COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.	SUPERIOR COURT CIVIL ACTION NO.: 1984-CV-03333-BLS1
COMMONWEALTH OF MASSACHUSETTS, Plaintiff, v. EXXON MOBIL CORPORATION, Defendant.	**Service Via E-Mail**

REPLY MEMORANDUM OF DEFENDANT EXXON MOBIL CORPORATION IN SUPPORT OF ITS MOTION TO DISMISS THE AMENDED COMPLAINT

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INTRODUCTION

In its opening brief, ExxonMobil explained why the Amended Complaint should be dismissed for lack of personal jurisdiction, failure to state a claim, violations of the Constitution, or all of the above. In an effort to save its complaint, the Office of the Massachusetts Attorney General (the "Attorney General") guts it and tries to assemble the remaining pieces into something that might resemble a viable claim. Those efforts betray a breathtaking abandonment of the Attorney General's case and only further support dismissal.

The Amended Complaint assails ExxonMobil's projections about future demand for oil and gas, its views on the potential risks presented by climate change, and its advocacy for (and against) various energy and climate policies. But none of those statements originated in or specifically targeted Massachusetts. Under well-settled precedent, claims against ExxonMobil arising from those statements cannot be brought in Massachusetts.

That left the Attorney General scrambling for forum contacts that could give rise to an actionable claim. In its brief, the Attorney General refers to a handful of meetings between ExxonMobil and three Boston-based financial institutions, but fails to identify any statement made at those meetings that gives rise to its investor deception claim. That failing is reason enough to dismiss the claim, but there is more. The statements that purportedly give rise to the Attorney General's claim are forward-looking statements of opinion and therefore not actionable.

As to consumer deception, the Attorney General attempts to supplement its pleadings by relying on new advertisements that allegedly appeared in Massachusetts. Offering new allegations for the first time in its opposition brief only highlights the Amended Complaint's deficiencies. But even on its own terms, this additional evidence counts for nothing. The advertisements in question state that ExxonMobil's Synergy fuel improves engine efficiency. The Attorney General does not claim that these representations are false and has failed to plead plausible allegations that they

would materially mislead a reasonable consumer. With regard to Mobil 1 motor oil, the Attorney General relies exclusively on an image of a bottle with a green label. But using the color green in product packaging is not deceptive. As for its purported "greenwashing" claim, the Attorney General seeks to premise jurisdiction solely on nationally circulated publications, which are not forum contacts, and fails plausibly to allege that statements disclosing ExxonMobil's investment and research into algae biofuels are false or would reasonably mislead consumers.

Finally, the Attorney General's claims violate the First Amendment's prohibition on compelling speech that is not purely factual and uncontroversial. The Attorney General does not deny that it seeks compelled disclosures; it does not deny that the First Amendment restricts such disclosures to purely factual, uncontroversial information; and it does not contend that its requested disclosures satisfy this standard. The Attorney General cannot avoid constitutional scrutiny merely by urging delay or seeking exemption for fraud cases. For any or all of these reasons, the Amended Complaint should be dismissed.

ARGUMENT

I. ExxonMobil Is Not Subject to Personal Jurisdiction in Massachusetts

The Attorney General has failed to make a prima facie showing that this Court has personal jurisdiction over ExxonMobil for each of the claims asserted because it has not shown that its claims arise from ExxonMobil's contacts with Massachusetts—*i.e.*, that ExxonMobil's forum contacts are a "but for" cause of the claims. *Tatro* v. *Manor Care, Inc.*, 416 Mass. 763, 771, 773 (1994). Where, as here, a claim is premised on Chapter 93A, the only "wrongful conduct to be considered for purposes of personal jurisdiction . . . is that conduct which violated 93A." *Roche* v. *Royal Bank of Can.*, 109 F.3d 820, 827 (1st Cir. 1997). According to the Amended Complaint, the purportedly "wrongful conduct" consists of statements ExxonMobil made in Texas that were published on its website, the internet, in national publications, and in corporate reports. Apparently

recognizing that those statements were not made in or directed at Massachusetts, the Attorney General does not defend them as forum contacts. Instead, it seeks refuge in a prior decision that sheds no light on the claims asserted here and a handful of purported in-state activities that do not give rise to its claims.

A. The Supreme Judicial Court Has Not Approved the Claims Asserted Here

The Attorney General's lead argument is that jurisdiction has already been decided by the Supreme Judicial Court. But that court never ruled on personal jurisdiction over ExxonMobil for the claims asserted here. (Opp. 7, 9, 11-13, 18.) In *Exxon Mobil Corp.* v. *Attorney Gen.*, the Supreme Judicial Court considered whether ExxonMobil was subject to personal jurisdiction in the "investigatory context," which it held required the court to "broaden its analysis" of ExxonMobil's jurisdictional contacts. 479 Mass. 312, 315 (2018). That broadened analysis has no application where, as here, a court is asked to exercise jurisdiction over claims actually asserted in a civil suit. Recognizing as much, the Attorney General previously invoked the distinct standard that applies in the investigatory context to oppose ExxonMobil's petition for certiorari. *See* Attorney General Br. in Opp. at 13, Dec. 4, 2018, *Exxon Mobil Corp.* v. *Healey*, No. 18-311 (U.S.). It is therefore estopped from arguing that the more lenient investigatory standard applies here.

