COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

2017-P-0366

EXXON MOBIL CORPORATION,

Petitioner-Appellant,

v.

OFFICE OF THE ATTORNEY GENERAL,

Respondent-Appellee.

ON APPEAL FROM A FINAL ORDER
OF THE SUPERIOR COURT IN SUFFOLK COUNTY

BRIEF OF APPELLEE
OFFICE OF THE ATTORNEY GENERAL
COMMONWEALTH OF MASSACHUSETTS

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May 31, 2017

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STATEMENT OF THE ISSUES

The Massachusetts Consumer Protection Act authorizes the Attorney General to issue a civil investigative demand (CID) to investigate potential unfair acts and practices in the conduct of any trade or commerce "whenever [she] believes a person has engaged in or is engaging in any" conduct proscribed by the Act. G.L. c. 93A, § 6. In an exercise of that broad investigatory authority and in furtherance of her duty to protect Massachusetts and its residents from unscrupulous business practices, the Attorney General's Office (Office) issued to Exxon Mobil Corporation (Exxon) a CID for documents and testimony to investigate whether Exxon made misleading statements to investors and consumers and/or failed to disclose information to investors and consumers with respect to its knowledge of climate change, the role of its fossil-fuel products in causing climate change, and the impacts of climate change on the valuation of Exxon's fossil fuel reserves and other assets. The questions presented are:

1. Whether the Superior Court properly exercised personal jurisdiction over Exxon to enforce a CID that seeks information about the company's marketing, solicitation for sale, and sale of fossil fuel products and securities to Massachusetts consumers and investors, where Exxon has conceded that it advertised its products, had franchise agreements that provide for complete control over Exxon-branded service stations' marketing, and sold securities, in Massachusetts?

2. Whether the Superior Court properly exercised its discretion when it concluded that Exxon failed to demonstrate that the Office's CID is arbitrary and capricious, seeks documents that are plainly irrelevant, or constitutes an abuse of process necessitating disqualification of the Attorney General's Office from the investigation?

3. Whether the Superior Court properly exercised its discretion when it refused to stay this action pending the resolution of Exxon's duplicative federal court action, where the issues all arise from the CID and the Massachusetts Consumer Protection Act designates the Superior Court as the forum to resolve CID-related challenges?

STATEMENT OF THE CASE

Reminiscent of what occurred with tobacco companies, internal Exxon documents from the 1970s and 1980s unearthed by investigative journalists in 2015 suggest that Exxon engaged in a decades-long campaign to hide from consumers and investors what it knew about the impact of fossil fuels on climate change and of climate change on its business model and assets.[1] Fossil fuel combustion is a primary cause of climate change, and climate change is already wreaking havoc with the earth's systems and impacting public health, including in Massachusetts.[2] The investigative reports

[1] *See* Allen M. Brandt, The Cigarette Century: The Rise, Fall, and Deadly Persistence of the Product that Defined America 234 (2007); *United States v. Philip Morris USA*, 566 F.3d 1095, 1106-09 (D.C. Cir. 2009); *see also* Benjamin Hulac, *Document Trove Details Links Between Tobacco, Oil Industries*, ClimateWire, July 20, 2016, *reproduced at* Joint Appendix (JA) 453-55.

[2] The Intergovernmental Panel on Climate Change's 2014 Synthesis Report concluded that "[h]uman influence on the climate system is clear," "[r]ecent

and Exxon's internal documents show that the company's own scientists decades ago informed Exxon management that major reductions in fossil fuel combustion would be required to mitigate potentially "catastrophic" climate change impacts. *Infra* p.9. Yet it appears that, despite its sophisticated internal knowledge, Exxon failed to disclose what it knew to either the consumers who purchased its fossil fuel products or investors who purchased its securities, and indeed engaged in efforts to sow doubt in the public mind about the science of climate change.

After reading the investigative reports, reviewing Exxon's internal documents disclosed by that reporting, and becoming aware of other governmental investigations of the company's conduct, the Office opened an investigation into whether Exxon's marketing and/or sale of energy and other fossil-fuel-derived products to Massachusetts consumers and its marketing and/or sale of securities to Massachusetts investors

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climate changes have had widespread impacts on human and natural systems," and "78% of the total [greenhouse gas] emissions increase from 1970 to 2010" are attributable to "fossil fuel combustion and industrial processes." JA 498, 501. These impacts are both global and local. One recent study concluded, for example, that sea levels in Boston may rise two times as much as originally predicted, putting about thirty-percent of Boston under water by the end of this century. JA 492; *see also* JA 488 (detailing sea level rise impacts on Cape Cod); *Massachusetts v. EPA*, 549 U.S. 497, 521-23 (2007) (describing current and future harms from climate change affecting Massachusetts).

violated the Massachusetts Consumer Protection Act, G.L. c. 93A, § 2. JA 92.[3] In April 2016, the Office served on Exxon's Massachusetts registered agent for service a CID seeking information related to (1) what Exxon knew about (a) how combustion of fossil fuels (its primary product) contributes to climate change and (b) the risk that climate change creates for the value of Exxon's businesses and assets; (2) when Exxon learned those facts; and (3) what Exxon told Massachusetts consumers and investors, among others, about those facts. JA 92, 103-11.

In response to the CID, Exxon filed, pursuant to G.L. c. 93A, § 6(7), a petition asking the Superior Court to set aside or modify the CID or to issue a protective order, JA 5, and an emergency motion seeking the same, JA 30. Exxon claimed that the court lacked personal jurisdiction to enforce the CID. JA 5, 24. Alternatively, Exxon argued that the CID was issued only to further a "political agenda," JA 6, violated constitutional speech and due process rights, JA 5, and exceeded limits on the scope of CIDs, JA 26-

[3] The Office holds a longstanding commitment to protect Massachusetts and its residents from climate change. Over a decade ago, for example, the Office led the fight in the Supreme Court that ultimately caused the U.S. Environmental Protection Agency to find that greenhouse gases "endanger both the public health and the public welfare of current and future generations." 74 Fed. Reg. 66,496, 66,496 (Dec. 15, 2009); *Massachusetts*, 549 U.S. at 518-21, 532-35.

27, and asked the court to "disqualify" the Office from the investigation. JA 5, 24-25.[4] The company also asked the court to stay the action because it had sued the Attorney General in a Texas federal district court the day before, similarly to stop the investigation. JA 27-28. The Commonwealth cross-moved, pursuant to G.L. c. 93A, § 7, for an order compelling Exxon to comply with the CID. JA 262. On December 7, 2016, the Superior Court (Brieger, J.) held a two-hour hearing to probe the parties' positions, as set forth in hundreds of pages of briefing and thousands of pages of exhibits.

In a January 11, 2017 order, the court denied Exxon's motion and granted the Commonwealth's motion to compel compliance with the CID. Addendum (Add-_) 1. In its decision, the court concluded that it had personal jurisdiction to enforce the CID against Exxon under the Massachusetts long-arm statute and that doing so complied with due process. Add-6-7. In making that finding, the court relied on Exxon's franchise agreements with more than three hundred Exxon-branded service stations, concluding that the tight-knit

[4] While Exxon argued below that the CID's most "egregious[]" problem was its impingement on speech rights, JA 1330, Exxon has not made that claim, or asserted any of its non-jurisdictional constitutional arguments, on appeal. *See* Exxon Br. 1-50. Exxon has thus waived them. *Bongaards v. Millen*, 440 Mass. 10, 28 (2003).

relationship enables the company to "control[] the very conduct at issue in this investigation--the marketing of Exxon products to consumers." Add-6.[5] After finding it had personal jurisdiction, the court rejected Exxon's other CID challenges and its requests to disqualify the Office and stay the case. Add-8-14. On February 8, 2017, Exxon timely noticed its appeal.[6]

STATEMENT OF LEGAL AND FACTUAL BACKGROUND

I. THE MASSACHUSETTS CONSUMER PROTECTION ACT AND CIVIL INVESTIGATIVE DEMANDS.

The Massachusetts Consumer Protection Act, G.L. c. 93A, §§ 1-11 (Act or Chapter 93A), prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce," G.L. c. 93A, § 2(a), and applies broadly to "the advertising, the offering for sale ... [and] the sale ... or distribution of any services," "property," or "security." *Id.* § 1(b). Because "[t]here is no limit to human inventiveness in this field," *Commonwealth v. Fremont Inv. & Loan*, 452 Mass. 733, 742 (2008) (citations omitted & alteration in original), the Legislature and the courts have

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[5] The Superior Court had before it a sample franchise agreement (i.e., the Brand Fee Agreement) that the court had asked Exxon to provide to it. *See* JA 1345-46, 1508.

[6] This Court has jurisdiction to review the Superior Court's order because it arises, in part, from an action to enforce the CID. *CUNA Mut. Ins. Soc'y v. Attorney General*, 380 Mass. 539, 540-41 (1980).

eschewed any effort to define precisely what conduct is unfair or deceptive.[7] Instead, Chapter 93A liability depends on the "circumstances of each case," *Commonwealth v. DeCotis*, 366 Mass. 234, 242 (1974), and the "context" in which they occur, *Kattar v. Demoulas*, 433 Mass. 1, 14 (2000)(citation omitted).

To secure the Act's benefits for Massachusetts and its residents, the Legislature gave the Attorney General broad investigatory and enforcement authority. *Attorney General v. Bodimetric Profiles*, 404 Mass. 152, 157 (1989). The Act thus authorizes the Attorney General to issue CIDs to investigate potential unlawful conduct "[w]henever [she] believes a person has engaged in or is engaging in any method, act or practice declared unlawful by" the Act. G.L. c. 93A, § 6(1); *see also Harmon Law Offices, P.C. v. Attorney General*, 83 Mass. App. Ct. 830, 834 (2013). Indeed, an "effective [Chapter 93A] investigation requires broad access to sources of information ... because evidence of the alleged violations is within the control of the investigated party." *In re Yankee Milk, Inc.*, 372 Mass. 353, 364-65 (1977). "[T]he question of [the CID recipient's ultimate] liability," however, "has no

[7] Thus, for example, even a statement that is "true as a literal matter" can violate Chapter 93A where the "failure to disclose material information" creates "an over-all misleading impression." *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 395 (2004); *see also* 940 C.M.R. §§ 3.05, 3.16(2), 6.03.

bearing on the validity of CIDs," *Harmon*, 83 Mass. App. Ct. at 836, and courts should reject a CID recipient's attempt to conflate its potential liability with the CID's validity.

The Attorney General, as the Commonwealth's chief law officer, has a "common law duty to represent the public interest," *Secretary of Admin. & Finance v. Attorney General*, 367 Mass. 154, 163 (1975), and CIDs are one of the vital tools the Office uses to obtain information to effectuate that duty. Since 2013, the Office has issued several hundred CIDs, including ones involving joint investigations with the federal government, other states, or both. JA 320-21. Those CIDs have covered a range of businesses and business practices, including foreclosures, pharmaceuticals, gun manufacturers, securities, and consumer products. JA 321, 1266. They also have covered conduct that adversely affects the environment and public health. The Office, for example, played a leadership role in the multistate investigation into Volkswagen's "clean diesel" deception that secured recently a partial settlement awarding Massachusetts nearly $100 million in Chapter 93A civil penalties and environmental mitigation, *see* JA 478-79, and was involved in past successful efforts to curb deceptive tobacco marketing and sales practices. *E.g.*, JA 836-38, 1237.

II. THE ATTORNEY GENERAL'S EXXON INVESTIGATION.

The Attorney General's decision to issue a CID to Exxon was based on (i) a substantial, newly-available, public record indicating that Exxon for decades has been aware of how its products contribute to climate change and how climate change and related regulatory actions could undermine its profitability, and (ii) the possibility that Exxon's failure to disclose that information had (and continues to have), *inter alia*, the capacity, tendency to, or effect of, deceiving Massachusetts consumers and investors and unfairly distorting the marketplace. *See Aspinall*, 442 Mass. at 394-96 & n.18.

A. The Bases for the Attorney General's Chapter 93A Investigation.

1. The Publicly Reported Evidence.

Nearly forty years ago, Exxon scientists, based on Exxon's own internal climate science research activities, wrote "it is distinctly possible that" climate change will eventually "produce effects which will indeed be catastrophic (at least for a substantial fraction of the earth's population)," JA 656, and "mitigation" of those catastrophic effects "would require major reductions in fossil fuel consumption," JA 398. These statements and others like them were publicly disclosed beginning in September 2015 as part of separate investigative reports by the

Los Angeles Times and the Pulitzer Prize-winning news organization InsideClimate News. JA 529-43, 545-651. The reporting included interviews with former Exxon employees and a review of hundreds of Exxon's now-public internal documents, and shows that Exxon had a robust climate change scientific research program in the late 1970s into the 1980s. *See* JA 532, 546-48. That program documented the serious potential for climate change, how fossil fuels contributed to it, and the risks climate change posed to Exxon's assets and businesses.

According to the publicly disclosed documents, Exxon's management understood by the early 1980s that (i) carbon dioxide emissions were causing increases in global average temperature, *e.g.*, JA 397, and (ii) atmospheric doubling of carbon dioxide would occur "sometime in the latter half of the 21st century," JA 662, and such a doubling "would result in an average global temperature rise of (3.0 ± 1.5)°C," JA 661.[8] Exxon's scientists then concurred with what they described as the "unanimous agreement in the scientific community that a temperature increase of th[at] magnitude would bring about significant changes in the earth's climate." JA 661; *see also id.* 347

[8] A temperature increase of 1.5 to 4.5 degrees Celsius equals a temperature increase of 2.7 to 8.1 degrees Fahrenheit.

(noting detrimental environmental and human health impacts). The documents show Exxon knew then that warming in excess of two degrees Celsius (3.6 degrees Fahrenheit) would pose a significant threat, JA 398; today, consistent with Exxon's understanding decades ago, there is broad scientific consensus that, to avert the most severe climate change impacts, carbon dioxide emissions must be reduced to ensure that global average temperature increase does not exceed two degrees Celsius, JA 390. To achieve that objective--one that formed the basis for the "Paris Agreement," a global accord to address climate change by, among other things, reducing global carbon dioxide emissions from fossil fuel combustion, JA 352--no "more than one-third of proven reserves of fossil fuels can be consumed prior to 2050." JA 381.

Exxon's internal documents also suggest that it understood nearly four decades ago the climate-driven risk to its business. JA 334-47, 395-98, 666-91. Those risks have become even clearer today, with one New England-based financial services provider concluding that "there are fundamental questions about whether fossil fuel companies like Exxon[] have a long-term future in the marketplace." JA 390. Yet, despite Exxon's longstanding internal knowledge, it appears that Exxon failed to disclose fully its understanding of climate change's threats.

Instead, it appears that Exxon shifted its climate-research effort to a climate-disinformation effort in the late 1980s. JA 547, 555. Public documents reveal that Exxon engaged in a campaign from at least the 1990s onward with other fossil fuel interests to sway public opinion and prevent government action to reduce greenhouse gas emissions. For example, it "helped to found and lead the Global Climate Coalition, an alliance of some of the world's largest companies seeking to halt government efforts to curb fossil fuel emissions." JA 555. And, in 1998, Exxon participated as a member of the "Global Climate Science Communications Team," JA 704, which sought to undermine "the science underpinning the global climate change theory" by publicizing a position--one directly contrary to Exxon's internal knowledge--that "it [is] not known for sure whether (a) climate change actually is occurring, or (b) if it is, whether humans really have any influence on it." JA 705. "Victory," the team's draft plan notes, would be achieved only if they stopped all "initiatives to thwart the threat of climate change." JA 703. Exxon thus may very well have distorted public perception about the risk of climate change, its products' contribution to climate change, and the likely impacts on Exxon's business of efforts to mitigate the threat of climate change by reducing carbon dioxide emissions.

Exxon's apparent failure to fully disclose that information appears to be ongoing. In response to shareholder demands for analysis of climate-driven risks, Exxon recently informed investors, in a 2014 report entitled *Energy and Carbon: Managing the Risks* that is still published on its website, JA 400-29, that "we are confident that none of our hydrocarbon reserves are now or will become 'stranded.'" JA 400.[9] In 2016, Exxon reaffirmed that statement to the Securities and Exchange Commission (SEC). JA 434. And, in sharp contrast with its own earlier research and global scientific confirmation of it, Exxon's website proclaimed to investors and consumers that "current scientific understanding provides limited guidance on the likelihood, magnitude, or time frame of these [climate change] events." JA 450.

Since the CID was issued, Exxon's refusal to acknowledge the climate-driven risks to its assets and its insistence that none of its hydrocarbon reserves will become stranded has become the focus of an investigation by the SEC. JA 1256-59. At issue, in particular, is Exxon's practice of not "writing down" the value of its oil and gas reserves when developing

[9] A later story on the report, co-authored by a Massachusetts investment firm manager, argued that "Exxon is taking a ... willfully distorted view of climate and carbon-asset risk ... to minimize the extent to which investors accurately price it into Exxon's shares." JA 700 (emphasis added).

them becomes unprofitable--a practice that no other major oil company follows. JA 1257. That practice came into sharp focus in October 2016, when Exxon, for the first time in the company's history, announced that it might have to write-down 4.6 billion barrels of tar sands oil reserves (reserves that are more affected by climate-change-related risks).[10] According to Exxon, the write down would be "the biggest accounting revision of reserves in its history"[11]--news that prompted a shareholder class action.[12] And, contrary to Exxon's prior assurances that "none of our hydrocarbon reserves are now or will become stranded," JA 400, 434, in early 2017, Exxon did write down the value of its oil reserves, debooking about 3.3 billion barrels of so-called "proved" reserves and appreciably

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[10] Bradley Olson & Lynn Cook, *Exxon Warns on Reserves as It Posts Lower Profit*, Wall St. J., Oct. 28, 2016, https://www.wsj.com/articles/exxon-mobil-profit-revenue-slide-again-1477657202, *cited at* JA 1263 n.3. This announcement closely coincided in time with the New York Supreme Court's October 26 order compelling Exxon to produce accounting documents regarding this very issue in response to the New York Attorney General's subpoena of Exxon's auditing firm. *See* JA 1263, 1473-91.

[11] Clifford Krauss, *Exxon Concedes it May Need to Declare Lower Value for Oil in Ground*, N.Y. Times, Oct. 28, 2016, http://nyti.ms/2dU7Ztx, *cited at* JA 1263 n.2.

[12] The class action alleges federal securities violations in connection with Exxon's failure to disclose climate-change impacts on the value of its assets. *See Ramirez v. Exxon Mobil Corp.*, No. 3:16-cv-3111-L (N.D. Tex., filed Nov. 7, 2016).

shrinking the value of one of the largest companies in the world.[13] Indeed, on the date of this filing, Exxon's shareholders, for the first time in the company's history, voted overwhelmingly to require Exxon to report to investors the impacts of climate change on its business.[14]

2. The New York Attorney General's Investigation.

Following the 2015 release of Exxon's internal documents, on November 4, 2015, the New York Attorney General's Office issued a subpoena to Exxon seeking documents regarding Exxon's climate research and its communications to investors and consumers about the risks of climate change and the effect of those risks on Exxon's business. JA 1455-63; *see also* JA 721.[15] As part of that active investigation, Exxon repeatedly

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[13] Joe Carroll, *Exxon Caves to Oil Crash With Historic Global Reserves Cut*, Bloomberg, Feb. 22, 2017, https://www.bloomberg.com/news/articles/2017-02-22/exxon-takes-historic-cut-to-oil-reserves-amid-crude-market-rout.

