COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION No. 1984-CV-03333-BLS1

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

EXXON MOBIL CORPORATION,

Defendant.

Service by E-Mail

Leave to File Overlength Brief Granted December 29, 2023

CONSOLIDATED OPPOSITION OF THE COMMONWEALTH TO EXXONMOBIL'S THREE MOTIONS TO COMPEL THE PRODUCTION OF DOCUMENTS

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INTRODUCTION

The Commonwealth opposes three motions by defendant Exxon Mobil Corporation (ExxonMobil) to compel the Attorney General to produce irrelevant and protected documents and communications. The Attorney General's Office (AGO) has already produced voluminous material to ExxonMobil in response to the company's document requests, which now include 73 separate requests. And the eleven non-party state agencies that ExxonMobil served with Rule 45 subpoenas—some of which were served nearly two years ago—have also produced material to ExxonMobil in response to those third-party document requests. But the document requests at issue in the current motions go far beyond the material ExxonMobil is entitled to receive, and, therefore, the Commonwealth respectfully requests that the Court deny ExxonMobil's motions.

For over seven years, ExxonMobil has attempted to distort the Attorney General's civil investigation into ExxonMobil's climate change deception and the ensuing complaint filed by the Attorney General in the name of the Commonwealth pursuant to G.L. c. 93A, § 4, rather than confront the substance of the actual investigation and lawsuit. The Attorney General has successfully defeated ExxonMobil's many prior attempts to redirect this case away from ExxonMobil's conduct, yet the company's three motions are cut from the same cloth. The Court should again reject ExxonMobil's continued attempts to deflect this case toward irrelevant topics.

First, the Court should deny ExxonMobil's motion to compel the Attorney General to collect and produce documents from non-party state agencies. *See* Motion to Compel the Commonwealth to Search for and Produce Relevant Documents Possessed by the Commonwealth's Own Governmental Agencies and Departments (Agency Br.). This Court addressed the same issue in the same type of case—an action filed by the Attorney General under

G.L. c. 93A, § 4—and held, among other things, that the Attorney General may not compel non-party state agencies to turn over their state agency files to the Attorney General so that the Attorney General may produce documents responsive to a document request served on the Commonwealth. *Commonwealth v. Ortho-McNeil-Janssen Pharms., Inc.*, Civ. A. No. 2011-2811-BLS2, 2012 WL 5392617 (Suffolk Super. Ct. Oct. 5, 2012) (Sanders, J.) (Add-23).[1] Consistent with *Ortho-McNeil*, ExxonMobil has served at least eleven non-party state agencies with Rule 45 subpoenas (some of which were served nearly two years ago), engaged in meet and confers with those agencies about those subpoenas, and received responsive documents from them. Accordingly, the Court should reject ExxonMobil's about face and deny its request for an order compelling the Attorney General to produce what it does not possess or control.

Second, the Court should deny ExxonMobil's motion to compel the Attorney General's Office to produce communications with other state attorneys general about "the substance or timing" of the complaint or amended complaint or with Matthew Pawa—a private attorney. *See* Motion to Compel the Commonwealth to Search for and Produce Relevant Documents and Make Appropriate Disclosures with Respect to Withheld Documents (Miscellaneous Issues Br. Pt. III). The Attorney General, as ExxonMobil knows, has entered into at least two common interest agreements with other state attorneys general that both describe the attorneys general's shared common interest in investigating or suing ExxonMobil based on the company's climate-related deceptions and describe a desire to share documents and discuss strategy in pursuit of those efforts without waiving either the attorney client privilege or work product doctrine.

[1] For the Court's convenience, unreported Massachusetts, federal, and out-of-state state judicial opinions together with the record materials cited in this opposition are included in a separately filed Addendum to this opposition, which includes a detailed table of contents. Materials included in the Addendum are cited in this opposition as Add-##.

ExxonMobil's requests seek forced disclosure of confidential information exchanged pursuant to those agreements and should be rejected. The communications ExxonMobil seeks are also irrelevant based on this Court's Memorandum and Order on Motion to Strike Certain Defenses (Motion to Strike Order), Dkt. No. 70 (Add-1), and at least some of the Attorney General's communications with Pawa are protected by the attorney client privilege, which was triggered when the Attorney General engaged in deliberations about whether to retain Pawa's law firm to represent the Office.

Third, the Court should deny ExxonMobil's motion to compel the production of documents related to the Commonwealth's fossil fuel use and knowledge about climate change. *See* Motion to Compel the Commonwealth to Produce Documents Related to Fossil Fuel Use and Knowledge about Climate Change in Massachusetts (Fossil Fuel Br.) & Miscellaneous Issues Br. Pt. II. As this Court made clear in the Motion to Strike Order, this case concerns ExxonMobil—the company's knowledge of climate change, the company's internal decisions about how to respond to climate change, and the company's deceptive public representations about climate change; this case does not concern the Commonwealth's knowledge, response, or public representations. Motion to Strike Order at 16-18 (Add-16-18). The Commonwealth asked this Court to strike ExxonMobil's invalid defenses to limit unnecessary discovery, and the Court did so, but now ExxonMobil is stringing together strained arguments to try to obtain through the back door what the Court has firmly closed-off through the front. The Court should reject each of ExxonMobil's contrived rationales to obtain discovery that is solely relevant to the stricken defenses.

Fourth, the Court should deny ExxonMobil's motion to compel the disclosure of the identity of each third party the Attorney General's Office communicated with in the course of

developing this case. *See* Miscellaneous Issues Br. Pt.1. Consistent with the United States District Court for the District of Massachusetts's opinion in *Commonwealth v. First National Supermarkets*, 112 F.R.D. 149 (D. Mass. 1986) and other relevant precedent, the work product doctrine protects from disclosure the complete list of persons the Attorney General's Office communicated with as part of developing its case. While ExxonMobil is entitled to receive a list of individuals and entities that are likely to have discoverable information, it is not entitled to ascertain the Office's legal theories and strategic decisions through receipt of the complete list of individuals and entities that the Office may have spoken with in the development of this case. Indeed, ExxonMobil has not moved to compel a response to its interrogatory request seeking that information, presumably for that very reason, but now seeks to obtain that information through its document requests. The Court should reject ExxonMobil's attempt at an end-run around the work product doctrine.

To provide better clarity, the Attorney General addresses ExxonMobil's numerous and somewhat inconsistently conjoined issues in the following order. First, in Point I, the Attorney General addresses the issues raised in the Agency Brief. *Infra* pp.9-15. Second, in Point II, the Attorney General addresses the third point in the Miscellaneous Issues Br., which concerns the common interest doctrine, relevance, and the attorney client privilege. *Infra* pp.15-27. Third, in Point III, the Attorney General addresses the issues raised in the Fossil Fuel Br. and the second point in the Miscellaneous Issues Br., which concern the Commonwealth's use of fossil fuels and knowledge about climate change. *Infra* pp.28-38. Finally, in Point IV, the Attorney General addresses the first point in the Miscellaneous Issues Br., which concerns the identity of third parties with whom the Attorney General communicated in the course of developing this case. *Infra* pp.38-42.

BACKGROUND

In April 2016, then Attorney General Maura Healey, having a belief that ExxonMobil had committed violations of Chapter 93A with respect to disclosures about climate change in its representations to Massachusetts investors and consumers, served a Civil Investigative Demand ("CID") on ExxonMobil. Rather than complying with the CID, ExxonMobil initiated its hyperaggressive litigation strategy, which two separate courts have characterized as "running roughshod over the adage that the best defense is a good offense." *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 686 (S.D.N.Y. 2018); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 35 (D. Mass. 2020).

ExxonMobil began its attack by filing two lawsuits to block the investigation: one in this court, *In re Civil Investigative Demand No. 2016-EPD-36*, Civ. A. No. 16-1888F (Suffolk Super. Ct., filed June 16, 2016), and another in federal court in Texas, *Exxon Mobil Corp. v. Maura Tracy Healey*, Civ. A. No. 4:16-CV-469 (N.D. Tex., filed June 15, 2016). ExxonMobil alleged that that the CID was impermissibly motivated, constituted an abuse of process under state law, violated ExxonMobil's rights under the Massachusetts and U.S. Constitution, including the U.S. Constitution's First, Fourth, and Fourteenth Amendments, and was preempted by federal law. *E.g.*, ExxonMobil's First Amended Compl. ¶¶ 105-128, *Exxon Mobil Corp. v. Schneiderman*, Civ. A. No. 16-0469 (N.D. Tex., filed Nov. 10, 2016) (ECF No. 100) (Add-293).

In the Texas litigation, ExxonMobil initiated an extreme and far-reaching discovery expedition into the Attorney General's motives for investigating ExxonMobil. The company served over 100 requests for written discovery and documents on the Attorney General and then noticed depositions of the Attorney General herself and two members of her case team. Following transfer of venue and subsequent briefing, however, a United States District Judge

dismissed ExxonMobil's claims, reasoning that they were based on "extremely thin allegations and speculative inferences." *Exxon Mobil Corp.*, 316 F. Supp. 3d at 686, *aff'd sub nom.*, *Exxon Mobil Corp. v. Healey*, 28 F.4th 383 (2d. Cir. 2022). In particular, the Court ruled that ExxonMobil's "allegations that the AGs are pursuing bad faith investigations. . . to violate Exxon's constitutional rights are implausible." *Id.* at 687. This Court likewise rejected ExxonMobil's challenges to the CID and granted the Attorney General's cross-motion to enforce it. *In re Civil Investigative Demand No. 2016-EPD-36*, Civ. A. No. 16-1888F, 2017 WL 627305 (Super. Ct. Jan. 11, 2017) (Brieger, J.). The Supreme Judicial Court affirmed this Court's opinion in all respects. *Exxon Mobil Corp. v. Attorney General*, 479 Mass. 312 (2018), *cert. denied sub nom.*, *Exxon Mobil Corp. v. Healey*, 139 S. Ct. 794 (2019).

