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PRELIMINARY STATEMENT

More than one year ago, Exxon Mobil Corporation (“ExxonMobil”) served requests for production of documents (“RFPs”) on the Commonwealth. Since then, the Commonwealth has refused to produce (and in some cases, even search for) documents responsive to many of these requests. Three categories of RFPs are at issue here: (1) the Commonwealth’s communications with third parties about this case, *see* App. A, RFP Nos. 6-8, 10,¹ (2) records related to the understanding of the Commonwealth and its residents about the risks of climate change as expressed during two prior lawsuits involving the Commonwealth, *id.* RFP Nos. 34-35, and (3) the Commonwealth’s communications with other state Attorneys General (“AGs”) and a private attorney named Matthew Pawa about its allegations and ExxonMobil, *id.* RFP Nos. 39-42.

The Commonwealth offers no principled basis for its refusal to produce documents and information responsive to these requests, and none exists. Over time, the Commonwealth has shifted its purported rationales for withholding documents, and it has selectively produced some records without explaining why it believes they differ from those it is withholding. The Commonwealth has also advanced a patently incorrect understanding of relevance in attempting to justify withholding responsive records. The Commonwealth’s refusal to produce violates its discovery obligations, and it should be compelled to produce the improperly withheld documents.

As to the first category of requests (Nos. 6-8, 10), the Commonwealth selectively withheld some responsive communications based on the work product doctrine and refused even to *identify* the other parties with whom the communications were made, baselessly asserting that those

¹ Appendix A sets forth the relevant RFPs. The Commonwealth’s September 15, 2022 Responses with respect to these RFPs are attached as Exhibit 1 to the Rhee Affidavit. The Commonwealth’s current position on these RFPs is also articulated in its September 5, 2023 letter to the Court, Dkt. No. 85; the transcript of the September 7, 2023 status conference, Ex. 2; and the Commonwealth’s September 15, 2023 and October 13, 2023 letters to ExxonMobil, Ex. 3 and Ex. 5.

identities are *themselves* work product.

The second category of RFPs (Nos. 34-35) seeks records related to the understanding of the Commonwealth and Massachusetts consumers and investors about the risks of climate change as shown in the context of two lawsuits, which resulted in the U.S. Supreme Court's *Massachusetts v. EPA* and Massachusetts Supreme Judicial Court's *Kain v. DEP*. Plaintiffs in those cases, the Commonwealth and Massachusetts consumers, respectively, have long known of those risks. The Commonwealth argues that responsive records are irrelevant, a position that strains credulity given the Commonwealth's thesis in this case: that ExxonMobil deceived Massachusetts consumers and investors by failing to disclose the risks of climate change. The Commonwealth also refuses even to *search* for responsive records on the ground that any such records would be privileged, even though documents such as communications with the press and the Commonwealth's rulemaking comments submitted to the EPA obviously cannot be. The Commonwealth also incorrectly claims that any non-privileged records are publicly available, but that is no basis to avoid discovery.

The third category of RFPs (Nos. 39-42) seeks the Commonwealth's communications with AGs from other states and private attorney Pawa about the substance of the Commonwealth's complaints and ExxonMobil. The Commonwealth claims that all such communications are irrelevant, but they are directly relevant because they expressly concern the allegations in this case. The Commonwealth also asserts that these communications are categorically protected by the common interest doctrine and, for the first time on September 15, 2023, by the attorney-client privilege as to Pawa. To the extent the Commonwealth has articulated any "common legal interest," it is sweeping and unsupported. And by the Commonwealth's admission, it belatedly invoked the attorney-client privilege as to Pawa without having gathered supportive facts.

Following numerous meet-and-confers, a September 7 status conference with the Court,

and additional correspondence, these categories of disputes are now ripe for the Court's resolution. The Commonwealth should be ordered to identify the parties to any communications the Commonwealth has withheld as work product (RFP Nos. 6-8, 10), search for responsive records, and produce those that are not privileged (RFP Nos. 34-35, 39-42).

BACKGROUND

The Commonwealth commenced this action on October 24, 2019, and filed an amended complaint on June 5, 2020. The amended complaint alleges that ExxonMobil somehow deceived Massachusetts consumers and investors about whether fossil fuels contribute to climate change and about risks posed by climate change, largely by failing to disclose such risks in every statement it made, and on every product it sold. As a result, the Commonwealth claims ExxonMobil violated Chapter 93A of the Massachusetts General Laws by making material misrepresentations and omissions (1) to Massachusetts investors about the "risks posed by climate change" and related issues; (2) to Massachusetts consumers about Synergy gasoline and Mobil 1 motor oil, whether "fossil fuels products" are a "leading cause of climate change," and whether use of those products impacts climate change; and (3) to Massachusetts consumers about purported "greenwashing" that supposedly "obscure[d] the extreme effects of climate change caused by the production and normal use of fossil fuel products." *E.g.*, Am. Compl. ¶¶ 734-70.

