COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

NO. 2017-P-0366

EXXON MOBIL CORPORATION,

Petitioner-Appellant,

v.

OFFICE OF THE ATTORNEY GENERAL
OF THE COMMONWEALTH OF MASSACHUSETTS,

Respondent-Appellee.

ON APPEAL FROM SUFFOLK SUPERIOR COURT
CIVIL ACTION NO. 16-1888F

PETITIONER-APPELLANT'S BRIEF

EXXON MOBIL CORPORATION
Patrick J. Conlon
(pro hac vice)
Daniel E. Bolia
(pro hac vice)
1301 Fannin Street
Houston, TX 77002
Tel: 832-624-6336
patrick.j.conlon@exxonmobil.com
daniel.e.bolia@exxonmobil.com

FISH & RICHARDSON P.C.
Thomas C. Frongillo
(BBO# 180690)
Caroline K. Simons
(BBO# 680827)
One Marina Park Drive
Boston, MA 02210
Tel: 617-542-5070
frongillo@fr.com
simons@fr.com

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
Theodore V. Wells, Jr.
(pro hac vice)
Daniel J. Toal
(pro hac vice)
1285 Avenue of the Americas
New York, NY 10019
Tel: 212-373-3000
twells@paulweiss.com
dtoal@paulweiss.com

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
Justin Anderson
(pro hac vice)
2001 K Street
NW Washington, DC 20006
Tel: 202-223-7300
janderson@paulweiss.com

Dated: May 1, 2017

RULE 1:21 CORPORATE DISCLOSURE STATEMENT ON POSSIBLE JUDICIAL CONFLICT OF INTEREST

Pursuant to Supreme Judicial Court Rule 1:21, Exxon Mobil Corporation hereby states that it is a publicly-held corporation, shares of which are traded on the New York Stock Exchange under the symbol XOM. Exxon Mobil Corporation has no parent corporation, and no entity owns more than 10% of its stock.

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I. STATEMENT OF THE ISSUES

1. The Superior Court exercised personal jurisdiction over ExxonMobil, a non-resident corporation, based solely on a licensing agreement between ExxonMobil and independent Massachusetts retailers that created no agency relationship and, in any event, is irrelevant to the substantive issues. Did that decision violate Supreme Court precedent holding that the Due Process Clause requires specific personal jurisdiction to arise from a party's own suit-related contacts with the forum?

2. When setting aside ExxonMobil's objections to a civil investigative demand ("CID"), the Superior Court announced a new rule that a CID cannot be overbroad or unduly burdensome unless compliance with it would "seriously interfere" with the responding party's normal activities. The Superior Court went on to hold that this standard cannot be met if the responding party is already complying with a different demand for similar records issued by another government agency. Is this new rule of extreme deference to executive power consistent with the requirements of judicial review under Massachusetts law?

3. ExxonMobil made a prima facie showing that the Attorney General's asserted grounds for investigating ExxonMobil were pretexts and not honestly held. Did the Superior Court err by refusing to conduct an independent evaluation of those grounds to determine whether they were, in fact, mere pretexts?

4. The Attorney General publicly announced before she issued the CID that ExxonMobil had deceived the public and "must be held accountable" for its perceived opposition to climate change policies advocated by the Attorney General. Faced with this uncontested factual record, was it error for the Superior Court to conclude that there was "no actionable bias" displayed by the Attorney General?

5. A federal court is currently considering ExxonMobil's earlier-filed action challenging the Attorney General's investigation on constitutional grounds. Should the Superior Court have stayed this action pending resolution of the earlier filed case, which could wholly dispose of the dispute?

II. STATEMENT OF THE CASE

A. Nature of the Case

This action raises important questions about

the limits of executive power and the vital role of judicial review in enforcing those limits. In the Superior Court, Exxon Mobil Corporation ("ExxonMobil"), a non-resident New Jersey corporation headquartered in Texas,[1] challenged a CID issued by the Massachusetts Attorney General compelling production of documents located outside Massachusetts about ExxonMobil's statements and activities outside Massachusetts. The Superior Court (Brieger, J.) denied ExxonMobil's motion, pursuant to G.L. c. 93A, § 6(7), to set aside, modify, or issue a protective order with respect to the CID, and allowed the Attorney General's cross-motion, pursuant to G.L. c. 93A, § 7, to compel compliance with the CID. In this appeal, ExxonMobil seeks reversal or vacatur of those rulings.

B. Course of Proceedings

On April 19, 2016, the Attorney General issued a CID to ExxonMobil, purporting to investigate "potential violations of M.G.L. c. 93A, §2" ("Chapter 93A") through "the marketing and/or sale of energy and other fossil fuel derived products to consumers in the

[1] J.A. 64 (Affidavit of Robert Luettgen, dated June 14, 2016 ("Luettgen Aff.") ¶¶ 3-4).

Commonwealth of Massachusetts," and "the marketing and/or sale of securities . . . to investors in the Commonwealth."[2] In effect, the CID sought the production of forty years of materials, encompassing essentially all ExxonMobil documents relating to climate change.

On June 15, 2016, ExxonMobil filed a complaint for declaratory and injunctive relief in the United States District Court for the Northern District of Texas. Exxon Mobil Corp. v. Healey, No. 4:16-cv-469-K (N.D. Tex.).[3] That lawsuit challenges the investigation on constitutional grounds not raised in this action.

Solely to preserve its rights under G.L. c. 93A § 6(7) and avoid the risk of waiver, ExxonMobil filed a petition in Suffolk County Superior Court on June 16, 2016, seeking relief from the CID. The Superior Court heard oral argument on ExxonMobil's motion and the Attorney General's cross-motion on December 7, 2016.

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[2] J.A. 92.

[3] J.A. 216-48. That action has been transferred to the United States District Court for the Southern District of New York, where it is currently pending. Exxon Mobil Corp. v. Healey & Schneiderman, No. 1:17-cv-02301 (S.D.N.Y. Mar. 30, 2017), ECF No. 181.

C. Disposition in Superior Court

On January 12, 2017, the Superior Court denied ExxonMobil's challenge to the CID and granted the Attorney General's motion to compel.

First, the court held that it had personal jurisdiction over ExxonMobil under G.L. c. 223A, §3(a) of the Massachusetts long-arm statute, which provides for jurisdiction where a party "either directly or through an agent transacted any business in the Commonwealth." Order 3, 6 (internal quotation marks omitted).[4] To support this conclusion, the Superior Court relied exclusively on a licensing agreement—known as a Brand Fee Agreement ("BFA")—between ExxonMobil and independently owned and operated retail service stations. Id. at 3-8. The BFA authorizes those stations to distribute fossil fuel products to Massachusetts consumers under the "Exxon" or "Mobil" brand name, but it does not create an agency relationship or pertain in any way to climate change, the subject of the CID.[5]

The court rejected ExxonMobil's due process

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[4] "Order" refers to the Order entered by the Superior Court on January 12, 2017, which is the subject of this appeal. J.A. 1596-1609.

[5] J.A. 1540 (BFA § 42).

objections because, "[i]f the court does not assert its jurisdiction in this situation, then G. L. c. 93A would be 'de-fanged,'" a rationale which rests uneasily with settled precedent. Order 7. Similarly unmoored from precedent, the court saw no barrier in the Due Process Clause to jurisdiction "insofar as Exxon delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in all states, including Massachusetts." Order 7-8.

Second, the Superior Court found that the CID was not unreasonably burdensome or unspecific. Articulating a new, narrow, and highly deferential standard for undue burden, the court held that a CID is unreasonably burdensome "only when" the demands "seriously interfere with the functioning of the investigated party." Order 11 (internal quotation marks omitted). ExxonMobil could not meet this standard, in the Court's view, because of its compliance with the New York Attorney General's purportedly "similar" subpoena. Order 11.

Third, when determining that the CID was not issued arbitrarily or capriciously, the Superior Court accepted the Attorney General's stated belief that

ExxonMobil misled consumers about climate change but did not examine evidence showing that the belief was pretextual. See Order 8-9.

Fourth, the Superior Court rejected ExxonMobil's request to disqualify the Attorney General from this action. The court held that the Attorney General's public statements about the "troubling disconnect between what Exxon knew" and what it "chose to share with investors and with the American public" and her pledge to hold ExxonMobil "accountable" did not show bias. Order 12-13.

Finally, the Superior Court denied ExxonMobil's motion to stay this action pending resolution of a motion then seeking provisional relief in federal court because a Massachusetts court is "more familiar" with Chapter 93A. Order 13-14.

On February 8, 2017, ExxonMobil timely filed a notice of appeal.[6]

III. STATEMENT OF FACTS

A. ExxonMobil's Lack of Suit-Related Contacts with Massachusetts.

According to the CID, the Attorney General is investigating possible violations of Chapter 93A

[6] J.A. 1610-12.

arising from ExxonMobil's "marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth of Massachusetts" and "the marketing and/or sale of securities . . . to investors in the Commonwealth."[7]

During the relevant limitations period, however, ExxonMobil has not engaged in any trade or commerce in Massachusetts out of which a violation of Chapter 93A could arise.

ExxonMobil has not owned or operated a single retail store or gas station in Massachusetts in the last five years.[8] Any consumer purchases of ExxonMobil-branded products were made indirectly through intermediaries, such as wholesalers, retailers, and BFA holders, all of whom remain wholly independent of ExxonMobil.[9]

Likewise, ExxonMobil has not marketed or sold any securities to the general public in Massachusetts in the past five years.[10] While ExxonMobil has sold short-term, fixed rate notes (so-called "commercial paper") to sophisticated

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[7] J.A. 92 (emphasis added).
[8] J.A. 62 (Affidavit of Geoffrey Grant Doescher, dated June 10, 2016 ("Doescher June 10 Aff.") ¶ 3).
[9] J.A. 62 (Id. ¶¶ 3-4).
[10] J.A. 65 (Luettgen Aff. ¶ 7).

Massachusetts investors in the past five years, questions about the potential long-term impacts of climate change on ExxonMobil's business are irrelevant to the sale of these notes, which have maturity dates no longer than 270 days.[11] Any Massachusetts investor who purchased ExxonMobil stock (or any other long-lived security) during this period purchased such securities from third parties in the open market.

Although ExxonMobil lacks any direct connection to Massachusetts, the CID treats ExxonMobil as if the company were a Massachusetts corporation, subject to general jurisdiction in Massachusetts. But ExxonMobil is a New Jersey corporation with its principal place of business in Texas and is therefore not subject to general jurisdiction in Massachusetts.[12]

The content of the CID itself shows that the Attorney General's investigation is focused largely on activities occurring outside Massachusetts. Spanning 25 pages, the CID contains numerous requests pertaining to conduct that occurred outside Massachusetts.[13] For example, Request 8 seeks documents concerning a presentation made in Beijing,

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[11] J.A. 65 (Luettgen Aff. ¶¶ 9-10).
[12] J.A. 64 (Id. ¶¶ 3-4).
[13] J.A. 92-116.

