

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO.: 16-1888F

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

RECEIVED

OCT 18 2019

SUPERIOR COURT-CIVIL
MICHAEL JOSEPH DONOVAN
CLERK/MAGISTRATE

**THE COMMONWEALTH'S OPPOSITION TO
EXXONMOBIL'S SO-CALLED EMERGENCY MOTION TO EXTEND TIME
TO MEET AND CONFER UNDER G.L. c. 93A, § 4**

The Office of the Attorney General ("AGO") of the Commonwealth of Massachusetts (the "Commonwealth") opposes the so-called Emergency Motion of the petitioner Exxon Mobil Corporation ("ExxonMobil" or the "Company") to extend the time to meet and confer with the AGO. ExxonMobil's Emergency Motion follows the AGO's service by hand on ExxonMobil last week—on Thursday, October 10, 2019—of the Commonwealth's letter providing the statutorily-afforded five days' notice of its intent to file an action against ExxonMobil for the Company's violations of the Massachusetts Consumer Protection Act ("Chapter 93A"), G.L. c. 93A, § 4 (the "Notice"). The Emergency Motion seeks unprecedented relief without legal basis and should be denied. For that reason and because, indeed, ExxonMobil violated its own obligation to confer with the AGO under Superior Court Rule 9A(d) regarding the Emergency Motion, the Commonwealth respectfully requests that the Court immediately deny the Emergency Motion on the papers without a hearing. ExxonMobil's litany of "conspiracy" accusations against the Attorney General do nothing to rescue the Company's failure to follow proper court procedure or advance a legal rationale for relief—because this Court and the

Supreme Judicial Court already have rejected such claims as a basis for derailing the Attorney General's efforts to investigate and sue it for violations of Chapter 93A.

Section 4 of Chapter 93A requires the AGO to provide a prospective defendant five days' notice of the Commonwealth's intent to sue and "an opportunity to confer with the [A]ttorney [G]eneral in person *or* by counsel" (emphasis added). The Notice afforded ExxonMobil that opportunity. The AGO is aware of no authority—and ExxonMobil cites none—that this requirement provides a prospective defendant the right, as ExxonMobil misleadingly posits here, to defer suit until the defendant can conveniently confer *in person* with the AGO, on whatever timeframe the defendant chooses. Such a requirement would render the five-day period a nullity.¹

Rather than take advantage of the opportunity to confer with the AGO about its noticed action and any interest the Company may have in resolving the matter without litigation, ExxonMobil has filed this absurd motion. ExxonMobil is using this blatantly obstructionist tactic in the continuation of its over three-year effort to stymie first the AGO's pre-suit investigation, and now the AGO's properly-noticed initiation of a lawsuit to hold ExxonMobil accountable for its on-going deceptions of the Commonwealth's consumers and investors. ExxonMobil plainly seeks to blunt the AGO's enforcement of Chapter 93A and prevent the AGO from seeking to halt ExxonMobil's deceptive and unlawful practices.

As this Court will recall, the AGO originally served ExxonMobil with a civil investigative demand ("CID") in 2016. Rather than produce documents as called for in the CID,

¹ Whereas the Legislature provided businesses with 30 days to respond to consumer demand letters under Chapter 93A before consumers can initiate suit, the statute gives the Attorney General the right to bring suit five days after sending a notice letter to a defendant.

ExxonMobil not only filed a petition in this Court to strike or modify the CID, as is permitted by Chapter 93A, but also filed a second, similar federal lawsuit in the Northern District of Texas, a court that had no personal jurisdiction over the Attorney General. This Court rejected all of ExxonMobil's claims, and the Supreme Judicial Court affirmed. On the federal side, the Northern District of Texas transferred venue to the Southern District of New York,² where that court likewise rejected all of Exxon Mobil's contentions. ExxonMobil's appeal in the Court of Appeals for the Second Circuit is now pending.

Notwithstanding ExxonMobil's lack of cooperation in the investigation and failure to produce documents in response to the CID, the AGO has conducted a detailed investigation and is now prepared to sue ExxonMobil for deceiving Massachusetts investors and consumers. The AGO consequently served the Notice last week, on October 10, in expectation of conferring with the Company in a timely fashion and then, failing a fruitful conversation, promptly filing a civil action in this Court. In this regard, the Commonwealth has fully satisfied its obligations under G.L. c. 93A, § 4, having notified ExxonMobil of the Attorney General's intended action and having provided the Company an opportunity to confer as to the proposed action.

In fact, ExxonMobil has had a full week to confer with the AGO to demonstrate that it was prepared to have meaningful discussions about the Commonwealth's allegations, and the Company's perspective as to how to address them. On October 15, the AGO again invited such a discussion—to see if there was any reasonable prospect for fruitful negotiation—and rather than so engaging with the AGO in any fashion (even to alert the AGO of this Motion before its filing)

² The New York Attorney General was a co-defendant in that case and has now sued ExxonMobil in New York State Court, which is scheduled to start trial next week. The AGO is not involved in the New York trial.

