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Superior Court - Suffolk
Docket Number 1984CV03333

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 E-Mail

MEMORANDUM OF EXXON MOBIL CORPORATION IN OPPOSITION TO THE COMMONWEALTH'S MOTION TO COMPEL EXXONMOBIL TO PRODUCE DOCUMENTS RESPONSIVE TO REQUESTS FOR PRODUCTION 11, 12, AND 88 THROUGH A "TARGETED" PROCESS

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PRELIMINARY STATEMENT

After issuing 220 Requests for Production ("RFPs") and initially demanding the document collection of every single Exxon Mobil Corporation ("ExxonMobil" or "Company") employee, the Commonwealth reached agreement with ExxonMobil on August 28, 2023 to a set of 186 custodians.[1] The parties subsequently agreed to search those custodians' files using 201 expansive search terms. As this Court knows from the revised scheduling order it issued in December 2023, this resulted in the ingestion of more than 30 terabytes of data—the equivalent of more than 6 billion pages—and the Commonwealth is now in the process of receiving millions of pages of responsive documents in discovery from ExxonMobil. To meet the production deadlines the Court set forth, ExxonMobil expanded its document review team to over 250 people and has been producing hundreds of thousands of pages of documents on, for the most part, a weekly basis (including over 450,000 pages in its recent production dated February 20).

In the middle of this massive undertaking to meet ExxonMobil's production due date of May 31, 2024, the Commonwealth has now moved to compel ExxonMobil to employ a particular search methodology (so-called "targeted search") with respect to RFP Nos. 11, 12, and 88, which seek "all documents and Communications concerning" climate-related investor complaints and consumer surveys. Ex. 1 at 14, 49.[2] But unlike typical motions to compel under Massachusetts Rule of Civil Procedure 37(a), there is no dispute that ExxonMobil has agreed to and is producing responsive documents. Instead, the Commonwealth seeks to micromanage how ExxonMobil searches for and produces responsive documents, so that the Commonwealth can avoid the

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[1] ExxonMobil collected data for 185 current or former ExxonMobil employee custodians. One additional custodian is not an ExxonMobil employee, but ExxonMobil conveyed to Imperial Oil the Commonwealth's request for her inclusion as a custodian in this matter, and Imperial Oil consented. Accordingly, there are a total of 186 custodians.

[2] Citations to "Ex. __" refer to the exhibits to the accompanying Affidavit of Jeannie S. Rhee.

predictable consequences of its extraordinarily broad discovery demands—that it must actually review the voluminous set of documents that it demanded. This request, which finds no support in the law or the parties' negotiations, should be denied.

ExxonMobil is searching for and producing documents responsive to these RFPs using a custodial search. That means it is searching the files of the custodians on which the parties agreed, using the search terms on which they agreed. As ExxonMobil has explained to the Commonwealth, and as it shows in this brief, the Commonwealth's concerns about this search methodology for the three RFPs in question are unfounded. The agreed-upon custodians currently being searched *include* the sources of the information that the Commonwealth seeks to target with respect to these RFPs. Indeed, given that the Commonwealth requests "all documents and Communications concerning" the investor complaints and consumer surveys that are the subject of these RFPs, the only way to perform a "targeted search" for the requested documents is to perform the very custodial search about which the Commonwealth complains, so that the full scope of relevant employees' communications can be searched, reviewed, and produced. *See* Ex. 1 at 14, 49.

To the extent the Commonwealth attempts to present ExxonMobil's use of custodial searches for RFP Nos. 11, 12, and 88 as a bait-and-switch, that argument is baseless. The Commonwealth contends that the custodial-search approach is "unfair" because, one year ago—at a time when the parties had agreed upon a fraction of the custodians and none of the search terms had even been discussed—ExxonMobil, exercising its judgment about how best to locate responsive documents, originally communicated that it planned to respond to these RFPs through targeted collections (*i.e.*, going to certain sets of files and looking for documents). *See, e.g.*, Mem. of Law in Supp. of Commonwealth's Mot. to Compel. ("Mem.") at 1, 9–12. But there is nothing

unfair about what transpired thereafter. The Commonwealth's argument completely ignores the significant expansion of the scope of discovery and how that expansion changed the nature of the searches that would best fulfill specific RFPs. Critically, these expansions added as custodians individuals whose associated files are most likely to contain responsive documents for the three RFPs subject to this dispute. Against that transformed discovery landscape, it became apparent that any targeted search would be obviated by the custodial search ExxonMobil would already be conducting by agreement with the Commonwealth.

