COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

EXXON MOBIL CORPORATION,

Defendant.

Service Via E-Mail

CONSOLIDATED REPLY MEMORANDUM OF EXXON MOBIL CORPORATION TO THE COMMONWEALTH'S OPPOSITION TO THE MOTIONS TO COMPEL

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PRELIMINARY STATEMENT

Having brought a highly publicized complaint, alleging a multi-decade campaign to deceive the Commonwealth, along with other Massachusetts consumers and investors, the Commonwealth now opposes ExxonMobil's efforts to exercise basic discovery rights to obtain relevant evidence to defend itself from these baseless claims. The arguments advanced to oppose ExxonMobil's efforts to obtain party discovery in this case are truly astounding, and include:

- The Commonwealth claims to be a "sophisticated" fossil fuel consumer and investor, which (it says) exempts its decisions and understanding of climate change risks from discovery, Opp. 34;

- Although this case "concerns how Massachusetts investors and consumers interpreted ExxonMobil's deceptive messaging," Opp. 28, ExxonMobil is entitled to no discovery as to what those same investors and consumers understood about climate change and greenhouse gas emissions, the very subjects of the allegedly deceptive conduct;

- The Commonwealth's agencies should be treated as a sovereign monolith falling outside the scope of reasonable Massachusetts investors and consumers, Opp. 33-34, except when responding to discovery requests, at which point it should be treated as a set of disconnected agencies and offices distinct from the Office of the Attorney General, Opp. 10-14;

- ExxonMobil is not entitled to discovery about the Commonwealth's records as to whether climate-risk disclosures in securities offerings are actually important to Massachusetts investors, or about whether "forward-looking statements" about future projections are considered "opinion rather than fact," despite the central relevance of these matters to the Commonwealth's claims, Opp. 31-32;

- ExxonMobil and the Court must simply accept the Commonwealth's assertions of work product, and are entitled to zero information to test those broad assertions, Opp. 38-42.

The Commonwealth chose to be the plaintiff in this case, and it is not entitled to special Commonwealth-only discovery rules. This Court should reject the Commonwealth's meritless arguments and grant ExxonMobil's motions so that the parties can fully develop the factual record.

ARGUMENT

I. ExxonMobil Is Entitled To Discovery From The Commonwealth About Fossil Fuel Use And Understanding Of Climate Change Risks (RFP Nos. 13, 15-26, 28-38).

The Commonwealth repeatedly defends its refusal to produce any documents in response to 24 RFPs on the ground that the records sought are not, in its view, dispositive of any element of its claims. Opp. 28-36. But whether evidence is *dispositive* of a claim is not the standard for discovery, and the Commonwealth identifies no law supporting that proposition. Parties are entitled to broad discovery of "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Cronin* v. *Strayer*, 392 Mass. 525, 534 (1984); FF Br. 7. The Commonwealth must produce documents bearing on issues in the case, including ones showing that ExxonMobil's statements were neither deceptive nor material.[1]

A. ExxonMobil Is Entitled To Discovery About Fossil Fuel Consumption In The Commonwealth.

Discovery about the use of fossil fuels and the transition to renewable energy in the Commonwealth is relevant to show that ExxonMobil's statements about those topics were accurate. FF Br. 8-12. The Commonwealth now argues that it is *not* alleging that any of ExxonMobil's statements on these topics were false, and instead only that ExxonMobil somehow "insufficiently" articulated "systemic" climate change risks. Opp. 30-31. Regardless of how the Commonwealth chooses to describe its *claims*, the discovery sought is relevant to ExxonMobil's remaining *defenses*, including that its statements were accurate and thus not deceptive.[2]

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[1] The Commonwealth's other general excuses for refusing discovery are no more persuasive. It suggests that some evidence sought might not carry much weight when the claims are adjudicated. *E.g.*, Opp. 29-30, 33. ExxonMobil disagrees. But discovery is not the time to determine the weight evidence should be given. The Commonwealth also asserts that ExxonMobil seeks records only to support "stricken defenses." *E.g.*, *id.* 28-29. ExxonMobil has no intention of raising defenses struck by this Court. And the Commonwealth's opinion of what evidence might be used for does not foreclose discovery when the evidence is clearly relevant and bears on core issues in the case.