[14] Steven Mufson, *Financial Firms Lead Shareholder Rebellion Against ExxonMobil Climate Change Policies*, Wash. Post, May 31, 2017, https://www.washingtonpost.com/news/energy-environment/wp/2017/05/31/exxonmobil-is-trying-to-fend-off-a-shareholder-rebellion-over-climate-change/?hpid=hp_hp-top-table-main_exxonmobile-115p%3Ahomepage%2Fstory&utm_term=.07f07a6621b4

[15] Three months after the New York subpoena, the U.S. Department of Justice confirmed that, following a congressional request, the Federal Bureau of Investigation was considering whether to investigate Exxon for failing to "disclose truthful information to investors and the public regarding climate science." JA 736; *see also* JA 739.

has informed the New York state court that, in its view, the company "is fully complying with" the New York subpoena. *E.g.*, JA 1492. As of May 19, 2017, Exxon claims to have produced to New York 2.8 million pages in documents,[16] and it just recently lost an appeal challenging an order requiring the production of documents from Exxon's independent auditor.[17]

B. The Office's Investigation and the Civil Investigative Demand.

Attorney General Healey announced that she had opened a Chapter 93A investigation into Exxon at a March 2016 press conference where she stood alongside other Attorneys General with whom the Office has for years collaborated on a wide range of issues. JA 82. There, she noted the "incredibly serious ... human and economic consequences" of climate change and the need to hold accountable companies that have "deceived investors and consumers about" it. JA 82-83. And, as further explained below, the Attorney General--based on the Office's review of the already rich, recently-disclosed public record of Exxon's internal documents --noted the "troubling disconnect between what Exxon

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[16] Suppl. Affirmation of M. Hirshman ¶ 22 (May 19, 2017) *in In re Subpoena Issued by the Attorney General of New York*, No. 451962/2016, https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=Lv0amgmJQao7w64lIBy5wg==&system=prod.

[17] *New York v. PriceWaterhouseCoopers, LLP*, __ N.Y.S.3d __, 2017 WL 2231158 (N.Y. App. Div., May 23, 2017).

knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public." JA 82.

On April 19, 2016, the Office served on Exxon's registered agent in Massachusetts[18] a CID requesting that Exxon produce documents related to the investigation. JA 92. In that regard, the CID defines the term "Exxon Products and Services" as "petroleum and natural gas energy products and related services, offered to and/or sold by Exxon to consumers in Massachusetts," JA 97, and the term "Security" to include "fixed- and floating rate-notes, bonds, and common stock, available to investors for purchase by Massachusetts residents." JA 99. The CID then requests, "all advertisements ... and informational materials" used "to solicit or market Exxon Products and Services in Massachusetts," JA 109, and all "Documents and Communications concerning ... public relations and marketing decisions for addressing investor perceptions regarding Climate Change ... in

[18] As a foreign corporation "transacting business in the [C]ommonwealth," Exxon was required to register with the Secretary of State, G.L. c. 156D, § 15.03(a), and "continuously maintain in the [C]ommonwealth" a registered agent for service of process. *Id.* at § 15.07. Exxon has been registered to do business in Massachusetts since at least 1972. Corps. Div., Sec'y of State, Business Entity Summary, http://corp.sec.state.ma.us/CorpWeb/CorpSearch/CorpSummary.aspx?FEIN=135409005&SEARCH_TYPE=1 (last visited May 30, 2017).

connection with Exxon's offering and selling Securities in Massachusetts." JA 108.

C. The Three-Front Attack on the Office's Investigation.

Exxon did not comply with the CID and instead, the Office found itself defending challenges to the CID on three fronts: state court, federal court, and Congress. First, Exxon filed the action that resulted in this appeal, where it has pursued an unprecedented request to disqualify the entire Office from even investigating the company's conduct. JA 5, 24-25.

Second, Exxon filed a duplicative action against the Attorney General in the U.S. District Court for the Northern District of Texas,[19] where Exxon's corporate headquarters are located. JA 216, 221. There, Exxon obtained orders authorizing it to conduct unlimited discovery about the Attorney General's investigatory motives and directing her to appear personally for a Dallas, Texas courtroom deposition. JA 1262-64. Shortly after the Attorney General filed an emergency petition with the U.S Court of Appeals for the Fifth Circuit, the district court vacated the discovery orders (without any discovery having

[19] Exxon's federal court allegations are virtually identical to those raised in its state court action; Exxon cites in its federal complaint the federal constitutional analogs of the state constitutional provisions cited in its state petition. *Compare* JA 5-29 (state pet.), *with* JA 216-48 (federal compl.).

occurred), JA 1587, and then, on venue grounds, transferred the case to the Southern District of New York. The Attorney General has recently filed a renewed motion to dismiss in that federal court.[20]

Third, the Office's Exxon investigation elicited an immediate response from Texas Congressman and Chair of the U.S. House Committee on Science, Space and Technology, Lamar Smith. Within one month of the CID's issuance, Chairman Smith opened an investigation, not to investigate Exxon's conduct, but to investigate the Massachusetts and New York Attorneys Generals' Exxon investigations.[21] In July 2016 and February 2017, Chairman Smith took the unprecedented step of issuing subpoenas to both Attorneys General. JA 454; *see also* JA 748-49 ("research has identified no other example--in the over 240 years of United States history--of a Congressional committee subpoenaing a state attorney general working in their official capacity to

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[20] The Attorney General's motion addresses, at the judge's request, the preclusive effect of the Superior Court's decision, the applicability of *Colorado River* abstention, ripeness of Exxon's claims, and whether the federal court may exercise personal jurisdiction over the Attorney General. *See* Mem. of L. in Supp. of Attorney General Healey's Renewed Motion to Dismiss First Amended Compl. (May 19, 2017) *in Exxon v. Schneiderman et al.*, No. 17-CV-2301, http://www.mass.gov/ago/docs/energy-utilities/exxon/mtd-memorandum-of-law.pdf (last visited May 30, 2017).

[21] The full record of correspondence between the Committee and the Office is available at: http://www.mass.gov/ago/bureaus/eeb/the-environmental-protection-division/exxon-investigation.html.

investigate potential state law violations.").[22] Both Attorneys General have submitted extensive objections to these subpoenas.

III. EXXON'S UNDISPUTED MASSACHUSETTS PRESENCE

Exxon has, for many years, had physical, marketing, and product-sales presences in Massachusetts. For example, Exxon owns an interstate refined oil products pipeline that terminates in Massachusetts and two major fuel distribution terminals in Springfield and Everett. JA 788. The company uses the terminals, which hold large volumes of gasoline and other fuels, to distribute Exxon petroleum products by truck to gas stations and other retail facilities throughout Massachusetts. JA 833.[23]

Indeed, there are more than three hundred Exxon-branded retail service stations in Massachusetts--governed by a franchise agreement that allows Exxon to control the franchisees' marketing, *see infra* pp.36-39--that sell Exxon gasoline and other fossil fuel products in Massachusetts to Massachusetts residents, JA 780-83, 785. Exxon publicly represents that those

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[22] The subpoena is available at: http://www.mass.gov/ago/docs/energy-utilities/exxon/02-16-2017-sst-healey.pdf (last visited May 30, 2017).

[23] In 2010, Exxon consented to the entry in Suffolk Superior Court of a judgment against it and the payment of a $2.9 million civil penalty to settle a complaint by the Commonwealth, which alleged that Exxon had violated Massachusetts environmental laws at the two fuel storage terminals. JA 833.

stations are "[o]ur stations," JA 778, 793,[24] and that Exxon offers for them "best-in-class marketing and advertising support," "dedicated sales expertise," and "[e]asy access to advertising materials," JA 791.

Exxon is also one of the leading suppliers of fossil-fuel products to large national retailers with Massachusetts retail locations such as Pep Boys, NAPA Auto Parts, Target, and Costco. JA 760-75.

Exxon promotes the sale of its fossil fuel products through consumer-directed marketing devices and advertisements. Exxon has, for example, created a "Fuel Finder App" that consumers can download to their phones for free to locate Exxon-branded service stations in Massachusetts, *see* JA 778-79, operates a "Speedpass" program and mobile application that directly processes payments for fossil fuel and other products purchased at Exxon-branded service stations, *see* JA 791, *see also* JA 793, and, through its website, allows consumers to enter a zip code to find the nearest location to purchase Exxon petroleum products, including oil and gasoline. *See* JA 760, 778. Exxon also promotes the sale of its fossil fuel products by placing advertisements on radio, television, and

[24] In 2002, Exxon entered into a Chapter 93A Assurance of Discontinuance (G.L. c. 93A, § 5) with the Attorney General, which required Exxon to prohibit Exxon-branded service stations from marketing tobacco products to minors. JA 1235, 1249.

internet media that target markets in Massachusetts. JA 329.

To further promote its products in Massachusetts, Exxon has touted its engine-oil contract with the Massachusetts State Police as one that "will help fleet efficiency [in modern gasoline engines], provide a positive environmental impact, and support annual cost savings." JA 795.

Exxon's business transactions also include dealings with Massachusetts securities investors, including actively marketing its securities to them. The company admits it recently sold, for example, securities (short term fixed rate notes or "commercial paper") to investors in Massachusetts. JA 65. And the Massachusetts-based investment manager for the Commonwealth's own Pension Reserves Investment Trust has made a significant investment in Exxon securities on the Pension's behalf. JA 330. Three Boston-based institutional investors--State Street Corporation, Wellington Management, and Fidelity Investments--also hold billions of dollars in Exxon's common stock. JA 801-02, 804. And, Exxon communicates with these institutional investors and other Massachusetts-based investors both through traditional public filings and otherwise. At its 2014 annual shareholder meeting, for example, Exxon's then-chief executive officer responded to a Massachusetts investor's question about

what Exxon "is doing to support the clean energy movement." JA 828.

SUMMARY OF THE ARGUMENT

The Superior Court's assertion of specific personal jurisdiction over Exxon based on Exxon's extensive in-state CID-related contacts satisfies the Massachusetts long-arm statute and comports with due process. Here, Exxon contests only the court's finding that the company's Massachusetts contacts are related to the CID's areas of inquiry. The relatedness test is easily satisfied in this case, since Exxon admits that it has marketed and/or sold its fossil fuel products and securities in Massachusetts and those acts are central to the CID (pp.26-35). Exxon also controls its Exxon-branded service stations' marketing of Exxon's products in Massachusetts--another basis for jurisdiction (pp.36-39). And Exxon sells its products to national retailers with the intent and purpose that they will be sold in Massachusetts (pp.39-41). On these facts, jurisdiction over Exxon is proper and fair.

Exxon has not come close to carrying its burden to demonstrate that the CID is arbitrary and capricious, unreasonably burdensome, or issued for a purpose that would justify disqualifying the Office. After reviewing evidence of Exxon's past and current conduct, the Attorney General formed a belief that

Exxon has engaged in or is engaging in Chapter 93A proscribed conduct--the predicate for issuing a CID--and Exxon's self-serving spin on the meaning of its internal documents cannot satisfy its heavy burden to prove that belief was arbitrary (pp.41-43). Neither the CID's breadth nor its scope are unreasonable, because Exxon's historic documents are relevant to determining whether Exxon's current conduct violates Chapter 93A, and Exxon--one of the largest companies in the world--has already produced 2.8 million pages of related documents to New York (pp.43-45). Finally, given the belief formed by Attorney General about Exxon's potential misconduct, there was nothing improper about informing the public that the Office had initiated the investigation (pp.46-48).

Neither the law nor the facts justify a stay of this action based on Exxon's duplicative federal court action challenging the CID, given that longstanding principles of federal-state court comity dictate federal court deference to state court proceedings in these circumstances, as well as Chapter 93A's designation of the Superior Court as the forum for Exxon's CID challenges, and the preclusive effect of the Superior Court's order on all of Exxon's cognizable federal court claims (pp.48-50).

ARGUMENT

I. PERSONAL JURISDICTION OVER EXXON IN MASSACHUSETTS SATISFIES THE MASSACHUSETTS LONG ARM STATUTE AND COMPORTS WITH DUE PROCESS.

Massachusetts courts may exercise personal jurisdiction over Exxon because Exxon has admitted to pervasive, purposeful contacts with Massachusetts, and those contacts are at the heart of the conduct that the CID seeks to explore through its request for documents and testimony. Exxon advertises its products in Massachusetts, directly solicits sales of its fossil fuel products in Massachusetts through mobile applications and its website, and sells securities to Massachusetts investors. Exxon quite appropriately does not even try to dispute on appeal the fact of these contacts. Yet it attempts to maintain that Massachusetts courts lack personal jurisdiction to enforce a CID that seeks information about those very contacts--advertising, marketing, and selling fossil fuel products and securities. Exxon is wrong.

Exxon resorts to a single argument that, on its face, belies the facts: that Exxon's control over three hundred Massachusetts Exxon-branded service stations' marketing and advertising of Exxon's products is not a basis for personal jurisdiction over Exxon in a case about the company's advertising and marketing of its products. *See* Exxon Br. 15-30. As the Superior Court recognizes, however, Exxon's franchise

agreements allow it to "directly control the very conduct at issue in [the] investigation--the marketing of [fossil fuel] products to [Massachusetts] consumers," Add-6, and that control fully justifies the assertion of jurisdiction by Massachusetts courts over Exxon to enforce a CID seeking information about that specific conduct.[25]

A. The Personal Jurisdiction Issue Here Is Whether a Nexus Exists Between Exxon's Massachusetts Contacts and the CID's Areas of Inquiry.

Massachusetts courts may exercise personal jurisdiction over Exxon, a non-resident, if Exxon's conduct falls within the long-arm statute, G.L. c. 223A, § 3, and the enforcement of the CID comports with due process. *Good Hope Industries, Inc. v. Ryder Scott Co.*, 378 Mass. 1, 5-6 (1979). Because the Supreme Judicial Court has construed the long-arm statute as extending jurisdiction to the limits of the U.S. Constitution, courts often by-pass the long-arm

[25] With its near singular focus on the court's finding that there is a sufficient nexus between Exxon's control of its franchisees' marketing and the conduct under investigation, Exxon has waived its long-arm statute claims and any due process claims that it either did not purposefully direct its activities at Massachusetts or that the assertion of jurisdiction here would be unreasonable. *See Abate v. Fremont Inv. & Loan*, 470 Mass. 821, 833 (2015) ("failure to address ... issue on appeal waives ... right to appellate review" of it). Exxon is barred from resurrecting these issues in its reply. *Pasquale v. Casale*, 72 Mass. App. Ct. 729, 738 (2008).

inquiry and focus only on the constitutional one. *Adelson v. Hananel*, 652 F.3d 75, 80 (1st Cir. 2011).[26] Here, where no evidentiary hearing was held (or even requested), the Commonwealth bears the burden of establishing prima facie facts, construed in its favor, that support jurisdiction. *Cepeda v. Kass*, 62 Mass. App. Ct. 732, 735 (2004). This Court reviews the Superior Court's finding *de novo*, *Sullivan v. Smith*, 90 Mass. App. Ct. 743, 746-47 (2016), and it may affirm that finding on any record-supported ground. *Commonwealth v. Va Meng Joe*, 425 Mass. 99, 102 (1997).

Personal jurisdiction may be general or specific.[27] Here, the Superior Court exercised specific jurisdiction over Exxon. In that context, the "'constitutional touchstone' ... remains whether [Exxon] established 'minimum contacts' in" this state, *Bulldog Inv. Gen. P'ship v. Sec'y of the Commonwealth*, 457 Mass. 210, 217 (2010)(citation omitted), and

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[26] *See Openrisk, LLC v. Roston*, 90 Mass. App. Ct. 1107, 2016 WL 5596005, at *4 (Sept. 29, 2016) (1-28)(by-passing long-arm analysis). Because Exxon has waived any long-arm related argument, the Attorney General focuses solely on the due process inquiry.

[27] General jurisdiction differs from specific jurisdiction in that the former allows courts to adjudicate any claim against out-of-state actor (i.e., regardless of whether the claim relates to the in-state contacts) when the actor's "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Daimler AG v. Bauman*, 134 S. Ct. 746, 751, 754 (2014) (citation omitted).

normally entails an inquiry into whether: (i) the non-resident purposefully directed its activities at Massachusetts; (ii) a nexus exists between those contacts and the "claim," and (iii) the assertion of jurisdiction does "not offend 'traditional notions of fair plain and substantial justice.'" *Id.* at 217 (quoting *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 773 (1994) (citation omitted)). Here, as noted above, all that remains in issue is the second "nexus" or "relatedness" factor.

The relatedness test requires the "claim" to "arise out of or relate to the defendant's contacts with the forum." *Bulldog*, 457 Mass. at 217 (citation omitted).[28] The test is a "flexible, relaxed standard" that focuses on the "nexus" between the contacts and the claim. *Adelson*, 652 F.3d at 81; *Tatro*, 416 Mass. at 774 ("nexus"). This case, of course, does not concern a "claim" for damages, but rather a motion to compel compliance with an investigatory demand for documents, some of which seek further information about Exxon's Massachusetts contacts. *E.g.*, JA 109

[28] Massachusetts courts have employed a "but for" test, *Tatro*, 416 Mass. at 770, which federal courts have referred to as a more "liberal approach." *See, e.g.*, *Weinberg v. Grand Circle Travel*, 891 F. Supp. 2d 228, 245 (D. Mass. 2012); *see also Lyle Richards Int'l v. Ashworth, Inc.*, 132 F.3d 111, 114 (1st Cir. 1997) (describing "but for" test as a liberal interpretation of "arising from" designed to "favor ... asserting jurisdiction.").

(No. 24). So, contrary to Exxon's argument, Exxon Br. 16, the Superior Court properly focused on the relationship between Exxon's Massachusetts contacts and the CID's areas of inquiry--not a particular future Chapter 93A action. *In re Appl. to Enforce Admin. Subpoenas Duces Tecum of SEC*, 87 F.3d 413, 419 (10th Cir. 1996).[29] The different focus urged by Exxon would eviscerate the CID's purpose to "discover and procure evidence" to determine whether liability exists, *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 201 (1946), and require the Commonwealth to prove at this early stage the very issue it seeks to investigate. Again, Exxon's "liability ... has no bearing on the validity of the CID[]." *Harmon*, 83 Mass. App. Ct. at 836.

B. Exxon Has Engaged in Extensive and Purposeful Contacts in Massachusetts That Are Closely Related to the Areas Examined by the CID.

Exxon's contacts with Massachusetts are closely related to the areas of inquiry covered by the CID; as such, they easily satisfy the relatedness test. *See In re Appl. to Enforce Admin. Subpoenas Duces Tecum of SEC*, 87 F.3d at 419; *see also Lines Overseas*, 2005 WL

[29] *See also SEC v. Lines Overseas Mgmt.*, 2005 WL 3627141, at *4 (D.D.C., Jan. 7, 2005) (Add-51) ("The causal relationship necessary for the Court to assert specific personal jurisdiction over the Respondents in exercising its subpoena enforcement power is between the ... jurisdictional contacts and the central areas of inquiry covered by the SEC investigation....").

3627141, at *4. Or, in *Tatro*'s words, there is a "sufficient nexus" between Exxon's contacts and the CID. 416 Mass. at 774; *see also Nowak v. Tak How Invs.*, 94 F.3d 708, 716 (1st Cir. 1996) ("meaningful link"). As described below, Exxon has had extensive contact with Massachusetts in the course of marketing and selling its products and securities, and those contacts have a strong nexus to the CID, which seeks to examine how, in marketing and selling its fossil-fuel products and securities, Exxon accounted for the role of its products in contributing to climate change, climate-driven risk to the company's own business and assets, and what it told Massachusetts consumers and investors about those risks.

The company has, for example, admitted that it targeted Massachusetts with "Massachusetts-specific advertisements" for its fossil fuel products, JA 915, and it has not denied advertising its petroleum-based products in Massachusetts through the internet. *Compare id.*, *with* JA 329.[30] As explained below, Exxon also exerts significant control over its three hundred Massachusetts Exxon-branded service stations' marketing of Exxon's fossil fuel products to

[30] If purposeful availment were still at issue, these advertisements would readily satisfy that test too. *Gunner v. Elmwood Dodge Inc.*, 24 Mass. App. Ct. 96, 99-101 (1987) (out-of-state company's advertising in Massachusetts market justified jurisdiction).