After continuing her investigation into ExxonMobil's marketing of its securities and fossil fuel products to Massachusetts investors and consumers, the Attorney General served notice on ExxonMobil that she intended to file a complaint against the company for violating Chapter 93A at the close of a meet and confer period required by the statute. G.L. c. 93A, § 4. Within a week, ExxonMobil—without any basis in law—filed with this Court an emergency motion to extend the statutory meet and confer period. At that time, ExxonMobil asserted that the Attorney General's decision to file the lawsuit represented "the freshest evidence of" the Attorney General's "participation in a conspiracy with other state attorneys general." Add-373. This Court rejected ExxonMobil's motion, Add-432 (Brieger, J.), and the Attorney General commenced this action on October 24, 2019. Dkt. No. 1.

ExxonMobil next removed the case to federal court, even though the complaint alleged only state-law Chapter 93A causes of action. Notice of Removal, *Commonwealth v. Exxon Mobil Corp.*, Civ. A. No. 19-cv-12430-WGY (D. Mass. Nov. 29, 2019) (ECF No. 1). Judge

Young, therefore, remanded this case while reprimanding ExxonMobil for its aggressive litigation tactics. *Massachusetts*, 462 F. Supp. 3d at 35.

On remand, the Attorney General filed an amended complaint alleging three claims pursuant to G.L. c. 93A regarding ExxonMobil's misrepresentations to Massachusetts investors and consumers. ExxonMobil responded by filing two separate motions to dismiss—the first based on the anti-SLAPP statute and grounded in its same baseless theories about the Attorney General's motives, and the second pursuant to Mass. R. Civ. P. 12(b)(2) and 12(b)(6). After briefing and a lengthy hearing, this Court (Green, J.), denied both motions on June 24, 2021. Dkt. Nos. 42-43. Discovery was stayed until the Supreme Judicial Court affirmed this Court's anti-SLAPP decision in May 2022. *Commonwealth v. Exxon Mobil Corp.*, 489 Mass. 724 (2022).

ExxonMobil filed its answer in July 2021, which the company later amended in October 2021 in response to the Commonwealth's Motion to Strike Certain Defenses in ExxonMobil's Answer. Dkt. Nos. 45, 53, 55. The Amended Answer asserted forty-one separate defenses to the Amended Complaint. Dkt. No. 53. ExxonMobil did not file a counterclaim. *Id.* Fourteen of ExxonMobil's defenses restated its spurious arguments that the Attorney General's Office conspired to deprive the company of its constitutional rights and added various other invalid equity-based and causation defenses, which sought to establish the Commonwealth as equally culpable for the allegations in the amended complaint. *See id.* at 82-94. In September 2021, the Attorney General filed a Motion to Strike Certain Defenses in ExxonMobil's Answer, arguing that the defenses "serve no purpose other than to obfuscate the matters actually presented by this case, unjustifiably expand discovery, and needlessly waste judicial and the Commonwealth's

time and resources." Dkt. No. 55 at 1. In March 2022, this Court granted the Attorney General's motion. Dkt. No. 70.

In July 2022, ExxonMobil, undeterred by the Court's Order, served document requests for material relevant only to the stricken affirmative defenses. Add-342. The Attorney General's Office properly objected and declined to produce documents in response to document requests that attempted to obtain material solely relevant to the stricken affirmative defenses. Add-233. The Attorney General's Office further objected on the basis that the requested material was protected by applicable privileges and other protections, including the common interest doctrine with respect to communications between the Attorney General and other state attorneys general's suing ExxonMobil for its climate change-related deception concerning the "substance" of the complaint. *Id.* Moreover, the Attorney General's Office also objected on the grounds that the Attorney General is not responsible for producing documents from non-party state agencies, which lie outside of the Office's possession, custody, or control. *Id.* For the ensuing fifteen months, ExxonMobil was on notice that the Attorney General was refusing to produce documents responsive to the requests at issue in ExxonMobil's pending motions.

Among other things, ExxonMobil specifically inquired as to whether the Attorney General was representing other Massachusetts agencies in this case; the Attorney General responded that it was not. Add-375. By November 2021, the Attorney General—at ExxonMobil's request—had referred ExxonMobil to specific counsel for each agency. *Id.* In December 2022, the Attorney General reiterated to ExxonMobil that the Attorney General was not responsible for producing documents in the possession, custody, or control of other Massachusetts agencies, citing a controlling case from this Court, *Ortho-McNeil*, 2012 WL 5392617 (Add-23). ExxonMobil responded not by filing a motion challenging the controlling

case law, but instead by serving subpoenas on various Massachusetts agencies. Agency Br. at 5-6 n.3 (noting that ExxonMobil has served 11 subpoenas on Massachusetts agencies). Those Massachusetts agencies, represented by their general counsel's offices and/or outside counsel, have been in time- and resource-intensive negotiations with ExxonMobil and have produced many documents to ExxonMobil, including as recently as a few weeks ago. *See, e.g.*, Add-409.

On October 12, 2023, this Court (Kazanjian, J.) issued an order setting December 8, 2023, as the parties' deadline to produce documents responsive to the first rounds of document requests. Dkt. No. 87. On December 4, 2023, with the December 8 deadline for the parties to produce documents responsive to the 2022 document requests looming, ExxonMobil filed a motion to enlarge all discovery deadlines in this case by almost six months to allow the company to meet its discovery obligations. Dkt. No. 88. On December 8, the same day that the Attorney General's Office was producing the documents responsive to ExxonMobil's requests in accordance with the then applicable Court ordered discovery deadline, ExxonMobil served the instant motions to compel the Commonwealth to produce irrelevant and/or protected documents.

ARGUMENT

I. Consistent with this Court's Opinion in *Ortho-McNeil*, the Court Should Deny ExxonMobil's Motion to Compel the Attorney General to Produce Documents in the Possession, Custody, and Control of Non-Party State Agencies.

The Court should reject ExxonMobil's motion to compel the Attorney General to produce documents that it neither possesses nor controls; namely, documents from non-party state agencies, especially given that those agencies received—some of them long-ago—Rule 45 subpoenas from ExxonMobil and have or are in the process of responding by, among other things, producing responsive documents. Indeed, this Court has already addressed this issue in *Ortho-McNeil* where it ruled in a nearly identical case that the Attorney General's "discovery

obligations are limited to producing documents in the possession of her office," 2012 WL 5392617 at *1 (Add-23), because, among other reasons, the Attorney General's general authority to represent state agencies in litigation "is not enough to infer an obligation on her part to demand that . . . [non-party state] agencies open their files," *id*. at *2. The Court should reach the same conclusion here.

A. The Attorney General is the Real Party in Interest And It Would Be Improper to Aggregate All State Agencies Simply Because This Action Was Filed by the Attorney General in the Name of the Commonwealth.

As in *Ortho-McNeil*, the Attorney General brought this action in the public interest under authority the Legislature granted exclusively to her in G.L. c. 93A, § 4. That section provides that "[w]henever the attorney general has reason to believe that any person is using or is about to use any method, act, or practice declared by section two to be unlawful, and that proceedings would be in the public interest, [the attorney general] may bring an action *in the name* of the commonwealth against such person . . . ." G.L. c. 93A, § 4 (emphasis added). As that text makes clear, the Attorney General is the real party in interest—the party with exclusive and independent authority to file actions under G.L. c. 93A, § 4—and the Commonwealth, per the terms of the statute, is merely a nominal party. *See id.*; *see also New York v. Nat'l R.R. Passenger Corp.*, 233 F.R.D. 259, 265 (N.D.N.Y. 2006) (finding that the state was "only nominally the plaintiff" under law requiring actions be brought in the name of the state of New York and that non-party state agencies could not be subjected to party discovery). Thus, by directing the Attorney General to bring section 4 actions in the name of the Commonwealth, the Legislature made clear that the Attorney General—not the Commonwealth—is the plaintiff in section 4 actions. Accordingly, it would contravene that Legislative choice to treat all of the Commonwealth's executive agencies as parties for discovery purposes.