To the extent the Supreme Judicial Court considered any potential claims at all, it identified only "[p]ossible misrepresentations or omissions about the threat [of] climate change" in connection with potentially defrauding third parties who license ExxonMobil's brands at their service stations. 479 Mass. at 323. The Attorney General has not alleged ExxonMobil defrauded those licensees. And the Supreme Judicial Court did not rule on any potential claims of investor deception whatsoever, explaining that it "need not reach" the question of personal jurisdiction "with respect to the Attorney General's alternative theory that Exxon may have deceived investors," since "very few of the [document] requests even mention investors or securities." *Id.*

at 324 n.9. The Supreme Judicial Court's ruling sheds no light on the claims asserted here.

B. The Investor Deception Claim Does Not Arise from Forum Contacts

As set forth in ExxonMobil's opening brief, the Attorney General's investor fraud claim arises from statements not made in or specifically aimed at Massachusetts. (Br. 15-18.)[1] Conceding as much, the Attorney General abandons paragraph after paragraph of its Amended Complaint, which focused on corporate reports prepared and published in Texas (Am. Compl. ¶¶ 257-58, 365-77, 388, 402, 491-501, 504-13), and statements by ExxonMobil executives at meetings that occurred outside of Massachusetts (*id.* ¶¶ 378-79, 488-522). It is now settled that those reports and statements cannot give rise to personal jurisdiction in Massachusetts.[2]

That leaves the Attorney General in a bind. It must rely solely on a handful of meetings between ExxonMobil and certain financial institutions in Massachusetts as grounds for personal jurisdiction. (*Id.* ¶¶ 451-52, 455-56, 459-62, 464-67; Opp. 17.) But those meetings do not give rise to the Attorney General's investor deception claim. The Attorney General has failed to allege that any false or misleading statements were made at those meetings, much less identify them by pleading "specific, non-conclusory facts." *Fern* v. *Immergut*, 55 Mass. App. Ct. 577, 580 n.7, 584 (2002). Both the pleadings and the Goldberg Affidavit provide only vague descriptions of the topics discussed. Critically, the Attorney General has failed to allege that the purportedly deceptive statements challenged in the Amended Complaint were made at any of the in-state meetings. (*See, e.g.*, Am. Compl. ¶¶ 383, 447, 457.) The investor meetings are therefore insufficient to confer personal jurisdiction over ExxonMobil for the investor deception claim.[3]

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[1] "Br." refers to ExxonMobil's opening brief; and "Opp." refers to the Attorney General's opposition brief.

[2] The Attorney General's failure to defend the Court's jurisdiction to adjudicate challenges to these out-of-state statements warrants striking the following allegations from the Amended Complaint as "immaterial [and] impertinent" under Rule 12(f): Am. Compl. ¶¶ 22, 27, 257-61, 350, 365-79, 384-402, 429, 468, 487-518.

[3] Even if the Attorney General had identified false or misleading statements at those meetings, they could at most support jurisdiction over claims arising from the specific statements made at the five meetings between 2015 and 2018 alleged by the Attorney General. (Goldberg Aff., Exs. 7-11.) They cannot support personal jurisdiction over

The meetings are legally inadequate for a separate and independently sufficient reason: no securities transactions are alleged to have taken place or been discussed at any of the meetings. The Attorney General contends that it need not allege actual sales in Massachusetts, provided that "ExxonMobil *solicited* the sale and purchase of its securities" in Massachusetts. (Opp. 14.) But the Attorney General does not allege that the in-state meetings between ExxonMobil and institutional investors were held to solicit the sale of securities. (Webb Aff. ¶ 13.) To the contrary, in both the Amended Complaint and its opposition, the Attorney General contends that ExxonMobil merely "assured investors" about its business at these meetings. (*See, e.g.*, Am. Compl. ¶¶ 20, 358, 364, 526; Opp. 4.) Because no sales or solicitations are alleged to have occurred at those meetings, they are incapable of giving rise to the Attorney General's claims and insufficient for personal jurisdiction.[4]

C. The Consumer Deception Claim Does Not Arise from Forum Contacts

The Attorney General's consumer deception claim is afflicted with similar, fatal defects. The Amended Complaint alleges deception from statements on the internet (including ExxonMobil's website and YouTube) that Synergy gasoline and Mobil 1 motor oil "will reduce greenhouse gas emissions." (Am. Compl. ¶¶ 581-82, 587-88, 592-96, 611, 612-14.) The Attorney General does not allege that those statements were made in or directed specifically at Massachusetts, which makes them insufficient to support jurisdiction. *See, e.g., NexLearn, LLC* v. *Allen Interactions, Inc.*, 859 F.3d 1371, 1379 (Fed. Cir. 2017). (Br. at 16-17.) Once again, the Attorney General concedes the point and abandons those allegations as forum contacts.[5]

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the Attorney General's claim that ExxonMobil deceived the broader investing community over a longer time period.

[4] Indeed, ExxonMobil has not sold common stock to the general public or institutional investors in 40 years. (Webb Aff. ¶ 10.) The Attorney General does not argue otherwise.

[5] The allegations regarding these out-of-state statements also should be stricken under Rule 12(f). *See* Am. Compl. ¶¶ 586-88, 591-593, 595-97, 611-15, 640-44, 648-49, 653-55, 660-93, 707.