Massachusetts consumers. *Infra* Pt.I.C. Chapter 93A makes unlawful any "advertisements which are untrue, misleading, [or] deceptive," 940 C.M.R. § 6.03(2), and makes clear that an "unfair or deceptive representation may result from ... omitting or obscuring a material fact," § 6.03(4). The CID seeks information about Exxon's Massachusetts-specific advertisements to determine whether the company's conduct violated Chapter 93A. JA 109-10 (Nos. 24-28). Thus, the CID is related directly to Exxon's admitted in-state advertising.

Exxon also uses its website to directly solicit sales of its gasoline and motor fuel products at multiple Exxon-branded service stations and retailers throughout Massachusetts. It guides Massachusetts consumers who enter their zip code to the nearest Massachusetts retailer, JA 760-76, or service station, JA 778-83. And to further enhance market loyalty, Exxon has developed a "Fuel Finder App" and "Speedpass" payment-processing application that puts Exxon's Massachusetts products a mere tap away on any Massachusetts consumer's smart phone. JA 778-79, 791.[31]

[31] Either Fuel Finder or Speedpass is enough to satisfy the purposeful availment test here, *see Bulldog*, 457 Mass. at 211, 217, a factor Exxon has, again, conceded. Indeed, Exxon's payment platforms are designed to "attract more customers" and "provide motorists with discounts and offers to reward ... loyal customers." JA 793.

Exxon's deployment of these software applications is decisive to relatedness: the website solicits the purchase by Massachusetts consumers of the very Exxon fossil fuel products that gave rise to the CID. Indeed, the CID concerns potential Chapter 93A violations "arising" from "the marketing and/or sale of energy and other fossil fuel derived products to consumers in ... Massachusetts." JA 92.

Exxon has also admitted that it recently sold securities to Massachusetts investors. JA 65.[32] And Exxon does not dispute that (i) the Massachusetts Pension Reserves Investment Trust's Massachusetts-based investment manager made a significant investment in Exxon securities on the Trust's behalf, JA 330, (ii) three Boston-based institutional investors alone hold billions of dollars in Exxon common stock, JA 802, 804, or (iii) that these entities make decisions about whether to purchase or sell Exxon securities based, in part, on what Exxon says about its profitability and the value of its assets.[33] Chapter

[32] Exxon does not dispute nor could it that it actively disseminates marketing materials about its securities to investors, including investors in Massachusetts. *E.g.*, JA 400-29; 439-44; 446-51; 1108-16.

[33] Investors, like Boston-based State Street Corporation, Wellington Management, and Fidelity Investments, which hold billions of dollars of Exxon's common stock, rely, in part, on the accuracy of Exxon's financial filings with the SEC to make informed investment decisions about whether to buy or

93A specifically proscribes unfair and deceptive acts or practices in the "advertising, the offering for sale, ... the sale, ... or distribution of any services and any ... security," G.L. c. 93A, § 1(b), and that proscription applies to both pre- and post-investment company statements. *See Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 61 (2004). Here, the CID thus seeks information to determine whether Exxon deceived investors about its securities, the value of its assets, and the company's business prospects in violation of Chapter 93A. *E.g.*, JA 92, 108-10 (Nos. 19-22, 30-32).

In sum, Exxon's numerous Massachusetts contacts are closely tethered to the CID's primary areas of inquiry: how, in the course of marketing its fossil fuel products in Massachusetts and soliciting for sale and the actual sale of securities in Massachusetts, Exxon accounted for climate change, e.g., what Exxon

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sell Exxon's stock. Like the SEC investigation into Exxon's accounting for climate-driven risk to its assets, *supra* pp.13-15, the CID also seeks this information. *E.g.*, JA 108 (No. 19). Exxon's statements and investors' reactions to them have real world consequences, as demonstrated by Exxon's recent write-down. *Supra* pp.14-15. As the Wall Street Journal has remarked, "Exxon faces headwinds from regulators aimed at reducing carbon dioxide and other greenhouse gas emissions." JA 1264. Others have been more direct, accusing Exxon of distorting climate risk to prevent investors from pricing "accurately" Exxon's shares. *Supra* p.13 n.9. If the investigation bears this out, it would be actionable under Chapter 93A.

knew about the impacts of fossil fuels on climate change and climate-driven risk to the company's own business and assets, when Exxon knew those facts, and what Exxon told the Massachusetts consumers and investors about those facts.[34] The CID probes how Exxon planned to address "consumer perceptions regarding Climate Change and Climate Risks in connection with Exxon's offering and selling Exxon Products and Services to consumers in Massachusetts," JA 108,[35] and "investor perceptions regarding Climate Change, Climate Risk, and Exxon's future profitability in connection with Exxon's offering and selling

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[34] Put differently, the CID seeks this information, in part, to determine whether Exxon made any false, deceptive, and/or misleading statements about its products and/or the value of its assets that would tend to distort consumer, investor, and public perception about the risks associated with climate change and thereby influence the choices they may have made in the marketplace based on that distorted perception. In this context, it is worth recalling, a practice is "deceptive ... if it 'could reasonably be found to have caused a person to act differently from the way he [or she] otherwise would have acted,'" *Aspinall*, 442 Mass. at 394(citation omitted), and such an act violates Chapter 93A regardless of proof of actual reliance on it or any ascertainable injury. *Id*.

[35] Internally, these were apparently very real concerns for Exxon; indeed, so sensitive that Exxon's former CEO used an alias e-mail account to discuss climate change and other sensitive matters with the company's board members. Erik Larson & Joe Carrol, *Exxon Can't Find Up to a Year of Tillerson's 'Wayne Tracker' Emails*, Bloomberg News, Mar. 22, 2017, https://www.bloomberg.com/politics/articles/2017-03-22/exxon-lost-a-year-of-wayne-tracker-emails-n-y-tells-court.

Securities in Massachusetts." *Id.* All of the CID's requests thus relate back to Exxon's contacts in Massachusetts, and are necessary to effectuate the type of broad investigation that Chapter 93A authorizes to secure its purposes. *See In re Yankee*, 372 Mass. at 364-65.

The assertion of jurisdiction over Exxon is also fair, since it is not unreasonably burdened by appearing in this forum--a point, as noted, that Exxon does not dispute. *See Diamond Group, Inc. v. Selective Dist. Int'l*, 84 Mass. App. Ct. 545, 552 (2013) ("[t]he third element is essentially a test of fairness"). As discussed above, Exxon enjoys a pervasive presence in Massachusetts, and, in fact, has previously consented to the jurisdiction of Massachusetts courts. *Supra* pp.20-21 nn.23-24. As well, the Commonwealth has an undeniably "strong interest" in investigating potential violations of Massachusetts law. *Bulldog*, 457 Mass. at 218. Tellingly, Exxon fails to articulate any express argument that it would be unfair to enforce the CID in a Massachusetts forum. *See* Exxon Br. 1-50. Indeed, the idea that the company could insulate itself from an investigation where it has such an extensive business presence is offensive to the traditional notions of "fair play and substantial justice" that animate the due process inquiry. *See Burger King v. Rudzewicz*, 471 U.S. 462, 476 (1985).

C. Exxon's Control of Its Franchisees' Marketing of Exxon Products Constitutes an Independent Basis for Personal Jurisdiction.

On its face, Exxon's franchise agreement with Massachusetts Exxon-branded service stations affords Exxon the ability to control those stations' marketing of Exxon's products in Massachusetts, and this level of control is more than sufficient to support personal jurisdiction here, as the Superior Court held. Add-6. Indeed, the record further demonstrates that the very purpose of this agreement is to promote the sale of Exxon's products, including through marketing efforts, and that Exxon does, in fact, provide direct advertising and marketing support to the stations to ensure that they carry Exxon's message to the Massachusetts market.

It is undisputed that there are more than three-hundred Exxon-branded service stations located in Massachusetts. JA 780-83, 785. Those stations operate under an agreement that establishes a franchise relationship between Exxon and the franchisee. JA 1508. According to Exxon, "[a] primary business purpose" of the agreements is "to optimize effective and efficient distribution and representation of ... [Exxon branded motor fuel] through planned market and image development." JA 1524 (§ 13(a))(emphasis added). In exchange for the ability to use the Exxon name and to sell Exxon-branded fuel products, the franchisees

agree both to "acknowledge ... that the operation" of Exxon branded stations "impacts customers' perceptions and acceptance of" Exxon's products and name, JA 1510 (§ 2(d)(2)), and to "diligently promote the sale of [Exxon's] Products, including through advertisements." JA 1525 (§ 15(a)). The latter obligation comes with a significant caveat, however--Exxon has "the authority to review and approve, in its sole discretion, all forms of advertising and sales promotions ... for the promotion and sale of any product, merchandise or services" that "(i) uses or incorporates any Proprietary Mark or (ii) relates to any Business operated at a" branded station. JA 1525 (§ 15(a)).

A principal focus of the CID is on Exxon's marketing and advertising of its fossil fuel products in Massachusetts, including, contrary to Exxon's statement (Exxon Br. 26), advertising by its "franchisees." JA 109 (No. 24). There are, of course, limits on the circumstances when a franchisor, like Exxon, can be held vicariously liable for the acts of its franchisee, like the stations here. Exxon Br. 19-20. But this matter does not concern Exxon's Chapter 93A liability, *see Harmon*, 83 Mass. App. Ct. at 836, and, even if it did, the level of control Exxon retains over its franchisees is more than enough to tie their marketing to Exxon. That is so because, as described above, Exxon "controls or has a right to

control" its franchisees' marketing. *See Depianti v. Jan-Pro Franchising Int'l*, 465 Mass. 607, 617 (2013). As the Superior Court held, the agreement includes approval and procedural requirements well beyond what Exxon needs simply to protect its brand. Add-6.

Additional record evidence further supports the court's conclusion. In fact, Exxon's involvement in its branded-stations' marketing goes well beyond just review and approval. Exxon, for example, provides "advertising materials" to its franchisees and offers them "best-in-class marketing and advertising support and dedicated sales expertise." JA 791. Because of the pervasive role Exxon plays in controlling and facilitating its franchisees' marketing of Exxon's products, Exxon's former CEO acknowledged that the company does "have a fair amount of control over the quality of how the brand is presented to the customer" by Exxon's franchisees. JA 829. "[I]t's us," he remarked, *id*., and they are "[o]ur stations," Exxon's fuel finder website informs consumers. JA 778, 793.[36] Taken together, the agreement's terms and Exxon's own statements show that the franchisees are in fact

[36] Notably, Exxon in 2002 entered into a Chapter 93A Assurance with the Attorney General, filed in the Superior Court, acceding to the court's ongoing jurisdiction to enforce Exxon's obligations to ensure that franchisee marketing does not offend Chapter 93A. JA 1235-54 (requiring Exxon to ensure appropriate marketing of tobacco products at branded service stations, including those owned by franchisees).

instrumentalities to promote Exxon's message and its business--the sale of fossil fuel products, which is the heart of the CID's area of inquiry.

D. Exxon's Attack on the Superior Court's Stream of Commerce Reference is Misplaced.

The Superior Court also could have rested (but did not in fact rest) its personal jurisdiction finding on a stream of commerce theory. While Exxon takes aim at that theory, *see* Exxon Br. 30, this Court will search in vain to find a passage in the Superior Court's order relying on that doctrine to support its purposeful availment or relatedness analyses. *See* Add-1-8. Instead, the court referenced that theory only to buttress its finding that it is reasonable for Exxon to appear in a Massachusetts court, a point Exxon does not dispute. *See* Add-8 (noting "it is not overly burdened"). For that reason alone, Exxon's argument entirely misses the mark.

Even if the court had relied on a stream of commerce theory, Exxon's actions satisfy that basis for personal jurisdiction as well. Under that doctrine's original formulation, a court may exercise "personal jurisdiction over [an out-of-state party] corporation ... that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum [s]tate." *Heins v. Wilhelm Loh Wetzlar Optical Machinery GmbH & Co.*,

26 Mass. App. Ct. 14, 224 (1988) (citation omitted). Non-controlling Supreme Court opinions have since articulated a stricter version of the test, which requires the defendant to target the forum state. *Id.* Neither Massachusetts appellate courts nor the Supreme Court, however, have settled on "the [test's] proper articulation." *See AFTG-TG, LLC v. Nuvoton Tech.*, 689 F.3d 1358, 1362 (Fed. Cir. 2012).[37]

Exxon's conduct satisfies either test. With both the expectation and the clear intention that its fossil fuel products will be purchased by consumers in Massachusetts, Exxon sells them to national retailers like NAPA Auto Parts and Costco, which sell Exxon those products in Massachusetts. JA 760-75 (Exxon website directing consumers to national retailers that sell its products in Massachusetts). This conduct also supports personal jurisdiction here. Indeed, the U.S. District Court for the District of Massachusetts held recently that a defendant's conduct met that stricter stream of commerce test where, like Exxon here, the company sold its products to national retailers that sold those products in Massachusetts and used its website to direct consumers to those retail outlets. *Hilsinger v. FBW Invest., LLC*, 109 F. Supp. 3d 409,

[37] Exxon's claim that *McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011), resolved the debate is false. *Vermont v. Atlantic Richfield Co.*, 142 A.3d 215, 221-23 (Vt. 2016); *AFTG-TG*, 689 F.3d at 1363.

426-29 (D. Mass. 2015). On these facts, Exxon cannot be surprised to be subject to the jurisdiction of a Massachusetts court. *See id.* at 428.

II. THE ATTORNEY GENERAL'S CIVIL INVESTIGATIVE DEMAND WAS NEITHER ARBITRARY AND CAPRICIOUS NOR ISSUED FOR AN IMPROPER PURPOSE.

A. Exxon Cannot Demonstrate that the Civil Investigative Demand Is Arbitrary and Capricious, Sought Plainly Irrelevant Information, or Is Unduly Burdensome.

Far from acting arbitrarily or capriciously, the Attorney General, based on, *inter alia*, Exxon's own publicly disclosed internal documents, formed a belief that Exxon has engaged or is engaging in Chapter 93A proscribed conduct. Such a belief, under Chapter 93A, was all that was required to issue the CID. G.L. c. 93A, § 6. And, as Exxon has conceded, *infra* p.44, none of the requested information is "plainly irrelevant," the liberal standard that this Court has employed to ensure that the Attorney General can conduct the type of broad investigation necessary to effectuate Chapter 93A's purposes. While Exxon accuses the Superior Court of being no more than a "rubber stamp" or "automaton," Exxon Br. 38-39, the record and the court's thoughtful decision repudiate these charges.

Exxon has failed to demonstrate that the Superior Court abused its discretion in finding that the company did not meet its "heavy burden," *CUNA*, 380 Mass. at 543, to establish that the "Attorney General

acted arbitrarily or capriciously in issuing the demand." *Bodimetric*, 404 Mass. at 157.[38] As this Court has made clear, the Attorney General "must ... be able to exercise" her investigatory "powers on mere belief that" Chapter 93A "is being violated," *In re Bob Brest Buick, Inc.*, 5 Mass. App. Ct. 717, 719 (1977), and here that belief was supported by an extensive record of Exxon's past and current conduct. *Supra* pp.9-16. Exxon cannot prove that belief was arbitrary and capricious simply by presenting its own self-serving characterization of its internal documents that formed a part of the basis for that belief, *see* Exxon Br. 41-42, especially where the New York Attorney General is conducting his own investigation based on the very same record and Exxon claims to be fully complying with it. *Supra* pp.15-16.[39] In fact, by relying on its own publicly available historical documents here, Exxon has demonstrated the common-sense proposition

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[38] That is, Exxon had to prove that there is "no ground which 'reasonable [persons] might deem proper' to support it." *FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone*, 41 Mass. App. Ct. 681, 684-85 (1996) (citation omitted & alteration in original).

[39] That the Superior Court did not specifically address investors is of no moment. The order quoted the CID's purpose as reaching Exxon's potential violations of Chapter 93A in sales or marketing of securities, Add-1, and plainly upheld the CID without limitation, with an analysis focused on the potential Chapter 93A violations in Exxon's marketing, *id.* at 8-9, whether directed at consumers or investors.

that a more complete range of the relevant internal documents from the entire period in question would be probative of Exxon's potential Chapter 93A liability and thus are appropriate CID subjects. *See infra* pp.44-45.

Exxon's challenge to the CID's breadth and burden fares no better than its challenge to the CID's validity. As an initial matter, the Superior Court's order contradicts Exxon's claim that the court applied the wrong legal standards. Exxon Br. 34. Consistent with current law, the court recognized: "[a] CID complies with [Chapter 93A] if '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.'" Add-10 (citation omitted).[40] It then proceeded to apply that law and reject all of Exxon's challenges, finding that the information the CID seeks is related properly to legitimate issues for investigation, Add-10-11, and that the CID would not place "excessive burdens" on Exxon in light of its admitted production of over one

[40] Exxon's argument that the "seriously interfere with the functioning of the investigated party" burden test lacks precedential support is false. *Compare* Exxon Br. 34, *with Bodimetric*, 404 Mass. at 159 (quoting *In re Yankee*, 372 Mass. at 361 n.8).

million of pages in response to the New York Attorney General's similar investigation, Add-11.

Exxon does not challenge the Superior Court's specificity finding on appeal; instead, it effectively takes aim at the relevance of the CID-requested historical documents and production burden. *See* Exxon Br. 35-37. But, in regard to relevance, Exxon conceded below that the historical documents "would certainly pass the test ... of relevance," JA 1358-59, and that concession forecloses any relevance-related argument here. Even if it did not, Exxon's apparent claim that it is *per se* impermissible to obtain documents from outside Chapter 93A's limitations period enjoys no support. Exxon Br. 35.[41] Courts apply a "plainly irrelevant" test, *In re Bob Brest Buick*, 5 Mass. App. Ct. at 719-20, and have stressed the importance of "context" to a Chapter 93A claim, *Kattar*, 433 Mass. at 14 (citation omitted).[42] As in the tobacco litigation,[43] documents that demonstrate Exxon's internal knowledge regarding climate change, and when that knowledge was developed, may be highly relevant to a determination

[41] *See also* JA 1367 (clarifying that Exxon disputed the CID's "breadth, not depth").

[42] *See also Ocean Spray Cranberries v. Mass. Comm'n Against Discrimination*, 441 Mass. 632, 647 (2004) (similarly recognizing in the discrimination context that historic conduct evidence is relevant to determine whether later conduct violated the law).

[43] *Philip Morris*, 566 F.3d at 1106-09 (describing historical record and how it was relevant to claims).

whether Exxon is currently or has in the recent past, misled Massachusetts consumers and investors.[44] For these reasons, the Superior Court did not surpass the "broad area of discretion" it held to reject Exxon's claim. *Harmon*, 83 Mass. App. Ct. at 835 (quoting *In re Yankee*, 372 Mass. at 356).

In regard to reasonableness, the Superior Court, both as a matter of common sense and as a matter of Chapter 93A case law, appropriately accounted for the fact that Exxon is complying with a similar subpoena issued by the New York Attorney General and could readily, as a practical matter, reproduce those extensive productions in Massachusetts. Add-11. On these facts, Exxon cannot show that compliance with the CID would be unreasonably burdensome. Indeed, "[d]ocumentary 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,'" *Bodimetric*, 404 Mass. at 159 (citation omitted), a showing that Exxon has not seriously attempted here. *See* Exxon Br. 35-37.

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[44] And, it is possible that the investigation, including documents obtained as a result of the CID, might reveal a basis for equitable tolling of the Chapter 93A statute of limitations. *See, e.g.*, *Lambert v. Fleet Nat'l Bank*, 449 Mass. 119, 126 (2007) (discovery rule applies to Chapter 93A); *Szymanski v. Boston Mut. Life Ins.*, 56 Mass. App. Ct. 367, 370 (2002) (same).

