss that action[13] and opposed Exxon's motion for a preliminary injunction in the case.

This Court should deny Exxon's request that this action in Massachusetts be stayed, deny Exxon's petition, and grant the Attorney General's cross-motion to compel production of the documents sought by the CID.

[12] *Exxon Mobil Corporation v. Maura Tracy Healey*, U.S. District Court for the Northern District of Texas, Case No. 4:16-cv-469 (Kinkeade, J.).

[13] The grounds for the dismissal motion in the Texas case include the Texas court's lack of personal jurisdiction over the Attorney General, its lack of subject matter jurisdiction, and improper venue.

II. FACTS

A. Massachusetts AGO Civil Investigative Demands

CIDs are a crucial tool for gaining information regarding whether an entity under investigation has violated the law.[14] Since 2013, the AGO has issued several hundred CIDs to or regarding companies or individuals suspected of committing unfair and deceptive business practices or other conduct in violation of Massachusetts law. Appendix ("App."), Affidavit of Melissa A. Hoffer ("Hoffer Aff."), ¶ 13. Those CIDs included a number issued in connection with joint investigations with other states and the federal government: about twenty-five with other states; about thirty involving the federal government; and some involving joint investigations with other states and the federal government. *Id*. at ¶ 14.[15] CIDs issued pursuant to the AGO's Chapter 93A authority have addressed, among other things, foreclosure practices of banks, business practices in the pharmaceuticals industry, the marketing and sale of securities,

[14] Nearly every other state attorney general has CID or similar authority. *See, e.g.*, Ala. Code § 8-19-9; Alaska Stat. Ann. § 45.50.495; Ariz. Rev. Stat. Ann. § 44-1524; Ark. Code Ann. § 4-88-111; Colo. Rev. Stat. Ann. § 6-1-107; Del. Code Ann. tit. 6, § 2514; Fla. Stat. Ann. § 501.206; Ga. Code Ann., § 10-1-403; Idaho Code Ann. § 48-611; 815 Ill. Comp. Stat. Ann. 505/3; Kan. Stat. Ann. § 50-631; Ky. Rev. Stat. Ann. § 367.240; La. Stat. Ann. § 51:1412; Md. Code Ann., Com. Law § 13-405; Minn. Stat. Ann. § 8.31; Miss. Code. Ann. § 75-24-27; Mo. Ann. Stat. § 407.040; Mont. Code Ann. § 30-14-113; Neb. Rev. Stat. Ann. § 59-1611; N.H. Rev. Stat. Ann. § 358-A:8; N.J. Stat. Ann. § 56:8-3; N.M. Stat. Ann. § 57-12-12; N.Y. Exec. Law § 63; N.C. Gen. Stat. Ann. § 75-10; Ohio Rev. Code Ann § 1345.06; Okla. Stat. Ann. tit. 15, § 758; Or. Rev. Stat. Ann. § 646.618; 71 Pa. Stat. and Cons. Stat. Ann. § 307-3; 9 R.I. Gen. Laws Ann. § 9-1.1-6; S.C. Code Ann. § 39-5-70; S.D. Codified Laws § 37-24-12; Tenn. Code Ann. § 47-18-106; Tex. Bus. & Com. Code Ann. § 17.61; Vt. Stat. Ann. tit. 9, § 2460; Va. Code Ann. § 59.1-201; Wash. Rev. Code Ann. § 19.86.110; Wyo. Stat. Ann. § 40-12-112.

[15] Examples since 2013, which have become public through settlement with the target companies, include: investigations involving large multistate groups and the federal government (Chase Bank, Ocwen, and HSBC); investigations with small groups of states and the federal government (Citigroup, JP Morgan); a joint investigation with federal authorities (Oppenheimer); a joint investigation with another state (LPL Financial); and a joint investigation with a large multistate group (MoneyGram). Hoffer Aff., ¶ 15; Exs. 11-18, App. 409-428 (Office press releases).

and solicitations and transactions involving other products and services sold in the Commonwealth. *Id*. at ¶ 14.

A very recent, visible example is the Office's 2016 leadership and participation in a multistate investigation into Volkswagen's "clean diesel" deception, which has so far resulted in a partial settlement providing Massachusetts with nearly $100 million in Chapter 93A civil penalties and environmental mitigation.[16]

B. Massachusetts AGO's Longstanding Efforts on Climate Change

For years, the AGO has been a leader in addressing the threat of climate change, often in collaboration with other state attorneys general. The Office led the federal litigation that resulted in the United States Supreme Court's determination in *Massachusetts v. EPA* that greenhouse gases are pollutants warranting regulation under the federal Clean Air Act. *See* 549 U.S. 497 (2007). In the intervening decade, Massachusetts's injuries from climate change—and the scientific predictions of future injuries—have only grown more devastating.[17] In subsequent litigation, the Office has worked closely with other states to advocate for and defend federal findings and regulations addressing climate change under the Clean Air Act, including the EPA's Clean Power Plan regulations to reduce power plant greenhouse gas emissions and the EPA's recent regulations regarding methane emissions from oil and gas facilities. Massachusetts has enacted laws that require reductions in greenhouse gas emissions and encourage strategies to reduce reliance on fossil fuels, including the Global Warming Solutions Act, 2008 Mass. Acts. ch. 298, and the Green Communities Act, 2008 Mass. Acts ch. 169. As state and federal law

[16] Ex. 19, App. 430 (Office press release). On July 19, 2016, Massachusetts, New York, and Maryland announced the filing of separate state suits against Volkswagen alleging state environmental law violations that were not covered under the partial settlement and that arose from the corporate misconduct identified through the multi-state investigation, including depositions and document productions in response to the states' CIDs. Ex. 20, App. 433 (press release announcing lawsuits).

[17] *See, e.g.*, Ex. 21, App. 439 (recent reports on Massachusetts impacts of sea level rise).

recognize, the overwhelming scientific evidence indicates that human activity, and the burning of fossil fuels in particular, are key drivers of climate change.[18]

C. 2015 Investigative Reporting and Release of Exxon Documents

In 2015, the Los Angeles Times, in cooperation with the Columbia University School of Journalism,[19] and the news organization InsideClimate News,[20] published a series of investigative reports and internal Exxon and other documents establishing that Exxon had a robust climate change scientific research program in the late 1970s into the 1980s that documented the serious potential for climate change, the likely contribution of fossil fuels (the Company's chief product) to climate change, and the risks of climate change including to Exxon's assets and businesses.[21] As set forth above, Exxon was, in the early 1980s, predicting

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[18] *See, e.g.*, Ex. 22, App. 450-453 (Intergovernmental Panel on Climate Change, *Climate Change 2014 Synthesis Report*, Summary for Policymakers, at 2-5) ("Human influence on the climate system is clear, and recent anthropogenic emissions of greenhouse gases are the highest in history. Recent climate changes have had widespread impacts on humans and natural systems. . . . Warming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and oceans have warmed, the amounts of snow and ice have diminished, and sea level has risen. . . . Emissions of CO_2 from fossil fuel combustion and industrial processes contributed about 78% of the total [greenhouse gas] emissions increase from 1970 to 2010, with a similar percentage contribution for the increase during the period 2000 to 2010. Globally, economic and population growth continued to be the most important drivers of increases in CO_2 emissions from fossil fuel combustion." (internal citations omitted)).

[19] Ex. 23, App. 481 (Sara Jerving, et al., *What Exxon knew about the Earth's melting Arctic*, L.A. Times, Oct. 9, 2015).

[20] Ex. 24, App. 497 (InsideClimate News articles in Exxon: The Road Not Taken series). InsideClimate News was named a finalist for a Pulitzer Prize for its work on the series. Ex. 25, App. 602.

[21] According to InsideClimate News, its "reporters interviewed former Exxon employees, scientists, and federal officials, and consulted hundreds of pages of internal Exxon documents, many of them written between 1977 and 1986." Neela Banerjee, *et al.*, Exxon: The Road Not Taken 2, (InsideClimate News 2015), *available at* https://insideclimatenews.org/content/Exxon-The-Road-Not-Taken (last accessed Aug. 5, 2016). InsideClimate News also reviewed "thousands of documents from archives including those held at the University of Texas-Austin, the Massachusetts Institute of Technology and the American Association for the Advancement of Science." *Id.* Following the disclosure, Exxon does not dispute the authenticity of the documents. Ex. 26, App. 605 (Exxon webpage posting documents).

significant increases in global temperature as a result of climate change and understood that a two to three degree Celsius increase could pose a significant threat to ecosystems and human populations.[22] One Exxon scientist warned that it was "distinctly possible" that the effects of climate change over time will "indeed be catastrophic (at least for a substantial fraction of the earth's population)."[23]

Exxon understood that doubling of atmospheric carbon dioxide would occur "sometime in the latter half of the 21st century," and that "CO_2-induced climate changes should be observable well before doubling."[24] Exxon's scientists agreed with the scientific consensus that "a doubling of atmospheric CO_2 from its pre-industrial revolution value would result in an average global temperature rise of (3.0 ± 1.5) [degrees Celsius]."[25] Exxon knew what that would mean for humanity and ecological systems: "There is unanimous agreement in the scientific community that a temperature increase of this magnitude would bring about significant changes in the earth's climate, including rainfall distribution and alterations in the biosphere."[26] Nevertheless, in 2016, Exxon maintains that "[w]hile most scientists agree climate change poses risks related to extreme weather, sea-level rise, temperature extremes, and precipitation changes, current scientific understanding provides limited guidance on the likelihood, magnitude, or time frame of these events."[27]

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[22] Ex. 1, App. 286 (Henry Shaw, *CO_2 Greenhouse and Climate Issues* (March 28, 1984)).