ExxonMobil denied these allegations and asserted 38 defenses, including that the challenged statements were accurate, not misleading, and not material to consumers and investors—who were well aware of the risks of climate change, including because the Commonwealth itself and innumerable other sources had been publicly discussing those risks for years. Dkt. No. 53 ¶¶ 52-53, 55, 60 (Sep. Defense Nos. 9-10, 12, 17). The Commonwealth moved to strike some of those defenses, but none that related to the accuracy or materiality of ExxonMobil's statements or any defenses ExxonMobil has invoked as a basis for obtaining the

requested discovery. The Court granted the motion. *See Order, Commonwealth v. Exxon Mobil Corp.*, Civil No. 19-3333-BLSI, at *19 (Mar. 21, 2022) (“MTS Order”). But the order striking a portion of the defenses did not relieve the Commonwealth of its burden to prove its case under Chapter 93A, including by proving that ExxonMobil’s statements were deceptive and material to consumers and investors. Nor did the order limit ExxonMobil’s right to pursue discovery as to the Commonwealth’s claims or the remaining defenses.

In July 2022, ExxonMobil served its first set of RFPs on the Commonwealth. Since then, the parties have engaged in extensive meet-and-confers. As set forth in the parties’ September 1 and September 5 letters to the Court and the September 7 status conference, the Commonwealth has refused to produce documents responsive to RFP Nos. 6-8, 10, 34-35, and 39-42 or justify its refusal to produce them. *See Ex. 2* at 25:05-26:03, 26:19-27:16, 30:08-15, 31:14-32:01. And, to the extent the Commonwealth has produced any documents that it may contend are responsive to these RFPs, those documents consist largely of automated newsletters, automated court emails, and correspondence with ExxonMobil’s attorneys, rather than relevant documents of substance.

On September 15, the Commonwealth provided additional information about its assertions of the common interest doctrine as to RFP Nos. 39-42. *See Ex. 3*. On September 25, ExxonMobil posed follow-up questions to the Commonwealth, *Ex. 4* at 2-3, which responded on October 13, *Ex. 5*. The Commonwealth’s letters have brought its untenable positions into even sharper focus. It is now apparent that there is a clear impasse, and an order compelling production is warranted.

ARGUMENT

ExxonMobil is entitled to discovery “regarding any matter” that “is relevant to the subject matter” of this litigation, “whether it relates to the claim or defense of” ExxonMobil or the Commonwealth. Mass. R. Civ. P. 26(b)(1). Evidence is relevant where “it has any tendency to make a fact” that is of consequence “more or less probable than it would be without the evidence.”

Mass. G. Evid. § 401. Relevant evidence “need not establish directly the proposition sought; it must only provide a link in the chain of proof.” *Comm. v. Correia*, 492 Mass. 220, 228 (2023); *see Comm. v. Tantillo*, 103 Mass. App. Ct. 20, 28 (2023) (“It is not necessary that the evidence be conclusive of the issue.”). The records sought here are relevant to rebutting the Commonwealth’s claims and to supporting ExxonMobil’s defenses, and ExxonMobil is therefore entitled to them.

I. The Commonwealth Must Identify Each Third Party With Which It Exchanged Supposed Work Product Responsive To ExxonMobil’s RFPs So That ExxonMobil And The Court Can Assess The Assertion of Work Product (RFP Nos. 6-8, 10).

RFP Nos. 6-8 and 10 seek communications between the Commonwealth and third parties, including the press and the public, related to ExxonMobil, the investigation of ExxonMobil, and the original and amended complaints. The Commonwealth does not dispute the relevance of responsive documents and has produced some of them, but it has withheld other responsive communications with third parties as work product. As to those communications, it has refused to disclose even the *identities* of the third parties, taking the wholly unsupported position that the identities themselves constitute work product and never need to be disclosed. *See* Dkt. No. 85 at 1; Ex. 2 at 25:12-24. The Commonwealth should be ordered to identify these third parties.

A. The Law Requires The Commonwealth To Provide Enough Information To Allow ExxonMobil To Assess The Commonwealth’s Work Product Claims.

To support its work product claim, the Commonwealth must show that the withheld information was “prepared in anticipation of litigation or for trial” by or for its attorneys. Mass. R. Civ. P. 26(b)(3). The Commonwealth must also show that its disclosure of work product to third parties was not made “in a way inconsistent with keeping [the information] from” ExxonMobil, as such disclosure would waive work product protection. *Bank of Am. v. Deloitte & Touche*, 2008 WL 2423265, at *2 (Mass. Super. Ct. June 13, 2008). A withholding party must “describe the nature” of the withheld communications “in a manner that . . . will enable other

parties to assess the claim.” Mass. R. Civ. P. 26(b)(5)(A)(ii) (emphasis added) (requirements for asserting any privilege). That generally requires specifying “*who created the document and all recipients*, and concisely stat[ing] the basis for the claim of privilege.” *Neelon v. Krueger*, 2015 WL 4254017, at *2 (D. Mass. July 14, 2015) (emphasis added) (addressing Rule 26(b)(5)(A)(ii) as to attorney-client privilege); *Att’y Gen. v. Facebook, Inc.*, 2020 WL 742136, at *13 (Mass. Super. Ct. Jan. 17, 2020) (party must provide “sufficient factual detail so as to allow the [requesting party] to understand and challenge” privilege claim), *aff’d in relevant part*, 487 Mass. 109 (2021).

B. The Commonwealth Must Identify Third Parties With Which It Communicated To Allow ExxonMobil To Assess The Work Product Claims.

