COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13211

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff-Appellee,

v.

EXXON MOBIL CORPORATION,

Defendant-Appellant.

ON APPEAL FROM AN INTERLOCUTORY DECISION
OF THE SUPERIOR COURT IN SUFFOLK COUNTY

BRIEF OF APPELLEE
COMMONWEALTH OF MASSACHUSETTS

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STATEMENT OF ISSUES

The Massachusetts law prohibiting "strategic lawsuits against public participation"—the anti-SLAPP statute, G.L. c. 231, § 59H—was enacted to protect Massachusetts residents from lawsuits by private interests that seek to chill residents' right to petition the government. Exxon Mobil Corporation (ExxonMobil), one of the world's largest private interests, invoked the statute, seeking to dismiss a law enforcement action by the Attorney General on behalf of the Commonwealth. That action seeks to hold ExxonMobil accountable for violating the Massachusetts Consumer Protection Act, G.L. c. 93A, by deceiving Massachusetts investors in its securities-related representations and consumers in its product-advertising and brand-marketing. The issues presented are:

1. Does the anti-SLAPP statute apply to law enforcement actions filed by the Attorney General on behalf of the Commonwealth under express statutory authority to protect the public interest, where the Legislature did not expressly include the Attorney General or the Commonwealth within the statute's scope and instead assigned the Attorney General a special role to effectuate the anti-SLAPP statute's purpose?

2. If the anti-SLAPP statute applies, did the Superior Court correctly deny ExxonMobil's special motion to dismiss, where the court found that the Commonwealth's three claims are not "solely based" on ExxonMobil's petitioning but instead on its deceptive corporate reports and representations to Massachusetts investors and on its deceptive commercial product- and brand-marketing to Massachusetts consumers?

3. If each of the Commonwealth's three Chapter 93A claims is deemed to be "solely based" on ExxonMobil's petitioning, is the Commonwealth's Chapter 93A action nevertheless *not* a meritless SLAPP under the "second path" described in

Blanchard v. Steward Carney Hospital, Inc., 477 Mass. 141 (2017), where each of those claims is colorable and not filed to chill ExxonMobil's right to petition?

STATEMENT OF THE CASE

The anti-SLAPP statute establishes a special "procedural remedy for early dismissal of ... meritless lawsuits brought by large private interests to deter common citizens from exercising their" constitutional right to petition the government. *Duracraft Corp. v. Holmes Prods. Corp.*, 427 Mass. 156, 161 (1988). By all accounts, the Legislature enacted the statute in direct response to a lawsuit between *private* parties. *See id.* The filing of a special motion to dismiss under the law has immediate consequences, including a mandatory discovery stay, G.L. c. 231, § 59H, and the trial court's denial of such a motion is subject to immediate appeal, *Fabre v. Walton*, 436 Mass. 517, 521-22 (2002).

Nine months after the Commonwealth filed this Chapter 93A enforcement action against ExxonMobil and following the denial of the company's other efforts to delay this case,[1] ExxonMobil invoked the anti-SLAPP statute, seeking to insulate itself from Chapter 93A liability. It did so even though various courts, including this one, *Exxon Mobil Corp. v. Attorney Gen.*, 479 Mass. 312, 327-28 (2018), had already

[1] 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) (denying ExxonMobil's motion to delay filing of Commonwealth's complaint as lacking "any statutory authority whatsoever")(Add-117); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 34 (D. Mass. 2020) (rejecting as meritless ExxonMobil's removal of case and remanding case to state court).

rejected ExxonMobil's investigatory-stage claims that the Attorney General is pursuing ExxonMobil, not for potential violations of Chapter 93A, but to retaliate against the company for its public advocacy on climate change policy—a claim it makes nearly verbatim here, Br. 20, and which another court had found "implausible," *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 687 (S.D.N.Y. 2018), *appeal pending*, No. 18-1170 (2d Cir., argued Feb. 18, 2020).