[23] Ex. 27, App. 608 (interoffice memorandum from Roger W. Cohen to W. Glass (Aug, 18, 1981)).

[24] Ex. 28, App. 614 (letter from Roger W. Cohen to A.M. Natkin, Exxon Office of Science and Technology (Sept. 2, 1982)).

[25] *Id.*, App. 613. A temperature increase of 1.5 to 4.5 degrees Celsius equals a temperature increase of 2.7 to 8.1 degrees Fahrenheit.

[26] *Id.*

[27] Ex. 9, App. 398 (Exxon webpage, *Meeting global needs—managing climate change business risks*).

As well, it appears Exxon may have failed to disclose fully its knowledge of climate change threats to investors and consumers to whom it continued to market and sell securities and products. For example, by 1982, Exxon knew about the climate-driven risk to its businesses, and its management recognized that "[m]itigation of the 'greenhouse effect' would require major reductions in fossil fuel combustion,"[28] and by 1984, Exxon scientists were advising Exxon management that "[w]e can either adapt our civilization to a warmer planet or avoid the problem by sharply curtailing the use of fossil fuels."[29] Exxon knew that "should it be deemed necessary to maintain atmospheric CO_2 levels to prevent significant climatic changes, dramatic changes in patterns of energy use would be required."[30]

Yet, as of 2016, when it has become even clearer, as set forth above, that to avoid severe climate disruption, carbon dioxide emissions must be reduced to ensure global average temperature increase does not exceed two degrees Celsius above preindustrial levels—which means that well over half of the world's fossil fuels reserves must remain unburned—Exxon continues to tell its investors that "[w]e are confident that none of our hydrocarbon reserves are now or will become stranded."[31] Attorney General Healey's concern that Exxon has not adequately disclosed climate risk to Massachusetts investors in its securities is reflected in recent actions by Exxon shareholders (including Massachusetts-based shareholders) to compel the Company to more fully assess and respond to climate risks.[32]

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[28] Ex. 5, App. 347 (memorandum from M.B. Glaser to a broad distribution list of Exxon management, attaching document, "CO_2 'Greenhouse Effect' Summary").

[29] Ex. 1, App. 286 (Henry Shaw, *CO_2 Greenhouse and Climate Issues* (March 28, 1984)).

[30] Ex. 29, App. 618 (letter from W.L. Ferrall to Dr. H.L. Hirsch regarding "Controlling Atmospheric CO_2," with attached memorandum (Oct. 16, 1979)).

[31] Ex. 6, App. 352 (Exxon, *Energy and Carbon—Managing the Risks* (2014)).

[32] In the past year, Exxon shareholders came close to passing resolutions that would have required Exxon to implement "stress tests" to ascertain more specifically the climate-driven risks to Exxon's businesses. The proposals "drew more support than any contested climate-related

Despite its knowledge of the potentially "catastrophic" impacts of climate change, Exxon appears to have engaged with other fossil fuel interests in a campaign from at least the 1990s onward to prevent government action to reduce greenhouse gas emissions.[33] In 1998, Exxon participated as a member of the "Global Climate Science Communications Team," which engaged in a concerted effort to challenge the "scientific underpinning of the global climate change theory" in the media, and which took the position, directly contrary to Exxon's internal knowledge at the time, that "[i]n fact, it [sic] not known for sure whether (a) climate change actually is occurring, or (b) if it is, whether humans really have any influence on it."[34] A draft plan prepared by that team noted that "[u]nless 'climate change' becomes a non-issue, meaning that the Kyoto proposal is defeated and there are no further initiatives to thwart the threat of climate change, there may be no moment when we can declare victory for our efforts."[35]

D. Exxon Investigations and Litigation

1. New York Subpoena, Requests for Federal Investigation, and Massachusetts CID

Following the 2015 release of Exxon's documents, on or about November 5, 2015, New York Attorney General Eric Schneiderman issued a subpoena to Exxon under New York's Martin Act, seeking documents regarding Exxon's climate research and its communications to investors and consumers about the risks of climate change and the effect of those risks on

votes" in Exxon's history, and indicate that "more mainstream shareholders like pension funds, sovereign wealth funds, and asset managers are starting to take more seriously" the effects on Exxon of a "global weaning from fossil fuels." Ex. 30, App. 645 (Bradley Olson & Nicole Friedman, *Exxon, Chevron Shareholders Narrowly Reject Climate-Change Stress Tests*, The Wall Street Journal, May 25, 2016); *see also* Ex. 31, App. 650 (Natasha Lamb & Bob Litterman, *Really? Exxon left the risk out of its climate risk report*, May 28, 2014) (discussing Exxon's *Energy and Carbon—Managing the Risks* report (Ex. 6)).

[33] Ex. 32, App. 654 (email from Joe Walker to Global Climate Science Team, with "draft Global Climate Science Communications Plan").

[34] *Id.*, App. 657.

[35] *Id.*, App. 655. Adopted in 1997 to limit carbon emissions in industrialized countries, the Kyoto climate change treaty (the "Kyoto Protocol") was ratified by 191 countries but never ratified by the United States. Ex. 33, App. 664 (Kyoto Protocol ratification status).

Exxon's business.[36] Exxon is cooperating with the New York subpoena and has produced more than 700,000 pages of documents to New York.[37]

In January 2016, at the request of members of Congress, the Department of Justice asked the Federal Bureau of Investigation to investigate whether Exxon should be prosecuted under the federal Racketeer Influenced and Corrupt Organizations Act, based on the documents released by journalists.[38] United States Attorney General Lynch recently confirmed that the investigation is ongoing.[39]

Following the disclosure of the Exxon documents, the AGO also reviewed them and other Exxon public statements and representations and determined that an investigation pursuant to Chapter 93A was warranted. Attorneys General Schneiderman and Healey and several other attorneys general met in New York in March 2016 and discussed at a press conference their cooperation on a number of national environmental issues.[40] Attorney General Healey announced that her office also would be investigating Exxon.[41]

On April 19, 2016, the AGO served Exxon's Massachusetts registered agent with its CID.[42] The CID seeks documents from Exxon on such topics as "Exxon's development,

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[36] Ex. 34, App. 673 (*Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General*, N.Y. Times, Nov. 5, 2015).

[37] Ex. 35, App. 679 (comment to InsideClimate News published on July 7, 2016).

[38] Ex. 36, App. 688 (Jan. 12, 2016, letter from Department of Justice to Hon. Ted W. Lieu and Hon. Mark DeSaulnier).

[39] Ex. 37, App. 690 (comment reported in press).

[40] Ex 38, App. 695 (press release regarding press conference, including video recording).

[41] *Id.* (video recording).

[42] Issuance of the CID triggered an investigation by the House Science, Space, and Technology Committee into state attorneys general investigations of Exxon, and on July 13, 2016, Attorneys General Healey and Schneiderman were served with subpoenas by the Committee. The subpoenas appear to be the first ever served by Congress on a sitting state attorney general. Attorney General Healey, as well as Attorney General Schneiderman, has objected to the subpoena as an unconstitutional abuse of Congressional authority. The subpoena correspondence is available at http://www.mass.gov/ago/bureaus/eeb/the-environmental-

planning, implementation, review, and analysis of research efforts to study CO_2 emissions"; research on how the effects of climate change will affect Exxon's costs, marketability, and future profits; and how this information was communicated to consumers and investors.[43]

As well, in early July 2016, nineteen members of the United States Senate called for an end to fossil fuel companies', including Exxon's, climate change "misinformation campaign to mislead the public and cast doubt in order to protect their financial interest,"[44] and offered support for a resolution urging fossil fuel companies to cooperate with "active or future investigation into (A) their climate-change related activities; (B) what they knew about climate change and when they knew that information; (C) what they knew about the harmful effects of fossil fuels on the climate; and (D) any activities to mislead the public about climate change."[45]

2. Texas and Massachusetts Cases

On June 15, 2016, Exxon filed a civil complaint against Attorney General Healey, in her official capacity, in United States District Court for the Northern District of Texas under 42 U.S.C. § 1983, alleging that Attorney General Healey's investigation violated its constitutional rights, along with a motion for a preliminary injunction to enjoin Attorney General Healey from enforcing the CID. The following day, June 16, 2016, Exxon filed the instant petition to set aside or modify the CID or for a protective order, along with an emergency motion seeking the same relief and a stay of the Massachusetts proceedings pending the outcome of the Texas proceeding.