China; Request 10 seeks documents concerning a speech given in Dallas, Texas; and Request 11 demands records concerning a speech given in London, England.[14] The CID also demands corporate materials concerning ExxonMobil securities, including the Company's SEC filings and its efforts to address shareholder resolutions, all of which are handled at ExxonMobil's headquarters in Texas.[15]

B. The Attorney General's Pledge to Hold ExxonMobil Accountable for Climate Change.

On March 29, 2016, the Attorney General announced at a press conference in New York City that she was investigating ExxonMobil because of its statements about climate change.[16] The press conference was organized by a coalition of state attorneys general, calling themselves "AGs United For Clean Power" and the "Green 20," who denounced the

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[14] J.A. 105-06.

[15] J.A. 106-08, 110 (CID Request Nos. 14, 15, 16, 19, 21, 31, 32). Of the more than 430,000 documents produced to the New York Attorney General pursuant to the subpoena that the Superior Court found to be "similar" to the CID, none were collected from the custodial files of ExxonMobil employees based in Massachusetts.

[16] J.A. 82 (Transcript of AGs United For Clean Power Press Conference). A video recording of the press conference can be found here: https://ag.ny.gov/press-release/ag-schneiderman-former-vice-president-al-gore-and-coalition-attorneys-general-across.

"morally vacant forces that are trying to block every step by the federal government to take meaningful action" on climate change.[17]

During that press conference, the Attorney General promised that those who "deceived" the public —by purportedly disagreeing with her about climate change policy—"should be, must be, held accountable."[18] According to the Attorney General, by "not hav[ing] told the whole story," ExxonMobil "le[d] many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts."[19] In the next breath, the Attorney General declared that she too had "joined in investigating the practices of ExxonMobil."[20] Revealing the prejudgment tainting her investigation, the Attorney General promised "quick, aggressive action" to "hold[] accountable those who have needed to be held accountable for far too long," a thinly veiled reference to ExxonMobil.[21] Indeed, the Attorney General revealed the preordained conclusion of her investigation, proclaiming that there was a "troubling

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[17] J.A. 72, 74.
[18] J.A. 82.
[19] J.A. 82.
[20] J.A. 82.
[21] J.A. 83.

disconnect between what Exxon knew . . . and what the company . . . chose to share with investors and with the American public."[22]

IV. ARGUMENT

A. Summary of the Argument

Judicial review of executive power is deeply rooted in the foundational creed of American democracy. It is manifestly the role of courts to enforce limits, particularly when the executive targets an unpopular speaker or disfavored views. Misconstruing this critical gatekeeping role, the Superior Court adopted a position of near total deference toward the Attorney General, not the independent review that our system requires. As a result, limits on executive power have gone unenforced in this matter.

Jurisdiction is one such limit. For Massachusetts courts to have jurisdiction over ExxonMobil for a Chapter 93A violation, it must have engaged in suit-related conduct in the forum. The relevant conduct in this lawsuit has been defined by the Attorney General's CID: consumer and investor fraud in connection with climate change. But

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[22] J.A. 82.

ExxonMobil has not engaged in any conduct in Massachusetts—innocent or culpable—that could give rise to a Chapter 93A violation. That is because ExxonMobil sells no products to consumers in Massachusetts and does not market any securities for sale to investors in Massachusetts (other than short-term debt instruments that are irrelevant here). ExxonMobil therefore engages in no suit-related conduct in the forum.

Recognizing that fact, the Superior Court improperly looked to ExxonMobil's Massachusetts-based licensee service stations to provide the requisite in-forum contacts. But even if the licensees' activities could be imputed to ExxonMobil, there is no connection between the subject matter of the Attorney General's investigation and the licensees. Nothing in the record (or common sense) suggests that the licensees made statements about climate change on behalf of ExxonMobil to consumers, much less issued ExxonMobil securities to investors. Nor is it enough after Daimler to point amorphously to ExxonMobil's "doing business" in Massachusetts. If ExxonMobil is not engaged in suit-related conduct in the forum, there can be no jurisdiction.

Massachusetts courts exist in part to impose limits on executive power. In the conduct of an Attorney General's investigation those vital limits include restricting CIDs to a reasonable scope, ensuring that CIDs are not issued arbitrarily and capriciously, and disqualifying prosecutors for bias. Here, the Superior Court refused to enforce those limits. Instead, the Superior Court announced a new rule whereby no CID can be held overly broad or burdensome unless it causes serious disruption to the responding party. That standard effectively frees the executive to impose onerous, incommensurate burdens on CID recipients with no recourse to courts. Likewise, the Superior Court's decision to accept at face value the Attorney General's justification for her actions, rather than examine ExxonMobil's prima facie case of pretext and bias, effectively removes any restrictions on executive power that is exercised in an arbitrary, capricious, or biased manner.

The rule of law requires a careful review of whether the Attorney General has exercised her power within the limits imposed by state and federal precedent. The Superior Court did not conduct that review and erred by ordering ExxonMobil to comply with

the CID. This Court should correct that error.

B. Massachusetts Courts Lack Personal Jurisdiction over ExxonMobil.

Massachusetts courts may exercise personal jurisdiction over ExxonMobil only for legal disputes that arise from ExxonMobil's own contacts with the forum. The Superior Court erred by exercising personal jurisdiction over ExxonMobil based solely on the contacts of its licensees. The licensees' contacts, however, are not attributable to ExxonMobil under settled agency law, and even if they were, they are not connected to the legal dispute at issue here. Either way, the licensees' forum contacts are incapable of supporting personal jurisdiction over ExxonMobil.

1. Personal Jurisdiction over Non-Residents Must Be Based on their Suit-Related Contacts with the Forum.

Personal jurisdiction over a party can arise in only two forms consistent with the Due Process Clause. General jurisdiction permits a court to hear "any and all claims" against a party "at home" in the forum state, which occurs when the party is incorporated or has its primary place of business in that forum. See Daimler AG v. Bauman, 134 S. Ct. 746,

760 (2014). Simply "doing business" in the state is insufficient to meet the requirements of general jurisdiction. See id. at 761, 761 n.18.

If a party is not subject to a court's general jurisdiction, it may nevertheless be subject to its specific jurisdiction. Daimler, 134 S. Ct. at 754. The court's jurisdiction will then reach only legal claims that "arise[ ] out of or relate[ ] to the [non-resident's] contacts with the forum." Id. (citation and internal quotation marks omitted). Incidental contact is insufficient. Rather, the "in-state conduct must . . . form an important, or at least material, element" of the legal claim. United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1089 (1st Cir. 1992) (citation and internal quotation marks omitted).

Under the Massachusetts long-arm statute, specific jurisdiction may be asserted over a non-resident only if the claimed injury would not have occurred "[b]ut for the defendant's" forum-state activity. Tatro v. Manor Care, Inc., 416 Mass. 763, 771 (1994) (emphasis added); G.L. c. 223A, § 3(a). Where, as here, a potential violation of Chapter 93A is at issue, the only "wrongful conduct to be

considered for purposes of personal jurisdiction . . . is that conduct which violated 93A." Roche v. Royal Bank of Canada, 109 F.3d 820, 827 (1st Cir. 1997) (citation and internal quotation marks omitted).

The Attorney General, as the "party claiming that a court has power to grant relief," bears "the burden of persuasion on the jurisdictional issue." Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 612 n.28 (1979) (citation and internal quotation marks omitted). To meet this burden, the Attorney General "must make a prima facie showing of evidence that, if credited, would be sufficient to support findings of all facts essential to personal jurisdiction." Fern v. Immergut, 55 Mass. App. Ct. 577, 579 (2002).

Challenges to personal jurisdiction are reviewed de novo. See Sullivan v. Smith, 90 Mass. App. Ct. 743, 746-47 (2016).

2. The Superior Court Improperly Exercised Personal Jurisdiction over ExxonMobil Based on Third-Party Contacts with Massachusetts.

The Superior Court asserted jurisdiction over ExxonMobil based solely on the activities of independent, third-party service stations that pay licensing fees to use the "Exxon" and "Mobil" brands.

Order 3-6.[23] It was necessary to look to these independent licensees—the BFA holders—because the record established that ExxonMobil has not transacted with Massachusetts consumers or investors.[24] While it was correct for the Superior Court to recognize that ExxonMobil's own contacts with the forum could not support personal jurisdiction, it was error to rely on the activities of independent third parties to fill that void.

The BFA holders are independent entities, not agents of ExxonMobil, and their contacts with Massachusetts cannot be attributed to ExxonMobil. The contract establishing the relationship between the BFA holders and ExxonMobil provides that "the parties will carry on their respective business pursuant to this Agreement as independent contractors in pursuit of their independent callings and not as partners, fiduciaries, agents, or in any other capacity."[25] Under the express terms of the relevant contract, no

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[23] The Superior Court recognized that, as a non-resident, ExxonMobil was not within its general jurisdiction and could be subject only to specific jurisdiction as authorized by the long-arm statute and the Due Process Clause. Order 3.

[24] J.A. 62 (Doescher June 10 Aff. ¶¶ 3-4), J.A. 65 (Luettgen Aff. ¶¶ 7-8).

[25] J.A. 1540 (BFA § 42 (emphasis added)).

agency relationship was created between ExxonMobil and its licensees.

Disregarding that unambiguous contract language, the Superior Court concluded that the BFA holders' conduct in Massachusetts could be attributed to ExxonMobil because of its contractual right to "review and approve . . . all forms of advertising and sales promotion" relating to the ExxonMobil brand. Order 5-8. In light of that control—common to nearly all brand licensing agreements—the Superior Court concluded that "Exxon retains sufficient control over the [BFA holders]" to attribute their conduct to ExxonMobil for purposes of personal jurisdiction. Order 6.

The Superior Court's conclusion will have far-reaching, harmful consequences. It undermines well-settled and important precedent governing the liability of those who license their brands subject to restrictions meant to protect the integrity and value of those brands. For example, Depianti v. Jan-Pro Franchising Int'l, Inc., holds that a franchisor's control over the "marketing, quality, and operational standards commonly found in franchisee agreements [is] insufficient to establish the close supervisory

control or right to control necessary to demonstrate the existence of a master/servant relationship." 465 Mass. 607, 615 (2013)(quoting Kerl v. Dennis Rasmussen, Inc., 273 Wis. 2d 106, 113 (2004)). The court limited franchisor liability in those circumstances as a matter of policy because "[u]nder Federal law, a franchisor is required to maintain control and supervision over a franchisee's use of its mark," id. at 615, and so extending liability "could have the undesirable effect of penalizing franchisors for complying with Federal law." Id. at 615-16.

