

Commonwealth.” Am. Compl. ¶¶ 2, 43. The Commonwealth is represented in this case by the AGO, just as ExxonMobil is represented by outside counsel.

2. In July 2022, ExxonMobil served its first set of RFPs on the Commonwealth. In its Responses and Objections to ExxonMobil’s RFPs, the Commonwealth objected to searching for or producing documents from the files of any Commonwealth agency or department other than the AGO on the grounds that such documents were not in the possession, custody, or control of custodians in the AGO. Ex. 1 at 3. The Commonwealth has refused to negotiate the other agencies to be searched or the scope of any such searches.

3. The Commonwealth’s sole basis for this objection is that *Commonwealth v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 2012 WL 5392617 (Mass. Super. Ct. Oct. 5, 2012)—a narrow consumer protection case holding that, on the facts of that case, the Commonwealth was not required to conduct “massive document searches” of every agency, department, and political subdivision of the state, *id.* at *1-*3—absolves it of its obligation to search for and produce documents from Commonwealth agencies besides the AGO. *See* Ex. 2 at 2.

4. The Commonwealth’s objection to searching for and producing responsive records outside of the AGO’s files and in the files of other relevant agencies and departments should be rejected for three reasons.

5. *First*, the Commonwealth is the plaintiff in this suit and has an obligation under Mass. R. Civ. P. 34 to respond to ExxonMobil’s discovery requests by producing documents within its possession, custody, and control.

6. *Second*, even if the Commonwealth’s production obligations were somehow limited to documents within the possession, custody, or control of the AGO, the result would be no different. The AGO has the legal authority to manage all aspects of litigation brought by the

Commonwealth, and that authority necessarily includes control over the files of other Commonwealth agencies for purposes of discovery in such suits.

7. *Third, Ortho-McNeil* does not absolve the Commonwealth of this obligation. That case relied on facts not present here, including that the defendant sought extensive discovery from every Commonwealth subdivision, department, and agency despite the narrow scope of the case. *See Ortho-McNeil*, 2012 WL 5392617, at *1, *3. Here, the Commonwealth's case is sweeping, and ExxonMobil seeks less extensive discovery than did the defendant in *Ortho-McNeil*. Moreover, *Ortho-McNeil* concluded that compelling the AGO to produce documents from other agencies in that case could "upset the constitutional balance of power" between the Attorney General and Governor, who the court was concerned might not even be aware of the litigation. *Id.* at *3. Here, the Governor—who was the Attorney General when this case was filed—is well aware of it. And *Ortho-McNeil* did not consider the authority granted to the Attorney General over the Commonwealth's legal affairs and litigation, which necessarily allocates to the Attorney General, not the Governor, power to obtain agency documents for purposes of litigation.

8. In support of its motion to compel, ExxonMobil also relies on the accompanying (i) Memorandum of Law, (ii) Affidavit of Jeannie S. Rhee ("Rhee Affidavit"), and (iii) Exhibits 1 through 11, which are attached to the Rhee Affidavit.

9. Pursuant to Superior Court Rule 9A(c), ExxonMobil respectfully requests a hearing on all issues raised in this motion and the accompanying Memorandum of Law. A hearing is warranted because this motion addresses discovery issues that are central to the claims and defenses in the case.

CONCLUSION

For the foregoing reasons, ExxonMobil respectfully requests that this Court allow its motion to compel, reject the Commonwealth's objection to searching for responsive records

outside of the AGO's files, and order the Commonwealth to make reasonable efforts to search for and produce documents responsive to ExxonMobil's RFPs in the files of other relevant agencies and offices.

Dated: December 8, 2023

Respectfully submitted,

CAMPBELL CONROY & O'NEIL, PC

/s/ Thomas C. Frongillo

Thomas C. Frongillo (BBO No. 180690)
tfrongillo@campbell-trial-lawyers.com
20 City Square, Suite 300
Boston, MA 02129
(617) 241-3092

PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP

Theodore V. Wells, Jr. (*pro hac vice*)
twells@paulweiss.com
Daniel J. Toal (*pro hac vice*)
dtoal@paulweiss.com
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

Jeannie S. Rhee (*pro hac vice*)
jrhec@paulweiss.com
Kyle Smith (*pro hac vice*)
ksmith@paulweiss.com
2001 K Street, NW
Washington, D.C. 20006-1047
(202) 223-7300
Fax: (202) 223-7420

Counsel for Exxon Mobil Corporation

CERTIFICATION UNDER SUPERIOR COURT RULE 9C

Pursuant to Superior Court Rule 9C, counsel for Defendant ExxonMobil Corporation (Thomas C. Frongillo, Pat Conlon, Jeannie S. Rhee, Justin Anderson, Kyle Smith, and David Kessler) and counsel for Plaintiff, the Commonwealth of Massachusetts (Brian Clappier, Richard A. Johnston, Shennan Kavanagh, Seth Schofield, Andy Goldberg, and Ezra Geggel), conducted telephonic conferences on November 22, 2022, June 8, 2023, and August 22, 2023, and exchanged multiple letters on these issues, and made a good faith effort to narrow the areas of disagreement to the fullest extent regarding the Commonwealth's refusal to search for documents outside of the files of the Attorney General's Office in response to ExxonMobil's requests for production.

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 Exxon Mobil Corporation's Motion to Compel on counsel of record by electronic service.

/s/ Thomas C. Frongillo

Thomas C. Frongillo (BBO No. 180690)
tfrongillo@campbell-trial-lawyers.com
20 City Square, Suite 300
Boston, MA 02129
(617) 241-3092