The Commonwealth's additional claim that it is "unfair" for it to have to review "millions of pages" of documents without the identification of particular Bates numbers responsive to these RFPs is especially astounding given that *the Commonwealth demanded*—and ExxonMobil has agreed to provide—the broad volume of discovery about which the Commonwealth now complains. Mem. at 1, 3. Any burden faced by the Commonwealth is one of its own creation, and the Commonwealth cites no authority—and ExxonMobil is aware of none—supporting the idea that a responding party is under an obligation to identify documents by Bates number.

Finally, this Motion should be denied as premature under Rule 37(a). The Commonwealth simply speculates without evidence that ExxonMobil's ultimate production, which is not yet complete and which the Commonwealth thus has not reviewed, will at some point in the future turn out to be deficient. *See* Mem. at 9–10. The Commonwealth provides no authority supporting court intervention to address that hypothetical concern. The discovery schedule provides ample time for the Commonwealth to raise, and for ExxonMobil to address, deficiencies that the

Commonwealth might purport to identify and wish to discuss *after* it has reviewed ExxonMobil's productions. But the time for doing so, if ever, certainly is not now.[3]

As explained in further detail below, there is no legal or logical support for the Motion, and the Court should deny it.

BACKGROUND

ExxonMobil is producing documents in response to RFP Nos. 11, 12, and 88—which generally seek records related to investor complaints and consumer market research, Ex. 1 at 14, 49—by applying 201 agreed-upon search terms across the files of the 186 agreed-upon custodians. That search is well underway. Despite this, the Commonwealth's principal argument is that ExxonMobil's reliance on agreed-upon search terms and custodians "unfairly" deviates from initial proposals made in December 2022 and March 2023—long before the parties agreed on the full scope of custodians and search terms to be used—to produce documents responsive to these RFPs pursuant to "targeted" collections. Mem. at 1, 4–5. But the discovery landscape changed dramatically between the time when the targeted searches were initially proposed in late 2022 and early 2023, and the parties' agreement to a sweeping number of custodians and search terms in the fall of 2023. This material expansion resulted in the determination that a custodial search methodology would appropriately satisfy the RFPs at issue.

In December 2022, when ExxonMobil agreed to a targeted collection to respond to RFP No. 88, the parties had agreed on *only 15 custodians* and had *not even begun* formal search term negotiations. *See* Add-086–88.[4] And in March 2023, when ExxonMobil proposed a targeted

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[3] Under the bifurcated discovery schedule the Commonwealth requested—and the Court endorsed—the Commonwealth has eight months to review ExxonMobil's productions before the completion of fact discovery. Third Suppl. Scheduling Order at 1–2.

[4] Citations to "Add-__" refer to the Commonwealth's addendum accompanying its Memorandum of Law in Support of its Motion.

collection for RFP Nos. 11 and 12, the parties had agreed on only 57 custodians and still had not agreed on a set of search terms. *See* Add-117. Given the more limited scope of custodians agreed to by the parties and the lack of clarity on search terms, a targeted search seemed, at the time, to be an appropriate approach to RFPs on topics not specifically covered by the state of custodial and search-term agreements.

By September 2023, however, the parties had agreed to an expanded universe of 186 custodians, resulting in the laborious collection by ExxonMobil of over 30 terabytes of data in this case, and the parties were close to agreement on 201 search terms.[5] The totality of the Commonwealth's discovery demands require ExxonMobil to review and produce millions of documents from this massive trove of data in order to meet an expedited production deadline of May 31, 2024.

As this Court is aware, since September 2023, ExxonMobil has made extensive efforts to ensure that it will meet its document production deadline. It has expanded its review team by more than 400%, to over 250 reviewers, and has been producing hundreds of thousands of documents on, for the most part, a weekly basis (including its recent production of more than 450,000 pages of documents on February 20).[6] It also developed a Technology Assisted Review ("TAR") model to improve the efficiency and effectiveness of its custodial review. On top of this, ExxonMobil

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[5] One terabyte ("TB") is equivalent to approximately 220 million pages of text, and three TBs would hold "30% of the printed collection of the Library of Congress." *Schwarz* v. *United States*, 828 F. App'x 628, 634 n.3 (11th Cir. 2020). 30 TB is therefore equivalent to three times the entire printed collection of the Library of Congress.