Having gutted its core allegations, the Attorney General now contends that personal jurisdiction arises solely from in-state advertising at Exxon and Mobil-branded service stations owned and operated by third parties. (Am. Compl. ¶¶ 545, 549-54, 577, 584-85, 589; Opp. 11-12, 15, 17-18.) Recognizing that the Amended Complaint lacks allegations about the content of any in-state advertising, the Attorney General attempts to cure that deficiency by supplementing the allegations. (Goldberg Aff. Exs. 3-6 (depicting service-station advertising, sweepstakes announcement, and Mobil 1 motor oil bottle).) These materials are not properly considered on a Rule 12(b)(6) motion to dismiss. *See Coghlin Elec. Contractors, Inc.* v. *Gilbane Bldg. Co.*, 472 Mass. 549, 552 n.5 (2015); Mass. R. Civ. P. 12(b). But even on their own terms, the in-state advertisements are insufficient because they do not give rise to the Attorney General's claims.

The newly offered advertisements merely promoted Synergy gasoline's capacity to "keep your engine 2X cleaner for better gas mileage," displayed a Mobil 1 motor oil bottle with a fluorescent green label, and alerted consumers to ExxonMobil's Rewards+ program and mobile application. (Goldberg Aff., Exs. 3-A-I, 6, 4-A-O.) Even assuming these advertisements at independently owned and operated service stations can be imputed to ExxonMobil, they do not contain the purported misrepresentations that give rise to the consumer deception claim. The Attorney General has not pointed to a single example of in-state advertising representing that Synergy fuel or Mobil 1 motor oil "will reduce greenhouse gas emissions" (Am. Compl. ¶ 581), the crux of the allegations in the Amended Complaint. Nor do these advertisements discuss climate change, environmental benefits, or even greenhouse gas emissions.

In a final (but futile) effort, the Attorney General offers a grab bag of purported contacts hoping to generate enough smoke to suggest fire. This effort fails. ExxonMobil's Rewards+ smartphone app does not give rise to its consumer deception claim, and its use by Massachusetts

consumers (Opp. 15-16, 18), along with others in all 50 states, is legally insufficient to confer personal jurisdiction. *See, e.g.*, *Cossaboon* v. *Maine Med. Ctr.*, 600 F.3d 25, 35 (1st Cir. 2010) (online platform cannot support personal jurisdiction where it is "available to anyone with internet access and does not target [Massachusetts] residents in particular"); *Intercarrier Commc'ns LLC* v. *WhatsApp Inc.*, No. 3:12–cv–776–JAG, 2013 WL 5230631, at *4 (E.D. Va. Sept. 13, 2013) (holding that a company does not target a forum when a user unilaterally downloads or uses its app within the forum). The Attorney General's references to ExxonMobil's (i) national Earth Day sweepstakes and (ii) partnership with the Boston Celtics (Opp. 15-16; Goldberg Aff. Ex. 5) are equally unavailing. The Attorney General does not allege that ExxonMobil made any representations, let alone false or misleading representations, about Synergy fuel or Mobil 1 motor oil in connection with either activity. (Goldberg Aff., Ex. 5; Am. Compl. ¶¶ 572, 616-17.)

D. The Greenwashing Claim Does Not Arise from Forum Contacts

In defense of personal jurisdiction for the greenwashing claim, the Attorney General offers a single purported forum contact: "print and post editions of the New York Times." (Opp. 18.) The Attorney General, however, does not explain how advertising disseminated in a national newspaper based in New York City constitutes a contact by ExxonMobil with Massachusetts. Precedent opposes that argument at every turn (Br. 16-18), including the Attorney General's own precedent. (Opp. 18.) In *Commonwealth* v. *Purdue Pharma, L.P.*, the defendants "promoted [opioid savings cards] to Massachusetts doctors for use by Massachusetts patients," "sen[t] false representations about Purdue opioids into Massachusetts," and engaged in marketing "targeted at and sent to Massachusetts." No. 1884CV01808, 2019 WL 5617817, at *2-3, 5-7 (Mass. Super. Oct. 8, 2019). Here, the Attorney General does not allege that ExxonMobil specifically targeted Massachusetts through the nationally circulated advertisements alleged in its greenwashing claim.

E. The Attorney General Has Not Alleged Tortious Injury

The Attorney General's inability to show that any of ExxonMobil's forum contacts give rise to its claims, as required by the Due Process Clause, is fully sufficient to defeat personal jurisdiction. The long-arm statute provides an independent basis to reach the same conclusion because the Attorney General has not alleged any injury—much less a tortious injury—as required under Sections 3(c) or 3(d). *Roberts* v. *Legendary Marine Sales*, 447 Mass. 860, 864-65 (2006).