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protection-division/exxon-investigation.html. On August 3, 2016, all eleven members of the Massachusetts Congressional delegation sent a joint letter to the Committee's chair, objecting to the issuance of the subpoenas. Ex. 39, App. 700.

[43] Civil Investigative Demand No. 2016-EPD-36, at 12-20 (Exxon Petition, Exhibit B).

[44] Ex. 40, App. 704 (*19 Senate Democrats call out Exxon, fossil fuel industry on climate change denial*, FuelFix, Jul. 11, 2016).

[45] Ex. 41, App. 707 (S. Con. Res. 45, 114th Cong. (2016)).

III. SUMMARY OF ARGUMENT

Notwithstanding Exxon's disingenuous assertions to the contrary, this Court has personal jurisdiction over Exxon both to compel Exxon to comply with the CID and to adjudicate any claims that may result from the Attorney General's investigation. On the merits, Exxon's motion should be denied in its entirety because Exxon has not: (1) met its heavy burden of demonstrating the Attorney General issued her CID arbitrarily or capriciously; (2) demonstrated that the documents the Attorney General seeks are irrelevant to her investigation; or (3) established good cause for the relief it seeks pursuant to G.L. c. 93A, § 6(7), such as the burdens of production being a substantial interference with its business. Exxon has not shown, because it cannot show, that any of its constitutional rights are threatened by the Attorney General's investigation. Accordingly, the Court should deny Exxon's motion and grant the Commonwealth's cross-motion pursuant to G.L. c. 93A, § 7, to compel Exxon to comply in all respects with the CID, including by producing the documents identified in the CID to the Attorney General's Office.

IV. ARGUMENT

A. This Court Has Personal Jurisdiction over Exxon.

Incredibly, Exxon's papers deny its pervasive business contacts with the Commonwealth, which fully support this Court's personal jurisdiction over Exxon in this matter. For the Court to exercise personal jurisdiction, jurisdiction must comport with the state long-arm statute, G.L. c. 223A, § 3, and also the due process requirements of the Fourteenth Amendment to the United States Constitution. *See Good Hope Indus., Inc. v. Ryder Scott Co.*, 378 Mass. 1, 5-6 (1979). Both the long-arm statute and due process are clearly satisfied here.

1. This Court Properly May Exercise Personal Jurisdiction over Exxon Under the Massachusetts Long-Arm Statute.

The state's long-arm statute, G.L. c. 223A, § 3, authorizes personal jurisdiction over defendants in actions arising from a person's "(a) transacting any business in the commonwealth; (b) contracting to supply services or things in this commonwealth; (c) causing tortious injury by an act or omission in this commonwealth; [or] (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth . . . ."

The Commonwealth issued the CID in connection with Exxon's "transaction of business" in Massachusetts, namely its marketing and sale of fossil fuel derived products to consumers in Massachusetts and of securities to investors here. These activities plainly subject Exxon to personal jurisdiction under G.L. c. 223A, § 3(a). Courts construe "transacting any business in the commonwealth" in a "generous manner," and in applying the clause to the facts, focus on whether the party "attempted to participate in the commonwealth's economic life." *Cossart v. United Excel Corp.*, 804 F.3d 13, 18 (1st Cir. 2015).[46]

The Court should reject Exxon's preposterous effort to deny its wide-ranging and ongoing Massachusetts business activities. The facts contradict Exxon's representation that it has not marketed and sold fossil fuel products and services or its securities in Massachusetts.[47]

[46] *See also Lyle Richards, Int'l v. Ashworth, Ltd.*, 132 F.3d 111 (1st Cir. 1997) ("transacting business" test is designed to identify deliberate, as distinguished from fortuitous, contacts with forum by nonresident party); *Hahn v. Vermont Law School*, 698 F.2d 48 (1st Cir. 1983) (law school "transact[ed] business" in Massachusetts despite never maintaining any Massachusetts campus, office, bank account, mailing address, or telephone listing, where plaintiff initiated contact with the law school without prior solicitation).

[47] *See* Exxon Appendix, Affidavit of Geoffrey Grant Doescher ("Doescher Aff."), ¶ 3 ("At no point during the last five years has Exxon Mobil Corporation (1) sold fossil fuel derived products to consumers in Massachusetts, or (2) owned or operated a single retail store or gas

Exxon conducts extensive business in Massachusetts, including sales of its fossil fuel products to the State and to wholesalers and retailers located in Massachusetts, and sales of its securities to large Massachusetts-based financial services companies. Indeed, Exxon is one of the leading suppliers of fossil-fuel products in Massachusetts, routinely conducting transactions with at least hundreds of Massachusetts retailers of Exxon products, including Pep Boys, Advance Auto Parts, Auto Zone, NAPA Auto Parts, Costco, and Target.[48] Most prominently, Exxon distributes fossil fuel products to consumers through more than 300 Exxon-branded retail service stations that sell Exxon gasoline and other fuel products[49] and through the operation of its own interstate oil pipeline system and major fuel distribution terminals in the Massachusetts cities of Springfield and Everett.[50] Exxon's terminals store large quantities of gasoline and other fuels, which are transported by truck to commercial gasoline stations and other facilities throughout Massachusetts and New England. Exxon provides advertising and marketing support directly to wholesalers of its products, including those located in Massachusetts.[51] To promote its sales of fossil fuel products, Exxon advertises them in Massachusetts through all types of media, including radio, television, and the Internet. Hoffer Aff., ¶ 46. Exxon also sold its products at

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station in the Commonwealth"); *id.* at ¶ 4 ("Any service station that sells fossil fuel derived products under an 'Exxon' or 'Mobil' banner is owned and operated independently").

[48] Ex. 42, App. 712 (portion of an Exxon website with the "Where to buy Mobil™ motor oil" store locator results for the Boston zip code 02108).

[49] Ex. 43, App. 730 (Exxon webpage directing customers to find its branded stations in Massachusetts); Ex. 44, App. 737 (portion of an Exxon website for a representative Mobil-branded station in Boston, Massachusetts).

[50] Ex. 45, App. 740 (Exxon webpage describing its interstate oil pipeline system and fuel distribution terminals in the Massachusetts cities of Springfield and Everett).

[51] Ex. 46, App. 742 (portion of Exxon website describing its relationship with its branded wholesalers, including that wholesalers of Exxon products "have access to premier fuel products and innovative consumer pull programs [and] best-in-class marketing and advertising support and dedicated sales expertise"). *See also* Ex. 47, App. 745 (*ExxonMobil Launches New U.S. Retail Fuels Platform*, CSP Daily News, Jan. 14, 2014) (describing Exxon's "retail fuels technology platform" for Exxon-branded stations and quoting Exxon wholesale manager Grant Doescher describing platform's benefits for "[o]ur stations").

relevant times *to the Commonwealth*. An Exxon division entered into a contract to supply the Massachusetts State Police with motor oil for its cruisers from 2011 through 2014. The deal was touted to provide environmental benefits to Massachusetts.[52] Exxon's fossil-fuel product sales and marketing activities are plainly the "transaction of business" under the Commonwealth's long-arm statute.

Exxon's business transactions in the Commonwealth also include its dealings with Massachusetts securities investors, and the Company admits it has sold securities (short term fixed rate notes) in Massachusetts during the limitations period.[53] Without more, these admitted sales of short term fixed rate notes, the marketing of which is one subject of the Attorney General's investigation, suffice to bring Exxon within the ambit of the state's long-arm statute.[54] Beyond Exxon's admitted sales of securities to Massachusetts investors, Exxon common stock is held by, among many other Massachusetts shareholders, the following institutional investors:

- Boston-based State Street Corporation, the second largest institutional investor in Exxon common stock, with holdings valued at approximately $16.7 billion as of March 31, 2016;
- Boston-based Wellington Management, the seventh largest institutional investor in Exxon stock, with holdings valued at approximately $4.6 billion as of March 31, 2016; and

[52] Ex. 48, App. 747 (press release announcing Exxon partnership with Massachusetts State Police, dated Jun. 14, 2012); Ex. 49, App. 750 (standard contract between ExxonMobil Oil Corp. and the Commonwealth).