[6] To date, ExxonMobil has exceeded the biweekly production pace set by the Court in its Scheduling Order. Third Suppl. Scheduling Order at 2.

has further agreed on a process now underway to reorder the review and production of documents to prioritize fifteen custodians that the Commonwealth selected.[7]

By the time this massive collection of data was agreed to in the fall of 2023, the employees whose files initially would have been the subject of targeted searches for thirteen of the RFPs, including the three RFPs at issue here, had become agreed-upon custodians. Based on the addition of those custodians, it became apparent that custodial searches would be the most appropriate method to capture documents responsive to RFP Nos. 11, 12, and 88. ExxonMobil communicated this determination clearly and transparently to the Commonwealth on September 13, 2023, shortly after the parties reached agreement on the 186 custodians.[8]

ARGUMENT

I. ExxonMobil Is Not Obligated To Conduct Targeted Searches, And Custodial Searches Will Provide The Commonwealth With The Requested Documents.

The Commonwealth asserts that ExxonMobil must conduct a targeted search process, rather than a custodial search process, for RFP Nos. 11, 12, and 88. It claims that it is unfair for ExxonMobil to proceed with a custodial search because that search will not yield sufficient responsive documents, given that the Commonwealth did not specifically negotiate search terms for these RFPs. Mem. at 9–10, 12. But ExxonMobil's custodial search is well-suited to identify responsive records, and ExxonMobil's determination that a custodial search methodology is

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[7] The fifteen priority custodians selected by the Commonwealth include custodians likely to have documents responsive to RFP Nos. 11, 12, and 88, further obviating the Commonwealth's complaints that ExxonMobil's custodial search methodology "interferes" with its "receipt" and "use" of the responsive documents. *See* Mem. at 9–10. Indeed, the Commonwealth is receiving documents responsive to these requests on an expedited basis as a result of the prioritization agreement.

[8] *See* Add-167 n.3 ("[I]n recognition of the addition of many custodians covering a wide range of subject matter within the last few weeks, ExxonMobil is recategorizing 13 requests from targeted searches to custodial searches.").

appropriate is entitled to deference under well-established discovery principles, as set forth in the Sedona Principles, a widely recognized and frequently cited set of e-discovery standards.

When it comes to the process of searching for responsive documents, the "responding party is best situated to preserve, search, and produce its own ESI. . . . *without direction from the court or opposing counsel . . . unless a specific deficiency is shown in a party's production.*" *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 1, 118 (2018) (emphasis added). As a result, courts across the United States routinely deny motions, such as the Commonwealth's, that seek to alter a responding party's chosen search methodology. For example, in *Livingston* v. *City of Chicago*, 2020 WL 5253848, at *3 (N.D. Ill. Sept. 3, 2020), the court refused to compel a party to use keyword searches to identify responsive documents rather than employing a TAR model. The court found that, where the responding party disclosed its approach to identifying and producing discovery, the requesting party had no "foothold" in the rules governing discovery to insist that the parties collaborate to select a particular review methodology. *Id.* The court based its decision, in part, on the Sedona Principle that the responding party is best situated to decide how to search for and produce responsive discovery. *Id.* (citing *The Sedona Principles*, *supra*, Principle 6). Specifically, the Sedona Principles provide that "[r]arely will a court or opposing party have direct access to the specific knowledge required" to ascertain what, precisely, a party must do to meet its discovery obligations. *The Sedona Principles*, *supra*, at 120.[9]

[9] *See also, e.g.*, *Mortg. Resolution Servicing* v. *JPMorgan Chase Bank, N.A.*, 2017 WL 2305398, at *2 (S.D.N.Y. May 18, 2017) (Unless the chosen methodology is "manifestly unreasonable or the requesting party demonstrates that the resulting production is deficient the court should play no role in dictating the design of the search, whether in choosing search tools, selecting search terms, or, as here, designating custodians."); *see also Hyles* v. *New York City*, 2016 WL 407711, at *3 (S.D.N.Y. Aug. 1, 2016) (declining to require the producing party to use the search methodology desired by the requesting party in part because a "responding party is best situated to decide how to search for and produce ESI responsive to [the requesting party's] document requests" and because "the standard

