COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

EXXON MOBIL CORPORATION,

Defendant.

Service Via Email and U.S. Mail

REPLY MEMORANDUM IN SUPPORT OF EXXON MOBIL CORPORATION'S MOTION TO COMPEL NAMED AGENCIES TO PRODUCE RESPONSIVE EMAILS

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PRELIMINARY STATEMENT

The four agencies at issue in this motion—DEP, DOER, DPU, and OSD (the "Agencies")—concede that they *possess* emails that are relevant and responsive to the subpoenas.[1] But the Agencies' Opposition doubles down on their refusal to *produce* any emails at all, based on the following nonsensical analysis: The Agencies reviewed a limited subset of search term hits, identified some records that *are* responsive to the subpoenas, and then inexplicably decided not to search for or produce any emails *at all* because, in their estimation, the number of responsive records in that subset of search term results was too low. They then extended this blanket email boycott even to emails they had already identified and to emails that could be identified by the so-called "subject matter experts" tasked with responding to the subpoenas.

To the extent that the Agencies' position is based on a premise that no relevant emails exist, that premise is belied by what the Agencies have said, records produced by others in the case, and the Agencies' self-professed missions related to climate change, fossil fuels, and renewable energy—topics central to the Commonwealth's claims and ExxonMobil's defenses. What really seems to be driving the Agencies' resistance is their position that producing emails would be unduly burdensome. But it is the Agencies who must show, with specificity, that complying with the subpoenas would be unduly burdensome. The suggestion of *possible* burden here cannot be accepted given that the Agencies called off negotiations aimed at addressing the purported burden and are refusing to produce any emails at all, not just emails identified through search terms. The Agencies also lump themselves together for purposes of counting documents in a manner that artificially inflates the perceived burden, although in reality each agency received a separate

[1] The Agencies served the Opposition on ExxonMobil the day after the May 13, 2024 deadline. *See* Mass. Super. Ct. R. 9A(b)(4)(i).

subpoena and is responsible only for its own potentially responsive records. The Agencies' position is also untenable given that other Commonwealth agencies have produced tens of thousands of emails to ExxonMobil, and that discovery of emails is a critical part of modern litigation. *See* Br. at 8.[2]

Nor should the Agencies be allowed to hide behind the fiction that they are disinterested third parties. The Commonwealth brought this lawsuit, and the Agencies are part of the Commonwealth. The Commonwealth's refusal to produce documents from the Agencies in party discovery forced ExxonMobil to subpoena each agency. It makes no sense that those Agencies could then refuse to provide discovery by invoking third-party discovery standards, when it was the Commonwealth's refusal to look beyond the Attorney General's Office's files that artificially converted them into "third parties." This Court should not countenance such unabashed gamesmanship and should order the Agencies to produce responsive, nonprivileged emails.

ARGUMENT

I. The Agencies Possess Relevant Emails Responsive To The Subpoenas.

First, the Agencies do not dispute that they possess emails about the relevant topics that ExxonMobil identified in its Motion, such as consumer awareness of the risks of climate change, the consumption of fossil fuels by Massachusetts consumers, and the demand for fossil fuels and renewable energy. *See* Opp. at 6 ("almost all"—but *not* all—surveyed "hits were on items such as news articles and other irrelevant documents"); *see also id.* at 13–14 (conceding that the Agencies found "responsive documents"); Br. at 7–9. Nor could they. It would be absurd to suggest that employees of these Agencies have never communicated by email about those topics given that the

[2] Citations to "Ex. __" refer to exhibits to the Supplemental Affidavit of Jack W. Pirozzolo. "Br." refers to ExxonMobil's opening brief, and "Opp." refers to the Agencies' opposition brief.

Agencies are collectively charged with protecting the environment, ensuring the adequacy of the Commonwealth's energy supply, overseeing the Commonwealth's fossil fuel-dependent energy utilities, and managing the Commonwealth's procurement of fuel and motor oil. Opp. at 1–2.

Moreover, there is no need to theorize about the nature of emails that these Agencies possess. Emails already produced by the Massachusetts Department of Transportation ("MassDOT"), for example, demonstrate that the Agencies are having meaningful discussions—by email—about relevant topics, including the Commonwealth's proposed transition to renewable energy sources and electric vehicles, continued demand for fossil fuels, and the potential for carbon capture technology. Examples of these emails, which involve employees of the Agencies, include:

Example	**Relevance**
A 2014 email chain among MassDOT and DEP employees in which a MassDOT employee expresses concern about DEP's apparent "confidence in [greenhouse gas] reduction quantities for specific measures that we [(*i.e.*, MassDOT)] do not share." Ex. 1.	The discussion is relevant to the Commonwealth's allegations that ExxonMobil made deceptive statements about its view of continued demand for fossil fuels and to the awareness of climate change risks in Massachusetts. *See, e.g.*, Am. Compl. ¶¶ 22, 117.
A 2015 email chain among MassDOT and EEA personnel in which an EEA employee sends a "master list of all strategies going back to 2009" for reducing greenhouse gas emissions. Exs. 2, 3. The list includes strategies that involve lengthy anticipated time frames and would require new legislation or significant funding. *Id.*	Communications such as this one are relevant to the awareness of climate change risks in Massachusetts (here, going back to 2009), and bear on whether ExxonMobil's statements concerning its view of continued demand for fossil fuels were not deceptive. *See, e.g.*, Am. Compl. ¶¶ 22, 117.
A 2017 email in which an OSD employee sent a MassDOT employee a "summary of gallons of fuel purchased by DOT for each fiscal year." Ex. 4.	OSD likely has similar emails with other Commonwealth entities that acted as Massachusetts consumers of fossil fuels, and the behavior of those consumers is central to this case. *See, e.g.*, Am. Compl. ¶¶ 710–711, 755.
A 2018 email among MassDOT, DEP, DOER, OSD, and other EEA personnel in which an EEA employee sends a "final summary of 2017" for the "Mass Drive Clean" initiative. Ex. 5. The	Communications about challenges to the transition to renewable energy are relevant to the Commonwealth's allegations that ExxonMobil made deceptive statements

Example	Relevance
summary includes survey results about consumer perceptions of electric vehicles, including barriers to purchasing electric vehicles. Ex. 6.	about the timing for that transition. *See, e.g.*, Am. Compl. ¶¶ 455, 497.
A 2020 email chain among MassDOT, DEP, DPU, and other EEA personnel discussing the "enormous cost of making the transition from an internal combustion based transportation system" to one with only electric vehicles. Ex. 7.	Communications about persistent demand for fossil fuels and difficulties in transitioning to renewable energy are relevant, as discussed above.

These examples just scratch the surface, as MassDOT's production was not designed specifically to look for communications between MassDOT and one or more of the Agencies and, of course, would not have captured communications between or among the Agencies in which MassDOT was not involved.[3]

Rather than dispute that they possess such responsive emails, the Agencies parrot the Commonwealth's inaccurate contention that none of these emails will be relevant. Opp. at 7–11. ExxonMobil has already refuted those arguments. Br. at 1 n.1, 7–10; *see* Dkt. No. 97; Dkt. No. 103 at 2–8. To reiterate, the records sought here are relevant to central issues in the case, including whether ExxonMobil's statements about its view of future demand for fossil fuels and renewable energy were deceptive, the extent to which Massachusetts consumers were aware of climate change risks (relevant to whether ExxonMobil's statements were deceptive), and the importance of fossil fuels to Massachusetts consumers. Taking just one additional example, DOER and DPU received a report in 2018 that acknowledged there were "serious uncertainties surrounding climate damage estimates." *See* Ex. 8 at 143 ("Avoided Energy Supply Components in New England:

[3] These emails were found based on just an initial review of MassDOT's production.

2018 Report").[4] It should be self-evident that email discussions about the "uncertainties" associated with estimating the impact of climate change are highly relevant to a dispute in which ExxonMobil is accused of making deceptive statements about the level of uncertainty associated with climate change.

Second, the Agencies do not dispute that their approach will deny ExxonMobil access to important kinds of information, including critical information needed to identify potential witnesses and deponents. Br. at 9–10. For example, the Agencies are withholding emails that attach concededly responsive documents, choosing instead to collect and produce those documents from other sources. Opp. at 13. That refusal deprives ExxonMobil of information about who sent and received the responsive document, and when that occurred. Indeed, the Agencies are essentially saying that employees never *again* emailed about relevant attachments they have sent. That is implausible. The Agencies also do not dispute that they possess emails among former employees about relevant topics, and that their refusal to produce such emails will deny ExxonMobil any unique information they possessed. *See* Br. at 10.

Third, the Agencies assert that they have no emails at all about certain topics but offer no explanation for their assertions. Opp. at 12. They do not explain how they can know, at this stage, that they possess *no* emails about ExxonMobil or this action. Opp. at 6, 12. And that is doubtful. For example, OSD has issued to prospective vendors what it labeled "requests for response"—*i.e.*, solicitations for bids—for ExxonMobil products. *See* Ex. 10 at 22 (2020 request involving Mobil 1 oil). It is therefore beyond dispute that OSD, as a Massachusetts consumer, possesses data about

[4] To give another example, in April 2014, DOER made a presentation to the Massachusetts Energy Efficiency Advisory Council concerning the Commonwealth's dependence on natural gas and difficulties with renewable energies, and the conclusion that there are "significant economic and mounting reliability problems," including based on "[i]nsufficient transmission infrastructure for Renewables." Ex. 9 at 22 (April 8, 2014 DOER Presentation).

specific purchases of ExxonMobil products, *see* Ex. 11 (purchasing report including ExxonMobil product purchases), and it is not plausible that no emails exist about the decision to request or purchase those products. Similarly, the Agencies do not dispute that information about "public awareness and prioritization of climate change" is relevant. Opp. at 12. Yet they contend, without explanation, that such information will "be located on publicly available websites and/or the Agencies' internal document servers" but somehow would be presumptively absent from any emails. *Id.* The Court should not credit these implausible assertions.