That point is reinforced by the fact that actions by the Attorney General under G.L. c. 93A, § 4, including this one, are not brought by, through, on behalf of, or in relation to any other agency of the Commonwealth, unlike actions where the Attorney General files an action on behalf of a state agency in the name of the Commonwealth. *Compare* Add-172-173 (Compl. ¶¶ 7, 9, 10, 11 *in Commonwealth v. Barnhardt Mfg. Co.*, Civ. A. No. 21-02726H (Suffolk Super. Ct., filed Nov. 29, 2021) ("The Plaintiff is the Commonwealth . . . appearing by and through the Attorney General, MassDEP, DFW and its Director, and EEA and its Secretary)) *and* Add-214 (Compl. ¶¶ 5, 7 *in Commonwealth v. Pulte Homes of New England, LLC*, Civ. A. No. 21-2745-F (Suffolk Super. Ct., filed Dec. 1, 2021) ("The Plaintiff is the Commonwealth . . . acting by and through the Massachusetts Department of Environmental Protection [] and the Attorney General.")), *with* Amend. Compl. ¶ 43 ("The plaintiff is the Commonwealth, acting by and through the . . . Attorney General."). In actions filed by the Attorney General on behalf of specifically named state agencies in the name of the Commonwealth, those state agencies are the real parties in interest and appropriately subject to party discovery just like the Attorney General is in this case. *See Illinois v. Monsanto Co.*, Civ. A. No. 22-C-5339, 2023 WL 4083934 at **2, 7 (N.D. Ill. June 20, 2023) (holding that state agencies specifically named as parties in the complaint subject to party discovery and all other state agencies subject to third-party discovery). A contrary rule that focuses myopically on the nominal party—the Commonwealth—to expose any and all state agencies to party discovery would defeat the conscious choice about which state agency the Attorney General designates as the real party plaintiff in interest.

B. The Attorney General's Authority to Represent State Agencies Does Not Give the Attorney General the Right to Control Non-Party State Agency Files.

ExxonMobil is wrong to claim that the Attorney General has the legal right to obtain documents from non-party state agencies simply because the Attorney General has a general statutory obligation "'to appear for the commonwealth' in 'all suits and other civil proceedings in which the commonwealth is a party'" and a general obligation to "'prosecute[] or defend[]" all suits or to direct the same. Agency Br. at 9. That claim stretches that general authority beyond its breaking point and ignores the separation of powers between the Attorney General and the Executive. For that reason, it is thus hardly surprising that this Court did not hesitate to reject that very argument in *Ortho-McNeil*, where, again, the Court held that general authority "is not enough from which to infer an obligation on [the Attorney General's] part to demand that [state] agencies open their files" so that the Attorney General could respond to document requests served on her office. 2012 WL 5392617 at *2 (Add-25). *Ortho-McNeil*, just like this action, was filed by the Attorney General pursuant to G.L. c. 93A, § 4. *Id.* at *1 (Add-23). There, just like here, the plaintiff served discovery requests on the Attorney General that did "not differentiate between state agencies, much less make any particularized showing that the Attorney General has any control over them." *Id.* at *2 (Add-25).[2] While ExxonMobil spills much ink trying to distinguish and otherwise discredit the reasoning in *Ortho-McNeil*, Agency Br. at 12-18, *Ortho-McNeil*'s commonsense ruling is not so malleable.

In all events, here, just as in *Ortho-McNeil*, ExxonMobil has failed to satisfy its burden to demonstrate that the Attorney General has control over non-party state agency files because it

[2] In its document requests, ExxonMobil defined the "Commonwealth" to "mean the Commonwealth of Massachusetts, including any of its departments, agencies, employees, agents, and representatives." Add-343.

has cited no authority that expressly gives the Attorney General control over the documents in a non-party state agency's possession. *Strom v. Am. Honda Motor Co.*, 423 Mass. 330, 344 (1996) (describing moving party's burden).[3] That is because there is none. The Attorney General and the Governor are both independent, separately elected Constitutional officers, Mass. Const. Art. LXIV, § 1, and it is the Governor—not the Attorney General—who oversees, directs, and controls the state agencies. As the United States District Court for the Eastern District of New York held (albeit in a case not involving the Commonwealth but which is consistent with Massachusetts law), "[l]egally, the State Attorneys General have no more way of compelling production than [the defendant] does if an agency refuses to cooperate" because the "state agencies" at issue there, as is the case here, "operate outside of the State Attorneys General's authority." *United States v. Am. Express Co.*, Civ. A. No. 10-CV-04496, 2011 WL 13073683, at *3 (E.D.N.Y. July 29, 2011). For that reason, the court reached the obvious conclusion that it could not "order a party"—a state Attorney General—to produce that which it does not have." *Id.* To be sure, as noted above, when the Attorney General brings an action on behalf of a specific state agency at the state agency's behest or defends a state agency in action brought

[3] Attempting to refute this point, ExxonMobil cites the United States District Court for the Eastern District of Pennsylvania's unpublished opinion in *In re Generic Pharms. Pricing Antitrust Lit.*, Civ. A. No. MDL 2724, 2023 WL 6985587 (E.D. Pa. Oct. 20, 2023), *see* Agency Br. at 16, where the Court denied a protective order that sought to protect the Attorney General's Office from having to produce documents from non-party state agencies because "the AGO cites no authority preventing it from obtaining documents from state agencies in these circumstances." *Id.* at *4. While the circumstance here are quite different (i.e., the Attorney General, for example, does not seek damages on behalf of any state agencies in this case as it did in that case, *id.* at *2), the court in that case also wrongly shifted the "burden of establishing the opposing party's control over th[e] documents" onto the opposing party, i.e., the Attorney General. *Id.* at *4; *Strom*, 423 Mass. at 344. And, as ExxonMobil acknowledges, Agency Br. at 11 n.4, at least one other court—employing the burden correctly—reached the opposite conclusion with respect to the Attorney General's Office. *Colorado v. Warner Chilcott Holdings Co. III*, Civ. A. No. 05-2182, 2007 WL 9813287 at *4 (D.D.C. May 8, 2007).

against the state agency, the agency is necessarily subject to party discovery since it is in fact the real party in interest and the Attorney General, as the agency's counsel, will necessarily aid the agency in its compliance with its discovery obligations. But just as ExxonMobil's counsel would "object if in bringing a law suit on behalf of one client (or even in [the firm's own name]) their adversary sought documents belonging to another client as party," *see id.* at 3, the Attorney General's Office is well within its rights (and *Ortho-McNeil*) to lodge the same objection and prevail on it.

C. ExxonMobil Effectively Accepted *Ortho-McNeil*'s Holding By Serving Rule 45 Subpoenas on at Least Eleven Non-Party State Agencies, Some of Which Were Served Almost Two Years Ago.

ExxonMobil's arguments here are all the more surprising because the company seemingly understood more than two years ago that the Attorney General's Office did not have control over non-party state agency files. During the fall of 2021, ExxonMobil's counsel asked the Attorney General's Office whether it would represent state agencies with respect to Rule 45 subpoenas. Add-375. The answer was no but the Attorney General's Office agreed as a matter of courtesy to supply ExxonMobil's counsel with the "contact information for the [state agency] official responsible for subpoena compliance." *See id.* The Attorney General's Office has consistently presented that position based on *Ortho-McNeil*. *E.g.*, Add-385; Add-624. ExxonMobil proceeded to serve Rule 45 subpoenas on five state agencies on March 24, 2022—nearly *two* years ago. Add-472, 487, 502, 518, 534. ExxonMobil has since served at least six additional Rule 45 subpoenas on non-party state agencies. Add-433, 446, 459, 549, 578, 594. And the state agencies, through their non-AGO counsel, have engaged in meet and confers with ExxonMobil's counsel, served written responses and objections to those subpoenas, and produced non-privileged, responsive documents to ExxonMobil. Indeed, on January 5, 2024,

ExxonMobil notified the Attorney General's Office that it had received additional productions from the Massachusetts Department of Revenue and the Massachusetts Penson Reserves Investment Management Board. Add-409. Given this nearly two-year course of conduct and the discussion above, it would be both wrong as a matter of law and unfair as a matter of practice to impose on the Attorney General's Office at this late date the undue burden of the about-face ExxonMobil demands, especially where *Ortho-McNeil* provides that the Court simply cannot compel the Attorney General's Office to produce what it plainly does not have or control.

II. ExxonMobil's Attempt to Compel the Attorney General's Office to Produce Communications with Other State Attorneys General's Offices and Massachusetts Attorney Matthew Pawa Concerning this Case Defies the Common Interest Doctrine, this Court's Order on the Commonwealth's Motion to Strike Certain Defenses, and the Attorney Client Privilege (RFP Nos. 39-42).

ExxonMobil inappropriately asks this Court to compel the Attorney General's Office to produce irrelevant documents protected by multiple common interest agreements with other state attorneys general's offices by requesting:

- "[t]he Common Interest Agreement . . . signed by the Commonwealth on October 8, 2020, and all documents concerning the Common Interest Agreement," RFP No. 39;
- "[a]ll documents or communications between [the AGO] and the Attorney General of New York [or other state attorneys general] concerning ExxonMobil, the substance or timing of filing of the original complaint . . . or the . . . amended complaint," RFP Nos. 40-41; and
- "[a]ll documents concerning the Commonwealth's meeting and communications involving Matthew Pawa and his provision of a presentation on 'what Exxon knew,'" RFP No. 42.

Those requests are misplaced for at least three reasons. First, the Attorney General's communications with other state attorneys general about "ExxonMobil" or the "substance or timing" of the Attorney General's G.L. c. 93A, § 4 enforcement action against ExxonMobil are plainly protected by the common interest doctrine. Second, both those communications and any

communications with Matthew Pawa—an attorney—are irrelevant to the claims and remaining defenses in this action per the terms of this Court's March 21, 2022 Motion to Strike Order. Third, at least some of the Attorney General's communications with Matthew Pawa are protected by the attorney-client privilege.