During the September 7 conference, the Court asked the Commonwealth how the Court could assess the basis of its work product assertions without knowing the identities of the third parties: “How am I supposed to know . . . unless we know who they are?” Ex. 2 at 25:12-13. The Commonwealth responded that neither the Court nor ExxonMobil is entitled to those identities because an oft-rejected federal court decision, *Commonwealth v. First National Supermarkets*, 112 F.R.D. 149 (D. Mass. 1986), absolves the Commonwealth from having to disclose them. Ex. 2 at 25:15-24. But the Commonwealth conceded that, if the Court rejected its (far-fetched) interpretation of *First National*, then the Commonwealth would be “on the wrong side of the line” and be “forced to reveal the identification” of the third parties. *Id.* at 25:20-24. As discussed below, the Commonwealth’s interpretation of *First National* is wrong. That case does not address the identification of third parties with whom purported work product was exchanged and does not apply here. By refusing to identify the third parties, the Commonwealth has failed to comply with its obligation to provide information sufficient to “enable” ExxonMobil and the Court to “assess” whether its communications are work product. Mass. R. Civ. P. 26(b)(5)(A)(ii).

For example, without knowing the third parties with which the Commonwealth

communicated, ExxonMobil cannot test the assertion that the communications were prepared “in anticipation of litigation” by or for a “party’s representative,” as Rule 26(b)(3) requires. In addition, withholding the identities of third parties deprives ExxonMobil of information critical to assessing whether the Commonwealth waived work product protection by disclosing information in a manner “inconsistent with keeping it from” ExxonMobil. *Bank of Am.*, 2008 WL 2423265, at *2. For example, sharing communications with the press, the public, and individuals—such as former ExxonMobil employees—who are in contact with ExxonMobil would be inconsistent with keeping the content of those communications from ExxonMobil.²

Not surprisingly, the Commonwealth has identified *no case* in which a party was allowed categorically to withhold, on work product grounds, its written communications with third parties *while also* refusing to identify the third parties, where the third parties were not interviewees in a privileged investigation. To the contrary, the information ExxonMobil seeks is routinely disclosed in discovery. And courts have recognized that these identities are essential for “assessing” a claim of privilege. For example, in *Fine v. Sovereign Bank*, 2008 WL 11388663 (D. Mass. Mar. 7, 2008), plaintiffs objected to producing certain third-party communications on multiple bases, including that the communications were protected work product. *Id.* at *6. The court held that to enable “proper[] evaluat[ion of] the claims of privilege,” plaintiffs should “identify each document and the individuals who are parties to the communications.” *Id.* at *9; *accord, e.g., Neelon v. Krueger*, 2015 WL 4254017, at *5 (D. Mass. July 14, 2015) (failure to list titles and roles of those involved in privileged communications was “inadequate to assess the claim of privilege”).

This Court itself has recognized that a party asserting privilege, including work product,

² The third-party identities may also be relevant to assessing whether ExxonMobil cannot obtain the “substantial equivalent” of the factual information in those communications without “undue hardship,” a showing needed to obtain protected factual work product. Mass. R. Civ. P. 26(b)(3).

“need[s] to provide sufficient information, so that the other side can actually meaningfully move to compel, and the court can look at it, and make a decision.” Ex. 2 at 22:25-23:2; *see id.* at 20:15 (party must “explain in enough detail so that [the Court] can decide” if privilege applies). No one could meaningfully “make a decision” about whether work product applies to communications without knowing the parties involved. In fact, the Commonwealth adopted an identical position at the September 7 conference when seeking information about documents ExxonMobil withheld: the “names of the individuals” who prepared the documents, a “meaningful description of the subject matter of the” documents, and “whether the purportedly and [sic] privileged documents constitute opinion or fact work product or both.” *Id.* at 20:22-21:1. Yet the Commonwealth refuses to provide the very information it argued was required to assess assertions of work product.

C. *First National* Does Not Excuse The Commonwealth’s Failure To Identify The Third Parties Whose Responsive Communications It Has Withheld.

To support its contradictory position that it need not identify the third parties with which it had purportedly work-product-protected communications, the Commonwealth relies primarily on *First National*. But, as discussed, the Commonwealth conceded that, if *First National* does not apply, then the Commonwealth must “reveal” the third parties at issue. Ex. 2 at 25:20-24. As *First National* is indeed inapposite, the Commonwealth must identify these third parties.

This Court should follow the many courts that have rejected the reasoning in *First National* on the ground that identifying individuals with whom a party spoke does not reveal legal strategy. *See, e.g., United States v. Cameron-Ehlen Grp., Inc.*, 2019 WL 1453063, at *5 (D. Minn. Apr. 2, 2019) (holding it was “unlikely” that work product doctrine covered identities of interviewees in investigation because the identities themselves did not reveal attorney mental impressions).³

³ *See also Packard v. Darveau*, 2012 WL 4443505, at *4 (D. Neb. Sept. 25, 2012) (“identities of persons who provided statements” not “protected work product”); *Myers v. Goldco, Inc.*, 2008 WL

In *First National*, corporate counsel interviewed corporate employees in the course of a privileged internal investigation. 112 F.R.D. at 151. That court declined to force the company to answer an interrogatory seeking the identities of the employees with whom counsel had spoken as part of the investigation on the grounds that answering would “reveal the pattern of investigation and exploration employed by [the corporate] attorney.” *Id.* at 154.⁴ Other courts, however, have recognized that identifying the interviewees in an investigation reveals no protected work product. For example, in *Alexander v. FBI*, 192 F.R.D. 12 (D.D.C. 2000), an intervenor objected to testifying as to whether a third party had performed certain investigations “or contacted specific individuals.” *Id.* at 17. The court compelled the third party to provide “a list of interviewees” because “revealing only names and whether he has talked to these people” would reveal no privileged material. *Id.* at 19. The court distinguished those names from information that would “tend to reveal the thoughts, opinions, and strategies of [the intervenor’s] attorneys,” recognizing that the latter may be protected. *Id.* Here, the third-party communicants are not employees of the Massachusetts Attorney General’s Office who were contacted as part of a privileged internal investigation, but rather are like the interviewees in *Alexander*: revealing their identities would not reveal protected material. The Commonwealth has offered no reason why this Court should expand *First National* to this distinct factual setting, rather than following the reasoned decisions of many other courts holding that the identities of communicants are not protected.