ExxonMobil waited until the last possible moment before the end of the five-day notice period to file its application to block the Commonwealth's filing of its lawsuit. Clearly, ExxonMobil's vituperative tone in its sole communication with the AGO and papers before this Court reflects its apparent determination to reject good faith discussions regarding the Commonwealth's claims and defeats the entire purpose of the five-day period for conference set forth in § 4.

The Commonwealth has statutory authority to file suit once the five-day notice period is satisfied. G.L. c. 93A, § 4. Again, the Commonwealth is aware of no case law, and ExxonMobil cites none, that provides this Court with authority to bar the Commonwealth from filing suit once it has lawfully complied, as the Commonwealth has, with Chapter 93A's pre-suit notice requirements, including an offer to confer with the Company or its counsel. *See Matter of McKnight*, 406 Mass. 787, 791-92 (1990) (court may not direct agency to act regarding a matter within the agency's discretion). ExxonMobil's opportunity to confer, by the terms of the statute, has now elapsed, as a matter of law. The Commonwealth reserves all of its rights to initiate its action against ExxonMobil at any time. ExxonMobil has not made a showing, nor could it, that this Court has any legal or equitable ground to enjoin the Commonwealth's lawful exercise of its enforcement authority. Whatever rights ExxonMobil might have to raise its objections in a motion to dismiss following the filing of the Complaint, the Company cannot block the filing. This Court should reject ExxonMobil's invitation to further impede the Commonwealth's exercise of its rightful, statutory enforcement prerogatives, including the AGO's authority to file a complaint against ExxonMobil to obtain the relief necessary to protect Massachusetts consumers and investors under Chapter 93A, and the AGO urges the Court not to restrain the AGO from filing suit at risk of infringing the separation of powers.

ExxonMobil's refrain of alleged prosecutorial bias and bad faith collusion by the AGO with the New York Attorney General can in no way support its Motion. These baseless claims have now been rejected by the courts, both state and federal, that have heard them, including this Court, the Supreme Judicial Court, and the Southern District of New York.³

Nor is the Company's availability to confer during the statutory period in any question. ExxonMobil is one of the country's largest companies with numerous executives capable of conferring with the Attorney General. The Company is represented in this matter by the Paul Weiss firm, which employs over 1,000 lawyers in eight offices spanning the globe, as well as skilled local and in-house counsel. Moreover, ExxonMobil has been sued by at least a dozen

³ ExxonMobil's renewal of its conspiracy theory here is barred by, among other things, *res judicata*. Unbelievably, ExxonMobil's papers repeat the Company's allegations of bias (dating to 2012, three years prior to the Attorney General taking office) without even the candor of citing this Court's or the Supreme Judicial Court's rulings on that very issue. See *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, Brieger, J., dated January 11, 2017, pp. 11-13; *Exxon Mobil Corporation v. Attorney General*, 479 Mass. 312 (2018), pp. 327-329.

states and municipalities in connection with its contribution to climate change.⁴ In each of those proceedings, the Paul Weiss law firm represents ExxonMobil, and it also represents ExxonMobil in other matters. It is simply not credible that ExxonMobil, the largest publicly traded oil and gas company in the world, is not in a position to engage in discussions with the AGO about the Commonwealth's action because it is also scheduled to commence next week the trial in one of those cases, the New York Attorney General's Office's claims against it related to ExxonMobil's climate change-related investor deception.

Indeed, it is a certainty that ExxonMobil and its counsel spent more time discussing, preparing, and filing this purported Emergency Motion and Memorandum of Law (running to 18 pages of argument) than a conversation with the AGO would have taken to determine that no settlement of the Commonwealth's claims was likely.

Accordingly, there is no basis for ExxonMobil's assertion that its upcoming trial precludes it from now taking advantage of Chapter 93A's "meet and confer" opportunities. Indeed, this Emergency Motion is a page from the now all-to-familiar ExxonMobil playbook—for example, ExxonMobil declined various attempts to resolve disputes over the CID issued to it