B. The Attorney General Did Not Exhibit Impermissible Bias by Publicly Announcing the Investigation.

The Superior Court did not abuse its discretion when it rejected Exxon's extraordinary claim that the court should disqualify the Office from investigating Exxon based on its view that the Attorney General's public statements evince bias against the company and prejudge the investigation. Add-11-13.[45] Exxon focuses on the Attorney General's brief public statement at the March 2016 New York press conference where she and other state attorneys general discussed climate change and related actions by their respective offices. Exxon Br. at 42-46.[46] But, as the Superior Court recognized, the Attorney General's public statement was no more than a recitation of the view she must hold under G.L. c. 93A, § 6, to issue a CID--that she "believes," based on available facts, that Exxon's conduct may constitute a violation of Chapter 93A. *See Harmon*, 83

[45] Exxon's unsupported call for "searching review" of on this issue ignores the deferential standards of review that apply to public officers' statements and prosecutorial decisions. *S. Boston Betterment Trust v. Boston Redev. Auth.*, 438 Mass. 57, 69 (2002) (applying the presumption of good faith); *Shepard v. Attorney General*, 409 Mass. 398, 402 (1991)(applying "arbitrary and capricious" standard to prosecutorial decision).

[46] The press conference transcript is reproduced at JA 70, and the relevant portion of the Attorney General's remarks are set forth in the Superior Court's order, Add-12.

Mass. App. Ct. at 834.[47] If this belief were a disqualifying bias as Exxon contends, then the Attorney General would never be permitted to issue a CID to any target of a Chapter 93A investigation.

The Attorney General's public statement was both unexceptional and fair, especially when the available facts--in this case, grounded in publicly-disclosed internal Exxon documents and Exxon's public statements about climate change--were then in the public domain. And, contrary to Exxon's claim, the Attorney General was well within the bounds when she informed the public about the Office's investigation. The Rules of Professional Conduct expressly allow investigating attorneys to state publicly "the claim, offense, or defense involved, and, except when prohibited by law, the identity of the persons involved," "the information contained in a public record," and "that an investigation of the matter is in progress." Mass. R. Prof. Conduct 3.6(b)(1)-(3).[48] On these facts, Exxon

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[47] Far from an assertion of Exxon's "guilt," Exxon Br. 44, the Attorney General's statement merely indicated that she had joined the New York Attorney General in investigating Exxon and described the apparent "troubling disconnect" between what Exxon knew and what it told investors and consumers. Add-12. As the transcript shows, she did not declare, as Exxon falsely states, that Exxon itself had "deceived the public," was a "ringleader," failed to tell "the whole story," or that Exxon itself "must be held accountable." *Compare* Br. 2, 11, 44, *with* JA 82-83.

[48] *See also, e.g.*, *Buckley v. Fitzsimmons*, 509 U.S. 259, 278 (1993) ("Statements to the press may be an

cannot overcome the longstanding presumption of good faith that attached to the Attorney General's statements, *see S. Boston Betterment Trust*, 438 Mass. at 69, let alone obtain the order's reversal or the Office's disqualification.

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETIION BY REJECTING EXXON'S HALF-HEARTED STAY REQUEST.

Finally, Exxon's request for stay based on Exxon's parallel federal action against the Attorney General lacks a basis in fact or law. *See Soe v. Sex Offender Registry Bd.*, 466 Mass. 381, 392 (2013) (denial of stay reviewed for "abuse of discretion").[49] The request had no merit at the outset of this litigation, and it certainly has none now, since this state-court action has advanced well beyond the federal court action. And, decisively, the Superior Court's order has preclusive effect on all of Exxon's cognizable federal claims.

Exxon's argument rests on the astounding premise that federal courts--first in Texas and now in New

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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.").

[49] Neither the original Texas federal court nor the New York federal court where the Texas case was recently transferred has ruled on the merits of Exxon's claims or the Attorney General's motions to dismiss. *See supra* p.19 n.20.

York--are more capable of adjudicating Exxon's objections to the Massachusetts CID, including the purportedly broader claims it has chosen to assert in federal court. Exxon Br. 46. But principles of comity between federal and state courts run in precisely the opposite direction. A long line of federal decisions in fact "espouse a strong federal policy against federal-court interference with pending state judicial proceedings," and make clear that "[m]inimal respect for the state processes ... precludes any *presumption* that the state courts will not safeguard federal constitutional rights." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). This is a "foundational principle of our federal system." *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013).

Here, as the Superior Court recognized, in passing Chapter 93A, the Legislature designated the Superior as the forum for Exxon to challenge the CID, G.L. c. 93A, § 6(7), and it was thus empowered to adjudicate all objections to it, whether based on state or federal law. *See School Comm. of Springfield v. Bd. of Edu.*, 362 Mass. 417, 446 n.29 (1972)("It is fully within the competence of judges of the Superior Court to adjudicate claims under the State and Federal Constitutions."). With this authority, the Superior Court resolved all of Exxon's claims, and issued a final, appealable, order denying them and granting the

Attorney General's motion to compel compliance with the CID. Add-1. Under settled *res judicata* principles, that order requires dismissal of Exxon's federal action, as the Attorney General argued to the New York federal court earlier this month. *See* Mem. in Supp. of Attorney General's Renewed Mot. to Dismiss at 8-13, *supra* p.18 n.19; *see also O'Brien v. Hanover Ins.*, 427 Mass. 194, 201 (1998) (final order "has preclusive effect" even if on appeal); *Tausevich v. Bd. of Appeals of Stoughton*, 402 Mass. 146, 148-50 (1988) (where appellate review is available, order carries preclusive effect).

A stay of this action is thus legally unjustified and nonsensical. Indeed, in electing to seek the same relief in a Texas federal court as it has in this state court action, Exxon's own actions precipitated the circumstances (potential disruption of federal-state court comity, risk of inconsistent rulings, and inefficiency) Exxon wrongly claims support a stay in Exxon's down-is-up view. On these facts, the Superior Court clearly did not abuse its broad discretion when it declined to stay this case.

CONCLUSION

For the forgoing reasons, this Court should affirm the Superior Court order denying Exxon's motion to set aside the CID and granting the Commonwealth's motion to compel compliance with the CID.

Respectfully submitted,

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/s/ Seth Schofield

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May 31, 2017

MASS. R. A. P. 16(K) CERTIFICATION

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

/s/ Seth Schofield
Seth Schofield

ADDENDUM

Appeals Court
No. 2017-P-0366

BLANK

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

Jersey and headquartered in Texas. All of its central operations are in Texas.

Determining whether the court has personal jurisdiction over a nonresident defendant involves a familiar two-pronged inquiry: (1) is the assertion of jurisdiction authorized by the longarm statute, G. L. c. 223A, § 3, and (2) if authorized, is the exercise of jurisdiction under State law consistent with basic due process requirements mandated by the United States Constitution? Good Hope Indus., Inc. v. Ryder Scott Co., 378 Mass. 1, 5-6 (1979). Jurisdiction is permissible only when both questions draw affirmative responses. Id. As the party claiming that the court has the power to grant relief, the Commonwealth has the burden of persuasion on the issue of personal jurisdiction. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 612 n.28 (1979).

The Commonwealth invokes jurisdiction under G. L. c. 223A, § 3(a), which permits the court to assert jurisdiction over a defendant if the defendant "either directly or through an agent transacted any business in the Commonwealth, and if the alleged cause of action arose from such transaction of business." Good Hope Indus., Inc., 378 Mass. at 6. The "transacting any business" language is to be construed broadly. See Tatro v. Manor Care, Inc., 416 Mass. 763, 767 (1994). "Although an isolated (and minor) transaction with a Massachusetts resident may be insufficient, generally the purposeful and successful solicitation of business from residents of the Commonwealth, by a defendant or its agent, will suffice to satisfy this requirement." Id. Whether the alleged injury "arose from" a defendant's transaction of business in Massachusetts is determined by a "but for" test. Id. at 771-772 (jurisdiction only proper if *but for* defendant's solicitation of business in Massachusetts, plaintiff would not have been injured).

The CID says that the Attorney General is investigating potential violations arising from

Exxon's marketing and/or sale of energy and other fossil fuel derived products to Commonwealth consumers. The Commonwealth argues that Exxon's distribution of fossil fuel to Massachusetts consumers "through more than 300 Exxon-branded retail service stations that sell Exxon gasoline and other fuel products" satisfies the transaction of business requirement. Exxon objects because it contends that for the past five years, it has neither (1) sold fossil fuel derived products to consumers in Massachusetts, nor (2) owned or operated a retail store or gas station in Massachusetts. According to the affidavit of Geoffrey Grant Doescher ("Doescher"), the U.S. Branded Wholesale Manager, ExxonMobil Fuels, Lubricants and Specialities Marketing Company at Exxon, any service station or wholesaler in Massachusetts selling fossil fuel derived products under an "Exxon" or "Mobil" banner is independently owned and operated pursuant to a Brand Fee Agreement ("BFA"). Doescher says that branded service stations purchase gasoline from wholesalers who create ExxonMobil-branded gasoline by combining unbranded gasoline with ExxonMobil-approved additives obtained from a third-party supplier. The BFA also provides that Exxon agrees to allow motor fuel sold from these outlets to be branded as Exxon or Mobil-branded motor fuel.

Exxon provided to the court and the Commonwealth a sample BFA. By letter dated December 19, 2016, the Commonwealth argued that many provisions of the BFA properly give rise to this court's jurisdiction. The Commonwealth contends that the BFA provides many instances in which Exxon retains the right to control both the BFA Holder and the BFA Holder's franchisees.[1] For example, Section 15(a) of the BFA states:

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[1] The BFA mandates that all BFA Holders require their outlets to meet minimum facility, product, and service requirements, Section 13, and provide a certain level of customer service, Section 16. Moreover, Exxon requires that the BFA Holder enter into written agreements with

> BFA Holder agrees to diligently promote and cause its Franchise Dealers to diligently promote the sales of Products, including through advertisements, all in accordance with the terms of this Agreement. BFA Holder hereby acknowledges and agrees that, notwithstanding anything set forth herein to the contrary, to insure the integrity of ExxonMobil trademarks, products and reputation, ExxonMobil shall have the authority to review and approve, in its sole discretion, all forms of advertising and sales promotions that will use media vehicles for the promotion and sale of any product, merchandise or services, in each case that (i) uses or incorporates and Proprietary Mark or (ii) relates to any Business operated at a BFA Holder Branded outlet, ... BFA Holder shall expressly require all Franchise Dealers to (a) agree to such review and control by ExxonMobil. ...

By letter dated December 27, 2016, Exxon disputes that any of the BFA's provisions establish the level of control necessary to attribute the conduct of a BFA Holder to Exxon. See Depianti v. Jan-Pro Franchising Int'l Inc., 465 Mass. 607, 617 (2013) (citation omitted) ("[T]he marketing, quality, and operational standards commonly found in franchise agreements are insufficient to establish the close supervisory control or right of control necessary to demonstrate the existence of a master/servant relationship for all purposes or as a general matter."); Lind v. Domino's Pizza LLC, 87 Mass. App. Ct. 650, 654-655 (2015) ("The mere fact that franchisors set baseline standards and regulations that franchisees must follow in an effort to protect the franchisor's trademarks and comply with Federal law, does not mean that franchisors have undertaken an agency relationship with the franchisee such that vicarious liability should apply."); Theos & Sons, Inc. v. Mack Trucks, Inc., 1999 Mass. App. Div. 14, 17 (1999)

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each of its Franchise Dealers and in the agreement, the Franchise Dealer must commit to Exxon's "Core Values." Section 19. "Core Values" is defined on page one of the BFA:

> BHA Holder acknowledges that ExxonMobil has established the following core values ("Core Values") to build and maintain a lasting relationship with its customers, the motoring public:
> (1) To deliver quality products that consumers can trust.
> (2) To employ friendly, helpful people.
> (3) To provide speedy, reliable service.
> (4) To provide clean and attractive retail facilities.
> (5) To be a responsible, environmentally-conscious neighbor.

(obligations to render prompt and efficient service in accordance with licensor's policies and standards and to satisfy other warranty related service requirements did not constitute evidence of agency relationship because they were unrelated to licensee's day-to-day operations and specific manner in which they were conducted).

Here, though, Section 15 of the BFA evidences a retention of more control than necessary simply to protect the integrity of the Exxon brand. By Section 15, Exxon directly controls the very conduct at issue in this investigation – the marketing of Exxon products to consumers. See Depianti, 465 Mass. at 617 ("right to control test" should be applied to franchisor-franchisee relationship in such a way as to ensure that liability will be imposed only where conduct at issue properly may be imputed to franchisor). This is especially true because the Attorney General's investigation focuses on Exxon's marketing and/or sale of energy and other fossil fuel derived products to Massachusetts consumers. Section 15(a) makes it evident to the court that Exxon has retained the right to control the "specific policy or practice" allegedly resulting in harm to Massachusetts consumers. See id. (franchisor vicariously liable for conduct of franchisee only where franchisor controls or has right to control specific policy or practice resulting in harm to plaintiff). The quantum of control Exxon retains over its BFA Holders and the BFA Holders' franchisees as to marketing means that Exxon retains sufficient control over the entities actually marketing and selling fossil fuel derived products to consumers in the Commonwealth such that the court may assert personal jurisdiction over Exxon under G. L. c. 223A, § 3(a).

To determine whether such an exercise of personal jurisdiction satisfies – or does not satisfy – due process, "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." Burger King Corp. v. Rudzewicz, 471 U.S.

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.

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

TEL: (617) 727-2200
www.mass.gov/ago

CIVIL INVESTIGATIVE DEMAND

BY HAND DELIVERY

Demand No.: 2016-EPD-36

Date Issued: April 19, 2016

Issued To: Exxon Mobil Corporation
c/o Corporation Service Company, its Registered Agent
84 State Street
Boston, Massachusetts 02109

This Civil Investigative Demand ("CID") is issued to Exxon Mobil Corporation ("Exxon" or "You") pursuant to Massachusetts General Laws c. 93A, § 6, as part of a pending investigation concerning potential violations of M.G.L. c. 93A, § 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 of Massachusetts (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.

This CID requires You to produce the documents identified in Schedule A below, pursuant to M.G.L. c. 93A, § 6(1). The Documents identified in Schedule A must be produced by May 19, 2016, by delivering them to:

I. Andrew Goldberg
Assistant Attorney General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

The documents shall be accompanied by an affidavit in the form attached hereto. AAG Goldberg and such other employees, agents, consultants, and experts of the Office of the Attorney General as needed in its discretion, shall review Your affidavit and the documents produced in conjunction with our investigation.

This CID also requires You to appear and give testimony under oath through Your authorized custodian of records that the documents You produce in response to this CID represent all of the documents called for in this CID; that You have not withheld any documents responsive to this CID; and that all of the documents You produce were records made in good faith and kept in the regular course of Your business, and it was the regular course of Your business to make and keep such records. This testimony will be taken on June 10, 2016, beginning at 9:30 a.m. at the Boston Office of the Attorney General, 100 Cambridge Street, 10th Floor, Boston, Massachusetts. The testimony will be taken by AAG Goldberg or an appropriate designee, before an officer duly authorized to administer oaths by the law of the Commonwealth, and shall proceed, day to day, until the taking of testimony is completed. The witness has the right to be accompanied by an attorney. Rule 30(c) of the Massachusetts Rules of Civil Procedure shall apply. Your attendance and testimony are necessary to conduct this investigation.

This CID also requires You to appear and give testimony under oath through one or more of Your officers, directors or managing agents, or other persons most knowledgeable concerning the subject matter areas enumerated in Schedule B, below. This testimony will be taken on June 24, 2016, beginning at 9:30 a.m. at the Boston Office of the Attorney General, 100 Cambridge Street, 10th Floor, Boston, Massachusetts. The testimony will be taken by AAG Goldberg or an appropriate designee, before an officer duly authorized to administer oaths by the law of the Commonwealth, and shall proceed, day to day, until the taking of testimony is completed. The witness has the right to be accompanied by an attorney. Rule 30(c) of the Massachusetts Rules of Civil Procedure shall apply. Your attendance and testimony are necessary to conduct this investigation.

Under G.L. c. 93A, § 6(7), You may make a motion prior to the production date specified in this notice, or within twenty-one days after this notice has been served, whichever period is shorter, in the appropriate court of law to modify or set aside this CID for good cause shown.

If the production of the documents required by this CID would be, in whole or in part, unduly burdensome, or if You require clarification of any request, please contact AAG Goldberg promptly at the phone number below.

Finally, please note that under G.L. c. 93A, §7, obstruction of this investigation, including the alteration or destruction of any responsive document after receipt of

this CID, is subject to a fine of up to five thousand dollars ($5,000.00). A copy of that provision is reprinted at Schedule C.

Issued at Boston, Massachusetts, this 19th day of April, 2016.

COMMONWEALTH OF
MASSACHUSETTS

MAURA HEALEY
ATTORNEY GENERAL

By: _____

I. Andrew Goldberg
Assistant Attorney General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
Tel. (617) 727-2200

Demand No.: 2016-EPD-36
Date Issued: April 19, 2016
Issued To: Exxon Mobil Corporation

SCHEDULE A

A. General Definitions and Rules of Construction

1. "Advertisement" means a commercial message made orally or in any newspaper, magazine, leaflet, flyer, or catalog; on radio, television, or public address system; electronically, including by email, social media, and blog post; or made in person, in direct mail literature or other printed material, or on any interior or exterior sign or display, in any window display, in any point of transaction literature, but not including on any product label, which is delivered or made available to a customer or prospective customer in any manner whatsoever.

2. "All" means each and every.

3. "Any" means any and all.

4. "And" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the CID all information or Documents that might otherwise be construed to be outside of its scope.

5. "Communication" means any conversation, discussion, letter, email, memorandum, meeting, note or other transmittal of information or message, whether transmitted in writing, orally, electronically or by any other means, and shall include any Document that abstracts, digests, transcribes, records or reflects any of the foregoing. Except where otherwise stated, a request for "Communications" means a request for all such Communications.

6. "Concerning" means, directly or indirectly, in whole or in part, relating to, referring to, describing, evidencing or constituting.

7. "Custodian" means any Person or Entity that, as of the date of this CID, maintained, possessed, or otherwise kept or controlled such Document.

8. "Document" is used herein in the broadest sense of the term and means all records and other tangible media of expression of whatever nature however and wherever created, produced or stored (manually, mechanically, electronically or otherwise), including without limitation all versions whether draft or final, all annotated or nonconforming or other copies, electronic mail ("e-mail"), instant messages, text messages, personal digital assistant or other wireless device messages, voicemail, calendars, date books, appointment books, diaries, books, papers, files, notes, confirmations, accounts statements, correspondence, memoranda, reports, records, journals, registers, analyses, plans, manuals, policies, telegrams, faxes, telexes, wires, telephone logs, telephone messages, message slips, minutes, notes or records or transcriptions of conversations or

Communications or meetings, tape recordings, videotapes, disks, and other electronic media, microfilm, microfiche, storage devices, press releases, contracts, agreements, notices and summaries. Any non-identical version of a Document constitutes a separate Document within this definition, including without limitation drafts or copies bearing any notation, edit, comment, marginalia, underscoring, highlighting, marking, or any other alteration of any kind resulting in any difference between two or more otherwise identical Documents. In the case of Documents bearing any notation or other marking made by highlighting ink, the term Document means the original version bearing the highlighting ink, which original must be produced as opposed to any copy thereof. Except where otherwise stated, a request for "Documents" means a request for all such Documents.

9. "Entity" means without limitation any corporation, company, limited liability company or corporation, partnership, limited partnership, association, or other firm or similar body, or any unit, division, agency, department, or similar subdivision thereof.

10. "Identify" or "Identity," as applied to any Document means the provision in writing of information sufficiently particular to enable the Attorney General to request the Document's production through CID or otherwise, including but not limited to: (a) Document type (letter, memo, etc.); (b) Document subject matter; (c) Document date; and (d) Document author(s), addressee(s) and recipient(s). In lieu of identifying a Document, the Attorney General will accept production of the Document, together with designation of the Document's Custodian, and identification of each Person You believe to have received a copy of the Document.