The logic behind this rule has long been recognized by courts in Massachusetts and beyond. See, e.g., Theos & Sons, Inc. v. Mack Trucks, Inc., 431 Mass. 736, 744, 746-47 (2000) (holding franchisee dealer was not agent of franchisor manufacturer based on "agreement [that] undeniably establishes several minimum requirements" for the franchisee's work "to protect the good name of [the franchisor's] trademark that [the franchisor is] allowing another to display").

These features of a franchise agreement flow from the affirmative obligation that federal trademark law imposes on franchisors to supervise their

trademark and "are not intended 'to create a federal law of agency or to saddle the licensor with the responsibilities under State law of a principal for his agent.'" Depianti, 465 Mass. at 615 (quoting Oberlin v. Marlin Am. Corp., 596 F.2d 1322, 1327 (7th Cir. 1979)); see also Jordan K. Rand, Ltd. v. Lazoff Bros., 537 F. Supp. 587, 592-93 (D.P.R. 1982). The Superior Court's ruling, however, would impose exactly the form of agency relationship that federal trademark law sought to avoid.

The level of control extended to ExxonMobil under the BFAs is entirely consistent with that found time and again not to create an agency relationship between the brand owner and the licenses. For example, the BFA allows ExxonMobil to "review and approve" franchisee marketing, BFA § 15(a),[26] but "[m]ere approval . . . cannot be equated with control over the manner and means" of franchisee marketing. See Thomas v. Taco Bell Corp., 879 F. Supp. 2d 1079, 1085 (C.D. Cal. 2012), aff'd, 582 F. App'x 678 (9th Cir. 2014). ExxonMobil proffered evidence below that BFA holders control their own marketing,[27] and the

[26] J.A. 1525-26.

[27] See, e.g., J.A. 1504-05, J.A. 1591-94, J.A. 1508,

Attorney General—despite bearing the burden of proof —failed to offer evidence demonstrating control beyond the BFA itself. On this record, the Superior Court's decision to impose an agency relationship expressly eschewed by contract cannot stand.

3. The BFA Holders' Massachusetts Contacts Have Nothing To Do with the CID's Record Demands.

Even if the activities of the BFA holders in Massachusetts could be attributed to ExxonMobil, the Attorney General has not demonstrated that the BFA holders' contacts are related to the CID in any way. The BFA holders play no part in generating or safekeeping the records demanded by the CID, nor have they disseminated any of the statements about climate change that are purportedly the focus of the Attorney General's investigation.[28] The BFA holders are entirely irrelevant to the Attorney General's investigation, having been conscripted into this case at the eleventh hour by the Attorney General in an effort to cure a jurisdictional defect.

But the defect remains. In-forum activities

1512-14 (BFA 1, §§ 2(e)(6), 3(a), (h)), J.A. 938 (Affidavit of Geoffrey Grant Doescher, dated August 31, 2016 ("Doescher Aug. 31 Aff.") ¶¶ 4-5).

[28] See J.A. 64 (Luettgen Aff. ¶ 6), J.A. 62 (Doescher June 10 Aff. ¶ 4).

cannot provide a basis for jurisdiction when those activities are unrelated to the claims at issue.

The Superior Court improperly relied solely on the BFA holders' in-state activities to determine that the court had personal jurisdiction over ExxonMobil to compel compliance with a CID "investigating potential violations arising from Exxon's marketing and/or sale of energy and other fossil fuel derived products to Commonwealth consumers." Order 3-4. There are at least two fundamental errors in this analysis, even if the BFA holders' activities could be attributed to ExxonMobil.

First, the BFA holders' contacts provide no basis whatsoever for the CID's demands for records pertaining to "the marketing and/or sale of securities . . . to investors in the Commonwealth."[29] The Superior Court did not identify any connection between the BFA holders' in-state activities and the CID's demands related to investor fraud. That is not surprising. The BFA holders—i.e., service stations operators—have absolutely nothing to do with any

[29] J.A. 92.

transaction in ExxonMobil securities.[30]

The Superior Court's inability to link investor deception to the service stations is significant because the in-state activities of the BFA holders was the sole basis for exercising personal jurisdiction over ExxonMobil. See Order 3-8. For the Superior Court to compel ExxonMobil's compliance with the CID's demands related to investor fraud, it was necessary to link those demands to the activities of the BFA holders. See, e.g., Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 141 (2d Cir. 2014) (court must confirm that "enforcement action" it is adjudicating "ar[ose] out of [the nonparty's] contacts with the forum.") (citing Application to Enforce Administrative Subpoenas Duces Tecum of the S.E.C. v. Knowles, 87 F.3d 413, 418 (10th Cir. 2000)).

Linking the in-state activities to consumer fraud is insufficient because "[q]uestions of specific jurisdiction are always tied to the particular claims asserted." Phillips Exeter Acad. v. Howard Phillips Fund, 196 F.3d 284, 289 (1st Cir. 1999). Investor fraud requires its own connection, but the Superior

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[30] See J.A. 62 (Doescher June 10 Aff. ¶ 4), J.A. 65 (Luettgen Aff. ¶¶ 7-8).

Court identified none. In the absence of any such connection, there is no jurisdictional basis for ordering ExxonMobil to comply with the CID's demands related to investor fraud.

This conclusion fits well within settled precedent. Where the in-forum contacts of a non-resident are connected to some claims in an action but unconnected to others, courts exercise jurisdiction only over the connected claims and decline it over the others. See, e.g., Milford Power Ltd. P'ship by Milford Power Assocs., Inc. v. New England Power Co., 918 F. Supp. 471, 479-80 (D. Mass. 1996) (finding personal jurisdiction to adjudicate Chapter 93A claims, among others, which arose out of a meeting in Massachusetts, but not claims for breach of contract, which "did not arise out of" that meeting). Here, investor fraud was never connected to the in-state activities of the BFA holders. The Superior Court therefore lacks jurisdiction to compel ExxonMobil's compliance with any demand in the CID related to investor fraud.

Second, the purported connection to consumer fraud cannot withstand even cursory scrutiny. ExxonMobil has no direct contact with any consumers in

Massachusetts.[31] Nor does the Attorney General's consumer fraud investigation seek materials that reside with or pertain to the service stations in Massachusetts operated by the BFA holders.[32]

To the contrary, the CID seeks corporate records entirely unrelated to the service stations. For example, the CID orders the production of documents related to public statements ExxonMobil's former CEO made in Texas, New York, and London, England.[33] These statements were not conceived, drafted, or delivered at any Exxon- or Mobil-branded service station in Massachusetts—or anywhere else in the Commonwealth.

Likewise, the CID instructs ExxonMobil to produce communications with twelve named organizations, which have been derided as so-called climate change "deniers," as well as documents

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[31] It is the BFA holder that has the "sole[ ] responsib[ility]" for operating its business, and maintains "full responsibility" for the "sourcing of motor fuel product[s]" that are sold to Massachusetts consumers. See J.A. 1508, 1510, 1516 (BFA at 1; id. §§ 2(c), 5(a)); see also J.A. 938 (Doescher Aug. 31 Aff. ¶ 6); infra note 35.

[32] The self-professed focus of the Attorney General's investigation concerns statements about climate change made by Exxon Mobil itself, not any activity of the Massachusetts service stations. J.A. 82-83, 277-281, 284-85, 301-03, 1197, 1232.

[33] J.A. 105-06 (CID Request Nos. 9-11).

concerning ExxonMobil's corporate funding of those organizations.[34] But such communications and funding are wholly unconnected to the activities of individual service stations in Massachusetts.

The other document requests in the CID are equally unconnected to the service stations that purportedly form the basis for jurisdiction. Neither the Attorney General nor the Superior Court has ever explained how the CID's demands arise from the activities of the service stations in Massachusetts.

This disconnect between the activities of the BFA holders and the CID's record demands violates well-recognized boundaries of personal jurisdiction. It violates the requirement under the U.S. Constitution that the basis for asserting personal jurisdiction provide "an important, or at least material, element of proof" in the underlying claim. See United Elec., 960 F.2d at 1089 (citation, alteration, and internal quotation marks omitted). It also violates the even more stringent requirement under Massachusetts law that the conduct supporting jurisdiction be a "but for" cause of the claim at issue. Tatro, 416 Mass. at 771.

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[34] J.A. 104 (CID Request No. 5).

Nothing in the record establishes an important or material relationship, much less a "but for" relationship, between the BFA holders' service stations and either the documents requested by the CID or the Attorney General's investigation of possible consumer fraud. Even worse, the Attorney General has not identified a single potentially deceptive statement that originated in or was specifically directed at Massachusetts.[35]

It is no answer for the Attorney General to point to the BFA holders' silence about climate change as a possible "material omission[]."[36] While omissions can form the basis for imposing liability, they are insufficient to confer jurisdiction. It is well established that "an omission" cannot "furnish the minimum contact with that state that is needed to confer jurisdiction." Chlebda v. H. E. Fortna & Brother, Inc., 609 F.2d 1022, 1023-24 (1st Cir. 1979); see also Fiske v. Sandvik Mining, 540 F. Supp. 2d 250,

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[35] The Attorney General did not even attempt to counter ExxonMobil's evidence that none of its Massachusetts-specific advertisements mention the cause, magnitude, or impact of climate change. See J.A. 915, J.A. 935 (Affidavit of Laura Bustard ¶ 3), J.A. 950 (Affidavit of Justin Anderson, dated September 6, 2016, ("Anderson Sept. 6 Aff.") ¶ 29).

[36] J.A. 1229 n.5.

254 (D. Mass. 2008) ("[A] failure to act outside the state cannot be considered an act or omission in Massachusetts" for purposes of personal jurisdiction.). But all of this is common sense. It would be perverse to premise personal jurisdiction on the absence of conduct (an omission) in the forum.

It is equally insufficient to rely solely on business transactions that the BFA holders or ExxonMobil itself might undertake in Massachusetts. Doing business in a state, standing alone, does not provide all-purpose jurisdiction over a non-resident. The Due Process Clause forbids the exercise of personal jurisdiction over a non-resident corporation based solely on the fact that it was "doing business" in the state—even if it had significant contacts with Massachusetts—unless the suit arises out of those contacts. Daimler AG v. Bauman, 134 S. Ct. 746, 756 n.8, 761, 763 (2014).[37] A connection between the basis

[37] See also Fed. Home Loan Bank of Bos. v. Ally Fin., Inc., No. CIV.A. 11-10952-GAO, 2014 WL 4964506, at *2 (D. Mass. Sept. 30, 2014), vacated and remanded on other grounds sub nom. Fed. Home Loan Bank of Boston v. Moody's Corp., 821 F.3d 102 (1st Cir. 2016) (finding no general personal jurisdiction under Daimler where non-resident corporation had "significant 'continuous and systematic' contacts with Massachusetts, including corporate activities in Massachusetts generating significant revenue").

for jurisdiction and the claim is essential.

