COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

DAR-_____
Appeals Court No. 2021-P-0680

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff- Appellee,

v.

EXXON MOBIL CORPORATION,

Defendant- Appellant.

ON APPEAL FROM A DECISION
OF THE SUPERIOR COURT IN SUFFOLK COUNTY

APPLICATION FOR DIRECT APPELLATE REVIEW AND FOR EXPEDITED CONSIDERATION

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REQUEST FOR DIRECT APPELLATE REVIEW

Exxon Mobil Corporation's (ExxonMobil or Company) business operations--the extraction and production of fossil fuels--and consumer use of those products make it one of the largest sources of greenhouse gas emissions in the United States. It is also the world's largest investor-owned oil and gas company. The Company markets its securities to Massachusetts investors, which hold billions of dollars of the Company's shares, for themselves and their clients. ExxonMobil also markets its fossil fuel products to Massachusetts consumers at hundreds of ExxonMobil-branded Massachusetts service stations. After this Court upheld the Attorney General's right to investigate ExxonMobil for its climate change-related statements,[1] the Commonwealth sued the Company for violating Chapter 93A by deceiving Massachusetts investors about the existential threat climate change poses to the Company's economic survival and Massachusetts consumers about the fact that its fossil fuel products cause the devastating effects of climate change.

The Commonwealth asks this Court to grant this request for direct appellate review of ExxonMobil's appeal of the Superior Court's denial of its special motion to

[1] *Exxon Mobil Corp. v. Attorney General*, 479 Mass. 312 (2018) (transferred *sua sponte* from Appeals Court), *cert. denied sub nom.*, *Exxon Mobil Corp. v. Healey*, 139 S. Ct. 794 (2019).

dismiss the Commonwealth's amended complaint under G.L. c. 231, § 59H (the anti-SLAPP statute (strategic lawsuits against public participation)). It makes that request because of the importance of the issues and, in the interests of judicial economy and orderly litigation, the need to obtain prompt and final resolution of the issues presented so that its law enforcement action may fully proceed. ExxonMobil's misuse of the anti-SLAPP statute is just the latest in a series of spurious tactics, first to delay the Attorney General's investigation, and now to impede the Commonwealth's enforcement action. While the Superior Court correctly denied ExxonMobil's special motion based on settled law, this appeal also raises the novel, threshold question whether the anti-SLAPP statute applies to an enforcement action by the Attorney General on behalf of the Commonwealth to vindicate the public interest. Given the widespread attention on these proceedings, other defendants are likely to replicate ExxonMobil's vexatious misuse of the anti-SLAPP statute to, like ExxonMobil, delay and impede actions by the Commonwealth to enforce state law.

For those reasons and based on the important issues presented and the public interest, the Commonwealth requests that this Court expedite its consideration of this application and then grant it. *See Blanchard v. Steward Carney Hosp., Inc.*, 483 Mass. 200, 213 n.16 (2019) ("parties may seek leave of the appellate court

to expedite an interlocutory appeal" of the denial of an anti-SLAPP motion). And if this Court grants this application, the Commonwealth further requests that the Court schedule the matter for argument during the Court's earliest possible sitting. *See id.* Like ExxonMobil's efforts to forestall the underlying Chapter 93A investigation, *e.g.*, *Exxon Mobil*, 479 Mass. at 312-30, this appeal has unjustifiably delayed progress in the Superior Court. Given the gravity of the Commonwealth's claims and the public interests at stake, the time is long-past due for the Commonwealth's case to advance unhindered by ExxonMobil's repeated delay strategies.

PRIOR PROCEEDINGS

Following protracted litigation concerning the Attorney General's investigation of ExxonMobil's climate-change-related statements, *see infra* pp.11-13, on October 24, 2019, the Attorney General filed a civil complaint against ExxonMobil on behalf of the Commonwealth in Suffolk Superior Court. Add-36. There, the Commonwealth alleged that ExxonMobil violated, and continues to violate, Chapter 93A by deceiving Massachusetts investors about the risk climate change poses to the Company's viability and the value of its securities and to Massachusetts consumers about the fact that use of its fossil fuel products causes climate change.

On November 29, 2019, ExxonMobil removed the Commonwealth's action to the United States District Court

for the District of Massachusetts. Acting on the Commonwealth's remand motion, the court (Young, J.) remanded the case to the Suffolk Superior Court. *See Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 34 (D. Mass. 2020). ExxonMobil did not appeal.

On remand, the Commonwealth filed an amended complaint, refining and updating its allegations. Add-38.[2] On July 30 and August 5, 2020, ExxonMobil served two motions to dismiss. In its first "special" motion to dismiss, the Company invoked Massachusetts' anti-SLAPP statute (G.L. c. 231, § 59H) and argued that the Commonwealth's claims are based solely on ExxonMobil's petitioning activities. In its second motion to dismiss, the Company invoked Mass. R. Civ. P. 12(b)(2) and (6) and argued, among other things, that Massachusetts courts lack personal jurisdiction over it (even though this Court had already reached the opposite conclusion).

On June 24, 2021, the court (Green, J.) denied both motions. Add-41, 49. On August 17, 2021, ExxonMobil timely noticed an interlocutory appeal of the Superior Court's denial of its special motion to dismiss. *See Blanchard*, 483 Mass. at 212 (re-affirming right to interlocutory appeal of anti-SLAPP motion denial). The Appeals Court docketed the appeal on September 27, 2021.

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[2] The Commonwealth's amended complaint is available at: https://www.mass.gov/doc/june-5-2020-amended-exxon-complaint/download.

STATEMENT OF FACTS

The Attorney General is Massachusetts' "chief law officer" with a "common law duty to represent the public interest," *Sec'y of Admin. & Fin. v. Att'y Gen.*, 367 Mass. 154, 159, 163 (1975), and express authority to investigate, and to bring an action against, any person who she believes has engaged in practices that violate Chapter 93A. G.L. c. 93A, §§ 2(a), 4, 6; *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 88 (1984) ("The Attorney General is given specific power ... to enforce" Chapter 93A). Liability under Chapter 93A is broad, *Exxon Mobil*, 479 Mass. at 315, and can arise from half-truths and omissions, *Commonwealth v. AmCan Enter.*, 47 Mass. App. Ct. 330, 334 (1999). Marketing may, for example, "consist of a half-truth, or even may be true as a literal matter, but still create an over-all misleading impression through failure to disclose material information." *Exxon Mobil*, 479 Mass. at 320 (citation omitted).

On April 19, 2016, the Attorney General commenced an investigation of ExxonMobil's marketing and sale of securities to Massachusetts investors and its marketing and sale of its fossil fuel products to Massachusetts consumers. *Id.* at 313-14. Based on publicly released internal ExxonMobil documents, the Attorney General formed a belief that the Company may have engaged in a decades-long campaign to hide from consumers and investors its knowledge that using its fossil fuel products

would cause life-altering impacts on the earth's climate and that those impacts would threaten the Company's financial viability. *Id.* at 313. Fossil fuel products, including those that ExxonMobil markets to Massachusetts consumers, are responsible for "nearly half of U.S. energy-related carbon dioxide emissions (by far the dominant contributor to overall greenhouse gas emissions)." Am. Compl. ¶ 223. ExxonMobil is the largest publicly traded oil and gas company in the world, *id.* ¶ 1, and spent "*$56* million ... on climate-focused" brand marketing between 2015 and 2019 alone, *id.* ¶ 663.

In response, ExxonMobil sought to thwart the Attorney General's investigation at every turn. The Company sued the Attorney General in the United States District Court for the Northern District of Texas (transferred later to the Southern District of New York) and the Suffolk Superior Court to block enforcement of the Civil Investigative Demand (CID) the Attorney General issued to the Company as part of her investigation.[3] After protracted and resource intensive litigation in both courts where ExxonMobil claimed, among other things, that the Attorney General's CID was issued to

[3] *Exxon Mobil Corp. v. Maura Tracy Healey*, Civ. A. No. 4:16-CV-469 (N.D. Tex., filed June 15, 2016), *transferred to*, Civ. A. No. 17-cv-02301 (S.D.N.Y. Mar. 30, 2017), *appeal pending*, No. 18-1170 (2d Cir., argued Feb. 18, 2020); *In re Civil Investigative Demand No. 2016-EPD-36*, Civ. A. No. 16-1888F (Suffolk Super. Ct., filed June 16, 2016).

retaliate against ExxonMobil for expressing a viewpoint on climate change policy with which the Attorney General disagreed, the Attorney General ultimately prevailed.

The Southern District of New York found ExxonMobil's "allegations that the [Massachusetts and New York Attorneys General] are pursuing bad faith investigations ... to violate Exxon[Mobil]'s constitutional rights ... implausible," *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 686-87 (S.D.N.Y. 2018), and its contention that the Attorneys General had an intent to chill the Company's speech a "wild stretch of logic," *id.* at 689. The Court also described ExxonMobil's requested relief as "extraordinary," and, accordingly, characterized the Company's action as "running roughshod over the adage that the best defense is a good offense." *Id.* at 686. This Court likewise confirmed that the Attorney General's investigation was not based "solely" on a "pretext" to violate the ExxonMobil's constitutional rights or any "actionable bias." *Exxon Mobil*, 479 Mass. at 327-28.

Undeterred by ExxonMobil's litigation tactics, the Attorney General continued her investigation through other means. Am. Compl. ¶¶ 3-4. Following that investigation, during which ExxonMobil used (and continues to use) the shield of its still pending federal appeal to avoid producing any documents, the Attorney General, on October 10, 2019, notified ExxonMobil that she intended

to sue the Company for violating, and continuing to violate, Chapter 93A. *See* G.L. c. 93A, § 4. In response, ExxonMobil filed an emergency motion to delay the filing of the complaint--a motion that the Superior Court (Brieger, J.) denied as lacking "any statutory authority whatsoever." Tr. of Mot. Hr'g at 28:7, *In re Civil Investigative Demand No. 2016-EPD-36*, C.A. No. 16-1888-F (Suffolk Super. Ct. Oct. 24, 2019). ExxonMobil did not seek review of that ruling.

On October 24, 2019, the Attorney General filed a complaint on behalf of the Commonwealth against ExxonMobil for violating, and continuing to violate, Chapter 93A. Rather than face the Attorney General's serious investor and consumer deception allegations in state court, ExxonMobil removed the case to the District of Massachusetts even though the Commonwealth had alleged only state-law Chapter 93A claims. The District of Massachusetts (Young, J.) rejected all of ExxonMobil's removal arguments. *Massachusetts*, 462 F. Supp. 3d at 34. In doing so, the court agreed that the "Commonwealth's analogy to the tobacco industry ... is apt," and found that "[c]ontrary to ExxonMobil's caricature of the complaint," the Commonwealth had alleged "only corporate fraud." *Id.* at 43-44. "The complaint," the court continued, "alleges that ExxonMobil hid or obscured the scientific evidence of climate change and thus duped its investors about the long-term health of its corporation

and defrauded consumers of its fossil fuel products." *Id.* at 43.

With ExxonMobil's latest litigation tactic derailed, on June 5, 2020, the Attorney General filed a three-count, two-hundred page amended complaint in Suffolk Superior Court detailing ExxonMobil's violations of Chapter 93A. There, the Commonwealth alleges that ExxonMobil has known for decades that its fossil fuel products cause climate change, Am. Compl. ¶¶ 69-114, climate change could be "catastrophic" for a "substantial fraction of the earth's population," *id*. ¶ 96, "major reductions" in fossil fuel use would be required to mitigate those climate change effects, *id.* ¶ 107; *see also id.* ¶¶ 77, 95, 108, 112-13 (similar statements), and such mitigation efforts and climate change effects themselves pose a serious threat to the survival of its business and systemic risks to the economy, *id.* ¶¶ 72, 75, 83, 90, 101. Despite that knowledge, ExxonMobil decided to hide the truth from Massachusetts investors "about the material climate-driven risks to its business," and from Massachusetts consumers "about how its fossil fuel products cause climate change" in an effort "to increase its short-term profits [and] stock price and access to capital." *Id.* ¶ 1.