[2] The Commonwealth objects to producing fossil fuel consumption data related to the Commonwealth because Massachusetts is a small portion of the global population. Opp. 29. The Commonwealth ignores that *it has relied on* Massachusetts-specific consumption data, including by alleging that ExxonMobil "injured" the "Massachusetts consumers . . . who purchase thousands

The Commonwealth also claims that discovery related to fossil fuel consumption by Massachusetts consumers "has no relevance" to whether ExxonMobil "accurately disclosed" climate change risks. Opp. 31-32. But this case is about more than whether ExxonMobil should have given a more robust disclaimer about "systemic" risks, as the Commonwealth believes (but refuses to articulate what that disclaimer should have been). Discovery about "consumption of fossil fuels and/or lubricants in the Commonwealth" (RFP No. 22) will bear on whether Massachusetts consumers were deceived by what ExxonMobil did say, and what information is material to them. FF Br. 8-11, 18-20. For example, discovery of records about specific gasoline and motor oil purchases, as well as aggregate data, over time will allow the parties to compare those consumption decisions against the dates and times of specific alleged statements, acts, and practices, and thereby assess the effect (if any) of those statements, acts, and practices.[3] Indeed, the Commonwealth itself recognized the relevance of this data in its complaint: "disclosure [of allegedly undisclosed risks] would reasonably be expected to cause a consumer to act differently than she may otherwise have acted. For example, a consumer might purchase fewer ExxonMobil fossil fuel products, or none." Am. Compl. ¶ 710. It is not credible for the Commonwealth to now argue that such data is irrelevant and need not be produced.

B. ExxonMobil Is Entitled To Discovery About The Awareness of Massachusetts

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of gallons of ExxonMobil fuel every day." Opp. to Mot. to Dismiss at 10, Ex. 6. This is also an improper effort to litigate—during discovery—the weight that evidence ultimately should be given. And the Commonwealth asserts that ExxonMobil "already has available" data. Opp. 30. That other data might *also* be relevant does not exempt Commonwealth data from discovery.

[3] The Commonwealth suggests, without basis, that ExxonMobil seeks only "aggregate" consumption data, and that "ExxonMobil has detailed records" of its own sales. Opp. 34. That argument: (1) mischaracterizes the RFPs, which seek all records related to fossil fuel consumption, not just "aggregate" data; (2) ignores that discovery related to purchases of non-ExxonMobil products will bear on whether Massachusetts consumers view "systemic" climate risks as important to the decision to buy gasoline and motor oil; and (3) ignores that ExxonMobil no longer owns or operates service stations in Massachusetts, and does not have full information as to the sales of each gallon of gasoline and bottle of motor oil.

Consumers And Investors Regarding Climate Change Risks.

The Commonwealth cites no support for its assertion that its non-public documents about climate change risks are immune from discovery. Opp. 33. Nor is there any.

First, the Commonwealth is simply wrong when it asserts that its "non-public, internal" documents are irrelevant because they could never "reflect what was 'widely available' or known to Massachusetts investors or consumers." *Id.* 33. Responsive "internal" documents, such as emails, obviously can address the extent to which climate change risks are known in the Commonwealth. For example, the Commonwealth's 2004 *Climate Protection Plan* anticipated that, by 2005, "all Massachusetts citizens" would "be aware of climate change" and "understand what actions they can take . . . to reduce the release of heat-trapping gases." Ex. 1 at 14. And the 2023 *Recommendations of the Climate Chief* states: "[m]any Massachusetts residents are aware of and concerned about climate change." Ex. 2 at 56. Internal documents justifying these assertions about Massachusetts residents' understanding of climate risks are subject to discovery because they will provide further evidence of the awareness of residents, including consumers, of the risks.