A. The Common Interest Doctrine Shields from Production All Communications Between the Attorney General's Office and other Attorneys General's Offices about "ExxonMobil" and the "substance" or "timing" of the Commonwealth's Complaint or Amended Complaint.

The Supreme Judicial Court adopted an "expansive" application of the common interest doctrine in *Hanover Inst. v. Rapo & Jepsen Ins.*, 449 Mass. 609, 619 (2007), based on the rule set forth in the Restatement (Third) of the Law Governing Lawyers § 76(1). There, the Court made clear that the doctrine applies to extend the attorney client privilege and work product protection to communications and materials that are shared with outside parties with a common interest. *Id.* at 614, 617. The doctrine applies when two or more parties "share a sufficiently similar interest and attempt to promote that interest by sharing a privileged communication." *Id.* at 619. The common interest "may be either legal, factual, or strategic in character." Restatement (Third) of the Law Governing Lawyers § 76 cmt.e (2000 & 2023 Update). And, significantly, the shared interest need only be "sufficiently similar," not "identical." *Hanover Inst.*, 449 Mass. at 618. That test is met here as to any communications between the Attorney General's Office and other state attorneys general who may be investigating or suing ExxonMobil for, among other things, deceiving the public about climate change.

First, the attorneys general share common interests. Each of the attorneys general is bringing at least one claim under a state consumer protection act or comparable state common law against a common defendant (ExxonMobil), alleging that ExxonMobil made deceptive climate-related statements, the allegations for which are based on at least some of the same

documents, and seeking civil penalties and/or damages for ExxonMobil's deceptive and misleading conduct. The terms of the 2020 Common Interest Agreement reflect those common interests. ExxonMobil already has a copy of that Agreement, which the attorneys general of Connecticut, Massachusetts, Delaware, Minnesota, and the District of Columbia executed in October 2020, and which was produced pursuant to a public records request in another state. Add-342 (RFPs); Add-163 (2020 CIA). In its brief, ExxonMobil presents a highly distorted characterization of the Agreement's terms, which it chose not to attach as one of its numerous other exhibits for the Court's reference. But, as the Court will see when it reviews the Agreement itself, the attorneys general stated with specificity their shared legal interests, which include the fact that they:

> are engaged in separate litigations against certain fossil fuel industry defendants, namely, *State of Connecticut v. Exxon Mobil Corp[.],* Superior Court Civil Action No. HHD-CV-20-6132568-S, *State of Delaware, ex rel. Kathleen Jennings v. BP America Inc., et al.*, Superior Court Case No. N20C-09-097 AML CCLD; *District of Columbia v. Exxon Mobil Corp[.], et al.*, Superior Court Civil Action No. 2020 CA 2892 B, *Commonwealth of Massachusetts v. Exxon Mobil Corp[.]*, Superior Court Civil Action No. 1984-CV-03333-BLS1, *and State of Minnesota v. American Petroleum Institute et al.*, Ramsey County District Court Civil Action No. 62-cv-20-3837.

Add-163 (2020 CIA). While ExxonMobil asserts that "lawsuits purportedly sharing some general elements can still comprise different matters over the course of many years, involving various defendants, with different legal claims, facts, and victims," Miscellaneous Issues Br. at 19, ExxonMobil conveniently omits that ExxonMobil is a defendant in each of those cases and that each of those cases "share common facts [and] causes of action (*including consumer protection or consumer fraud claims*)." Add-163 (emphasis added).

In addition, the attorneys general also made clear in the 2020 Agreement that their actions:

> share aims: for Connecticut's case, to ensure that Exxon Mobil is prohibited from violating the Connecticut Unfair Trade Practices Act and penalized for past violations; for Delaware's case, to ensure that the defendants are held accountable for their violations of Delaware law, including without limitation violations of the Delaware Consumer Fraud Act; for the District's case, to ensure that the defendants are prohibited from violating the District's Consumer Protection Procedures Act and penalized for their past violations; for Massachusetts's case, to ensure that Exxon Mobil is prohibited from violating the Massachusetts Consumer Protection Act and penalized for its past violations; and, for Minnesota's case, to ensure that the defendants are prohibited from violating Minnesota's Prevention of Consumer Fraud Act and penalized for past actions, and are held accountable for the failure to warn consumers about their dangerous products.

Add-163.

Second, the attorneys general agreed that they would "attempt to promote that [common] interest by sharing [] privileged communication[s]." *Hanover Inst.*, 449 Mass. at 619. Specifically, the attorneys general agreed that based on the "commonalities of fact, law, and purpose," they would each "benefit from sharing of information, including but not limited to legal and factual analysis, litigation strategies, draft briefs and other draft court filings, and other documents." *Id.* The attorneys general further stated their intention to "pursue their common interest throughout the preparations for, and the course of, any judicial proceedings, including any dispositive motions, trials, and appeals involving these issues by exchanging privileged materials, while avoiding any waiver of the confidentiality of those privileged materials." *Id.*

As reflected in ExxonMobil's amended answer, the company also has a copy of another common interest agreement that was executed in 2016 by the attorneys general of California, Connecticut, the District of Columbia, Illinois, Massachusetts, Maryland, Maine, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Virginia, the Virgin Islands,

Vermont, and Washington. Add-146; Add-162 (2016 CIA).[4] The terms of the 2016 Agreement memorialize an agreement to protect from disclosure documents and communications shared with respect to "conducting investigations of representations made by companies to investors, consumers and the public regarding fossil fuels, renewable energy and climate change" and undertaking one or more . . . legal actions, including litigation" in furtherance of those efforts and share interests. *Id.* at 1. In a footnote, ExxonMobil seeks cursorily to dismiss the significance of the 2016 Agreement by stating that "[t]he mere existence of a written agreement does not create a common interest." Miscellaneous Issues Br. 19 n.9 (citing *Hanover Inst.*, 449 Mass. at 618). True enough, but that is not what the *Hanover* Court meant. Instead, the Court was making clear that parties need not enter into a written common interest agreement for the doctrine to apply. *Hanover Inst.*, 449 Mass. at 618. But where the parties have executed an agreement, the Court also made clear that the agreement "may be evidence of the existence of confidential communications protected by the attorney-client privilege" and work product doctrine. *Id.* That is the case here, and the terms of the 2016 Agreement evidence the state attorneys general's shared common interest and intention to share privileged communications in furtherance of that interest.

Of course, as ExxonMobil states, "[d]eclaring" a "matter 'sufficiently similar'" to other matters "does not make it so." Miscellaneous Issues Br. at 19. But the terms of the Agreements themselves, as reflected in the quoted text above, go far beyond a mere declaration of similarity. Indeed, and again, each of the legal actions, for example, involves a common defendant (ExxonMobil), asserts at least one claim under a state consumer protection act or comparable

[4] ExxonMobil has a copy of the 2016 Common Interest Agreement because it was produced by another state in response to a public records request.

state common law, and seeks civil penalties for ExxonMobil's deceptive and misleading conduct. Given the shared legal interest, the Attorney General has joined numerous amicus briefs filed in federal courts of appeals to support those state attorneys general in their own actions against ExxonMobil. *E.g.*, Br. of New York et al., *District of Columbia v. Exxon Mobil Corp. et al.*, No. 22-7163 (D.C. Cir. Apr. 7, 2023), 2023 WL 2837518; Br. of New York et al, *Connecticut v. Exxon Mobil Corp.*, No. 21-1446 (2d Cir. Nov. 12, 2021), 2021 WL 5331667; Br. of Washington et al., *Minnesota v. Am. Petroleum Inst. et al*, No. 21-1752 (8th Cir. Aug. 26, 2021), 2021 WL 3962117. And the resulting opinions recognized what ExxonMobil already knows well: each state alleged similar violations of its consumer protection law or comparable common law based on similar facts. *E.g.*, *District of Columbia v. Exxon Mobil Corp.*, __ F.4th __, 2023 WL 8721812, at *1 (D.C. Cir. Dec. 19, 2023) (recognizing that the District of Columbia alleges that ExxonMobil's "advertisements and information campaigns about fossil fuels were 'unfair or deceptive trade practices'" under "the District of Columbia Consumer Protection Procedures Act"); *Connecticut v. Exxon Mobil Corp.*, 83 F.4th 122, 129 (2d Cir. 2023) (recognizing that "Connecticut asserted eight claims against Exxon Mobil, all under the Connecticut Unfair Trade Practices Act"); *Minnesota v. Am. Petroleum Inst.*, 63 F.4th 703, 708 (8th Cir. 2023) (recognizing that Minnesota alleged "violations of Minnesota's consumer protection statutes" against ExxonMobil).