A simple gauge to measure the irrelevance of the BFA holders' service stations to the CID is to ask what would happen in a but-for world where there were no service stations in Massachusetts carrying the "Exxon" or "Mobil" brands. In that world, the Attorney General would not alter one word of the CID or change any aspect of her investigation. The only consequence would be to eliminate an unsound basis for asserting personal jurisdiction over ExxonMobil. Personal jurisdiction is lacking in that world and this one.

4. The U.S. Supreme Court Has Rejected the Superior Court's "Stream of Commerce" Analysis.

The absence of in-state, suit-related conduct cannot be remedied by pointing to ExxonMobil's nationwide distribution of its products. According to the Superior Court, "insofar as Exxon delivers its products into the stream of commerce with the expectation that they will be purchased in all states, including Massachusetts, it is not overly burdened by being called into court in Massachusetts." Order 7-8. This is not the law. The Supreme Court rejected precisely that reasoning in J. McIntyre Machinery,

Ltd. v. Nicastro, where it held that personal jurisdiction could not be asserted over a non-resident who "might have predicted that its goods will reach the forum State." 564 U.S. 873, 882 (2011).

A non-resident's placement of products into the "stream of commerce," without more, cannot confer jurisdiction. Plaintiffs must come forward with evidence of more than a defendant's "[m]erely placing a product into the stream of commerce," even when the "seller is aware that the product will enter a forum state." Zuraitis v. Kimberden, Inc., 2008 WL 142773, at *3 (Mass. Super. Ct. Jan. 2, 2008); see also Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 682 (1st Cir. 1992)(holding that the test for personal jurisdiction "is not knowledge of the ultimate destination of the product, but whether the [seller] has purposefully engaged in forum activities so it can reasonably expect to be haled into court there") (citation and internal quotation marks omitted). Under well-settled precedent, it was error for the Superior Court to rely on ExxonMobil's participation in inter-state commerce as a basis to assert personal jurisdiction.

5. Massachusetts Courts Cannot Rely on Policy Preferences to Circumvent Constitutional Limits on Personal Jurisdiction.

It was equally impermissible and contrary to precedent for the Superior Court to rely on policy considerations—rather than in-state, suit-related conduct—as grounds for asserting personal jurisdiction over ExxonMobil. The Superior Court committed this error when it reasoned that, if it "does not assert its jurisdiction in this situation, then G.L. c. 93A would be 'de-fanged,' and consequently, a statute enacted to protect Massachusetts consumers would be reduced to providing hollow protection against non-resident defendants." Order 7. Concerns about "defanging" or "hollowing out" a state law simply do not permit a court to set aside the requirements of the Constitution. If a constitutional provision imposes limits on a state statute, those limits must be respected, not set aside as contrary to a state's policy.

The Due Process Clause imposes exactly such a limit with respect to a state's assertion of jurisdiction over non-residents. It "sets the outer boundaries of a state tribunal's authority to proceed

against a defendant," Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 923 (2011), and "constrains a State's authority to bind a nonresident defendant to a judgment of its courts," Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014) (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980)). Massachusetts laws, even those that are to be "construed liberally in favor of the government," Order 2, cannot extend to conduct beyond the constitutional limits of personal jurisdiction.

The Due Process Clause's requirement of in-state, suit-related conduct for personal jurisdiction was binding here. The Superior Court erred by circumventing it in a misguided effort to promote what it considered good policy.

C. The Superior Court Abused Its Discretion By Refusing to Set Aside the Facially Overbroad and Burdensome CID.

The Superior Court erred further by adopting a position of extreme deference to the Attorney General that neutered its review of the CID's unreasonable breadth and burden.[38]

[38] This issue and the three that follow are reviewed for abuse of discretion. Matter of Yankee Milk, Inc., 372 Mass. 353, 356 (1977) ("[I]n C.I.D. matters there must be, as in all discovery

The Superior Court relied on Matter of Yankee Milk, Inc., 372 Mass. 353, 361 n.8 (1977), for the proposition that a CID "exceed[s] reasonable limits only when [it] 'seriously interfere[s] with the functioning of the investigated party by placing excessive burdens on manpower or requiring removal of critical records.'" Order 11 (emphasis added). But this cannot be found in Yankee Milk or any other precedent. See id.

Rather, Yankee Milk provided an example of a CID that was "punitive and exceed[ed] reasonable limits" because it "seriously interfere[d]" with the functioning of the recipient. 372 Mass. at 361 n.8. The court never held that only such CIDs are impermissible. It was illustrative, not prescriptive. Yankee Milk did not announce a rule requiring Massachusetts courts to defer to executive authority unless compliance with the CID causes serious

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proceedings, a broad area of discretion residing in the judge."); see also Commonwealth v. Reynolds, 16 Mass. App. Ct. 662, 664 (1983) (disqualification); W.R. Grace & Co. v. Hartford Accident & Indem. Co., 407 Mass. 572, 583-84 (1990) (stay in favor of alternative proceedings). An abuse of discretion can be found where, as here, a court's decision "constitutes a significant error of law." Chambers v. RDI Logistics, Inc., 476 Mass. 95, 110 (2016) (internal quotation marks omitted).

interference to the recipient.

To the contrary, Massachusetts statutes permit a court to set aside or modify a CID when it contains "any requirement which would be unreasonable," G.L. c. 93A, § 6(5), or when "justice requires" that a court "protect a party" from "undue burden." Mass. R. Civ. P. 26(c). ExxonMobil satisfied this showing by demonstrating that the CID's requests "exceed reasonable limits," are "punitive," "invade any [of its] constitutional rights," or are not "relevant" to a "valid investigation." Yankee Milk, 372 Mass. at 357, 361 n.8.

Here, the CID patently exceeds "reasonable limits" and should have been set aside or narrowed. It demands forty years of records to purportedly investigate violations with a limitations period of four years.[39] Such a request is unreasonable under Massachusetts law. See Donaldson v. Akibia, Inc., 24 Mass. L. Rptr. 525, 2008 WL 4635848, at *15 (Mass. Super. Ct. Aug. 30, 2008) (finding subpoena that requested information from a time period not relevant to the complaint to be unreasonable).

The Superior Court also erred by concluding

[39] See, e.g., J.A. 103-04.

that ExxonMobil's compliance with a "similar demand for documents" from the New York Attorney General foreclosed its objections to this CID. Order 11. Courts routinely find requests for documents unreasonable, even where the party resisting production has previously produced the exact same documents in a related litigation. In Lima LS PLC v. PHL Variable Ins. Co., for example, the court held that "similar allegations" in another litigation did not justify re-production of the documents produced in that litigation where the "broad requests [were] simply unwarranted." No. 3:12 CV 1122 (WWE), 2014 WL 5471760, at *1 (D. Conn. Oct. 22, 2014). And in E-Contact Techs., LLC v. Apple, Inc., the court found that ordering the defendant to produce discovery from another complex litigation would be unduly burdensome. No. 112CV471 (LED/KFG), 2013 WL 12143967, at *3-4 (E.D. Tex. Feb. 6, 2013); see also Burke v. Ability Ins. Co., 291 F.R.D. 343, 355 (D.S.D. 2013) (refusing to order production of documents already produced in related litigation given uncertainty concerning the relevance of such documents).

In addition to legal infirmity, the Superior Court's reliance on ExxonMobil's production of

materials to the New York Attorney General was also factually unsound. The CID is both broader and more burdensome than the New York subpoena. Notably, the CID's demand for "all documents produced to the New York State Attorney General's Office," comprises only one of its 38 requests.[40] The CID therefore demands that ExxonMobil search for and produce 37 categories of documents in addition to its request for the more than two million pages of documents already produced to the New York Attorney General.

The Superior Court's summary dismissal of ExxonMobil's objection to the CID's breadth and burden amounts to little more than a rubber stamp of the executive's power. Massachusetts courts have an obligation to do more—to provide a vigilant safeguard against the abuse of broad investigative powers. This Court should require that such a review take place.

D. The CID Should Have Been Set Aside as Arbitrary and Capricious.

Before the Superior Court, ExxonMobil established that the justifications presented by the Attorney General for issuing the CID were nothing more

[40] J.A. 110-11 (CID Request No. 33).

than pretexts,[41] rendering the CID an arbitrary and capricious exercise of executive power. The Superior Court refused to engage with that powerful showing. It instead accepted at face value the Attorney General's justifications, notwithstanding the record evidence establishing pretext and ulterior motives.[42] Applying a rubber stamp of approval to executive conduct, the Superior Court uncritically accepted that the Attorney General's purported "concerns about Exxon's possible misrepresentations to Massachusetts consumers" were "sufficient grounds . . . upon which to issue the CID." Order 9 (emphasis added).

This was error for two reasons. On the most basic level, the Superior Court's analysis failed to address investor fraud. The Superior Court credited none of the Attorney General's justifications for her investigation of purported investor fraud, so that line of inquiry should have been excised from the CID but was not.[43] That error alone is sufficient to

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[41] J.A. 924-26, 1355-65.

[42] See, e.g., J.A. 82-83, 132, 188, 203-07, 211, 1061-62, 1065.

[43] Many of the requests in the CID pertain solely to communications with investors, not consumers. See J.A. 108, 110 (CID Request Nos. 19, 21, 31, 32). Compliance with those requests should not have been ordered.

warrant reversal.

The Superior Court erred further by disregarding important safeguards on the arbitrary and capricious use of executive power to issue CIDs. A reviewing court is not "an automaton which must unquestionably compel obedience to a subpoena simply because the [Attorney General] issued it." Galvin v. The Gillette Co., 19 Mass. L. Rptr. 291, 2005 WL 1155253, at *8 (Mass. Super. Ct. Apr. 28, 2005) (citation and internal quotation marks omitted).

Those safeguards include (i) limiting the scope of production to material relevant to a legitimate investigation, see Yankee Milk, 372 Mass. at 357; (ii) ensuring that the CID is not "in excess of [the Attorney General's] statutory authority," Attorney Gen. v. Bodimetric Profiles, 404 Mass. 152, 157 (1989) (citation and internal quotation marks omitted); and (iii) barring the issuance of CIDs on a "mere whim or vagary," Yerardi's Moody St. Rest. & Lounge, Inc. v. Bd. of Selectmen of Randolph, 19 Mass. App. Ct. 296, 301 (1985); see also Hercules Chem. Co. v. Dep't of Envtl. Prot., 76 Mass. App. Ct. 639, 643 (2010). Here, the Superior Court did not give careful scrutiny to the Attorney General's conduct as required

by law and by ExxonMobil's prima facie showing.