1995131, at *1 (N.D. Fl. May 6, 2008) (“interrogatory seeking the names and addresses of witnesses whom a party has interviewed is not protected work product”); *Sanchez v. Matta*, 229 F.R.D. 649, 659 (D.N.M. 2004) (work product does not protect “identity of persons interviewed”); *Lincoln Gateway Realty Co. v. Carri-Craft, Inc.*, 53 F.R.D. 303, 307 (W.D. Mo. 1971) (identities of persons from whom statements were obtained are not “trial preparation materials”).

⁴ The Commonwealth has also cited *United States v. District Council of NYC*, 1992 WL 208284, at *10 (S.D.N.Y. Aug. 18, 1992), a case that is just as irrelevant as *First National* because it too involved discovery of only the identities of interviewees who spoke to an investigator.

Moreover, even if *First National* were correctly decided, it would still not justify the Commonwealth's refusal to identify the third parties here. Unlike in *First National*, ExxonMobil does not seek the identities of Commonwealth employees who were interviewed in a privileged internal investigation. Rather, ExxonMobil seeks the identities of third parties with whom the Commonwealth exchanged written communications, in order to assess the Commonwealth's invocation of the work product doctrine as to those communications. *First National* did not address the disclosure of the identities of third-party communicants in the context of an assertion of work product over responsive written communications, and the Commonwealth has given no basis for expanding *First National* to allow a party to withhold those identities, thereby foreclosing the opposing party's and the Court's ability to assess the assertion of work product protection.

Finally, the Commonwealth has not applied its interpretation of *First National* consistently. The Commonwealth has selectively produced some responsive communications about the case with third parties, thereby identifying those parties as individuals with whom it has communicated. For example, the Commonwealth has produced (among other third-party communications) emails with attorneys for investment managers State Street and Wellington related to the Commonwealth's investigation and litigation of this case. These and other documents identify the parties with which the Commonwealth communicated. But that is the very information that the Commonwealth asserts is protected under *First National* for other, unnamed third parties. The Commonwealth's inconsistent actions undermine its assertion that *First National* provides absolute protection of third-party identities, and demonstrates an arbitrary approach to protecting identities the Commonwealth refuses to reveal. This Court should not allow such gamesmanship.

II. The Commonwealth Should Search For And Produce Records Related To *Massachusetts v. EPA* and *Kain v. DEP* That Will Show Massachusetts Consumers And Investors' Knowledge About Climate Change Risks (RFP Nos. 34-35).

RFP Nos. 34-35 seek documents related to two lawsuits about greenhouse gas emissions.

Massachusetts v. EPA is the seminal case in which the U.S. Supreme Court held that greenhouse gases are “air pollutants” under the Clean Air Act, giving EPA authority to regulate greenhouse gas emissions from new motor vehicles. 549 U.S. 497, 532 (2007). The case arose from the Commonwealth’s challenge in 2003 to the EPA’s refusal to regulate those emissions, which allegedly contributed to global warming—a risk of which the Commonwealth was plainly aware—in the D.C. Circuit and then Supreme Court. *See* 415 F.3d 50 (D.C. Cir. 2005). ExxonMobil seeks records related to the Commonwealth’s understanding of the greenhouse-gas risks that it felt necessitated EPA action. *Kain* involved a 2014 state-law challenge by Massachusetts residents to the Commonwealth DEP’s failure to address climate change by refusing to set binding limits for greenhouse gas emissions. 474 Mass. 278, 279 (2016). The *Kain* litigation followed a 2012 rulemaking petition, public hearing, and subsequent DEP public statement describing climate change risks and the regulatory schemes already in place to reduce greenhouse gases. *Id.* Thus, there is no doubt that Massachusetts residents knew of climate change risks when they filed the petition that was later litigated in *Kain*. These RFPs seek documents, including ones related to the petition and any transcripts and documents from the DEP hearing, demonstrating that knowledge.

Responsive records are indisputably relevant to rebut the Commonwealth’s transparently counterfactual claims that Massachusetts consumers and investors were somehow unaware of, and deceived by ExxonMobil’s statements about, climate change risks. But the Commonwealth refuses even to *search* for such records, claiming that they are irrelevant, privileged, or publicly available. Dkt. No. 85 at 2. The Court should reject these arguments and order the search for and production of responsive records regarding these lawsuits and related agency rulemakings.

A. Documents Related To *Massachusetts v. EPA* And *Kain v. DEP* Are Relevant To Central Issues In This Case About Climate Change.