11. "Identify" or "Identity," as applied to any Entity, means the provision in writing of such Entity's legal name, any d/b/a, former, or other names, any parent, subsidiary, officers, employees, or agents thereof, and any address(es) and any telephone number(s) thereof.
12. "Identify" or "Identity," as applied to any natural person, means and includes the provision in writing of the natural person's name, title(s), any aliases, place(s) of employment, telephone number(s), e-mail address(es), mailing addresses and physical address(es).

13. "Person" means any natural person, or any Entity.

14. "Refer" means embody, refer or relate, in any manner, to the subject of the document demand.

15. "Refer or Relate to" means to make a statement about, embody, discuss, describe, reflect, identify, deal with, consist of, establish, comprise, list, or in any way pertain, in whole or in part, to the subject of the document demand.

16. "Sent" or "received" as used herein means, in addition to their usual meanings, the transmittal or reception of a Document by physical, electronic or other delivery, whether by direct or indirect means.

17. "CID" means this subpoena and any schedules, appendices, or attachments thereto.

18. The use of the singular form of any word used herein shall include the plural and vice versa. The use of any tense of any verb includes all other tenses of the verb.

19. The references to Communications, Custodians, Documents, Persons, and Entities in this CID encompass all such relevant ones worldwide.

B. Particular Definitions

1. "Exxon," "You," or "Your," means Exxon Mobil Corporation, and any present or former parents, subsidiaries, affiliates, directors, officers, partners, employees, agents, representatives, attorneys or other Persons acting on its behalf, and including predecessors or successors or any affiliates of the foregoing.

2. "Exxon Products and Services" means products and services, including without limitation petroleum and natural gas energy products and related services, offered to and/or sold by Exxon to consumers in Massachusetts.
3. "Carbon Dioxide" or "CO_2" means the naturally occurring chemical compound composed of a carbon atom covalently double bonded to two oxygen atoms that is fixed by photosynthesis into organic matter.

4. "Climate" means the statistical description in terms of the mean and variability of relevant quantities, such as surface variables, including, without limitation, temperature, precipitation, and wind, on Earth over a period of time ranging from months to thousands or millions of years. Climate is the state, including a statistical description, of the Climate System. *See* Intergovernmental Panel on Climate Change (IPCC), 2012: Glossary of terms. In: Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation [Field, C.B., V. Barros, T.F. Stocker, D. Qin, D.J. Dokken, K.L. Ebi, M.D. Mastrandrea, K.J. Mach, G.-K. Plattner, S.K. Allen, M. Tignor, and P.M. Midgley (eds.)]. A Special Report of Working Groups I and II of the IPCC. Cambridge University Press, Cambridge, UK, and New York, NY, USA (the "IPCC Glossary"), p. 557.

5. "Climate Change" means a change in the state of Earth's Climate that can be identified (e.g., by using statistical tests) by changes in the mean and/or the variability of its properties and that persists for an extended period, typically decades or longer. *See* IPCC Glossary, p. 557.

6. "Climate Model" means a numerical representation of the Climate System based on the physical, chemical, and biological properties of its components, their interactions, and feedback processes, and that accounts for all or some of its known properties. Climate models are applied as a research tool to study and simulate the climate, and for operational purposes, including monthly, seasonal, interannual, and longer-term climate predictions. *See* IPCC Glossary, p. 557.

7. "Climate Risk" means the risk that variables in the Climate System reach values that adversely affect natural and human systems and regions, including those that relate to extreme values of the climate variables such as high wind speed, high river water and sea level stages (flood), and low water stages (drought). These include, without limitation, such risks to ecosystems, human health, geopolitical stability, infrastructure, facilities, businesses, asset value, revenues, and profits, as well as the business risks associated with public policies and market changes that arise from efforts to mitigate or adapt to Climate Change.

8. "Climate Science" means the study of the Climate on Earth.
9. "Climate System" means the dynamics and interactions on Earth of five major components: atmosphere, hydrosphere, cryosphere, land surface, and biosphere. *See* IPCC Glossary, p. 557.

10. "Global Warming" means the gradual increase, observed or projected, in Earth's global surface temperature, as one of the consequences of radiative forcing caused by anthropogenic emissions.

11. "Greenhouse Gas" means a gaseous constituent of Earth's atmosphere, both natural and anthropogenic, that absorbs and emits radiation at specific wavelengths within the spectrum of infrared radiation emitted by the Earth's surface, the atmosphere, and clouds. Water vapor (H_2O), carbon dioxide (CO_2), nitrous oxide (N_2O), methane (CH_4), chlorofluorocarbons (CFCs), and ozone (O_3) are the primary Greenhouse Gases in the Earth's atmosphere. *See* IPCC Glossary, p. 560.

12. "Greenhouse Gas Emissions" means the exiting to the atmosphere of Greenhouse Gas.

13. "Methane" or "CH_4" means the chemical compound composed of one atom of carbon and four atoms of hydrogen. Methane is the main component of natural gas.

14. "Radiative Forcing Effect" means the influence a factor has in altering the balance of incoming and outgoing energy in the Earth-atmosphere system and is an index of the importance of the factor as a potential climate change mechanism.

15. "Security" has the same meaning as defined in M.G.L. c. 110A, § 401(k), and includes, without limitation, any fixed- and floating rate-notes, bonds, and common stock, available to investors for purchase by Massachusetts residents.

16. "Sustainable Development" means development that meets the needs of the present without compromising the ability of future generations to meet their own needs. *See* IPCC Glossary, p. 564.

17. "Sustainability Reporting" means the practice of measuring, disclosing and being accountable to internal and external stakeholders for organizational performance towards the goals of Sustainable Development.

18. "Acton Institute for the Study of Religion and Liberty" or "Acton Institute" means the nonprofit organization by that name. Acton Institute is located in Grand Rapids, Michigan.

19. "American Enterprise Institute for Public Policy Research" or "AEI" means the nonprofit public policy organization by that name. AEI is based in Washington, D.C.

20. "Americans for Prosperity" means the nonprofit advocacy group by that name. Americans for Prosperity is based in Arlington, Virginia.

21. "American Legislative Exchange Council" or "ALEC" means the nonprofit organization by that name consisting of state legislator and private sector members. ALEC is based in in Arlington, Virginia.

22. "American Petroleum Institute" or "API" means the oil and gas industry trade association by that name. API is based in Washington, D.C.

23. "Beacon Hill Institute at Suffolk University" means the research arm of the Department of Economics at Suffolk University in Boston, Massachusetts, by that name.

24. "Center for Industrial Progress" or "CIP" means the for profit organization by that name. CIP is located in Laguna Hills, California.

25. "Competitive Enterprise Institute" or "CEI" means the nonprofit public policy organization by that name. CEI is based in Washington, D.C.

26. "George C. Marshall Institute" means the nonprofit public policy organization by that name. George C. Marshall Institute is based in Arlington, Virginia.

27. "The Heartland Institute" means the nonprofit public policy organization by that name. The Heartland Institute is based in Arlington Heights, Illinois.

28. "The Heritage Foundation" means the nonprofit public policy organization by that name. The Heritage Foundation is based in Washington, D.C.

29. "Mercatus Center at George Mason University" means the university-based nonprofit public policy organization by that name. Mercatus Center at George Mason University is based in Arlington, Virginia.

C. Instructions

1. Preservation of Relevant Documents and Information; Spoliation. You are reminded of your obligations under law to preserve Documents and information relevant or potentially relevant to this CID from destruction or loss, and of the consequences of, and penalties available for, spoliation of evidence. No agreement, written or otherwise, purporting to modify, limit or otherwise vary the terms of this CID, shall be construed in any way to narrow, qualify, eliminate or otherwise diminish your aforementioned preservation obligations. Nor shall you act, in reliance upon any such agreement or otherwise, in any manner inconsistent with your preservation obligations under law. No agreement purporting to modify, limit or otherwise vary your preservation obligations under law shall be construed as in any way narrowing, qualifying, eliminating or otherwise diminishing such aforementioned preservation obligations, nor shall you act in reliance upon any such agreement, unless an Assistant Attorney General confirms or acknowledges such agreement in writing, or makes such agreement a matter of record in open court.

2. Possession, Custody, and Control. The CID calls for all responsive Documents or information in your possession, custody or control. This includes, without limitation, Documents or information possessed or held by any of your officers, directors, employees, agents, representatives, divisions, affiliates, subsidiaries or Persons from whom you could request Documents or information. If Documents or information responsive to a request in this CID are in your control, but not in your possession or custody, you shall promptly Identify the Person with possession or custody.

3. Documents No Longer in Your Possession. If any Document requested herein was formerly in your possession, custody or control but is no longer available, or no longer exists, you shall submit a statement in writing under oath that: (a) describes

in detail the nature of such Document and its contents; (b) Identifies the Person(s) who prepared such Document and its contents; (c) Identifies all Persons who have seen or had possession of such Document; (d) specifies the date(s) on which such Document was prepared, transmitted or received; (e) specifies the date(s) on which such Document became unavailable; (f) specifies the reason why such Document is unavailable, including without limitation whether it was misplaced, lost, destroyed or transferred; and if such Document has been destroyed or transferred, the conditions of and reasons for such destruction or transfer and the Identity of the Person(s) requesting and performing such destruction or transfer; and (g) Identifies all Persons with knowledge of any portion of the contents of the Document.

4. No Documents Responsive to CID Requests. If there are no Documents responsive to any particular CID request, you shall so state in writing under oath in the Affidavit of Compliance attached hereto, identifying the paragraph number(s) of the CID request concerned.

5. Format of Production. You shall produce Documents, Communications, and information responsive to this CID in electronic format that meets the specifications set out in Schedule D.

6. Existing Organization of Documents to be Preserved. Regardless of whether a production is in electronic or paper format, each Document shall be produced in the same form, sequence, organization or other order or layout in which it was maintained before production, including but not limited to production of any Document or other material indicating filing or other organization. Such production shall include without limitation any file folder, file jacket, cover or similar organizational material, as well as any folder bearing any title or legend that contains no Document. Documents that are physically attached to each other in your files shall be accompanied by a notation or information sufficient to indicate clearly such physical attachment.

7. Document Numbering. All Documents responsive to this CID, regardless of whether produced or withheld on ground of privilege or other legal doctrine, and regardless of whether production is in electronic or paper format, shall be numbered in the lower right corner of each page of such Document, without disrupting or altering the form, sequence, organization or other order or layout in which such Documents were maintained before production. Such number shall comprise a prefix containing the producing Person's name or an abbreviation thereof, followed by a unique, sequential, identifying document control number.

8. Privilege Placeholders. For each Document withheld from production on ground of privilege or other legal doctrine, regardless of whether a production is electronic or in hard copy, you shall insert one or more placeholder page(s) in the

production bearing the same document control number(s) borne by the Document withheld, in the sequential place(s) originally occupied by the Document before it was removed from the production.

9. Privilege. If You withhold or redact any Document responsive to this CID of privilege or other legal doctrine, you shall submit with the Documents produced a statement in writing under oath, stating: (a) the document control number(s) of the Document withheld or redacted; (b) the type of Document; (c) the date of the Document; (d) the author(s) and recipient(s) of the Document; (e) the general subject matter of the Document; and (f) the legal ground for withholding or redacting the Document. If the legal ground for withholding or redacting the Document is attorney-client privilege, you shall indicate the name of the attorney(s) whose legal advice is sought or provided in the Document.

10. Your Production Instructions to be Produced. You shall produce a copy of all written or otherwise recorded instructions prepared by you concerning the steps taken to respond to this CID. For any unrecorded instructions given, you shall provide a written statement under oath from the Person(s) who gave such instructions that details the specific content of the instructions and any Person(s) to whom the instructions were given.

11. Cover Letter. Accompanying any production(s) made pursuant to this CID, You shall include a cover letter that shall at a minimum provide an index containing the following: (a) a description of the type and content of each Document produced therewith; (b) the paragraph number(s) of the CID request to which each such Document is responsive; (c) the Identity of the Custodian(s) of each such Document; and (d) the document control number(s) of each such Document.

12. Affidavit of Compliance. A copy of the Affidavit of Compliance provided herewith shall be completed and executed by all natural persons supervising or participating in compliance with this CID, and you shall submit such executed Affidavit(s) of Compliance with Your response to this CID.

13. Identification of Persons Preparing Production. In a schedule attached to the Affidavit of Compliance provided herewith, you shall Identify the natural person(s) who prepared or assembled any productions or responses to this CID. You shall further Identify the natural person(s) under whose personal supervision the preparation and assembly of productions and responses to this CID occurred. You shall further Identify all other natural person(s) able competently to testify: (a) that such productions and responses are complete and correct to the best of such person's knowledge and belief; and (b) that any Documents produced are authentic, genuine and what they purport to be.

14. Continuing Obligation to Produce. This CID imposes a continuing obligation to produce the Documents and information requested. Documents located, and information learned or acquired, at any time after your response is due shall be promptly produced at the place specified in this CID.

15. No Oral Modifications. No agreement purporting to modify, limit or otherwise vary this CID shall be valid or binding, and you shall not act in reliance upon any such agreement, unless an Assistant Attorney General confirms or acknowledges such agreement in writing, or makes such agreement a matter of record in open court.

16. Time Period. Except where otherwise stated, the time period covered by this CID shall be from April 1, 2010, through the date of the production.

D. **Documents to be Produced**

1. For the time period from January 1, 1976, through the date of this production, Documents and Communications concerning Exxon's development, planning, implementation, review, and analysis of research efforts to study CO_2 emissions (including, without limitation, from fossil fuel extraction, production, and use), and the effects of these emissions on the Climate, including, without limitation, efforts by Exxon to:

   (a) analyze the absorption rate of atmospheric CO_2 in the oceans by developing and using Climate Models;

   (b) measure atmospheric and oceanic CO_2 levels (including, without limitation, through work conducted on Exxon's *Esso Atlantic* tanker);

   (c) determine the source of the annual CO_2 increment that has been increasing over time since the Industrial Revolution by measuring changes in the isotopic ratios of carbon and the distribution of radon in the ocean; and/or

   (d) assess the financial costs and environmental consequences associated with the disposal of CO_2 and hydrogen sulfide gas from the development of offshore gas from the seabed of the South China Sea off Natuna Island, Indonesia.

2. For the time period from January 1, 1976, through the date of this production, Documents and Communications concerning papers prepared, and presentations given, by James F. Black, at times Scientific Advisor in the Products Research Division of Exxon Research and Engineering, author of, among others, the paper *The Greenhouse Effect*, produced in or around 1978.

3. For the time period from January 1, 1976, through the date of this production, Documents and Communications concerning the paper *CO_2 Greenhouse Effect A Technical Review*, dated April 1, 1982, prepared by the Coordination and Planning Division of Exxon Research and Engineering Company.

4. For the time period from January 1, 1976, through the date of this production, Documents and Communications concerning the paper *CO_2 Greenhouse and Climate Issues*, dated March 28, 1984, prepared by Henry Shaw, including all Documents:

   (a) forming the basis for Exxon's projection of a 1.3 to 3.1 degree Celsius average temperature rise by 2090 due to increasing CO_2 emissions and all Documents describing the basis for Exxon's conclusions that a 2 to 3 degree Celsius increase in global average temperature could:

      - Be "amplified to about 10 degrees C at the poles," which could cause "polar ice melting and a possible sea-level rise of 0.7 meter[sic] by 2080"
      - Cause redistribution of rainfall
      - Cause detrimental health effects
      - Cause population migration

   (b) forming the basis for Exxon's conclusion that society could "avoid the problem by sharply curtailing the use of fossil fuels."

5. Documents and Communications with any of Acton Institute, AEI, Americans for Prosperity, ALEC, API, Beacon Hill Institute at Suffolk University, CEI, CIP, George C. Marshall Institute, The Heartland Institute, The Heritage Foundation, and/or Mercatus Center at George Mason University, concerning Climate Change and/or Global Warming, Climate Risk, Climate Science, and/or communications regarding Climate Science by fossil fuel companies to the media and/or to investors or consumers, including Documents and Communications relating to the funding by Exxon of any of those organizations.

6. For the time period from September 1, 1997, through the date of this production, Documents and Communications concerning the API's draft *Global Climate Science Communications Plan* dated in or around 1998.

7. For the time period from January 1, 2007, through the date of this production, Documents and Communications concerning Exxon's awareness of, and/or response to, the Union of Concerned Scientists report *Smoke, Mirrors & Hot Air: How ExxonMobil Uses Big Tobacco's Tactics to Manufacture Uncertainty on Climate Science*, dated January 2007.

8. For the time period from April 1, 1997, through the date of this production, Documents and Communications concerning the decision making by Exxon in preparing, and substantiation of, the following statements in the remarks *Energy – key to growth and a better environment for Asia-Pacific nations*, by then Chairman Lee R. Raymond to the World Petroleum Congress, Beijing, People's Republic of China, 10/13/97 (the "Raymond WPC Statements"):

    - It is highly unlikely that the temperature in the middle of the next century will be significantly affected whether policies are enacted now or 20 years from now. (Raymond WPC Statements, p. 11)

    - Forecasts of future warming come from computer models that try to replicate Earth's past climate and predict the future. They are notoriously inaccurate. None can do it without significant overriding adjustments. (Raymond WPC Statements, p. 10)

    - Proponents of the agreements [that could result from the Kyoto Climate Change Conference in December 1997] say they are necessary because burning fossil fuels causes global warming. Many people – politicians and the public alike – believe that global warming is a rock-solid certainty. But it's not. (Raymond WPC Statements, p. 8)

    - To achieve this kind of reduction in carbon dioxide emissions most advocates are talking about, governments would have to resort to energy rationing administered by a vast international bureaucracy responsible to no one. (Raymond WPC Statements, p. 10)

    - We also have to keep in mind that most of the greenhouse effect comes from natural sources, especially water vapor. Less than a quarter is from carbon dioxide, and, of this, only four percent of the carbon dioxide entering the atmosphere is due to human activities – 96 percent comes from nature. (Raymond WPC Statements, p. 9)

9. Documents and Communications concerning Chairman Rex W. Tillerson's June 27, 2012, address to the Council on Foreign Relations, including those sufficient to document the factual basis for the following statements:

    - Efforts to address climate change should focus on engineering methods to adapt to shifting weather patterns and rising sea levels rather than trying to eliminate use of fossil fuels.

    - Humans have long adapted to change, and governments should create policies to cope with the Earth's rising temperatures.

- Changes to weather patterns that move crop production areas around – we'll adapt to that. It's an engineering problem and it has engineering solutions.

- Issues such as global poverty [are] more pressing than climate change, and billions of people without access to energy would benefit from oil and gas supplies.

10. Documents and Communications concerning Chairman Tillerson's statements regarding Climate Change and Global Warming, on or about May 30, 2013, to shareholders at an Exxon shareholder meeting in Dallas, Texas, including Chairman Tillerson's statement "What good is it to save the planet if humanity suffers?"

11. Documents and Communications concerning Chairman Tillerson's speech *Unleashing Innovation to Meet Our Energy and Environmental Needs*, presented to the 36th Annual Oil and Money Conference in London, England, 10/7/15 (the "2015 Oil and Money Conference Speech"), including Documents sufficient to demonstrate the factual basis for Chairman Tillerson's representation that Exxon's scientific research on Climate Change, begun in the 1970s, "led to work with the U.N.'s Intergovernmental Panel on Climate Change and collaboration with academic institutions and to reaching out to policymakers and others, who sought to advance scientific understanding and policy dialogue."

12. Documents and Communications concerning any public statement Chairman Tillerson has made about Climate Change or Global Warming from 2012 to present.