As the Superior Court found, the Commonwealth's three claims are based both on ExxonMobil's failure to disclose material information to Massachusetts investors

and consumers and its deceptive statements to Massachusetts investors and consumers. Add-43-44, 46-48. In its investor claim (count I), the Commonwealth alleges, for example, that ExxonMobil has repeatedly informed investors that it "will face virtually no meaningful ... risks from climate change." Am. Compl. ¶ 497. In its first consumer claim (count II), the Commonwealth alleges, for example, that ExxonMobil markets its gasoline to Massachusetts consumers as being "engineered for: [b]etter gas mileage" and "[l]ower emissions" and being "2X Cleaner." *Id.* ¶ 595 (quotations omitted); *see also, e.g., id.* ¶ 589. And in its second consumer claim (count III), the Commonwealth alleges, for example, that ExxonMobil has perpetrated a years-long "greenwashing" campaign through, among other things, its "Protect Tomorrow. Today," brand-marketing campaign, which portrays the Company as working to protect the environment, *id.* ¶¶ 639-44, while, in fact, it is "ramp[ing] up [its] fossil fuel exploration, development, and production activities," *id.* ¶ 650, *see also id.* ¶¶ 659, 693.

The Superior Court (Green, J.) denied both ExxonMobil's anti-SLAPP special motion to dismiss, Add-41, and its Rule 12(b)(2) and 12(b)(6) motion to dismiss, Add-49. In its Rule 12(b) decision, the Court found, once again, that Massachusetts courts may exercise personal jurisdiction over ExxonMobil, Add-55-63, and then held that the Commonwealth has alleged sufficient facts to

plausibly suggest an entitlement to relief on each of its three Chapter 93A claims, Add-64-74. With respect to ExxonMobil's special motion to dismiss, the court did not address the important legal question whether the anti-SLAPP statute applies to claims brought by the Attorney General on behalf of the Commonwealth to enforce Massachusetts law. Add-44 n.3. Instead, the court held that the Company "failed to meet its threshold burden" to "show[] that the Commonwealth's claims are based *solely* on Exxon[Mobil]'s petitioning activities." Add-44. First, it found that the Commonwealth's claims are based, in part, on ExxonMobil's omissions (i.e., the Company's failure to disclose material information to investors and consumers) and that the anti-SLAPP statute applies only to affirmative statements, not omissions. Add-44-45. Second, it found that the Commonwealth's claims are also based, in part, on ExxonMobil's statements seeking to "influenc[e]" investors and consumers' investment and purchasing choices (i.e., the statements have a commercial purpose) and thus do not constitute petitioning. Add-47-48. ExxonMobil's appeal of that decision is the subject of this application.

ISSUES OF LAW RAISED BY THE APPEAL

The Commonwealth seeks direct appellate review of two issues that were properly raised and preserved in the Superior Court:

1. Whether the anti-SLAPP statute applies to a law enforcement action brought by the Attorney General on behalf of the Commonwealth based on her common law and statutory authority to protect and promote the public interest?

2. Whether the Superior Court decided correctly that the Commonwealth's Chapter 93A claims are not "based solely" on ExxonMobil's petitioning where those claims are based on material omissions and commercial marketing intended to influence investor and consumer decisions?

ARGUMENT

ExxonMobil's appeal will present two issues for resolution: the novel question whether the anti-SLAPP statute even applies to actions brought by the Attorney General, and whether, if it does, the Superior Court erred in denying ExxonMobil's motion to dismiss. The Superior Court did not reach the first, novel question because the court correctly discerned that it was clear that, even if the statute does apply, ExxonMobil's special motion to dismiss should be denied under this Court's precedents. However, the predicate question whether the statute even applies at all undoubtedly

presents a "novel" issue of "such public interest" that it warrants resolution by this Court, Mass. R. App. P. 11(a), and that issue should be resolved in the Attorney General's favor. So too does the public interest warrant this Court's expeditious rejection of ExxonMobil's appeal under the settled anti-SLAPP standard in order that this important case, so long delayed by ExxonMobil's vexatious litigation strategy, not be further delayed any longer than necessary.

I. The Anti-SLAPP Statute Does Not Apply to Civil Actions Filed by the Attorney General on Behalf of the Commonwealth to Enforce State Law.

The anti-SLAPP statute's text, purpose, and context demonstrate that the Legislature did not intend for the law to apply to law enforcement actions by the Attorney General on behalf of the Commonwealth to vindicate the public interest. Indeed, "[t]he circumstances presented here are just the type of 'wholly different circumstances' to which the anti-SLAPP statute was not meant to, and does not, apply." *In re Hamm*, 487 Mass. 394, 398-99 (2021) (citation omitted). By all accounts, the Legislature, in 1994, enacted the anti-SLAPP statute to counteract a "disturbing increase in [meritless] lawsuits," 1994 House Doc. No. 1520 (preamble), "brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so," *Duracraft Corp. v. Holmes Prods.*

Corp., 427 Mass. 156, 161 (1998).[4] The Attorney General, of course, is not a "large private interest," and ExxonMobil is not a "common citizen"; instead, it is a defendant in a serious law enforcement matter.

This case thus presents yet another instance where this Court should narrow the anti-SLAPP statute's "problematic sweep," *Blanchard v. Steward Carney Hosp., Inc.*, 477 Mass. 141, 159 (2017), to eliminate its misuse as a device to delay law enforcement actions like this one. *See People v. Health Labs. of N. Am.*, 87 Cal. App. 4th 442, 451 (2001) ("False advertising enforcement actions could be particularly susceptible to delay by the moving manufacture's easy assertion [in an anti-SLAPP motion] that the prosecutor's action interfered with its" First Amendment rights).[5] Indeed, this is not the first time a party has used the anti-SLAPP statute to try to thwart an enforcement action by the Commonwealth, but it should be the last. *Commonwealth v. Commonwealth Tank, Inc.*, Civ. A. No. 17-2306-D (Suffolk Super. Ct. Nov. 13, 2017) (denying special motion to dismiss environmental

[4] As this Court stated in *Duracraft*, "[o]ne lawsuit" between *private* parties "appears to have been the impetus for introduction of the anti-SLAPP legislation." 427 Mass. at 161.

[5] Unlike § 59H, California's law excludes "enforcement action[s] brought in the name of the people of ... California," Cal. Civ. Proc. § 425.16(d), but that exclusion was added only "to confirm the existence of the prosecutorial exemption assumed by the [statute's] drafters," *City of Long Beach v. Cal. Citizens for Neighborhood Empowerment*, 111 Cal. App. 4th 302, 307 (2003).

enforcement action). Given this case's public nature,[6] defendants, like ExxonMobil here, will undoubtedly invoke the statute to impede actions by the Commonwealth to enforce Massachusetts remedial statutes like Chapter 93A absent a ruling from this Court that the anti-SLAPP statute simply does not apply to such actions.

A sound textual basis supports such an interpretation. First, the Legislature carved out an express role for the Attorney General to further the anti-SLAPP statute's purpose--aiding a defendant in its defense against a SLAPP suit--and that is the only reference to the Attorney General in the statute. G.L. c. 231, § 59H; *see also Beeler v. Downey*, 387 Mass. 609, 616 (1982) ("language should not be implied" where it is "employed ... in one paragraph, but not in another"). Second, by contrast, the Legislature authorized a "party" to file a "special motion to dismiss" only the other "party['s] claims against it, G.L. c. 231, § 59H, and it is settled that, absent an express statement, generic terms like party, person, and whoever do not encompass the State, *e.g.*, *Hanson v. Commonwealth*, 344 Mass. 214, 219 (1962).[7]

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[6] *E.g.*, Erik Larson, *Exxon Seeking Dismissal of Massachusetts AG's Climate Lawsuit*, Bloomberg, Aug. 4, 2020, https://tinyurl.com/vabb979x.

[7] *See also Bretton v. State Lottery Comm'n*, 41 Mass. App. Ct. 736, 738-39 (1996) (state commission not subject to suit where statute "contains no explicit indication that governmental entities" come within "its provisions"); *compare* G.L. c. 161C, § 6 (defining term "party" to include the Commonwealth).

Third, the Legislature authorized a party who prevails on a special motion to dismiss to recover its "costs and reasonable attorney's fees," G.L. c. 231, § 59H, but it did not also *expressly*, as this Court's opinions require, authorize a prevailing party to recover attorney's fees from the Commonwealth, *Judge Rotenberg Educ. Ctr. v. Comm'r of the Dep't of Mental Retardation*, 424 Mass. 430, 470 (1997). Those textual clues all point in one direction: the Legislature did not intend § 59H to apply to law enforcement actions by the Commonwealth.

The anti-SLAPP statute's purpose points in that direction too. Again, the Legislature enacted the statute to create a device for the quick, inexpensive dismissal of meritless lawsuits filed by large private interests "to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *In re Hamm*, 487 Mass. at 397 (quotations omitted). The Attorney General is not a large private interest; she is the Commonwealth's chief law enforcement officer with a "common law duty to represent the public interest," *Sec'y of Admin. & Fin.*, 367 Mass. at 163, and broad discretion to decide when, and against whom, to enforce state law, *Shepard v. Att'y Gen.*, 409 Mass. 398, 401 (1991). And by statute, the Attorney General is authorized to bring an action whenever she has reason to believe a person has violated Chapter 93A. G.L. c. 93A, § 4; *Exxon Mobil*, 479 Mass. at 323 ("a

manifest interest in enforcing [] c. 93A"). Application of the anti-SLAPP statute to such enforcement actions, as this case illustrates, impairs "the performance of a core executive constitutional function." *See United States v. Armstrong*, 517 U.S. 456, 465 (1996). Indeed, it eviscerates the "presumption of regularity" that attaches to such actions. *Id.* at 464; *see Commonwealth v. Bernardo B.*, 453 Mass. 158, 167 (2009). That, of course, is the exact type of "absurd result" that this Court has counseled against, especially where, as here, it is contrary to "the Legislature's intent." *Conservation Comm'n of Norton v. Pesa*, 488 Mass. 325, 332 (2021).

Finally, there are other indicia that support the Commonwealth's interpretation too. First, the federal and Massachusetts constitutions do not bar "*private* abridgement of speech." *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019); *Commonwealth v. Hood*, 389 Mass. 581, 584-85 (1983). For that reason, the Legislature described the evil it sought to remedy with the anti-SLAPP statute--"lawsuits brought primarily to chill the valid exercise of" First Amendment rights --only as "*disfavored,*" not unconstitutional. 1994 House Doc. No. 1520 (preamble) (emphasis added). The anti-SLAPP statute thus extends a remedy that was already

available against the government to *private* parties.[8] Second, such an interpretation would constitute a logical extension of *In re Discipline of an Att'y*, 442 Mass. 600 (2004). While this precise issue was not presented there, this Court has summarized the attorney's attempted use of the anti-SLAPP statute to dismiss the disciplinary charges against him (like a government enforcement action) as "improper[]." *Blanchard*, 477 Mass. at 160 n.26. Third, such an interpretation is consistent with the Maine Supreme Judicial Court's interpretation of Maine's materially identical anti-SLAPP statute in *Town of Madawaska v. Cayer*, 103 A.3d 547 (Me. 2014). There, the Court held that Maine's anti-SLAPP statute cannot "be invoked to thwart a ... government enforcement action commenced to address [a] defendant['s] alleged violations of law." *Id.* at 548.

Here, "all roads lead to Rome:" the statute's text, its purpose, its context, and other indicia "point unerringly in the same direction," *Alphas Co. v. William H. Kopke, Jr., Inc.*, 708 F.3d 33, 38 (1st Cir. 2013)--the statute does not apply to law enforcement actions by the Attorney General on behalf of the Commonwealth.

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[8] ExxonMobil is well-aware of the actual mechanisms for raising a First Amendment claim or defense in response to a purportedly unconstitutional *government* action. Indeed, it has already done so and lost. *E.g.*, *Exxon Mobil*, 316 F. Supp. 3d at 691 (summarizing ExxonMobil's 42 U.S.C. § 1983 constitutional tort claims (including First Amendment) against Attorney General).