Given that context, ExxonMobil's claim that it is entitled to receive, for example, "all documents concerning the Common Interest Agreement," RFP No. 39, and "[a]ll documents and communications concerning the Commonwealth's meetings and communications with other state Attorneys General concerning ExxonMobil or the substance or timing of filing of the original . . . or the amended complaint," RFP Nos. 40-41, borders on frivolity. Under ExxonMobil's vaguely

articulated theory, ExxonMobil appears to contend that the Court should compel the Attorney General's Office to produce an e-mail from another attorney general's office that has sued ExxonMobil criticizing "the substance" of the Commonwealth's amended complaint, offering a strategic opinion about how best to articulate a consumer deception "greenwashing" claim, or offering an opinion on an ExxonMobil advertisement that it views as deceptive. Those hypothetical communications, of course, would all plainly be privileged under the common interest doctrine. Indeed, if ExxonMobil were correct, it would mean that the Attorney General is entitled to request and has a legal right to receive all documents and communications between ExxonMobil's counsel in the above referenced actions and counsel for ExxonMobil's co-defendants in those actions. To be sure, the states in the above referenced actions are not co-plaintiffs, but, as *Hanover* makes clear, "the determination" whether the common interest doctrine applies "should focus on the . . . general purpose for which [the communication] is shared, rather than on the relationship of the parties." *Hanover Inst.*, 449 Mass. at 618 (citation omitted).

The case ExxonMobil cites to support its theory that the state attorneys general do not share a sufficiently similar interest does not help the company either. In that case—*Kaiser v. Kirchick*, Civ. A. No. 21-10590, 2022 WL 182375 (D. Mass. Jan. 20, 2022)—the federal magistrate judge held, among other things, that the parties did not enjoy a sufficiently similar interest because the two matters in which two parties (parties A and B) claimed a common interest—a dispute between party A about "pear trees" on a neighboring property owned by party C and a dispute between party B and party C about a real estate deal concerning a different property, *id.* at **1-2—were unrelated. *See id.* at **6-7. In contrast, and as described above, the matters in which the state attorneys general share a common interest all relate to common facts

and allegations, including ExxonMobil's historical knowledge of climate change and ExxonMobil's marketing campaigns to deceive and otherwise mislead consumers about the negative impacts of using its fossil fuel products on climate change. *Supra* pp. 16-17.

Other courts have concluded readily that communications between state attorneys general concerning climate change and other environmental issues "in an effort to unify . . . strategy and conserve resources" were protected from disclosure by the common interest doctrine. *E.g.*, *Energy Policy Advocates v. Att'y General's Office*, __ A.3d __, 2023 WL 4983137, at *4 (Vt. 2023) (affirming denial of challenge to Vermont Attorney General's refusal to produce communications with other state attorneys general pursuant to the common interest doctrine in response to public records request and trial court's decision not to conduct in camera review). In other words, ExxonMobil is now seeking to use this current motion to destroy a privilege relied on across the country by many state attorneys general to obtain documents and communications that fall within the common interest doctrine's heartland. For all of these reasons, the Court should reject ExxonMobil's baseless motion to compel the Attorney General to produce documents and communications plainly encompassed by the common interest doctrine.

As a coda, ExxonMobil makes the peculiar and contradictory argument that while, on the one hand, the Attorney General and the New York Attorney General do not share common interests sufficient to establish a common interest privilege, on the other hand, the two attorneys general's interests are so similar that they are in privity with one another such that the principle of *res judicata* applies. Miscellaneous Issues Br. at 17. ExxonMobil argues that it is, therefore, entitled to pierce the common interest privilege and obtain discovery of the communications between the two offices to determine the strength of its *res judicata* defense "[r]egardless," in ExxonMobil's own words, "of what the discovery ultimately shows." Add-618. But, in the end,

ExxonMobil does not even attempt to provide any rationale to support its contention that separate attorneys general enforcing separate state laws in their own state courts are in privity with one another for purposes of *res judicata*, much less any precedent approaching the fact pattern here. There is none, and, accordingly, this Court should reject ExxonMobil's attempt to negate the common interest doctrine through its baseless *res judicata* defense.

B. The Documents and Communications ExxonMobil Requests in RFP Nos. 39 to 42 Are Also Irrelevant to the Claims and Defenses in this Action.

ExxonMobil fares no better in its fleeting effort to explain how documents and communications that may have been exchanged between state attorneys general with shared interests or the Attorney General and Mathew Pawa are relevant to the claims and defenses in this G.L. c. 93A, § 4 enforcement action. Miscellaneous Issues Br. at 17. After this Court struck ExxonMobil's related defenses and ExxonMobil removed its twenty-seventh defense (regarding the Attorney General's decision about when to file the original complaint), the documents and communications requested in RFP Nos. 39 to 42 are no longer relevant to the claims and remaining defenses in this matter.

To begin, ExxonMobil makes no attempt whatsoever to explain why "[a]ll documents or communications between [the Attorney General] and the Attorney General of the State of New York, including his or her representatives, concerning . . . the . . . *timing of filing* of the original complaint in October 2019," RFP No. 40 (emphasis added), or "documents or communications with other state Attorneys General concerning . . . the . . . *timing of filing* of the original complaint or the amended complaint," RFP No. 41 (emphasis added), are relevant to the claims and remaining defenses in this action. Having failed to justify that request, ExxonMobil has waived it. *See Carey v. New England Organ Bank*, 446 Mass. 270, 285 (2006) (issue not raised in trial court is waived). And for good reason. As ExxonMobil knows, the company decided to

withdraw voluntarily its twenty-seventh defense, which related to the Attorney General's decision about when to file the original or amended complaints, after it received service of the Motion to Strike Certain Defenses in ExxonMobil's Answer. *Compare* Answer 73 (Dkt. No. 45), *with* Amended Answer 87 (Dkt. No. 53). That defense was part and parcel of ExxonMobil's repeatedly rejected claim that the Attorney General was conspiring with other state attorneys general to punish the company for its viewpoints on climate change and climate change risks. For example, ExxonMobil wrote in an October 14, 2019 letter to the Attorney General's Office that "the timing of" the Attorney General's pre-suit notice letter was "proof of the collusive conduct between [the Attorney General's Office] and the New York Attorney General's office" and "the freshest evidence of [the Attorney General's] office's participation in a conspiracy with other state attorneys general." Add-374.[5] Having lost on those conspiracy and improper motive assertions again in the motion to strike context and having voluntarily removed its complaint-timing-related defense from its amended answer, ExxonMobil has no basis to claim that such communications—to the extent there are any—are relevant to the claims and remaining defenses in this action.

ExxonMobil's single sentence argument that "documents related to Pawa's 'What Exxon Knew' presentation are relevant to the Commonwealth's claims" is misplaced. Miscellaneous Issues Br. at 17; *see* RFP Nos. 41, 42. In the preamble to its amended answer, ExxonMobil refers to Pawa fourteen times, Amended Answer ¶¶ 23-35, under hyperbolic (and unsupported) headings such as "The Attorney General Filed this Meritless Lawsuit Based on Improper Motives," and "The Attorney General and Special Interests Colluded to Suppress ExxonMobil's Speech," *id.* at 74. In its decision striking the defenses related to those allegations, the Court

[5] This Court rejected that argument in its October 23, 2019 Order. Add-432 (Brieger, J.).

recited ExxonMobil's allegations that: (i) the then Attorney General "aligned herself with other activist attorneys general to use law enforcement to establish climate policy," (ii) "she concealed here connections to private activists," including participating in "'secret workshops' hosted by Matthew Pawa," and (iii) "enter[ed] into a 'common-interest agreement . . . with other activist attorneys general' allegedly designed to 'shield information concerning [her] closed-door meeting with climate activi[sts]." Mot. to Strike Order at 7 (Add-7). The Court also specifically referenced ExxonMobil's allegations that "Pawa encouraged the Mass. AG to bring an action against Exxon[Mobil] and provided a presentation to her 'on what Exxon knew.'" *Id.* Despite all of that and having lost its petition asking a single justice of the Appeals Court to reverse that ruling, Order Denying Petition Pursuant to G.L. c. 231, § 118, *Commonwealth v. Exxon Mobil Corp.*, No. 2022-J-0200 (Mass. App. Ct. May 3, 2022 (Neyman, J.), ExxonMobil effectively asks the Court to revisit that ruling. The Court should not entertain that request.[6]

ExxonMobil also claims that "[d]ocuments about the 'substance of the complaint in this case—for example, about information supposedly concealed from Massachusetts consumers—and about ExxonMobil" generally "are undoubtedly relevant to claims and defenses in this case. Miscellaneous Issues Br. at 17. That may be so, as far as it goes, but ExxonMobil has requested those documents, to the extent they exist, as they pertain to "the Commonwealth's meetings and communications with other state Attorneys General," including, specifically, the New York Attorney General. RFP Nos. 40 & 41. As explained above, those documents would have been exchanged between the Attorney General and the other states' attorneys general in pursuit of advancing their consumer protection claims against ExxonMobil and thus protected by the

[6] Even though the requested documents and communications are irrelevant, the Attorney General's Office has searched its records for a copy of the seemingly infamous "What Exxon Knew" presentation. To date, the Office has not discovered a copy of that presentation.

common interest doctrine. *Supra* Pt. II.A. And, in any event, ExxonMobil's request for all documents and communications between state attorneys general concerning "ExxonMobil" (RFP Nos. 40 & 41) is breathtakingly overbroad in that it is unlimited to the claims and defenses in *this* case. In other words, the request seeks any document or communication concerning ExxonMobil regardless of the document or communication's subject matter. For these additional reasons, the Court should reject ExxonMobil's motion to compel the Attorney General to produce the documents and communications encompassed by RFP Nos. 39 to 42.