13. Documents and Communications concerning changes in the design, construction, or operation of any Exxon facility to address possible variations in sea level and/or other variables, such as temperature, precipitation, timing of sea ice formation, wind speed, and increased storm intensity, associated with Climate Change, including but not limited to:

    (a) adjustments to the height of Exxon's coastal and/or offshore drilling platforms; and

    (b) adjustments to any seasonal activity, including shipping and the movement of vehicles.

14. Documents and Communications concerning any research, analysis, assessment, evaluation, Climate Modeling or other consideration performed by Exxon, or with funding provided by Exxon, concerning the costs for CO_2 mitigation, including,

without limitation, concerning the 2014 Exxon report to shareholders *Energy and Carbon – Managing the Risks* (the "2014 Managing the Risks Report").

15. Documents and Communications substantiating or refuting the following claims in the 2014 Managing the Risks Report:

- [B]y 2030 for the 450ppm CO2 stabilization pathway, the average American household would face an added CO2 cost of almost $2,350 per year for energy, amounting to about 5 percent of total before-tax median income. (p. 9)
- These costs would need to escalate steeply over time, and be more than double the 2030 level by mid-century. (p. 9)
- Further, in order to stabilize atmospheric GHG concentrations, these CO2 costs would have to be applied across both developed and undeveloped countries. (p. 9)
- [W]e see world GDP growing at a rate that exceeds population growth through [the year 2040], almost tripling in size from what it was globally in 2000 [fn. omitted]. It is largely the poorest and least developed of the world's countries that benefit most from this anticipated growth. However, this level of GDP growth requires more accessible, reliable and affordable energy to fuel growth, and it is vulnerable populations who would suffer most should that growth be artificially constrained. (pp. 3 – 4)
- [W]e anticipate renewables growing at the fastest pace among all sources through [the year 2040]. However, because they make a relatively small contribution compared to other energy sources, renewables will continue to comprise about 5 percent of the total energy mix by 2040. Factors limiting further penetration of renewables include scalability, geographic dispersion, intermittency (in the case of solar and wind), and cost relative to other sources. (p. 6)
- In assessing the economic viability of proved reserves, we do not believe a scenario consistent with reducing GHG emissions by 80 percent by 2050, as suggested by the "low carbon scenario," lies within the "reasonably likely to occur" range of planning assumptions, since we consider the scenario highly unlikely. (p. 16)

16. Documents and Communications that formed the basis for the following statements in Exxon's January 26, 2016, press release on Exxon's 2016 Energy Outlook:

- In 2040, oil and natural gas are expected to make up nearly 60 percent of global supplies, while nuclear and renewables will be approaching 25 percent. Oil will provide one third of the world's energy in 2040, remaining the No. 1 source of fuel, and natural gas will move into second place.

- ExxonMobil's analysis and those of independent agencies confirms our long-standing view that all viable energy sources will be needed to meet increasing demand.

- The Outlook projects that global energy-related carbon dioxide emissions will peak around 2030 and then start to decline. Emissions in OECD nations are projected to fall by about 20 percent from 2014 to 2040.

17. Documents and Communications concerning any research, study, and/or evaluation by Exxon and/or any other fossil fuel company regarding the Climate Change Radiative Forcing Effect of natural gas (Methane), and potential regulation of Methane as a Greenhouse Gas.

18. Documents and Communications concerning Exxon's internal consideration of public relations and marketing decisions for addressing consumer perceptions regarding Climate Change and Climate Risks in connection with Exxon's offering and selling Exxon Products and Services to consumers in Massachusetts.

19. Documents and Communications concerning the drafting and finalizing of text, including all existing drafts of such text, concerning Greenhouse Gas Emissions and the issue of Climate Change or Global Warming filed with the U.S. Securities and Exchange Commission (the "SEC") by Exxon, including, without limitation, Exxon's Notices of Meeting; Form 10-Ks; Form 10-Qs; Form 8-Ks; Prospectuses; Prospectus Supplements; and Free Will Prospectuses; and/or contained in any offering memoranda and offering circulars from filings with the SEC under Regulation D (17 CFR § 230.501, et seq.).

20. Documents and Communications concerning Exxon's consideration of public relations and marketing decisions for addressing investor perceptions regarding Climate Change, Climate Risk, and Exxon's future profitability in connection with Exxon's offering and selling Securities in Massachusetts.

21. Documents and Communications related to Exxon's efforts in 2015 and 2016 to address any shareholder resolutions related to Climate Change, Global Warming, and how efforts to reduce Greenhouse Gas Emissions will affect Exxon's ability to operate profitably.
22. For the time period from January 1, 2006, through the date of this production, Documents and Communications concerning Exxon's development of its program

for Sustainability Reporting addressing Climate Change and Climate Risk, including, without limitation, regarding Exxon's annual "Corporate Citizenship Report" and Exxon's "Environmental Aspects Guide."

23. Documents and Communications concerning information exchange among Exxon and other companies and/or industry groups representing energy companies, regarding marketing of energy and/or fossil fuel products to consumers in light of public perceptions regarding Climate Change and Climate Risk.

24. Exemplars of all advertisements, flyers, promotional materials, and informational materials of any type, including but not limited to web-postings, blog-posts, social media-postings, print ads (including ads on op-ed pages of newspapers), radio and television advertisements, brochures, posters, billboards, flyers and disclosures used by or for You, Your employees, agents, franchisees or independent contractors to solicit or market Exxon Products and Services in Massachusetts, including but not limited to:

    - A copy of each print advertisement placed in the Commonwealth;
    - A DVD format copy of each television advertisement that ran in the Commonwealth;
    - An audio recording of each radio advertisement and audio portion of each internet advertisement;
    - A copy of each direct mail advertisement, brochure, or other written promotional materials;
    - A printout, screenshot or copy of each advertisement, information, or communication provided via the internet, email, Facebook, Twitter, You Tube, or other electronic communications system; and/or
    - A copy of each point-of-sale promotional material used by You or on Your behalf.

25. Documents and Communications sufficient to show where each of the exemplars in Demand No. 24 was placed and the intended or estimated consumers thereof, including, where appropriate, the number of hits on each internet page and all Commonwealth Internet Service Providers viewing same.

26. Documents and Communications substantiating the claims made in the advertisements, flyers, promotional materials, and informational materials identified in response to Demand Nos. 22 through 24.

27. Documents and Communications concerning Your evaluation or review of the impact, success or effectiveness of each Document referenced in Demand Nos. 22 through 24, including but not limited to Documents discussing or referring in any way to: (a) the effects of advertising campaigns or communications; (b) focus groups; (c) copy tests; (d) consumer perception; (e) market research; (f) consumer

research; and/or (g) other study or survey or the reactions, perceptions, beliefs, attitudes, wishes, needs, or understandings of potential consumers of Exxon Products and Services in light of public perceptions of Climate Change, Greenhouse Gas Emissions, and Climate Risk.

28. Documents sufficient to show Exxon's organizational structure and leadership over time, including but not limited to organizational charts, reflecting all Exxon Entities in any way involved in:

    (a) the marketing, advertisement, solicitation, promotion, and/or sale of Exxon Products and Services to consumers in the Commonwealth; and/or

    (b) the marketing, advertisement, solicitation, promotion, and/or sale to investors of Exxon Securities in the Commonwealth.

29. Documents and Communications sufficient to identify each agreement entered into on or after April 1, 2010, through the present, between and among Exxon and the Commonwealth of Massachusetts, its agencies, and/or its political subdivisions, for Exxon to provide Exxon Products and Services in Massachusetts.

30. Documents sufficient to identify all claims, lawsuits, court proceedings and/or administrative or other proceedings against You in any jurisdiction within the United States concerning Climate Change and relating to Your solicitation of consumers of Exxon Products and Services and/or relating to Your solicitation of consumers of Exxon Securities, including all pleadings and evidence in such proceedings and, if applicable, the resolution, disposition or settlement of any such matters.

31. Documents sufficient to identify and describe any discussion or consideration of disclosing in any materials filed with the SEC or provided to potential or existing investors (e.g., in prospectuses for debt offerings) information or opinions concerning the environmental impacts of Greenhouse Gas Emissions, including, without limitation, the risks associated with Climate Change, and Documents sufficient to identify all Persons involved in such consideration.

32. Transcripts of investor calls, conferences or presentations given by You at which any officer or director spoke concerning the environmental impacts of Greenhouse Gas Emissions, including, without limitation, the risks associated with Climate Change.

33. Documents and Communications concerning any subpoena or other demand for production of documents or for witness testimony issued to Exxon by the New

York State Attorney General's Office concerning Climate Change and Your marketing of Exxon Products and Services and/or Exxon Securities, including, through the date of Your production in response to this CID, all Documents produced to the New York State Attorney General's Office pursuant to any such subpoena or demand.

34. Documents sufficient to Identify all other federal or state law enforcement or regulatory agencies that have issued subpoenas or are otherwise currently investigating You concerning Your marketing of Exxon Products and Services to consumers and/or of Exxon Securities to investors.

35. Documents sufficient to Identify any Massachusetts consumer who has complained to You, or to any Massachusetts state or local consumer protection agency, concerning Your actions with respect to Climate Change, and for each such consumer identified, documents sufficient to identify each such complaint; each correspondence between You and such consumer or such consumer's representative; any internal notes or recordings regarding such complaint; and the resolution, if any, of each such complaint.

36. Documents and communications that disclose Your document retention policies in effect between January 1, 1976 and the date of this production.

37. Documents sufficient to Identify Your officers, directors and/or managing agents, or other persons most knowledgeable concerning the subject matter areas enumerated in Schedule B, below.

38. Documents sufficient to identify all natural persons involved in the preparation of Your response to this CID.

Demand No.: 2016-EPD-36
Date Issued: April 19, 2016
Issued To: Exxon Mobil Corporation

SCHEDULE B

Pursuant to the terms of this CID, you are commanded to produce one or more witnesses at the above-designated place and time, or any agreed-upon adjourned place and time, who is or are competent to testify as to the following subject matter areas:

1. Your compliance with Massachusetts General Law Chapter 93A, § 2, and the regulations promulgated thereunder concerning, the marketing, advertising, soliciting, promoting, and communicating or sale of: (1) Exxon Products and Services in the Commonwealth and/or to Massachusetts residents; and (2) Securities in the Commonwealth and/or to Massachusetts residents.

2. The marketing, advertising, soliciting, promoting, and communicating or sale of Exxon Products and Services in the Commonwealth and/or to Massachusetts residents, including their environmental impacts with respect to Greenhouse Gas Emission, Climate Change and/or Climate Risk.

3. The marketing, advertising, soliciting, promoting, and communicating or sale of Securities in the Commonwealth and/or to Massachusetts residents, including as to Exxon's disclosures of risks to its business related to Climate Change.

4. All topics covered in the demands above.

5. Your recordkeeping methods for the demands above, including what information is kept and how it is maintained.

6. Your compliance with this CID.

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Date Issued: April 19, 2016
Issued To: Exxon Mobil Corporation

SCHEDULE C

CHAPTER 93A. REGULATION OF BUSINESS PRACTICES FOR CONSUMERS PROTECTION

Chapter 93A: Section 7. Failure to appear or to comply with notice

Section 7. 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.

Demand No.: 2016-EPD-36
Date Issued: April 19, 2016
Issued To: Exxon Mobil Corporation

SCHEDULE D

See attached "Office of the Attorney General - Data Delivery Specification."

Demand No.: 2016-EPD-36
Date Issued: April 19, 2016
Issued To: Exxon Mobil Corporation

AFFIDAVIT OF COMPLIANCE WITH CIVIL INVESTIGATIVE DEMAND

State of

County of

I, _____, being duly sworn, state as follows:

1. I am employed by _____ in the position of _____;

2. The enclosed production of documents and responses to Civil Investigative Demand 2016-EPD-36 of the Attorney General of the Commonwealth of Massachusetts, dated April 19, 2016 (the "CID") were prepared and assembled under my personal supervision;

3. I made or caused to be made a diligent, complete and comprehensive search for all Documents and information requested by the CID, in full accordance with the instructions and definitions set forth in the CID;

4. The enclosed production of documents and responses to the CID are complete and correct to the best of my knowledge and belief;

5. No Documents or information responsive to the CID have been withheld from this production and response, other than responsive Documents or information withheld on the basis of a legal privilege or doctrine;

6. All responsive Documents or information withheld on the basis of a legal privilege or doctrine have been identified on a privilege log composed and produced in accordance with the instructions in the CID;

7. The Documents contained in these productions and responses to the CID are authentic, genuine and what they purport to be;

8. Attached is a true and accurate record of all persons who prepared and assembled any productions and responses to the CID, all persons under whose personal supervision the preparation and assembly of productions and responses to the CID occurred, and all persons able competently to testify: (a) that such productions and responses are complete and correct to the best of such person's knowledge and belief; and (b) that any Documents produced are authentic, genuine and what they purport to be; and

9. Attached is a true and accurate statement of those requests under the CID as to

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which no responsive Documents were located in the course of the aforementioned search.

_____ _____
Signature of Affiant Date

_____
Printed Name of Affiant

Subscribed and sworn to before me

this __ day of _____ 2016.

_____
Notary Public
My commission expires:

_____

Office of the Attorney General - Data Delivery Specification
ONE – Production Load File

I. General

1. Images produced to the Office of the Attorney General should be single page series IV TIFF images, 300 dpi or better quality. TIFFs may be Black & White or color.
2. Bates Numbers should be placed in the lower right hand corner unless to do so would obscure the underlying image. In such cases, the Bates number should be placed as near to that position as possible while preserving the underlying image. Bates numbers should contain no spaces, hyphens or underscores. Example: AG0000000001.
3. Spreadsheets and Powerpoint ESI should be produced as native ESI and name for the bates number associated with the first page of the item. If the item has a confidentiality designation, please *DO NOT* append it to the bates numbered file name. The designation should be stored in a field in the DAT.
4. For any ESI that exists in encrypted format or is password-protected, instructions on means for access should be provided with the production to the AGO. (For example, by supplying passwords.)
5. All records should include at least the following fields of created data:
   a. Beginning Bates Number (where TIFF Images are produced)
   b. Ending Bates Number
   c. Beginning Attachment Range
   d. Ending Attachment Range
   e. RemovedFrom: If records were globally deduplicated, this field should contain a concatenated list of all custodians or sources which originally held the item.
   f. MD5 Hash or other hash value
   g. Custodian / Source
   h. Original file path or folder structure
   i. FamilyID
   j. Path/Link to natives
   k. Path/Link to text files (*do not produce inline text in the dat file*)
   l. Redacted – Bit Character field (1 or 0 where 1=Yes and 0=No)
   m. Production date
   n. Volume name
   o. Confidentiality or other treatment stamps
6. Email should be produced with at least the following fields of metadata:
   a. TO
   b. FROM
   c. CC
   d. BCC
   e. Subject
   f. Path to text file (*do not produce inline text in the dat file*)

g. Sent Date (dates and times must be stored in separate fields)
h. Sent Time (dates and times must be stored in separate fields and without time zones)
i. File extension (.txt, .msg, etc.)
j. Attachment count.

7. eFiles should be produced with at least the following individual fields of metadata:
   a. Author
   b. CreateDate (dates and times must be stored in separate fields)
   c. CreateTime (dates and times must be stored in separate fields with no time zones or am/pm)
   d. LastModifiedDate (dates and times must be stored in separate fields)
   e. LastModifiedTime (dates and times must be stored in separate fields with no time zones or am/pm).
8. Deduplication (Removed From data field)
   a. If the producing entity wishes to deduplicate, exact hash value duplicates may be removed on a global basis if the producing entity provides a field of created data for each deduplicated item that provides a concatenated list of all custodians or other sources where the item was original located. This list should be provided in the RemovedFrom data field.
   b. Any other form of deduplication must be approved in advance by the Office of the Attorney General.

II. File Types and Load File Requirements

a. <u>File Types</u>

Data: Text, images and native files should each be delivered as subfolders in a folder named "DATA". See screen shot "Example Production Deliverable."

- Images: Single page TIFF images delivered in a folder named "IMAGES."
- Text: Multipage text files (one text file per document), delivered in a folder named "TEXT."
- Natives: Delivered in a folder named 'NATIVES".

Load Files: Concordance format data load file and Opticon format image load file should be delivered in a folder named LOAD (at the same level as the folder DATA in the structure). See screen shot "Example Production Deliverable."

Office of the Attorney General - Data Delivery Specification
ONE – Production Load File

Example Production Deliverable
- VOL001
  - DATA
    - IMAGES
    - NATIVES
    - TEXT
  - LOAD

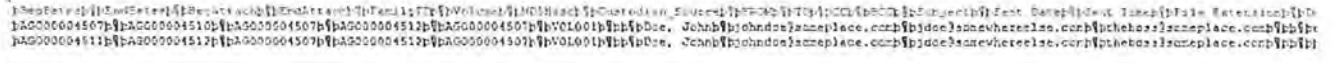
b. Fields to be Produced in ONE Data Load File – Concordance Format·

Field Name	Description/Notes
BegBates	Starting Bates Number for document
EndBates	Ending Bates Number for document
BegAttach	Starting Bates Number of Parent document
EndAttach	Ending Bates Number of last attachment in family
FamilyID	Parent BegBates
Volume	Name of Volume or Load File
MD5Hash	
Custodian_Source	If the source is a human custodian, please provide the name: Last name, first name. If this results in duplicates, add numbers or middle initials Last name, first name, middle initial or # If the source is not a human custodian, please provide a unique name for the source. Ex: AcctgServer
FROM	Email
TO	Email
CC	Email
BCC	Email
Subject	Email
Sent Date	Email
Sent Time	Email
File Extension	
Attch Count	Email
Doc Type	Email, attachment
Original FilePath	Original location of the item at time of Preservation.
FileName	
CreateDate	Loose files or attachments. Date and Time must be in separate fields.
CreateTime	Loose files or attachments. Date and Time must be in separate fields and the Time field should not include Time Zone (EDT, EST etc)
LastModDate	Loose files or attachments (Date and Time must be in separate fields)
LastModTime	Loose files or attachments. Date and Time must be in separate fields and the Time field should not include Time Zone (EDT, EST, AM, PM etc)
Redacted	This is a Boolean/bit character field. Data value should be "0" or "1" where 0 = No and 1=Yes.
Confidentiality Designation	NOTE: *Do not append the Confidentiality Designation to the native file name*
RemovedFrom	Last name, first name with semi colon as separator Lastname, firstname; nextlastname, nextfirstname etc.

Office of the Attorney General - Data Delivery Specification
ONE – Production Load File

Encrypted_pwp	This is a single character field. Data value should be "N" or "Y". (File is or is not encrypted/password protected)
EncryptKey_password	For those files where Encrypted_pwp is Y, provide password or encryption key information in this field.
ProdDate	MM\DD\YYYY
TextLink	path to the text files should begin with TEXT\
NativeLink	path to the native files should begin with NATIVES\

The Data load file for ONE is the same as a Concordance load file, with the same field delimiters () and text qualifiers (þ). Here is a screen shot of part of a ONE load file with the fields identified above:



c. Fields required for an Images Load File – Opticon Format

The Images load file for ONE is the same as an OPTICON load file. It contains these fields, although Folder Break and Box Break are often not used.