II. The Commonwealth's Chapter 93A Claims Are, In Any Event, Not Based Solely on ExxonMobil's Purported Petitioning.

Even if the anti-SLAPP statute were to apply to an action by the Commonwealth to enforce state law, ExxonMobil's special motion to dismiss, as the Superior Court held, stumbles immediately on the merits-based threshold inquiry. This Court has established a now-familiar two-stage burden shifting framework for deciding a special motion to dismiss. In the first stage--the only stage necessary to consider here--the "special movant must demonstrate [by a preponderance of the evidence] that the non-moving party's claims are *solely based* on [the moving party's] ... petitioning activities." *Blanchard*, 477 Mass. at 159 (emphasis added); *see also Blanchard*, 483 Mass. at 203. That is, the moving party must show that the "nonmoving party's claim itself arises only from and complains only of [the moving party's] ... petitioning activity." *Blanchard*, 477 Mass. at 160 n.25. That, as the Superior Court held, Add-47-48, ExxonMobil cannot do here.[9]

The three actual claims in the Commonwealth's amended complaint could not be clearer on this point notwithstanding ExxonMobil's attempts to mischaracterize them. *See Massachusetts*, 462 F. Supp. 3d at 38, 43-

[9] Indeed, that conclusion is unassailable here where the Superior Court also held in a separate decision that the Commonwealth has alleged sufficient facts to plausibly suggest an entitlement to relief on each of its three Chapter 93A claims. Add-50, 65-75.

44 (rejecting ExxonMobil's characterization of complaint). In count I, the Commonwealth alleges that ExxonMobil has, in violation of Chapter 93A, misrepresented and failed to disclose material facts with respect to systemic climate change to Massachusetts investors. Amend. Compl. ¶¶ 734-46. That claim is based on ExxonMobil's communications to Massachusetts investors. For example, the Commonwealth alleges that the Company has represented to investors that it will "face virtually no meaningful transition risks from climate change because aggressive regulatory action is unlikely, renewable energy sources are uncompetitive, and fossil fuel demand and investment will continue to grow. *Id.* ¶ 497; *see id.* ¶¶ 506, 510, 606. And the Commonwealth alleges that ExxonMobil representatives have made such representations at meetings in Boston with Massachusetts investors. *Id.* ¶¶ 463-65. The Commonwealth's investor claim thus focuses on ExxonMobil's "ongoing communications with Massachusetts investors," not petitioning. *Id.* ¶ 737.

In count II, the Commonwealth alleges that ExxonMobil has, in violation of Chapter 93A, deceived Massachusetts consumers by misrepresenting the purported environmental benefit of using its Synergy™ and "Green" Mobil 1™ products and failing to disclose to Massachusetts consumers the fact that using its products causes climate change. Amend. Compl. ¶¶ 747-60. The Commonwealth's consumer deception claim is based on what

ExxonMobil communicates to Massachusetts consumers through its promotional marketing, including at its Massachusetts ExxonMobil-branded service stations, *id.* ¶¶ 549, 569, 608, 616-17, its consumer-facing Rewards+ app, *id*. ¶¶ 561, 593-95, and its consumer-directed promotional website, *id.* ¶¶ 593, 595. With those materials, ExxonMobil tells Massachusetts consumers that using its fossil fuel products will "reduce greenhouse gas emissions," *id.* ¶¶ 587-88; boost "environmental performance," *id.* ¶ 587; and help consumers "reduce their emissions," *id*. ¶ 592. But ExxonMobil is actually increasing fossil fuel production, *id.* ¶ 598, and planning to contribute to a projected $21 *trillion* in oil and gas investment globally through 2040, *id.* ¶ 605. The Commonwealth's consumer claim thus also focuses on ExxonMobil's "marketing" communications to Massachusetts consumers, not petitioning. *Id.* ¶ 752-53.

In count III, the Commonwealth alleges that ExxonMobil has, in violation of Chapter 93A, deceived Massachusetts consumers through false and misleading greenwashing brand-marketing campaigns, Am. Compl. ¶¶ 761-70,[10] which falsely and misleadingly promote the

[10] "Greenwashing" is a type of falsehood disseminated by a company to present an environmentally responsible image that contradicts its true environmental record and impact, Am. Compl. ¶ 634, and is used as a marketing strategy to induce consumer product purchases and build brand loyalty. *See Jordan v. Jewel Food Stores*, 743 F.3d 509, 518 (7th Cir. 2014) (advertisement "no less

Company's "leadership in solving the problem of climate change, support of action to reduce greenhouse gas emissions, and focus on developing clean energy to 'protect tomorrow today,'" *id.* ¶ 762. The Commonwealth's greenwashing claim is based on what ExxonMobil communicates to Massachusetts consumers through its promotional marketing campaigns. For example, the Commonwealth alleges that ExxonMobil's "Protect Tomorrow. Today" brand marketing campaign falsely proclaims its commitment to "protect the environment for future generations," *id.* ¶ 643, while failing to disclose the facts that production and use of its fossil fuel products is a leading cause of climate change that, if unabated, will condemn future generations to catastrophe, *id.* ¶¶ 90, 96, 105. The Commonwealth's greenwashing claim too thus focuses on ExxonMobil's "advertising and promotional materials directed to Massachusetts consumers," not petitioning. *Id.* ¶ 766

Again, the "key inquiry here is whether 'the *only* conduct complained of is ... [ExxonMobil's] petitioning activity.'" *477 Harrison Ave, LLC v. Jace Boston, LLC*, 477 Mass. 162, 168 (2017). ExxonMobil cannot satisfy that standard because, as the Superior Court rightly found, the Commonwealth's claims are based, in part, on

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'commercial' because it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific product or service").

ExxonMobil's material *omissions*, which are not covered by the anti-SLAPP statute at all. Add-44-45. And, even if that were not so, ExxonMobil also cannot show that the Commonwealth's claims are solely based on its petitioning, as the foregoing examples demonstrate. Indeed, none of those statements can even fairly be described as petitioning. Instead, as the Superior Court also correctly found, the foregoing statements were intended to achieve a commercial goal: (i) convincing Massachusetts investors to purchase and hold ExxonMobil securities; (ii) inducing Massachusetts consumers to buy ExxonMobil fossil-fuel products; and (iii) building brand-loyalty among Massachusetts consumers to increase its sales. *See id.* Thus, if the Court disagrees with the Commonwealth on the first question, which it should not for the reasons stated, then it should still clearly affirm.

STATEMENT OF REASONS WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

Two reasons justify direct appellate review:

i. First, this appeal presents a "novel question[] of law which should be submitted for final determination to" this Court. Mass. R. App. P. 11(a)(1). And the answer to that question is not only important to this case but, more broadly, to the interrelationship, if any, between the Attorney General's exercise of her constitutional duty to enforce the laws of the Commonwealth to vindicate the public interest and a private party's right to invoke

the anti-SLAPP statute to dismiss a lawsuit designed to chill its right to petition the government. The highly publicized nature of this case makes it nearly certain that other defendants will replicate ExxonMobil's litigation tactic and greatly impede law enforcement actions by the Commonwealth--with deleterious effects--if that question is not put to rest in this case.

ii. Second, this appeal presents issues "of such public interest that justice requires a final determination by" this Court. Mass. R. App. P. 11(a)(3). Indeed, that may well be why this Court took, *sua sponte*, ExxonMobil's prior appeal of the decision rejecting its attempt to quash the Attorney General's investigative CID. *Exxon Mobil*, 479 Mass. at 313. In any event, not much more needs to be said: (a) ExxonMobil, the world's largest investor-owned fossil fuel company and one of the United States' largest greenhouse gas emitters, has invoked a statute designed to protect common citizens from meritless private lawsuits; (b) it has done so not to dismiss a SLAPP suit but a suit by the state's chief law officer seeking to hold it accountable for deceiving Massachusetts investors and consumers; and (c) the deception concerns the risk climate change poses to its business' viability and the climate-change causing effects of using its chief product--fossil fuel. Indeed, that test would be satisfied if this case were just about the "grave threat[]" of "climate change." *New England*

Power Generators Ass'n v. Dep't of Envtl. Prot., 480 Mass. 398, 399 (2018), which "threatens our planet and all its people, including those in Massachusetts, with intolerable disaster," *Massachusetts*, 462 F. Supp. 3d at 36. The fact that it concerns unlawful deception by the largest investor-owned fossil fuel company *about* climate change makes that conclusion undeniable.

CONCLUSION

For the foregoing reasons, the Court should expedite its consideration of this application for direct appellate review and grant it.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS

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Attorney General

/s/ Seth Schofield

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October 6, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the rules of court that pertain to the filing of briefs, including Mass. R. App. P. 11 (application for direct appellate review), Mass. R. App. P. 16(e) (references to the record), Mass. R. App. P. 20(a) (form and length of briefs, appendices, and other papers), Mass. R. App. P. 21 (redaction), and

2. This brief complies with the format and type-volume limitations of Mass. R. App. P. 11(b) and Mass. R. App. P. 20 because the brief has been prepared in a monospaced font using Microsoft Word with 12-point, Courier New-style font, and the argument section consists of not more than 10 pages of text, excluding the parts of the application exempted by Mass. R. App. P. 11(b).

Dated: October 6, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2021, I served the Application of the Plaintiff-Appellee Commonwealth of Massachusetts for Direct Appellate Review and for Expedited Consideration by the Electronic Filing System and electronic mail on:

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Counsel of Record for ExxonMobil Corporation

Dated: October 6, 2021

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ADDENDUM

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- Open
- File Date
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- DCM Track:
- B - Special Track (BLS)
- Initiating Action:
- Actions Involving Business Entities and Government
- Status Date:
- 03/25/2020
- Case Judge:
-
- Next Event:
-

All Information | Party | Event | Tickler | Docket | Disposition

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10/24/2019	Attorney appearance On this date Shennan Alexandra Kavanagh, Esq. added for Plaintiff Commonwealth of Massachusetts		
10/24/2019	Attorney appearance On this date I. Andrew Goldberg, Esq. added for Plaintiff Commonwealth of Massachusetts		
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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1984CV03333-BLS1

Notice Sent
06.23.21
TCF
CC+Opc
DJT
TVWJ
TA
BDC
SAlc
CGC
MQB
TSR
GSC
MAH
AAG
RT
JAS
AAG
SS
LAG
MD

COMMONWEALTH OF MASSACHUSETTS

vs.

EXXON MOBIL CORPORATION

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S SPECIAL MOTION TO DISMISS THE AMENDED COMPLAINT

The Commonwealth of Massachusetts, by its Attorney General ("Commonwealth"), sued Exxon Mobil Corporation ("Exxon") for alleged violations of G.L. c. 93A. The Commonwealth claims that Exxon has violated c. 93A by: (1) misrepresenting and failing to disclose material facts regarding systemic climate change risks to Massachusetts investors (Count I); (2) misrepresenting the purported environmental benefit of using its Synergy™ and Mobil 1™ products and failing to disclose the risks of climate change caused by its fossil fuel products to Massachusetts consumers (Count II); and (3) promoting false and misleading "greenwashing" campaigns to Massachusetts consumers (Count III).

The matter is now before me on Exxon's Special Motion to Dismiss pursuant to the anti-SLAPP ("Strategic Litigation against Public Participation") statute, G.L. c. 231, § 59H. After a hearing and for the reasons that follow, Exxon's motion is **DENIED**.

DISCUSSION

The Massachusetts Legislature enacted the anti-SLAPP statute to counteract "SLAPP" suits, defined broadly as "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *Duracraft Corp.* v. *Holmes Prods. Corp.*, 427 Mass. 156, 161 (1998) (objective of SLAPP suit is not to

win, but to use litigation to intimidate opponents' exercise of rights of petitioning and speech). Generally, a SLAPP suit has no merit. See *Cadle Co.* v. *Schlichtmann*, 448 Mass. 242, 248 (2007).

The anti-SLAPP statute protects "a party's exercise of its right of petition." G.L. c. 231, § 59H. In relevant part, it provides:

> In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss.

That definition makes clear that "'the statute is designed to protect overtures to the government by parties petitioning in their status as citizens .... The right of petition contemplated by the Legislature is thus one in which a party seeks some redress from the government.'" *Fustolo* v. *Hollander*, 455 Mass. 861, 866 (2010), quoting *Kobrin* v. *Gastfriend*, 443 Mass. 327, 332-333 (2005). The anti-SLAPP statute defines "a party's exercise of its right to petition" as:

> [1] any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; [2] any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; [3] any statement reasonably likely to encourage consideration or review of an issue by a legislative executive, or judicial body or any other governmental proceeding; [4] any statement reasonably likely to enlist public participation in an effort to effect such consideration; or [5] any other statement falling within constitutional protection of the right to petition government.