The Commonwealth must prove that ExxonMobil engaged in “deceptive acts or practices”

in violation of Chapter 93A. *See* G.L. c 93A, § 2. This requires showing that ExxonMobil's alleged representations were both deceptive and material. A representation is "deceptive" when "it has the capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted (i.e., to entice a reasonable consumer to purchase the product)." *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 396 (2004). Whether a statement is deceptive is a "fact-specific" analysis that considers, among other things, whether the statement would have misled consumers "interpreting the message *reasonably under the circumstances*." *Tomasella v. Nestlé USA, Inc.*, 962 F.3d 60, 71 (1st Cir. 2020) (emphasis added); *see Comm. v. Exxon Mobil Corp.*, 2021 WL 3493456, at *12 (June 22, 2021) ("How Exxon's statements would be understood by a reasonable consumer are questions ill-suited for resolution on a motion to dismiss."). A statement is "material" if it contains information that "is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *Comm. v. AmCan Enters.*, 712 N.E.2d 1205, 1209 (Mass. App. Ct. 1999); *Aspinall*, 442 Mass. At 396.

The record in *Massachusetts v. EPA* and *Kain* suggests that responsive documents will show the extent of the Commonwealth's and other Massachusetts consumers' and investors' knowledge of the effects of greenhouse gas emissions on climate change, and of the risks of climate change. For example, in *Massachusetts v. EPA*, the Commonwealth challenged the EPA's denial of a 1999 petition that asked the EPA to regulate greenhouse gases, warning the D.C. Circuit that "[e]missions from U.S. motor vehicles, power plants, and other sources continue to increase the concentration of greenhouse gases," thereby causing climate change, and that "the effects of climate change" include rising sea levels and extreme weather events. Ex. 6 at *2-4, *6, *12.

Similarly, in *Kain*, plaintiffs petitioned the Commonwealth DEP in 2012 to set binding greenhouse gas limits given the risks of climate change, explaining that "[h]uman-caused fossil

fuel burning and the resulting climate change” threaten human health and global food security and could lead to severe storms and floods. Ex. 7 ¶¶ 17, 40-43. The DEP held a public hearing and subsequently “agree[d]” that “the increase in CO₂ emissions has significantly contributed to the effects of global warming” but declined to adopt the proposed regulation given its existing regulatory efforts to fight climate change. Ex. 8 at 4. Plaintiffs then sued, alleging that “ongoing climate change” was “caused by emissions of greenhouse gases” and that the effects of climate change included “rising sea levels and warming temperatures.” Ex. 9 at Intro. & ¶ 5 (complaint). Later on appeal, plaintiffs emphasized that the “effects of climate change are well underway in Massachusetts” and will “impact human health, degrade water quality, and disrupt ecosystems.” Ex. 10 at 4. Representing the DEP, the Attorney General argued that binding limits were not required. 474 Mass. at 287. The Supreme Judicial Court held that Massachusetts law did require the DEP to promulgate additional regulations to limit greenhouse gas emissions, observing that the relevant laws were “developed against the backdrop of an emerging consensus . . . that climate change is attributable to increased emissions, as well as perceptions in the Commonwealth that national and international efforts to reduce those emissions are inadequate.” *Id.* at 280-81.

Responsive records related to these two lawsuits, and the EPA and DEP rulemakings that preceded them, showing what the Commonwealth and Massachusetts consumers and investors, including the *Kain* plaintiffs, knew about climate change risks are relevant to help establish the circumstances in which ExxonMobil’s statements were received in Massachusetts. *See Tomasella*, 962 F.3d at 72. Such circumstances include the extent to which there was widespread understanding of climate change among the purported victims of ExxonMobil’s alleged deception. Records showing what climate change risks were known to Massachusetts consumers will also tend to make it “less probable” that ExxonMobil concealed such risks, as alleged here. Mass. G.

Evid. § 401(a). And responsive records may also address the element of materiality by showing whether climate change concerns were “important to” Massachusetts consumers who engaged in emissions-causing conduct, such as driving cars that use fossil fuels. *AmCan*, 712 N.E.2d at 1209. For example, the perceived need for increased regulation shows that Massachusetts consumers were not tempering their emissions-causing behavior based on known climate change concerns.

It is a head scratcher that the Commonwealth suggests *Massachusetts v. EPA* is too old to be relevant. *See* Dkt. No. 85 at 2. The Commonwealth alleged that ExxonMobil engaged in a “consumer deception campaign” dating back to the 1980s. *E.g.*, Am. Compl. ¶¶ 13, 115. Evidence of what Massachusetts consumers and investors actually knew during that alleged “deception campaign” about the connection between greenhouse gases and climate change and the risks of climate change is obviously relevant. In turn, evidence about how the Commonwealth broadcasted those risks publicly, including to the EPA, the D.C. Circuit, and the U.S. Supreme Court, speaks directly to what the Commonwealth and other consumers and investors knew about those risks.

The Commonwealth erroneously argues that ExxonMobil seeks these documents only to support a stricken defense that the Commonwealth is “equally culpable” for climate change. Dkt. No. 85 at 2. Not so. Responsive records are directly relevant because they tend to rebut elements of the Commonwealth’s claims—that ExxonMobil’s statements were deceptive and material to Massachusetts consumers and investors. The Commonwealth tries to avoid this by asserting that “the claims here focus on what ExxonMobil knew” and said about climate change. *Id.* But that is only part of the Commonwealth’s case; the claims also relate to whether, if at all, reasonable Massachusetts consumers and investors would have been deceived by ExxonMobil. The relevance of documents for purposes of discovery depends not on what the Commonwealth myopically wants to “focus” on, but on what the Commonwealth must actually prove in court based upon its claims.

B. The Law Does Not Permit The Commonwealth's Blanket Arguments That All Responsive Documents Are Privileged Or Publicly Available.