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As set forth below, and as ExxonMobil has repeatedly explained to the Commonwealth, ExxonMobil has done sufficient work to confirm that the custodial search methodology it is employing is appropriate for locating documents responsive to RFP Nos. 11, 12, and 88. That determination is entitled to deference. In fact, because ExxonMobil has not identified any centralized repositories containing the requested documents, a targeted approach to collecting the documents would necessarily involve the very same process of searching custodial files by using search terms. ExxonMobil's understanding of and judgment concerning its own documents has led the Company to determine that the custodians most relevant to these RFPs are already encompassed within the parties' agreed-upon custodians, and that the agreed-upon search terms are sufficient to capture responsive documents.

A. RFP No. 88 Seeks Consumer Surveys, Which Numerous Custodians And Search Terms Will Capture.

RFP No. 88 seeks "All documents and Communications, including surveys, data, and qualitative and quantitative testing, concerning consumers' perceptions of ExxonMobil's products and corporate brand in connection with ExxonMobil's advertising, public relations, data analytics, and marketing campaigns, including consumers' perceptions regarding GHG emissions, global warming, climate change, and climate risk." Ex. 1 at 49. ExxonMobil determined that using custodial searches is an appropriate method to search for documents responsive to this RFP, after interviewing relevant marketing employees and confirming that surveys and other testing concerning consumers' perceptions of ExxonMobil's products and corporate brand would be contained in custodial files, not a separate repository.

[for discovery] is not perfection, or using the 'best' tool . . . but whether the search results are reasonable and proportional").

As just one example, the Commonwealth sought as a custodian an individual who held the title "Global Market Research and Data Analytics Manager" (the "Research Manager"). In support of its request that this Research Manager be made a custodian, the Commonwealth specifically stated that he "[r]eviewed market research data on retail marketing to consumers." Ex. 2 at Attachment 1, p. 5. Notably, this Research Manager was added to the custodian list at the Commonwealth's request *after* ExxonMobil had communicated its initial position that it would conduct a targeted search to identify documents responsive to RFP No. 88.

Continuing the example, given the parties' agreement that the Research Manager would be a document custodian, his files would be searched using the parties' agreed-upon search terms. Multiple search terms directly address RFP No. 88, capturing documents that contain the word "consumer" or "customer" and a variety of consumer marketing and climate-related keywords such as "survey," "study," "research," "fossil fuel," "climate change," "green," or "environment."[10] These terms also capture any documents that contain the phrase "qualitive testing" or "quantitative testing."[11] Thus, the agreed-upon search terms will capture exactly the type of consumer surveys, testing, and related communications sought by RFP No. 88.

The Commonwealth suggests that ExxonMobil should instead conduct a "targeted" search for documents responsive to RFP No. 88 by "conduct[ing] interviews with employees to determine

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[10] Consumer Term 11 (Add-208, App'x C): (consumer* OR customer*) AND ((percept* OR view* OR survey* OR study OR studies OR research OR "focus group" OR data OR "A/B Testing" OR analy* OR emotion* OR RTB OR "brand vision" OR "choice modeling" OR sentiment* OR "creative testing" OR "dial testing" OR "master brand" OR "message testing" OR messaging) w/100 (CO2 OR carbon OR GHG OR "greenhouse gas*" OR pollution OR "climate change" OR "climate science" OR "fossil fuel*" OR sustain* OR green OR environment* OR emission* OR emits OR emitted OR emitting OR (emit w/10 (carbon OR gas OR gases OR GHG OR GHGs OR methane OR CH4 OR pollut* OR greenhouse)))).

[11] Consumer Term 71 (Add-219, App'x C): (qualitative OR quantitative) AND testing.

which employees were involved in the preparation and/or review of consumer surveys and then collect and produce those surveys from those employees." Mem. at 3. But, as explained above, ExxonMobil did exactly that: it conducted interviews with relevant employees and determined that documents responsive to RFP No. 88—which seeks not just consumer surveys themselves, but also communications regarding those surveys—would be located in the files of agreed-upon custodians, including files associated with the Research Manager. The Commonwealth's "lack of confidence that a custodial production could satisfactorily result in the production of responsive documents" is therefore entirely unfounded. Mem. at 10.