C. Some Communications with Pawa Are Protected from Disclosure by the Attorney Client Privilege.

Contrary to ExxonMobil's claim, Miscellaneous Issues Br. at 18, at least some of the Attorney General's communications with Pawa are protected from disclosure by the attorney client privilege. As ExxonMobil notes, the Attorney General previously produced some non-privileged communications between Pawa and the Attorney General that pre-date the establishment of any attorney-client relationship and that were previously produced to another entity in response to that entity's public records request. Miscellaneous Issues Br. at 16-17; Add-399. But as the Attorney General's Office explained to ExxonMobil in its September 15, 2023 letter, the Attorney General's Office also "communicated with Matthew Pawa—an attorney—to consider retaining him to represent the AGO." Add-399. And it is well established that an attorney client "relationship may be established through preliminary consultations, even though the attorney is never formally retained and the client pays no fee." *Bays v. Theran*, 418 Mass. 685, 690 (1994). For that reason and the additional ones set forth below, the Court should reject ExxonMobil's motion to compel the production of any communications or documents that were exchanged as part of the Attorney General's consideration of whether to retain outside

counsel to represent the Attorney General's Office in an investigation or action against ExxonMobil.

More specifically, as part of its continued due diligence to ascertain the facts about that relationship from nearly eight years ago, the Attorney General's Office has now identified two proposals that Pawa sent to the Attorney General—the first on February 2, 2016 and the second on February 26, 2016—setting forth the "terms" pursuant to which the Pawa Law Group, P.C. and another law firm (Hagens Berman Sobol Shapiro LLP) were "prepared to represent the State." Add-411; Add-421. As evidence of those proposals, the Attorney General's Office has attached redacted versions of those proposals so as not to waive the attorney client privilege. *Id.*[7] Those proposals make clear that the Attorney General was in fact engaged "in preliminary communications looking toward representation," which, as *Bays* confirms, are protected by the attorney client privilege, "even" though "representation [was ultimately] never undertaken." *Bays*, 418 Mass. 690 (quoting *Commonwealth v. O'Brien*, 377 Mass. 772, 775 (1979)).

The Attorney General will produce to ExxonMobil some additional materials that pre-date the first proposal (i.e., February 2, 2016) and some additional materials that post-date the Attorney General's decision not to retain the two firms to represent the Attorney General's Office in its investigation of ExxonMobil or any enforcement action that followed it. But the Attorney General is entitled to continue to withhold from production the proposals themselves and any documents or communications that were exchanged or occurred during the Attorney General's consideration of whether to retain the two firms to represent the Attorney General's Office. *Bays*, 418 Mass. at 690.

[7] At the Court's request, the Attorney General's Office is prepared to provide the Court with un-redacted versions of those proposals for *in camera* review.

III. The Commonwealth's Fossil Fuel Use and Knowledge About Climate Change Are Irrelevant to the Claims and Remaining Defenses.

Before addressing the many flaws in ExxonMobil's attempt to obtain information relevant only to the stricken defenses, it is important to correct ExxonMobil's distorted recitation of the allegations by stating—in the Attorney General's own, plain language—what this case is about and what it is not about. The Attorney General is alleging that ExxonMobil knew decades ago from its own scientists that fossil fuels are the driving cause behind climate change, that climate change will be catastrophic and impose huge costs on society, and that, as a result, it is necessary for society to transition away from fossil fuels—the company's primary business. But ExxonMobil determined that it would be bad for its business for society to transition away from fossil fuels, and, therefore, ExxonMobil decided to persuade the public, including consumers and investors, to doubt the growing scientific consensus that fossil fuels cause climate change and that climate change will impose huge costs on society. As climate change became harder to deny outright, and investors and consumers became increasingly aware and focused on climate change, ExxonMobil developed deceptive climate-related messaging aimed at allaying any climate-related concerns about the need to transition away from fossil fuels. Put simply, ExxonMobil has been telling Massachusetts consumers not to worry that their purchases of ExxonMobil oil and gasoline are harming the climate and has been telling Massachusetts investors not to worry that climate change would harm their ExxonMobil investments. As part of this effort, ExxonMobil has been increasingly misrepresenting many of its fossil fuel products and businesses as "climate solutions."

This case, therefore, concerns ExxonMobil's knowledge, decision-making, and actions. This case also concerns how Massachusetts investors and consumers interpreted ExxonMobil's deceptive messaging. By contrast, this case does not concern how the Commonwealth, as a

sovereign entity, approached climate change. As a result, this Court has stricken ExxonMobil's defenses that tried to refocus this case on the Commonwealth's use of fossil fuels, knowledge about climate change, disclosures related to fossil fuels, and policies for combating climate change. Motion to Strike Order at 16-18 (Add-16-18).

ExxonMobil has now come up with backup arguments to justify its continued attempt to refocus this case on the Commonwealth's actions, despite lacking any counterclaim or relevant defenses. ExxonMobil tries to do so by arguing that the Commonwealth's actions either render ExxonMobil's statements non-deceptive or somehow shed light on how Massachusetts investors and consumers interpreted ExxonMobil's deceptive statements. But ExxonMobil's arguments rely on a combination of misstating the Attorney General's allegations and flawed logic to justify requests solely relevant to the stricken defenses.

A. The Commonwealth's Use of Fossil Fuels and Management of the Energy Transition Are Irrelevant to the Allegation that ExxonMobil Did Not Disclose Systemic Climate Risk.

ExxonMobil is seeking discovery related to "current and future use of fossil fuels in the Commonwealth" and the Commonwealth's "challenges in transitioning to renewable energy" to support its argument that its projections of worldwide oil and gas demand were accurate. Fossil Fuel Br. at 2. But that argument misstates the Attorney General's position and is merely a mask for seeking material related to the stricken defenses.

As an initial matter, ExxonMobil is supposedly seeking to substantiate its projections of global future fossil fuel use by reference to fossil fuel use in Massachusetts, even though Massachusetts' population constitutes approximately 0.09 percent of the global population.[8]

[8] *See* Census.gov/popclock; https://www.census.gov/quickfacts/fact/table/MA/PST045222 (approximately 7 million out of 8 billion).

ExxonMobil, as the world's largest publicly traded oil and gas company, already has available for its use a wealth of data about global fossil fuel use and the pace of the energy transition and it could surely rely on that date if its true aim were to substantiate its past projections of future fossil fuel use and demand.

But even taking ExxonMobil at its word, the company's arguments do not engage with the aspect of ExxonMobil's projections that the Attorney General alleges is misleading—ExxonMobil's failure to disclose the systemic climate risks inherent in its projections. Despite ExxonMobil's attempts to distort the Attorney General's allegations, the Attorney General is not contending that ExxonMobil failed accurately to predict the future. Instead, the Attorney General is alleging that ExxonMobil's statements, at the time they were made, presented an incomplete, misleading message. Specifically, ExxonMobil glossed over the necessary consequences of sustained, high-level fossil fuel use. If the world uses as much oil and gas as ExxonMobil has projected, there will be climate and ensuing economic consequences that create systemic worldwide risk and uncertainty, especially for ExxonMobil's core oil and gas business. Therefore, if ExxonMobil wants to convey to its investors that they need not worry about restrictions on oil and gas demand over the lifespan of ExxonMobil's investments, then ExxonMobil also needs to disclose the ensuing climate-related risks, including ever-increasing regulatory risks, to ExxonMobil associated with a world that uses that much oil and gas for the next three decades. The Attorney General is alleging that ExxonMobil has insufficiently articulated those risks and has overstated how the company is mitigating those risks.

ExxonMobil's motion selectively quotes from the Amended Complaint to omit the crux of the Attorney General's allegations. For example, ExxonMobil's brief quotes from paragraph 471 in the Amended Complaint, Fossil Fuel Br. at 8, where the Attorney General alleges that

ExxonMobil's disclosures are misleading because they assert that "fossil fuel demand is fated to grow in the coming decades, clean energy alternatives are not and will not in the near future be competitive with fossil fuels, and the world's governments are unlikely to constrain fossil fuel use to limit global warming to the level those governments have agreed is necessary to avert the most harmful potential consequences of climate change." Amended Compl. ¶ 471. But ExxonMobil's brief omits the next paragraph in the Amended Complaint, where the Attorney General explains why those projections are misleading. Paragraph 472 states, "ExxonMobil's climate risk disclosures and related communications to investors are deceptive *because* they deny or ignore the numerous systemic risks that climate change presents to the global economy, the world's financial markets, the fossil fuel industry, and ultimately ExxonMobil's own business." Amended Compl. ¶ 471 (emphasis added); *see id.* ¶¶ 501, 503 (similar). Notably, when this Court succinctly summarized the Attorney General's allegations in the Memorandum of Decision and Order Denying ExxonMobil's Motion to Dismiss, the Court—unlike ExxonMobil—quoted from both paragraphs 471 and 472 of the Amended Complaint. Dkt. No. 42 at 17 (Green, J.). Therefore, the Commonwealth's current use of fossil fuels and the pace of the energy transition in the Commonwealth do not relate to the relevant analysis—did ExxonMobil appropriately disclose the systemic climate-related risks inherent in its projections of sustained, high fossil fuel use at the time ExxonMobil made those disclosures.

