

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

EXXON MOBIL CORPORATION,

Defendant.

SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
FILED

MAY 31 2024

JOHN E. POWERS, III
ACTING CLERK MAGISTRATE

**NON-PARTIES MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL
PROTECTION, MASSACHUSETTS DEPARTMENT OF ENERGY RESOURCES,
MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES, AND MASSACHUSETTS
OPERATIONAL SERVICES DIVISION'S OPPOSITION TO PLAINTIFFS' MOTION
TO COMPEL PRODUCTION OF DOCUMENTS**

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I. INTRODUCTION

Non-parties Massachusetts Departments of Environmental Protection (“DEP”), Energy Resources (“DOER”), and Public Utilities (“DPU”) (collectively, the “EEA Agencies”), and the Operational Services Division (“OSD”) (together with the EEA Agencies, the “Agencies”), through their undersigned counsel, hereby oppose Defendant ExxonMobil’s Motion to Compel (the “Motion”). The Motion seeks an order compelling four non-party government agencies with limited resources to fully comply with vastly overbroad subpoenas, which seek the production of millions of documents – consisting of several terabytes of data – that not only are irrelevant to the above-captioned action (the “Action”), but that also substantively encapsulate nearly the *entirety* of the work that each respective Agency performs for the citizens of the Commonwealth.

DEP’s mission is to protect and enhance the Commonwealth’s natural resources—air, water, and land—to provide for the health, safety, and welfare of all people, and to ensure a clean and safe environment for future generations. In carrying out this mission, the DEP commits to address and advance environmental justice and equity for all people of the Commonwealth, to provide meaningful, inclusive opportunities for people to participate in agency decisions that affect their lives.¹

DOER develops and implements policies and programs aimed at ensuring the adequacy, security, diversity, and cost-effectiveness of the Commonwealth’s energy supply to create a clean, affordable, equitable, and resilient energy future for all residents, businesses, communities, and institutions.²

DPU is an adjudicatory agency overseen by a three-member Commission. It is responsible for oversight of investor-owned electric power, natural gas, and water utilities in the

¹ See <https://www.mass.gov/orgs/massachusetts-department-of-environmental-protection>.

² See <https://www.mass.gov/orgs/massachusetts-department-of-energy-resources>.

Commonwealth. In addition, the DPU is charged with developing alternatives to traditional regulation, monitoring service quality, regulating safety in the transportation and gas pipeline areas, and siting energy facilities.³

OSD serves both business and government customers through a variety of services and programs that include managing the state fleet of vehicles and the COMMBUYS Procurement platform, setting the tuition prices for approved Private Special Education Programs, and management and oversight of procurements for goods and services, which includes the direct management of more than 100 Statewide Contracts, including fuel and motor oil.⁴

In each of the Subpoenas, among at least twenty other requests, ExxonMobil seeks all documents provided to, received by, reviewed by, or prepared by the agency concerning fossil fuels. Given the missions and purposes of each agency, these requests effectively seek *every* document ever sent to or created by OSD and each EEA Agency, respectively, within the twelve-year subpoena time period.

But as Defendant's counsel has aptly noted, the Agencies are non-parties to the Action, and "the scope of the Rule 45 subpoena, and the rights under the Rule 45 process is not the same as against a party opponent." Mot. Ex. 1 (Transcript of March 21, 2024 Motion to Compel and Status Conference) at 3. Nevertheless, the Agencies have met and conferred with Defendant in good faith several times to try to reach a compromise that would both satisfy Defendant's need to adequately develop a factual record and defend itself at trial, but also limit the massive burden that would result from their devotion of significant resources to fully comply with the far-overreaching third-party subpoenas.

³ See <https://www.mass.gov/orgs/department-of-public-utilities>.

⁴ See <https://www.mass.gov/orgs/operational-services-division>.