G.L. c. 231, § 59H. For the purposes of § 59H, "[p]etitioning includes all 'statements made to influence, inform, or at the very least, reach governmental bodies—either directly or indirectly.'" *North American Expositions Co. Ltd. Partnership* v. *Corcoran*, 452 Mass. 852, 862 (2009), quoting *Global NAPS, Inc.* v. *Verizon New England, Inc.*, 63 Mass. App. Ct. 600, 605 (2005).

As the moving party, Exxon, which alleges it has been the target of a SLAPP suit, first must show, by a preponderance of the evidence, that each claim it challenges is "solely based on

[Exxon's] own petitioning activities." *Blanchard* v. *Steward Carney Hosp., Inc.*, 483 Mass. 200, 203 (2019); *Duracraft Corp.*, 427 Mass. at 167-168 (moving party must show that claims against it are based on its petitioning activities alone and have no substantial basis other than or in addition to petitioning activities); *Blanchard* v. *Steward Carney Hosp., Inc.*, 477 Mass. 141, 148 (2017) (as part of threshold burden, moving party must show that conduct complained of constitutes exercise of its right to petition). If Exxon fails to show that the only conduct about which the Commonwealth complains is petitioning activity, the court must deny the special motion to dismiss. See *Benoit* v. *Frederickson*, 454 Mass. 148, 152 (2009).[1]

If Exxon satisfies its threshold burden, then the burden shifts to the Commonwealth to demonstrate that G.L. c. 231, § 59H does not require dismissal of its claims. See *477 Harrison Ave., LLC* v. *JACE Boston, LLC*, 483 Mass. 514, 516 (2019). The Commonwealth can do so in one of two ways. First, it can establish, by a preponderance of the evidence, that "[Exxon's] exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and ... [its] acts caused actual injury to the [Commonwealth]." G.L. c. 231, § 59H. Alternatively, it can establish, "such that the motion judge can conclude with fair assurance," that each of the Commonwealth's claims is not a "'meritless'" SLAPP suit, *i.e.*, that it is both colorable and non-retaliatory. *477 Harrison Ave., LLC*, 483 Mass. at 516, 518-519, citing *Blanchard*, 477 Mass. at 159-160. If the Commonwealth does not meet its burden, the court must grant the special motion to dismiss. G.L. c. 231, § 59H.

In Count I, the conduct complained of is Exxon's alleged misrepresentation of and failure to disclose material facts regarding systemic climate change risks to Massachusetts investors. In

[1] Contrary to the Commonwealth's suggestion, *see* Commonwealth's Opposition at page 11, I may not "pass over" this threshold inquiry. A court should apply the augmented *Duracraft* framework sequentially. *477 Harrison Ave., LLC* v. *JACE Boston, LLC*, 483 Mass. 514, 515, 519 (2019).

Count II, it is Exxon's alleged misrepresentation of the purported environmental benefit of consumer use of its Synergy™ and Mobil 1™ products and failure to disclose the risks of climate change caused by its fossil fuel products to Massachusetts consumers. Count III complains of Exxon's promotion of allegedly false and misleading "greenwashing" campaigns designed to "convey a false impression that [it] is more environmentally responsible than it really is, and so to induce consumers to purchase its products." Amended Complaint, ¶ 540.

Exxon argues that its statements to investors constitute petitioning activity because they ""were issued in a manner that was likely to influence or, at the very least, reach' regulators and 'members of the public wishing to weigh in' on climate policy." Motion, page 14, quoting *Blanchard*, 477 Mass. at 151. Exxon also contends that its public statements regarding its Synergy™ and Mobil 1™ products constitute petitioning activity because, "at a minimum, this speech was intended and reasonably likely to 'enlist the participation of the public' in the [climate] policy debate at the heart of the Attorney General's lawsuit." Motion, page 15. Finally, Exxon argues that the statements the Commonwealth labels as "greenwashing" are actually its "advocacy of climate policy choices under consideration by various government and regulating bodies." Motion, page 16.[2]

Exxon has failed to meet its threshold burden of showing that the Commonwealth's claims are based *solely* on Exxon's petitioning activities.[3] As an initial matter, Exxon has

[2] Exxon does not specify in its papers which definition of § 59H applies to qualify its statements as "exercise[s] of its right of petition." When asked to do so during the hearing, Exxon responded that it relies on all of them.

[3] The parties disagree whether the anti-SLAPP statute applies to civil enforcement actions brought by the Attorney General on the Commonwealth's behalf. Because Exxon has not met its initial burden of showing that the Commonwealth's claims against it are based solely on its petitioning activities, I need not reach this issue.

entirely failed to explain how any of the omissions alleged by the Commonwealth as violating c. 93A qualify as petitioning protected by § 59H, which applies only to "statements."[4]

With respect to statements on which the Commonwealth relies, the mere fact "[t]hat a statement concerns a topic that has attracted governmental attention, in itself, does not give that statement the [petitioning] character contemplated by the statute." *Global NAPs, Inc.*, 63 Mass. App. Ct. at 605. Further, although a commercial motive may not preclude a finding that speech constitutes protected petitioning activity, it "may provide evidence that particular statements do not constitute petitioning activity." *Fustolo*, 455 Mass. at 870 & n.11, citing *North Am. Expositions Co. Ltd. Partnership*, 452 Mass. at 863. For example, speech that is intended to achieve a purely commercial result, such as increasing demand for one's products or services, is not protected petitioning activity. See *Cadle Co.*, 448 Mass. at 250-254 (defendant lawyer's publication of statements on website, allegedly to share with public information about company's allegedly unlawful business practices, which he previously provided to regulatory officials and courts, did not constitute petitioning activity where he "created the Web site, at least in part, to generate more litigation to profit himself and his law firm"); *Ehrlich* v. *Stern*, 74 Mass. App. Ct. 531, 540-542 (2009). The court considers statements in the context in which they were made in determining whether they are protected petitioning. See *Wynne* v. *Creigle*, 63 Mass. App. Ct. 246, 253 (2005).

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[4] In its complaint, the Commonwealth alleges not only misrepresentations by Exxon, but also failures to disclose information that the Commonwealth contends would be relevant to Massachusetts investors and consumers. For example, ¶ 18 of the Amended Complaint states: "In its communications with investors, including [Exxon's] supposed disclosures about climate change, ... ExxonMobil has failed to disclose the full extent of the risks of climate change to the world's people, the fossil fuel industry, and [Exxon]." Further, "[i]n its marketing and sales of ExxonMobil products to Massachusetts consumers, ... ExxonMobil likewise has failed ... to disclose in those advertisements and promotional materials that the development, refining, and normal consumer use of ExxonMobil fossil fuel products emit large volumes of greenhouse gases, which are causing global average temperatures to rise and destabilizing the global climate system." *Id.* at ¶ 33; see also ¶ 538.

Climate change indisputably is a topic that has attracted governmental attention. And, indeed, some Exxon statements referenced in the complaint constitute protected petitioning within the scope of § 59H because they were made "in connection with an issue under consideration or review by a legislative, executive, or judicial body" and/or "to encourage consideration or review of an issue by a legislative executive, or judicial body or any other governmental proceeding." However, Exxon cannot "obtain dismissal through an anti-SLAPP motion just because *some* of the allegations in the complaint are directed at conduct by the defendants that constitutes petitioning activity." *Haverhill Stem LLC* v. *Jennings*, 99 Mass. App. Ct. 626, 634 (2021). Rather, Exxon must show "that the complaint, fairly read, is based *solely* on petitioning, and to that end the allegations need to be carefully parsed even within a single count." *Id.* (emphasis in original). It is apparent from the context in which they were made that many Exxon statements referenced in the complaint are not protected. See *Cadle Co.*, 448 Mass. at 250 (attorney published statements "not as a member of the public who had been injured by ... alleged practices, but as an attorney advertising his legal services").[5]

Review of a just a few of the Commonwealth's allegations suffices to demonstrate that each of its claims is not based *solely* on Exxon's petitioning activities. First, with respect to Count I, the Commonwealth alleges that Exxon has consistently represented *to investors* that it will "face virtually no meaningful transition risks from climate change because aggressive regulatory action is unlikely, renewable energy sources are uncompetitive, and fossil fuel demand and investment will continue to grow." Amended Complaint, ¶ 497. As an example,

[5] As an example, Exxon's "lobbying efforts" are arguably protected petitioning activities. But the anti-SLAPP inquiry produces an all or nothing result as to each count of the complaint. *Ehrlich*, 74 Mass. App. Ct. at 536. "Either [a] count survives the anti-SLAPP inquiry or it does not, and the statute does not create a process for parsing counts to segregate components that can proceed from those that cannot." *Id.* (citations omitted).

the Commonwealth alleges that, in its 2019 Energy and Carbon Summary issued *to investors*, Exxon modeled a scenario where global temperatures would increase by 2 degrees Celsius. Amended Complaint, ¶ 506. Exxon stated:

> [b]ased on currently anticipated production schedules, we estimate that by 2040 a substantial majority of our year-end 2017 proved reserves will have been produced. Since the 2°C scenarios average implies significant use of oil and natural gas through the middle of the century, we believe these reserves face little risk from declining demand.

Amended Complaint, ¶ 510. In the same document, Exxon claimed that its "actions to address the risks of climate change ... position ExxonMobil to meet the demands of an evolving energy system." Amended Complaint, ¶ 606. One of those "actions" is "[p]roviding products to help [Exxon's] customers reduce their emissions," including its Synergy™ fuels, which "yield better gas mileage, reduce emissions and improve engine responsiveness." *Id.*

Second, as to Count II, the Commonwealth alleges that Exxon markets its Synergy™ brand fuels *to consumers*, on *its promotional website*, as being "engineered for [b]etter gas mileage" and "[l]ower emissions." *Id.* at ¶ 595. For example, Exxon promotes its "Synergy Diesel Efficient™" fuel *to consumers* as the "latest breakthrough technology," and the "first diesel fuel widely available in the US" that helps "increase fuel economy" and "[r]educe emissions and burn cleaner," and represents that it "was created to let you drive cleaner, smarter and longer." *Id.* at ¶ 593. Finally, in support of Count III, the Commonwealth alleges that Exxon's "Protect Tomorrow. Today," *marketing campaign* amounts to deceptive "greenwashing" because Exxon falsely states that "Protect Tomorrow. Today" "defines [its] approach to the environment." *Id.* at ¶¶ 633, 639, 643.

Exxon has not shown, by a preponderance of the evidence, that it made any of these statements solely, or even primarily, to influence, inform, or reach any governmental body,

directly or indirectly. Instead, the statements appear to be directed at influencing investors to retain or purchase Exxon's securities or inducing consumers to purchase Exxon's products and thereby increase its profits. Compare *Cadle Co.*, 448 Mass. at 252 ("palpable commercial motivation behind" defendant's creation of website "so definitively undercuts" petitioning character of statements published on website) with *Cardno ChemRisk, LLC* v. *Foytlin*, 476 Mass. 479, 485-486 (2017) (activists' blog highlighting deceptive practices of company that reported on oil spill was protected petitioning activity, "implicit[ly] call[ing] for its readers to take action" to influence government). Because neither such statements nor the omissions alleged by the Commonwealth are protected under G.L. c. 59H, Exxon's special motion to dismiss must be denied.

ORDER

For the reasons stated above, it is hereby **ORDERED** that Exxon's Special Motion to Dismiss the Amended Complaint pursuant to the anti-SLAPP statute, G.L. c. 231, § 59H, is **DENIED**.

/s/ Karen F. Green
Karen F. Green
Associate Justice of the Superior Court

Dated: June 22, 2021

NOTIFY

06/22/ 42

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1984CV03333-BLS1

COMMONWEALTH OF MASSACHUSETTS

vs.