The Attorney General's authorities are not to the contrary. (Opp. 10.) *Commonwealth* v. *Mass. CRINC* did not construe "tortious injury" under the long-arm statute or even address personal jurisdiction. 392 Mass. 79, 88-89 (1984). *Purdue Pharma* entailed allegations that defendants engaged in marketing "targeted at and sent to Massachusetts" that caused "2,155 opioid-related deaths in Massachusetts." 2019 WL 5617817, at *2, 5-7. Those allegations of concrete, personal injuries are a far cry from the pleadings here, which do not allege any specific injury to Massachusetts consumers and investors. And *JMTR Enters., LLC* v. *Duchin*, 42 F. Supp. 2d 87 (D. Mass. 1999), and *Abbott* v. *Interactive Computing Devices, Inc.*, 1998 WL 1182003, at *2 (Mass. Super. Ct. Feb. 27, 1998), predate the Supreme Judicial Court's holding that monetary injuries from Chapter 93A deception do not constitute tortious injury. *Roberts*, 447 Mass. at 864.

II. The Attorney General Fails to State a Claim of Investor Deception

A. Opinions Regarding Future Events Are Not Actionable Under Chapter 93A

The Attorney General's investor deception claim challenges admittedly "forward-looking" statements of opinion (Opp. 22) that are not actionable under Chapter 93A. *See von Schönau-Riedweg* v. *Rothschild Bank AG*, 95 Mass. App. Ct. 471, 497-98 (2019). As the Attorney General's own authorities confirm (Opp. 21), to be actionable a "statement or omission must concern a fact, and not an opinion or belief, unless such an opinion is inconsistent with facts known *at the time they are made*." *Marram* v. *Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 57 n.24 (2004) (emphasis

added); *see also Briggs* v. *Carol Cars, Inc.*, 407 Mass. 391, 396 (1990) (car dealer's representation that car was in "good condition" was construed as a statement of fact); *McEneaney* v. *Chestnut Hill Realty Corp.*, 38 Mass. App. Ct. 573, 574 (1995) (real estate agent's statement that there were "no noise problems" in condominium was a "statement of fact").

The Attorney General attempts to shoehorn its claim within that precedent by claiming that ExxonMobil "did not genuinely or reasonably believe the positive opinions [it] touted." (Opp. 22.) But the Amended Complaint lacks any factual allegations supporting that conclusory accusation. The Attorney General has not identified any facts allegedly known to ExxonMobil that contradicted its projections of global energy demand at the time the projections were made. Likewise, the Attorney General fails to allege that ExxonMobil's opinions about how future climate regulations might affect its business were contradicted by any contemporaneously known facts.[6] All the Attorney General offers is the assertion that ExxonMobil "deceptively den[ied], downplay[ed], and fail[ed] to disclose" risks. (Opp. 20.) But a legal conclusion cannot substitute for well-pleaded factual allegations, which the Amended Complaint utterly lacks.

The Attorney General tries to evade this precedent by mischaracterizing ExxonMobil's forward-looking opinions about its business "outlook" as misrepresentations concerning ExxonMobil's "present" view of its business risks. (Opp. 20-21, 23.) Once again, the Amended Complaint contains no factual allegations supporting such an accusation, as the law requires. *See Marram*, 442 Mass. at 58 (addressing statements pertaining to fund's current level of diversification). Nowhere does the Attorney General allege that ExxonMobil misrepresented a

[6] The Attorney General's vague allusion to internal ExxonMobil documents from the 1970s and 1980s, concerning its early research into climate science, does not lend support to the Attorney General's conclusory assertion that ExxonMobil disbelieves the business outlook and projections for future energy demand that it has communicated to investors in recent years. Even assuming ExxonMobil's views have not evolved over the past 40-50 years, the Attorney General fails to allege that these historic documents say anything about its business outlook or expectations for energy demand that contradict the public statements it has made within the limitations period.

known fact about its business. Its claim focuses wholly on what might (or might not) happen in the future and faults ExxonMobil for not embracing a worst case scenario. (Am. Compl. ¶¶ 22, 27, 265, 471, 475, 488, 492, 497, 501-02, 505.) The Attorney General is entitled to its own views, but it may not compel ExxonMobil to adopt and disseminate its dire assessments.

The Attorney General's last resort is to ask this Court to postpone applying precedent that shields "'opinions' or 'puffery'" from Chapter 93A actions at this time. (Opp. 22.) There is no basis in law for the Attorney General's request to defer ruling on this valid basis for dismissal. Chapter 93A cases are routinely dismissed where, as here, they are premised on non-actionable statements. *See Hansmann* v. *Nationstar Mortg., LLC*, 85 Mass. App. Ct. 1128 (2014) (affirming dismissal of Chapter 93A claims based on "permissible puffery"); *Carlson* v. *The Gillette Co.*, 2015 WL 6453147, at *6 (D. Mass. Oct. 23, 2015) (dismissing Ch. 93A claims challenging advertisements that were "nothing more than a kind of self-directed corporate puffery").

B. ExxonMobil Has No Obligation to "Disclose" the Attorney General's Beliefs about Climate Change

The Attorney General also faults ExxonMobil for not affirmatively warning investors about "the financial risks posed by climate change to the Company, the oil and gas sector, and global financial markets." (Opp. 22.) Under the Attorney General's construction of Chapter 93A, ExxonMobil can be held liable for not sounding the alarm about the purported "risk of armed conflicts and their terrible economic consequences throughout the world" and "increasing climate change impacts [that] may cross 'tipping points' and trigger abrupt, severe, and even catastrophic changes to financial and social systems." (Am. Compl. ¶ 296). That is pure nonsense. Chapter 93A imposes only a duty "to disclose material facts known to a party at the time of a transaction." *Underwood* v. *Risman*, 414 Mass. 96, 100 (1993). It does not impose liability for failing to disclose a mere "suspicion or a likelihood, rather than knowledge." *Id.* And it certainly does not impose

an obligation to adopt and parrot the concerns the Attorney General might have about potential climate-related risks. ExxonMobil's knowledge and beliefs, not the Attorney General's, are all that matter here. The Amended Complaint contains no factual allegation that ExxonMobil subscribes to the Attorney General's apocalyptic view of the future risks to its business.