[53] Exxon Petition at 5 & n.15. Such notes are not exempt from the definition of "security" under Massachusetts law, subjecting such transactions to scrutiny pursuant to Chapter 93A. *Compare* 15 U.S.C. § 77c(a)(3) *with* G.L. c. 110A, § 401(k).

[54] Exxon's attempt to point to G.L. c. 110A, § 402(a)(10) to shield it from liability here is unavailing because the exemption provided by that provision relates only to filing requirements, not to Chapter 93A's proscription of misleading marketing or fraud, and it is irrelevant whether the securities Exxon admits to selling are exempt from filing requirements as long as they fit within the definition of securities in G.L. c. 110A, which these do.

- Boston-based Fidelity Investments, which holds Exxon stock as part of its extensive mutual fund offerings, including, *e.g.*, in the Fidelity Independence Fund.[55]

In addition, the Massachusetts Pension Reserves Investment Trust (the Massachusetts State Pension Fund) has made a significant investment in Exxon securities, purchased through its Massachusetts-based investment manager. Hoffer Aff., ¶ 42.

Exxon's activities also trigger the long-arm statute's other grounds for jurisdiction. Exxon's arrangements to supply fossil fuel products to retailers, other wholesalers, and consumers such as the Commonwealth constitute "contracting to supply services or things" in Massachusetts under G.L. c. 223A, § 3(b). Exxon's marketing and other statements to Massachusetts consumers and investors in violation of Chapter 93A also may constitute tortious acts and omissions in the state, which are independently sufficient for long-arm jurisdiction under G.L. c. 223A, § 3(c). *See, e.g.*, *North American Video Corp. v. Leon*, 480 F. Supp. 213, 218 (D. Mass. 1979) (intentional misrepresentation in Massachusetts triggers jurisdiction under M.G.L. c. 223A, § 3(c), by causing tortious injury by an act or omission in Massachusetts). Finally, Exxon's extensive contacts in Massachusetts also satisfy the long arm statute's "general jurisdiction" prong, G.L. c. 223A, § 3(d), with Exxon regularly engaged in or soliciting business here, engaging in other persistent courses of conduct in Massachusetts, and deriving substantial revenue from its goods sold and used here. *See Heins v. Wilhelm Loh Wetzlar Optical Mach. GmbH & Co. KG*., 26 Mass. App. Ct. 14, 20 (1988) (ruling requirements of "general

[55] *See* Ex. 50, App.753 (list of largest institutional shareholders); Ex. 51, App. 756 (holdings of the Fidelity Independence Fund). Exxon's communications with its Massachusetts investors are constant. That communication occurs both through traditional communications required by law and through more personal means: Exxon's chief executive officer discussed the Company's environmental performance with a Massachusetts-based investor at the Company's 2014 annual shareholder meeting. *See* Ex. 52, App. 780, 21 (shareholder meeting unofficial transcript).

jurisdiction" provision apply disjunctively, and "substantial revenues" requirement was satisfied where plaintiff asserted that dozens of defendant's machines, valued around $50,000 each, had been sold to Massachusetts companies).[56]

2. Exxon's Extensive Contacts with Massachusetts Support Jurisdiction Under the Due Process Requirements of the Fourteenth Amendment.

Exxon's Massachusetts business contacts also amply meet the constitutional requisites for personal jurisdiction here. For personal jurisdiction to comport with the due process requirements of the Constitution, the defendant must have "established 'minimum contacts' in the forum state," *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 772 (1994) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)). First, minimum contacts must arise from some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws"; second, plaintiff's claim must arise out of or relate to those contacts; and third, "the assertion of jurisdiction over the defendant must not offend 'traditional notions of fair play and substantial justice.'" *Bulldog Inv'rs Gen. P'ship v. Sec'y of Com.*, 457 Mass. 210, 217 (2010) (quoting, *inter alia*, *Tatro*, 416 Mass. at 773). Exxon's extensive business transactions in Massachusetts undoubtedly constitute the necessary "minimum contacts" for jurisdiction, including its "purposeful availment" of the privileges of doing business in the Massachusetts market. *See Tatro*, 416 Mass. at 772; *Bulldog Inv'rs*, 457 Mass. at 217 ("Because the plaintiffs operated a Web site accessible in Massachusetts

[56] Exxon's Massachusetts fossil fuel facilities have also been the subject of litigation by the Attorney General's Office. In 2010, Exxon and several subsidiaries agreed to pay the Commonwealth $2.9 million in civil penalties for air pollution related violations of state law, including emissions of gasoline vapors, volatile organic compounds, and other toxic air pollutants from its Massachusetts bulk gasoline terminals in Everett and Springfield. The settlement was memorialized in a consent judgment entered by this Court. Ex. 53, App. 785 (Office press release and Boston Globe story reporting settlement and noting Exxon statement that "we have entered into an agreement in an effort to resolve this matter and continue focusing on safe and environmentally responsible operations").

and sent a solicitation that is prohibited by Massachusetts law to a Massachusetts resident, it was reasonable for the plaintiffs to anticipate being held responsible in Massachusetts.").[57]

The second requirement of due process is also satisfied here. It was Exxon's "suit-related" sales and marketing of securities to investors and fossil fuel products to consumers *in Massachusetts*, as identified on the face of the CID, that may constitute Chapter 93A violations and thus subject Exxon to this Court's jurisdiction.

Asserting personal jurisdiction over Exxon also comports with the "fair play and substantial justice" requirements of due process. This analysis requires the Court to "weigh the Commonwealth's interest in adjudicating the dispute, the burden on the out-of-State party of litigating in Massachusetts, and the Commonwealth's interest in obtaining convenient and effective relief." *See Bulldog Inv'rs*, 457 Mass. at 218. The Commonwealth's interest in protecting its consumers and investors through enforcement of Chapter 93A in Massachusetts state courts is well-established and far outweighs any inconvenience that a large, publicly-traded corporation with a substantial Massachusetts presence and billions of dollars in quarterly profits may face in defending its conduct here. *See id.* (plaintiff's inconvenience "does not outweigh the Commonwealth's interest in enforcing its laws in a Massachusetts forum"); *Hongyu Luo v. Tao Ceramics Corp.*, No. 13-CV-5280-F, 2014 WL 3048679, at *4 (Mass. Super. Apr. 10, 2014) ("Massachusetts [consumer protection laws] would not provide Massachusetts residents with effective protection if they could not be enforced against non-resident defendants.").

For the reasons discussed above, both the Commonwealth's long-arm statute and due process support the Court's personal jurisdiction over Exxon to adjudicate the validity of the CID

[57] Exxon's reliance on *Walden v. Fiore*, 134 S.Ct. 1115 (2014) is misplaced. Plaintiff Exxon's Memorandum in Support of Motion to Set Aside or Modify Civil Investigative Demand or Issue a Protective Order (June 16, 2016) ("Memo."), 8. In *Walden*, none of the petitioner-defendant's conduct occurred in the forum state.

and in any eventual enforcement action that the Commonwealth files against Exxon in this matter.

B. The Attorney General Is Exercising Her Authority Lawfully and Without Improper Bias or Prejudgment.

The Attorney General's investigation of Exxon in no way constitutes an abuse of government power. *See, e.g.*, *SEC v. McGoff*, 647 F.2d 185, 192-93 (D.C. Cir. 1981) (finding SEC investigation into company's funding from apartheid South Africa involved no abuse of government authority because "investors and potential investors … have a clear stake in knowing, and a congressionally mandated right to disclosure, if South African funds have been used" by the company). The Court should summarily reject Exxon's claims that the Attorney General is violating its due process rights and should be recused from this investigation because she is biased. *See* Plaintiff Exxon's Memorandum in Support of Motion to Set Aside or Modify Civil Investigative Demand or Issue a Protective Order (June 16, 2016) ("Memo."), 8-10.

Exxon's arguments on this issue boil down to a contention that the Attorney General's brief statement at a New York press conference in March 2016 evinced an improper bias that would prevent her from serving as a "disinterested" prosecutor in the case.[58] The claim is utterly without merit. If credited, it would allow law enforcement targets to disrupt necessary investigations whenever a prosecutor speaks publicly on a matter.

The Attorney General's comments recognized climate change as an environmental matter of grave public concern—consistent with both her duty to protect the environmental resources of Massachusetts, G.L. c. 12, § 11D, and with the edicts of federal and state law[59]—and also

[58] Exxon offensively equates the Attorney General to prosecutors found guilty of gross misconduct, bad faith, or a pecuniary conflict of interest, none of which is at issue here.

