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**

REPLY MEMORANDUM IN SUPPORT OF EXXON MOBIL CORPORATION'S MOTION TO COMPEL THE COMMONWEALTH TO PRODUCE ADVERTISEMENTS FOR FOSSIL FUEL PRODUCTS BY INDUSTRY COUNTERPARTS

The Commonwealth has alleged that ExxonMobil omitted information about climate change risks in its product advertisements in an effort to deceive Massachusetts consumers into buying ExxonMobil products rather than products from other companies. Mot. at 2. According to the Commonwealth, the information ExxonMobil allegedly omitted would have been material to Massachusetts consumers in deciding which company's fossil fuel products to purchase. Ex. 3 at 137. The Commonwealth has further admitted that, in making decisions about which company's fossil fuel products to purchase, Massachusetts consumers also "would consider, among other things, what ExxonMobil's competitors have said publicly about their products." Ex. 4 at 111–13, 292–94. Thus the Commonwealth's Opposition to this Motion does not, and could not, dispute that, if other companies' advertisements also did not include information about climate-change risks, then the purported omission of such information in ExxonMobil advertisements could not have been a point of differentiation for Massachusetts consumers.

Despite this record, the Commonwealth maintains that ExxonMobil should not be entitled to party discovery about other companies' advertisements for gasoline and motor oil. But, having put the purchasing decisions of Massachusetts consumers squarely at issue, the Commonwealth cannot now refuse to produce relevant discovery with respect to how it has framed this case. The Commonwealth may want to litigate its claims in a vacuum and pretend that Massachusetts consumers were not exposed to any speech other than cherry-picked snippets of ExxonMobil advertisements, but that is not true, nor is it accurate even based upon the Commonwealth's own allegations. Massachusetts consumers were presented with myriad statements and advertisements about fossil fuels, including by other companies that sold gasoline and motor oil. Discovery as to those other statements bears on the Commonwealth's allegations, and its objections to RFP Nos. 137–138 should be rejected.

First, the Commonwealth argues that "the AGO case team did not collect advertisements from other fossil fuel companies," so it would be "unduly burdensome" for the AGO to determine whether "other case teams" have responsive records. Opp. at 3. But the AGO is required to conduct a reasonable search to respond to RFP Nos. 137–38, not an artificially constrained search of the files of one, undefined "AGO case team." Indeed, the parties litigated an entire motion as to the scope of the Commonwealth's party discovery obligations, during which the Commonwealth conceded "that the Attorney General's 'discovery obligations are limited to producing documents in the possession of her office.'" Dkt. No. 102 at 9–10, Comm.'s Opp. ExxonMobil's Motions to Compel (quoting *Commonwealth* v. *Ortho-McNeil-Janssen Pharms., Inc.*, 2012 WL 5392617 (Suffolk Super. Ct. Oct. 5, 2012)). This Court then reaffirmed that point in its decision, holding that the Commonwealth's discovery obligations extend to documents "in the possession, custody and control of the Attorney General's Office." Dkt. No. 158 at 9. The AGO did not argue in that earlier dispute that the scope of its discovery obligations should be further limited to just those documents in the possession of one "AGO case team," and this Court imposed no such limit.

Second, the Commonwealth contends that "examin[ing] the comparative deceptiveness of other company advertisements" would require "mini trials." Opp. at 2. But the issue here is whether the Commonwealth's allegations as to ExxonMobil advertising, including about materiality, hold up under even basic scrutiny. "Examining" whether other companies' advertisements include information allegedly omitted from ExxonMobil advertisements would not lead to "mini trials"; that examination is a central part *of the trial itself.* For example, the Commonwealth cannot prove the omission of climate-change risks would have been material to Massachusetts consumers who were deciding whether to buy ExxonMobil products, or products from competitors, if the advertisements for those competitors' products omitted the same climate-

change information that was allegedly omitted from ExxonMobil's advertisements.