Per Defendant's own recommendation, the Agencies, through undersigned counsel, reviewed a sample of email communications that "hit" on search terms that Defendant identified as most important and relevant; after review, it was determined that the Agencies' email communications – none of which directly concern Defendant – are plainly not relevant to the Action or responsive to the spirit of subpoenas. In hopes of finding a compromise, the Agencies offered to have outside counsel meet with Agency subject matter experts ("SMEs") for each of the topics raised in the subpoenas and have those SMEs use their knowledge of both the topics and their respective Agencies to identify and produce responsive, non-privileged documents. Despite these ongoing efforts, Defendant remains dissatisfied and instead insists that the Agencies yield to its unreasonable and burdensome demands.

If the Court were to grant the Defendant's Motion, it would be ordering the non-party Agencies to devote thousands of attorney hours⁵ to review millions of documents (which they do not have the bandwidth to do) or alternatively to pay outside counsel to conduct the review (which the Agencies do not have the budget to accomplish). The overly burdensome review would result in a miniscule percentage of the documents being produced – of questionable relevance to the proceedings – in response to unartfully drafted subpoenas. Compelling the Agencies to comply with subpoenas, in the manner the Defendant demands, will impose a significant drain of both personnel and financial resources that the Agencies simply cannot afford. In short, the Defendant's Motion is nothing more than a fishing expedition and should therefore be denied.

II. FACTUAL BACKGROUND

The Attorney General for the Commonwealth of Massachusetts initiated the Action on October 24, 2019, alleging multiple violations of G.L. c. 93A ("Chapter 93A") by ExxonMobil.

⁵ ExxonMobil boasts that it has deployed approximately 250 lawyers to review and produce millions of documents to the Commonwealth, while ignoring that: (1) the Agencies are not the Commonwealth, and remain non-parties to the Action; and (2) the Agencies do not have the luxury of being able to deploy hundreds of attorneys to respond to third-party subpoenas.

In response, ExxonMobil filed a special motion to dismiss under the anti-SLAPP statute, and a motion to dismiss under Massachusetts Rules of Civil Procedure 12(b)(2) and 12(b)(6). The Court denied both motions in June 2021. ExxonMobil filed an Answer and an Amended Answer in July 2021 and October 2021, respectively. The Amended Answer, among other things, asserted thirty-eight defenses which largely fell into two categories. The first category primarily involved assertions that: (a) the risks of climate change have been well known in Massachusetts for decades, (b) the Commonwealth has encouraged and benefited from ExxonMobil's production and promotion of natural gas and other fossil fuel products, and (c) ExxonMobil has relied on this encouragement in investing in and developing natural gas and other fossil fuel products. The second category primarily involved assertions that the Massachusetts Attorney General had filed the Action based on improper motives. On September 24, 2021, the Commonwealth moved to strike twelve of the defenses, and the Court granted the motion on March 21, 2022, concluding among other things: (1) that Exxon had failed to plausibly allege that the Massachusetts Attorney General's actions constitute selective enforcement, and (2) that estoppel, unclean hands, and *in pari delicto* do not constrain officials exercising their responsibilities where doing so would frustrate public policy intended to protect the public interest. *See* Memorandum and Order on Motion to Strike Certain Defenses, Dkt. 70.

A. ExxonMobil Issues the Overbroad Subpoenas.

On March 24, 2022, ExxonMobil issued subpoenas to the EEA Agencies (the "EEA Subpoenas").⁶ Each EEA Agency responded and objected to its respective subpoena, noting, among other things, that it was overly broad and unduly burdensome. ExxonMobil and the EEA Agencies had several meet-and-confer phone calls to discuss throughout 2022; but as of January

⁶ The EEA Subpoenas are individually referred to herein as the "DEP Subpoena" (Def. Memo. Ex. 9), the "DOER Subpoena" (Def. Memo. Ex. 10), and the "DPU Subpoena" (Def. Memo Ex. 11), respectively.