⁴ *City of NY v. BP p.l.c. et al.*, S.D.N.Y. 2018; *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc., et al.*, District Court for the County of Boulder, State of Colorado, 2018; *King County v. BP p.l.c., et al.*, Washington Superior Court, King County, 2018; *Rhode Island v. Chevron Corp., et al.*, State of Rhode Island, Providence County, 2018; *Mayor and City Council of Baltimore v. BP p.l.c.*, Circuit Court for Baltimore City, 2018; *County of Santa Cruz v. Chevron, et al.*, California Superior Court, County of Santa Cruz, 2017; *County of San Mateo v. Chevron, et al.*, California Superior Court, County of San Mateo, 2017; *City of Imperial Beach v. Chevron Corp., et al.*, California Superior Court, County of Contra Costa, 2017; *County of Marin v. Chevron, et al.*, California Superior Court, County of Marin, 2017; *People of the State of California v. BP p.l.c., et al.* (Oakland), California Superior Court, 2017; *People of the State of California v. BP p.l.c., et al.* (San Francisco), California Superior Court, 2017; and *People of the State of New York v. Exxon Mobil Corporation*, Supreme Court, New York County, 2018.

by the AGO in 2016, instead stonewalling the AGO's lawful investigation.⁵ It has twice sought delays of oral argument in the Second Circuit appeal of the district court ruling in the AGO's favor on ExxonMobil's baseless claims challenging the AGO's CID authority, citing work demands of one of ExxonMobil's Paul Weiss attorneys.

Further, ExxonMobil violated Superior Court Rule 9A(d)(1), when it elected not to confer with the AGO as required before filing its Emergency Motion. That rule exempts emergency motions from the other requirements of Rule 9A, "provided, however, that a party filing an emergency motion shall certify in the motion that it has made a good faith effort to contact and confer with all parties regarding the subject of the motion." In its motion filing, ExxonMobil made no such certification, nor could it, as it never made such an effort. Under these circumstances, ExxonMobil's unlawful tactics that disregard the Commonwealth's civil procedural requirements should not be rewarded with any further delay, and the Court should deny the Emergency Motion on the papers and without a hearing.⁶

ExxonMobil has requested in writing that the Commonwealth refrain from filing suit until after the hearing in this matter. The Attorney General has agreed in writing to refrain until the hearing—or such earlier time as the Court may deny the motion without hearing, subject to the understanding that ExxonMobil likewise refrains from suing the Commonwealth or the

⁵ For example, the parties met once in Boston and once at a federal court-ordered mediation without an offer from ExxonMobil to produce a single document in response to the CID, including any of the millions of pages that it produced to New York prior to New York's lawsuit.

⁶ The Commonwealth also notes that this proceeding in which ExxonMobil has filed its Emergency Motion is limited to ExxonMobil's challenge to the CID and the Attorney General's cross-motion for enforcement of the CID. The Emergency Motion involves neither a challenge to the CID (which is foreclosed by the Supreme Judicial Court opinion in this matter) nor an effort by the Attorney General to enforce it.

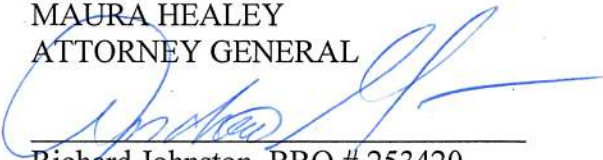
Attorney General in this Court or any other. In the event that the Court does not deny the Emergency Motion on the papers and without a hearing, that symmetry must remain in place until the hearing.⁷

Dated: October 18, 2019

Respectfully submitted,

THE COMMONWEALTH OF
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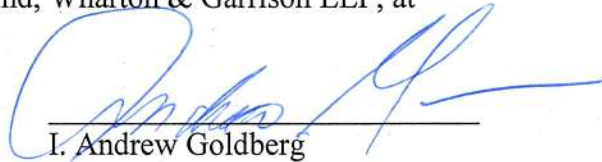
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⁷ Given ExxonMobil's prior resort to out-of-state federal courts to adjudicate duplicative claims and other vexatious tactics (such as pursuing a federal court deposition of the Attorney General herself in 2016), the Commonwealth is concerned that ExxonMobil intends to use any delay to tie up the AGO in other forums rather than to meet-and-confer regarding the Commonwealth's claims in good faith.

CERTIFICATE OF SERVICE

I, I. Andrew Goldberg, Assistant Attorney General, hereby certify that on this 18th day of October, 2019, I shall cause the foregoing document to be served on counsel of record by having a copy of said document delivered by hand to each of: (i) Thomas C. Frongillo, Esq., Pierce Bainbridge Beck Price & Hecht LLP, One Liberty Square, 13th Floor, Boston, Massachusetts 02109, and (ii) Caroline K. Simons, Esq., Orrick, Herrington & Sutcliffe LLP, 222 Berkeley Street, Suite 2000, Boston, Massachusetts 02116; and by email to each of: (i) Theodore V. Wells Jr., Esq., Paul, Weiss, Rifkind, Wharton & Garrison LLP, at twells@paulweiss.com, and (ii) Justin Anderson, Esq., Paul, Weiss, Rifkind, Wharton & Garrison LLP, at janderson@paulweiss.com.



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