C. ExxonMobil's Proxy Cost of Carbon Cannot Support a Deception Claim

The Attorney General's claim that ExxonMobil misled investors by accurately stating it uses a proxy cost of carbon fails as a matter of law. As explained in ExxonMobil's opening brief (Br. 27-29), the challenged statements are too general to be either misleading or material. *See Rodden* v. *Savin Hill Enter., LLC*, 33 Mass. L. Rptr. 442 (Suffolk Cty. Super. Ct. Apr. 21, 2016) (dismissing claims based on promises that were "undeniably non-specific" and, "at the very most, predictive as to possible future events"). The Attorney General offers nothing in response to that argument. It does not even attempt to identify a single statement concerning the proxy cost that is sufficiently concrete to support a deception claim. Instead, the Attorney General feigns "astonish[ment]" that the proxy cost did not alter the company's current or past financial performance, as reported in income statements, balance sheets, and other regulatory filings. (Opp. 26.) But the Attorney General's own allegations should dispel its supposed astonishment. As alleged, the proxy cost is a planning tool representing potential "future impacts" of climate change regulations decades in the future (Am. Compl. ¶ 358) and therefore would not be expected to appear in any public report of current financial results.

That, of course, was one of several grounds recognized by the New York Supreme Court when it squarely and definitively rejected identical allegations last year. *People* v. *Exxon Mobil Corp.*, No. 452044/2018, 2019 WL 6795771, at *15 (N.Y. Sup. Ct. Dec. 10, 2019). The Attorney General does not dispute that it is pursuing the same claims here. Rather, it inaccurately implies that New York law differs from Massachusetts law on this claim. (Opp. at 26 n.18.) Not so.

Massachusetts and New York law are the same on the element of materiality. *Compare Exxon Mobil Corp.*, 2019 WL 6795771, at *3 ("[A] statement or omission is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to act."), *with Com.* v. *AmCan Enter., Inc.*, 47 Mass. App. Ct. 330, 335 (1999) ("[M]ateriality . . . 'involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.'"). The Attorney General's rehashing of this rejected theory of deception is meritless.

D. The Amended Complaint Lacks Plausible Allegations Affecting "Trade or Commerce"

The Attorney General argues that its investor deception claim satisfies Chapter 93A's trade or commerce requirement because the challenged statements were made with a commercial purpose to "attract and keep investors." (Opp. 27-28.) That argument ignores that Chapter 93A defines "'trade' and 'commerce'" as the "advertising, the offering for sale, . . . the sale, . . . or distribution of . . . any security." G.L. c. 93A, § 1(b); *Reisman* v. *KPMG Peat Marwick LLP*, 965 F. Supp. 165, 174 (D. Mass. 1997). As ExxonMobil argued in its opening brief (Br. 36), the Attorney General has failed to allege that ExxonMobil made the relevant statements in connection with a sale or offer to sell securities.[7]

In response, the Attorney General submits that the statements need not have been made in connection with a sale or offer to sell involving ExxonMobil as a counter-party. Under the Attorney General's construction of the statute, transactions between third parties on the secondary market could give rise to a claim against ExxonMobil if the buyer read statements ExxonMobil made to the general public. (Opp. 27.) The Attorney General has come forward with no

7 The Attorney General falsely claims ExxonMobil does not dispute that its statements "advertised its securities." (Opp. 27.) ExxonMobil unambiguously argued that the Attorney General "fails to allege that the purportedly deceptive statements . . . were made in connection with a sale of or offer to sell securities." (Br. 36.)

precedent—trial or appellate, state or federal—supporting its statutory construction. And ExxonMobil is unaware of any, because it is not the law.

The only legal precedent the Attorney General offers in support of this spurious assertion addresses situations where the plaintiff was an intended beneficiary of the transaction at issue. *See UBS Fin. Servs., Inc.* v. *Aliberti*, 483 Mass. 396, 397 (2019) (claim by IRA beneficiary against custodian); *Ciardi* v. *F. Hoffmann-La Roche, Ltd.*, 436 Mass. 53, 61 (2002) (unfair practice claim by indirect purchaser of vitamins against manufacturer); *Barron* v. *Fidelity Magellan Fund*, 57 Mass. App. Ct. 507, 512 (2003) (claim regarding a mutual fund account purchased for plaintiff by his father when plaintiff was an infant); *Fed. Home Loan Bank of Boston* v. *Ally Fin., Inc.*, No. SUCV201101533BLS1, 2019 WL 4739263, at *11 (Mass. Super. Ct. Aug. 29, 2019) (allowing indirect purchaser's c. 93A claims related to mortgage-backed securities because the claims were bundled with "direct sales c. 93A claims"). None of these cases suggest, much less establish, that a company's public statements constitute "trade or commerce" under Chapter 93A simply because of trading in that company's securities that does not involve the company as buyer or seller.

