COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

NO. 2017-P-0366

EXXON MOBIL CORPORATION,

Petitioner-Appellant,

v.

OFFICE OF THE ATTORNEY GENERAL
OF THE COMMONWEALTH OF MASSACHUSETTS,

Respondent-Appellee.

ON APPEAL FROM SUFFOLK SUPERIOR COURT
CIVIL ACTION NO. 16-1888F

PETITIONER-APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

It is unsurprising that the Attorney General resists judicial review of her actions. As with others who wield executive power, the Attorney General would prefer that that her "broad investigatory and enforcement authority" go unchecked by courts. (Opp. 7.)[1] But where, as here, executive power is broad, it is particularly appropriate for courts to enforce constitutional and statutory limits that protect the rights of those against whom power is deployed.

ExxonMobil urges this Court to provide that oversight here. In its opening brief, ExxonMobil established that the sole ground identified by the Superior Court for asserting personal jurisdiction was untenable as a matter of law and did not provide the requisite nexus for the CID's document demands. The Attorney General appears to agree, half-heartedly defending the Superior Court's rationale only on page 36 of a 50-page brief and only after urging affirmance on alternate grounds. But those other grounds (which

[1] "Opp." refers to the brief filed by the Attorney General on June 1, 2017; "Br." refers to the brief filed by ExxonMobil on May 1, 2017; "Amicus Br." refers to the brief filed by former Massachusetts attorneys general on June 7, 2017; and "Order" refers to the opinion of the Superior Court issued on January 11, 2017.

are meritless on their own terms) find no support in the Superior Court's decision or findings of fact.

The absence of a sound basis for personal jurisdiction under the Due Process Clause and the Massachusetts long-arm statute cannot be remedied by invoking generalities about the importance of CIDs or the need to protect consumers and investors. But that thin gruel is all the Attorney General and her predecessors in office offer when they warn that an adverse ruling might "hinder the Attorney General's ability to pursue such investigations and protect the people of the Commonwealth." (Amicus Br. 7-13; Opp. 7-8.) This results-oriented approach to constitutional and statutory construction is entirely improper and should be rejected out of hand.

That approach does, however, provide a window into the Attorney General's misguided understanding of the role courts play in adjudicating challenges to CIDs. In the Attorney General's view, it was right for the Superior Court not to consider the disproportionate, 40-year burden imposed by the CID's document demands unless compliance with those demands would effectively shut down ExxonMobil's operations. Such an exacting standard would foreclose virtually

all CID challenges based on burden and make proportionality and reasonableness a dead letter.

The Attorney General also believes that Massachusetts courts should take at face value her justifications for issuing a CID and turn a blind eye to public statements unmasking her bias. Acceptance of that position would reduce the judiciary to a mere "automaton which must unquestionably compel obedience to a subpoena simply because the [Attorney General] issued it." Galvin v. The Gillette Co., 19 Mass. L. Rptr. 291, 2005 WL 1155253, at *8 (Mass. Super. Ct. Apr. 28, 2005) (citation and internal quotation marks omitted). Courts should not be consigned to such a marginalized role in protecting rights from executive branch overreach.

That is particularly so where time has only further revealed the impropriety of the Attorney General's investigation. Even the New York Attorney General has moved away from the over-hyped (and false) theory that "Exxon Knew" something about climate change in the 1970s and 1980s that was inconsistent

with its public statements.[2] The Attorney General's continued reliance on that pretext to justify her investigation, and her mischaracterization of what the underlying documents say, only emphasizes the absence of any legitimate reason to have issued the CID in the first place.

While much is disputed in this matter, it is common ground that "[t]he importance of this case and its ramifications extend far beyond the specific issues and parties of record." (Amicus Br. 2.) If the Attorney General's position is accepted, judicial review will be robbed of any substance. This Court should reject that outcome and ensure the CID complies with constitutional and statutory requirements by overturning the Superior Court's decision.

II. ARGUMENT

A. The Massachusetts Courts Lack Personal Jurisdiction over ExxonMobil

The parties agree that personal jurisdiction over ExxonMobil requires in-state conduct on ExxonMobil's part that is related to the subject matter of the CID. (Br. 23-25; Opp. 28-30.) The parties also appear to

[2] See John Schwartz, Exxon Mobil Fraud Inquiry Said to Focus More on Future Than Past, N.Y. Times, Aug. 19, 2016, at B1.

agree that the Superior Court failed to identify a valid basis for asserting jurisdiction. That is why the Attorney General advances a series of alternative grounds not developed in the record or credited by the Superior Court before undertaking a pro forma defense of the Superior Court's sole ground for asserting jurisdiction. While she is right to abandon the Superior Court's flawed rationale, the Attorney General finds no refuge in alternative theories that are not established in the record and are insufficient in their own right. On the record before this Court, the Attorney General has failed to carry her burden of establishing personal jurisdiction over ExxonMobil.