ExxonMobil's special motion to dismiss, reminiscent of tobacco companies' failed attempt to cloak themselves in the petitioning clause's protection, *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1123-24 (D.C. Cir. 2009), has had its intended delaying effect. The failed motion and now this interlocutory appeal have prevented the Commonwealth from proceeding meaningfully with litigation of its claims that ExxonMobil has unlawfully deceived Massachusetts investors about the existential threat climate change poses to the company's value and Massachusetts consumers about the fact that its fossil fuel products cause the devastating effects of climate change. Instead, ExxonMobil has forced the Commonwealth and its courts, once again, to expend their resources to address the baseless accusation that the Commonwealth's claims are a subterfuge to retaliate against ExxonMobil based on its "viewpoints on climate change and energy policy." Br. 17.

This Court should once again reject ExxonMobil's meritless delay tactics. *Exxon*, 479 Mass. at 327-28. And, in doing so, the Court should hold that the anti-SLAPP statute does not apply to actions by the Attorney General on behalf of the Commonwealth to enforce state laws. If ExxonMobil were to prevail here, defendants in other law enforcement actions will undoubtedly invoke the anti-SLAPP statute to unjustifiably impede the Attorney General's authority to enforce state laws to protect and promote the public interest.

After the Commonwealth filed its amended complaint in this action on June 5, 2020, ExxonMobil served its special motion to dismiss under the anti-SLAPP statute on July 30, 2020, I-JA:224. In support of its motion, ExxonMobil included an affidavit with the same materials it attempted to use to support its claim, rejected by this Court,[2] that the Attorney General's Chapter 93A investigation was based on an improper purpose to punish ExxonMobil for expressing climate-change policy viewpoints. *E.g.*, I-JA:305. The Commonwealth opposed the motion, arguing: (i) the anti-SLAPP statute does not apply to government law enforcement actions and (ii) even if it did, (a) ExxonMobil failed to demonstrate that the Commonwealth's Chapter 93A claims are based solely on ExxonMobil's petitioning and (b) the Commonwealth's claims are, in any event, colorable and non-retaliatory.

[2] *Exxon*, 479 Mass. at 327-28.

IV-JA:5. The court (Green, J.) heard argument on March 12, 2021. I-JA:14; IV-JA:70.

On June 22, 2021, the court denied ExxonMobil's special motion to dismiss, holding that ExxonMobil "failed to meet its threshold burden to show that the Commonwealth's claims are based *solely* on Exxon[Mobil]'s petitioning." Add-67.[3] After considering the allegations in the Commonwealth's amended complaint, the court found that the statements at the heart of the Commonwealth's claims are "directed at influencing investors to retain or purchase Exxon[Mobil]'s securities or inducing consumers to purchase Exxon[Mobil]'s products and thereby increase its profits" and *not* based on ExxonMobil's petitioning. Add-71. Because ExxonMobil failed to satisfy its threshold burden, the court declined to reach the predicate question whether the anti-SLAPP statute even applies. Add-67 n.3. ExxonMobil timely appealed, IV-JA:176, and this Court granted the Commonwealth's application for direct appellate review.

[3] On the same day, the court also denied ExxonMobil's motion to dismiss for lack of personal jurisdiction and failure to state a claim because the Commonwealth's claims relate to or arise from ExxonMobil's advertising and marketing to Massachusetts investors and consumers and the Commonwealth had alleged facts plausibly demonstrating an entitlement to relief on each claim. *Infra* pp.23-24.

STATEMENT OF FACTS

I. The Attorney General Exercises Her Law Enforcement Authority to Investigate ExxonMobil for Potential Violations of Chapter 93A.

The Attorney General is the Commonwealth's "chief law officer" and has "a common law duty to represent the public interest." *Secretary of Admin. & Fin. v. Attorney Gen.*, 367 Mass. 154, 163 (1975). The Attorney General also has express authority to investigate any person she believes has violated Chapter 93A, G.L. c. 93A, § 6, and the "specific power ... to enforce" the statute, *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 88 (1984); G.L. c. 93A, § 4. Liability under Chapter 93A is broad. *Exxon*, 479 Mass. at 315. A company's marketing may, for example, violate Chapter 93A where it "consist[s] of a half-truth, or even" where it is "true as a literal matter, but still create[s] an over-all misleading impression through [a] failure to disclose material information." *Id.* at 320 (citation omitted).