Field Name	Description/Notes
Alias	Imagekey/Image link - Beginning bates or ctrl number for the document
Volume	Volume name or Load file name
Path	relative path to Images should begin with IMAGES\ and include the full file name and file extension (tif, jpg)
Document Break	Y denotes image marks the beginning of a document
Folder Break	N/A - leave blank
Box Break	N/A - leave blank
Pages	Number of Pages in document

Here is a screen shot of an opticon load file format in a text editor with each field separated by a comma. Alias, Volume, Path, Document Break, Folder Break (blank), Box Break (blank), Pages.

```
AGC00004507,VOL001,IMAGES\00\00\AGC00004507.TIF,Y,,,4
AGC00004508,VOL001,IMAGES\00\00\AGC00004508.TIF,,,,
AGC00004509,VOL001,IMAGES\00\00\AGC00004509.TIF,,,,
AGC00004510,VOL001,IMAGES\00\00\AGC00004510.TIF,,,,
AGC00004511,VOL001,IMAGES\01\00\AGC00004511.TIF,Y,,,2
AGC00004512,VOL001,IMAGES\01\00\AGC00004512.TIF,,,,
```

Technical questions regarding this specification should be addressed to:

Diane E. Barry
AAG / eDiscovery Attorney
Office of the Attorney General
One Ashburton Place
Boston MA 02108
Diane.E.Barry@state.ma.us
(617) 963-2120

MASSACHUSETTS CONSUMER PROTECTION ACT
G.L. C. 93A, §§ 1, 2, 6, 7 (WESTLAW 2017)

G.L. c. 93A, § 1 – Definitions

The following words, as used in this chapter unless the text otherwise requires or a different meaning is specifically required, shall mean--

(a) "Person" shall include, where applicable, natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.

(b) "Trade" and "commerce" shall include the advertising, the offering for sale, rent or lease, the sale, rent, lease or distribution of any services and any property, tangible or intangible, real, personal or mixed, any security as defined in subparagraph (k) of section four hundred and one of chapter one hundred and ten A and any contract of sale of a commodity for future delivery, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this commonwealth.

(c) "Documentary material" shall include the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate.

(d) "Examination of documentary material", the inspection, study, or copying of any such material, and the taking of testimony under oath or acknowledgment in respect of any such documentary material.

G.L. c. 93A, § 2 – Unfair practices; legislative intent; rules and regulations

(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.

G.L. c. 93A, § 6 – Examination of books and records; attendance of persons; notice

(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.

G.L. c. 93A, § 7 – Failure to appear or to comply with notice

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.

2005 WL 3627141
Only the Westlaw citation is currently available.
United States District Court, District of Columbia.

SECURITIES AND EXCHANGE COMMISSION, U.S. Securities and Exchange Commission 450 Fifth Street, N.W. Washington, DC 20549–0911
Movant,
v.
LINES OVERSEAS MANAGEMENT, LTD., and The LOM Building, 27 Reid Street, Hamilton HM 11 Bermuda Scott Lines The LOM Building, 27 Reid Street, Hamilton HM 11 Bermuda
Respondents.

No. Civ.A. 04–302 RWR/AK.
|
Jan. 7, 2005.

Attorneys and Law Firms

Michael Keith Lowman, Securities and Exchange Commission, Washington, DC, for Movant. Rebecca A. Beynon, Kellogg, Huber, Hansen, Todd & Evans, PLLC, Kara L. Haberbush, Pepper Hamilton LLP, Washington, DC, for Respondents.

MEMORANDUM OPINION

KAY, Magistrate J.

***1** Before the Court is the Security Exchange Commission's ("SEC") Application for Order to Show Cause and for Order Requiring Obedience to Subpoenas ("Application") [1], Respondent Scott Lines's Memorandum Showing Cause Why Subpoenas Should Not Be Enforced ("Lines Opposition") [7], as well as Lines Overseas Management, Ltd.'s ("LOM") Memorandum of Law in Opposition to Application for Order Requiring Obedience to Subpoenas and Supporting Declarations ("LOM Opposition") [9], the SEC's Reply Memorandum in Further Support of its initial Application ("Reply") [22], as well as various other supporting documents filed by all parties (e.g. affidavits and business records).

The SEC issued two subpoenas to Scott Lines and two subpoenas to LOM pursuant to Section 21(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(a). All four subpoenas were personally served on Scott Lines at Miami International Airport on April 20, 2004. The SEC is presently requesting an order from this Court directing the enforcement of these subpoenas. The SEC's request is made pursuant to 15 U.S.C. §§ 78u(c) and 77v(c).

On August 17, 2004, the Court ordered the Respondents to show cause why the subpoenas should not be enforced. The Respondents filed opposition papers claiming principally that this Court lacks personal jurisdiction over the them. The parties also raised substantive challenges regarding the legality and appropriateness of an order of obedience to these administrative subpoenas. To afford the parties every opportunity to argue their case, and on the request of Respondent LOM (LOM Opposition at 4), a hearing was held on December 10, 2004 to address all of the issues set forth above.

Primarily the Respondents raise similar arguments against enforcement of the subpoenas. They will therefore be considered together insofar as the claims, and applicable law are the same. Where the factual or legal issues diverge, a separate discussion will proceed.

I PROCEDURAL ANALYSIS

A. Subject Matter Jurisdiction

This Court must first determine whether it has jurisdiction over the subject matter presently before it. Because subject matter jurisdiction concerns the power of the judiciary to entertain a type of case in the first instance, pursuant to the limitations set forth in Article III of the Constitution, it is non-waivable and must be policed by the Courts on their own initiative before reaching personal jurisdiction. *See Ruhrgas v. Marathon Oil Company*, 526 U.S. 574, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999). Federal courts must "scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined." *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212, 92 S.Ct. 418, 30 L.Ed.2d 383 (1971). "It is a principle of first importance that the federal courts are courts of limited jurisdiction ... They are empowered to hear only those cases that (1) are within the judicial power ..., and (2) that have been entrusted to them by a jurisdictional grant by the Congress." 13 C. Wright, A Miller & E. Cooper, Fed. Prac. & Proc.2d § 3522 (2004). The statutes in question in this case are those governing the judicial authority to order obedience to administrative subpoenas pursuant to the investigative function of the SEC. *See* 15 U.S.C. §§ 77v, 78u.[1] In analyzing a statute substantively similar to Section 78u(c), the Court of Appeals held that the language of the statute in that case,

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was insufficient to confer upon the Federal courts subject matter jurisdiction. *See United States v. Hill*, 694 F.2d 258 (D.C.Cir.1982). Here, however, the SEC also claims that 15 U.S.C. § 77v confers upon this Court subject matter jurisdiction. (SEC Application at 2–3.) That section provides that "the district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto.." 15 U.S.C. § 77v(a).[2] This language provides the Court with subject matter jurisdiction over the present action. Taken together, § 77v and § 78u confers upon the SEC the authority to issue subpoenas as well as this court's jurisdiction to entertain action brought under the Securities Act of 1933 and the Securities Exchange Act of 1934. *See Hill*, 694 F.3d at 265–266.

[1] 15 U.S.C. § 78u(c) provides "in cases of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records.

[2] The SEC mistakenly relies on subsection (b) to Section 77v, whereas the explicit subject matter jurisdictional grant in that section rather, is found in subsection (a).

***2** In the absence of an express jurisdictional grant found in the Securities Act itself, the Judicial Code itself provides this Court with subject matter jurisdiction to enforce the administrative subpoena in this case. *See* 28 U.S.C. § 1331, 1337(a), 1345 (1976 & Supp. IV 1980). This Circuit has held that these statutory provisions grant "to district courts original jurisdiction 'of any civil action or proceeding arising under any Act of Congress regulating commerce." ' *Hill*, 694 F.2d at 267. Subpoena enforcement actions fall squarely within the meaning of sections 1331, 1337(a), and 1345. *See Id.*, 694 F.2d at 268. Thus, this Court has subject matter jurisdiction to consider the SEC's application for enforcement of administrative subpoenas either under the express statutory grant found in 15 U.S.C. § 78v or via the Judicial Code's general jurisdictional provisions.

B. Personal Jurisdiction

The Respondents challenge the Court's *in personam* jurisdiction over Respondents Scott Lines and LOM. Respondents claim this Court lacks personal jurisdiction because the due process requirements of minimum contacts and purposeful availement have not been satisfied. (*See* LOM Opposition at 22–31; Lines Opposition at 8–21.)

The Court must first determine the respective burdens carried by the parties in challenging personal jurisdiction and the concomitant presumptions thereto. The Petitioner has "the burden of proving personal jurisdiction, and can satisfy that burden with a *prima facie* showing, unless the trial court holds an evidentiary hearing ." *Edmond v. U.S. Postal Service General Counsel*, 949 F.2d 415, 424 (D.C.Cir.1991)(internal citation omitted). To make this showing, the Petitioner cannot rely merely on pleadings, but must proffer affirmative proof such as affidavits, testimony or other competent evidence of specific facts. *U.S. v. Ferrara*, 54 F.3d 825 (D.C.Cir.1995); *Burnett v. Al Baraha Inv. & Dev. Corp.*, 274 F.Supp.2d 86 (D.D.C.2003). *See also Freeman v. Lazar*, 925 F.Supp. 14 (D.D.C.1996). In determining whether a *prima facie* showing of personal jurisdiction has been made, the Court will employ a preponderance of the evidence standard. *See U.S. v. Phillip Morris*, 116 F.Supp. 116 (D.D.C.2000). If such a showing is made, the burden shifts to the Respondents to "convince the court that the assertion of personal jurisdiction would be unreasonable." 4 Wright and Miller § 1067.6 (2004).

Jurisdiction in this case is predicated on § 27 of the Securities Exchange Act of 1934 which allows the exercise of personal jurisdiction to the limits of the Due Process Clause of the Fifth Amendment. *See Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2nd Cir.1972). Assertions of personal jurisdiction must comport with the requirements of due process. *See Burnham v. Superior Court of California*, 495 U.S. 604, 110 S.Ct. 2105, 2110, 109 L.Ed.2d 631 (1990). Historically, the *capias ad respondendum*, or the defendant's physical presence in the jurisdiction was required for the Court to have jurisdiction over the person. *See Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878). Because "progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome"..."the requirements for personal jurisdiction over non-residents have evolved from the rigid rule of *Pennoyer v. Neff*, to the flexible standard of *International Shoe"* (*Hanson v. Denkla*, 357 U.S. 235, 251, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)), wherein an assertion by the Court of personal jurisdiction will not offend due process if there exist "certain minimum contacts ... such that the maintenance of the suit does not offend

'traditional notions of fair play and substantial justice." ' *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)(*quoting Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940).

***3** The factors to be assessed in making such a determination "cannot be simply mechanical or quantitative" but rather depend "upon the quality and nature of the activity." *Id.*, 326 U.S. at 319.

The touchstone of this due process analysis is whether the "defendant's conduct and connection with the forum [ ] are such that he should reasonably anticipate being haled into court there." *World–Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980). In other words, personal jurisdiction is established when a defendant "purposefully avails itself of the privileges of conducting activities within the forum state." *Hanson v. Denkla*, 357 U.S. at 253.

Within the personal jurisdiction rubric there exists a distinction between general jurisdiction and specific jurisdiction. Specific jurisdiction exists over a defendant where the defendant has " 'purposefully directed" his activities at the forum, and where the underlying action "arise[s] out of or relate[s] to" the defendant's contacts. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)(quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) and *Helicopters Nacionales de Columbia*, 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984)). By contrast, general jurisdiction may be invoked even when the underlying action is unrelated to the contact and exists when the defendant's contacts with the jurisdiction are "continuous and systematic" and where the Court's exercise of jurisdiction is "reasonable and just." *Helicopters Nationales*, 466 U.S. at 415.

The difference between the two, therefore, relates to whether there is a causal relationship between the respondent's contacts with the forum and the petitioner's cause of action. *See Hanson*, 357 U.S. 235, 250–53, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

In the present action, the SEC is seeking enforcement of subpoenas issued to both Scott Lines and LOM arising from interactions that these Respondents are alleged to have had with the United States, namely, the trading of securities over U.S. securities markets and contacts related to and arising directly from those contacts. Respondent LOM argues "no such nexus exists because—in issuing the subpoenas—the SEC itself has made perfectly plain that it has made *no* determination that any violation of the securities laws has occurred." (LOM Opposition at 29.)(emphasis in original). This argument misstates the law. Respondent LOM is correct that the cases cited by the SEC all involve contacts based on lawsuits involving securities laws, whereas this case involves an investigation where no allegation of criminal conduct has yet been made. (See LOM Opposition at 29.) To require that the causal relationship for specific jurisdiction be between alleged jurisdictional contacts and a lawsuit, however, would be to put the cart before the horse. Respondents' interpretation would require the SEC to make allegations of violations of the securities laws without the opportunity to utilize its subpoena authority to investigate activities necessary to make that determination. Such an interpretation would emasculate the judicial enforcement provisions of the Security Exchange Acts by preventing the SEC from seeking the enforcement of any subpoenas prior to filing a lawsuit or making a formal allegation of wrongdoing. To be sure, "the very purpose of the subpoena and of the order, as of the authorized investigation, is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so." *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 201, 66 S.Ct. 494, 90 L.Ed. 614 (1946). If the Court were to require a nexus between an ongoing criminal lawsuit and the alleged jurisdictional contact, for the purposes of establishing personal jurisdiction it would, "in effect deny not only Congress' power to enact the provision sustaining them, but also its authority to delegate effective power to investigate violations of its own laws; if not perhaps its own power to make such investigations." *Id.*

***4** The causal relationship necessary for the Court to assert specific personal jurisdiction over the Respondents in exercising its subpoena enforcement power is between the Respondents' jurisdictional contacts and the central areas of inquiry covered by the SEC investigation, regardless of whether that investigation has yet to indicate criminal wrongdoing. Indeed the jurisdictional contacts alleged—trading of securities over U.S. markets and other ancillary business activities—are precisely those activities which comprise the subject of the SEC's investigation. LOM argues that the "SEC's reasoning boils down to the untenable proposition that specific jurisdiction will exist in *any* subpoena enforcement action against a foreign broker-dealer that executed, on its affiliates' customers' behalf, transactions in securities that the SEC is investigating." (LOM Opposition at 29.) The law provides otherwise. Specific jurisdiction requires not only a nexus between the action and the contact but also that sufficient minimum contacts exist to satisfy due process. *See Burger King*, 471 U.S. at 462. The first having been settled in the

previous discussion, the Court now turns to a discussion of the alleged minimum contacts.

Because personal jurisdiction is being invoked pursuant to 15 U.S .C. §§ 78u(c), 77v(b), which provide for nationwide or worldwide service of process,[3] the relevant inquiry is whether the respondents have sufficient minimum contacts with the United States generally, rather than the District of Columbia specifically. *See e.g.*, *SEC v. Knowles*, 87 F.3d 413, 417 (10th Cir.1996); *Bush v. Buchman, Buchman & O'brien*, 11 F.3d 1255, 1258 (5th Cir.1994); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6 th Cir.1993); *United Elec. Workers v. 169 Pleasant St. Corp.*, 960 F.2d 1080, 1085–86 & n. 6 (1st Cir.1992); *Go–Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406, 1414–16 (9th Cir.1989).

[3] "... process in such cases may be served in any other district of which the defendant is an inhabitant or *wherever the defendant may be found.*" (emphasis added).

1. LOM

This Court will first consider the contacts of LOM to the United States and whether there are sufficient minimum contacts such that the assertion of personal jurisdiction would not offend "traditional notions of fair play and substantial justice." The Court must first consider, therefore, the evidence proffered by the Government in support of its contention that LOM has sufficient contacts with the United States to warrant an assertion of personal jurisdiction.

It is the SEC's claim that:

> LOM routinely trades securities through the U.S. markets. As of January 2003, LOM had established brokerage accounts in its own name with at least (4) U.S. firms: Knight Securities L.P.; Paragon Capital Markets Inc.; Wein Securities Corp.; and Vfinance Investments, Inc. As of January 2003, LOM also used a U.S. company, Mellon Securities Trust Corp., N.Y. ("Mellon"), to deposit securities into Depository Trust & Clearing Corporation ("DTC") so that those shares could be traded over U.S. markets. (DTC is a central securities repository for U.S. brokerage firms; those firms use DTC to settle millions of securities transactions on a daily basis.) As of January 2003, LOM also had clearing agreements with two U.S. firms (Bear Stearns Companies Inc. and Spear, Leeds & Kellogg) to clear its securities transactions. Currently, LOM also has accounts at Sterne, Agee Capital Markets, Inc. and Schwab Capital Markets LLC. In several of its account agreemtns with the U.S. firms at which it holds accounts, LOM agreed to submit to arbitration before self regularly organizations (including the New York Stock Exchange) if a dispute arose between LOM and one of these firms. Further, in its clearing agreement with one of the U.S. clearing firms (Bear Stearns Companies, Inc.), LOM has agreed to submit to the jurisdiction of the U.S. District Court for the Southern District of New York or the New York Supreme Court to seek provisional remedies prior to arbitration.

***5** (SEC Application at ¶ 4.) Mere allegations in the complaint, here styled an application, will not suffice. *See* Supra at 5. The SEC, however, has provided the Court with several affidavits in further support of its contention that minimum contacts exist. The affidavit of Michael Ungar, an attorney with the SEC, provides evidence that LOM maintains an account with Vfinance Investments, and that on a daily basis, it is "buying and selling hundreds of thousands of shares of U.S. securities through the U.S. stock markets." (Ungar Supplement at ¶ 4.) To initiate these trades, LOM made contact with Vfinance either via the Bloomberg system (an electronic system used by traders to send orders and communicate about them), or telephonically. (Id.) Furthermore, LOM made contact with Sterne, Agee Capital Markets, Inc., and Schwab Capital Markets LLC to initiate orders through its brokerage accounts with those U.S. companies. (Ungar Supplement at ¶ 7.) In the Schwab account alone, there is evidence that LOM traded on over 4,000 different occasions, a total of 151 million shares of U.S. securities during a two-week period in 2003. (Id. at ¶ 8.) Additionally, LOM maintains a website, *www.LOM.com*, which is registered in the United States with Network

Solutions and which actively solicits business from U.S. customers. (Id. at ¶ 11.) This website advertises the corporate finance services of LOM's affiliate, LOM Capital Limited to U.S. companies listed on the NASDAQ and OTC Bulletin Board and advertises LOM mutual funds that it markets to the general public. (Id.) The site also "touts that its LOM USD Money Market Fund received a high rating by the U.S. rating service of Standards & Poor's." (Id. at ¶ 13.) The purported 'contacts' discussed above are a small sampling of those identified in the Ungar Supplement. The Ungar Supplement discusses many other contacts and business transactions conducted by LOM with the United States. (*See* Ungar Supplement at ¶ 15–23.) The government's evidence is sufficient to establish the *prima facie* elements of 'minimum contacts' necessary for this Court to assert personal jurisdiction over LOM.

Respondent LOM must now demonstrate how the assertion of personal jurisdiction would be unreasonable. 4 Wright and Miller § 1067.6 (2004). Respondent LOM argues that sufficient minimum contacts do not exist to justify an assertion of personal jurisdiction. In support of this contention, LOM notes that it does not own any real estate and has made no capital investments in the U.S., leases no property in the U.S., is not licensed to do business in the U.S., has no telephone listings in the U.S., does not advertise in the U.S ., does not employ anyone in the U.S., does not conduct or solicit business in the U.S., has never filed tax returns in the U.S., and has never conducted any meetings in the U.S. (LOM Opposition at 24.) LOM alleges that the SEC has mischaracterised the contacts that LOM has had with the U.S. and that they are in reality, "*de minimus* and insufficient to support an exercise of general or specific jurisdiction." (Id.) In addition to these general assertions, LOM provides specific argument to counter the assertions made by the SEC.