EXXON MOBIL CORPORATION

notice sent 06.23.21 TCF CC to pc DJT TWJ VA AJC SAK CGC MQB TJR GSL MAH AAG RS JAS AAG SS LAG MD

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

The Commonwealth of Massachusetts, by its Attorney General, brings this action against Exxon Mobil Corporation ("Exxon") for violations of G.L. c. 93A. The Commonwealth claims that Exxon has "systematically and intentionally … misled Massachusetts investors and consumers about climate change"; more specifically, that Exxon "has been dishonest with investors about the material climate-driven risks to its business and with consumers about how its fossil fuel products cause climate change …." Amended Complaint, ¶ 1.

The Commonwealth filed its original complaint, alleging four violations of c. 93A, in this court on October 24, 2019. On November 29, 2019, Exxon removed the case to the United States District Court for the District of Massachusetts. The Commonwealth moved to remand on December 26, 2019, and on March 17, 2020, the District Court remanded the case to this court. On June 5, 2020, the Commonwealth filed an Amended Complaint, alleging three violations of c. 93A. Specifically, the Commonwealth claims that Exxon has: (1) misrepresented and failed to disclose material facts regarding systemic climate change risks to Massachusetts investors (Count I); (2) deceived Massachusetts consumers by misrepresenting the purported environmental benefit of using its Synergy™ and Mobil 1™ products and failed to disclose the risks of climate change caused by its fossil fuel product (Count II); and (3) deceived

Massachusetts consumers by promoting false and misleading "greenwashing" campaigns (Count III).[1] The Commonwealth requests injunctive relief, $5,000 for each violation of c. 93A, and an award of costs and attorneys' fees.

The matter is now before me on Exxon's Motion to Dismiss for lack of personal jurisdiction and for failure to state a claim upon which relief can be granted, pursuant to Mass. R. Civ. P. 12(b)(2) and 12(b)(6), respectively. For the reasons that follow, Exxon's motion is **DENIED**.

BACKGROUND

The Comonwealth's Amended Complaint, which is 202 pages and contains 770 paragraphs, cites to and quotes from numerous Exxon documents. I provide only a general overview of the Commonwealth's allegations here. I discuss other pertinent facts and allegations in the respective sections of the Discussion.

Since at least the late 1970s, Exxon has known that its fossil fuel products cause climate change. Exxon also knew the dangerous effects of global warming, resulting from increasing use of fossil fuels, on the global ecosystem. In the past, Exxon has described the impacts of climate change and global warming as akin to other "existential threats to human survival, such as 'a nuclear holocaust or world famine'" and "globally catastrophic." Amended Complaint, ¶¶ 86, 90, 96. Exxon knew that, once measurable, climate change effects "might not be reversible," and that "[m]itigation of the 'greenhouse effect' would require major reductions in fossil fuel." *Id.* at ¶ 107. Exxon understood the risk climate change poses to its business.

Despite knowing this information, Exxon has deceived Massachusetts investors in its marketing of securities by misrepresenting and failing to disclose the risk posed by climate

[1] In its original complaint, the Commonwealth also claimed that Exxon's allegedly materially false and misleading statements to Massachusetts investors regarding its use of a proxy cost of carbon violated c. 93A.

change to Exxon's business. For example, Exxon knows the "physical risks" from climate change, such as sea level rise, extreme weather, drought, and excessive heat, would harm fossil fuel demand because of efforts to reduce greenhouse gas emissions and market shifts to cleaner energy. These climate risks threaten the value of Exxon's business prospects and the value of Exxon securities held by Massachusetts investors. Instead of disclosing this information, Exxon has told Massachusetts investors that Exxon faces few if any financial risks from climate change, and little risk that its fossil fuel assets will be stranded, *i.e.*, "rendered economically incapable of being developed because of governmental limits on emissions and other measures that increase the cost of developing fossil fuel reserves and shift demand away from fossil fuels." Amended Complaint, ¶ 19.

Exxon has also deceived Massachusetts consumers by misrepresenting and failing to disclose that normal use of its fossil fuel products, like gasoline and motor oil, causes climate change. For example, Exxon deceptively markets Synergy™ as a product that improves, rather than harms, the environment. Finally, Exxon deceptively advertises itself as a company that protects the environment even though it knows continued reliance on its fossil fuels will harm the environment.

DISCUSSION

I. Personal Jurisdiction[2]

Exxon first argues that this court lacks personal jurisdiction over it because Exxon is an out-of-state resident and the Commonwealth's claims challenge Exxon's statements and activities outside Massachusetts.

[2] When a defense of lack of personal jurisdiction is raised, the court should resolve that issue before dealing with other questions, such as a Rule 12(b)(6) motion, that goes to the case's merits. See *Attorney Gen.* v. *Industrial Nat'l Bank of Rhode Island*, 380 Mass. 533, 534 (1980).

"For a nonresident to be subject to the authority of a Massachusetts court, the exercise of jurisdiction must satisfy both the Massachusetts's long-arm statute, G.L. c. 223A, § 3, and the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution." *Exxon Mobil Corp.* v. *Attorney Gen.,* 479 Mass. 312, 314 (2018), citing *SCVNGR, Inc.* v. *Punchh, Inc.*, 478 Mass. 324, 325 (2017). Exxon is a New Jersey corporation with a principal place of business in Texas. The Supreme Judicial Court ("SJC") has determined that Exxon is not subject to general jurisdiction in Massachusetts. See *Exxon Mobil Corp.* v. *Attorney Gen.*, 479 Mass. at 314 (concluding that total of Exxon's activities in Massachusetts does not approach volume required for assertion of general jurisdiction); see also *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 919 (2011) (court may assert general jurisdiction over corporation when its affiliations with the State are so "continuous and systematic" as to render them essentially at home in the forum State). Thus, the question is whether Exxon's contacts with Massachusetts are sufficient to confer specific jurisdiction under Massachusetts's long-arm statute, G.L. c. 223A, § 3.

"Specific jurisdiction exists when there is a demonstrable nexus between a plaintiff's claims and a defendant's forum-based activities, such as when the litigation itself is founded directly on those activities." *Massachusetts School of Law at Andover, Inc.* v. *American Bar Association*, 142 F.3d 26, 34 (1st Cir. 1998); see G.L. c. 223A, § 3 (granting jurisdiction over claims "arising from" certain enumerated grounds occurring within Massachusetts). It is confined to adjudication of "issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 919 (quotations and citation omitted). "Or put just a bit differently, 'there must be "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place

in the forum State and is therefore subject to the State's regulation."'" *Ford Motor Co.* v. *Montana Eighth Judicial District Court*, __U.S. ____, 141 S. Ct. 1017, 1025 (2021), quoting *Bristol-Myers Squibb Co.* v. *Superior Court of Cal., San Francisco Cty.*, 582 U.S. ___, 137 S.Ct. 1773, 1780 (2017). Thus, the question is whether a nexus exists between Exxon's in-state activities and the Commonwealth's legal claims. See *Exxon Mobil Corp.*, 479 Mass. at 315.

The Commonwealth's claims are based on G.L. c. 93A, "a statute of broad impact" that prohibits "unfair methods of competition" and "unfair or deceptive acts or practices in the conduct of any trade or commerce." *Slaney* v. *Westwood Auto, Inc.*, 366 Mass. 688, 693-694 (1975); G.L. c. 93A, § 2(a). The Commonwealth alleges that Exxon has misled Massachusetts consumers and investors about the impact of fossil fuels on both the Earth's climate and the company's value, in violation of c. 93A. See *Exxon Mobil Corp.*, 479 Mass. at 316. In its Amended Complaint, the Commonwealth claims that Exxon has made "significant factual misstatements" and failed "to make disclosures to investors and consumers that would have been material to decisions by Massachusetts investors to purchase, sell, retain, and price ExxonMobil securities and by Massachusetts consumers to purchase ExxonMobil fossil fuel products that cause climate change." Amended Complaint, ¶ 2. See also *Exxon Mobil Corp.*, 479 Mass. at 316 (Commonwealth claims that "[d]espite [Exxon's] sophisticated internal knowledge" about impact of fossil fuels on both Earth's climate and value of the company, "'Exxon failed to disclose what it knew to either the consumers who purchased its fossil fuel products or investors who purchased its securities'").

A. <u>Burden of Proof and Standard of Review</u>

The Commonwealth "has the burden of establishing the facts upon which the question of personal jurisdiction over [Exxon] is to be determined." *Droukas* v. *Divers Training Academy,*

Inc., 375 Mass. 149, 151 (1978). The Commonwealth "must eventually establish jurisdiction by a preponderance of the evidence at an evidentiary hearing or at trial." *Cepeda* v. *Kass*, 62 Mass. App. Ct. 732, 738 (2004). When a defendant challenges the assertion of personal jurisdiction over it, the court, in its discretion, may either (1) consider the motion under the *prima facie* standard and defer a final determination on the issue until the time of trial, when the plaintiff must establish jurisdiction by a preponderance of the evidence, or (2) hold an evidentiary hearing under the preponderance of evidence standard. See *von Schönau-Riedweg* v. *Rothschild Bank AG*, 95 Mass. App. Ct. 471, 483 (2019); *Cepeda*, 62 Mass. App. Ct. at 739-740; see also Mass. R. Civ. P. 12(d) (motion pursuant to 12(b)(2) "shall be heard and determined before trial ... unless the court orders that the hearing and determination thereof be deferred until the trial").

Courts typically resolve such motions by applying the *prima facie* standard. *Cepeda*, 62 Mass. App. Ct. at 737 (most common approach allows court to determine rule 12(b)(2) motion solely on affidavits and other written evidence without conducting an evidentiary hearing). The plaintiff "must make a *prima facie* showing of evidence that, if credited, would be sufficient to support findings of all facts essential to personal jurisdiction." *Fern* v. *Immergut*, 55 Mass. App. Ct. 577, 579 (2002). In evaluating whether a *prima facie* showing has been made, the court acts as a data collector, not as a fact finder, and the plaintiff's burden is one of production, not persuasion. *Cepeda*, 62 Mass. App. Ct. at 737-738. The court takes "specific facts affirmatively alleged by the plaintiff as true (whether or not disputed) and construe[s] them in the light most congenial to the plaintiff's jurisdictional claim." *Massachusetts School of Law at Andover, Inc.*, 142 F.3d at 34; see *Cepeda*, 62 Mass. App. Ct. at 739 (that facts may be controverted by defendant does not overcome *prima facie* showing). The court then "add[s] to the mix facts put forward by defendants; to the extent they are uncontradicted." *Massachusetts School of Law at*

Andover, Inc., 142 F.3d at 34. Where a court denies a motion pursuant to Mass. R. Civ. P. 12(b)(2), without holding an evidentiary hearing, it "reserves the jurisdictional issue, unless waived by the defendant, for final determination at the trial, pursuant to a preponderance of the evidence standard." *Cepeda*, 62 Mass. App. Ct. at 737.

This court will apply the *prima facie* standard in ruling on Exxon's motion and thereby reserves the jurisdictional issue for final determination at trial based on a preponderance of the evidence. See *id.*

B. Long-Arm Statute

The Massachusetts long-arm statute, G.L. c. 223A, § 3, "sets out a list of specific instances in which a Massachusetts court may acquire personal jurisdiction over a nonresident defendant." *Tatro* v. *Manor Care, Inc.*, 416 Mass. 763, 767 (1994). The Commonwealth asserts specific jurisdiction under section (a), which extends "personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's ... transacting any business" in Massachusetts.[3]

The Commonwealth's allegations in this case may be categorized as (1) allegations that Exxon misled Massachusetts investors in connection with their decisions to buy, hold, and sell

[3] The Commonwealth also contends that Exxon is subject to personal jurisdiction under G.L. c. 223, § 3(c), which authorizes personal jurisdiction over a non-resident who causes "tortious injury" by an "act or omission in this Commonwealth," and § 3(d) which authorizes personal jurisdiction over a non-resident who causes "tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth." Because I conclude that § 3(a) grants personal jurisdiction over Exxon, I need not decide whether § 3(c) and (d) do as well. Nevertheless, there is some indication in the case law that § 3(d) may not be relied upon to establish specific jurisdiction. See *Fletcher Fixed Income Alpha Fund, Ltd.* v. *Grant Thornton LLP*, 89 Mass. App. Ct. 718, 725 (2016), citing *Connecticut Nat. Bank* v. *Hoover Treated Wood Prods., Inc.*, 37 Mass. App. Ct. 231, 233 n.6 (1994) (§ 3[d] "is predicated on general jurisdiction," *i.e.*, defendant having engaged in continuous and systematic activity in forum, unrelated to suit); *Fern*, 55 Mass. App. Ct. at 581 n.9 (referring to claim under § 3[d] as one for general jurisdiction); *Ericson* v. *Conagra Foods, Inc.*, 2020 U.S. Dist. LEXIS 219813 *9 (D. Mass. 2020), and cases cited ("Section 3(d) is the Massachusetts long-arm statute's general personal jurisdiction provision and is applicable only if the defendant is subject to general personal jurisdiction in Massachusetts.").