III. The Attorney General Fails to State a Claim of Consumer Deception

A. The Amended Complaint Contains No Plausible Allegations of False or Misleading Statements

The Attorney General fails to plausibly allege that ExxonMobil deceived consumers by promoting its Synergy gasoline and Mobil 1 motor oil for improving engine efficiency and fuel economy relative to other gasoline products. As set forth in ExxonMobil's opening brief, the Attorney General does not allege that these statements are false, nor does it plausibly allege that they conveyed a materially misleading impression about the benefits of these products. (Br. 30-32.) The Attorney General has now conceded that point by failing to identify any allegation in the Amended Complaint that Synergy and Mobil 1 did not work as advertised or that consumers did

not get exactly the benefit they bargained for: a cleaner, more efficient engine that results in better gas mileage relative to other oil and gas products.

That leaves the Attorney General struggling to defend its claim by positing that consumers would misunderstand ExxonMobil's advertising to mean that producing and using Synergy and Mobil 1 products yields no greenhouse gas emissions at all. (Opp. 30.) That is nonsense. No *reasonable* consumer would understand ExxonMobil's statements about improved engine performance and fuel efficiency to mean that its fossil-fuel products do not emit greenhouse gases.[8]

Through selective quotation, the Attorney General's attempts to manufacture a misleading impression that is belied by the actual content of the statements recounted in the Amended Complaint and opposition exhibits. For instance, while the Attorney General repeatedly accuses ExxonMobil of representing that "its *products are cleaner* and greener than other fuel products" (Opp. 30 (emphasis added)), the underlying statements do not remotely contain such a broad pronouncement. With regard to Synergy gasoline, rather than characterizing the products themselves as "clean" or "environmentally beneficial," the advertisements merely state that Synergy fuel "keep[s] *your engine* 2X cleaner for better gas mileage." (Goldberg Aff., Exs. 3-A-I.) As for Mobil 1 motor oil, the only in-state conduct that the Attorney General alleges is the sale of Mobil 1 motor oil, some of which has a *fluorescent* green color. (*Id.*, Ex. 6; Opp. 6, 30.) The Attorney General fails to articulate any false belief that this color would tend to induce in a reasonable consumer, or cite any authority permitting it to dictate the color of product packaging.

B. The Attorney General Cannot Proceed on a Theory of Pure Omission

The Attorney General next argues that it is not what ExxonMobil said, but rather what it

[8] The Attorney General's contention that the Court must credit its assertion that ExxonMobil's advertising creates a misleading "perception" is wrong. (Opp. 30 n.22.) This is a legal conclusion entitled to no weight. On a motion to dismiss, the Court may not adopt an unreasonable construction of plain language quoted in the pleadings.

did not say that is misleading. According to the Attorney General, ExxonMobil was required to tell consumers the following before allowing them to buy gasoline or motor oil:

- "[F]ossil fuels are the leading cause of climate change";
- "[B]urning fossil fuels is not clean";
- "[ExxonMobil has] knowledge of the dire climate change consequences of using ExxonMobil fossil fuel products"; and
- "ExxonMobil is a leading global source of the very carbon emissions it purports to be mitigating."

(Opp. 30, 32.) However, the Attorney General fails to allege facts plausibly suggesting that omitting this information has the "capacity to mislead." *Tomasella* v. *Nestlé USA, Inc.*, 962 F.3d 60, 74 (1st Cir. 2020) (citing *Aspinall*, 442 Mass. at 395); *Risman*, 414 Mass. at 99-100.

The Attorney General does not explain how ExxonMobil's factual assertions about improved engine performance and fuel efficiency would tend to mislead a reasonable consumer about the causes or purportedly "dire" impacts of climate change, much less about ExxonMobil's claimed role in contributing to this global phenomenon. (Opp. 31-32.) Its bald assertion that ExxonMobil "made the 'environmental' attributes of its fossil fuel products a central characteristic by extensively describing those characteristics," lacks support in law or the pleadings. (*Id.* at 34.) The challenged in-state statements do not discuss climate change or the environment, and do not even mention "emissions."[9] The Attorney General's claim amounts to nothing more than a non-

[9] The Attorney General alleges that ExxonMobil represented its Synergy products "lower emissions" solely in statements appearing on online platforms, over which the Attorney General has not established jurisdiction. (Am. Compl. ¶¶ 587-88, 595-96, 611.) To the extent the Court considers these allegations, they are also not plausibly misleading. No reasonable consumer would understand the statement that a product *lowers* a consumer's own vehicular emissions when compared to standard oil and gasoline products to mean that these products produce no emissions. Nor does this statement reasonably convey any impression about ExxonMobil's own business practices or the supply side of producing these materials. *See Nestlé*, 962 F.3d 74-75; *Animal Legal Defense Fund Bos., Inc.* v. *Provimi Veal Corp.*, 626 F. Supp. 278, 279-81 (D. Mass. 1986) (dismissing Chapter 93A claim that veal producer deceptively failed to tell consumers about the upstream mistreatment of calves in its supply chain).

cognizable claim of pure omission. *Nestlé*, 962 F.3d at 74. (Br. 32-33.)