[59] *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (federal law); Global Warming Solutions Act, 2008 Mass. Acts ch. 298, and Green Communities Act, 2008 Mass. Acts ch. 169 (state laws addressing climate change).

announced the initiation of the investigation at issue in this case. The statement also explained the reasons for the investigation and her reasonable belief that Exxon's statements—as reflected in Exxon's own documents in the public domain as discussed above—may have misled investors, consumers, and the public about the harms caused by climate change, both to Exxon's business and assets and to the environment and human populations. Indeed, *such a belief that Exxon violated state law is the very basis for an investigation*. *See Harmon Law Offices, P.C. v. Attorney General*, 83 Mass. App. Ct. 830, 834 (2013). Exxon has cited no case holding that such a public statement by a prosecutor demonstrates improper motive or bias, inappropriate prejudgment of the investigation, or personal animus.

Exxon's assertions that the Attorney General's statement demonstrates her bias or prejudgment of the investigation's merits disregard the Attorney General's unremarkable authority, as an elected official and a prosecutor, to explain to the public and the press that she is conducting an investigation. "Statements to the press may be an integral part of a prosecutor's job . . . and they may serve a vital public function." *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). *See also Goldstein v. Galvin*, 719 F.3d 16, 30 (1st Cir. 2013) ("Not only do public officials have free speech rights, but they also have an obligation to speak out on matters of public concern."); Scott M. Matheson, Jr., *The Prosecutor, the Press, and Free Speech*, 58 Fordham L. Rev. 865, 888 (1990) ("Prosecutors are publicly accountable; their accountability is measured in part through public information about the prosecutor's office, and about particular cases. Indeed, it is generally accepted that elected prosecutors have an obligation to inform the community about the functioning of their offices."). The Attorney General's statement merely reflects her belief, in light of her Office's review of the public record, that Exxon violated

Chapter 93A with respect to its marketing and sale of fossil fuel derived products to consumers and of securities to investors.

That the Attorney General has coordinated with other state attorneys general in conducting this investigation into potential violations by Exxon of Chapter 93A, and engaged with interested third parties on matters of public concern, is of no moment. What Exxon attempts to paint as nefarious is customary and routine practice for the Attorney General's Office and for attorneys general's offices around the country.[60] Attorneys general are advocates for the public interest, charged by statute with enforcing state law against unfair and deceptive business practices through investigations and legal action, and that is what Attorney General Healey is doing in this case. Neither the Attorney General's statement nor her participation in discussions with other attorneys general provides a basis for this Court to order her recusal from this matter on constitutional grounds or otherwise.

C. Chapter 93A Provides Lawful Authority for the Attorney General's Investigation, and There Are Sufficient Grounds to Investigate Exxon for Its Potential Violations of the Statute.

Amid pages of irrelevant descriptions of meetings and communications in which the Attorney General took no part, Exxon's papers offer a series of conclusory arguments that the Court should set aside the CID. Memo., 11-18. None of Exxon's arguments satisfies its heavy burden to establish that the CID is arbitrary or capricious. *Att'y Gen. v. Bodimetric Profiles*, 404 Mass. 152, 157 (1989).

[60] The investigatory practices here with respect to this inquiry into Exxon's potential fraudulent misrepresentations regarding the risks of climate change closely parallel the largely successful collaborations of state attorneys general in tobacco litigation and in other multistate investigations discussed above. *See, e.g.*, Ex. 54, App. 788 (background from National Association of Attorneys General regarding tobacco Master Settlement Agreement); Section II.A, *supra*.

1. Statutory Background and Standard of Review

The purpose of Chapter 93A is "to improve the commercial relationship between consumers and business persons and to encourage more equitable behavior in the marketplace," *Poznik v. Mass. Med. Prof'l Ins. Ass'n*, 417 Mass. 48, 53 (1994) (abrogated by statute on other grounds), as well as to provide "proper disclosure of information and a more equitable balance in the relationship of consumers to persons conducting business activities," *Commonwealth v. DeCotis*, 366 Mass. 234, 238 (1974). To that end, G.L. c. 93A, § 2, prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce."

"*[W]henever [s]he believes* a person has engaged in any method, act or practice declared to be unlawful" by Chapter 93A, the Attorney General enjoys broad powers to investigate the unlawful conduct, including the issuance of civil investigative demands. *Bodimetric*, 404 Mass. at 157 (quoting and interpreting Attorney General's authority under G.L. c. 93A, § 6(1) (emphasis in original)).

In challenging the Attorney General's CID, it is Exxon's burden to show that the Attorney General has acted arbitrarily or capriciously. *Bodimetric*, 404 Mass. at 157. The Attorney General has no affirmative burden in a case challenging a CID, and an "assertion that the Attorney General has not affirmatively demonstrated the validity of [her] belief is insufficient to establish that the Attorney General has acted arbitrarily and capriciously." *Id.* at 157-58; *Harmon Law Offices*, 83 Mass App. Ct. at 835 (affirming superior court's decision dismissing complaint to set aside CIDs to law firm suspected of Chapter 93A violations in its foreclosure and eviction practices and finding CID recipient has "heavy burden" to show good cause why it should not be compelled to respond). In assessing the reasonableness of the Attorney General's demands, the Court applies a "plainly irrelevant" standard. *Matter of Bob Brest Buick, Inc.*, 5 Mass. App. Ct. 717, 719-20 (1977) ("[i]t cannot now be said that the C.I.D., as modified, was too

indefinite, exceeded reasonable limits, or was 'plainly irrelevant' . . . to the public interest sought to be protected").

2. The AGO's CID Is Reasonable Because It Is Premised on the Public Record of Exxon's Evidently Fraudulent Conduct.

As set forth in Section II.C, the internal Exxon documents recently made public establish that Exxon's climate change scientific research program in the late 1970s into the 1980s documented the serious potential for climate change, the likely contribution of fossil fuels (the Company's chief product) to climate change, and the risks of climate change to the world's natural and economic systems, including Exxon's own assets and businesses. *See* Section II.C, *supra* (discussing evidence of Exxon's knowledge of risks posed by climate change to its businesses). Indeed, a key rationale for Exxon's decision to launch its cutting-edge climate change research program was to "[d]evelop expertise to assess the possible impact of the greenhouse effect on Exxon business" and "[f]orm [a] responsible team that can credibly carry bad news, if any, to the corporation."[61] At that time, Exxon also understood "the potential for [its] research to attract the attention of the popular news media because of the connection between Exxon's major business and the role of fossil fuel combustion in contributing to the increase of atmospheric CO_2."[62] And, by 1984, Exxon's scientists recognized that "[w]e can either adapt our civilization to a warmer planet or avoid the problem by sharply curtailing the use of fossil fuels."[63]

In recent years, when it has become even clearer, as reflected in the Paris Agreement, that to achieve the goal of stabilizing average global temperatures at a safer level well over half of the

[61] Ex. 55, App. 792 (Exxon presentation to National Oceanic and Atmospheric Administration (March 26, 1979)).

[62] Ex. 28, App. 613 (letter from Roger W. Cohen to A.M. Natkin, Exxon Office of Science and Technology (Sept. 2, 1982)).

[63] Ex. 1, App. 286 (Henry Shaw, *CO_2 Greenhouse and Climate Issues* (March 28, 1984)).

world's fossil fuel reserves must remain unburned, and despite Exxon's knowledge over three decades ago that to avoid the worst impacts of climate change, fossil fuel use would need to be "sharply curtail[ed],"[64] Exxon continues to make apparently misleading and deceptive statements to investors. In a 2014 report Exxon prepared for shareholders that is still being disseminated to Massachusetts investors on Exxon's website, Exxon represented that "[w]e are confident that none of our hydrocarbon reserves are now or will become stranded."[65] Exxon has made that same representation to the U.S. Securities and Exchange Commission in 2016 correspondence,[66] and likewise represented in 2016 that "[o]il will provide one third of the world's energy in 2040, remaining the No. 1 source of fuel, and natural gas will move into second place."[67] Even though Exxon understood long ago that responses to climate change could likely involve drastic reductions in reliance on fossil fuels, in a 2015 speech to the Annual Oil and Money Conference, Exxon's Chief Executive Officer and Chairman did not include climate change among the three key factors determining future global energy demand ("at ExxonMobil, we foresee future energy demand being shaped by three major forces: population growth, trade and economic development, and energy efficiency").[68] Exxon's recent statements fail to disclose Exxon's extensive knowledge of the likely impacts of climate change and the risks to its businesses. Instead they portray falsely, to a public unaware of Exxon's research and internal knowledge, a bright future for Exxon and the oil industry.

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[64] *Id.*

[65] Ex. 6, App. 352 (Exxon, *Energy and Carbon—Managing the Risks* (2014)).

[66] Ex. 7, App. 383 (Feb. 29, 2016, letter from Exxon counsel Louis L. Goldberg, Esq., to Office of Chief Counsel, U.S. Securities and Exchange Commission).

[67] Ex. 8, App. 391 (press release, "ExxonMobil's Energy Outlook Projects Energy Demand Increase and Decline in Carbon Intensity," dated Jan. 25, 2016).