Exxon securities (Count I); and (2) allegations that Exxon misled Massachusetts consumers in connection with their decisions to purchase Exxon products (Count II and III). Although no Massachusetts state court has specifically adopted a claim-specific analysis under G.L. c. 223A, I will consider the investor claim and the consumer claims separately under c. 223A(a). See *Figawi, Inc.* v. *Horan*, 16 F. Supp. 2d 74, 79 (D. Mass. 1998) (referencing claim-specific nature of "specific" *in personam* jurisdiction under § 3(a)).[4]

"For jurisdiction to exist under § 3(a), the facts must satisfy two requirements — the defendant must have transacted business in Massachusetts, and the plaintiff's claim must have arisen from the transaction of business by the defendant." *Tatro*, 416 Mass. at 767. The court construes these dual requirements "broadly." *Id.* at 771. The transacting business requirement "embraces any purposeful acts performed in Massachusetts whether personal, private, or commercial." *Johnson* v. *Witkowski*, 30 Mass. App. Ct. 697, 713 (1991). The "arising from" requirement creates a "but for" test. See *Tatro*, 416 Mass. at 770-771. Exxon apparently does not dispute that it transacts business in Massachusetts; instead, it argues that the Commonwealth's claims do not "arise from" Exxon's transaction of business in Massachusetts.[5]

1. Count I

[4] The First Circuit "divides [the due process] minimum contacts analysis into three inquires: purposeful availment, relatedness, and reasonableness." *Astro-Med, Inc.* v. *Nihon Kohden America, Inc.*, 591 F.3d 1, 9 (1st Cir. 2009). In evaluating relatedness under the due process analysis, "questions of specific jurisdiction are always tied to the particular claims asserted." *Phillips Exeter Academy* v. *Howard Phillips Fund, Inc.*, 196 F.3d 284, 289 (1st Cir. 1999). "To satisfy the relatedness prong, [the plaintiff] must show a nexus between its claims and [the defendant's] forum-based activities." *A Corp.* v. *All Am. Plumbing, Inc.*, 812 F.3d 54, 59 (1st Cir. 2016).

[5] Exxon also makes this argument in connection with the second due process prong, that is, the requirement that the claim "arise out of or relate to the defendant's contacts with the forum." *Bulldog Investors Gen. P'ship* v. *Secretary of the Commonwealth*, 457 Mass. 210, 217 (2010) (citations and quotations omitted). The court, however, must consider the requirements of the long-arm statute first. See *SCVNGR, INC.*, 478 Mass. at 329-330 (2017) (requirements of G L. c. 223A, § 3 "may not be circumvented by restricting the jurisdictional inquiry to due process considerations").

The Commonwealth claims that Exxon deceived investors about the long-term health of Exxon by failing to disclose the full extent of risks associated with climate change and climate regulation. Exxon contends that the court lacks jurisdiction over the investor deception claim because it does not arise from Exxon's contacts with the forum. More specifically, Exxon argues that any statements the Commonwealth alleges Exxon made regarding the impact of climate risks on future demand for oil and natural gas and Exxon's processes for assessing those risks were not made in Massachusetts. I disagree.

The Commonwealth alleges that Exxon "offers its securities, including its common stock and debt instruments, directly to Massachusetts investors" and "investment managers," that "collectively[] hold millions of shares of [Exxon] common stock worth billions of dollars." Amended Complaint, ¶¶ 270, 273; see *id.* at ¶¶ 271, 274-279, 281-283, 289.[6] The Commonwealth further alleges:

> Notwithstanding the additional anticipated costs it expects to incur as a result of increased efforts to reduce greenhouse gas emissions, [Exxon] insists that its businesses will continue to meet growing demand for fossil fuel energy around the world and its reserves are not at risk of becoming stranded. Over the last decade, [Exxon] assured its Massachusetts ... investors[, including State Street Corporation, Wellington Management Group, Fidelity Investments, and Boston Trust Walden Company and their affiliates,] that it has accounted for such risks by building into its business planning what is known as a 'proxy cost' of carbon, which accounts for the likelihood of increasing costs from policies that will tax or regulate greenhouse gas emissions from [Exxon's] operations and fossil fuel products.
>
> ...
>
> This story of careful risk management was highly misleading, as [Exxon's] actual internal practices were, in fact, inconsistent with its representations to investors and did not actually influence [Exxon's] business decisions.

[6] As an example, the Commonwealth claims that: "As of December 31, 2019, State Street [Corporation and its affiliates] was the third-largest institutional investor in [Exxon] common stock, holding 202,281,808 shares with a total value of approximately $14.1 billion." Amended Complaint, ¶ 275.

Amended Complaint, ¶¶ 20, 358. The Commonwealth also references direct communications between Exxon and Massachusetts investors regarding the impact of climate change and climate change regulation on Exxon's business and Exxon's management of climate risk, including its proxy cost of carbon. *Id.* at ¶¶ 446-469. These included a 2015 meeting with Wellington Management at which Exxon's CEO "relayed ... that Massachusetts Institute of Technology scientists with whom Exxon[] works ha[d] advised [Exxon] that 'the jury is still out,' on climate change"; a 2016 meeting with Fidelity Investments at which Exxon's CEO "expressed his skepticism about the viability of renewable energy and his confidence in Exxon[]'s business model in the context of proposals to increase the use of renewables"; and various other meetings in Boston in 2017 and 2018 between representatives of Exxon and of Massachusetts institutional investors. *Id.* at ¶¶ 452, 455, 459-467.

In notes from its March 17, 2017 meeting with Exxon, State Street writes that Exxon stated that, "the price of carbon is used as a modeling tool and [Exxon] has used this since 2007 and it considered the proxy cost of carbon before COP21 [the United Nations climate change conference] so the [Paris] climate agreement did not impact their strategy because they had already accounted for a global event like that." Exhibit 8 to Affidavit of I. Andrew Goldberg. Further, when asked about "stranded assets," Exxon replied that it "has 13 years of proven reserves but there are opportunities for future development and the resource development planning process is robust and there is a process in place to look at future returns that considers geopolitical risk, regulations, environmental impact assessments, etc." *Id.*

These are examples of statements that the Commonwealth alleges were deceptive because Exxon failed to disclose known risks to its business presented by climate change. Indeed, a few months later, in October 2017, a representative from Wellington Management

pointed this out. The Wellington representative stated in notes from an Exxon meeting, in which several investors participated:

> Despite the strong message from shareholders asking for [Exxon] to address climate risks in its long-term planning, the company continues to avoid the real issue. Instead, [Exxon] responded by focusing on the algae biofuel research results they announced in June. [Exxon] has put a lot of money into advertising this research, which I believe is an effort to improve its image on environmental issues rather than an effort to truly address risks posed by climate change to their business.

Id. at Exhibit 9.

Thus, the Commonwealth has shown that its claim regarding investor deception arises from Exxon's contacts with Massachusetts. The Commonwealth has sufficiently alleged that Massachusetts investors would not have purchased or retained Exxon's stocks but for its misrepresentations and omissions concerning the risk of climate change to its business.

2. Counts II and III

The SJC already has determined that Exxon's "franchise network of more than 300 retail service stations under the Exxon and Mobil brands that sell gasoline and other fossil fuel products to Massachusetts consumers," represents Exxon's "purposeful and successful solicitation of business from residents of the Commonwealth," such that it satisfies the "transacting any business" prong of § 3(a). *Exxon Mobil Corp.*, 479 Mass. at 317-318. If the Commonwealth's consumer deception claims arise from this franchise network of Exxon and Mobil-branded fuel stations, the court can assert personal jurisdiction over Exxon. Again, the SJC has concluded that "[t]hrough its control over franchisee advertising, Exxon communicates directly with Massachusetts consumers about its fossil fuel products ...." *Exxon Mobil Corp.*, 479 Mass. at 320.[7] Exxon argues that because the advertisements at these franchises "do not

[7] Exxon argues that the SJC's analysis does not control here because, according to the SJC, "the [Civil Investigative Demand] context requires that we broaden our analysis to consider the relationship between Exxon's Massachusetts

contain the purported misrepresentations that give rise to the consumer deception claim," Reply Memorandum at page 6, they cannot support personal jurisdiction over Exxon. I am not persuaded.

A person may violate G.L. c. 93A through false or misleading advertising. See *id.* "[A]dvertising need not be totally false in order to be deemed deceptive in the context of G.L. c. 93A.... The criticized advertising may consist of a half-truth, or even may be true as a literal matter, but still create an over-all misleading impression through failure to disclose material information." *Aspinall* v. *Philip Morris Cos.*, 442 Mass. 381, 394-395 (2004); *Underwood* v. *Risman*, 414 Mass. 96, 99-100 (1993) (duty exists under c. 93A to disclose material facts known to a party at time of transaction); 940 Code Mass. Regs. § 3.05(1) ("No claim or representation shall be made by any means concerning a product which directly, or by implication, or by failure to adequately disclose additional relevant information, has the capacity or tendency or effect of deceiving buyers or prospective buyers in any material respect.").

The Commonwealth claims that Exxon "deceives Massachusetts consumers by failing to disclose in advertisements and promotional materials directed at them ... the extreme safety risk associated with the use of [Exxon's] dangerous fossil fuel products, which are causing potentially 'catastrophic' climate change...." Amended Complaint, ¶¶ 578, 579. It further alleges that Exxon's "misleading representations and omissions to consumers are material because disclosure of information that [Exxon] knows regarding the dangerous climate effects of

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activities and the 'central areas of inquiry covered by the [Attorney General's] investigation, regardless of whether that investigation has yet to indicate [any] ... wrongdoing.'" *Exxon Mobil Corp.*, 479 Mass. at 315. Notwithstanding the SJC's use of the word "broad," the question before this court is whether the Commonwealth's claims arise from Exxon's transaction of business in Massachusetts. To the extent that the Commonwealth alleges that Exxon is deceiving its customers through its franchisees, the SJC's analysis controls.

using [Exxon's] fossil fuel products would influence the purchasing behavior of Massachusetts consumers." *Id.* at ¶ 36.

In response to Exxon's motion to dismiss for lack of personal jurisdiction, the Commonwealth submitted the affidavit of I. Andrew Goldberg, which contains photographs of signs posted at Exxon and Mobil-branded fuel stations in Massachusetts. These signs state that Exxon's Synergy™ "Supreme" gas "provides 2x cleaner engine for better gas mileage," but do not state that the gas causes climate change. It is Exxon's failure to disclose this allegedly material information to Massachusetts consumers that forms the basis of Count II of the Commonwealth's complaint. The Commonwealth claims that Exxon's failure to include allegedly material information in its in-state advertising created an over-all misleading impression in violation of c. 93A. See *Aspinall*, 442 Mass. at 394-395 (criticized advertising may create an over-all misleading impression through failure to disclose material information).[8]

Thus, the Commonwealth's claims regarding consumer deception arise from Exxon's advertisements through its Massachusetts franchisees. More specifically, the alleged injury to Massachusetts consumers, that is, their purchase in Massachusetts of "dangerous" fossil fuel products, would not have occurred "but for" Exxon's failure to disclose additional and allegedly relevant information about those products at its franchise stations.