The Commonwealth's assertion that *all* documents related to these lawsuits are privileged is meritless. For example, the RFPs seek communications with the media and comments the Commonwealth submitted to the EPA, which are obviously not privileged. And "blanket assertions of privilege are extremely disfavored." *Refuse & Env't Sys. v. Indus. Servs. of Am.*, 120 F.R.D. 8, 11 (D. Mass. 1988); *see Moloney v. U.S.*, 204 F.R.D. 16, 20 (D. Mass. 2001) ("blanket assertion of privilege is insufficient"). The Commonwealth should conduct a reasonable search, withhold only records that are actually privileged, and provide a log of those documents.

Similarly, the Commonwealth's assertion that it need not search for responsive records because any non-privileged records are publicly available is meritless. First, there is no reason to believe that all of the Commonwealth's responsive communications—including with the media, residents, and legislators—the "written comments" it received about the *Kain* petition, Ex. 8 at 1, or its internal agency records are publicly available. Second, even if some responsive records were publicly available, that would not allow the Commonwealth to avoid searching for and producing all responsive documents. As discussed, the fact that information about climate risks was known to the Commonwealth and other Massachusetts consumers and investors is relevant to proving, among other things, the "circumstances" in which ExxonMobil's alleged statements were made. And Rule 26 contains no carveout for documents that are publicly available. *See In re Bushay*, 327 B.R. 695, 705 (B.A.P. 1st Cir. 2005) (describing claim that a party "should not be obligated to produce documents that are of public record" as "meritless"). Documents responsive to RFP Nos. 34-35 are highly relevant and must be produced.

III. The Commonwealth's Refusal To Produce Records Based On The Common Interest Doctrine And Attorney-Client Privilege Is Baseless (RFP Nos. 39-42).

Some of the discovery requests seek communications with AGs from other states and with

Matthew Pawa, a private attorney who prepared a presentation titled “What Exxon Knew,” about the substance of the complaints in this case and ExxonMobil.⁵ See RFP Nos. 40-42. The Commonwealth refuses to produce any responsive communications with other states, arguing they are irrelevant and entirely within the common interest doctrine.⁶

The Commonwealth also argues that responsive communications with Pawa are irrelevant and has presented a shifting litany of reasons for withholding them. In its September letter to this Court and in meet-and-confers, the Commonwealth never claimed that such communications were protected by the attorney-client privilege, invoking only the common interest doctrine. See Dkt. No. 85 at 2. Then, on September 15, the Commonwealth first claimed that those communications *are* subject to the attorney-client privilege because it had communicated with Pawa “to consider retaining him to represent the AGO and/or the Commonwealth.” Ex. 3 at 3. ExxonMobil asked for the “facts on which the Commonwealth relies to establish whether and when an ‘attorney-client relationship had been formed,’” but the Commonwealth conceded it was “working to collect the additional facts requested.”⁷ Ex. 5 at 2-3. Thus, despite belatedly claiming an attorney-client relationship with Pawa, the Commonwealth appears still to be trying to reverse-engineer an explanation and find facts to support it.⁸ The Commonwealth also relies on this privilege claim despite previously producing records “related to [a meeting with Pawa] and the scheduling of

⁵ See, e.g., Vt. Law & Grad. Sch., *What Exxon Knew: Presentation by Matt Pawa*, Ex. 11.

⁶ The Commonwealth also refuses to produce records responsive to RFP No. 39, which seeks documents related to a 2020 common interest agreement among the Commonwealth and Connecticut, Delaware, Minnesota, and the District of Columbia (the “2020 CI Agreement”).

⁷ The Commonwealth “reserve[d] the right” later to assert a common legal interest with Pawa, further evidence that it is struggling to identify a valid basis for withholding records. Ex. 5 at 2.

⁸ The Commonwealth appears not to rely on Pawa’s unsupported assertions, in a motion to quash an ExxonMobil subpoena, that he had an attorney-client relationship with state AGs. *Exxon Mobil Corp. v. Pawa Law Grp.*, No. 16-mc-91354, Dkt. No. 2 at 15-16 (D. Mass. Nov. 23, 2016).

another meeting,” Ex. 3 at 3, and without explaining why it believes those communications are not privileged but the ones sought here are. These ever-changing arguments should be rejected.

A. Responsive Communications With State AGs And With Pawa About The Substance Of This Case And ExxonMobil Are Obviously Relevant.

Documents about the “substance” of the complaints in this case—for example, about information supposedly concealed from Massachusetts consumers—and about ExxonMobil are undoubtedly relevant to claims and defenses in this case. Similarly, documents related to Pawa’s “What Exxon Knew” presentation are relevant to the Commonwealth’s claims, which it describes as “focus[ing] on what *ExxonMobil* knew about climate change.” Dkt. No. 85 at 2. The Commonwealth’s bare assertion that all records responsive to RFP Nos. 39-42, which seek records about these subjects, are irrelevant makes no sense and should be rejected. Ex. 3 at 3.

Responsive records are also highly relevant to ExxonMobil’s live collateral estoppel and res judicata defenses. *See* MTS Order; Am. Ans., Dkt. No. 53 at 83 ¶ 46. Those defenses assert that the Commonwealth and the New York Attorney General (“NYAG”) were in privity with each other such that the New York Supreme Court’s decision in favor of ExxonMobil on materially similar claims in an earlier trial binds the Commonwealth. These RFPs seek facts to establish whether privity existed, which requires showing that “the interests of the nonparty can be said to have been represented in the prior proceeding.” *Green v. Santa Fe Indus.*, 514 N.E.2d 105, 108 (N.Y. 1987). Discovery will inform whether ExxonMobil will prevail on those defenses, and the Commonwealth should not be allowed to thwart ExxonMobil’s effort to discover the facts by improperly refusing to produce responsive records. Thus, the discovery ExxonMobil seeks is relevant to its undisputedly live defenses and to rebutting the Commonwealth’s allegations.