B. RFP Nos. 11 And 12 Seek Investor Complaints, Which Numerous Custodians And Search Terms Will Capture.

RFP Nos. 11 and 12 seek "All documents and Communications concerning any complaint lodged with ExxonMobil, the SEC, or any other federal or Massachusetts state or local investor protection agency concerning ExxonMobil's actions or statements with respect to increases in GHG emissions, increases in global surface temperatures, global warming, climate change, or climate risk, or the potential impact of any of these topics on ExxonMobil's revenues, profitability, or securities' value" (RFP No. 11), and documents sufficient to identify these complaints (RFP No. 12). Ex. 1 at 14.

The Commonwealth's focus on the methodology used in connection with RFP Nos. 11 and 12 seemingly turns in part on a fundamental misunderstanding about how certain investor inquiries were processed by ExxonMobil—a misunderstanding ExxonMobil has tried to correct in prior discussions with the Commonwealth by explaining that ExxonMobil does not maintain a central repository of complaints. Specifically, in a letter dated November 21, 2023, the Commonwealth claimed that it had identified an email that it believed to be evidence of a central repository for investor complaints. Ex. 3; *see* Ex. 4 at 1–3. That same week, ExxonMobil pointed out in response

that the document actually showed that comments submitted through a page on ExxonMobil's website "were routed to the inboxes of relevant point persons," including "custodians in this matter." Add-243. "In other words, this document does not signify that ExxonMobil retains a central repository of complaints." *Id.*

This exchange is instructive to the present Motion for at least three reasons. First, it proves the logic behind the principle, articulated in the Sedona Principles, that ExxonMobil as the responding party is entitled to deference because it is best situated to preserve, search, and produce its own ESI given its superior knowledge of how its own documents are organized and maintained. Second, the fact that there is no central repository weighs in favor of using custodial searches to respond to the RFPs, because a custodial approach allows for an expansive search of documents and communications across large numbers of files in multiple locations. Finally, the Commonwealth raised the issue in the first place based on its receipt of a responsive document produced through the very custodial searches it now speculates might, at some later point, prove inadequate to locate documents responsive to RFP Nos. 11 and 12.[12] The Commonwealth's possession of this document confirms that custodial searches are appropriate to respond in this instance.

The expansive custodial search protocol that is already in place will thus capture responsive documents. To be responsive to RFP Nos. 11 and 12, a document must relate to a complaint "concerning . . . increases in GHG emissions, increases in global surface temperatures, global warming, climate change, or climate risk." Ex. 1 at 14. A custodial search therefore is well-suited

[12] While the Commonwealth contends that it "would have insisted on including the word 'complaint' as a search term if the parties had agreed to designate RFP Nos. 11 and 12 as custodial searches," Mem. at 10, nowhere in the document the Commonwealth identified, Ex. 3, does the word "complaint" appear, and thus it would not have been captured by a search term containing the word "complaint," *see* Ex. 4.

to identifying responsive documents because the agreed-upon search terms capture numerous words and phrases related to these issues, such as: "climate risk"; "GHG emissions" and "climate" or "global warming"; or "global temperature."[13] The Commonwealth speculates that documents responsive to these RFPs will not be adequately captured by the agreed-upon search terms because the terms do not contain the word "complaint." Mem. at 10. But the standalone term "complaint" is too broad, and it would capture irrelevant and nonresponsive materials. Adding the word "complaint" to existing climate-related search strings, however, would *narrow* the universe of documents captured by ExxonMobil's existing searches and result in *fewer* documents produced to the Commonwealth. Using ExxonMobil's methodology, if a complaint in ExxonMobil's files concerns any of the issues enumerated in RFP Nos. 11 and 12, then the complaint would be identified by the terms outlined above, among others, *regardless* of whether the term "complaint" was used. Adding the term "complaint" as a search term is not necessary to capture the documents sought by these RFPs.

Nor is there any basis for the Commonwealth's argument that the "parties did not engage in negotiations over which ExxonMobil employees were likely to be custodians for . . . investor complaints (RFP Nos. 11 & 12)." Mem. at 9–10. The agreed-upon custodians include numerous employees from ExxonMobil's investor relations department, including the ESG Engagement Manager, the Vice President of Investor Relations, and multiple investor relations personnel. *See*

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[13] Investor and Climate Term 1, sub-Term 1 (Add-192, App'x A): (climate OR carbon OR CO2 OR GHG OR GHGs OR greenhouse OR "global warming") w/20 risk.