Second, the Commonwealth refuses discovery concerning Massachusetts consumers' and investors' awareness of climate change risks because "generalized knowledge about climate change" does not "inoculate[]" consumers and investors from deception. Opp. 33. But evidence as to what actual Massachusetts consumers and investors understood about climate change risks is undoubtedly relevant, including to establish what reasonable Massachusetts consumers and investors understood about such risks, "the circumstances" in which they interpreted ExxonMobil's statements, and whether they would have found information allegedly not disclosed to be material. FF Br. 13, 18-20. The point of discovery is to develop the record as to *what* awareness those consumers and investors actually had, and then to assess how consumers and investors with that awareness would have interpreted ExxonMobil's statements and, if there were

"insufficiently" disclosed "systemic" risks, whether the risks would have been important to them. Opp. 30-31. Rule 26 does not permit the Commonwealth to obstruct development of that record.

The Commonwealth's argument would lead to the absurd result that ExxonMobil could not even obtain discovery as to, for example, the two reports cited above related to the awareness of Massachusetts residents of the very "systemic" risks that ExxonMobil allegedly should have told them about. Such a result could not possibly comport with Rule 26.

Third, discovery of climate change risks discussed in Commonwealth files is relevant to rebut the Commonwealth's arguments that ExxonMobil hid from the world unspecified and unique information it supposedly had about those risks. *See* FF Br. 13-14. This discovery would show the extent to which the Commonwealth (and others) were aware of those allegedly concealed risks, and thus reveal they were not concealed at all. The Commonwealth fails to address this point.

C. ExxonMobil Is Entitled To Discovery About The Commonwealth's Own Fossil Fuel Consumption And Investment Decisions.

The Commonwealth alleges that ExxonMobil deceived Massachusetts investors and consumers of fossil fuels, including itself. It is inconceivable therefore that the Commonwealth's own fossil fuel investments and purchases have no bearing in the case. Opp. 33.

First, the Commonwealth's consumption and investment decisions are made by Commonwealth employees. Discovery about the conduct and knowledge of those state procurement officials is no less relevant than the conduct and understanding of other Massachusetts consumers and investors. For example, discovery about the decisions of Commonwealth employees to buy Mobil 1 oil for the State Police will contribute to the overall factual record as to whether information about "systemic" climate change risks was material to Massachusetts consumers and whether reasonable consumers would have been deceived by ExxonMobil's statements about Mobil 1. (The Commonwealth concedes, as it must, that this case

"concerns how Massachusetts . . . consumers interpreted ExxonMobil's" statements. Opp. 28.)

Second, the Commonwealth argues that it is not "a proxy" for "a Massachusetts consumer" because the Commonwealth's fossil fuel consumption decisions are informed by "sophisticated subject matter experts," whereas the decisions of other Massachusetts consumers are not. *See* Opp. 34. Massachusetts consumers undoubtedly have a wide range of sophistication; that some consumers may be relatively more sophisticated than others is no basis to allow discovery about unsophisticated consumers but preclude discovery about more savvy ones. *See, e.g.*, *In re Generic Pharms.*, 571 F. Supp. 3d 406, 410 (E.D. Pa. 2021) (state agencies' records of their own purchases of drugs were relevant to consumer protection claim brought by state alleging inflated drug prices).

Moreover, the Commonwealth's continued fossil fuel investments and consumption *despite* its "sophisticated" awareness of climate change risks shows that even well-informed consumers and investors did not change their habits despite a greater awareness of those risks, contrary to its allegations that "fully" informed consumers would "act differently." Am. Compl. ¶ 710. And, in any event, discovery is needed as to which Commonwealth consumption and investment decisions *were* informed by "sophisticated" experts, what information they possessed, and whether the information was important to those decisions. The Commonwealth protests that it would "rarely be able to hold companies accountable" for deception if they could use its "own knowledge to defeat such a claim." Opp. 34. The point here is not that the Commonwealth's knowledge "defeats" claims. Discovery about the Commonwealth's knowledge as consumer and investor will inform the mosaic of what reasonable Massachusetts consumers and investors knew about systemic risks, and whether insufficiently disclosed risks, as alleged, were material to them.