C. Due Process

The court must also determine whether the exercise of personal jurisdiction over Exxon comports with the requirements of due process. The "touchstone" of this inquiry is "whether the defendant purposefully established 'minimum contacts' in the forum state." *Tatro*, 416 Mass. at

[8] Exxon also argues that the Commonwealth's "greenwashing" claim does not arise from its forum contacts. But part of Exxon's "greenwashing" claim involves the selling of Exxon's products at its Exxon and Mobil-branded fuel stations in Massachusetts, including Mobil 1™, which is "literally colored green by" Exxon. See Commonwealth's Opposition, page 6; Amended Complaint, ¶ 611.

772, quoting *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 474 (1985). "The governing principle [of due process] is the fairness of subjecting a defendant to suit in a distant forum." *Good Hope Indus., Inc.* v. *Ryder Scott Co.*, 378 Mass. 1, 7 (1979). A plaintiff seeking to assert personal jurisdiction over a defendant must establish that: (1) the defendant purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws; (2) the claim arises out of or relates to the defendant's contacts with the forum state; and (3) the assertion of jurisdiction over the defendant does not offend traditional notions of fair play and substantial justice. *Bulldog Investors Gen. P'ship* v. *Secretary of the Commonwealth*, 457 Mass. 210, 217 (2010) (citations and quotations omitted).

The court's exercise of personal jurisdiction over Exxon comports with the requirements of due process. First, the SJC already has held that Exxon has purposefully availed itself of the privilege of conducting business activities in Massachusetts. See *Exxon Mobil Corp.*, 479 Mass. at 321-323.

Further, as discussed above, the claims asserted by the Commonwealth arise out of Exxon's contacts with Massachusetts. See *Tatro*, 416 Mass. at 772, citing *Burger King Corp.*, 471 U.S. at 472 ("The plaintiff's claim must arise out of, or relate to, the defendant's forum contacts."); see also *Ford Motor Co.*, 141 S. Ct. at 1026, 1028 (quotations and citation omitted) (language "or relate to" "contemplates that some relationships will support jurisdiction without a causal showing"; because Ford "had systematically served a market in [States where plaintiffs brought suit] for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States," there was "strong relationship among the defendant, the forum, and the litigation—the essential foundation of specific jurisdiction").

Finally, the exercise of personal jurisdiction over Exxon does not offend "traditional notions of fair play and substantial justice." See *Exxon Mobil Corp.*, 479 Mass. at 323, quoting *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). The Commonwealth has a strong interest in enforcing its consumer protection law, including against allegedly false and misleading statements, in Massachusetts. Meanwhile, Exxon delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in all states, including Massachusetts. See *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297-298 (1980) (forum State does not exceed its powers under Due Process Clause if it asserts personal jurisdiction over corporation that delivers its products into stream of commerce with expectation that they will be purchased by consumers in forum State). Exxon also interacts with investors in Massachusetts with the expectation that they will purchase and retain its securities. Although having to litigate this case in Massachusetts may result in some inconvenience to Exxon, any such inconvenience is outweighed by the Commonwealth's interest in enforcing its laws in a Massachusetts forum. See *Bulldog Investors Gen. P'ship*, 457 Mass. at 218 (Commonwealth's interest in adjudicating violations of Massachusetts securities laws in Massachusetts forum outweighed any inconvenience to out-of-state defendant resulting from having to litigate there).

Because the court's exercise of jurisdiction over Exxon satisfies both the Massachusetts long-arm statute, G.L. c. 223A, § 3, and the due process clause of the Fourteenth Amendment to the United States Constitution, Exxon's motion to dismiss for lack of personal jurisdiction is **denied**.

II. Failure to State a Claim

In deciding the motion to dismiss, the court accepts as true the factual allegations of the complaint and the reasonable inferences that can be drawn from those facts in the plaintiff's favor. *Foster* v. *Commissioner of Correction (No. 2)*, 484 Mass. 1059, 1059 (2020), citing *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 625 n.7 (2008). The court considers whether the allegations, if true, plausibly suggest an entitlement to any relief against the defendant. *Foster*, 484 Mass. at 1060, citing *Iannacchino*, 451 Mass. at 635-636.

Chapter 93A prohibits "unfair methods of competition"[9] and "unfair or deceptive acts or practices in the conduct of any trade or commerce." *Slaney*, 366 Mass. at 693-694; G.L. c. 93A, § 2(a). "A successful G.L. c. 93A action based on deceptive acts or practices does not require proof that a plaintiff relied on the representation ... or that the defendant intended to deceive the plaintiff ... or even knowledge on the part of the defendant that the representation was false." *Aspinall*, 442 Mass. at 394 (internal citations omitted). An act or practice is deceptive if it "has the capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted (i.e., to entice a reasonable consumer to purchase the product)." *Id.* at 396; see *Leardi* v. *Brown*, 394 Mass. 151, 156 (1985) (act or practice is deceptive if it possesses "a tendency to deceive"). One can also violate c. 93A "by failing to disclose to a buyer a fact that might have influenced the buyer to refrain from the purchase." *Greenery Rehabilitation Group, Inc.* v. *Antaramian*, 36 Mass. App. Ct. 73, 78 (1994). In determining whether an act or practice is deceptive, the court considers the effect that the act or practice might reasonably be expected to have upon the general public. *Leardi*, 394 Mass. at 156.[10]

[9] The Commonwealth has not alleged any unfair methods of competition.

[10] The First Circuit has recently reiterated that a deceptive act or practice consists of three elements: "(1) there must be a representation, practice, or omission likely to mislead consumers; (2) the consumers must be interpreting the message reasonably under the circumstances; and (3) the misleading effects must be material, that is likely to affect

A. Count I

In this count, the Commonwealth claims that Exxon violated c. 93A by misrepresenting and failing to disclose the financial risks to Exxon posed by climate change to Exxon's business in its marketing of its securities to Massachusetts investors. The Commonwealth alleges that Exxon's "supposed climate risk disclosures [to investors] assert that [Exxon] has accounted for and is responsibly managing climate change risks and that, in any event, they pose no meaningful threat to the Company's business model, its assets, or the value of its securities." Amended Complaint, ¶ 471. According to the Commonwealth, this is because Exxon claims that "fossil fuel demand is fated to grow in the coming decades, clean energy alternatives are not and will not in the near future be competitive with fossil fuels, and the world's governments are unlikely to constrain fossil fuel use to limit global warming to the levels those governments have agreed is necessary to avert the most harmful potential consequences of climate change." *Id.* Further, "[t]hese communications are deceptive because they deny or ignore the numerous systemic risks that climate change presents to the global economy, the world's financial markets, the fossil fuel industry, and ultimately [Exxon's] own business ... despite [Exxon's] longstanding scientific understanding of the potentially 'catastrophic' nature of these risks." Amended Complaint, ¶ 472.

For example, the Commonwealth alleges that Exxon has "repeatedly said that it was accounting for climate change risks through the use of a high and rising 'proxy cost' of carbon that would capture the future impact of greenhouse gas regulations" on Exxon's business, yet Exxon "did not use proxy costs as represented ...." Amended Complaint, ¶ 358, 364. Instead, Exxon's "use of a proxy cost of carbon was not, in fact, a serious corporate effort to characterize

consumers' conduct or decision with regard to a product." *Tomasella* v. *Nestle USA, Inc.*, 962 F. 3d 60, 72 (1st Cir. 2020) (quotations and citation omitted).

and manage climate change risks. Internally, [Exxon] did not apply proxy costs consistently or uniformly; its internal corporate guidance for planning, budgeting, and reserves calculations did not match its publicly-disclosed proxy costs. For some projects, [Exxon] did not apply a proxy cost at all." Amended Complaint, ¶ 384. All the while, however, Exxon "reassured investors that the coming regulatory costs of climate change posed no risk of asset stranding and indeed no meaningful risk at all to" Exxon. Amended Complaint, ¶ 384.

Exxon contends that this court should dismiss Count I because it fails plausibly to allege that reasonable investors would be misled by Exxon's statements about the risks of climate change. First, Exxon claims that its statements are not actionable as a matter of law because they are "forward looking" statements of opinion and "only statement of facts are actionable." *NPS, LLC* v. *Ambac Assur. Corp.*, 706 F. Supp. 2d 162, 171 (D. Mass. 2010); *von Schönau-Riedweg*, 95 Mass. App. Ct. at 497 (statement on which liability for misrepresentation may be based must be one of fact, not of expectation, estimate, opinion, or judgment). Statements of opinion and belief, however, may be actionable if the "opinion is inconsistent with facts known" at the time the statement is made. *Marram* v. *Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 57 n.24 (2004). Further, a "statement that, in form, is one of opinion, in some circumstances may reasonably be interpreted by the recipient to imply that the maker of the statement knows facts that justify the opinion." *Briggs* v. *Carol Cars, Inc.*, 407 Mass. 391, 396 (1990) (uninformed person purchased used vehicle from used vehicle dealer whose representations that vehicle was in good condition reasonably implied that it was safe and operable and that vehicle's oil requirements would be far less than they turned out to be); see also *McEneaney* v. *Chestnut Hill Realty Corp.*, 38 Mass. App. Ct. 573, 575 (1995) ("[A] statement that in form is one of opinion may constitute a

statement of fact if it may reasonably be understood by the recipient as implying that there are facts to justify the opinion or at least that there are no facts that are incompatible with it.").

The Commonwealth has specifically alleged that Exxon made statements to investors that climate change risks pose no meaningful threat to Exxon's business model, its assets, or the value of its securities despite Exxon's "longstanding scientific understanding of the potentially 'catastrophic' nature of these risks." Amended Complaint, ¶ 472. This is enough to survive a motion to dismiss. See *Marram*, 442 Mass. at 62 (whether statements by defendant "are unactionable 'mere puffery'" cannot be resolved on pleadings); *McEneaney*, 38 Mass. App. Ct. at 575 (distinction between statement of fact and statement of opinion is "often a difficult one to draw"); see also *In re Smith & Wesson Holding Corp.*, 604 F. Supp. 2d 332, 343 (D. Mass. 2009) (information offered by defendants to rebut plaintiffs' claims of falsity "may be pertinent to an assessment of a future motion for summary judgment, but it cannot support dismissal prior to discovery").

Second, Exxon contends that Count I is implausible because "Chapter 93A does not require a company to disclose 'information [that is] readily available to consumers,'" and "Exxon has issued numerous climate risk disclosures." This argument fails for at least two reasons. First, Exxon's reliance on *Tomasella* v. *Nestle USA, Inc.*, 962 F.3d 60, 81-82 (1st Cir. 2020) is misplaced. See *id.* (affirming dismissal of c. 93A claim based on "pure omission" theory; that defendants repeatedly made information about prevalence of worst forms of child labor in their supply chains publicly available through their websites and other media mitigated concern that their omission at point of sale was unethical under c. 93A, regardless of whether plaintiffs were aware of website disclosures). Second, the Commonwealth is not alleging a failure to disclose information readily available to the public; it is alleging that Exxon's public

disclosures regarding the risks to its business presented by climate change were deceptively misleading in light of information Exxon knew, but omitted.

Next, Exxon contends that the Commonwealth has not plausibly alleged that its failure affirmatively to warn investors of systemic climate risks was "knowing[] and willful" as required by c. 93A. See *Underwood*, 414 Mass. at 100 (duty exists under c. 93A to disclose material facts known to party "at the time of a transaction"; there is no liability for failing to disclose what that party does not know); *Mayer* v. *Cohen-Miles, Ins. Agency, Inc.*, 48 Mass. App. Ct. 435, 443 (2000) (c. 93A proscribes material, knowing, and willful nondisclosures that are "likely to mislead consumers acting reasonably under the circumstances"). To the contrary, the Commonwealth has specifically alleged that Exxon knew and purposely concealed such information. These allegations that Exxon deliberately misrepresented and omitted information about the risks of climate change on its company state a viable claim that Exxon engaged in deceptive conduct in violation of G.L. c. 93A.[11]

Exxon also contends that this court should dismiss Count I because it was not engaged in "trade or commerce" at the time it made the statements challenged therein. More specifically, Exxon claims that it did not sell securities directly to Massachusetts investors and, therefore, its purportedly deceptive statements were not made in connection with an offer to sell, or sale of, securities.