B. The Commonwealth Has Failed To Prove That All Responsive Records Are Protected By The Attorney-Client Privilege Or Common Interest Doctrine.

1. The Commonwealth Has Failed To Prove That Communications With Pawa Are Privileged.

Given the complete absence of support for the eleventh-hour assertion that the attorney-client privilege protects the Commonwealth's communications with Pawa, and the ample time for fact gathering that has elapsed in the nearly sixteen months since ExxonMobil served its RFPs (July 2022), the Court should order the Commonwealth to produce responsive communications with Pawa. Further, assuming no attorney-client privilege existed between the Commonwealth and Pawa, the Commonwealth should also be ordered to produce communications responsive to RFP Nos. 39-42 where Pawa was copied, as Pawa's presence as an individual outside the privilege and not part of any common interest group waived any protection over such communications. *See Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.*, 449 Mass. 609, 612 (2007) (common interest doctrine applies to certain communications shared "in a confidential manner").

2. The Commonwealth Has Not Justified Withholding All Responsive Communications With Other States Based On A Common Interest.

The common interest doctrine "extends the attorney-client privilege to any privileged communication shared with another represented party's counsel in a confidential manner for the purpose of furthering a common legal interest." *Hanover*, 449 Mass. at 612. A common legal interest requires a common enterprise that is "in furtherance or [in] protection of [shared] legal interests." *Harpel v. Nicholson*, 2013 WL 5466636, at *2 (D. Mass. Oct. 1, 2013). A shared desire for a particular legal outcome is not sufficient. *See id.* (that a party "obviously shared [plaintiff's] desire to prevail against [defendant]" does not make a "common legal interest"). The Commonwealth bears the burden of proving that the common interest doctrine applies, *Hanover*, 449 Mass. at 620, but has not met that burden as to all responsive communications with state AGs.

First, the Commonwealth unpersuasively argues that the 2020 CI Agreement "made plain" a "sufficiently similar interest" with other state AGs. Ex. 3 at 2. That agreement asserts that the

various litigations brought by the other states “share common facts, causes of action . . . and defendants,” including ExxonMobil. *Id.* But 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. Indeed, the Commonwealth has emphasized that its claims here all arise under a Massachusetts-specific statute (Chapter 93A) and the “body of Massachusetts case law applying” it, rather than the common law or law from other jurisdictions, and are brought “to protect Massachusetts consumers and investors.” *See* Comm.’s Mem. of Law, *Comm. v. Exxon Mobil Corp.*, No. 19-cv-12430, Dkt. No. 14 at 1, 6, 8 (D. Mass. Dec. 26, 2019). Declaring this matter “sufficiently similar” to those in other states does not make it so.⁹

This case is like *Kaiser v. Kirchick*, 2022 WL 182375 (D. Mass. Jan. 20, 2022), where there was a series of legal disputes in which defendant’s brother claimed a shared interest with defendant in reaching a “global resolution.” *Id.* at *5. The court held this shared interest to be insufficient to support the common interest doctrine. *Id.* at *6. Here, too, the Commonwealth merely suggests that it shares with other states some global interest in suing fossil fuel companies.¹⁰

Notably, the Commonwealth identifies no case in Massachusetts (or elsewhere) that allowed withholding of records based on a “common legal interest” as broad as the Commonwealth

⁹ The Commonwealth similarly asserts that a 2016 agreement shows that certain state AGs share a common legal interest. The mere existence of a written agreement does not create a common interest. *See Hanover*, 449 Mass. at 618 (document “does not [itself] give rise to the privilege”).

¹⁰ Where courts have found a “substantially similar interest,” the interests were more specific than the concept of “conducting investigations” and articulated with particularity. *See Am. Test Kitchen v. Kimball*, 2018 WL 2049490, at *3 (Mass. Super. Ct. Apr. 2, 2018) (threatened trade secrets lawsuit by television show created sufficiently similar interest in defending against lawsuit among former employee, competitor show, and investor); *Shipyard Assocs. v. City of Hoboken*, 2015 WL 4623470 (D.N.J. Aug. 3, 2015) (common interest in preventing development along Hoboken pier may exist among Hoboken, non-profit concerned about open space, and condominium association near pier); *Lane Constr. Corp. v. Skanska USA*, 2022 WL 18773723 (M.D. Fla. Nov. 7, 2022) (development company and affiliate share sufficiently similar interest in preventing plaintiff, fellow member of a joint venture, from defaulting on obligations arising from venture).

asserts. The only cases it has identified as purportedly supporting its position merely describe state litigations, without demonstrating the requisite shared legal interest to justify application of the common interest doctrine. *See* Ex. 3 at n.2 (citing *Minnesota v. Am. Petroleum Inst.*, 63 F.4th 703, 708 (8th Cir. 2023) and *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 49-50 (1st Cir. 2022)).