The Attorney General's attempt to analogize its theory of deceptive omission to the claims in *Aspinall* v. *Philip Morris Cos.*, 442 Mass. 381, 397 (2004), is unpersuasive. Contrary to the Attorney General's suggestion, the deception alleged in *Aspinall* was not premised on tobacco companies' mere failure to disclose the known health risks of smoking. (Opp. 33-34.) Rather, the Supreme Judicial Court held that the defendant's *specific* misrepresentation about "Light" cigarettes containing "lowered tar and nicotine" were deceptive if the defendant made that representation "with full knowledge that most Marlboro Lights smokers would not in fact *receive the promised benefits* of 'lowered tar and nicotine.'" *Aspinall*, 442 Mass. at 397 (emphasis added). Here, however, the Attorney General alleges no facts to suggest that consumers of Synergy and Mobil 1 would not receive the promised benefit of improved engine performance, improved fuel efficiency, or even reduced emissions relative to other oil and gas products. The Attorney General's subjective opinion that the environmental impacts of fossil fuels should be important to consumers or renders them "unfit for normal use" is precisely analogous to the theory of pure omission that was recently rejected in *Nestlé*, 962 F.3d at 74, after extensive analysis of the principles articulated in *Aspinall*.

IV. The Attorney General Fails to State a Claim of So-Called "Greenwashing"

The Attorney General fails to provide any authority supporting the viability of its so-called "greenwashing" claim or to respond to ExxonMobil's arguments for dismissal.

First, the Attorney General does not deny the accuracy of the factual statements challenged in the greenwashing claim, which are fully contextualized by ExxonMobil's public disclosures. (Br. 34-35.) The Attorney General contends that ExxonMobil's wholly accurate disclosures in its corporate reports and on its websites about its funding of research into emissions-reducing technology, including "algae and plant-waste-based biofuels," would tend to confuse consumers

about the nature of ExxonMobil's business by creating the impression that ExxonMobil is no longer producing traditional fossil fuels. (Opp. 36-37.) This theory of deception falls flat. No *reasonable* consumer exposed to ExxonMobil's representations about its investment in emissions-reduction measures would conclude the Company has ceased investing in traditional fossil fuel products. Indeed, this suggestion is belied by the Amended Complaint, which itself alleges ExxonMobil's continued advertisement of fossil fuel products, including ExxonMobil-branded gasoline. (Am. Compl. ¶ 542.)

In an effort to manufacture confusion, the Attorney General contends that ExxonMobil's statements about its current efforts to reduce emissions are contradicted by its "research in the 1970s and 1980s" concerning "potentially 'catastrophic' climate change impacts." (Opp. 36.) Not only does the Attorney General dramatically mischaracterize these historical documents,[10] it also fails to identify any contradiction between ExxonMobil's current statements about biofuels and environmental stewardship, and research on climate change from nearly half a century ago.

Second, the Attorney General does not rebut ExxonMobil's argument that the corporate branding that it labels "greenwashing" at most amounts to non-actionable corporate puffery. (Br. 33-34.) Instead, in a passing footnote, the Attorney General asserts that this determination cannot be made at the motion-to-dismiss stage. (Opp. 35 n.25.) Not so; courts do not hesitate to decide that question on a motion to dismiss where, as here, the facts pleaded do not state a viable claim. *See Hansmann*, 85 Mass. App. Ct. at 1128; *Carlson*, 2015 WL 6453147, at *6.

The Attorney General also fails to identify a single precedent upholding a deception claim

[10] The Attorney General mischaracterizes ExxonMobil's historic documents, which are incorporated by reference into the pleadings. *See Marram*, 442 Mass. at 45 n.4. For instance, it claims that ExxonMobil likened climate risks to a "nuclear holocaust or world famine" in a 1980s document. (Opp. 3 (citing Am. Compl. ¶ 86).) That document, which discussed a "scientific workshop on climate change," in fact states precisely the opposite: "society can adapt to the increase in CO_2 and that *this problem is not as significant* to mankind as a nuclear holocaust or world famine." (Affidavit of Justin Anderson in Support of ExxonMobil's Motion to Dismiss, Ex. A at 5 (emphasis added).)

premised on analogous corporate branding. Nor could it. The Attorney General's greenwashing claim, which challenges a logo depicting a "sun shining over mountains and water" and the slogan "Protect Tomorrow. Today." (Opp. 35-36), is entirely without precedent. No Chapter 93A case has premised liability on a company's promotion of efforts to improve environmental performance, much less on the use of generic images and abstract slogans. The sole, out-of-state authority the Attorney General cites in support of its greenwashing claim did not even concern deception, much less deceptive greenwashing. In *Jordan* v. *Jewel Food Stores, Inc.*, the Seventh Circuit addressed whether an advertisement in *Sports Illustrated* constituted commercial speech under the First Amendment. 743 F.3d 509 (7th Cir. 2014). That decision has no relevance to whether a logo depicting the sun gives rise to consumer deception under Chapter 93A.