***6** First, LOM argues that because its contacts with Mellon Securities Trust was with its Canadian affiliate, Mellon Global Securities Services Company, and because "it has no control over CIBC Mellon's independent relationship" with its U.S. affiliate (Hill Declaration at ¶ 18), no minimum contacts can be found from this relationship. (LOM Opposition at 26.) The Court finds this argument both factually incorrect and contrary to law. Factual evidence attached to the Ungar Supplement demonstrates that LOM indeed had direct business dealings with Mellon's New York office by sending copies of share certificates directly to the New York office. (*See* Ungar Supplement at ¶ 15.) This contact refutes LOM's factual assertion and lends credence to this Court's conclusion that the purpose for which LOM conducted business with the Canadian affiliate of Mellon was to engage in trading over the U.S. securities markets. LOM's actions were directed toward the U.S. 'stream of commerce.' *See Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 112, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). The central objective of LOM's dealings with the Canadian affiliate of Mellon was to engage in trading over the U.S. market. Taking the scenic route does not in any way change the destination of their contacts. LOM's activities were "purposefully directed" toward the United States, albeit via another foreign entity. *Id.*

LOM next challenges the SEC's claim that LOM "used its Vfinance account to buy or sell thousands of U.S. securities over the U.S. markets on behalf of clients or officers," arguing that the SEC has not offered a "shred of factual detail regarding these alleged transactions, such as the names of the issuers, the number of or the dates of these transactions, the aggregate value of the transactions, or the nationalities of Lines Overseas Management Limited's clients that traded through these accounts." (LOM Opposition at 26–27.) Attached to the SEC's reply papers, however, is documentation from Vfinance listing the transactions made by LOM. (*See* Ungar Supplement at Ex. A.) According to the SEC, the absence of the factual detail, relied upon by LOM, is due to the redactions made by LOM in its previous disclosures and is the 'detail' that comprises some of the information sought by the SEC in this action. For the purposes of determining 'minimum contacts,' however, lack of factual detail is irrelevant. The acknowledged existence of the trades, and not the specific details surrounding them, evinces contacts and is therefore the only information germane to the jurisdictional inquiry.

LOM next argues that the existence of business contracts with U.S. brokerage firms is by itself insufficient to confer personal jurisdiction because contracts are "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." (LOM Opposition at 27, *citing Burger King*, 471 U.S. at 479.) Assuming arguendo the correctness of this legal assertion, LOM's argument is inapplicable to the facts at hand for two reasons. First, the *Burger King* Court simply concludes that a single contract, *standing alone*, is insufficient to confer jurisdiction. *See Id.* Unlike the facts in *Burger King*, here personal jurisdiction is predicated on many alleged contacts—contractual relationships being but one of many. Second, the *Burger King* Court noted that there may exist certain factors "—prior negotiations and future consequence, along with the terms of the contract and the parties' actual course of dealing—that

must be evaluated in determining whether the defendant purposefully established minimum contacts with the forum." *Id.* The record and pleadings before this Court provide sparse information concerning the characteristics of these contracts. The only information presented to the Court comes from the SEC, asserting that some of these contracts provide for arbitration of disputes before the New York Stock Exchange while in another, LOM has agreed to submit to the jurisdiction of the U.S. Distict Court for the Southern District of New York or that State's court should a dispute arise. (Application at ¶ 4.) While agreements to submit to a particular jurisdiction for resolution of disputes may not conclusively establish personal jurisdiction, *see Canadian Group Underwriters Ins. Co., v. M/V Arctic Trader*, No. 96–9242 DAB, 1998 WL 730334, at *3 (S.D.N.Y.1998), it is nevertheless one factor relevant in an evaluation of the contract in question. *See Burger King*, 471 U.S. at 479. Furthermore, LOM regularly placed orders for securities over the U.S. markets with Sterne, Agee Capital Market, Inc. (Ungar Supplement at ¶ 7.)

***7** Based on all of these factors, the Court finds that LOM has engaged in "continuous and systematic contacts with the United States through its numerous contacts with U.S. brokerage firms, clearing houses, and other business entities. *See Helicopters Nacionales de Columbia,* 466 U.S. 414 (1984). In engaging actively in the purchase and sale of U.S. securities, both directly with entities located in the United States and through circumambage, established clearly by the evidence proffered by the SEC, LOM has "purposefully directed" its activities at the United States' securities markets. *See Burger King Corp.*, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Although LOM, via affidavits in support of its position that it has no physical presence in the United States, shows that it owns no real estate nor has engaged in any physical business transactions in the United States, such physical contacts are not a necessary prerequisite in establishing personal jurisdiction. *See Hanson v. Denkla*, 357 U.S. 235, 251, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *International Shoe*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). With contacts now possible over telephone lines, web-pages, and other electronic media, the test for sufficient minimum contacts is not solely physical presence in the jurisdiction but rather whether LOM's "conduct and connection with the forum [ ] are such that [it] should reasonably anticipate being haled into court there." *World–Wide Volkswagen v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). Again, LOM's continuous advertisement of financial and securities related services to individuals and companies within the United States, as well as its business dealings with business entities engaged in the facilitation of securities transactions over the U.S. securities markets make clear the reasonableness of personal jurisdiction by a Court in this country. The extent of LOM's business dealings with these U.S. citizens, entities, and markets makes the prospect of being "haled into court" in this country not merely reasonable, but entirely likely.

Perhaps, as LOM argues, personal jurisdiction would not exist if the sole contact was contractual relationships between LOM and U.S. business entities. And perhaps, as LOM argues, its business dealings with both U.S. and Canadian businesses, in purchasing and selling securities over the U.S. markets would be insufficient, if the sole factor, in establishing personal jurisdiction, although doubtful. And perhaps the numerous phone calls and other electronic communications initiated by LOM with Vfinance as well as other entities would not, if the sole factor, suffice in establishing personal jurisdiction, although doubtful. And finally perhaps the solicitation of business from U.S. persons and businesses via LOM's web-site, if the sole factor, would not be sufficient contact to establish personal jurisdiction. But where, as here, and considered in the aggregate, a corporation makes routine telephone and wire communications with U.S. businesses for the sole purpose of trading in hundreds of thousands of shares of securities over the U.S. markets, engages in targeted solicitation of U.S. citizens and businesses for future business relationships, and establishes contracts with U.S. entities for the conduct of future business dealings, that corporation cannot credibly assert that is has not "purposefully availed itself" of the benefits of engaging in business in the forum, has not "purposefully directed" its business endeavors toward that forum, has not engaged in "continuous and systematic" contact with that forum, and therefore, argue that it could not reasonably be expected to be "haled into Court" in that forum.

***8** From the factors set forth by the SEC, in the supporting documentation attached both the declarations of Michael Ungar, as well as to the SEC's reply memorandum, it is clear that personal jurisdiction exists as to LOM.[4] LOM has been afforded an opportunity to argue to the contrary both in pleadings with the Court as well as orally at the December 10, 2004 hearing and has failed to persuade the Court otherwise.

[4] Because the Court finds jurisdiction based on minimum contacts, it need not address the arguments made by the parties concerning 'tag jurisdiction' and its applicability to this case.

2. Scott Lines

Having found sufficient minimum contacts between LOM and the United States to justify personal jurisdiction, the Court must now determine whether those contacts are fairly imputed to Respondent Lines or whether there exist contacts independent from LOM that support a finding of minimum contacts between Lines and the United States.

Insofar as Lines' arguments raise issues regarding LOM contacts with the United States, those issues have been resolved in the analysis above. As with the previous analysis, the Court will begin by assessing the evidence proffered by the government in support of its contention that sufficient minimum contacts exist.

According to evidence presented by the SEC, Scott Lines is the Managing Director of LOM. (Ungar Declaration at ¶ 6.) Mr. Lines, and his brother, Brian Lines, jointly control Largo Flight Limited and Monashee Limited (Ungar Supplement Ex. S) and sold close to a million shares of SHEP Technologies, Inc., over the U.S. market. (Ungar Supplement Ex. R.) Furthermore, "Brian and Scott Lines were apparently the brokers on the Two LOM Accounts, which sold over 2 million SHEP shares over the U.S. market. In addition, the two people who controlled the Two LOM Accounts paid the U.S. SHEP touters by wiring $600,000 into the U.S. from the Two LOM Accounts. The same two people who controlled these accounts also transferred from the Two LOM Accounts approximately 130,000 SHEP shares into U.S. brokerage accounts to compensate the SHEP touters." (Id. at ¶ 25 .) It is Ungar's contention that Lines is the broker on the Two LOM Accounts. (*See* Id.; Id. at Ex. Q.) The Ungar Supplement discusses an account with LOM called ICH Investments Limited, which was used to pool together resources of the various companies and shell companies making up the Sedona Group "towards the purchase price of the Sedona shell, to distribute the purchase price to the sellers of the Sedona shares, and subsequently, to sell 143,000 Sedona shares into the U.S. market." (Ungar Supplement at ¶ 28.) As is demonstrated by Exhibits V and T to the Ungar Supplement, Scott Lines contributed over $200,000 toward the purchase of 99% of Sedona Shares by ICH Investments Limited. As Ungar states, "as the broker on the ICH account and a member of the Sedona Group, Scott Lines either directed these money transfers into the U.S. or, at least, was aware of them." (Id. at ¶ 33.) Shortly after acquiring Sedona, ICH began selling its shares over the U.S. market. As soon as proceeds were generated from the sale of Sedona shares over the U .S. markets, ICH made money transfers to Largo, Monashee and Golden Accumulator totaling $384,999, an amount equal to the capital contribution needed for the initial purchase of the Sedona shell. (Id. at 42.) Because the evidence indicates that Scott Lines controls Largo and Monashee, as well as ICH company, the SEC believes Lines could be liable for several securities violations. In addition to contacts derived from his control of these entities, personally Scott Lines sent a letter directly to Renaissance in the United States regarding the withdrawal of LOM's offer to assist Renaissance in raising capital. (Id. at ¶ 48.)

***9** The extent of these interactions with the U.S. markets convinces this Court that Scott Lines has sufficient minimum contacts with the United States such that he is subject to personal jurisdiction. Lines actively engaged in the purchase and sales of securities through purposeful interactions with LOM as its managing director, maintained ownership in U.S. shell companies, and engaging individually in the purchase and sale of securities over the U.S. markets. The web of contacts between Lines and the U.S. markets when simplified, reveal direct contact with the U.S.

Whether or not Lines is correct that the SEC cannot conclusively prove his contacts (Lines Opposition at 14), the SEC's allegations nevertheless are clear and convincing and meet a *prima facie* case. Line offers no evidence to refute the SEC's preliminary and sufficient showing as is his burden. *See* 4 Wright & Miller § 1067.6 (2004).

As with LOM, Scott Lines has clearly made numerous contacts with the United States in directly facilitating and executing securities transactions with U.S. businesses and as managing director of LOM. His actions were 'purposefully directed' at the U.S. securities market. The Court concludes that his actions make the prospect of being 'haled' into a United States court foreseeable and the Court so holds. *Burger King,* 471 U.S. at 472; *World–Side Volkswagen v. Woodson,* 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490.

II. SUBSTANTIVE ANALYSIS OF SUBPOENAS

Both Respondent LOM and Lines argue, in the alternative, that the subpoenas are not valid and enforceable. To determine whether an administrative subpoena will be enforced, the Court must ensure that the agency is not overreaching or abusing the authority granted it by Congress. *Oklahoma Press Pub. Co. v. Walling,* 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946). Neither Respondent has alleged that the SEC has abused its discretion to enforce subpoenas regarding investigations into practices concerning U.S. securities markets. Facially, these subpoenas are both germane to the purposes of the SEC's investigatory powers and

reasonably calculated to obtaining information in the Respondents' possession.

The Court will therefore turn to the specific allegations made by the Respondents as to why the Court should not order enforcement of the subpoenas.

A. Service

The first argument considered by the Court is whether the subpoenas have been properly served on the Respondents. Although Respondent Lines makes arguments regarding the insufficiency of service, those arguments were made with regard to whether the personal service on Lines in Miami established personal jurisdiction, not whether the personal service constituted valid service. The Securities Exchange Act permits worldwide service of process in cases of the enforcement of subpoenas issued by the SEC. 15 U.S.C. § 77v(a). That section provides that service of process may be made on a defendant in any district "of which the defendant is an inhabitant or *wherever the defendant may be found." Id., emphasis added.*

***10** In the instant case, Mr. Lines was served with the subpoenas directed both at him personally and as an agent of LOM. Additionally, this Court's Order to Show Cause was sent via certified mail to LOM and Scott Lines at addresses in Bermuda pursuant to Rule 4 of the Federal Rules of Civil Procedure. These actions constituted proper service on the Respondents.

A. Sedona Subpoena as to LOM

LOM argues that the Sedona Subpoena is unenforceable because it is not addressed to Lines Overseas Management Limited, but rather, to 'LOM Group of Companies.' Because the company's proper name is not listed, LOM argues, the subpoena is facially defective and unenforceable. (LOM Opposition at 18–22.) LOM is incorrect in this assertion for two reasons. First, as the SEC notes, LOM holds itself out on its own website as 'LOM Group of Companies.' (SEC Reply at 47 .) Thus, it is entirely reasonable that the SEC subpoena would be addressed in that name. Second, minor errors in subpoenas are insufficient to invalidate the subpoena as to the target entity, "if it names them in such terms that every intelligent person understands who is meant ... the misnomer of a corporation in a notice, summons ... or other step in a judicial proceeding is immaterial if it appears that [the corporation] could not have been, or was not, misled." *Morrel v. Nationwide Mut. Fire Ins. Co.,* 188 F.3d 218, 224 (4th Cir.1999). LOM relies on *Alexander v. FBI,* 186 F.R.D. 21, 41 (D.D.C.1998) in support of its claim that "the Court cannot require defendant to comply with the subpoena ..." (LOM Opposition at 20–21.) LOM's reliance on *Alexander* is misplaced. In that case, the Court refused to enforce a subpoena because the subpoena failed to state whether the target of the subpoena was to turn over documents held in his personal or business capacity. *Id.* As such, that case did not involve the misnomer of the defendant, but rather, the specificity of the subpoena. As the subpoena in this case is directed clearly at a corporate entity, and it being plainly obvious that the target Defendant for that subpoena is LOM, the direction of the subpoena to 'LOM Group of Companies,' rather than 'LOM, Ltd.' is insufficient to invalidate it.

B. Compliance with Foreign Privacy Laws

Both LOM and Lines argue that the subpoenas may not be enforced because disclosure would subject them to liability in foreign jurisdictions. (See LOM Opposition at 31; Lines Opposition at 20.[5]) According to the Respondents, "foreign law prohibits it from producing certain customer-related financial information to the SEC." (LOM Opposition at 31.) In support of this position, LOM cites to *In Re Sealed Case,* 825 F.2d 494, 498 (D.C.Cir.1987). There the Court of Appeals overturned an order requiring a foreign bank to violate its own nation's laws. *See Id.* The Court noted that "it causes us considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question." *Id.* Several factors differentiate *In Re Sealed Case* from the case at hand, however. First, the subpoenas here are directed at the very subjects of the investigation, whereas in *In Re Sealed Case,* "the bank, against whom the order is directed, it not itself the focus of the criminal investigation in this case but is a third party ..." *Id.* Second, unlike LOM, in *In Re Sealed Case* the target of the subpoena was an entity owned by the government of that country. Third, in *In Re Sealed Case,* the government conceded that it would be impossible to comply with the contempt order without violating the laws of the foreign country. *Id.* In the instant case, the government has, at length, provided argument and witness testimony challenging LOM's assertion that compliance would necessarily constitute a violation of foreign law. (*See* Reply at 27–34 and attached exhibits.) As the Court noted in *In Re Sealed Case,* "one who relies on foreign law assumes the burden of showing that such law prevents compliance with the court's order." *In Re Sealed Case,* 825 F.2d at 498. According to the government's evidence, there is a foreign legal mechanism by which LOM and Lines can lawfully (within those countries) comply with the U.S. subpoena. (*See* Reply at 28–33 and attached

exhibits.) Thus, LOM has not met its burden of establishing that compliance would violate foreign law, even assuming such a finding would preclude an order of enforcement.

[5] Respondent Lines' argument in this regard is styled as a challenge to the Court's assertion of personal jurisdiction. Although this position is incorrect, and may prevent the Respondent from litigating this issue with regard to the merits of this case, the Court will nonetheless entertain Lines' arguments in the analysis of the arguments more fully and saliently made by Respondent LOM's counsel.

***11** Because this Court is unconvinced that an order of enforcement would subject the Respondents to liability in foreign courts, this Court need not reach a determination whether potential liability, if it existed, would necessarily tip the balance against ordering compliance.

The Court can, in the context of ordering discovery made in the course of civil litigation, "be wary of ordering such discovery until it is clear that the requested discovery is necessary." *In Re Vitamins Antitrust Litigation*, No. 99–197 TFH, 2001 WL 1049433, at *10, n. 20 (D.D.C. June 20, 2001). In contrast, here the requests are made by an administrative body which by statutorily granted authority can do so within its discretion. The Court will therefore determine whether the SEC abused its discretionary authority. *See Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946). Section 21 of the Securities Exchange Act of 1934 states that "the Commission is authorized in its discretion ... to investigate facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions" ... and "the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry." With such a broad grant of discretion, this Court is not prepared to second guess the determinations of the Commission absent an affirmative indication by the Respondents that the Commission has abused its discretion. Neither Respondents have proffered any evidence, past that which has previously been addressed by this Court, that indicate an abuse of discretion. Absent such a showing, this Court will not decline a request for enforcement based solely on the mere prospect of foreign liability, especially where, as here, the Respondents, through affirmative engagement with the U.S. securities markets, have themselves spawned the very inquiry they are now seeking protection from.

C. Previously Disclosed Documents

The Respondents' final argument in opposition to the SEC's request is that the documents requested in the subpoenas have previously been disclosed to the SEC. (*See* LOM Opposition at 38.) The government disagrees, arguing that the information provided to the SEC contained a significant number of redactions and that the information redacted comprises the bulk of the information it now seeks. (SEC Reply at 44.) Further, according to the government, the information sought is relevant to SEC investigations concerning significant sales of the shares of Sedona, SHEP, and Heinergy stock to unsuspecting U.S. investors. (SEC Reply at 38.) The importance of the investigation, and the nexus between the information sought and the subject of the investigation significantly outweigh any burden that may arise if, assuming arguendo, this information had previously been disclosed. The Court notes, however, that LOM is careful to state that it has already produced "many of the documents that are responsive to the Subpoenas." (LOM Opposition at 38.) LOM, the target of an administrative subpoena, cannot pick and choose the information that it wants to produce. The decision with regard to what information will be disclosed is made by the administrative agency, in its sound discretion, pursuant to express authorization by the Congress.

***12** The Court has serious reservations that the tenacity with which the parties have litigated this issue stems solely from the SEC's desire to obtain information that it already has, and LOM and Lines' desire not to disclose information that it has already disclosed. If, as the SEC asserts, there remains evidence that both falls within the scope of the subpoenas and which is relevant to the investigation, that evidence must be produced. LOM's claim, that they shouldn't be required to turn over information previously provided to the SEC, absent a scintilla of evidence of abusive, repetitive, or harassing requests, or that such requests are overly burdensome, is without merit.

D. Possession of the Documents

Both Respondents claim that they cannot comply with the SEC's subpoenas because they do not have custody of the documents and information sought and that they are unable to procure said information. (LOM Opposition at 46; Lines Opposition at 21.) The parties have argued that they previously turned over the documents which they, alternatively, now argue they do not have. Pretermitting this inconsistency, the Court cannot order compliance if

the parties' assertion in this regard is true. Nevertheless, it would appear to the Court that LOM and Lines' business activities would include either the preparation or receipt of documents that contain the requested information. In light of the internal inconsistency between the parties' position and because the Court does not credit Respondents' assertion that they are unable to provide responsive documentation or information, the Court will order them to comply. In the event they do not have any relevant documents in their possession, they should respond to the subpoenas to that effect, under oath. If not true, Respondents would be subject to the sanctioning authority of the Court. This rationale and ruling applies with equal force to subpoenas for document production as well as for subpoenas duces tecum issued to the Respondents.

III. CONCLUSION

Having concluded that the Respondents have sufficient minimum contacts with the United States such that personal jurisdiction is appropriate, and there being no showing that the SEC's subpoenas are contrary to law or an abuse of discretion, the SEC's Motion for an Order Requiring Obedience to Subpoenas is GRANTED. An appropriate Order will follow.

All Citations

Not Reported in F.Supp.2d, 2005 WL 3627141

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