2023, ExxonMobil had not made any meaningful attempt to narrow the overbroad subpoenas, nor did they engage in meaningful negotiation with the Agencies through the first half of 2023; then, during the summer and fall, following discussions with the Agencies, and prior to undersigned counsel being retained, ExxonMobil proposed twenty-one separate search term strings. The twenty-one searches for the EEA Agencies yielded more than five million documents. *See* Def. Memo. at 4. Based upon discussions with outside counsel and ExxonMobil, the Agencies requested that revised search queries be executed. The revised queries did not cover all of the original twenty-one queries, or all of the requests in the subpoenas but instead included seven queries. The seven searches resulted in almost four million documents. *Id.* at 5; Affidavit of Cory Flashner (“Flashner Aff.”) ¶ 3.

In September 2023, ExxonMobil issued a subpoena to OSD (the “OSD Subpoena”⁷, and together with the EEA Subpoenas, the “Subpoenas”). After discussion, OSD agreed to produce certain documents. In so doing, OSD ran several search terms on its own and provided the results to Defendant’s counsel. Defendant’s counsel later requested that OSD run five additional searches using search strings. Prior to providing the results of those searches to Defendant’s counsel, OSD and the other Agencies retained the undersigned outside counsel. Flashner Aff. ¶ 3.

B. Meetings Concerning the Subpoenas Fail to Limit the Requests & Initial Review of Emails.

Counsel for the Agencies and ExxonMobil have met and conferred over a dozen times since January 2024, during which they have discussed hit counts for each of ExxonMobil’s proposed search terms. By January and February 2024, they were having weekly phone calls. Per ExxonMobil’s suggestion, the Agencies harvested emails which hit on specific search terms that ExxonMobil deemed “most important” and relevant. This included searches 1, 9, and 10 for the

⁷ *See* Def. Memo. Ex. 16.

EEA Agencies and searches 2, 3, and 4 for OSD (see Def. Memo Exs. 13, 14). After including attachments, this amounted to approximately 1,000 EEA documents, and 11,000 OSD documents. The Agencies' outside counsel reviewed roughly 2,000 OSD emails and all 1,000 EEA Agencies emails, and determined that the email communications themselves were not responsive, but that a small percentage of attachments to the emails hit on search terms. However, almost all of those hits were on items such as news articles and other irrelevant documents. Instead of wasting time, effort, and resources on reviewing unresponsive emails and attachments, the Agencies shifted away from the overbroad email search terms (which had been shown to produce nonresponsive documents) and began to conduct focused interviews. The Agencies, through outside counsel, conducted interviews with over twenty SMEs from the Agencies to identify responsive documents. Based upon these meetings with the SMEs, the Agencies anticipate making document productions in late May and early June. Flashner Aff. ¶¶ 5-6.

In its May 1 Motion, ExxonMobil insists that this laborious effort by the Agencies is insufficient and that the Agencies should continue to review the millions of irrelevant and nonresponsive emails.

III. ARGUMENT

A. Legal Standard

A judge considering a motion to compel discovery has broad discretion to place appropriate limitations on the scope of discovery if requests are unduly burdensome or overly broad. Mass. R. Civ. P. 26(c); Mass. R. Civ. P. 45; *see also Dzung Duy Nguyen v. Mass. Inst. of Tech.*, No. MICV2011-03152-J2012, Mass. Super. LEXIS 146, at *1 (Mass. Super. Ct. April 30, 2012). Further, “[s]ubpoenas are subject to supervision by the presiding judge to prevent oppressive, unnecessary, irrelevant, and other improper inquiry and investigation.” *Cronin v. Stayer*, 392 Mass. 525, 535 (1984). Under Rule 45, “[a] party or attorney responsible for issuing and serving

a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.” Mass. R. Civ. P. 45.