Third, the Commonwealth asserts that its disclosures of climate change risks in its bond offerings are irrelevant because it is not an "oil and gas" company and so should not be compared

to such companies. Opp. 36. But discovery as to all climate risk disclosures the Commonwealth made will factor into the reasonableness of ExxonMobil disclosures about similar risks. Moreover, the Commonwealth refers to revenue from fossil-fuel-connected sources, such as gasoline taxes, when issuing bonds. FF Br. 19-20 n.18. Discovery about the extent to which the Commonwealth assessed "systemic" climate risks to this revenue to be material to Massachusetts investors, and so require disclosure, "may lead to the discovery of admissible evidence" about the extent to which those risks are material to such investors. *See* Opp. 36 n.10.[4]

At trial, the parties can address the weight to be given the Commonwealth's conduct. But Rule 26 requires the Commonwealth to produce responsive discovery so that the record can be developed and to allow ExxonMobil a full and fair opportunity to litigate the claims and defenses.

D. The Commonwealth Must Search For And Produce Records Related To *Massachusetts* v. *EPA* And *Kain* v. *DEP* About Climate Change Risks.

The Commonwealth lacks any legitimate basis for its refusal to produce documents relating to *Massachusetts* v. *EPA* and *Kain* v. *DEP*. It argues that "statements in legal briefs" do not establish consumers' and investors' "knowledge" of climate change risks. Opp. 37. That is not the issue here. Based on public filings related to those matters, it is apparent that the Commonwealth's files about the matters are likely to contain discoverable and responsive records showing the state of consumers' awareness in Massachusetts about so-called "systemic" climate change risks. The Commonwealth's belief that some responsive records will be subject to attorney-client privilege or work product claims does not allow it to wholesale refuse searching for responsive, non-privileged documents to satisfy its discovery obligations. *See* Opp. 38. It must

[4] The Commonwealth also suggests its production of some PRIM records satisfies its discovery obligations as to its own investments. Opp. 36. But even if the Commonwealth had produced all responsive PRIM records, it would still have to produce records of its other investments, including in the Development Finance Agency's STAR Fund and Treasury's SMART Plan.

search for and produce non-privileged documents and set forth the bases for withholding others. The Commonwealth also boasts that it finally has produced some documents in response to other RFPs. *Id.* But it said in a cover letter that the production "does not contain documents from *Massachusetts v. EPA* or *Kain*" and instead consists of "publicly available comment letters and briefs." Opp. Add. 407. Partial production of responsive records—and barely one, at that—does not excuse the Commonwealth's failure to produce the balance.[5]

II. The Commonwealth Must Search For And Produce Responsive Documents In The Files Of Relevant Commonwealth Agencies.

The Commonwealth has failed to justify its refusal to comply with its discovery obligation as a party to produce responsive records from relevant Commonwealth agencies.

A. The Commonwealth, Not The AGO, Is The Plaintiff.

The Commonwealth claims that Chapter 93A's "text" makes the Attorney General, not the Commonwealth, the "real party in interest" because it authorizes her to sue "in the name of the commonwealth." Opp. 10. That claim ignores that "every action shall be prosecuted in the name of the real party in interest," and only a "proper plaintiff" may bring a claim. Mass. R. Civ. P. 17(a); *Mass. Ass'n* v. *Comm'r of Ins.*, 373 Mass. 290, 801 (1977). It also ignores that G.L. c. 93A, § 4 requires any penalties to be paid "to the commonwealth," not the AGO. Thus, Chapter 93A's text makes the Commonwealth the "real party in interest," and the party for discovery purposes.

