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*NOT ADMITTED TO THE DC BAR

September 1, 2023

BY ELECTRONIC FILING

The Honorable Peter B. Krupp
Suffolk County Superior Court – Civil
Suffolk County Courthouse, 12th 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:

As a result of numerous meet and confers, including extensive outreach and accommodation by ExxonMobil, the parties have been able to resolve a number of issues without

the Court's intervention. There are three disputes, however, related to ExxonMobil's outstanding Requests for Production ("RFPs") that ExxonMobil respectfully submits to the Court.¹

The Commonwealth's communications with third parties related to ExxonMobil or this case as to which it is asserting work product protection (RFPs 6-8 and 10). The Commonwealth is withholding an unidentified number of responsive records on the grounds that those records are protected by the work product doctrine. Relevant here, the Commonwealth has refused to identify the third parties for which it is withholding purportedly work-product-protected communications because, it claims, the identities of the parties with which it has had those communications *is itself work product*. The Commonwealth thus evidently believes it can (1) withhold third-party communications by invoking work product protection, but (2) undermine ExxonMobil's ability to assess the invocation of work product protection by concealing the identities of the third parties with whom it had those communications.

This Court should reject that position. The work product doctrine does not apply to all communications by the Commonwealth with third parties related to this case or ExxonMobil. Instead, work product applies only to "documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative." Mass. R. Civ. P. 26(b)(3); *see also McCarthy v. Slade Assocs.*, 463 Mass. 181, 194 (2012). Moreover, even when it is validly invoked, a party may obtain work-product-protected records upon a showing of "substantial need" and "undue hardship" in obtaining the equivalent evidence by other means, *id.*, and the protection is waived if the evidence is disclosed to a third party "in a way [that is] inconsistent with keeping it from an adversary." *Bank of America, N.A. v. Deloitte & Touche LLP*, 2008 WL 2423265, at *2 (Mass. Sup. Ct. June 13, 2008). If ExxonMobil does not know the third parties whose documents are being withheld, it cannot even begin to evaluate, let alone test, whether those documents were made in such a manner that the requirements of the work product doctrine apply. That is why, at a bare minimum, the law requires a party withholding records as privileged to "describe the nature" of those records with sufficient specificity to "enable other parties to assess the claim" of privilege. Mass. R. Civ. P. 26(b)(5)(A)(ii); *see Att'y Gen. v. Facebook, Inc.*, 2020 WL 742136, at *13 (Mass. Super. Jan. 17, 2020) (withholding party must produce "a written privilege log identifying each document withheld and the basis for the assertion of the privilege with sufficient factual detail so as to allow the [requesting party] to understand and challenge" the "claim of privilege"), *aff'd in part, rev'd in part*, 487 Mass. 109, 164 N.E.3d 873 (2021). The Commonwealth has stated that it will not revisit its position on this issue at any point before trial unless ordered to do so by this Court.

Communications with other state Attorneys General regarding ExxonMobil (RFPs 39-42). The Commonwealth has refused to produce any responsive documents on the grounds that all such documents are protected by the common interest privilege ("CIP"). The CIP is a

¹ Addendum A sets forth each RFP at issue in this letter. The parties continue to meet and confer on other issues related to the Commonwealth's search and production of records responsive to ExxonMobil's RFPs, including about the scope of records responsive to ExxonMobil's requests. If discussions with the Commonwealth reach an impasse, ExxonMobil may seek court intervention, but the issues are not yet ripe for the Court.

limited exception to the rule that communication with third parties waives attorney-client privilege, but it applies only to communications made “for the purpose of furthering a common legal interest.” *Hanover Ins. v. Rapo & Jepsen Ins. Servs.*, 449 Mass. 609, 612 (2007) (citation omitted). The Commonwealth has the burden of proving that the CIP applies. *Id.* at 619. It has not remotely done so. To the contrary, in an August 22, 2023 call with OAG attorneys, the Commonwealth stated the “common legal interest” claimed here is “the investigation and litigation against ExxonMobil.” That broad description does not meet the Commonwealth’s burden.

Such a vague and expansive view of “common legal interest” does not remotely satisfy the requirement of the CIP. Various AGs may share a general desire to bring claims against ExxonMobil for myriad reasons, but that would not constitute a “common legal interest” that would allow such entities to cloak their communications with the attorney-client privilege. *See, e.g., Harpel v. Nicholson*, 2013 WL 5466636, at *2 (D. Mass. Oct. 1, 2013) (desire for a particular litigation outcome “does not amount to the existence of a common legal interest”); *NPG Recs., Inc. v. Roc Nation*, 2018 WL 6437103, at *4 (D. Minn. Feb. 9, 2018) (CIP “cannot apply simply because separate lawsuits are filed against the same entity”). The investigations and lawsuits brought over the last five years by various AGs against ExxonMobil and other defendants involve different alleged conduct, purported injuries, defendants, legal claims, and state laws. To hold that these disparate litigations are united by the CIP stretches the doctrine well beyond its breaking point. This Court should reject the Commonwealth’s generic and unsupported invocation of CIP and require the Commonwealth to identify each party with which it asserts a common interest, as well as the specific nature of the asserted common interest with each State AG or any other third party with whom it claims to have such a common interest.