[68] Ex. 56, App. 822 (address of Exxon Chairman and Chief Executive Officer Rex Tillerson, "Unleashing Innovation to Meet Our Energy and Environmental Needs," 36th Annual Oil and Money Conference, dated Oct. 7, 2015).

Based on the publicly available Exxon documents and statements the Office has reviewed, the Attorney General believes that Exxon has engaged in conduct that included, at least, misleading statements to investors and consumers that minimized, obfuscated, and otherwise did not fully disclose—and therefore were deceptive and misrepresented—Exxon's knowledge of the extent of climate-driven risks to its assets. These risks implicate, among other things: Exxon's operations; valuations of Exxon's fossil fuel reserves, including the risks that those assets will be "stranded"; the financial viability of new Exxon fossil fuel development projects; and the anticipated impacts on Exxon's business of the Paris Agreement or similar climate change public policies to cap global average temperature increase at two degrees Celsius (in other words, the resilience of Exxon's portfolio in a low carbon scenario).

The Attorney General further believes that Exxon made statements that misled investors, consumers, and the public about Exxon's knowledge, based in part on previous research by Exxon's own scientists, regarding the role of Exxon products in contributing to climate change; the severity of the actual and threatened impacts of climate change on ecological systems that support human health and sustain life; Exxon's scientists' recognition that transitioning away from reliance on fossil fuels could avert severe climate change; and the likely climate impacts of continued, long term primary reliance on fossil fuels.[69]

[69] According to public documents, Exxon, with the assistance of other fossil fuel interests and non-governmental entities, also appears to have disseminated misleading statements in order to raise doubts about the credibility of scientific findings demonstrating the risks of climate change, thereby distorting consumer, investor, and public perception of the risks. This conduct is plainly relevant to Exxon's potential violations of Chapter 93A; CID Demand No. 5 (Exxon Petition, Exhibit B, App. 35) therefore requests Exxon's communications with these third parties. Such communications may also provide further information regarding Exxon's internal knowledge of climate risks relative to its contemporaneous and later statements to consumers and investors.

With this predicate, the CID seeks information about Exxon's continuing efforts to present to consumers, investors, and the public potentially misleading information about the risks of climate change, the viability of alternative energy sources, and the environmental attributes of its products and services. *See* CID Demand Nos. 9, 10, and 11 (Exxon Petition, Exhibit B, App. 36-37).[70] The CID also seeks information regarding Exxon's deceptive statements contained in advertising and public relations campaigns over many years about climate change and the environmental bona fides of the Company and its products, as those may be shown to have driven customer investment in its products to the detriment of cleaner alternative energy (such as purchasing biofuels).[71] Further, the CID seeks information regarding Exxon's statements in securities offerings and other contexts, which may also include similar misrepresentations to investors about the risks of climate change to its businesses and assets, and the risks of regulatory costs and requirements associated with policy responses to climate change. *See* CID Demand Nos. 19, 20, 21, 31, and 32 (Exxon Petition, Exhibit B, App. 39-41).

[70] Under Massachusetts law, the purchase of an intentionally falsely represented product, without more, is an "ascertainable injury" under Chapter 93A, and an action based on deceptive acts or practices does not require proof that a consumer relied on the deception. *See Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 394 (2004) (sales of cigarettes labeled "light" "in order to establish in the individual and collective consciousness the concept that [light cigarettes] are more healthful" where defendant cigarette manufacturer knew that smokers of such cigarettes would not "in fact receive the promised benefits" are deceptive under Chapter 93A). As well, marketing "need not be totally false in order to be deemed deceptive in the context" of Chapter 93A. *Id.* at 394-95. Deceptive marketing "may consist of a half-truth, or even may be true in a literal manner, but still create an overall misleading impression through failure to disclose material information." *Id.*

[71] Public relations efforts, as it appears Exxon was engaged in, to deceptively downplay climate risks, when targeted at consumers, may tend to depress appreciation of the urgent need for, and investment in, cleaner alternative energy sources that are competing with Exxon products and services. *See* Ex. 10, App. 405 ("Both [the tobacco and oil] industries hired public relations company Hill & Knowlton Inc., an influential New York firm, for outreach as early as 1956."). For this reason, the CID seeks to elicit information regarding the engagement of public relations firms. *See* CID Demand Nos. 18 and 20, Exxon Petition, Exhibit B, App. 39.

In all its papers, Exxon has made no specific arguments that the requested information is "plainly irrelevant" to potential Chapter 93A violations by the Company. It therefore has not met its "heavy burden" to show good cause for setting aside or modifying the CID. To the contrary, the documents that the AGO seeks through the CID are needed for the Attorney General to continue to exercise her reasoned judgment in assessing whether an enforcement action under Chapter 93A is justified.

3. Documents Dated and Related to Exxon's Actions Outside the Limitations Period Are Highly Relevant to the Investigation.

In its Petition and Memorandum in support of its motion, Exxon argues that the CID constitutes an "abuse of government power" and is otherwise unwarranted because Exxon claims it has, "for more than a decade" recognized that the risk of climate change and its potential impacts "may" be significant, and baldly asserts that the Attorney General has failed to identify any Exxon statement about climate change that could establish liability under Chapter 93A "during the relevant limitations period." Petition, 4, 16-17; Memo, 7.

On the contrary, the Attorney General believes Exxon has violated Chapter 93A during the four-year limitations period applicable to actions under the statute. As set forth above, the Attorney General believes that Exxon has engaged in conduct during the limitations period that included, at least, statements to shareholders and consumers that did not fully disclose and otherwise misrepresented Exxon's knowledge of the extent of climate-driven risk to its assets, its operations, and new Exxon fossil fuel development projects; and the effects on Exxon's business of regulations, treaties, agreements, and other measures to reduce greenhouse gas emissions. Exxon statements during the limitations period, reflected in the CID,[72] confirm the sound basis for that belief.

[72] *See* CID Demand Nos. 9, 10, and 11 (Exxon Petition, Exhibit B, App. 36-37).

Understanding what Exxon knew—and for how long it has known it—about the impacts of climate change on its business and consumers is highly relevant to a determination whether Exxon has violated Chapter 93A during the limitations period. Such information can demonstrate that Exxon knew that statements it made during the limitations period were false, misleading, or fraudulent *in light of* Exxon's *prior* knowledge and conduct. Events occurring prior to the limitations period, therefore, may provide critical evidence regarding whether a violation of law occurred during the limitations period. *See, e.g.*, *Ocean Spray Cranberries, Inc. v. Mass. Comm'n Against Discrimination*, 441 Mass. 632, 647 (2004) (plaintiff who had seasonable claim may use events occurring prior to limitations period as "background evidence" and entity's prior conduct "is relevant as background evidence" to a determination whether subsequent actions by entity constitute violations of applicable law).

Further, the investigation may reveal facts that would demonstrate that Exxon's conduct prior to the limitations period is actionable. For example, Exxon's conduct may constitute a continuing violation. *See, e.g.*, *Taygeta Corp. v. Varian Assocs. Inc.*, 436 Mass. 217, 232 (2002) (recurring tortious conduct in the form of continuing flow of contaminated groundwater to abutting property constituted continuing nuisance not barred by three-year statute of limitations even though dumping that caused contamination occurred decades before suit). If Exxon engaged in conduct prior to the limitations period that is determined to be misleading, based on its pre-limitations period knowledge, and continued to make fresh misleading representations during the limitation period that spring from that initial fraud, its conduct could constitute a continuing violation. *Cf. Bazemore v. Friday*, 478 U.S. 385, 395 (1986) (Brennan, J., concurring in part) (pattern or practice that would have constituted violation of statute, but for the fact that statute had not yet become effective, became violation upon statute's passage and liability may

be imposed if present day salary structure is mere continuation of illegal pre-statute pay structure).