Chapter 93A defines "trade and commerce" to include "the advertising, the offering for sale, ... the sale, ... or distribution of ... any security." G.L. c. 93A, § 1. It shall include "any

[11] Exxon also argues that its statements about its use of a proxy cost of carbon would not materially mislead reasonable investors. The Commonwealth's allegations about proxy costs once supported a separate claim for violation of c. 93A, but are now included in Count I. The court will therefore not specifically address Exxon's arguments that its disclosures about proxy costs were neither false nor misleading or that no reasonable investor would have considered the information material except to note that, like most of Exxon's arguments, they are not ones that are appropriately decided at the motion to dismiss stage.

trade or commerce directly or *indirectly* affecting the people of this commonwealth." *Id.* (emphasis added). "By enacting this broad standard for coverage under c. 93A, the Legislature provided protection not only for specific individuals involved in a transaction, but also for the public as a whole." *Manning* v. *Zuckerman*, 388 Mass. 8, 14 (1983). Chapter 93A seeks to deter unfair or deceptive acts or practices between particular individuals, and "to reduce the general danger to the public arising from the potential for such unscrupulous behavior in the marketplace." *Id.*; see also *Ciardi* v. *F. Hoffmann La Roche, Ltd.*, 436 Mass. 53, 66-67 (2002) (c. 93A's language evinces clear statement of legislative policy to protect Massachusetts consumers through authorization of indirect purchaser actions).[12] At this stage, the Commonwealth's allegations are sufficient to state a claim that Exxon was engaged in trade or commerce when it made the allegedly deceptive statements to Massachusetts investors.

B. Count II

In Count II, the Commonwealth alleges that Exxon has misled Massachusetts consumers by advertising that consumer use of certain Exxon products, such as Synergy™ gas and Mobil 1™ motor oil, will reduce greenhouse gas emissions. Amended Complaint, ¶ 538. Further, these advertisements are deceptive because Exxon does not disclose that the "development, refining, and consumer use of [Exxon] fossil fuel products emit large volumes of greenhouse gases, which are causing global average temperatures to rise and destabilizing the global climate system." Amended Complaint, ¶ 538. Further, these allegedly false and misleading misrepresentations are material because they directly influence a consumer's decision to purchase Exxon's products. Amended Complaint, ¶ 537.

[12] I do not find persuasive the single sentence in a twenty-six-year-old, factually distinguishable District Court case on which Exxon relies in support of its argument. See *Salkind* v. *Wang*, 1995 U.S. Dist. LEXIS 4327 *31 (D. Mass. 1995) (company's public dissemination of statements reflecting confidence in company's future – "simply do not constitute 'trade or commerce' as defined under 93A when stock is purchased by investors through open markets").

Exxon argues that the court should dismiss this claim because (1) the Commonwealth does not allege that any statements made by Exxon about Synergy™ and Mobil 1™ were false; (2) Exxon's representations about Synergy™ and Mobil 1™ were not misleading half-truths because a reasonable consumer would not have been misled by them; and (3) Exxon cannot be liable for failing affirmatively to disclose the risks of climate change because a "pure omission" is not a basis for liability under c. 93A. I disagree.

First, "advertising need not be totally false in order to be deemed deceptive in the context of G.L. c. 93A." *Aspinall*, 442 Mass. at 394.[13] Advertising may consist of a half-truth, "or even may be true as a literal matter, but still create an over-all misleading impression through failure to disclose material information." *Id.* at 395; *Greenery Rehabilitation Group, Inc.*, 36 Mass. App. Ct. at 78 ("One can violate § 2 of G.L. c. 93A ... by failing to disclose to a buyer a fact that might have influenced the buyer to refrain from the purchase."). Thus, contrary to Exxon's argument, the Commonwealth does not have to allege that Exxon's representations about the benefits of Synergy™ and Mobil 1™ were false to "plausibly allege" that the representations were misleading.[14]

Next, Exxon argues that no reasonable consumer would be misled by Exxon's advertisements because its statements necessarily imply that their products produce some CO2

[13] See also 940 Code Mass. Regs. § 3.05(1) ("No claim or representation shall be made by any means concerning a product which directly, or by implication, or by failure to adequately disclose additional relevant information, has the capacity or tendency or effect of deceiving buyers or prospective buyers in any material respect."); 940 Code Mass. Regs. § 3.16(2) (providing that an act or practice is a violation of § 2, if "[a]ny person or other legal entity subject to this act fails to disclose to a buyer or prospective buyer any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction"); 940 Code Mass. Regs. § 6.01 (material representation is claim "which has the tendency or capacity to influence the decision of reasonable buyers or reasonable prospective buyers whether to purchase the product"); 940 Code Mass. Regs. § 6.04(1) (misleading representation is material representation which seller knows or should know "is false or misleading or has the tendency or capacity to be misleading"). These regulations are authorized by G.L. c. 93A, § 2(c), have the force of law, and "set standards the violations of which . . . constitute violations of c. 93A." *Purity Supreme, Inc.* v. *Attorney Gen.*, 380 Mass. 762, 769-773 (1980).

[14] The case cited by Exxon, *Ortiz* v. *Examworks, Inc.*, 470 Mass. 784, 794 (2015), did not involve advertisements.

emissions and because a reasonable consumer would be aware of the connection between fossil fuels and climate change. "[A]n advertisement is deceptive when it has the capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted (i.e., to entice a reasonable consumer to purchase the product)." *Aspinall*, 442 Mass. at 396. Whether statements made by Exxon would have misled a reasonable consumer or how Exxon's statements would be understood by a reasonable consumer are questions ill-suited for resolution on a motion to dismiss. For example, the court cannot conclude at this stage that no reasonable consumer would be misled by Exxon's promotion of its Synergy™ fuel on its website:

> **Environmental Performance**
>
> Conscientious practices. Rigorous standards.
>
> **Continually improving environmental performance while pursuing reliable and affordable energy.**
>
> Ten years ago, we introduced Protect Tomorrow. Today. – a set of expectations that serves as the foundation for our environmental performance. Guided by a scientific understanding of the environmental impacts and related risks of our operations, these rigorous standards and good practices have become an integral part of our day-to-day operations in every country in which we do business including those with minimal regulations in place....
>
> The following are the three major areas in which we've concentrated our efforts to reduce environmental impacts ....
>
> **Improve efficiency in consumer use of fuels**
>
> We're continually innovating to develop products that enable customers to reduce their energy use and CO2 emissions. For example, we have: ...
>
> Engineered Fuel Technology Synergy fuels to help improve fuel economy and reduce CO2 emissions.

Amended Complaint, ¶¶ 587, 588.

Finally, this claim does not involve a "pure omission" as Exxon contends. A pure omission occurs when a seller "merely stay[s] silent about a subject in circumstances that do not give any particular meaning to [the] silence." *Tomasella*, 962 F.3d at 73 (quotations and citation omitted). Declaring pure omissions to be deceptive would inevitably "expand[] that concept virtually beyond limits," considering the vast universe of "erroneous preconceptions" that individual consumers may have about any given product as well as "[t]he number of facts that may be material to [them]." *Id.* at 75 (quotations and citation omitted). Instead, the Commonwealth's claim is based on Exxon advertising that consumer use of its products will reduce greenhouse gas emissions when "consumer use of fossil fuel products (even products that may yield relatively more efficient engine performance) *increase* greenhouse gas emissions." Amended Complaint, ¶ 582 (emphasis in original). According to the Commonwealth, Exxon is not "merely staying silent" about the subject, but is actually (mis)representing that its products "reduce greenhouse gas emissions." This is not a prior consumer misconception, see *Tomasella*, 962 F.3d at 73; it is a misconception allegedly created by Exxon.

In addition, the Commonwealth does not claim that Exxon had an affirmative duty to warn consumers about climate risks associated with use of its products; it claims that Exxon had a duty to fully disclose those risks once it created the impression that using its products resulted in environmental benefits. See Amended Complaint, ¶ 582. Compare *Tomasella*, 962 F.3d at 67 (First Circuit affirmed dismissal of plaintiff's c. 93A claims and concluded that by not disclosing on packaging of their chocolate products that there are known child labor abuses in their cocoa supply chains, defendants "stay[ed] silent on the subject in a way that [did] not constitute a half-truth or create any misleading impressions about the upstream labor conditions in the cocoa supply chain").

The Commonwealth's allegations about Exxon's deceptive advertising state a viable claim that Exxon engaged in unfair and deceptive practices in violation of G.L. c. 93A.

C. Count III

Finally, the Commonwealth charges Exxon with "greenwashing," which it defines as "advertising and promotional materials designed to convey a false impression that a company is more environmentally responsible than it really is, and so to induce consumers to purchase its products." Amended Complaint, ¶ 540. Exxon's "deceptive 'greenwashing' campaigns ... target Massachusetts consumers with false and misleading messages about [Exxon's] leadership in solving the problem of climate change, support of action to reduce greenhouse gas emissions, and focus on developing clean energy to 'protect tomorrow today,' and to protect future generations." Amended Complaint, ¶ 762. Exxon "promotes its products by falsely depicting [itself] as a leader in addressing climate change ... without disclosing (i) [Exxon's] ramp up of fossil fuel production in the face of a growing climate emergency; (ii) the minimal investment [Exxon] is actually making in clean energy compared to its investment in business-as-usual fossil fuel production; and (iii) [Exxon's] efforts to undermine measures that would improve consumer fuel economy." *Id.* at ¶ 541. These misrepresentations and omissions mislead consumers by "obscuring the extreme effects of climate change caused by the production and normal use of [Exxon's] fossil fuel products." *Id.* at ¶ 763. Further, Exxon "saturat[es] its brand with deceptive 'green' images that portray ExxonMobil as a good environmental steward...." *Id.* at ¶ 633. For example, the Commonwealth alleges that Exxon describes its "Protect Tomorrow. Today." campaign, as "defin[ing] our approach to the environment.... The environment we work in includes clean air, water, and ecosystems, which people, plants, and animals depend upon." Amended Complaint, ¶ 643.

Exxon contends that the court should dismiss this claim because the statements the Commonwealth alleges are deceptive do not violate c. 93A because they are "truthful at best and mere puffery at worst." *von Schönau-Riedweg*, 95 Mass. App. Ct. at 497; see also *Hansmann* v. *Nationstar Mortg., LLC*, 2014 Mass. App. Unpub. LEXIS 797 *3 (2014), citing *Kwaak* v. *Pfizer, Inc.*, 71 Mass. App. Ct. 293, 300-301 (2008) ("permissible puffery" statements are distinct from actionable conduct under c. 93A). The determination, however, of whether statements are actionable misrepresentations or inactionable puffery is not appropriate at a motion to dismiss stage. See *Marram*, 442 Mass. at 62; *NPS, LLC*, 706 F. Supp. 2d at 172 ("Courts vary in their conclusions of just where the line between [civilly actionable] misrepresentation and [inactionable] puffery lies, and often the determination is highly fact-specific.").

Further, as discussed earlier, the Commonwealth does not have to allege that any statement was false nor is it appropriate to resolve at the motion to dismiss stage what a reasonable consumer would think about Exxon's representations. Finally, Exxon argues that it did not make the challenged "greenwashing" statements in connection with the sale or offer to sell any "services" or "property." G.L. c. 93A, § 1. The Commonwealth alleges, however, that Exxon's "greenwashing" campaign is designed to "induce consumers to purchase its products." Amended Complaint, ¶ 540. The Commonwealth has thus sufficiently alleged that Exxon engaged in deceptive practices with respect to the "greenwashing" claim.

III. First Amendment

Exxon contends that the complaint must be dismissed because the Commonwealth seeks to use c. 93A to compel speech in violation of the First Amendment. Commercial speech is protected by the First Amendment if it concerns lawful activity and is not misleading. *Central Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980); see

also *Illinois ex rel. Madigan* v. *Telemarketing Associates, Inc.*, 538 US 600, 612 (2003) (First Amendment does not protect fraud). Here, the Commonwealth alleges that Exxon made misleading statements to consumers and investors in violation of G.L. c. 93A. This court is not in a position, at least at this stage, to determine whether any particular statement is protected by the First Amendment.

ORDER

For the reasons stated and other reasons articulated in the Commonwealth's Opposition, it is hereby **ORDERED** that the Defendant's Motion to Dismiss is **DENIED**.

/s/ Karen F. Green
Karen F. Green
Associate Justice of the Superior Court

Dated: June 22, 2021