Investor and Climate Term 2 (Add-192, App'x A): (climate w/3 model*) OR (climate w/3 project*) OR (extreme w/3 (weather OR heat)) OR (glob* w/3 temp*).

Climate Term 3 (Add-192, App'x A): ((emits OR emitted OR emitting OR emissions OR "emission* intensity") w/10 (carbon OR CO2 OR GHG OR GHGs OR greenhouse OR methane)) w/150 (climate OR "global warming" OR proxy OR report* OR increase* OR decreas* OR cost OR goal* OR target*).

Add-224–231; Ex. 2 at Attachment 1. ExxonMobil has already produced more than 18,000 documents from just these custodians that contain the words (i) "investor" or "shareholder" and (ii) "climate" or "global warming."[14] Given these custodians' frequent correspondence with investors and focus on environmental issues, if there are any documents related to investor complaints about climate-related issues, the searches of these custodians' files using the agreed-upon search terms will identify them.

Accordingly, ExxonMobil determined, based on its knowledge of and judgment concerning its own records, that the appropriate methodology for searching for responsive records is to search the files of investor relations employees using search terms likely to capture the requested documents, and that is exactly what ExxonMobil is doing through its custodial searches. It makes no difference whether the Commonwealth "consider[ed] whether the custodial process would result in the production of documents responsive to RFP Nos. 11, 12 and 88" during the parties' negotiations as to custodians and search terms. Mem. at 9.[15] The Commonwealth's subjective considerations during custodian and search term negotiations do not render ExxonMobil's search methodology insufficient. What matters is that the parties' comprehensive agreements on 186 custodians and 201 search terms are, as demonstrated above, sufficient to capture documents responsive to the RFPs.

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[14] A search of documents produced to the Commonwealth in production volumes MASS011-036, from the files of the referenced custodians, using the term "*(investor OR shareholder) AND (climate OR "global warming")*" returns 18,314 produced documents.

[15] ExxonMobil informed the Commonwealth on September 13, 2023 of its intention to use custodial searches to respond to these RFPs, and the Commonwealth did not suggest new terms related to these three RFPs over the ensuing three weeks as the parties continued negotiating and finalizing search terms. *See* Add-166–67, Add-189.

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II. ExxonMobil Is Not Obligated To Identify Documents By Bates Number, And It Never Agreed To Do So.

The Commonwealth also contends that ExxonMobil must identify by Bates number the documents responsive to RFP Nos. 11, 12, and 88, and that ExxonMobil had pledged to do so as part of its agreement to targeted searches. Mem. at 10–11. But even under a targeted methodology, there is no obligation under the applicable case law and e-discovery principles for ExxonMobil to identify those documents specifically, nor must ExxonMobil do so in order for the Commonwealth to "use" the records. And, contrary to the Commonwealth's contentions, ExxonMobil has never committed to providing the Bates numbers of documents collected through any specific search, whether targeted or custodial. To the extent the Commonwealth would like to identify specific documents responsive to RFP Nos. 11, 12, or 88, it can run searches for them across the productions, as parties in civil discovery routinely do.

Nor is it the case that ExxonMobil volunteered to provide Bates numbers for documents responsive to these RFPs. The Commonwealth states that, at a meet and confer in mid-August 2023—*before* September 13, 2023, when ExxonMobil communicated its redesignation of certain RFPs to custodial searches—ExxonMobil "confirmed that, on a conceptual basis" it would identify documents by Bates number with respect to targeted searches.[16] Mem. at 6. That is misleading. ExxonMobil explicitly stated during that meet and confer that it would not and could not commit at that time to identify documents responsive to particular RFPs by Bates number. And ExxonMobil did not subsequently make such a commitment.

[16] The Commonwealth points to the timing of this meet and confer as further evidence of what it inaccurately attempts to characterize as a bait-and-switch. But, as the Commonwealth is aware, ExxonMobil agreed to a total of 186 custodians requested by the Commonwealth *after* the mid-August meet and confer, on August 28, 2023. *See* Ex. 5. And ExxonMobil's communication of its intention to use custodial searches for these three RFPs, in view of that changed landscape, followed promptly thereafter, on September 13, 2023. Add-167 n.3.