As well, facts revealed during the investigation may also demonstrate that equitable tolling of the Chapter 93A statute of limitations would be proper. *See Lambert v. Fleet Nat'l Bank*, 449 Mass. 119, 126 (2007) (holding that discovery rule applies to Chapter 93A claims); *Szymanski v. Boston Mut. Life Ins. Co.*, 56 Mass. App. Ct. 367, 370 (2002) (same; reversing grant of summary judgment for defendant insurer where question of fact existed whether plaintiff should have understood vanishing premium policy's diminishing value prior to date of commencement of suit and therefore whether discovery rule should apply to toll the statute of limitations); *Cambridge Plating Co., Inc. v. Napco, Inc.*, 991 F.2d 21, 28 (1st Cir. 1993) (statute of limitations tolled until "an event or events have occurred that were reasonably likely to put plaintiff on notice that someone may have caused her injury"); *see also Demoulas v. Demoulas Super Mkts., Inc.*, 424 Mass. 501, 519 (1997) (breach of fiduciary duty of disclosure tolls limitations period under G.L. c. 260, § 12).[73]

[73] There are three circumstances that trigger application of the discovery rule in Massachusetts: "where a misrepresentation concerns a fact that was 'inherently unknowable' to the injured party, where a wrongdoer breached some duty of disclosure, or where a wrongdoer concealed the existence of a cause of action through some affirmative act done with the intent to deceive." *Szymanski*, 56 Mass. App. Ct. at 370 (citing *Patsos v. First Albany Corp.*, 433 Mass. 323 (2001)). The factual basis for a cause of action is "inherently unknowable" if it is "incapable of detection by the wronged party through the exercise of reasonable diligence." *Geo. Knight & Co., Inc. v. Watson Wyatt & Co.*, 170 F. 3d 210, 213 (1st. Cir. 1999). Fraudulent concealment requires evidence that a defendant committed an affirmative act to "conceal or cover up wrongful conduct which underlies the action." *Tomaselli v. Beaulieu*, 967 F. Supp. 2d 423, 442 (D. Mass. 2013); G.L. c. 260, § 12. A "mere failure to reveal information," can be "fraudulent concealment by a person, such as a fiduciary, who has a duty to disclose," and such a duty may exist when "one party reposes, to the other's knowledge, trust and confidence under circumstances in which the other's failure to make disclosure would be inequitable." *Watson Wyatt & Co.*, 170 F.3d at 215-16.

In light of the long history of Exxon's internal deliberations on climate change evident in the recently disclosed Exxon documents, certain of the demands in the CID necessarily seek documents that predate the limitations period. Given the several ways in which they may help prove actionable violations of Chapter 93A, these documents are highly relevant to the Commonwealth's potential Chapter 93A claims, and the CID's requests for documents outside the limitations period are therefore reasonable.

4. Exxon's Free Speech Objections to the CID Are Baseless.

Exxon cites several provisions of the Massachusetts Declaration of Rights that it says the Attorney General's CID and her comments at a New York press conference violate. Memo., 8-14. Exxon's conclusory arguments in this regard are mistaken.[74]

As a threshold matter, the CID does not regulate or burden any speech and therefore does not violate Exxon's rights under Article XVI of the Massachusetts Constitution. *See* Memo., 11-14.[75] Exxon says that the CID is a "direct and deliberate assault" on its First Amendment rights that "regulates" and "intrudes on" its political speech. *See* Memo., 11. The CID does no such thing.

Subpoenas and CIDs like the Attorney General's CID to Exxon "do not directly regulate the content, time, place, or manner of expression, nor do they directly regulate political

[74] In earlier sections, the Commonwealth addresses Exxon's repeated claims of unconstitutional harassment (Memo., 14), *see* Section IV.B, *supra*, and its claims that the scope of the CID exceeds constitutional or other bounds (Memo., 15-16), *see* Sections IV.C.2 and IV.C.3, *supra*.

[75] As relevant here, Massachusetts courts generally interpret the free speech guarantees of the Massachusetts Constitution consistently with the First Amendment, with resort to federal case law. *See, e.g.*, *Opinions of the Justices*, 387 Mass. 1201, 1202 (1982) ("criteria which have been established by the United States Supreme Court for judging claims arising under the First Amendment . . . are equally appropriate to claims brought under cognate provisions of the Massachusetts Constitution" (citation omitted)). As an apparent tactic to avoid obviously duplicative actions, Exxon asserted federal constitutional claims against the Attorney General in the Texas lawsuit, but not in its Massachusetts petition.

association." *SEC v. McGoff*, 647 F.2d 185, 187-88 (D.C. Cir. 1981) (upholding SEC subpoena for corporate records relating to transactions with South Africa). Article XVI does not ordinarily protect routine corporate business records, which are all that the CID requests. A subpoena for corporate records like the CID is a "generally applicable" order "*unconcerned with regulating speech*" and does not even have the incidental (but permissible) "effect of interfering with speech." *See Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 886 n.3 (1990) (emphasis added).

In *In re Enforcement of Subpoena*, 436 Mass. 784 (2002), a case nowhere cited in Exxon's papers that involved a challenge to the Judicial Conduct Commission's subpoena of a journalist who was the spouse of a judge under investigation, the Supreme Judicial Court held that subpoenas concerning matters of public controversy do not inherently implicate free speech protections:

> The mere fact that the subpoena calls for production of documents reflecting, inter alia, communications that the witness had with others does not burden speech. Indeed, witnesses in a vast array of proceedings are commonly called on to give evidence concerning what they said or wrote to others and what others said or wrote to them. A discovery request or subpoena seeking information about a witness's communications does not automatically raise free speech concerns. *Similarly, the fact that the subject matter of the witness's communications may include items that are of current public interest or controversy . . . do[es] not transform the . . . subpoena into a violation of free speech rights.*

436 Mass. at 790 (emphasis added).

Accordingly, the recipient of such a demand is not entitled to heightened scrutiny of the demand under Article XVI and the cases Exxon cites. This principle follows from the black letter law that the First Amendment, and thus Article XVI, does not prevent government inquiries that seek information from the press, a context with much weightier constitutional dimensions than a

routine inquiry from the Attorney General to a publicly traded company concerning its potentially misleading and deceptive practices in violation of the Commonwealth's consumer and investor protection laws. *See, e.g.*, *Commonwealth v. Corsetti*, 387 Mass. 1, 4 (1982) (citing *In the Matter of Roche*, 381 Mass. 624, 633 (1980) and *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)).[76]

The threadbare nature of Exxon's alleged Article XVI harms further undermines Exxon's free speech claims. *In re Enforcement of Subpoena*, 436 Mass. at 791, 794 (finding challenger "failed to show how requiring him to comply with this subpoena will chill his rights of expression or association" despite "all the constitutional rhetoric in [his] arguments").[77] Indeed, there is absolutely no evidence that the CID itself has chilled or silenced Exxon's speech or will do so in the future: in fact, before and after the CID was issued, Exxon has continued to speak

[76] The Attorney General thus need not demonstrate a "compelling interest" in the materials sought nor that her requests are "narrowly tailored," as Exxon contends. Memo., 11, 13. The CID would, in fact, meet even this exacting standard of scrutiny, given the CID's lack of effects on Exxon's speech, the compelling importance of enforcing Chapter 93A, and Exxon's sole possession of its own internal documents. *See In re Enforcement of Subpoena*, 436 Mass. at 791-92.

[77] *See Univ. of Penn. v. EEOC*, 493 U.S. 182, 195-202 (1990) (affirming denial of relief from administrative subpoena because alleged First Amendment harm to academic freedom too attenuated and speculative to preclude disclosure of peer review materials, citing *Branzburg*); *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) (affirming trial court denial of injunctive relief in First Amendment challenge to Army regulatory action and holding that unspecified "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm"); *In the Matter of Roche*, 381 Mass. 624, 633, 635 (1980) (citing *Branzburg* and finding harm to "free flow of information" too "speculative" to warrant First Amendment exception to the "longstanding principle that 'the public . . . has a right to every man's evidence'"); *Dole v. Milonas*, 889 F.2d 885, 891 (9th Cir. 1989) (affirming denial of protective order against administrative subpoena because "[b]are allegations of possible first amendment violations are insufficient to justify judicial intervention into a pending investigation" (citation omitted)).

about its views on climate change, including with regard to pending investigations and this very litigation.[78] Exxon makes no serious claim that the CID will impede its ability to speak freely.

Exxon also cannot claim that its responses to the CID will necessarily be made public in some way that threatens its internal political deliberations. G.L. c. 93A, § 6(6) provides that "[a]ny documentary material or other information produced . . . shall not, unless otherwise ordered by a court of the commonwealth for good cause shown, be disclosed to any person other than the authorized agent or representative of the attorney general . . . ." While the material and information elicited in response to the CID may be disclosed in court pleadings or other papers filed with the court, *id.*, the statute expressly authorizes the Court to grant protective orders in accordance with the standards in Massachusetts Rule of Civil Procedure 26(c), when appropriate, including to require that material to be filed in court be submitted under seal as set forth in Rule 26(c)(8). *See* G.L. c. 93A, § 6(7). The Attorney General fully recognizes and honors the protections afforded persons providing documents and information pursuant to her CID authority, and will satisfy those obligations here.[79]

Moreover, Article XVI in no way bars the Attorney General's investigation into whether Exxon's commercial communications with consumers and investors have been false, deceptive, misleading, or fraudulent in violation of Chapter 93A. *See* Section II.C., *supra*. The purpose of her investigation is wholly consistent with Article XVI and the First Amendment, which do not

[78] *See, e.g.*, Ex. 57, App. 835 (Exxon webpage, *ExxonMobil's perspectives on climate change, Our climate science history*); Ex. 58, App. 839 (Exxon blog post, *The truth about ExxonMobil and climate change*, May 23, 2016); Ex. 59, App. 843 (Exxon blog post, *The coordinated attack on ExxonMobil*, Apr. 20, 2016); Ex. 60, App. 846 (Exxon blog post, *ExxonMobil responds to state AGs*, Mar. 29, 2016; and Ex. 61, App. 849 (Exxon press release, "ExxonMobil to Hold Media Call on New York Attorney General Subpoena," dated Nov. 5, 2015).