B. The Subpoenas Seek Irrelevant Documents.

Most of the categories of documents ExxonMobil seeks from the non-party Agencies are, on their face, irrelevant to the claims and defenses. While state and federal courts in Massachusetts have broadly defined “relevance” to “encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issues that is or may be in the case,” *Cronin*, 392 Mass. at 534, they have also held that litigants may not “engage in merely speculative inquiries in the guise of relevant discovery.” *Heidelberg Ams., Inc. v. Tokyo Kikai Seisakusho, Ltd.*, 333 F.3d 38, 39 (1st Cir. 2003). Here, the Action concerns claims that ExxonMobil has: (1) misrepresented and failed to disclose material facts regarding systemic climate change risks to Massachusetts investors; (2) deceived Massachusetts consumers by misrepresenting the purported benefit of using its Synergy and Mobil 1 products and failed to disclose the climate change risks posed by its fossil fuel products; and (3) misled Massachusetts consumers by conducting “greenwashing” campaigns. Evidence relevant to the claims and defenses therefore concerns: (1) whether Defendant’s public disclosures to investors and product marketing to consumers were materially false, (2) whether Defendant’s disclosures and marketing were deceptive or misleading, and (3) whether Defendant’s disclosures and marketing were material to the decision-making of such consumers or investors. Rather than tailoring its subpoena requests to appropriately target documents relevant to these issues, Defendant has instead engaged in a fishing expedition, seeking a far-reaching range of irrelevant documents including:

- All documents concerning the measurement of the Agency’s or Massachusetts’ greenhouse gas emissions, including, without limitation, the quantity and source of such emissions.⁸

⁸ See DEP, DOER, DPU Subpoenas, Request No. 7.

- All documents relating to the Agency's determination of the risks posed to Massachusetts by extreme weather, climate change, greenhouse gas emissions, and global warming.⁹
- All documents concerning the Agency's management of or attempts to mitigate the risks posed to Massachusetts by extreme weather, climate change, greenhouse gas emissions, and global warming.¹⁰
- All documents provided to, received by, reviewed by, or prepared by or on the Agency's behalf concerning fossil fuels, including the purchase, use, or potential use of, or benefits or disadvantages of fossil fuels.¹¹
- All contracts and agreements between Massachusetts and any fossil fuel company concerning the purchase, sale, distribution, or promotion of fossil fuels.¹²
- All documents concerning Massachusetts' goals, plans, policies, actions, or programs for the use of renewable energy in connection with the operation or oversight of facilities owned or substantially controlled by Massachusetts.¹³
- All documents concerning Massachusetts' statements, policies, actions, or plans related to the operation of oil and gas businesses during states of emergency or other similar periods.¹⁴
- All documents relating to the Agency's involvement in the creation and dissemination of the Massachusetts Clean Energy and Climate Plan for 2020.¹⁵
- All documents relating to the creation and dissemination of the December 31, 2015 update to the Massachusetts Clean Energy and Climate Plan for 2020.¹⁶
- All documents relating to the Agency's involvement in the 2007 U.S. Supreme Court case *Massachusetts v. E.P.A.*¹⁷
- All documents relating to the Agency's involvement in the 2016 Massachusetts Supreme Judicial Court case *Kain v. Department of Environmental Protection*.¹⁸
- All documents concerning the supply and consumption of fossil fuels in Massachusetts.¹⁹

⁹ See DEP, DOER, DPU Subpoenas, Request No. 8; OSD Subpoena, Request No. 10.

¹⁰ See DEP, DOER, DPU Subpoenas, Request No. 9; OSD Subpoena, Request No. 16.

¹¹ See DEP, DOER, DPU Subpoenas, Request No. 10; OSD Subpoena, Request No. 17.

¹² See DEP, DOER Subpoenas, Request No. 11; DPU Subpoena, Request No. 13.

¹³ See DEP, DOER, Subpoenas, Request No. 12; DPU Subpoena, Request No. 16; OSD Subpoena, Request No. 18.

¹⁴ See DEP, DOER Subpoenas, Request No. 13; DPU Subpoena, Request No. 17.

¹⁵ See DEP Subpoena, Request No. 14; DOER Subpoena, Request No. 17; DPU Subpoena, Request No. 18.

¹⁶ See DEP Subpoena, Request No. 15; DOER Subpoena, Request No. 18; DPU Subpoena, Request No. 19.

¹⁷ See DEP Subpoena, Request No. 16; DPU Subpoena, Request No. 20; DOER Subpoena, Request No. 19.