A. The Attorney General Serves ExxonMobil with a Civil Investigative Demand.

On March 29, 2016, the Attorney General announced that her Office was investigating ExxonMobil to ascertain whether the company was violating Chapter 93A in its marketing to Massachusetts investors and consumers. I-JA:317. The Attorney General noted the importance of holding accountable companies that have "deceived investors and consumers about" climate change. I-JA:317. On April 19, 2016, the Attorney General served ExxonMobil with a civil investigative demand

(CID) seeking documents related to the investigation. I-JA:367. For example, the CID requested "all advertisements ... and informational materials" used "to solicit or market" ExxonMobil's fossil fuel products to Massachusetts consumers, I-JA:384, and "[d]ocuments and [c]ommunications concerning ... marketing decisions for addressing investor perceptions regarding [c]limate [c]hange," I-JA:383.

The Attorney General's decision to open the investigation was based on (i) newly-disclosed internal ExxonMobil documents indicating that ExxonMobil has for decades known its fossil fuel products cause climate change, with associated dangers for human societies, and that actions to slow climate change would diminish the company's value; and (ii) the possibility that ExxonMobil's failure to disclose that information in its corporate representations and marketing to Massachusetts investors and consumers could deceive them. *See Exxon*, 479 Mass. at 313. The Attorney General thus formed a belief that ExxonMobil may have engaged in a decades-long campaign to hide from investors and consumers its knowledge that fossil fuel products will cause profound impacts on earth's climate with devastating economic, environmental, and public-health consequences, and that those impacts would threaten the company's existence. *See id.*

B. The Courts Reject ExxonMobil's Claim that the Attorney General's Investigation Was Motivated by an Improper Purpose.

ExxonMobil responded by filing nearly simultaneous lawsuits against the Attorney General in a Texas federal court and a Massachusetts state court to block

the CID. Similar to its assertions here, *see* Br. 20, 36, ExxonMobil argued in each of those cases that the Attorney General initiated her investigation "to retaliate against Exxon[Mobil] for its views on climate change and thus violate Exxon[Mobil]'s constitutional rights." *Exxon*, 316 F. Supp. 3d at 686; *In re Civil Investigative Demand No. 2016-EPD-36*, 2017 WL 627305, at *4 (Super. Ct. Jan. 11, 2017)(Add-110) ("Exxon[Mobil] ... argues that the CID is politically motivated, that Exxon[Mobil] is the victim of viewpoint discrimination, and that it is being punished for its views on global warming."). Both courts rejected ExxonMobil's claims.

After the federal action was transferred to the Southern District of New York, the district court found ExxonMobil's "allegations that the" Attorney General was "pursuing [a] bad faith investigation[] ... to violate Exxon[Mobil]'s constitutional rights ... implausible," *Exxon*, 316 F. Supp. 3d at 687, and the company's contention that the Attorney[] General had an intent to chill the company's speech a "wild stretch of logic," *id.* at 689. ExxonMobil's appeal of that decision, which was argued in February 2020, remains pending before the Second Circuit. *Supra* p.12. Relying on a tolling agreement between the parties, ExxonMobil continues to use the appeal's pendency as the basis for not responding to the 2016 CID.

The Superior Court likewise rejected ExxonMobil's claims that issuance of the CID was "politically motivated" or intended to "punish[]" ExxonMobil "for its

views on global warming." Add-110. The court also found no "evidence" of "actionable bias on the part of the Attorney General." *Id.* at 112. On appeal, this Court confirmed that the Attorney General's investigation was not "solely" a "pre-text" for violating ExxonMobil's constitutional rights. *Exxon*, 479 Mass. at 327-28. The Supreme Court denied ExxonMobil's petition for certiorari. 139 S. Ct. 794 (2019).