Under governing law, government action cannot be justified by a belief that "lacks any rational explanation that reasonable persons might support," Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 303 (1997), or that was formed "without consideration and in disregard of facts and circumstances," Long v. Comm'r of Pub. Safety, 26 Mass. App. Ct. 61, 65 (1988) (citation and internal quotation marks omitted). Those precedents establish that a CID cannot be issued on grounds that are revealed to be mere pretexts for an abuse of power. When presented with evidence that a CID has been issued for an improper purpose but is being cloaked in a pretextual justification, it is the role of courts to determine whether the government acted properly in issuing the CID. See Shirley Wayside Ltd. P'ship v. Town of Shirley, No. 315160 (KCL), 2009 WL 1178583, at *1-2, 6 (Mass. Land Ct. May 1, 2009), aff'd, 461 Mass. 469 (2012) (overturning zoning decision as stated reasons were "mere pretexts").

To support the issuance of the CID, the Attorney General claimed that ExxonMobil's public statements to consumers about climate change were

inconsistent with internal analysis that was withheld from the public.[44] The purported basis for this claim was a handful of documents from the 1970s and 1980s from ExxonMobil's archives that appeared in a series of articles in print and online publications.[45] Yet ExxonMobil demonstrated that these documents were not inconsistent with ExxonMobil's public position and the Attorney General's selective quotation from the documents was misleading. For example, the Attorney General claimed that a 1982 ExxonMobil memorandum reflected that ExxonMobil "understood th[e] climate-driven risk to its business."[46] But that is not the case. Instead, the memorandum stated that "[t]here is currently no unambiguous scientific evidence that the earth is warming," and concluded that "[m]aking significant changes in energy consumption patterns now . . . would be premature," particularly since "there is time for further study and monitoring before specific actions need to be taken."[47]

The other historical documents were

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[44] J.A. 277-81, 284-87.
[45] Id. at 277-78, 284-85.
[46] J.A. 279.
[47] J.A. 397, 398, 1024.

equally innocuous.[48] And even if these documents about activities in the 1970s and 1980s did support a belief of an inconsistency 30 or 40 years ago, they do not support an investigation today under a statute with a four-year limitations period. To conduct an investigation of conduct that is not time-barred, the Attorney General would need to provide some grounds for her belief within the current century. Her failure to do so provides further evidence of pretext.

E. The Attorney General Should Have Been Disqualified for Bias.

Prior to issuing the CID, the Attorney General appeared at a press conference and announced that ExxonMobil "must be[] held accountable" for its perceived climate change deception and opposition to the Attorney General's favored climate change policies.[49] Those statements showed bias and prejudgment that should have resulted in her disqualification. Employing an overly deferential standard of review, however, the Superior Court excused the Attorney General's statements as merely "inform[ing] her constituents about the basis for her

[48] J.A. 940-47 (Anderson Sept. 6 Aff. ¶¶ 3-11), J.A. 924-26, 1355-59.
[49] J.A. 82, 1505-06.

investigation." Order 12. That charitable interpretation of the Attorney General's statements is not supported by precedent or the record.

While the Attorney General is authorized to inform the public of the nature and course of an investigation, those statements must be "strictly limited by [her] overarching duty to do justice." Aversa v. United States, 99 F.3d 1200, 1216 (1st Cir. 1996) (citation and internal quotation marks omitted); see also Commonwealth v. Ellis, 429 Mass. 362, 368, 372 (1999). Consistent with that precedent, Rule 3.6 of the Massachusetts Rules of Professional Conduct prohibits any lawyer from making prejudicial statements to the public about the target of an investigation. When these mandates are violated, courts have an obligation to disqualify the violator, "not only to prevent prejudice to a party, but also to avoid even the appearance of impropriety." Pisa v. Commonwealth, 378 Mass. 724, 728 (1979).

The Attorney General ran afoul of these restrictions multiple times at the press conference. At the outset, she described the purpose of her efforts as "speed[ing] our transition to a clean energy future" by overcoming "public perception"

shaped by "certain companies, certain industries," that lead "many to doubt whether climate change is real."[50] The Attorney General then cast ExxonMobil as the ringleader of this contrived offense, announcing she had already seen a "troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share."[51] These statements concluded with a pledge—prior to even conducting an investigation—to "hold[ ] accountable those who have needed to be held accountable for far too long."[52]

The Attorney General's statements amount to a public declaration that ExxonMobil engaged in deception and defrauded the public. Courts recognize the grave risk of unfair prejudice inherent in such declarations of guilt by government attorneys. See Attorney Grievance Comm'n of Md. v. Gansler, 835 A.2d 548, 572 (Md. 2003) ("[A] prosecutor's opinion of guilt is much more likely to create prejudice, given that his or her words carry the authority of the government and are especially persuasive in the public's eye."). When law enforcement officers pre-

[50] J.A. 82-83.
[51] J.A. 82.
[52] J.A. 83.

announce the guilt of their targets they poison the jury pool and deprive the accused of a fair trial.

But these statements were not merely prejudicial. Coming as they did before an investigation had even commenced, they also showed impermissible bias and prejudgment.[53] When a law enforcement official publicly declares the culpability of an investigation's target, she creates the appearance of impropriety and invites disqualification. The Supreme Court of Vermont faced just such a situation when evaluating public statements that "strongly indicat[ed] the state's attorney's personal belief in the guilt of the juvenile of an admittedly heinous crime." In re J.S., 436 A.2d 772, 772 (Vt. 1981). Those comments caused the court to disqualify the entire state attorney's

[53] Other members of the "AGs United for Clean Power" coalition have openly admitted to such bias against traditional energy companies and ExxonMobil in particular. In defense of its refusal to produce communications between coalition members, the Vermont Attorney General's Office admitted that, in deciding which public records requests to honor, it conducts Google searches of those seeking records of the coalition's activities, and upon learning of the requester's affiliation with "coal or Exxon or whatever," the office "give[s] this some thought . . . before we share information with this entity." See https://eelegal.org/wp-content/uploads/2017/04/VTWNCVA15563_3-28-2017.pdf (Tr. 13:22-14:10).

office because they violated the prosecutor's duty "to act with impartiality and with the objective of doing justice." Id. at 772-73.

The Attorney General's pubic statements caused ExxonMobil unfair prejudice, while revealing her bias and prejudgment. They should be subject to searching judicial review, not excused as merely providing the public with information about an investigation. It was error not to disqualify the Attorney General in light of her public statements.

F. This Matter Should Be Stayed.

An earlier filed action challenging the Attorney General's investigation is pending in federal court. That case raises constitutional claims against the Attorney General and the New York Attorney General that are far broader than those raised here and could have preclusive effect on the more narrow questions presented in ExxonMobil's petition. To promote judicial economy, comity, and the efficient administration of justice, ExxonMobil asked the Superior Court to stay this action pending resolution of the federal suit. The Superior Court declined on the sole ground that a Massachusetts court is "more familiar" with the Massachusetts consumer fraud

statute at issue. Order 13-14. It was an abuse of discretion to do so.

Even if the Superior Court was correct that a Massachusetts court is more capable than an out-of-state court to undertake the statutory construction of Chapter 93A—and there is good reason to question the premise[54]—that factor alone does not weigh in favor of declining to issue the stay.

First, the federal litigation involves constitutional claims and is unlikely to require the interpretation of Chapter 93A in any meaningful sense. It is therefore irrelevant which court has the greater expertise in the statute.

Second, the Superior Court failed to give appropriate consideration to the compelling factors weighing in favor of a stay:

- First filed. The federal action was first filed and is therefore "generally preferred."

[54] Federal courts in New York are certainly capable of interpreting Chapter 93A, and several already have. See, e.g., Miller v. Hyundai Motor Am., No. 15-CV-4722 (TPG), 2016 WL 5476000, at *5-*6 (S.D.N.Y. Sept. 28, 2016) (deciding whether defendant violated Chapter 93A by failing to disclose brake defects in its cars); Hadar v. Concordia Yacht Builders, Inc., No. 92 CIV. 3768 (RLC), 1997 WL 436464, at *5-*6 (S.D.N.Y. Aug. 4, 1997) (deciding whether defendants violated Chapter 93A through alleged misrepresentations).

Seidman v. Cent. Bancorp, Inc., 15 Mass. L. Rptr. 642, 2003 WL 369678, at *2 (Mass. Super. Ct. Feb. 3, 2003).

- Judicial Efficiency. The resolution of this case will not address the weighty constitutional claims presented in federal court. In the absence of a stay, this case may, "wast[e] the time and resources of parties and the courts." W.R. Grace & Co. v. Hartford Acc. & Indem. Co., 407 Mass. 572, 579 (1990).
- Resolution of All Claims. The federal suit is being actively litigated, involves a defendant not a party to this action, and could moot the narrow questions presented in this action. The federal action is the only proceeding "fully capable of furnishing complete relief to the parties." Mun. Lighting Comm'n of Peabody v. Stathos, 13 Mass. App. Ct. 990, 991 (1982).
- Avoid Inconsistent Rulings. Allowing this action and the federal suit to proceed creates the risk of "inconsistent results," which could be avoided with a stay. W.R. Grace, 407 Mass. at 579.
- Comity. Issuing a stay would avoid needless

conflict between state and federal court, while permitting the Superior Court to retain its jurisdiction to resume the action after the federal suit is resolved. See Van Emden Mgmt. Corp. v. Marsh & McLennan Cos., 20 Mass. L. Rptr. 79, 2005 WL 2456737, at *2 (Mass. Super. Ct. Sept. 21, 2005).

Faced with similar circumstances, Massachusetts courts regularly stay state actions pending the resolution of related federal actions, even when Massachusetts statutes must be interpreted. See, e.g., Van Emden Mgmt., 2005 WL 2456737, at *3 (staying state action raising Chapter 93A claims pending the resolution of earlier-filed federal actions); Williams v. Fedex Ground Package Sys., Inc., 23 Mass. L. Rptr. 192, 2007 WL 3013266, at *2 (Mass. Super. Ct. Sept. 20, 2007) (staying state action concerning the application of Massachusetts statutes pending the resolution of a related federal action); Seidman, 2003 WL 369678, at *2-3 (staying state court actions raising Chapter 156B claim pending the resolution of an earlier-filed federal action).

The Superior Court should have done the same. Nothing about the need to construe Chapter 93A

trumped the judicial economy, comity, and efficient administration of justice that could be obtained through issuance of stay. If this case is allowed to proceed, it should do so only after the resolution of the federal suit.