The Commonwealth relies to no avail on *New York ex rel. Boardman*, in which New York's Department of Transportation sued Amtrak for breach of contract under authority to sue on its own behalf in the state's name. 233 F.R.D. 259, 265 (N.D.N.Y. 2006). The court denied discovery from the state's Comptroller because the state was only nominally the plaintiff, as the agency had

[5] The Commonwealth produced the records, which it suggests respond to RFP Nos. 34-35, despite telling this Court there would be "no compromise" on those requests. Priv. Br. Ex. 2 at 31:14-17.

sued to protect its *own* interests. *Id.* But the Commonwealth is not the nominal plaintiff in a suit to vindicate the AGO's rights. Indeed, it has taken the position that it is suing in its *parens patriae* capacity to vindicate the "State's sovereign . . . interests." Ex. 3 at 20 & n.20 (federal court brief).

The Commonwealth also raises the specter that ordering it to search files outside of the AGO will "expose any and all state agencies to party discovery." Opp. 11. Not so. The order ExxonMobil seeks would compel a search of only "agencies and offices likely to have relevant records." Agency Br. 13. The Commonwealth's discovery obligations, like any plaintiff's, are commensurate with the scope of its case. Because the complaint alleges decades of misconduct, involving the knowledge of and decisions by countless Massachusetts consumers and investors, including the Commonwealth, the complaint as filed creates commensurate discovery obligations.

B. *Ortho-McNeil* Does Not Excuse The Failure To Produce Agencies' Records.

Ortho-McNeil does not stand for the proposition the Commonwealth advances, that its discovery obligations never extend beyond the AGO's files in a Chapter 93A suit. Opp. 2. To the contrary, in that case, the Commonwealth brought a far narrower consumer deception claim than at issue here, the defendant sought sweeping discovery from every Commonwealth agency, department, and political subdivision, and the court was concerned that the Governor was not even aware of the case. 2012 WL 5392617, at *3. Under such circumstances, the court held that requiring production of other agencies' files would upset the constitutional balance of power. *Id.* It did *not* hold that the Commonwealth can never be compelled to produce files from its agencies. If that were the black-letter law, then the *Ortho-McNeil* court's consideration of the breadth of the discovery requests, or the Governor's knowledge of the case, would have been irrelevant.

Moreover, even if the Court were to apply the framework from *Ortho-McNeil* to this case, the Commonwealth's discovery obligations would not be limited to the AGO's files. Here, unlike in *Ortho-McNeil*, the Commonwealth made "massive and wide ranging" allegations,

ExxonMobil's discovery requests are tied to those allegations, and the Governor is well aware of the case. Agency Br. 15. Indeed, the federal court in *In re Generic Pharmaceuticals* recently faced similar facts—"wide-ranging claims" seeking substantial recoveries and of which the Governor was aware—and ordered the AGO to produce records from other agencies, notwithstanding *Ortho-McNeil*. *Id.* 16; 2023 WL 6985587, at *4 & n.23 (E.D. Pa. Oct. 20, 2023). The Commonwealth's only response is that *Generic* applied the wrong burden of proof. Opp. 13 n.3. But that court's analysis of *Ortho-McNeil* had nothing to do with the burden of proof. Any effort to distinguish *Generic* rings hollow given that defendants in that case stated on January 19, 2024 that the Commonwealth had "met [its] production obligations." Ex. 4 at 1-2. This indicates that the Commonwealth can and will search for and produce documents from state agencies.[6]

C. The Rule 45 Subpoenas Do Not Excuse The Commonwealth's Failure.

The Commonwealth is simply wrong that ExxonMobil "[e]ffectively [a]ccepted" *Ortho-McNeil* when it served subpoenas on some state agencies. Opp. 14. ExxonMobil has repeatedly informed the Commonwealth that *Ortho-McNeil* does not "absolve[] the Commonwealth of its discovery obligations." Ex. 5 at 5; FF Br. Ex. 5 at 7-8. ExxonMobil has continued to pursue Rule 45 subpoenas to agencies in parallel to meeting and conferring with the Commonwealth to avoid delaying discovery; ExxonMobil should not be punished for having done so.