1. The BFA Holders' Activities Cannot Support Jurisdiction over ExxonMobil.

The Superior Court credited only one of the Attorney General's proffered grounds for asserting personal jurisdiction: the in-state activities of the independently owned service stations operating in Massachusetts under an ExxonMobil brand (the "BFA holders"). As established in ExxonMobil's opening brief, however, those activities cannot be attributed to ExxonMobil under settled agency precedent. (Br. 17-22.) And, even if they could, the BFA holders'

activities do not have a sufficient nexus to the CID to confer jurisdiction. (Br. 22-30.)

The Attorney General offers no precedent contesting the well-settled principle that a standard licensing agreement does not establish an agency relationship between licensee and licensor. Instead, the Attorney General asks this Court to ignore that precedent because "this matter does not concern Exxon's Chapter 93A liability." (Opp. 37 (emphasis in original).) But the parties agree that liability is not at issue here. The question, as stated plainly in ExxonMobil's brief, is whether the activities of the BFA holders can be attributed to ExxonMobil as its own in-state contacts. (Br. 1, 15.) ExxonMobil established that they could not under existing law, and the Attorney General's need to change the subject fully establishes that she has no coherent argument suggesting otherwise.[3]

[3] The Attorney General grasps at straws in two footnotes (Opp. 21 n.24, 38 n.36) by pointing to a 2002 agreement where ExxonMobil agreed "to adopt and to implement" certain "retailing business practices" at service stations it owned but to make only "good faith efforts to effect compliance on the part of each [branded service station] permitted by ExxonMobil to display the Exxon or the Mobil trademark." (JA 1248.) The distinction in this agreement between BFA holders and ExxonMobil's own

But even if the BFA holders' in-state activities were attributed (in violation of precedent) to ExxonMobil, they would fall well short of establishing a sufficient nexus to the CID. The Attorney General has no answer to ExxonMobil's argument that the BFA holders' activities in Massachusetts have nothing to do with the document requests related to investor deception. (Br. 23–25.) Nor could she. The service stations play no role in securities transactions, and nothing in the record or common sense says otherwise.

As to consumer deception, the Attorney General points vaguely to the BFA holders' "marketing and advertising of [ExxonMobil's] fossil fuel products in Massachusetts." (Opp. 37.) It is uncontested that none of that "marketing and advertising" has anything to do with climate change.[4] (Br. 28 n.35; JA 915, 935, 950.) As the First Circuit explained when affirming the dismissal of Chapter 93A claims in Copia Commc'ns, LLC v. AMResorts, L.P., although the defendant did "advertise in Massachusetts, ha[ve] Massachusetts

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service stations should put to rest the Attorney General's counter-factual claims about ExxonMobil's control over the BFA holders.

[4] Indeed, the only in-state advertisements identified by the Attorney General are not even advertisements for gasoline. (JA 329.)

residents among its customers, and ha[ve] some arrangements with travel agents in Massachusetts," such contacts "are not relevant to [the] specific jurisdiction analysis" where no disputed issue "arises out of or relates directly to any of these contacts." 812 F.3d 1, 5 (1st Cir. 2016).

The Attorney General has failed to establish such a nexus here. The advertising materials identified thus far have nothing to do with the public statements ExxonMobil's former CEO made in Texas, New York, and London, England; the company's communications with 12 organizations derided as so-called climate change "deniers"; or any of the substantive document requests in the CID. (Br. 26; JA 103-07.)

The Attorney General's failure to establish a nexus between those document demands and the sole basis for jurisdiction recognized by the Superior Court is particularly fatal to the exercise of jurisdiction. That is because "[t]he causal relationship necessary for the Court to assert specific personal jurisdiction over the Respondents in exercising its subpoena enforcement power is between the . . . jurisdictional contacts and the central areas of inquiry covered by the [government]

investigation." See, e.g., SEC v. Lines Overseas Mgmt., Ltd., No. CIV.A. 04-302 RWR/AK, 2005 WL 3627141, at *4 (D.D.C. Jan. 7, 2005) (emphasis added). The lack of an established nexus provides an independent and fully sufficient basis to reject jurisdiction premised on the BFA holders.