II. The Attorney General Sues ExxonMobil on Behalf of the Commonwealth for Violations of Chapter 93A.

The Attorney General continued her investigation, I-JA:22-23(¶¶3-4), and on October 10, 2019, notified ExxonMobil that she planned to sue the company for violating Chapter 93A. After ExxonMobil's attempt to delay the lawsuit's filing failed,[4] 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. I-JA:402. And after ExxonMobil's attempt to remove the case to federal court failed,[5] on June 5, 2020, the Attorney General filed a three-count amended complaint alleging violations of Chapter 93A. I-JA:17-223.

[4] *Supra* p.11 & n.1.

[5] *Supra* p.11 & n.1.

A. ExxonMobil Is a Fossil Fuel Business that Depends on the Sale of Its Fossil Fuel Products.

ExxonMobil, formed when Exxon and Mobil merged in 1999, is one of the largest investor-owned oil and gas companies in the world. *See* I-JA:38(¶51). Due to its advertising and brand-marketing campaigns, including at 300 Exxon- and Mobil-branded retail service stations in Massachusetts, I-JA:162(¶545), the company has become a household name across the United States and in Massachusetts. Massachusetts institutional and other investors also hold billions of dollars in the company's shares, for their clients and themselves. I-JA:89-90(¶¶273-79). In recent years, ExxonMobil has continually and deceptively reassured those investors that purchasing and holding ExxonMobil stock is a safe, long-term investment option. I-JA:113(¶357).

ExxonMobil is one of the largest sources of climate-change-causing greenhouse gas emissions in the United States. I-JA:40(¶¶66, 68). Since the early 1980s, ExxonMobil has known that "over the long term, climate change will 'produce effects which will indeed be catastrophic (at least for a substantial fraction of the earth's population),'" I-JA:46(¶96), and that "[m]itigation of the 'greenhouse effect' would require ... curtailment of fossil fuel consumption," I-JA:49(¶¶107-08). In the late 1970s, ExxonMobil also recognized that actions to address climate change would threaten its existence. I-JA:41-43(¶¶75-76, 83), 47(¶101), 49-50(¶¶107, 114). ExxonMobil then hid from Massachusetts investors "the material climate-driven

risks to its business," and from Massachusetts consumers "how its fossil fuel products cause climate change" "to increase its short-term profits [and] stock price." I-JA:22(¶1). To that end, ExxonMobil has engaged in an aggressive, tobacco-company-like marketing campaign, pouring millions—at least $56 million between 2015 and 2019 alone—into "climate-focused" marketing to convince investors that the company's future is bright and consumers that its products actually reduce harmful emissions. *See* I-JA:197-98(¶663); *see also* I-JA:50-65(¶¶115-72), 69-72(¶¶189-98).

B. The Commonwealth Alleges Investor, Consumer Products, and Consumer Greenwashing Deception Chapter 93A Claims.

The Commonwealth's amended complaint alleges three Chapter 93A claims, and each of those claims is based on ExxonMobil's deceptive corporate marketing reports and disclosures, advertising, brand-marketing, and other profit-oriented communications directed at Massachusetts investors and consumers. I-JA:215-22. Like the investigation, the Commonwealth's complaint "is premised on the Attorney General's belief that Exxon[Mobil] ... misled Massachusetts residents about the impact of fossil fuels on both the Earth's climate and the value of the company, in violation of c. 93A." *Exxon*, 479 Mass. at 316. Or, as the federal district court stated in rejecting ExxonMobil's removal attempt, the Commonwealth's complaint "alleges only corporate fraud." *Massachusetts*, 462 F. Supp. 3d at 44.

Investor Deception Claim: In count I, the Commonwealth alleges that ExxonMobil has misrepresented, obscured, and otherwise failed to disclose to Massachusetts investors material facts with respect to the risks climate change poses to global financial systems and markets (i.e., systemic risks) and the value of ExxonMobil's business. I-JA:215(¶736). Instead, ExxonMobil has falsely represented to Massachusetts investors that it "face[s] virtually no meaningful transition risks from climate change." I-JA:149(¶497). By failing to accurately and fully disclose those risks—risks known internally to ExxonMobil for decades, I-JA:40-50(¶¶69-114)—ExxonMobil has deprived Massachusetts investors of crucial information material to their decisions to purchase, sell, retain, and price ExxonMobil securities. I-JA:216(¶¶738-40).