Nor, contrary to the Commonwealth's claim, are Rule 45 subpoenas adequate substitutes for party discovery. Opp. 9. Under Rule 45, a non-party is "entitled to a greater measure of

[6] Nor does the Commonwealth address, let alone defend, errors in *Ortho-McNeil*'s reasoning. As ExxonMobil explained, the *Ortho-McNeil* opinion ignored that the AGO is the Commonwealth's "chief law officer," with plenary power over its legal affairs. Agency Br. 9-10. Commonwealth agencies do not "operate outside of" the AGO's authority, Opp. 13; the AGO "alone has control over the conduct of litigation involving the Commonwealth [and] its agencies," *Clerk of Superior Ct.* v. *Treas.*, 386 Mass. 517, 526 (1982). Indeed, if the AGO decided that an agency had to produce discovery in this case, but the Governor disagreed, the AGO's decision would prevail.

protection" than a party, *Strom* v. *Am. Honda Motor Co.*, 423 Mass. 330, 343 (1996), and ExxonMobil "must take reasonable steps to avoid imposing undue burden or expense," Mass. R. Civ. P. 45(b). Predictably, many agencies have made "undue burden" objections under Rule 45 that are not available to the Commonwealth and have produced few documents.[7] ExxonMobil is effectively being whipsawed: The Commonwealth refuses to produce relevant discovery on the ground that documents outside of AGO files should be obtained through subpoenas, but the agencies argue that Rule 45 protects them as non-parties from producing responsive documents. The Court should not countenance this conduct.[8]

III. The Commonwealth Must Produce Relevant Communications With Other State AGs And Matthew Pawa (RFP Nos. 39-42).

The Commonwealth's expansive view of the common interest doctrine, which is supported by no case, and its ever-shifting theory of an attorney-client relationship with Pawa should be rejected.

A. Invoking The Phrase "Common Interest" Does Not Shield Communications Among State AGs That Just Want To Investigate The Fossil Fuel Industry.

The Commonwealth has failed to meet its burden of showing that all communications with other state AGs are protected by the common interest doctrine. *First*, the Commonwealth's near-limitless view of the common interest doctrine should be rejected. According to the Commonwealth, all state AGs that are investigating or prosecuting any fossil fuel company for

[7] For example, the Office of the Treasurer objected to ExxonMobil's subpoena on the grounds that the subpoena would "impose undue burden . . . in violation of Mass. R. Civ. P. 45(b)" and "[t]he Treasury is not a party to this dispute." Ex. 7 at 1. The Treasurer has not produced any documents. Nor have the Departments of Environmental Protection, Energy Resources, or Public Utilities, each of which cited burden concerns under Rule 45 as recently as January 15, 2024.

[8] The argument that agencies have "non-AGO counsel" is irrelevant and misleading. Opp. 14. The AGO may right now be coordinating with and supervising "non-AGO counsel." And, if ExxonMobil moved to compel an agency, *the AGO* would be required to represent the agency in the litigation. *See* G.L. c. 12, § 3; G.L. c. 6C, § 18; *Alliance* v. *Comm.*, 425 Mass. 534, 537 (1997).

any conduct related to climate change "share common interests" that protect all of their communications, so long as that investigation (or prosecution) includes ExxonMobil and includes "at least one claim under a state consumer protection act or comparable state common law."[9] Opp. 16. The Commonwealth cites no case recognizing a common interest that broad, and the law defines cognizable common interests far more narrowly. *See* Priv. Br. 18-20 & n.10.