II. Producing Emails Will Not Impose An Undue Burden On The Agencies.

This Court should reject the Agencies' complaints that producing emails would impose an undue burden upon them given their status as so-called "third parties" in the case.[5]

First, the Agencies are not disinterested "third parties." The Commonwealth brought this action. Each of these Agencies is part of the Commonwealth and reports to the Governor. Moreover, any civil penalties recovered in this action will go "to the [C]ommonwealth." G. L. c. 93A § 4. As a result, this Court should not indulge the Agencies' contentions that they are disinterested third parties.

Second, the Agencies complain about the number of email hits, but those are the result of their decision to call off negotiations with ExxonMobil. *See* Br. at 5–6, 11. Developing and running search terms is an iterative process that often begins with broad results. *See Singleton* v. *Mazhari*, 2024 WL 1140691, at *3 (D. Md. Mar. 14, 2024). The Agencies did not review hit results for each search or provide ExxonMobil with sample documents to assist in determining how to modify the search terms. Nor did DEP, DOER, or DPU provide hit counts by custodian or

[5] Even assuming the Agencies are disinterested third-parties, they "bear[]the burden of showing that the subpoena imposes an undue burden" and must "show[] the manner and extent of the burden and the injurious consequences of insisting upon compliance." *Green* v. *Cosby*, 152 F. Supp. 3d 31, 36–37 (D. Mass. 2015) (collecting authorities).

discuss limiting searches to specific custodians—common discovery practices to address and ameliorate burden. The Agencies' position is particularly notable given that at least a few *other* Commonwealth agencies have continued to engage in the discovery process, including one agency that produced approximately 33,581 emails and another that produced 4,765 emails. Having spurned efforts to reduce burden, the Agencies should not be heard to invoke the number of hits as a basis for refusing to produce any emails at all.

Third, the Agencies disingenuously lump together the total number of email hits across the Agencies. There are *four* subpoenas here, issued to *four* different agencies. Under the Agencies' own view of the world, each agency is separate and must comply with its own subpoena. For example, the number of emails that DOER or DPU may need to review says nothing about whether the separate subpoena to DEP imposes an undue burden on DEP. This is just another example of the Agencies trying to have it both ways—painting themselves as resource-constrained third parties when that is perceived to be advantageous and treating themselves as a monolithic unit of the Commonwealth when it benefits their arguments to avoid their discovery obligations.

Fourth, the Agencies' position that they will not produce *any* emails because reviewing email hit results would be burdensome is meritless. It should go without saying that the production of emails is a central and critical part of discovery in modern litigation. Moreover, the Agencies have not even taken steps to produce emails that are unrelated to their supposed concern about burden. For example, the Agencies refuse to produce the responsive emails they have *already* identified, although doing so would impose no burden. Nor are they asking the so-called "subject matter experts" involved in responding to the subpoenas to search their own emails, although doing so would not implicate concerns about broad search terms. Opp. at 3. The failure to take even these basic discovery steps reveals that the Agencies' refusal to produce any emails is driven by

strategic considerations. They seek to prevent discovery of emails that the Commonwealth is required to provide—not to avoid any undue burden based on hit counts.[6]

CONCLUSION

ExxonMobil respectfully requests that the Court compel DEP, DOER, DPU, and OSD to collect and produce emails responsive to the respective subpoena issued to the agency.

Dated: May 31, 2024

Respectfully submitted,

SIDLEY AUSTIN LLP

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

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP

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

Jeannie S. Rhee (*pro hac vice*)
jrhee@paulweiss.com
Kyle Smith (*pro hac vice*)
ksmith@paulweiss.com
2001 K Street, NW
Washington, D.C. 20006-1047
(202) 223-7300
Fax: (202) 223-7420

Counsel for Exxon Mobil Corporation

[6] There is no basis for the Agencies' suggestion that the subpoenas' use of the phrase "All documents" is somehow improper. The Commonwealth itself phrases its subpoena requests to third parties in terms of "All documents." *See, e.g.*, Ex. 12 (the Commonwealth's subpoena to BlackRock Fund Advisors).

CERTIFICATE OF SERVICE

I, Jack W. Pirozzolo, counsel for Defendant Exxon Mobil Corporation, hereby certify that on May 31, 2024, I caused a copy of this Reply Memorandum in Support of Exxon Mobil Corporation's Motion to Compel Named Agencies To Produce Responsive Emails to be served on counsel for DEP, DOER, DPU, and OSD by email and U.S. mail, and on the Massachusetts Office of the Attorney General by email and U.S. mail.

Commonwealth of Massachusetts

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

Massachusetts Departments of Environmental Protection, Energy Resources, and Public Utilities, and the Operational Services Division

CORY S. FLASHNER
KATHERINE GALLE
Mintz Levin
One Financial Center
Boston, MA 02111
Tel.: (617) 542-6000
CSFlashner@mintz.com
KNGalle@mintz.com

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