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\*NOT ADMITTED TO THE DC BAR

September 5, 2023

BY ELECTRONIC FILING

The Honorable Peter B. Krupp and Hélène Kazanjian  
Suffolk County Superior Court – Civil  
Suffolk County Courthouse, 12<sup>th</sup> Floor  
Three Pemberton Square  
Boston, MA 02108

Re: *Commonwealth of Massachusetts v. Exxon Mobil Corporation*, Suffolk Superior Court Civil Action No. 1984-CV-03333-BLS1 (consolidated with *Exxon Mobil Corporation v. Office of the Attorney General*, Suffolk Superior Court Civil Action No. 1684-CV-01888)

Dear Justice Krupp and Justice Kazanjian:<sup>1</sup>

<sup>1</sup> Because Justice Krupp is listed on the docket as the justice presiding over the September 7 status conference, ExxonMobil addressed its September 1 letter to Justice Krupp. However, the Commonwealth addressed its September 1 letter to Justice Kazanjian. ExxonMobil has addressed this letter to both Justices Krupp and

We write in response to the Commonwealth's September 1, 2023 letter, and to discuss the parties' efforts to move discovery forward expeditiously in the coming months.

ExxonMobil respectfully disputes the Commonwealth's characterization of the record. While the Commonwealth asserts that it "has been seeking documents from ExxonMobil about alleged climate change deception for seven years," it wholly ignores that six of those seven years (2016 to 2022) were covered by the Commonwealth's voluntary agreement to toll ExxonMobil's discovery obligations with respect to its Civil Investigative Demand ("CID").<sup>2</sup> Within two weeks of the expiration of the tolling agreement, ExxonMobil produced its first set of documents responsive to the CID. Since the expiration of the tolling agreement, ExxonMobil has made 30 productions responsive to the Commonwealth's CID and discovery requests—an average of one production every other week.<sup>3</sup> Since discovery began 14 months ago, ExxonMobil has produced to the Commonwealth a total of 4.7 million pages of material.

By way of example of what has transpired since the lifting of the tolling agreement, the Commonwealth complains that it took over 10 months for the parties to reach an agreed final list of custodians and of the fact that ExxonMobil's voluntary productions during the negotiation period came from 29 core custodians' documents. But the Commonwealth fails to mention that it took the position at the outset that every individual in the "*entire organization*" from 1997 to the present was a covered custodian. In other words, the Commonwealth initially insisted that ExxonMobil collect the documents of over 100,000 current and former ExxonMobil employees from a 25-year period. However, ExxonMobil did not raise any of this negotiation history with the Court because the most important fact is that these issues are now resolved, with collection and production efforts well underway.

ExxonMobil is committed to working collaboratively and productively to bridge the remaining open issues, such as finalized search terms. After ExxonMobil provided a search term proposal for the outstanding discovery requests on July 13, 2023, the Commonwealth took five weeks to respond with a counter-proposal that did not adopt any portion of ExxonMobil's proposal or otherwise seek compromise between the parties' positions. The Commonwealth explained that it had rejected ExxonMobil's proposal because ExxonMobil had drafted search terms "on a request-by-request basis," instead of the Commonwealth's preferred, more abstract concept of "cumulative content." ExxonMobil fully expects that the parties will work to bridge the gap between their proposals—as they successfully did for the initial rounds of search terms. The fact that the parties have been able to find compromise on so many aspects of discovery and made such substantial progress is a testament to both sides' good-faith discussions and ExxonMobil's

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Kazanjian, and respectfully requests that the justice presiding over the September 7 status conference consider ExxonMobil's submissions.

<sup>2</sup> See January 15, 2019 Letter from Richard A. Johnston to Justice Brieger ("[T]he parties' Tolling Agreement provides that Exxon is not obligated to produce documents responsive to the Civil Investigative Demand ("CID") until the pending lawsuits in Massachusetts and in federal court are fully resolved, including appeals.").

<sup>3</sup> This week, ExxonMobil is commencing its production of documents retrieved based on targeted searches. Those targeted search productions will continue on a rolling basis.

significant accommodations to the Commonwealth's requests even where there is serious disagreement about the breadth of discovery sought by the Commonwealth.

Since the expanse of discovery sought by the Commonwealth will likely result in vast numbers of additional documents for review, even after the application of agreed-upon search terms, ExxonMobil is in the process of developing a proposed Technology Assisted Review for the remaining documents. This type of review is contemplated by the parties' agreed-upon ESI Protocol. *See* Stipulated Agreement Regarding Discovery of Electronically Stored Information ¶ 5, April 11, 2022.

The Commonwealth's September 1 letter also prematurely raises miscellaneous other issues, none of which are ripe for court intervention or at impasse:

***McKinsey & Company ("McKinsey").*** There is no live dispute related to McKinsey. Third-party McKinsey, which was retained on numerous occasions to consult for ExxonMobil, received a subpoena from the Commonwealth and identified potentially responsive documents, a small number of which ExxonMobil determined were subject to privilege. ExxonMobil and McKinsey have provided information to the Commonwealth that will allow it to assess ExxonMobil's privilege claim, and ExxonMobil is in the process of providing additional information the Commonwealth requested.

***Retention of Documents with Respect to Certain Former Employees.*** ExxonMobil has been responsive to the Commonwealth's requests on this issue and just provided its latest response to the Commonwealth's questions on August 31.

***Other Miscellaneous.*** ExxonMobil's "ability and willingness to produce historical material," production of materials from "retired climate scientists," and the parties' search term negotiations are not in dispute. The parties have been meeting and conferring on these issues.

Finally, the Commonwealth suggested that the Court schedule another interim status conference. ExxonMobil agrees with this suggestion and proposes scheduling a conference in three months (*i.e.*, in early December). ExxonMobil believes that, with an agreed upon custodian list and search terms nearly finalized, this is an appropriate period of time to check in on progress.

\* \* \*

Sincerely,

/s/ Jeannie S. Rhee  
Jeannie S. Rhee

cc: Counsel of Record (by email)