Second, lacking any legal authority, the Commonwealth cites the AGs' descriptions of their shared interest in the 2020 and 2016 Common Interest Agreements ("CIAs"). Even assuming the 2020 CIA accurately reflected the purported common interest among the various AGs who signed it, none of the considerations it sets forth—for example, that ExxonMobil ended up being a defendant in each litigation mentioned in the 2020 CIA, or that the AGs believed the matters "shar[ed] . . . causes of action (including consumer protection or consumer fraud claims)," or that the AGs "share[d] aims" and would "benefit from" sharing information—would have created a sufficient common interest among the AGs under the law. *See* Opp. 17-18 & Add. 163.[10]

The 2016 CIA also lists a generic litany of purported common interests, including "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." Opp. 19. But that misses the point. Whether each member of a group of AGs decides it may want to investigate the fossil fuel industry based on supposition about potential misconduct does not create a "common interest" under the law.

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[9] The one case the Commonwealth cites addressed a different issue: whether the *work product* doctrine covered some communications among a group of AGs. *Energy Policy Advocates* v. *Att'y General's Office*, 2023 WL 4983137, at *4-5 (Vt. 2023). That court "decline[d] to speculate" on the application of the common interest doctrine, the issue in this case. *Id.* at *5.

[10] Nor could the AGs retroactively cloak communications with a privilege that did not exist when the communications were made. *See Hudson* v. *Gen. Dynamics Corp.*, 186 F.R.D. 271, 277 (D. Conn. 1999) ("There is no such thing as a retroactive attorney client privilege to protect communications with the attorney before any attorney-client privilege relationship existed.").

Third, ExxonMobil's position as to the Commonwealth's claim of common interest is not "contradictory." Opp. 22. ExxonMobil's *res judicata* and collateral estoppel defenses argue the Commonwealth and New York were in privity, such that the New York court's decision in favor of ExxonMobil binds the Commonwealth. Priv. Br. 17. Denying that alignment, the Commonwealth refuses discovery by claiming common interest protection as to all records. *That* is contradictory: the Commonwealth avoids *res judicata* by arguing that its interests were not closely aligned with New York's, but then resists discovery of communications by arguing that its interests *were* closely aligned with New York's.

B. Records About ExxonMobil And The Substance Of This Case Are Relevant.

The Commonwealth does not contest that at least some records about ExxonMobil and about the "substance" of the complaint are relevant. Opp. 23-26. Nor could it. Responsive records about the defendant in this case, or about the allegations in the complaint, are obviously relevant. Priv Br. 17. The Commonwealth does complain that the RFPs are "overbroad" because some records about ExxonMobil may not be relevant, but it neither explains why that is nor addresses its steadfast refusal to negotiate the scope of the RFP Nos. 40-41. Opp. 25-26.

The Commonwealth also insists that records about the "What Exxon Knew" presentation are irrelevant, ignoring its own repeated assertions that "[t]his case . . . concerns ExxonMobil's knowledge." *Id.* at 28. Indeed, in 2016, the Commonwealth's AG announced this case by stating that there was a "troubling disconnect between *what Exxon knew*" about climate change and what it said. *Mass.* v. *Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 34 (D. Mass. 2020) (quoting the AG) (emphasis added). Documents related to a presentation purportedly about what ExxonMobil "knew" are plainly relevant to "ExxonMobil's knowledge." Given this, it is troubling that, after fighting this request for years, the Commonwealth admits in a footnote that it now "has searched

for a copy" of the presentation but "has not discovered a copy." *Id.* at 25 n.6.[11]