Consumer Products Deception Claim: In count II, the Commonwealth alleges that ExxonMobil has misrepresented and failed to disclose material information regarding the claimed environmental benefits of using its Synergy™ and "green" Mobil™ products and the fact that using those products cause climate change and its devastating effects in Massachusetts and elsewhere. I-JA:217-20(¶747-60). Instead, ExxonMobil tells Massachusetts consumers in its product marketing that using *its* fossil products will "reduce greenhouse gas emissions," I-JA:170-71(¶¶587-88). But it fails to disclose in that marketing that production and

use of those products result in massive greenhouse gas emissions that are causing climate change and endangering communities. I-JA:218-19(¶753).

Consumer Greenwashing Claim: In count III, the Commonwealth alleges that ExxonMobil has perpetrated sophisticated greenwashing brand-marketing campaigns that falsely and misleadingly portray the company as a "leader[] in solving the problem of climate change," "support[ing] ... action to reduce greenhouse gas emissions," and "focus[ed] on developing clean energy to 'protect tomorrow today.'" I-JA:220(¶762); *see* I-JA:220-22(¶¶761-70).[6] ExxonMobil's "Protect Tomorrow. Today" brand-marketing campaign, for example, falsely proclaims its commitment to "protect the environment for future generations," I-JA:189-90(¶643), while failing to disclose the facts that production and use of its fossil fuel products are a leading cause of climate change that, if unabated, will condemn future generations to catastrophe, I-JA:45-46(¶¶90, 96), 48(¶105), or that the company is actually *increasing* fossil fuel production, I-JA:175(¶598); *see* IV-JA-34-41.

[6] "Greenwashing" is a type of falsehood disseminated by a company to present an environmentally responsible image that contradicts its true environmental record and impact, I-JA:186(¶ 634), and is used as a marketing strategy to induce consumer product purchases and brand loyalty, *see Jordan v. Jewel Food Stores*, 743 F.3d 509, 518 (7th Cir. 2014) (advertisement "no less 'commercial' because it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific product or service").

C. The Superior Court Holds that the Commonwealth Has Stated Three Viable Chapter 93A Claims.

On the same day the Superior Court denied ExxonMobil's special motion to dismiss, it also rejected ExxonMobil's contention that Massachusetts courts lack personal jurisdiction over it—a contention this Court already rejected at the investigatory-stage, *Exxon*, 479 Mass. at 314-24—and ExxonMobil's assertion that the Commonwealth had failed to allege sufficient facts to state valid Chapter 93A claims, Add-72-98. In its detailed decision, the court made no suggestion that the Commonwealth's three claims are based on "ExxonMobil's public advocacy on energy policy." ExxonMobil Br. 15.

Regarding personal jurisdiction, the court held that the claims "arise out of Exxon[Mobil]'s contacts with Massachusetts." Add-85. The court held that the Commonwealth's claims arise from, among other things, (i) "direct communications between Exxon[Mobil] and Massachusetts investors regarding the impact of climate change and climate change regulation on Exxon[Mobil]'s business," Add-81, and (ii) ExxonMobil's failure to disclose that the company's fossil fuel products cause climate change in its advertisements to Massachusetts consumers about those products' environmental benefits, Add-82-84. Consistent with this Court's earlier opinion, *Exxon*, 479 Mass. at 314-24, the Superior Court then held that it had jurisdiction to adjudicate the Commonwealth's claims. Add-78-86.

Regarding the viability of the Commonwealth's claims, the Superior Court recognized that the Commonwealth's three claims focus on deceptive corporate marketing reports, advertising, and other brand-marketing directed at Massachusetts investors and consumers: count I concerning ExxonMobil's "marketing of its securities to Massachusetts investors," Add-88; count II concerning ExxonMobil's "advertising" to Massachusetts consumers, Add-92; *see id.* at 95 ("claim is based on Exxon[Mobil] advertising."); and count III concerning ExxonMobil's "greenwashing" campaign, acted-out through its "advertising and [brand] promotional materials." Add-96. Based on the Commonwealth's detailed allegations, the court held that the Commonwealth has stated three viable Chapter 93A claims. Add-88-97.