¹⁸ See DEP Subpoena, Request No. 17; DPU Subpoena, Request No. 21; DOER Subpoena, Request No. 20.

¹⁹ See DOER Subpoena, Request No. 14.

- All documents concerning energy assistance, rebate, and incentive programs the Agency offers to consumers or businesses in Massachusetts.²⁰
- All documents concerning the Comprehensive Energy Plan.²¹
- All documents sufficient to show Massachusetts' use of fossil fuels in connection with the operation or oversight of facilities.²²
- All documents sufficient to show the use of fossil fuels in connection with the operation or oversight of ongoing planned construction projects.²³
- All documents relating to the Agency's oversight of natural gas utilities.²⁴
- All communications between the agency and natural gas utilities concerning cost adjustments.²⁵
- All documents related to the purchase of ExxonMobil products by Massachusetts, including any state agency or executive office, or any eligible entity.²⁶
- All documents, contracts, and agreements between Massachusetts and any company, or between any eligible entity, and any company, concerning the purchase, sale, or distribution of fossil fuels.²⁷
- All documents, contracts and agreements concerning the quantity and source of such management, purchase, or sale of vehicles on behalf of Massachusetts and/or any eligible entity.²⁸
- All documents concerning the Agency's decision to enter into, renew, modify, or amend the statewide contract for Energy, Climate Action and Facility Services Agreement.²⁹
- All documents related to the Agency's designation of the Environmentally Preferable Products ("EPP") specifications as "mandatory" for certain products and services.³⁰

²⁰ See DOER Subpoena, Request No. 15.

²¹ See DOER Subpoena, Request No. 16.

²² See DPU Subpoena, Request No. 11.

²³ See DPU Subpoena, Request No. 12.

²⁴ See DPU Subpoena, Request No. 14.

²⁵ See DPU Subpoena, Request No. 15.

²⁶ See OSD Subpoena, Request No. 7.

²⁷ See OSD Subpoena, Request No. 8.

²⁸ See OSD Subpoena, Request No. 9.

²⁹ See OSD Subpoena, Request No. 11.

³⁰ See OSD Subpoena, Request No. 12.

- All documents related to the Agency's designation of EPP specifications as "desirable" for certain products and services.³¹
- All documents concerning any analysis, forecast, plan, or projection regarding the acquisition or leasing of electric vehicles by Massachusetts.³²
- All documents concerning any analysis, forecast plan, or projection about replacing or transitioning vehicles powered by fossil fuels to electric vehicles or about maintaining existing vehicles or types of vehicles powered by fossil fuels.³³
- Documents sufficient to show: (1) the quantity of fossil fuels purchased, (2) the sources of those purchases of fossil fuels, and (3) the amount of money spent on the purchase of fossil fuels, by year, for Massachusetts and each eligible entity.³⁴
- Documents sufficient to show: (1) the quantity of renewable energy purchased, (2) the sources of those purchases of renewable energy, and (3) the amount of money spent on the purchase of renewable energy, by year, for Massachusetts and each eligible entity.³⁵
- Documents sufficient to show: (1) the quantity and types of electric vehicles and of hybrid vehicles purchased, (2) the amount of money spent on the purchase of electric vehicles and of hybrid vehicles, (3) the quantity and types of vehicles powered by fossil fuels purchased, and (4) the amount of money spent on the purchase of vehicles powered by fossil fuels, by year, for Massachusetts and each eligible entity.³⁶
- Documents sufficient to show each Massachusetts agency and executive office's use of fossil fuels in connection with the operation of government vehicles and equipment.³⁷

These requests plainly bear no relevance whatsoever to whether ExxonMobil's disclosures to investors and its marketing to consumers were deceptive or otherwise misleading. Rather, the requests are merely a thinly veiled effort by ExxonMobil to "fish" for documents supporting – and to eventually relitigate – their now-stricken affirmative defenses including, for example, selective prosecution and unclean hands. ExxonMobil's explanation on pages 8 and 9 of its memorandum (*i.e.* that the Commonwealth of Massachusetts is both a consumer and an investor) reveals its actual

³¹ See OSD Subpoena, Request No. 13.