C. The Commonwealth Must Produce Communications With Matthew Pawa.

The Commonwealth concedes that it improperly withheld communications with Pawa on the ground that all such communications were subject to the attorney-client privilege, agreeing to produce "some additional materials" that pre-date and post-date the period in which it purportedly considered retaining Pawa to represent the Commonwealth. Opp. 27. But the Commonwealth must identify the dates on which it asserts that the period of consideration began and ended. And it must produce all responsive records outside of that time period, not just "some" records, as it has no claim of privilege over records outside the period in which it allegedly considered retaining Pawa. Nor may the Commonwealth withhold all "documents or communications that were *exchanged or occurred* during" its period of consideration. Opp. 27 (emphasis added). At most, it could withhold the subset of communications "undertaken for the purpose of obtaining legal advice." *Att'y Gen.* v. *Facebook*, 487 Mass. 109, 121 (2021). The Commonwealth also fails to justify withholding "proposals" initiated by Pawa, because unprompted attorney solicitations are not privileged. *See, e.g.*, *Sell* v. *Gama*, 2012 Ariz. App. Unpub. LEXIS 378, at *7 (Mar. 22, 2012). At the very least, it must show that Pawa-initiated "proposals" reflect privileged information.

IV. The Commonwealth Must Identify The Parties To Communications It Is Withholding Based Upon The Work Product Doctrine (RFP Nos. 6-8, 10).

The Commonwealth asserts that it may withhold communications as protected work product while refusing to identify the parties to those communications, thereby preventing ExxonMobil and the Court from assessing its assertions. The Commonwealth cites no authority

[11] The Commonwealth says ExxonMobil "waived" RFPs 40-41 as to records about the timing of the complaints because it "failed to justify that request." Opp. 23. But ExxonMobil explained that records responsive to RFPs 39-42 are relevant to its collateral estoppel and *res judicata* defenses. Priv. Br. 17. The Commonwealth may disagree with the argument, but it was certainly not waived.

for such a proposition. Nor does the Commonwealth comply with Rule 26(b)(5)(A)(ii), which requires a withholding party to "describe" withheld communications "in a manner that . . . will enable other parties to assess the claim," or explain how it has otherwise satisfied that rule.

The Commonwealth argues that it is not required to provide "a complete list of everyone the Attorney General has contacted." Opp. 38. But ExxonMobil is not seeking such a list through this motion, and granting the motion does not require the Commonwealth to provide one. Instead, ExxonMobil seeks basic information that is routinely provided in discovery—the identities of third parties to written communications being withheld as work product—to assess work product claims. The Commonwealth also continues to cite *Commonwealth* v. *First National Supermarkets*, 112 F.R.D. 149 (D. Mass. 1986), but never confronts that, as ExxonMobil has explained, the case addresses only whether the identities of *interviewees* in a privileged, internal investigation are protected as work product. Priv. Br. 8-10.[12] And the Commonwealth cites no authority for reading *First National* as superseding the requirements of Rule 26 with respect to written discovery. Most notably, *Commissioner of Revenue* v. *Comcast* considered whether a party had properly withheld *documents* under the attorney-client privilege and work-product doctrine. 453 Mass. 293, 294, 299 n.14 (2009). The withholding party in *Comcast* identified the parties to those withheld communications—in other words, it did exactly what the Commonwealth refuses to do here. *Id.*[13]

CONCLUSION

ExxonMobil respectfully requests that this Court grant the three motions to compel.

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[12] The Commonwealth speciously argues that limiting *First National* to "interviews in the context of an internal investigation" would "provide corporate defendants" protection unavailable to others. Opp. 40. But the case applies to any organizational party, including the Commonwealth.

[13] *U.S.* v. *Bank Julius Baer* and *Chiperas* v. *Rubin* stand for the same proposition as *First National*, that who "counsel determined were worth interviewing" is protected work product. 270 F. Supp. 3d 220, 225 (D.D.C. 2017); 1998 WL 531845, at *1 (D.D.C. Aug. 24, 1998). That reasoning has been rejected, *see* Priv. Br. 8-9 & n.3, and these holdings are just as inapposite as *First National*'s.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas C. Frongillo, counsel for Defendant Exxon Mobil Corporation, hereby certify that on January 31, 2024, I caused a copy of this Consolidated Reply Memorandum of ExxonMobil to the Commonwealth's Opposition to the Motions to Compel to be served on counsel of record by electronic service.

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