2. The Alternative Grounds Do Not Support Personal Jurisdiction.

Abandoning the Superior Court's decision, the Attorney General devotes much of her brief to alternative jurisdictional bases that were not endorsed below or supported by any findings of fact. (Opp. 21-35.) To affirm on grounds other than those reached by the Superior Court, this Court is limited to "facts, as set forth by the motion judge and supplemented by uncontested statements in the materials" before her. REMF Corp. v. Miranda, 60 Mass. App. Ct. 905, 905 (2004). If additional fact finding is necessary, it "should be addressed in the trial court," not on appeal. Mass. Highway Dep't v. Smith, 51 Mass. App. Ct. 614, 621 (2001). Here, there are no alternative grounds rooted in the factual record that support exercising jurisdiction over ExxonMobil.

(a) Alleged Consumer Contacts.

To support her document demands related to consumer fraud, the Attorney General points for the first time in this litigation to smartphone apps that allow consumers to identify where ExxonMobil products are sold. (Opp. 31-32.) While the Attorney General claims that "these software applications [are] decisive to [jurisdictional] relatedness" (Opp. 32), she "did not even mention" them in the briefing below, Palmer v. Murphy, 42 Mass. App. Ct. 334, 338 (1997). And neither the Superior Court's factual findings, nor the record itself, provides any support for the Attorney General's representations about the apps and how they function. (Compare Opp. 21, 31-32, with JA 778-79, 791.) This eleventh-hour allegation of fact cannot provide an adequate basis to affirm the Superior Court's decision.

In any event, a smartphone app——just like ExxonMobil's website——is insufficient to establish purposeful availment, a necessary component of specific personal jurisdiction.[5] These platforms are

[5] Contrary to the Attorney General's claim, ExxonMobil has not waived arguments contesting purposeful availment or reasonableness. (Opp. 30 n.30, 31 n.31.) Where the Superior Court addressed those

"available to anyone with internet access and do [] not target [Massachusetts] residents in particular." Cossaboon v. Maine Med. Ctr., 600 F.3d 25, 35 (1st Cir. 2010). The Attorney General has not alleged (much less established, as is her burden) that ExxonMobil's website offers "interactive features which allow the successful online ordering of [ExxonMobil's] products," the minimum required for a nationally available website to support personal jurisdiction. See McBee v. Delica Co., 417 F.3d 107, 124 (1st Cir. 2005).

A commonplace "store locator" function does not suffice. See, e.g., LML Investments, LLC v. Liegey, No. 2:12-CV-723, 2012 WL 6023863, at *3 (S.D. Ohio Dec. 4, 2012). "[G]iven the 'omnipresence' of internet websites," to conclude otherwise would "improperly erode important limits on personal jurisdiction over out-of-state defendants." A Corp. v. All Am. Plumbing, Inc., 812 F.3d 54, 61 (1st Cir.

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issues (Order 7-8), ExxonMobil challenged the ruling (Br. 30-33). Insofar as the Attorney General presses on appeal alternative grounds for jurisdiction, ExxonMobil is entitled to "an equal opportunity to respond" as to whether those grounds satisfy purposeful availment and reasonableness. Commonwealth v. Encarnacion, 91 Mass. App. Ct. 1117, 1117 n.2 (2017).

2016) (quoting Cossaboon, 600 F.3d at 35).

The Attorney General insinuates that personal jurisdiction can be premised on ExxonMobil's (i) interstate oil pipeline, (ii) distribution terminals in Springfield and Everett, (iii) wholesale distribution to Massachusetts retailers, and (iv) contract with the Massachusetts police.[6] (Opp. 20–22.) But the factual record on those points was never developed in the Superior Court, and there is no apparent nexus between those in-state activities (even if they could be attributed to ExxonMobil) and the subject matter of the CID. That is likely why the Attorney General declines to argue that any of those contacts satisfy personal jurisdiction's nexus requirement. (Opp. 29-35.) None of those contacts is sufficient to support jurisdiction here.[7]

The Attorney General therefore attempts to breathe new life into the moribund "stream of commerce" doctrine. (Opp. 39-41.) But, as one of the

[6] In fact, ExxonMobil no longer owns either the Springfield terminal or the interstate oil pipeline, and has not since before the Attorney General issued the CID. The Attorney General has failed to submit any current evidence to the contrary.

[7] Insofar as the Attorney General argues that advertising is sufficient even without a connection to BFA holders (Opp. 30-31), that argument falls short for the same reasons discussed above.

Attorney General's own authorities confirms, "the fact that a defendant places its product into the stream of interstate commerce, knowing that it may end up in Massachusetts, is not enough to establish 'purposeful availment.'" Hilsinger Co. v. FBW Investments, 109 F. Supp. 3d 409, 425 (D. Mass. 2015).