For similar reasons, ExxonMobil's related arguments fall short. Because the Attorney General is alleging that ExxonMobil failed adequately to disclose risks inherent in its projections, ExxonMobil is not entitled to obtain discovery into whether the Commonwealth views forward-looking statements about fossil fuel use to be opinion rather than fact. Fossil Fuel Br. at 11. ExxonMobil is also not entitled to obtain discovery into whether fossil fuels are

currently "critical" to the Commonwealth. *Id.* at 10. The current level of purchases of fossil fuels by Massachusetts residents, whether or not in an emergency setting, has no relevance to whether ExxonMobil's accurately disclosed the systemic risks of climate change.[9]

B. The Commonwealth's Internal Records Are Irrelevant to the "Context" of ExxonMobil's Deceptive Statements.

ExxonMobil next argues that the Commonwealth's records about climate change risk are relevant. Fossil Fuel Br. at 2; 12-14. At one level, the Attorney General agrees; information related to climate change risks and the potential impacts of climate change in the Commonwealth are relevant. As a result, on December 8, 2023, the same day that ExxonMobil filed its motions to compel, the Attorney General produced voluminous material to ExxonMobil detailing the Attorney General's publicly available evaluation of climate-related risks as well as publicly available Commonwealth reports analyzing climate risk in the Attorney General's possession. Add-404. ExxonMobil knew that the Attorney General was planning to make this production, including that the Attorney General was producing documents related to climate risk, and it is unclear why ExxonMobil did not seek to hold a meet and confer prior to filing these motions, during which the Attorney General would have reminded ExxonMobil of the agreed-upon content of the upcoming productions.

ExxonMobil, however, then pivots to argue that the Commonwealth's *internal* evaluation of climate change risk is relevant to establish the "context" and "circumstances" of

[9] ExxonMobil also references a 2008 report published by an Advanced Biofuels Task Force convened by the Governor and Legislature. Fossil Fuel Br. at 10; Advanced Biofuels Task Force Report, Commonwealth of Massachusetts (2008). This report, which lays out the advantages and disadvantages of a variety of biofuels, including bioalgae, has no bearing on whether ExxonMobil used bioalgae to greenwash its brand, overstated its investments in algae biofuels, or overstated the role algae biofuels had and were projected to have in the company's energy portfolio. *See, e.g.*, Amended Compl. ¶¶ 645-672.

ExxonMobil's deceptive statements. Fossil Fuel Br. at 2; 13. Specifically, ExxonMobil argues that if information about climate change in general and how fossil fuel use causes climate change was "widely available," then it is "less probable" that its deceptive statements misled Massachusetts investors and consumers. Fossil Fuel Br. at 12-13. Even leaving to the side the fundamental flaw in ExxonMobil's argument that somehow generalized knowledge about climate change inoculates investors and consumers against ExxonMobil's deceptive climate-related messaging, ExxonMobil neither attempts to nor can explain how non-public, internal government documents reflect what was "widely available" or known to Massachusetts investors and consumers. As stated above, the Attorney General's Office has already produced to ExxonMobil public documents providing the Attorney General's public analysis of climate risk and the impact of fossil fuels as well as public documents in the Attorney General's possession reflecting the same, and ExxonMobil's arguments about "context" and "circumstances" do not justify a broad production of non-public material. Again, it is difficult to shake the notion that ExxonMobil is seeking this discovery to redirect the focus of this case away from the company's approach to climate change and onto the Commonwealth's approach—an effort this Court squarely rejected in its Motion to Strike Order.

C. The Commonwealth's Use of Fossil Fuels Is Irrelevant to the Materiality of ExxonMobil's Deceptive Representations.

ExxonMobil then raises a secondary, materiality-based argument to justify its continued attempts to obtain records of the Commonwealth's fossil fuel purchases. ExxonMobil argues that the Commonwealth's purchases of oil and gas despite its awareness of climate change tends to show that climate change is not a material factor for a reasonable Massachusetts consumer. Given the many evident flaws in this reasoning, it is difficult not to view the argument as merely a continuation of ExxonMobil's stricken defense that the Commonwealth cannot both purchase

fossil fuels and sue a fossil fuel company—this time using the fig leaf of materiality as the justification for the same underlying point.

As an initial matter, the Commonwealth's actions are not a proxy for those of a Massachusetts consumer. ExxonMobil ignores this point to argue, "Five years after calling global warming 'the most pressing environmental challenge of our time,' the Commonwealth, through its agency the Massachusetts State Police" purchased motor oil. Fossil Fuel Br. at 15-16. ExxonMobil, therefore, assigns climate change knowledge to the Commonwealth based on a brief the Attorney General filed in the U.S. Supreme Court, and then argues that the Commonwealth must not view climate change to be a material purchasing factor because the Massachusetts State Police later bought motor oil. *Id.* This outlandish argument has no bearing on whether a reasonable Massachusetts consumer's awareness of climate change influences that consumer's purchasing decision-making. And ExxonMobil has cited no case or other precedent that has held that the government's knowledge—and therefore the knowledge of its sophisticated subject matter experts—reflects a reasonable consumer's knowledge about a subject. Indeed, if that were the rule, the Attorney General would rarely be able to hold companies accountable for their deceptive statements because they would undoubtedly point to the Commonwealth's own knowledge to defeat such a claim.

ExxonMobil then embarks on a quixotic pursuit of Massachusetts tax records and other material the company is ostensibly seeking to establish aggregate levels of motor oil and gasoline purchases statewide. Fossil Fuel Br. at 18-19. Absent an ulterior motive, it is perplexing why ExxonMobil is trying to use the Commonwealth's tax records to establish the level of motor oil and gasoline purchases in the Commonwealth when ExxonMobil has detailed records—as the purveyor of those products—of how much of these products it has sold in the Commonwealth.

Moreover, ExxonMobil's argument also appears to contemplate that if a Massachusetts consumer is aware of climate change in general, that consumer's purchase of motor oil or gasoline means that the consumer does not consider climate change to be a material purchasing factor. Leaving aside what appears to be ExxonMobil's argument that climate-related factors are immaterial to Massachusetts consumers—an argument that strains credulity when ExxonMobil has used climate-related messaging to influence consumer behavior—ExxonMobil's argument again misstates the Attorney General's allegations. The Attorney General is alleging, among other things, that ExxonMobil made misleading climate-related statements about its products *because* many Massachusetts consumers were aware of climate change, much like the tobacco industry made misleading representations about health benefits because many consumers were aware of the health risks. *E.g.*, Amended Compl. ¶¶ 623-28. Therefore, the mere fact of motor oil and gasoline purchases by a consumer who has some generalized knowledge of climate change does not tend to show that ExxonMobil's deceptive climate related advertisements were immaterial. And certainly the aggregate purchasing records of all Massachusetts consumers matched up against selected climate-related statements in legal briefing by the Attorney General has no bearing on whether ExxonMobil's statements were material.

Turning to ExxonMobil's interest in records relating to the Pension Reserves Investment Management Board (PRIM), it is unclear why ExxonMobil is raising these issues in a motion to compel. The Attorney General's understanding is that ExxonMobil has been in discussions with PRIM for many months regarding PRIM's response to the Rule 45 subpoena for documents that ExxonMobil served on PRIM on December 28, 2022, *see* Add-459, and PRIM made another, substantial production of documents to ExxonMobil in late December 2023. Add-409. Based on a preliminary review of PRIM's productions, the produced documents appear to include records

about PRIM's purchases of ExxonMobil stock as well as PRIM's purchases of other energy company stocks—the very information ExxonMobil is seeking in this motion. The Attorney General also made a production to ExxonMobil containing non-privileged material relating to PRIM's holdings that were in the Attorney General's possession. Add-404. Again, ExxonMobil would have been better served to have sought a meet and confer prior to serving this motion so that the parties could appropriately narrow the issues in dispute.[10]

ExxonMobil's final argument in its brief is that the Commonwealth did not adequately disclose climate-related risks when the Commonwealth issued bonds. ExxonMobil contends that it is not pursuing an *in pari delicto* or unclean hands argument, which were struck by this Court in its Motion to Strike Order at 16-18 (Add-16-18), but instead that somehow documents relating to the Commonwealth's bond issuance will tend to show that climate-related disclosures are not material to investors in an oil and gas company. ExxonMobil's brief does not attempt to further connect these disparate events, and the Court should reject this argument as well as the other arguments ExxonMobil has made to support is claim that the documents requested are relevant for all of the reasons set forth above.

D. The Commonwealth's Internal Records Regarding *Massachusetts v. EPA* and *Kain v. DEP* Are Irrelevant.

ExxonMobil reiterates many of the above, flawed arguments in its Miscellaneous Issues Brief, where it seeks the Attorney General's internal litigation files for two cases, *Massachusetts v. EPA* and *Kain v. DEP*. Miscellaneous Issues Br. at 10-15. While both cases concerned climate change, the similarities end there. In *Massachusetts v. EPA*, the U.S. Supreme Court

[10] The Attorney General does not accept any of ExxonMobil's arguments as to the relevancy of PRIM's holdings. But the Attorney General recognizes that information reflecting purchases and sales of ExxonMobil stock may lead to the discovery of admissible evidence.

held that the EPA has the authority to regulate greenhouse gas emissions as "air pollutants" under the Clean Air Act. 549 U.S. 497, 532 (2007). In *Kain v. DEP*, the Supreme Judicial Court held Massachusetts law required the Massachusetts Department of Environmental Protection (DEP) to promulgate regulations to limit greenhouse gas emissions. 474 Mass. 278, 280 (2016). ExxonMobil attempts to link these cases to the current litigation by arguing that the Attorney General's briefing about climate change in those matters shows that Massachusetts residents were aware of climate change, and that awareness tends to show (i) that ExxonMobil's statements about how its products impacted climate change and how climate change impacted the company were not misleading and (ii) that "the perceived need for increased regulation" is relevant to a materiality inquiry because it "shows that Massachusetts consumers were not tempering their emissions-causing behavior based on known climate change concerns." Miscellaneous Issues Br. at 13-14.

