

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION NO.:  
1984-CV-03333-BLS1

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|--------------------------------|---|----------------------------------|
| COMMONWEALTH OF MASSACHUSETTS, | ) |                                  |
|                                | ) |                                  |
| Plaintiff,                     | ) |                                  |
|                                | ) |                                  |
|                                | ) |                                  |
| v.                             | ) | <b><u>Service Via E-Mail</u></b> |
|                                | ) |                                  |
| EXXON MOBIL CORPORATION,       | ) |                                  |
|                                | ) |                                  |
| Defendant.                     | ) |                                  |

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**DEFENDANT EXXON MOBIL CORPORATION'S  
MOTION TO COMPEL THE COMMONWEALTH TO SEARCH FOR AND PRODUCE  
RELEVANT DOCUMENTS AND MAKE APPROPRIATE DISCLOSURES WITH  
RESPECT TO WITHHELD DOCUMENTS**

Pursuant to Mass. R. Civ. P. 37(a) and Superior Court Rule 9A, Defendant Exxon Mobil Corporation (“ExxonMobil”) hereby moves to compel the Commonwealth to search for and produce relevant documents and make appropriate disclosures with respect to withheld documents in relation to 10 Requests for Production (“RFPs”) served on the Commonwealth. As grounds for this motion, and as set forth in detail in ExxonMobil’s Memorandum of Law in Support of this Motion, ExxonMobil states:

1. In July 2022, ExxonMobil served its first set of RFPs on the Commonwealth. Since then, the parties have engaged in extensive meet-and-confers relating to the Commonwealth’s refusal to produce documents responsive to some of ExxonMobil’s RFPs. Relevant here, the Commonwealth has refused to provide—and in some instances, even to search for—relevant

information and/or produce documents responsive to ExxonMobil's RFP Nos. 6-8, 10, 34-35, and 39-42. The Commonwealth should be compelled to search for and produce relevant documents and make appropriate disclosures with respect to withheld documents.

2. First, with respect to RFP Nos. 6, 7, 8, and 10—which seek communications with third parties about this case—the Commonwealth has produced some documents responsive to these requests but withheld other communications as attorney work product. As to those communications, the Commonwealth has refused to disclose even the identities of the third parties, asserting that the identities themselves constitute work product. This refusal violates the Commonwealth's obligation to “describe the nature of the documents [or] communications” being withheld in a manner that “will enable other parties to assess the claim.” Mass. R. Civ. P. 26(b)(5)(A)(ii). The Commonwealth should be ordered to identify these third parties.

3. Second, the Commonwealth should be compelled to search for and produce documents that are responsive to RFP Nos. 34 and 35. These requests seek 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*, 549 U.S. 497 (2007) and Massachusetts Supreme Judicial Court's *Kain v. DEP*, 474 Mass. 278 (2016). The Commonwealth claims that responsive documents are irrelevant. But responsive documents are relevant to rebutting the Commonwealth's allegations that ExxonMobil's statements were deceptive and material to Massachusetts consumers and investors, including because these records relate to the actual state of knowledge of the Commonwealth and other Massachusetts consumers and investors regarding the risks of greenhouse gas emissions and climate change. The Commonwealth further claims that all responsive documents will be privileged, and invokes that as a basis to refuse to search for or

produce any documents. But that blanket assertion is inconsistent with the Commonwealth's obligation to conduct a reasonable search and withhold only those records that are actually privileged. Finally, the Commonwealth asserts that any responsive, non-privileged records are publicly available. But that assertion is implausible because responsive documents would include internal records, and, in any event, the fact that something may be publicly available is no basis for withholding responsive records. The Commonwealth should be ordered to search for and produce responsive documents.

4. Third, the Commonwealth should be compelled to produce documents responsive to RFP Nos. 39-42. These requests seek the Commonwealth's communications with a private attorney named Matthew Pawa, and/or other state Attorneys General ("AGs"), about "the substance" of the Commonwealth's complaints and ExxonMobil, as well as the timing of the complaints. The Commonwealth claims that any responsive documents are irrelevant, but records about the "substance" of the complaint in this case, or about the defendant in this case, are obviously relevant to the claims and defenses in this case. The Commonwealth also claims that all communications with state AGs are shielded by the common interest doctrine, and that communications with Pawa are protected by the attorney-client privilege. But the Commonwealth has failed to satisfy its burden of showing that it shared a sufficiently similar legal interest with the other state AGs as to all responsive communications and that, even if the common interest doctrine applied, it was not waived. And the Commonwealth has offered no support for its assertion—made for the first time in September 2023—that it had an attorney-client relationship with Pawa. The Commonwealth should be ordered to produce communications responsive to RFP Nos. 39-42 involving Matthew Pawa and other state AGs.

5. 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.

6. 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**

ExxonMobil respectfully requests that the 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.

Dated: December 8, 2023

Respectfully submitted,

CAMPBELL CONROY & O'NEIL, PC

/s/ Thomas C. Frongillo

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*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, Jeannie Rhee, Kyle Smith, and David Kessler) and counsel for Plaintiff the Commonwealth of Massachusetts (Brian Clappier, Richard Johnston, Seth Schofield, Andy Goldberg, and Ezra Geggel), conducted telephonic conferences on June 8, 2023 at 10:00 a.m. and August 22, 2023 at 3:00 p.m., 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 produce documents in response to certain of 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

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