³² See OSD Subpoena, Request No. 14.

³³ See OSD Subpoena, Request No. 15.

³⁴ See OSD Subpoena, Request No. 19.

³⁵ See OSD Subpoena, Request No. 20.

³⁶ See OSD Subpoena, Request No. 21.

³⁷ See OSD Subpoena, Request No. 22.

motive: ExxonMobil is hoping to find documents that will support its arguments that the Commonwealth of Massachusetts has promoted the use of natural gas, invested in its use, and purchased the same or similar products – arguments which the Court rejected in its order on Plaintiff's motion to strike. *See* Memorandum and Order on Motion to Strike Certain Defenses, Dkt. 70. Nevertheless, the Agencies have, in good faith, offered to locate and produce documents responsive to several of these categories, without searching through voluminous emails concerning the Agencies' affairs. ExxonMobil has rejected that proposal. The Court should likewise reject ExxonMobil's backdoor attempt to revive its stricken defenses and deny the Motion.

C. The Subpoenas are Vastly Overbroad.

In addition to seeking irrelevant information that ignores the prior rulings of this Court, the categories of document requests detailed above are overly broad because they effectively seek documents concerning nearly *everything* that the Agencies do in Massachusetts. *See* Memo. at 2-3, 5 (describing the primary functions of each Agency). Further, to the extent that some of the other categories of document requests in the Subpoenas are relevant to the claims and defenses, they are nonetheless overly broad in scope. A judge considering a motion to compel discovery has broad discretion to place appropriate limitations on the scope of discovery if requests are unduly burdensome or overly broad. Mass. R. Civ. P. 26(c); Mass. R. Civ. P. 45; *see also Dzung Duy Nguyen*, 2012 Mass. Super. LEXIS 146, at *1. Further, “[s]ubpoenas are subject to supervision by the presiding judge to prevent oppressive, unnecessary, irrelevant, and other improper inquiry and investigation.” *Cronin*, 392 Mass. at 535. Several of the Defendant's subpoena requests, even if partially relevant, are oppressive and unnecessary because they seek far more documents than necessary for ExxonMobil to develop a factual record or defend itself at trial. For example, ExxonMobil's requests routinely ask for “all documents”:

- All documents concerning any investigation of ExxonMobil conducted by the Attorney General.³⁸
- All documents concerning meetings attended by the Agency or its representative and the Attorney general *concerning ExxonMobil*.³⁹
- All documents between the Agency and any federal, state, municipal, or local government official, including the Attorney General, *concerning ExxonMobil* or the allegations in the Amended complaint.⁴⁰
- All documents between the Agency and members of the public *concerning ExxonMobil* or the allegations in the Amended Complaint.⁴¹
- All documents between the Agency and the Press *concerning ExxonMobil* or the allegations in the Amended Complaint.⁴²

ExxonMobil makes no attempt to in any way tailor these requests specifically to documents that are relevant to the claims and defenses, or to documents that are likely to lead to admissible evidence. Instead, in each case it effectively asks for “*all*” documents “*concerning ExxonMobil*.” These requests extend far beyond the scope of the Action and are therefore vastly overly broad. Further, to the extent the Agencies possess relevant documents such as public awareness surveys and reports concerning public awareness and prioritization of climate change, the Agencies have determined that those documents can be located on publicly available websites and/or the Agencies’ internal document servers, and that Agency emails do not contain relevant discussions concerning ExxonMobil or the Action. Forcing the Agencies to expend resources combing through email inboxes of multiple Agency employees would undoubtedly impose a massive burden on the Agencies, each of which would quickly find itself drained of significant resources. The Motion should therefore be denied.

³⁸ See DEP, DOER, DPU, and OSD Subpoenas, Request No. 1.

³⁹ See DEP, DOER, DPU, and OSD Subpoenas, Request No. 3.

⁴⁰ See DEP, DOER, DPU, and OSD Subpoenas, Request No. 4.