Those strained arguments have numerous flaws. First, ExxonMobil and its deceptive statements to consumers were not at issue in either case. Second, ExxonMobil has not cited any authority for imputing knowledge broadly to consumers and investors based on statements in legal briefs by other parties. Third, ExxonMobil seems to want to use these lawsuits to argue that there was a baseline understanding of climate change in Massachusetts, but Massachusetts investors and consumers' general awareness of climate change is not relevant to whether ExxonMobil made material, misleading climate-related advertisements and representations to Massachusetts investors and consumers. Fourth, Massachusetts consumers' continued use of motor oil and gasoline has no bearing on whether those same consumers care about climate change (especially where ExxonMobil's deceptive conduct has slowed the introduction of non-fossil fuel alternatives). Fifth, the "perceived need for increased regulation" on the part of a

small group of plaintiffs in *Kain* is not a proxy for sustained fossil fuel use statewide. And finally, none of ExxonMobil's strained arguments provides any rationale for prying into the Attorney General's litigation files, especially given that ExxonMobil is seeking to use those files to establish how Massachusetts residents broadly understood climate change, and where the vast majority of the litigation files—if not all—will be protected from disclosure by the attorney client privilege or the work product doctrine.

The Attorney General has produced documents to ExxonMobil related to these lawsuits when those documents are responsive to a separate, permissible document request. As a result, on the same day that ExxonMobil filed these motions, the Attorney General produced the "comments the Commonwealth submitted to the EPA," which ExxonMobil explicitly requests in its motion. Miscellaneous Issues Br. at 15; Add-404. In that production, the Attorney General produced voluminous material that was publicly available. *See* Miscellaneous Issues Br. at 15; Add-404. Again, ExxonMobil did not seek to hold a final meet and confer prior to filing these briefs to narrow the issues, nor did ExxonMobil wait to review the Attorney General's December 8 production.

IV. ExxonMobil Is Not Entitled to Obtain a Complete List of Everyone the Attorney General Has Contacted to Develop Its Case

ExxonMobil is not entitled to obtain a complete list of everyone the Attorney General has contacted. *See* Miscellaneous Issues Br., Pt. 1. In *Commonwealth v. First National Supermarkets*, a District of Massachusetts judge articulated the principle that the work product doctrine protects from disclosure the full list of persons a party has contacted in the course of developing its case. 112 F.R.D. at 152. For over a year, the Attorney General has cited this principle to protect the full list of persons the office has contacted to develop its case, Add-625, and thereby prevent ExxonMobil from piggybacking off of the Attorney General's work, *see*

Commissioner of Revenue v. Comcast Corp., 453 Mass. 293, 311-12 (2009) ("The purpose of the doctrine is . . . to prevent one party from piggybacking on the adversary's preparation."). The out-of-state cases ExxonMobil cites provide this Court with no reason to overturn settled law.

In *First National*, the Attorney General sought a list of persons interviewed by the defendant as part of the defendant's investigation into the possible violations at issue. *Id.* at 151. The court identified "the distinction between asking the identity of persons with knowledge, which is clearly permissible, and asking the identity of persons contacted and/or interviewed during an investigation, which is not." *Id.* at 152. As such, the court denied the Attorney General's motion to compel the disclosure of the full list of persons the defendant's investigator interviewed, while observing that the Attorney General was entitled to a list of those with knowledge of the underlying facts. *Id.* at 153-54.

ExxonMobil cites a case from Minnesota that reached a different conclusion. *United States v. Cameron-Ehlen Grp., Inc.*, Civ. A. No. 13-3003, 2019 WL 1453063, at *5 (D. Minn. Apr. 2, 2019). But that case notes that there is a wide split among courts confronting this very issue. *Id.* (citing *United States v. All Assets Held at Bank Julius Baer & Co.*, 270 F. Supp. 3d 220, 223-25 (D.D.C. 2017)). In *Julius Baer*, the court identifies seven cases that have adopted ExxonMobil's position and seven that have aligned with Massachusetts law. 270 F. Supp. 3d at 224-25.

The reasoning in *Julius Baer* is instructive. There, the court distinguished cases where the requesting party is asking whether the responding party has "spoken to a handful of specifically-identified individuals," from cases where the requesting party is asking the responding party "to narrow a list of several hundred individuals that [the responding party] has identified as knowledgeable about the facts of this case by identifying . . . those individuals that

[the responding party's] counsel determined were worth interviewing." *Id.* at 225. As the court reasoned, "[s]uch a request calls for [responding party's] counsel to reveal their legal theories and strategic decisions regarding who to interview in preparation for trial based on the information available to them." *Id.* The requesting party has no valid justification for this information, which solely acts to run a valid discovery request (persons with knowledge) through a work product filter (those whom counsel has contacted). *See id.*

ExxonMobil's other citations and arguments provide no reason for this Court to depart from *First National* and create an intra-Massachusetts split (i.e., between Massachusetts state and federal courts) on this issue. ExxonMobil relies heavily on *Alexander v. FBI*, where President Clinton sought to block an investigator he had hired in the *Jones v. Clinton* matter from disclosing whether the investigator had recently spoken with six listed persons, including the President and First Lady. 192 F.R.D. 12, 15 (D.D.C. 2000). That factually distinct case, therefore, concerned a request regarding "a handful of specifically-identified individuals," *Julius Baer*, 270 F. Supp. 3d at 225, rather than the broad disclosure of everyone contacted by a party's counsel—the information protected by *First National* and similar cases.

ExxonMobil also attempts to distinguish *First National* because there, the defendant's investigator conducted interviews in the context of an internal investigation. Miscellaneous Issues Br. at 9. But such a distinction would provide corporate defendants with a work product protection to develop their cases not available to non-corporate plaintiffs. In any event, the court in *First National* did not rely on that distinction; 112 F.R.D. at 152-54, nor have other courts, *Julius Baer*, 270 F. Supp. 3d at 225; *Chiperas v. Rubin*, Civ. A. No. 96-130, 1998 WL 531845, at *1 (D.D.C. Aug. 24, 1998).

ExxonMobil then asserts that the Attorney General has not been asserting this protection consistently because it has produced certain responsive communications with third parties. Miscellaneous Issues Br. at 10. But that argument only underscores ExxonMobil's misarticulation of the work product the Attorney General is seeking to protect. The Attorney General is not asserting that the principle in *First National* prevents the Attorney General from providing any communications it has had with third parties; indeed, the Attorney General has produced to ExxonMobil voluminous communications with third parties. Add-404. Rather, ExxonMobil is not entitled to obtain a full roadmap of all persons whom the Attorney General has contacted in developing this case. It is the disclosure of the full list that *First National* protects. 112 F.R.D. at 152-54.

The complete list of persons contacted by the Attorney General remains protected work product regardless of the method ExxonMobil employs to seek this information. ExxonMobil has tried to obtain this information in two different ways. First, ExxonMobil served an interrogatory asking for that information, Add-363 but ExxonMobil has not chosen to move to compel on that interrogatory. Instead, ExxonMobil is moving to compel the disclosure of the same, protected information through a two-step process: (i) serving a document request asking for every communication with a third party, and (ii) demanding that the Attorney General furnish ExxonMobil with either the responsive communications or a privilege log that identifies each third party with whom the Attorney General has communicated. Miscellaneous Issues Br. at 6-8. But ExxonMobil's method of seeking this information does not somehow erase the work product protections. And ExxonMobil's citations and arguments in this section of its brief continue not to engage with the principle that a full list of all parties contacted constitutes work product. ExxonMobil cites *Fine v. Sovereign Bank* for the irrelevant points that a party cannot assert work

product over the identity of counsel it has retained and that a privilege log needs to comply with Rule 26. Civ. A. No. 06-11450, 2008 WL 11388663, at **6, 9 (D. Mass. Mar. 7, 2008); *see Neelon v. Krueger*, Civ. A. No. 12-11198, 2015 WL 4254017, at *5 (D. Mass. July 14, 2015) (cited by ExxonMobil for principle that a privilege log needs to comply with Rule 26). These cases do not analyze whether a party must produce a privilege log when the privilege log itself would break the work product protection, and ExxonMobil cites no case to support its novel attempt at an end-run around *First National*.[11]

CONCLUSION

For the foregoing reasons, this Court should deny ExxonMobil's three Motions to Compel.

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[11] The Attorney General remains interested in ExxonMobil's position as to whether the company can assert a protection over the identity of all third parties that the company has contacted regarding this case, including through third parties such as counsel, investigators, and public relations firms.

Dated: January 11, 2023

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS,

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CERTIFICATE OF SERVICE

I, Seth Schofield, certify that on January 11, 2024, I served the foregoing document and the supporting Addendum, by sending a copy thereof by electronic service in accordance with the Joint Motion to Set Pleading Deadlines, allowed by the Court on April 14, 2020 to:

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