V. CONCLUSION

The Superior Court erred when it determined that ExxonMobil is subject to personal jurisdiction in Massachusetts based solely on the Massachusetts contacts of third parties that have nothing to do with the CID. The Superior Court also abused its discretion by (i) holding that the CID was not unduly burdensome and overbroad, (ii) finding that the issuance of the CID was not arbitrary and capricious, and (iii) refusing to disqualify the Attorney General for bias. This Court should therefore reverse or vacate the Superior Court's Order and direct it to set aside the CID. Alternatively, the Court should direct the Superior Court to stay this case in favor of the earlier-filed federal action.

Respectfully submitted,

EXXON MOBIL CORPORATION

By its attorneys,

EXXON MOBIL CORPORATION

By: /s/ Patrick J. Conlon
Patrick J. Conlon
(pro hac vice)
Daniel E. Bolia
(pro hac vice)
1301 Fannin Street
Houston, TX 77002
Tel: (832) 624-6336
patrick.j.conlon@exxonmobil.com
daniel.e.bolia@exxonmobil.com

FISH & RICHARDSON P.C.

By: /s/ Thomas C. Frongillo
Thomas C. Frongillo
(BBO# 180690)
Caroline K. Simons
(BBO# 680827)
One Marina Park Drive
Boston, MA 02210
Tel: (617) 542-5070
frongillo@fr.com
simons@fr.com

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON, LLP

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

Justin Anderson
(*pro hac vice*)
2001 K Street, NW
Washington, DC 20006-1047
Tel: (202) 223-7300
Fax: (202) 223-7420
janderson@paulweiss.com

Dated: May 1, 2017

CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 16(K) OF THE
MASSACHUSETTS RULES OF APPELLATE PROCEDURE

I, Caroline K. Simons, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision);

Mass. R. A. P. 16(e) (references to the record);

Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations);

Mass. R. A. P. 16(h) (length of briefs);

Mass. R. A. P. 18 (appendix to the briefs); and

Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

/s/ Caroline K. Simons
Signed By

Caroline K. Simons (BBO# 680827)
Printed name & B.B.O. number

Address Fish & Richardson P.C., One Marina Park Dr.

City Boston State MA Zip 02210

CERTIFICATE OF SERVICE

I, Caroline K. Simons, hereby state under the penalties of perjury that on May 1, 2017, two true and correct copies of the Petitioner-Appellant's Opening Brief and Addendum were served on counsel of record in this case by hand.

Attorney General of the Commonwealth of Massachusetts

Richard A. Johnston
I. Andrew Goldberg
Melissa A. Hoffer
Christopher G. Courchesne
Peter C. Mulcahy
Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, MA 02108

/S/ Caroline K. Simons
Caroline K. Simons

ADDENDUM TABLE OF CONTENTS

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2016-1888-F

IN RE CIVIL INVESTIGATIVE DEMAND NO. 2016-EPD-36,
ISSUED BY THE OFFICE OF THE ATTORNEY GENERAL

ORDER ON EMERGENCY MOTION OF EXXONMOBIL CORPORATION TO SET ASIDE OR MODIFY THE CIVIL INVESTIGATIVE DEMAND OR ISSUE A PROTECTIVE ORDER AND THE COMMONWEALTH'S CROSS-MOTION TO COMPEL EXXONMOBIL CORPORATION TO COMPLY WITH CIVIL INVESTIGATIVE DEMAND NO. 2016-EPD-36

On April 19, 2016, the Massachusetts Attorney General issued a Civil Investigative Demand ("CID") to ExxonMobil Corporation ("Exxon") pursuant to G. L. c. 93A, § 6. The CID stated that it was issued as:

> [P]art of a pending investigation concerning potential violations of M.G.L. c. 91A, § 2, and the regulations promulgated thereunder arising both from (1) the marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth ...; and (2) the marketing and/or sale of securities, as defined in M.G.L. c. 110A, §401(k), to investors in the Commonwealth, including, without limitation, fixed- and floating rate-notes, bonds, and common stock, sold or offered to be sold in the Commonwealth.

Appendix in Support of Petition and Emergency Motion of Exxon Mobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, Exhibit B. The CID requests documents generally related to Exxon's study of CO^2 emissions and the effects of these emissions on the climate from January 1, 1976 through the date of production.

On June 16, 2016, Exxon commenced the instant action to set aside the CID. The Attorney General has cross-moved pursuant to G. L. c. 93A, § 7 to compel Exxon to comply with the CID. After a hearing and careful review of the parties' submissions, and for the reasons that follow, Exxon's motion to set aside the CID is **DENIED** and the Commonwealth's motion to

compel is **ALLOWED**, subject to this Order.

DISCUSSION

General Laws c. 93A, § 6 authorizes the Attorney General to obtain and examine documents "whenever he believes a person has engaged in or is engaging in any method, act or practice declared to be unlawful by this chapter." Among the things declared to be unlawful by chapter 93A are unfair and deceptive acts or practices in the conduct of any trade or commerce. G. L. c. 93A, § 2(a). General Laws c. 93A, § 6 "should be construed liberally in favor of the government," see Matter of Civil Investigative Demand Addressed to Yankee Milk, Inc., 372 Mass. 353, 364 (1977), and the party moving to set aside a CID "bears a heavy burden to show good cause why it should not be compelled to respond," see CUNA Mutual Ins. Soc. v. Attorney Gen., 380 Mass. 539, 544 (1980). There is no requirement that the Attorney General have probable cause to believe that a violation of G. L. c. 93A has occurred; she need only have a belief that a person has engaged in or is engaging in conduct declared to be unlawful by G. L. c. 93A. Id. at 542 n.5. While the Attorney General must not act arbitrarily or in excess of her statutory authority, she need not be confident of the probable result of her investigation. Id. (citations omitted).

I. Exxon's Motion to Set Aside the CID

A. Personal Jurisdiction

Exxon contends that this court does not have personal jurisdiction over it in connection with any violation of law contemplated by the Attorney General's investigation. Memorandum of Exxon Mobil Corporation in Support of its Emergency Motion to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, page 2. Exxon is incorporated in New

462, 474 (1985). The plaintiff must demonstrate (1) purposeful availment of commercial activity in the forum State by the defendant; (2) the relation of the claim to the defendant's forum contacts: and (3) the compliance of the exercise of jurisdiction with "traditional notions of fair play and substantial justice." Bulldog Investors Gen. Partnership v. Secretary of the Commonwealth, 457 Mass. 210, 217 (2010) (citations omitted). Due process requires that a nonresident defendant may be subjected to suit in Massachusetts only where "there was some minimum contact with the Commonwealth which resulted from an affirmative, intentional act of the defendant, such that it is fair and reasonable to require the defendant to come into the State to defend the action." Good Hope Indus., Inc., 378 Mass. at 7 (citation omitted). "In practical terms, this means that an assertion of jurisdiction must be tested for its reasonableness, taking into account such factors as the burden on the defendant of litigating in the plaintiff's chosen forum, the forum State's interest in adjudicating the dispute, and the plaintiff's interest in obtaining relief." Tatro, 416 Mass. at 773.

The court concludes that in the context of this CID, Exxon's due process rights are not offended by requiring it to comply in Massachusetts. If the court does not assert its jurisdiction in this situation, then G. L. c. 93A would be "de-fanged," and consequently, a statute enacted to protect Massachusetts consumers would be reduced to providing hollow protection against non-resident defendants. Compare Bulldog Investors Gen. Partnership, 457 Mass. at 218 (Massachusetts has strong interest in adjudicating violations of Massachusetts securities law; although there may be some inconvenience to non-resident plaintiffs in litigating in Massachusetts, such inconvenience does not outweigh Commonwealth's interest in enforcing its laws in Massachusetts forum). Also, insofar as Exxon delivers its products into the stream of

commerce with the expectation that they will be purchased by consumers in all states, including Massachusetts, it is not overly burdened by being called into court in Massachusetts. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-298 (1980) (forum State does not exceed its powers under Due Process Clause if it asserts personal jurisdiction over corporation that delivers its products into stream of commerce with expectation that they will be purchased by consumers in forum State).

For all of these reasons, the court concludes that it has personal jurisdiction over Exxon with respect to this CID.

B. Arbitrary and Capricious

Exxon next contends that the CID is not supported by the Attorney General's "reasonable belief" of wrongdoing. General Laws c. 93A, § 6 gives the Attorney General broad investigatory powers to conduct investigations whenever she *believes* a person has engaged in or is engaging in any conduct in violation of the statute. Attorney Gen. v. Bodimetric Profiles, 404 Mass. 152, 157 (1989); see Harmon Law Offices P.C. v. Attorney Gen., 83 Mass. App. Ct. 830, 834 (2013). General Laws c. 93A does not contain a "reasonable" standard, but the Attorney General "must not act arbitrarily or in excess of his statutory authority." See CUNA Mut. Ins. Soc., 380 Mass. at 542 n.5 (probable cause not required; Attorney General "need only have a belief that a person has engaged in or is engaging in conduct declared to be unlawful by G. L. c. 93A").

Here, Exxon has not met its burden of persuading the court that the Attorney General acted arbitrarily or capriciously in issuing the CID. See Bodimetric Profiles, 404 Mass. at 157 (challenger of CID has burden to show that Attorney General acted arbitrarily or capriciously). If Exxon presented to consumers "potentially misleading information about the risks of climate

change, the viability of alternative energy sources, and the environmental attributes of its products and services," see CID Demand Nos. 9, 10, and 11, the Attorney General may conclude that there was a 93A violation. See Aspinall v. Philip Morris Cos., 442 Mass. 381, 395 (2004) (advertising is deceptive in context of G. L. c. 93A if it consists of "a half truth, or even may be true as a literal matter, but still create an over-all misleading impression through failure to disclose material information"); Commonwealth v. DeCotis, 366 Mass. 234, 238 (1974) (G. L. c. 93A is legislative attempt to "regulate business activities with the view to providing proper disclosure of information and a more equitable balance in the relationship of consumers to persons conducting business activities"). The Attorney General is authorized to investigate such potential violations of G. L. c. 93A.

Exxon also argues that the CID is politically motivated, that Exxon is the victim of viewpoint discrimination, and that it is being punished for its views on global warming. As discussed above, however, the court finds that the Attorney General has assayed sufficient grounds – her concerns about Exxon's possible misrepresentations to Massachusetts consumers – upon which to issue the CID. In light of these concerns, the court concludes that Exxon has not met its burden of showing that the Attorney General is acting arbitrarily or capriciously toward it.[2]

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[2] The court does not address Exxon's arguments regarding free speech at this time because misleading or deceptive advertising is not protected by the First Amendment. In re Willis Furniture Co., 980 F.2d 721, 1992 U.S. App. LEXIS 32373 * 2 (1992), citing Friedman v. Rogers, 440 U.S. 1, 13-16 (1979). The Attorney General is investigating whether Exxon's statements to consumers, or lack thereof, were misleading or deceptive. If the Attorney General's investigation reveals that Exxon's statements were misleading or deceptive, Exxon is not entitled to any free speech protection.