Documents related to *Mass. v. EPA* and *Kain v. Dep’t of Env’tl Prot.* (RFPs 34-35). The litigations in these RFPs focused on greenhouse gases as a pollutant and the risks posed by climate change. In this suit, the Commonwealth accuses ExxonMobil of concealing the risks of greenhouse gas emissions from the public. *See, e.g., Am. Cmplt.* ¶¶ 5, 18, 23, 33, 736. The Commonwealth has taken the untenable position that it need not search for non-privileged responsive records in these prior cases on the theory that (1) its files are entirely protected by privilege and (2) any responsive, non-privileged information is publicly available. Just because many records related to these litigations may be privileged does not absolve the Commonwealth of its obligation to search for non-privileged records. The Commonwealth also conflates “non-privileged” with “publicly available”; it is reasonable to believe the Commonwealth possesses non-privileged documents that are not publicly available and, in any event, the obligation to search for responsive, non-privileged documents is not satisfied by the Commonwealth’s blanket assertion that all such documents will be publicly available. This Court should order the Commonwealth to search for responsive records, rather than merely assuming that all such records will be privileged or publicly available, and then to meet and confer with ExxonMobil about any remaining objections to the production of non-privileged documents.

* * *

Sincerely,

/s/ Jeannie S. Rhee
Jeannie S. Rhee

cc: Counsel of Record (by email)

Addendum A (Selected Requests for Production)

No.	Requests for Production
6	All documents concerning any communications between you and any person or entity, other than the undersigned counsel for ExxonMobil, related to ExxonMobil or the substance of the original complaint or amended complaint, or the investigation that began at least as early as March 29, 2016.
7	All documents concerning any communications between you and any member of the press or any press releases, talking points, and any drafts thereof, related in any way to ExxonMobil, the substance of the original or amended complaint, or the investigation that began at least as early as March 29, 2016.
8	All documents concerning any meetings that you attended related to ExxonMobil, the substance of the original complaint or amended complaint, or the investigation that began at least as early as March 29, 2016.
10	All documents between you and any member of the public concerning ExxonMobil or the allegations in the original complaint or the amended complaint.
34	<p>All documents relating to your involvement in <i>Massachusetts v. E.P.A.</i>, 549 U.S. 497 (2007), or in the request for any Environmental Protection Agency (“EPA”) greenhouse gas rulemaking that preceded this litigation, and the various EPA greenhouse gas rulemakings that post-dated this litigation, without respect to the relevant period defined above, including but not limited to:</p> <ul style="list-style-type: none">a. Internal memoranda, notes, analyses, research studies, technical assessments, or reports created by you, relied upon by you, or provided to you in connection with the litigation;b. Communications with the press, members of the public, and Commonwealth officials, including but not limited to officials employed by other Commonwealth agencies, and members of the Massachusetts Legislature; andc. Comments by the Commonwealth submitted to any public agencies in connection with any request to the EPA for proposed rulemaking of listing greenhouse gases as a pollutant under the Clean Air Act which led to this litigation, and any subsequent EPA greenhouse gas rulemakings that post-dated the litigation.
35	All documents relating to your involvement in <i>Kain v. Department of Environmental Protection</i> , 474 Mass. 278 (2016), including but not limited to:

No.	Requests for Production
	<p>a. Internal memoranda, notes, analyses, research studies, technical assessments, or reports created by you, relied upon by you, or provided to you in connection with the litigation;</p> <p>b. Documents relating to your understanding of, response to, and implementation of the Global Warming Solutions Act of 2008; and</p> <p>c. Communications with the press, members of the public, and Commonwealth officials, including but not limited to officials employed by other Commonwealth agencies, and members of the Massachusetts Legislature.</p>
39	The Common Interest Agreement concerning the sharing of information related to state lawsuits against energy companies, signed by the Commonwealth on October 8, 2020, and all documents concerning the Common Interest Agreement and the “pre-existing oral agreement” referenced in the Common Interest Agreement.
40	All documents or communications between you and the Attorney General of the State of New York, including his or her representatives, concerning ExxonMobil, the substance or timing of filing of the original complaint in October 2019, or the substance of the amended complaint.
41	All documents concerning the Commonwealth’s meetings and communications with other state Attorneys General concerning ExxonMobil or the substance or timing of filing of the original complaint in October 2019 or the amended complaint, including without limitation, meetings and communications involving Matthew Pawa and his provision of a presentation on “what Exxon knew.”
42	All documents concerning the Commonwealth’s meeting and communications involving Matthew Pawa and his provision of a presentation on “what Exxon knew.”