⁴¹ See DEP, DOER, DPU, and OSD Subpoenas, Request No. 5.

⁴² See DEP, DOER, DPU, and OSD Subpoenas, Request No. 6.

D. The Subpoenas are Unduly Burdensome.

The overly broad scope of the Subpoenas – and the resulting significant burden – is further evidenced by the sheer volume of documents that hit on the search terms that ExxonMobil has proposed. Again, a judge considering a motion to compel discovery has broad discretion to place appropriate limitations on the scope of discovery if requests are unduly burdensome or overly broad. Mass. R. Civ. P. 26(c); Mass. R. Civ. P. 45. As ExxonMobil concedes in its memorandum, in January 2024, the Agencies ran ExxonMobil’s proposed search terms across the Agencies’ servers, and they hit on over **five million** documents. *See* Def. Memo. at 4. In February, in an effort to cooperate in good faith, the Agencies suggested revised search terms; and even those narrower terms hit on almost **four million** documents. *Id.* at 5. To date, Defendant has not proposed any search terms that would reduce the number of documents in a meaningful way. *Flashner Aff.* ¶ 4.

In March, *Defendant* recommended that the Agencies review documents that hit on three of its proposed search terms, noting that it believed that those search terms were the most important. The Agencies complied with Defendant’s request, reviewed a sample of roughly two thousand documents, and determined that, while responsive documents occasionally appeared among many unrelated attachments to various emails, there were no relevant substantive email communications at all between or involving the Agencies. ExxonMobil misstates the approach the agencies are taking to identify responsive documents. (*see* Def. Memo. at 8). The Agencies have not proposed producing attachments without their parent emails. Rather, the Agencies have offered to identify relevant documents by meeting with SMEs and then tasking those SMEs to identify responsive documents that can be produced. This will result in the production of documents that may potentially be responsive to the Subpoenas, even though the documents may still not be *actually* relevant to the Action. Using SMEs will prevent the Agencies from reviewing millions of

unresponsive emails to simply find potentially responsive attachments. Instead, these potentially responsive documents, identified by the SMEs in whatever format they exist, will be harvested directly from their source (hard drives, share drives, etc). Despite this reasoned, proposal, Defendant instead asks the Court to force the Agencies to review (and ultimately heavily redact) millions of pages worth of emails and unrelated attachments. *Flashner Aff.* ¶¶ 7-8.

The Court should exercise its authority to place appropriate limitations on the scope of discovery, and to prevent oppressive, unnecessary, irrelevant, and other improper inquiry and investigation. *See* Mass R. Civ. P. 45(d)(1) (“Such an order to compel production or inspection shall protect a person who is neither a party nor a party’s officer from undue burden or expense resulting from compliance.”) More specifically, the Court should deny ExxonMobil’s motion to compel the Agencies to perform large scale email harvesting via search terms, which would be unduly burdensome. Instead the Court should permit the Agencies to comply with the subpoenas by having SMEs identify responsive documents, a process that is well underway.

IV. CONCLUSION

For the foregoing reasons, the non-party Agencies respectfully request that the Court deny Defendant’s Motion.

Dated: May 14, 2024

Respectfully submitted,

**MASSACHUSETTS DEPARTMENTS OF
ENVIRONMENTAL PROTECTION, ENERGY
RESOURCES, AND PUBLIC UTILITIES, AND
MASSACHUSETTS OPERATIONAL
SERVICES DIVISION**

By its attorneys,



Cory S. Flashner, BBO # 629205

Katherine Galle, BBO # 691660

Alain P. Mathieu, BBO # 698771

MINTZ, LEVIN, COHN, FERRIS,

GLOVSKY AND POPEO, P.C.

One Financial Center

Boston, MA 02111

Tel: (617) 542-6000

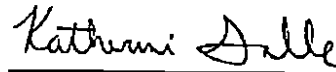
kngalle@mintz.com

csflashner@mintz.com

apmathieu@mintz.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Opposition to Defendant ExxonMobil's Motion to Compel was served upon counsel of record by email on May 14, 2019.



Katherine Galle

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