Even if this Court were to accept the Attorney General's proffered in-state contacts, the majority of the CID would lack any nexus to those contacts. Of the CID's 38 document requests, the Attorney General identifies at most two requests that purport to probe ExxonMobil's activities in Massachusetts for reasons other than to "seek further information about Exxon's Massachusetts contacts." (Opp. 28-29.) And nowhere does the Attorney General defend those requests that target ExxonMobil's activities outside Massachusetts. (Opp. 17-18, 29-35, 37.)

Accordingly, even if the Court were not required to find that every demand is jurisdictionally supported, it is plainly insufficient for the Attorney General to identify only two out of 38 requests that inquire into activities that "occurred or had [their] principal impact in" the forum. BNSF Railway Co. v. Tyrell, No. 16-405, 2017 WL 2322834, at *3, n.4 (U.S.

May 30, 2017). Were it otherwise, an attorney general could immunize any extraterritorial investigation into an out-of-state corporation from judicial scrutiny by merely tacking on a purely exploratory request for materials concerning some dealings with the forum state. The rigors of the Due Process Clause are not so easily circumvented.

(b) Alleged Investor Contacts.

Recognizing that ExxonMobil's alleged contacts with Massachusetts consumers——even if credited——would not justify the CID's demands for documents related to investor deception, the Attorney General offers two grounds to plug that acknowledged gap. But the Superior Court adopted neither one of those theories and made no factual findings that would support their viability on appeal. In the absence of an adequate basis in the factual record, this Court need not address the Attorney General's theories in the first instance. But if it does, the Court should find that ExxonMobil has no relevant contacts with investors in Massachusetts.

First, the Attorney General points to ExxonMobil's sale of commercial paper to institutional investors in Massachusetts as a basis for finding in-

state contacts related to the CID. (Opp. 22, 32.) As demonstrated below, however, commercial paper is a short-lived asset, with maturity dates no longer than 270 days. (JA 916-17 & nn.27, 28, 1085.) Questions of the long-term viability of a company or its industry are therefore irrelevant to the purchasers of such notes.[8] (JA 916-17, 1220.) The Attorney General provides no basis, much less a sound one, to conclude otherwise. Absent any nexus between the sale of these short-term notes and an investigation into statements concerning the long-term impacts of climate change, such transactions cannot provide a basis for personal jurisdiction. (Opp. 10-15, 34; JA 277-280.)

Second, the Attorney General claims that jurisdiction can be premised on the mere fact that ExxonMobil stock is held by investors in Massachusetts. (Opp. 32.) That is false. It is beyond dispute that a defendant's "connection with the forum State . . . must arise out of contacts that the 'defendant himself' creates with the forum." Walden v. Fiore, 134 S. Ct. 1115, 1121-22 (2014) (emphasis in

[8] That is why the commercial paper carve-out in G.L. c. 110A, § 402(a)(10), exempts such notes from the state and federal filing requirements applicable to other securities. JA 293 n.54, 1085, 1220.

original). Likewise, to satisfy Chapter 93A's "trade or commerce" requirement, a defendant accused of securities fraud must have "engaged in the actual sale of securities." Reisman v. KPMG Peat Marwick LLP, 965 F. Supp. 165, 174 (D. Mass. 1997).

Here, the Attorney General has not established (or even alleged) that the securities held by Massachusetts-based investors were purchased directly from ExxonMobil, rather than from participants in the secondary securities market. (Opp. 32-33.) Purchases and sales in the secondary market between Massachusetts residents and securities brokers who trade in ExxonMobil stock does not constitute in-state activity by ExxonMobil. That others might trade or hold ExxonMobil stock (which is freely transferable in the open market) in Massachusetts does not require ExxonMobil to engage in any conduct in the state that might subject it to jurisdiction.

Likewise, "publicly disseminating statements reflecting confidence in the company's future[ ] simply do[es] not constitute 'trade or commerce' as defined under 93A when stock is purchased by investors through open markets." Salkind v. Wang, No. CIV.A. 93-10912-WGY, 1995 WL 170122, at *9 (D. Mass. Mar. 30,

1995). The mere ownership of ExxonMobil securities by third parties in Massachusetts therefore is insufficient to support the exercise of personal jurisdiction over ExxonMobil.[9]

B. The CID Is Overbroad and Unduly Burdensome

The Attorney General offers nothing but platitudes to defend the overly burdensome CID challenged here. (Opp. 43-45.) When a CID is challenged for imposing an unreasonable burden, it is appropriate for courts to evaluate the demands presented in the CID and consider the burden imposed.