In fact, on August 28, 2023, in response to a request from the Commonwealth to "provide a response as to what details ExxonMobil is willing to share about its targeted searches," ExxonMobil responded that it agreed "to provide information to the Commonwealth on *the execution of* its targeted searches, consistent with the parties' agreement on this topic as set out in correspondence dated April 3, 2023." Add-157 (emphasis added). The referenced April 3 correspondence likewise stated that ExxonMobil agreed to describe "the *execution of*" its targeted searches. Add-248–49. As these letters made clear, ExxonMobil's commitments to the Commonwealth were limited to describing the execution process of such searches, and did not include providing the Bates numbers of responsive documents. It is telling that the Commonwealth provides no citation to a written agreement or memorialization of such agreement.[17]

The Commonwealth also argues that production without the identification of documents by Bates number is unfair because it will "shift[] to the Attorney General's Office the burden of reviewing what will likely be millions of pages to ascertain whether ExxonMobil's productions have satisfied its obligations *vis-à-vis* the three requests at issue." Mem. at 12. But that burden is derived from the Commonwealth's extensive discovery demands—issuing over 200 document requests and insisting upon hundreds of custodians and search terms—which have already resulted in the production of more than seven million pages of documents. That a requesting party must review discovery productions is not "unfair"; that is how discovery works.

[17] The Commonwealth's citation to one production cover letter in which ExxonMobil identified the RFP with respect to which certain documents produced were responsive, *see* Mem. at 2 n.2, 6, does not show ExxonMobil's agreement to do so for any other, or all, documents collected through a particular search methodology. ExxonMobil identified Bates numbers in that instance to provide context for the confidentiality designation ExxonMobil made over the documents in that production. *See* Add-165. The Commonwealth does not and cannot point to any other production cover letter in which ExxonMobil identified the RFPs corresponding to the documents produced through a targeted search methodology.

III. The Commonwealth's Motion To Compel The Use Of Its Preferred Search Methodology, Before Receiving The Documents Identified Through ExxonMobil's Methodology, Should Be Denied As Premature And Speculative.

The Commonwealth brings this Motion pursuant to Mass. R. Civ. P. 37(a). Under that Rule, a motion to compel is appropriate where a party, "in response to a request for inspection . . . fails to respond that inspection will be permitted as requested or fails to permit an inspection as requested." Mass. R. Civ. P. 37(a)(2). Yet, in this case, the Commonwealth acknowledges that ExxonMobil has *agreed* to produce the documents the Commonwealth requested.[18] *See, e.g.*, Mem. at 4–6. Instead, this Motion is based on the Commonwealth's speculation that the manner in which ExxonMobil will identify and produce certain documents might, once executed, turn out to be inadequate. As shown above, there is no basis for this speculation, and the Motion should be denied as not ripe and as a procedurally improper attempt to invoke Rule 37(a).[19]

The Commonwealth does not cite a single case in which a court granted the preemptive relief requested here—ordering a different search methodology in the middle of a document production. And ExxonMobil has not located any such case. To the contrary, courts have repeatedly recognized that moving to compel a party to search for responsive documents in a particular manner—and thus "preemptively restraining" an alternative search methodology—is improper. *The Sedona Principles*, *supra*, at 123 (citing cases).

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[18] The Commonwealth argues that, once it has met its "initial burden of demonstrating the relevance of the requested information," the burden "shifts" to ExxonMobil "to show that the discovery is improper." Mem. at 8 (quotations omitted). But that argument misapprehends the nature of the dispute between the parties. As discussed above, there is no dispute as to the relevance of RFP Nos. 11, 12, and 88. ExxonMobil has agreed to produce, and has been producing, responsive documents.

[19] The Commonwealth argues that compelling ExxonMobil to conduct targeted searches for RFP Nos. 11, 12, and 88 would "conserve the Court's limited time and resources" and "advance[] the discovery process." Mem. at 13. But the Commonwealth's Motion has the opposite effect, by embroiling the Court in purely hypothetical and speculative allegations and demanding that ExxonMobil undertake a search methodology that it has determined to be less appropriate than the custodial approach that ExxonMobil has employed and disclosed.