C. Unreasonable Burden and Unspecific

A CID complies with G. L. c. 93A, §§ 6(4)(c) & 6(5) if it "describes with reasonable particularity the material required, if the material required is not plainly irrelevant to the authorized investigation, and if the quantum of material required does not exceed reasonable limits." Matter of a Civil Investigative Demand Addressed to Yankee Milk, Inc., 372 Mass. at 360-361; see G. L. c. 93A. § 6(4)(c) (requiring that CID describe documentary material to be produced thereunder with reasonable specificity, so as fairly to indicate material demanded); G. L. c. 93A. § 6(5) (CID shall not "contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of the commonwealth; or require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of the commonwealth").

Exxon argues that the CID lacks the required specificity and furthermore imposes an unreasonable burden on it. With respect to specificity, Exxon takes issue with the CID's request for "essentially all documents related to climate change," and with the vagueness of some of the demands. Memorandum of Exxon Mobil Corporation in Support of its Emergency Motion to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, page 18. In particular, Exxon objects to producing documents that relate to its "awareness," "internal considerations," and "decision making" on climate change issues and its "information exchange" with other companies.

The court has reviewed the CID and disagrees that it lacks the requisite specificity. The CID seeks information related to what (and when) Exxon knew about the impacts of burning

fossil fuels on climate change and what Exxon told consumers about climate change over the years. Some of the words used to further describe that information – awareness and internal considerations – simply modify the "what" and "when" nature of the requests.

With respect to the CID being unreasonably burdensome, an effective investigation requires broad access to sources of information. See Matter of a Civil Investigative Demand Addressed to Yankee Milk, Inc., 372 Mass. at 364. Documentary demands exceed reasonable limits only when they "seriously interfere with the functioning of the investigated party by placing excessive burdens on manpower or requiring removal of critical records." Id. at 361 n.8. That is not the case here. At the hearing, both parties indicated that Exxon has already complied with its obligations regarding a similar demand for documents from the New York Attorney General. In fact, as of December 5, 2016, Exxon had produced 1.4 million pages of documents responsive to the New York Attorney General's request. It would not be overly burdensome for Exxon to produce these documents to the Massachusetts Attorney General.

Whether there should be reasonable limitations on the documents requested for other reasons, such as based upon confidentiality or other privileges, should be discussed by the parties in a conference guided by Superior Court Rule 9C. After such a meeting, counsel should submit to the court a joint status report outlining disagreements, if any, for the court to resolve.

II. Disqualification of Attorney General

Exxon requests the court to disqualify the Attorney General and appoint an independent investigator because her "public remarks demonstrate that she has predetermined the outcome of the investigation and is biased against ExxonMobil." Memorandum of Exxon Mobil Corporation in Support of its Emergency Motion to Set Aside or Modify the Civil Investigative

Demand or Issue a Protective Order, page 8. In making this request, Exxon relies on a speech made by the Attorney General on March 29, 2016, during an "AGs United for Clean Power" press conference with other Attorneys Generals. The relevant portion of Attorney General Healey's comments were:

> Part of the problem has been one of public perception, and it appears, certainly, that certain companies, certain industries, may not have told the whole story, leading many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts. Fossil fuel companies that deceived investors and consumers about the dangers of climate change should be, must be, held accountable. That's why I, too, have joined in investigating the practices of Exxon Mobil. We can all see today the troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public.

General Laws c. 93A, § 6 gives the Attorney General power to conduct investigations whenever she believes a person has engaged in or is engaging in any conduct in violation G. L. c. 93A. Bodimetric Profiles, 404 Mass. at 157. In the Attorney General's comments at the press conference, she identified the basis for her belief that Exxon may have violated G. L. c. 93A. In particular, she expressed concern that Exxon failed to disclose relevant information to its Massachusetts consumers. These remarks do not evidence any actionable bias on the part of the Attorney General; instead it seems logical that the Attorney General inform her constituents about the basis for her investigations. Cf. Buckley v. Fitzsimmons, 509 U.S. 259, 278 (1993) ("Statements to the press may be an integral part of a prosecutor's job ... and they may serve a vital public function."); Goldstein v. Galvin, 719 F.3d 16, 30 (1st Cir. 2013) ("Not only do public officials have free speech rights, but they also have an obligation to speak out about matters of public concern."); see also Commonwealth v. Ellis, 429 Mass. 362, 372 (1999) (due process provisions require that prosecutor be disinterested in sense that prosecutor must not be – nor

appear to be – influenced in exercise of discretion by personal interests). It is the Attorney General's duty to investigate Exxon if she believes it has violated G. L. c. 93A, § 6. See also G. L. c. 12, § 11D (attorney general shall have authority to prevent or remedy damage to the environment caused by any person or corporation). Nothing in the Attorney General's comments at the press conference indicates to the court that she is doing anything more than explaining reasons for her investigation to the Massachusetts consumers she represents. See generally Ellis, 429 Mass. at 378 ("That in the performance of their duties [the Attorney General has] zealously pursued the defendants, as is [his or her] duty within ethical limits, does not make [his or her] involvement improper, in fact or in appearance.").

III. Stay

On June 15, 2016, Exxon filed a complaint and a motion for preliminary injunction in the United States District Court for the Northern District of Texas alleging that the CID violates its federal constitutional rights. Exxon Mobil requests this court to stay its adjudication of the instant motion pending resolution of the Texas federal action. See G. L. c. 223A, § 5 ("When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just."); see WR Grace & Co. v. Hartford Accident & Indemnity Co., 407 Mass. 572, 577 (1990) (decision whether to stay action involves discretion of motion judge and depends greatly on specific facts of proceeding before court). The court determines that the interests of substantial justice dictate that the matter be heard in Massachusetts.

This matter involves the Massachusetts consumer protection statute and Massachusetts case law arising under it, about which the Massachusetts Superior Court is certainly more

familiar than would be a federal court in Texas. See New Amsterdam Casualty Co. v. Estes, 353 Mass. 90, 95-96 (1967) (factors to consider include administrative burdens caused by litigation that has its origins elsewhere and desirability of trial in forum that is at home with governing law). Further, the plain language of the statute itself directs a party seeking relief from the Attorney General's demand to the courts of the commonwealth. See G. L. c. 93A, § 6(7) (motion to set aside "may be filed in the superior court of the county in which the person served resides or has his usual place of business, or in Suffolk county"); see also G. L. c. 93A, § 7 ("A person upon whom notice is served pursuant to the provisions of section six shall comply with the terms thereof unless otherwise provided by the order of a court of the commonwealth."). The court declines to stay this proceeding.

ORDER

For the reasons discussed above, it is hereby **ORDERED** that the Emergency Motion of ExxonMobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order is **DENIED** and the Commonwealth's Cross-Motion to Compel ExxonMobil Corporation to Comply with Civil Investigative Demand No. 2016-EPD-36 is **ALLOWED** consistent with the terms of this Order. The parties are **ORDERED** to submit a joint status report to the court no later than February 15, 2017, outlining the results of a Rule 9C Conference.

Heidi E. Brieger
Associate Justice of the Superior Court

Dated at Lowell, Massachusetts, this 11th day of January, 2017.

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XV. Regulation of Trade (Ch. 93-110h)
Chapter 93A. Regulation of Business Practices for Consumers Protection (Refs & Annos)

M.G.L.A. 93A § 2

§ 2. Unfair practices; legislative intent; rules and regulations

Currentness

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) It is the intent of the legislature that in construing paragraph (a) of this section in actions brought under sections four, nine and eleven, the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

(c) The attorney general may make rules and regulations interpreting the provisions of subsection 2(a) of this chapter. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of 15 U.S.C. 45(a)(1) (The Federal Trade Commission Act), as from time to time amended.

Credits
Added by St.1967, c. 813, § 1. Amended by St.1978, c. 459, § 2.

Notes of Decisions (1431)

M.G.L.A. 93A § 2, MA ST 93A § 2
Current through Chapter 5 of the 2017 1st Annual Session

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XV. Regulation of Trade (Ch. 93-110h)
Chapter 93A. Regulation of Business Practices for Consumers Protection (Refs & Annos)

M.G.L.A. 93A § 6

§ 6. Examination of books and records; attendance of persons; notice

Currentness

(1) The attorney general, whenever he believes a person has engaged in or is engaging in any method, act or practice declared to be unlawful by this chapter, may conduct an investigation to ascertain whether in fact such person has engaged in or is engaging in such method, act or practice. In conducting such investigation he may (a) take testimony under oath concerning such alleged unlawful method, act or practice; (b) examine or cause to be examined any documentary material of whatever nature relevant to such alleged unlawful method, act or practice; and (c) require attendance during such examination of documentary material of any person having knowledge of the documentary material and take testimony under oath or acknowledgment in respect of any such documentary material. Such testimony and examination shall take place in the county where such person resides or has a place of business or, if the parties consent or such person is a nonresident or has no place of business within the commonwealth, in Suffolk county.

(2) Notice of the time, place and cause of such taking of testimony, examination or attendance shall be given by the attorney general at least ten days prior to the date of such taking of testimony or examination.

(3) Service of any such notice may be made by (a) delivering a duly executed copy thereof to the person to be served or to a partner or to any officer or agent authorized by appointment or by law to receive service of process on behalf of such person; (b) delivering a duly executed copy thereof to the principal place of business in the commonwealth of the person to be served; or (c) mailing by registered or certified mail a duly executed copy thereof addressed to the person to be served at the principal place of business in the commonwealth or, if said person has no place of business in the commonwealth, to his principal office or place of business.

(4) Each such notice shall (a) state the time and place for the taking of testimony or the examination and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs; (b) state the statute and section thereof, the alleged violation of which is under investigation and the general subject matter of the investigation; (c) describe the class or classes of documentary material to be produced thereunder with reasonable specificity, so as fairly to indicate the material demanded; (d) prescribe a return date within which the documentary material is to be produced; and (e) identify the members of the attorney general's staff to whom such documentary material is to be made available for inspection and copying.

(5) No such notice shall contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of the commonwealth; or require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of the commonwealth.

(6) Any documentary material or other information produced by any person pursuant to this section shall not, unless otherwise ordered by a court of the commonwealth for good cause shown, be disclosed to any person other than the authorized agent or representative of the attorney general, unless with the consent of the person producing the same; provided, however, that such material or information may be disclosed by the attorney general in court pleadings or other papers filed in court.