Second, the Commonwealth asserts an incomprehensibly overbroad common interest with *all* AGs that “have asserted, are asserting, or anticipate the possibility of asserting, claims against ExxonMobil and/or other fossil fuel companies for engaging in unlawful conduct with respect to climate change.” Ex. 5 at 5.¹¹ “Unlawful conduct” encompasses infinite potential claims, of which a Chapter 93A violation would be just one (over which no other AG has jurisdiction). And actual or possible claims “against ExxonMobil and/or other fossil fuel companies” encompass different conduct, defendants, victims, venues, and time periods. Thus, the Commonwealth has not met its burden of proving a common interest, and it should be ordered to produce responsive records.¹²

CONCLUSION

ExxonMobil respectfully requests that this Court allow its motion to compel and order the Commonwealth to: (1) identify third parties implicated by its claim of work product as to RFP Nos. 6-8, 10; (2) search for and produce documents related to *Massachusetts v. EPA* and *Kain* that are responsive to RFP Nos. 34-35; and (3) produce documents responsive to RFP Nos. 39-42 involving Matthew Pawa and AGs of other states.

¹¹ The Commonwealth has represented that, to the extent it identifies communications with state AGs who are not parties to the 2016 or 2020 agreements but to which it believes the common interest doctrine applies, it will “disclose that information in our privilege log.” Ex. 5 at 3.

¹² The Commonwealth asserts that all responsive communications with NYAG are protected by a common interest in a separate case in Texas federal court. *E.g.*, Ex. 3 at 2-3. It also asserts a common interest with other third parties—such as municipalities, class action plaintiffs, “whistleblowers,” and state agencies—but claims that it has not identified (so is not withholding) any responsive communications with them. *Id.* at 5-6. As to both claims, ExxonMobil does not now move to compel production of responsive records but reserves all rights to do so in the future.

Dated: December 8, 2023

Respectfully submitted,

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Counsel for Exxon Mobil Corporation

Appendix A

ExxonMobil's Request No. 6

All documents concerning any communications between you and any person or entity, other than the undersigned counsel for ExxonMobil, related to ExxonMobil or the substance of the original complaint or amended complaint, or the investigation that began at least as early as March 29, 2016.

ExxonMobil's Request No. 7

All documents concerning any communications between you and any member of the press or any press releases, talking points, and any drafts thereof, related in any way to ExxonMobil, the substance of the original or amended complaint, or the investigation that began at least as early as March 29, 2016.

ExxonMobil's Request No. 8

All documents concerning any meetings that you attended related to ExxonMobil, the substance of the original complaint or amended complaint, or the investigation that began at least as early as March 29, 2016.

ExxonMobil's Request No. 10

All documents between you and any member of the public concerning ExxonMobil or the allegations in the original complaint or the amended complaint.

ExxonMobil's Request No. 34

All documents relating to your involvement in *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007), or in the request for any Environmental Protection Agency ("EPA") greenhouse gas rulemaking that preceded this litigation, and the various EPA greenhouse gas rulemakings that

post-dated this litigation, without respect to the relevant period defined above, including but not limited to:

- a. Internal memoranda, notes, analyses, research studies, technical assessments, or reports created by you, relied upon by you, or provided to you in connection with the litigation;
- b. Communications with the press, members of the public, and Commonwealth officials, including but not limited to officials employed by other Commonwealth agencies, and members of the Massachusetts Legislature; and
- c. Comments by the Commonwealth submitted to any public agencies in connection with any request to the EPA for proposed rulemaking of listing greenhouse gases as a pollutant under the Clean Air Act which led to this litigation, and any subsequent EPA greenhouse gas rulemakings that post-dated the litigation.

ExxonMobil's Request No. 35

All documents relating to your involvement in *Kain v. Department of Environmental Protection*, 474 Mass. 278 (2016), including but not limited to:

- a. Internal memoranda, notes, analyses, research studies, technical assessments, or reports created by you, relied upon by you, or provided to you in connection with the litigation;
- b. Documents relating to your understanding of, response to, and implementation of the Global Warming Solutions Act of 2008; and

- c. Communications with the press, members of the public, and Commonwealth officials, including but not limited to officials employed by other Commonwealth agencies, and members of the Massachusetts Legislature.

ExxonMobil's Request No. 39

The Common Interest Agreement concerning the sharing of information related to state lawsuits against energy companies, signed by the Commonwealth on October 8, 2020, and all documents concerning the Common Interest Agreement and the “pre-existing oral agreement” referenced in the Common Interest Agreement.

ExxonMobil's Request No. 40

All documents or communications between you and the Attorney General of the State of New York, including his or her representatives, concerning ExxonMobil, the substance or timing of filing of the original complaint in October 2019, or the substance of the amended complaint.

ExxonMobil's Request No. 41

All documents concerning the Commonwealth's meetings and communications with other state Attorneys General concerning ExxonMobil or the substance or timing of filing of the original complaint in October 2019 or the amended complaint, including without limitation, meetings and communications involving Matthew Pawa and his provision of a presentation on “what Exxon knew.”

ExxonMobil's Request No. 42

All documents concerning the Commonwealth's meeting and communications involving Matthew Pawa and his provision of a presentation on “what Exxon knew.”

CERTIFICATE OF SERVICE

I, Thomas C. Frongillo, counsel for Defendant Exxon Mobil Corporation, hereby certify that on December 8, 2023, I caused a copy of this Memorandum of Exxon Mobil Corporation in Support of Its Motion to Compel the Commonwealth to Search for and Produce Relevant Documents and Make Appropriate Disclosures with Respect to Withheld Documents to be served on counsel of record by electronic service.

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