

THE COMMONWEALTH OF MASSACHUSETTS
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September 1, 2023

The Honorable Hélène Kazanjian
Suffolk County Superior Court, BLS1
Three Pemberton Square
Boston, MA 02108-1724

Re: Mass. Att’y Gen. Civil Investigative Demand No. 2016-EPD-36 and Commonwealth of Mass. v. Exxon Mobil Corp., No. 1984-CV-03333-BLS1 (consolidated)

Dear Associate Justice Kazanjian:

In a Scheduling Order dated June 15, 2023, this Court (Krupp, J.) set a status conference for September 7, 2023 and provided that the parties could each file a two-page letter by September 1, 2023 to raise discovery issues. Accordingly, the Attorney General’s Office (AGO) is providing the Court with a summary of the status of discovery, unresolved disputes, and proposed next steps.

The AGO has been seeking documents from ExxonMobil about alleged climate change deception for seven years, first through a still outstanding Civil Investigative Demand (CID) served in 2016, then through discovery in the related c. 93A enforcement action. These now-consolidated cases have gone through seven years of litigation, where five separate state and federal courts rejected ExxonMobil’s efforts to stop the AGO’s investigation and dismiss the lawsuit. The AGO was finally able to begin obtaining discovery only last summer, and the production from ExxonMobil since then has been slow and incomplete.

The parties have exchanged over 85 substantive discovery letters and held dozens of meet and confers. At times, the parties have resolved individual issues, but resolving those issues has taken far too long and often resolution has only been achieved in the lead-up to a status conference. For example, the parties spent approximately ten months negotiating a list of custodians for the CID and the AGO’s written document requests—ExxonMobil agreed to 186 custodians only this week. Indeed, as recently as a few weeks ago, ExxonMobil was, for example, taking the position that its CEOs would be superfluous custodians because it had “already agreed to produce documents from speechwriters.” Ltr. from J. Rhee, to R. Johnston at 25 (Aug. 8, 2023). Similarly, ExxonMobil has been arguing that it had no obligation to provide the AGO with “purely internal” evaluations of climate risk because it did not understand how the AGO’s “claims, which concern ExxonMobil’s external statements to investors, extend to ExxonMobil’s purely internal deliberations.” Ltr. from J. Rhee, to R. Johnston at 4 (Aug. 15, 2023). ExxonMobil only backed down from these unjustified positions earlier this week.

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As a result of these labor-intensive negotiations, ExxonMobil's productions have been slow. As of three weeks ago, ExxonMobil represented that it had begun producing documents from only 29 out of the now 186 agreed-on custodians and had not completed production from this set of 29, meaning that the overwhelming majority of documents remain to be produced. Similarly, last December, ExxonMobil committed to produce documents responsive to 24 requests via "targeted" productions, where ExxonMobil would "go and get" the material outside of a traditional electronic document review. But ExxonMobil has been unwilling to inform the AGO how far along the Company is in this production process, and it is possible that ExxonMobil has not even begun, or is only just beginning, collecting and producing such documents.

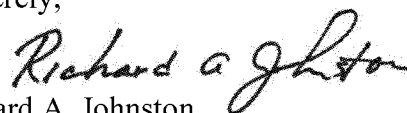
While ExxonMobil routinely points out that last summer it re-produced to the AGO the documents it had previously produced to the New York Attorney General and the SEC, this re-production of documents relating to different matters negotiated by different parties under different parameters cannot replace the documents that the AGO has been seeking, some for seven years and others as part of the enforcement action for the past year.

The AGO continues to strive to complete fact discovery by July 31, 2024—the deadline set by the Court's May 6, 2022 Scheduling Order. But we are growing increasingly concerned that the AGO will not receive the long-pursued documents with enough time to review them in advance of key depositions. At the status conference next week, the AGO will ask that the Court consider setting interim production deadlines to help the parties remain within the current schedule. The AGO also will ask the Court to schedule another interim status conference, given the important structural framework and incentives such conferences have provided to advancing the parties' negotiations.

There remain a number of open discovery issues, even with the recent resolution of certain disputes within the past week. Most of the remaining issues are not yet ready for court intervention. These include questions relating to ExxonMobil's: (i) retention of documents from important former employees; (ii) ability and willingness to produce historical material; (iii) production of documents from its retired climate scientists; and (iv) negotiations over search terms to collect documents from the agreed-on custodians that are responsive to the AGO's document requests. The parties have scheduled meet and confers regarding the latter two issues (nos. iii & iv) for next week, and it is possible that these two issues will be ripe within the next two weeks.

For now, the most pressing substantive issue where the parties have reached an impasse is related to a subpoena that the AGO served on McKinsey & Company. ExxonMobil has made vague assertions of privilege over documents within the possession of McKinsey regarding engagements where McKinsey, as a business consultant, provided advice to ExxonMobil relating to climate risk management. As an initial matter, the AGO has sought more information from ExxonMobil regarding its position, and the AGO will likely file a motion to compel production of documents from McKinsey if the information from ExxonMobil fails to establish a privilege.

Sincerely,



Richard A. Johnston
Chief, Energy and Environment Bureau