(7) At any time prior to the date specified in the notice, or within twenty-one days after the notice has been served, whichever period is shorter, the court may, upon motion for good cause shown, extend such reporting date or modify or set aside such demand or grant a protective order in accordance with the standards set forth in Rule 26(c) of the Massachusetts Rules of Civil Procedure. The motion may be filed in the superior court of the county in which the person served resides or has his usual place of business, or in Suffolk county. This section shall not be applicable to any criminal proceeding nor shall information obtained under the authority of this section be admissible in evidence in any criminal prosecution for substantially identical transactions.

Credits

Added by St.1967, c. 813, § 1. Amended by St.1969, c. 814, § 3; St.1988, c. 289, §§ 1 to 3.

M.G.L.A. 93A § 6, MA ST 93A § 6
Current through Chapter 5 of the 2017 1st Annual Session

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XV. Regulation of Trade (Ch. 93-110h)
Chapter 93A. Regulation of Business Practices for Consumers Protection (Refs & Annos)

M.G.L.A. 93A § 7

§ 7. Failure to appear or to comply with notice

Currentness

A person upon whom a notice is served pursuant to the provisions of section six shall comply with the terms thereof unless otherwise provided by the order of a court of the commonwealth. Any person who fails to appear, or with intent to avoid, evade, or prevent compliance, in whole or in part, with any civil investigation under this chapter, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies any documentary material in the possession, custody or control of any person subject to any such notice, or knowingly conceals any relevant information, shall be assessed a civil penalty of not more than five thousand dollars.

The attorney general may file in the superior court of the county in which such person resides or has his principal place of business, or of Suffolk county if such person is a nonresident or has no principal place of business in the commonwealth, and serve upon such person, in the same manner as provided in section six, a petition for an order of such court for the enforcement of this section and section six. Any disobedience of any final order entered under this section by any court shall be punished as a contempt thereof.

Credits
Added by St.1967, c. 813, § 1. Amended by St.1969, c. 814, § 3.

M.G.L.A. 93A § 7, MA ST 93A § 7
Current through Chapter 5 of the 2017 1st Annual Session

End of Document

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title II. Actions and Proceedings Therein (Ch. 223-236)
Chapter 223A. Jurisdiction of Courts of the Commonwealth over Persons in Other States and Countries (Refs & Annos)

M.G.L.A. 223A § 3

§ 3. Transactions or conduct for personal jurisdiction

Currentness

A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's

(a) transacting any business in this commonwealth;

(b) contracting to supply services or things in this commonwealth;

(c) causing tortious injury by an act or omission in this commonwealth;

(d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth;

(e) having an interest in, using or possessing real property in this commonwealth;

(f) contracting to insure any person, property or risk located within this commonwealth at the time of contracting;

(g) maintaining a domicile in this commonwealth while a party to a personal or marital relationship out of which arises a claim for divorce, alimony, property settlement, parentage of a child, child support or child custody; or the commission of any act giving rise to such a claim; or

(h) having been subject to the exercise of personal jurisdiction of a court of the commonwealth which has resulted in an order of alimony, custody, child support or property settlement, notwithstanding the subsequent departure of one of the original parties from the commonwealth, if the action involves modification of such order or orders and the moving party resides in the commonwealth, or if the action involves enforcement of such order notwithstanding the domicile of the moving party.

Credits

Added by St.1968, c. 760. Amended by St.1969, c. 623; St.1976, c. 435; St.1987, c. 100; St.1993, c. 460, § 86.

M.G.L.A. 223A § 3, MA ST 223A § 3
Current through Chapter 5 of the 2017 1st Annual Session

End of Document

Massachusetts General Laws Annotated
Massachusetts Rules of Civil Procedure
V. Depositions and Discovery (Refs & Annos)

Massachusetts Rules of Civil Procedure (Mass.R.Civ.P.), Rule 26

Rule 26. General Provisions Governing Discovery

Currentness

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods except as otherwise provided in Rule 30(a) and Rule 30A(a), (b): depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise, or unless otherwise provided in these rules, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Insurance Agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by

the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) *Claims of Privilege or Protection of Trial Preparation Materials.*

(A) *Privilege Log.* When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as material in anticipation of litigation or for trial, the party shall make the claim expressly and, without revealing information that is privileged or protected, shall prepare a privilege log containing the following information: the respective author(s) and sender(s) if different; the recipient(s); the date and type of document, written communication or thing not produced; and in general terms, the subject matter of the withheld information. By written agreement of the party seeking the withheld information and the party holding the information or by court order, a privilege log need not be prepared or may be limited to certain documents, written communications, or things.

(B) *Information mistakenly produced; claim of privilege.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party shall promptly return, sequester, or destroy the specified information and any copies it has; shall not use or disclose the information until the claim is resolved; shall take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under Trial Court Rule VIII, Uniform Rules on Impoundment

Procedure, for a determination of the claim. The producing party shall preserve the information until the claim is resolved.

In resolving any such claim, the court should determine whether:

(i) the disclosure was inadvertent;

(ii) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(iii) the holder promptly took reasonable steps to rectify the error

(C) *Effect of a ruling*. If the court, following such procedure, or pursuant to an order under Rule 26(f)(3), upholds the privilege or protection in a written order, the disclosure shall not be deemed a waiver in the matter before the court or in any other proceeding.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county or judicial district, as the case may be, where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time, place, or manner; or the sharing of costs; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Factors bearing on the decision whether discovery imposes an undue burden or expense may include the following:

(1) whether it is possible to obtain the information from some other source that is more convenient or less burdensome or expensive;

(2) whether the discovery sought is unreasonably cumulative or duplicative; and

(3) whether the likely burden or expense of the proposed discovery outweighs the likely benefit of its receipt, taking into account the parties' relative access to the information, the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(f) Electronically Stored Information.

(1) *Definition.*

"Inaccessible electronically stored information" means electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.

(2) *Electronically Stored Information Conferences.*

(A) *Conference as of right.* Upon the written request of any party made no later than 90 days after the service of the first responsive pleading by any defendant, the parties shall confer regarding electronically stored information. Such request shall be served on each party that has appeared, but it shall not be filed with the court. The conference shall be held as soon as practicable but no later than 30 days from the date of service of the request.

(B) *Conference by agreement of the parties.* At any time more than 90 days after the service of the first responsive pleading, any party may serve on each party that has appeared a request that all parties confer regarding electronically stored information. Such request shall not be filed with the court. If within 30 days after the request all parties do not agree to confer, any party may move that the court conduct a conference pursuant to Rule 16 regarding electronically stored information.

(C) *Purpose of electronically stored information conference among the parties.* The purpose of an electronically stored information conference is for the parties to develop a plan relating to the discovery of electronically stored information.

Within 14 days after such conference the parties shall file with the court the plan and a statement concerning any issues upon which the parties cannot agree. At any electronically stored information conference the parties shall discuss:

(i) any issues relating to preservation of discoverable information;

(ii) the form in which each type of the information will be produced;

(iii) what metadata, if any, shall be produced;

(iv) the time within which the information will be produced;

(v) the method for asserting or preserving claims of privilege or of protection of trial preparation materials, including whether such claims may be asserted after production;

(vi) the method for asserting or preserving confidential and proprietary status of information either of a party or a person not a party to the proceeding;

(vii) whether allocation among the parties of the expense of production is appropriate, and,

(viii) any other issue related to the discovery of electronically stored information.

(3) *Electronically Stored Information Orders.* The court may enter an order governing the discovery of electronically stored information pursuant to any plan referred to in subparagraph (2)(C), or following a Rule 16 conference, or upon motion of a party or stipulation of the parties, or *sua sponte*, after notice to the parties. Any such order may address:

(A) whether discovery of the information is reasonably likely to be sought in the proceeding;

(B) preservation of the information;

(C) the form in which each type of the information is to be produced;

(D) what metadata, if any, shall be produced;

(E) the time within which the information is to be produced;

(F) the permissible scope of discovery of the information;

(G) the method for asserting or preserving claims of privilege or of protection of the information as trial-preparation material after production;

(H) the method for asserting or preserving confidentiality and the proprietary status of information relating to a party or a person not a party to the proceeding;

(I) allocation of the expense of production; and

(J) any other issue relating to the discovery of the information.

(4) *Limitations on Electronically Stored Information Discovery.*

(A) A party may object to the discovery of inaccessible electronically stored information, and any such objection shall specify the reason that such discovery is inaccessible.

(B) On motion to compel or for a protective order relating to the discovery of electronically stored information, a party claiming inaccessibility bears the burden of showing inaccessibility.

(C) The court may order discovery of inaccessible electronically stored information if the party requesting discovery shows that the likely benefit of its receipt outweighs the likely burden of its production, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

(D) The court may set conditions for the discovery of inaccessible electronically stored information, including allocation of the expense of discovery.

(E) The court may limit the frequency or extent of electronically stored information discovery, even from an accessible source, in the interests of justice. Factors bearing on this decision include the following:

(i) whether it is possible to obtain the information from some other source that is more convenient or less burdensome or expensive;

(ii) whether the discovery sought is unreasonably cumulative or duplicative;

(iii) whether the party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or

(iv) whether the likely burden or expense of the proposed discovery outweighs the likely benefit.

Credits

Amended December 16, 1980, effective January 1, 1981; amended effective July 1, 1996; February 27, 2008, effective April 1, 2008; September 24, 2013, effective January 1, 2014; May 31, 2016, effective July 1, 2016.

Rules Civ. Proc., Rule 26, MA ST RCP Rule 26
Current with amendments received through January 15, 2017.

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Massachusetts General Laws Annotated
Rules of the Supreme Judicial Court (Refs & Annos)
Chapter Three. Ethical Requirements and Rules Concerning the Practice of Law
Rule 3:07. Massachusetts Rules of Professional Conduct and Comments (Refs & Annos)
Advocate

Massachusetts Rules of Professional Conduct (Mass.R.Prof.C.), Rule 3.6

Rule 3.6. Trial Publicity

Currentness

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense, or defense involved, and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation, and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time, and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

(e) This rule does not preclude a lawyer from replying to charges of misconduct publicly made against him or her or from participating in the proceedings of a legislative, administrative, or other investigative body.

Credits

Adopted June 9, 1997, effective January 1, 1998. Amended March 26, 2015, effective July 1, 2015.

S.J.C. Rule 3:07, Massachusetts Rules of Professional Conduct (Mass. R. Prof. C.), Rule 3.6, MA R S CT RULE 3:07 RPC Rule 3.6

Current with amendments received through January 15, 2017.

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