Third, the Commonwealth repeats (yet again) that ExxonMobil seeks discovery to support a "selective enforcement defense." Opp. at 2. Not so. As discussed, RFP Nos. 137–38 seek discovery that bears on the Commonwealth's own allegations. Mot. at 2–4, 5–8. ExxonMobil is not using, and will not use, such discovery to argue "selective enforcement." Nor does the Commonwealth offer any response, in its perfunctory three-page opposition, to the cases cited in ExxonMobil's motion, which establish that courts have considered evidence about competitors' practices and industry standards, such as the discovery sought here, when evaluating Chapter 93A claims. Mot. at 9–10.

Fourth, the Commonwealth argues that ExxonMobil is seeking to "obtain insight into the AGO's investigation of other fossil fuel companies." Opp. at 3. ExxonMobil seeks no such thing. What is relevant here is the theory that the AGO is advancing *against ExxonMobil*, a theory that presumes ExxonMobil's advertising was somehow different in kind from other companies' advertising and that such a difference was material to Massachusetts consumers. ExxonMobil is seeking discovery to rebut that claim. Nor would producing pre-existing advertisements infringe on any legitimate claim of work product by the AGO. Opp. at 1. ExxonMobil is not seeking internal AGO records about any investigations; ExxonMobil is merely seeking actual competitor advertisements within the files of the Attorney General. *See* Mot. at 11–12.

Finally, the Commonwealth argues that ExxonMobil's motive for seeking the discovery at issue here is called into question by the fact that ExxonMobil has not served third-party subpoenas on other fossil fuel companies. But ExxonMobil's other efforts to obtain relevant documents have no bearing on whether the Commonwealth, as the plaintiff, must conduct a reasonable search and produce records response to RFP Nos. 137–38. *See* Mot. at 11. In any event, ExxonMobil *has*

sought advertisements about other fossil fuel products through Rule 45 subpoenas. *See* Exhibit 12 to the Supplemental Affidavit of Jack W. Pirozzolo (Subpoena to JCDecaux).

It also is worth noting that both the Commonwealth and Commonwealth agencies have, in other briefing, faulted ExxonMobil for pursuing discovery from third parties. *See, e.g.*, Dkt. No. 204 at 4, DEP and OSD's Mot. to Quash (listing third parties that DEP and OSD believe should not have received subpoenas); Dkt. No. 206, Commonwealth's Letter of Support (joining in DEP and OSD's arguments). Yet, the Commonwealth now conveniently reverses course, and faults ExxonMobil for *not* pursuing enough third-party discovery. The Commonwealth's position really seems to be that ExxonMobil should not be allowed to present a vigorous defense to the case the Commonwealth brought. But that is not the law in Massachusetts.

Therefore, this Court should grant ExxonMobil's Motion to Compel, and order the Commonwealth to search for and produce documents responsive to RFP Nos. 137–38.

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Respectfully submitted,

SIDLEY AUSTIN LLP

/s/ Jack W. Pirozzolo
Jack W. Pirozzolo (BBO No. 564879)
jpirozzolo@sidley.com
60 State Street, 36th Floor
Boston, MA 02109
(617) 223-0304

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
David K. Kessler (*pro hac vice*)
dkessler@paulweiss.com
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

Counsel for Exxon Mobil Corporation

CERTIFICATE OF SERVICE

I, Jack W. Pirozzolo, counsel for Defendant Exxon Mobil Corporation, hereby certify that on July 10, 2025, I caused a copy of the foregoing document to be served on the Massachusetts Office of the Attorney General by e-mail.

Commonwealth of Massachusetts

RICHARD A. JOHNSTON (BBO # 253420)
Chief, Energy and Environment Bureau
SETH SCHOFIELD (BBO # 661210)
Senior Appellate Counsel, Energy and Environment Bureau
EZRA D. GEGGEL (BBO #691139)
BRIAN CLAPPIER (BBO #569472)
Assistant Attorneys General, Environmental Protection Division
JAMES SWEENEY (BBO# 543636)
State Trial Counsel, Government Bureau
Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108
Tel: (617) 963-2428
richard.johnston@mass.gov
seth.schofield@mass.gov
ezra.geggel@mass.gov
brian.clappier@mass.gov
jim.sweeney@mass.gov

/s/ Jack W. Pirozzolo
Jack W. Pirozzolo (BBO No. 564879)
jpirozzolo@sidley.com
60 State Street, 36th Floor
Boston, MA 02109
(617) 223-0304