The Attorney General and the Superior Court would instead ask whether the recipient has complied with another "similar" CID or subpoena and, where there has been such compliance, conduct no further inquiry. (Opp. 45.) But that amounts to no review at all. That is particularly so here, as the CID's demand for

[9] For the same reasons, ExxonMobil's statements at its 2014 annual shareholder meeting in Texas do not support jurisdiction, regardless of whether a Massachusetts investor attended. (Opp. 22-23.) As this Court has explained, "a defendant's actions outside the forum . . . d[o] not create sufficient contacts with the forum 'simply because he allegedly directed his conduct at plaintiffs whom he knew had [forum] connections." Fletcher Fixed Income Alpha Fund Ltd. v. Grant Thorton LLP, 89 Mass. App. Ct. 718, 722–23 (2016)(quoting Walden, 134 S. Ct. at 1125).

"all documents produced to the New York State Attorney General's Office" comprises only one of its 38 requests. (JA 110-11.) The other 37 categories present burdens that should be subject to a separate and distinct review for reasonableness.

The Attorney General also doubles down on the proposition that no CID is unreasonable unless it "seriously interfere[s] with the functioning of the investigated party." (Opp. 45.)[10] Yet Chapter 93A and precedent recognize a reasonableness requirement that directs courts to consider whether a CID is "unreasonable" or "exceed[s] reasonable limits." G.L. c. 93A, § 6(5); Matter of Yankee Milk, 372 Mass. 353, 357, 361 n.8 (1977). The CID has not yet been subject to a bona fide review for reasonableness. This Court should order that it be done.

C. The CID Is Arbitrary and Capricious

The pretexts offered by the Attorney General to justify her arbitrary and capricious issuance of the CID have grown ever more thin with time.[11] Even the

[10] The Attorney General relies on Attorney General v. Bodimetric Profiles, 404 Mass. 152, 159 (1989) to support this proposition. (Opp. 43 n. 40.) But the issue of burden was not properly before the court in Bodimetric, rendering the language merely dicta.

[11] The Attorney General concedes that the Superior

New York Attorney General has moved away from misrepresenting historical documents to make false claims about ExxonMobil's knowledge of climate change in the 1970s and 1980s.[12] But that is precisely what the Attorney General does here. (Opp. 9-12.) The ease with which that pretext has been debunked simply highlights the improper purpose animating the Attorney General's inquiry. (JA 924-26, 940-47.)

The Attorney General also gains little traction by relying on the New York Attorney General's parallel investigation——itself challenged in court proceedings ——to justify her actions here. (Opp. 42.) The existence of two improper investigations does nothing to reduce the arbitrary and capricious nature of either one.

D. The Attorney General Should Be Disqualified

The Attorney General's claim that her public statements about ExxonMobil were limited to "the claim [and] offense" of the investigation and the "identity" of the target cannot be credited. (Opp. 47.) ExxonMobil has described at length the impropriety of

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Court failed to identify any "belief," as required by M.G.L. c. 93A, § 6, that the Attorney General had for issuing a CID concerning potential deception of Massachusetts investors. (Opp. 42 n.39.)

[12] See supra note 2.

the Attorney General's public statements and the bias unmasked through those statements. (Br. 10-12, 42-46.) In her brief, the Attorney General inadvertently tips her hand further by admitting that she is investigating ExxonMobil for "hav[ing] distorted public perception about the risk of climate change." (Opp. 12.) No investigation brought in good faith and without bias can be centered on the target's participation in a public dialogue about policy.

III. CONCLUSION

The Attorney General has failed to carry her burden of establishing personal jurisdiction over ExxonMobil. In the absence of jurisdiction, the Superior Court had no authority to order ExxonMobil's compliance with the CID. While the Attorney General has attempted to pivot away from the concededly infirm basis identified by the Superior Court for finding jurisdiction, the grounds the Attorney General advances on appeal fare no better. The Superior Court's order should therefore be overturned. If further proceedings are required, the Court should remand with instructions to enter a stay pending the resolution of the federal litigation in New York.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
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I, Caroline K. Simons , hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

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Mass. R. A. P. 16(e) (references to the record);

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Mass. R. A. P. 16(h) (length of briefs);

Mass. R. A. P. 18 (appendix to the briefs); and

Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

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CERTIFICATE OF SERVICE

I, Caroline K. Simons, hereby certify that on June 14, 2017, two true and correct copies of the Petitioner-Appellant's Reply Brief were served on counsel of record in this case by hand.

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