Finally, the greenwashing claim bears no connection to trade or commerce and therefore is not actionable under Chapter 93A. (Br. 35-37.) The Attorney General has effectively conceded this point by failing to identify any product or service ExxonMobil offered for sale in connection with the relevant statements. The Amended Complaint does not contain any allegation that ExxonMobil misled consumers into buying biofuels, whether made from algae or otherwise, because ExxonMobil offers no such products at present. The Attorney General attempts to evade the requirement by arguing the trade or commerce element is satisfied by the statement's potential to "[i]ncreas[e] sales through customer goodwill . . . , regardless whether the advertising mentions a company's specific products." (Opp. 37.) But that argument stretches the trade or commerce requirement beyond any meaningful bounds. In attempting to reach statements that do not concern any product available to consumers, the Attorney General's interpretation would essentially read the trade or commerce requirement out of the statute and therefore should be rejected.[11]

[11] The Attorney General's reliance on *Jordan*, 743 F.3d at 519, is misplaced. In deciding whether speech was commercial under the First Amendment, the Seventh Circuit expressly doubted that "the Supreme Court's

V. The Attorney General Cannot Compel Others To Disseminate Its Viewpoint

As set forth in ExxonMobil's opening brief (Br. 37-39), the First Amendment requires dismissal of the Attorney General's claims because its theory of deceptive omission impermissibly seeks to impose liability on ExxonMobil for failing to disseminate the Attorney General's message about the "existential risk[]" of climate change and recommended policy responses. (Am. Compl. ¶ 687.)[12] The Attorney General does not deny that the First Amendment forbids it from compelling disclosures that are not "purely factual" and "uncontroversial," *Zauderer* v. *Off. of Disciplinary Couns. Of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985), nor does it contend that its so-called "corrective statements" satisfy this criteria. (Opp. 38.)

Instead, the Attorney General asserts that any challenge to its efforts to "requir[e] ExxonMobil to publish corrective statements" is premature. (Opp. 38, 40.) The Attorney General is wrong. This Court need not wait until litigation concludes to determine whether the requested compelled speech comports with the Constitution. *See, e.g.*, *Kimberly-Clark Corp.* v. *Dist. of Columbia*, 286 F. Supp. 3d 128, 141 (D.D.C. 2017) (striking down labeling statute, which compelled speech that was not purely factual and uncontroversial, even though "the city ha[d] not yet promulgated regulations implementing the Act, and it [wa]s therefore not entirely clear what Kimberly-Clark's label must include").

The Attorney General relies in vain on *United States* v. *Philip Morris USA Inc.*, 566 F.3d 1095 (D.C. Cir. 2009). There, the government had not yet identified the content of the corrective disclosures it sought, making assessment of their compliance with the Constitution truly

commercial-speech doctrine should be used to define" whether certain speech satisfies the commerce aspects of state statutes. *Id.* at 514 n.4.

[12] Contrary to the Attorney General's contention (Opp. 38 n.27), ExxonMobil properly challenged both the investor deception claim and consumer deception claims on this ground. ExxonMobil referenced the investor claim in the first paragraph of its First Amendment argument. (Br. 37.) That is because this claim similarly seeks to hold ExxonMobil liable for not disseminating the Attorney General's views on climate change. (*See, e.g.*, Am. Compl. ¶¶ 265, 364, 471-76, 482, 501, 522, 524-28, 533-36; Br. at 39 (citing Am. Compl. ¶ 503).)

premature. *Id.* at 1138-39. Here, by contrast, the Attorney General requests that the Court order ExxonMobil to "disclose in its advertising . . . the dire climate change consequences of using ExxonMobil fossil fuel products, and the fact that ExxonMobil is a leading global source of the very carbon dioxide emissions it purports to be mitigating." (Opp. 31-32.) Such disclosures are neither purely factual nor uncontroversial. *See Am. Beverage Ass'n* v. *City and Cty. of San Francisco*, 916 F.3d 749, 761 (9th Cir. 2019) (Ikuta, J., concurring) (striking down labeling regulation that would convey "San Francisco's one-sided policy views about sugar-sweetened beverages"). The Court has all the information it needs here to reach that legal conclusion now.

It is no response for the Attorney General to offer platitudes about fraud being unprotected by the First Amendment. (Opp. 38-40.) ExxonMobil is not seeking protection for its own statements (which it does not concede are fraudulent in the least), but protection *against* being compelled to support the Attorney General's opinions on controversial issues. The Attorney General identifies no precedent authorizing it to evade *Zauderer* review by alleging fraud. Nor could it. *Zauderer* itself addressed compelled disclosures intended to "dissipate the possibility of consumer confusion or deception." 471 U.S. at 651. And courts have held compelled disclosures unconstitutional under *Zauderer*, notwithstanding the government's contention that the disclosure sought to remedy "potentially misleading" commercial speech. *See, e.g.*, *Kimberly-Clark*, 286 F. Supp. 3d at 144. This Court should do the same here.

CONCLUSION

The Amended Complaint should be dismissed with prejudice because the Attorney General (i) fails to establish that this Court has personal jurisdiction over ExxonMobil; (ii) fails plausibly to allege deceptive conduct under Chapter 93A; (iii) seeks unconstitutionally to compel ExxonMobil to disseminate its preferred ideological messages; or all of the above.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Justin Anderson, counsel for Defendant Exxon Mobil Corporation, hereby certify that on December 15, 2020, I caused a copy of the Reply Memorandum of Exxon Mobil Corporation in Support of Its Motion to Dismiss the Amended Complaint to be served on counsel of record by electronic service in accordance with the Joint Motion to Set Pleading Deadlines, allowed by the Court on April 14, 2020.

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