[79] The CID itself was only made public when Exxon filed its papers in the Texas court on June 15, 2016.

protect false, deceptive, or misleading statements in the marketplace. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (government "may, and does, punish fraud directly"); *Friedman v. Rogers*, 440 U.S. 1, 9 (1979) (First Amendment does not limit "restrictions on false, deceptive, and misleading commercial speech"); *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1123 (D.C. Cir. 2009) ("it is well settled that the First Amendment does not protect fraud"); *Opinion of the Justices*, 373 Mass. 888, 891 (1977) (no constitutional protection for "deceptive, misleading, or false statements, and statements proposing illegal transactions"). If the Attorney General concludes as a result of her investigation that the statements are indeed fraudulent and chooses to pursue enforcement action, she may certainly do so consistently with Article XVI. Accordingly, the Court should disregard Exxon's conclusory and premature free speech objections to the CID.

5. The CID Is Not Overly Burdensome.

"Documentary demands exceed reasonable limits *only* when they '*seriously interfere with the functioning of the investigated party* by placing burdens on manpower or requiring removal of critical records.' [B]ecause the requested information is often peculiarly within the province of the person to whom the C.I.D. is addressed, broad discovery demands may be permitted even when such a demand 'imposes considerable expense and burden on the investigated party.'" *Bodimetric*, 404 Mass. at 159 (emphasis added) (quoting *Matter of Yankee Milk, Inc.*, 372 Mass. 353, 365 (1977)). *See also Matter of Yankee Milk, Inc.*, 372 Mass. at 364-65 ("[E]ffective investigation requires broad access to sources of information . . . because evidence of the alleged violations is within the control of the investigated party.").[80] Exxon cannot claim that producing

[80] *Cf. Cuomo v. Dreamland Amusements, Inc.*, No. 08 CIV.6321 JGK, 2008 WL 4369270, at *12 (S.D.N.Y. Sept. 22, 2008) (in considering claim of irreparable harm from compliance with state administrative subpoena, "no irreparable injury has been shown because

the documents requested by the CID will "seriously interfere" with the functioning of a company of Exxon's scale and resources.

Here, the documents the Attorney General seeks are within Exxon's exclusive control, are relevant to the Attorney General's investigation, and can be produced to the AGO without interfering with Exxon's business. Exxon's suggestion that it would be overly burdened by responding to the CID lacks credibility, because Exxon currently is in the process of producing documents responsive to the New York Attorney General's similar subpoena, more than 700,000 pages to date, and Exxon could readily duplicate at least those documents for production to the Commonwealth in the first instance at a *de minimis* cost, with a subsequent production of documents responsive only to the Massachusetts CID. In this context, Exxon's claimed burdens are no grounds for setting aside or modifying the CID.

D. The Court Should Not Stay This Proceeding Pending the Outcome of Exxon's Texas Lawsuit.

Exxon includes in its motion and supporting memorandum the untenable request that this Court stay its hand while a Texas federal district court adjudicates the merits of Exxon's lawsuit against the Attorney General, because it filed the federal case first. The Court should reject this transparent attempt to forum shop. The cited rule does not apply to two lawsuits filed by the same plaintiff, *see Ethicon Endo-Surgery, Inc. v. Pemberton*, No. 10-3973-B, 2010 WL 5071848, at *3 (Mass. Super. Oct. 27, 2010) (applying rule to consider "mirror image" actions where plaintiff and defendant filed separate actions in different courts); *Quality One Wireless, LLC v. Goldie Grp., LLC*, 37 F. Supp. 3d 536, 540 (D. Mass. 2014) (same). Besides, here the two cases were essentially simultaneous. Exxon filed in Texas a mere twenty-four hours earlier in order to make the nominal, and disingenuous, argument that its Texas lawsuit predated its Massachusetts

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the present detriment to Dreamland from the investigation is that it must participate in an investigation. The costs of such compliance do not constitute irreparable injury.").

petition. Moreover, the factors courts use in applying the "first-filed" presumption all cut against deferring to the other action, including:

(i) severe inconvenience to the Commonwealth of litigating challenges to its CID in Texas;

(ii) the Texas court's lack of personal jurisdiction over the Attorney General;

(iii) the distinction between the cases created by the Commonwealth's cross-motion to compel here, which it is not bringing in Texas court; and

(iv) the principles of federal-state comity favoring this Court's application of the Massachusetts law, Chapter 93A, that authorizes the CID.

Cf. Mass. R. Civ. P. 12(b)(9) (concerning dismissal of action based on prior actions pending in courts of the Commonwealth); Reporter's Notes, Mass. R. Civ. P. 12(b)(9) ("the court . . . should determine the location of the ultimate litigation").

Moreover, staying this case would powerfully constrain the Attorney General's use of CIDs to investigate foreign corporations' conduct in Massachusetts by encouraging foreign corporations that are targets of CIDs to engage in the very same gamesmanship Exxon has employed here. Any such company could bring objections in a federal court far from Massachusetts, despite a near-ubiquitous business presence in Massachusetts, and file a near-identical action in Massachusetts while simultaneously seeking to stay it, thereby vastly increasing the Commonwealth's inconvenience and costs.

E. In Light of the Sound Basis for the Attorney General's Investigation, the Court Should Grant the Commonwealth's Cross-Motion to Compel.

As demonstrated above in Sections IV.B and IV.C, the CID fully comports with the Attorney General's statutory authority, is reasonable based on the Office's review of publicly available Exxon documents and statements, does not offend Exxon's constitutional rights, and

does not impose impermissible burdens on Exxon. For these same reasons, the Court should grant the Attorney General's cross-motion to compel Exxon to comply with the CID in its entirety. In this context, the Court may treat its findings in support of its determination to deny Exxon's emergency motion to set aside or modify the CID as an affirmation of Exxon's legal obligation to comply with the CID. *Cf. Harmon Law Offices*, 83 Mass. App. Ct. at 832 (accepting parties' treatment of the judge's decision on CID recipient's motion to set aside as requiring compliance with CID).

Despite its references to some specific CID requests, Exxon does not present serious and particularized arguments that individual demands should be modified or set aside.[81] Nor has Exxon in any way met its burden with regard to the CID as a whole or with regard to any particular request. *Bodimetric*, 404 Mass. at 157. Should the Court wish to scrutinize the relevance of individual demands, the Commonwealth respectfully requests the opportunity to present briefing supporting the reasonableness of and rationale for those demands. For the reasons discussed above, the Attorney General's CID seeks documents from Exxon that are relevant to her potential claims of violations of Chapter 93A, and the Court should order Exxon to comply with the CID.

V. CONCLUSION

The Attorney General commenced an investigation into Exxon's business practices and issued the CID because the Attorney General has a reasonable belief that Exxon violated Chapter

[81] For example, in a single paragraph, Exxon references Requests 1, 2-4, 5, 8-35, and 37-38 (nearly every request in the CID), asserting they are overly burdensome because of their temporal scope. *See* Memo., 17 & nn. 54-56. Yet Exxon does not describe the claimed burden of responding to this request in any detail, instead simply relying on broad and general assertions that the CID cannot legitimately extend to documents predating the limitations period. *Id.* Setting aside the specific reasons for their relevance, *see* Section IV.C.3, *supra*, this conclusory approach can in no way satisfy Exxon's burden to show good cause to set aside or modify the CID. *See also* Memo., 18 & n.57 (similar).

93A and that Exxon is in possession of records and documents relevant to a determination whether such violations actually occurred. Exxon bears the heavy burden of showing that the Attorney General acted arbitrarily or capriciously in issuing the CID, and it has failed to do so. Exxon has provided the Court with nothing that could establish good cause for setting the CID aside, or otherwise requiring modification of the CID, or issuance of a protective order. Accordingly, the Court should decline Exxon's invitation to stay this litigation pending its parallel litigation against the Attorney General in Texas, deny Exxon's motion to set aside the CID, and order Exxon to comply in all respects with the CID, including by producing to the Attorney General's Office the documents identified in the CID.

Respectfully submitted,

THE COMMONWEALTH OF MASSACHUSETTS

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Dated: August 8, 2016

CERTIFICATE OF SERVICE

I, I. Andrew Goldberg, hereby certify that on this 8th day of August, 2016, I caused a copy of the foregoing document to be served upon counsel of record by regular mail.

I. Andrew Goldberg