For example, in *Hyles* v. *New York City*, the court declined one party's request to force the other to search for documents using a TAR methodology, as opposed to the producing party's selected methodology, while discovery was ongoing. 2016 WL 4077114, at *1.[20] The court's decision was based, in part, on the prematurity of the request. The court explained that a requesting party might be able to request a different search methodology if it "later demonstrates deficiencies in the . . . production," but that such a request "is not a basis for Court intervention" before document production had been made and reviewed. *Id.* at *3.[21] Here, as in *Hyles*, the Commonwealth's Motion to Compel is premature because ExxonMobil is in the midst of extensive efforts to search for and produce responsive documents—using a methodology well-designed to locate those documents. Therefore, at this juncture, the Commonwealth cannot meet its burden of showing that ExxonMobil's search methodology is inadequate.

The Commonwealth has not even attempted to identify an actual deficiency in the ongoing productions that would serve as a basis for relief under Rule 37(a). Rather, the Commonwealth merely claims a "lack of confidence" that a custodial production could satisfy ExxonMobil's discovery obligations as to these three RFPs. Mem. at 10. But a "lack of confidence" is not a ground for compelling discovery under Rule 37(a), and nothing in the text of the Rule supports such a theory. And the supposed "lack of confidence" is particularly unpersuasive here, given that

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[20] Massachusetts courts construe the Massachusetts Rules of Civil Procedure in line with Federal Rules, "absent compelling reasons to the contrary or significant differences in content." *Rollins Envtl. Servs., Inc.* v. *Superior Ct.*, 368 Mass. 174, 179–80 (1975).

[21] The court in *Hyles* also acknowledged that courts are "not normally in the business of dictating to parties the process that they should use when responding to discovery." *See* 2016 WL 4077114, at *3 (quoting *Dynamo Holdings Ltd P'ship* v. *Comm'r of Internal Revenue*, 143 T.C. 183, 188 (2014)); *see also* Hon. James C. Francis, IV, *Judicial Modesty: The Case for Jurist Restraint in the New Electronic Age*, LAW TECH. NEWS, Feb. 2013, at 27 (observing that no Federal Rule "has given judges the authority . . . to dictate to the parties how or where to search for documents").

ExxonMobil has shown that, through its chosen methodology, it will search the very sources where responsive documents are likely to be located.

The Commonwealth argues that it requires relief now because ExxonMobil's offer to meet and confer following the Commonwealth's review of ExxonMobil's productions "does not provide sufficient time for the [Commonwealth] to review millions of pages of documents; ascertain whether they are deficient with respect to Requests 11, 12, and 88; negotiate a mutually acceptable method for collecting the additional documents; and then make use of those documents" before the fact discovery deadline. Mem. at 12–13. Those points have no merit, because to the extent the Commonwealth later purports to identify actual deficiencies in ExxonMobil's productions, the discovery schedule provides ample time—eight months after ExxonMobil's completion of productions—to raise and discuss those concerns based on the actual record of documents produced. Third Suppl. Scheduling Order at 1–2. This period of time was added by the Court at the Commonwealth's request. The Commonwealth mischaracterizes this process as "cold comfort" because any meet and confer would take place after ExxonMobil's document production is complete. Mem. at 12. But that sequence is exactly what the case law and rules of discovery contemplate will occur. And because the Commonwealth is receiving documents from priority custodians on an expedited basis, it has *more* than eight months to review the responsive documents.

In any event, there is no basis for the Commonwealth's speculation that there will be deficiencies, as explained above. And the admission of additional counsel for the Commonwealth from the law firm Sher Edling presumably further facilitates the Commonwealth's review of discovery in this case. Moreover, ExxonMobil has been producing responsive documents on, for the most part, a weekly basis, and must continue to make productions on at least a biweekly basis

under the Court-ordered schedule, affording the Commonwealth more than enough time to review the sufficiency of the productions.

For all these reasons, the Motion should be denied as failing to satisfy Rule 37(a).

CONCLUSION

For the foregoing reasons, ExxonMobil respectfully requests that the Court deny the Commonwealth's Motion to Compel as substantively meritless and premature.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas C. Frongillo, counsel for Defendant Exxon Mobil Corporation, hereby certify that on March 5, 2024, I caused a copy of this Memorandum of ExxonMobil in Opposition to the Commonwealth's Motion to Compel to be served on counsel of record by electronic service.

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