STANDARD OF REVIEW

This Court reviews *de novo* the question of law whether the anti-SLAPP statute applies to government law enforcement actions. *Conservation Comm'n of Norton v. Pesa*, 488 Mass. 325, 339 (2021). This Court reviews for "abuse of discretion or error of law" the denial of ExxonMobil's special motion to dismiss for failure to satisfy its threshold burden by a preponderance of the evidence. *Cadle Co. v. Schlichtmann*, 448 Mass. 242, 250 (2007).[7] This Court may affirm on "any ground

[7] ExxonMobil, citing *Reichenbach v. Haydock*, 92 Mass. App. Ct. 567 (2017), and *Haverhill Stem LLC v. Jennings*, 99 Mass. App. Ct. 626 (2021), which relies on

apparent on the record that supports the result reached in the lower court." *Clair v. Clair*, 464 Mass. 205, 214 (2013).

SUMMARY OF ARGUMENT

1. The anti-SLAPP statute's text, structure, and purpose demonstrate that the statute does not apply to government law enforcement actions. It is a settled rule of statutory construction that remedial laws do not apply to the government unless the Legislature clearly expresses such an intent. Here, the Legislature did not unequivocally express that intent by, as it has done elsewhere, defining the key term "party" to include the government. The statute's structure reinforces this conclusion, because the Legislature gave the Attorney General the express role of aiding "part[ies]" in their use of the statute and did not expressly authorize a prevailing party under the statute to recover attorneys' fees from the government. The statute's history confirms it, since the Legislature enacted the law in direct response to a concern about *private*—not government—interference with the right to petition. And, as this case illustrates, sound public policy weighs against applying the statute to the government because mere invocation of the statute impairs vindication of the public interests secured by state law enforcement. (pp.28-39).

Reichenbach, states that this Court's review is *de novo*. Br. 24. *Reichenbach*, however, overlooked *Cadle*, where this Court applied the "abuse of discretion or error of law" standard to a lower court's threshold-stage ruling. *Cadle*, 448 Mass. at 250. Regardless, this Court should affirm under either standard.

2. Even if the anti-SLAPP statute were to apply, the Superior Court correctly held that ExxonMobil failed to demonstrate that the Commonwealth's claims are "solely based on" ExxonMobil's petitioning. Instead, the Commonwealth's investor, consumer products, and consumer greenwashing deception claims are based on ExxonMobil's deceptive corporate marketing reports and disclosures, product advertising, and brand-marketing that are all directed at Massachusetts investors and consumers to increase the company's profits. In holding that those communications do not constitute protected petitioning, the Superior Court did not evaluate ExxonMobil's subjective motivation, because, viewed objectively, the ExxonMobil communications at issue are plainly not petitioning. And ExxonMobil gains nothing from some scattered references to communications that may constitute petitioning, because mere references to some purported petitioning that the complaint mentions but does not directly challenge cannot justify complete or partial dismissal under the statute. (pp.39-51).

3. In all events, the Commonwealth's law enforcement action is not a meritless SLAPP suit, because each of the Commonwealth's claims is colorable and non-retaliatory. The Commonwealth's claims derive from an extensive investigation authorized by this Court, are consistent with a legal theory validated by this Court, and state, as the Superior Court recognized, plausible entitlements to relief under Chapter 93A. In other words, they deserve to be adjudicated by the

court. It is likewise clear that the Commonwealth did not file this lawsuit to retaliate against ExxonMobil's petitioning. Indeed, both this Court and a federal court have already held that the Attorney General's pursuit of ExxonMobil is *not* based on an intent to punish ExxonMobil for expressing its climate-change-policy viewpoints. The Attorney General filed this lawsuit "to hold ExxonMobil accountable for misleading the state's investors and consumers." I-JA:22(¶2). And even if that objective were not so clear, ExxonMobil has not overcome the presumption that the Attorney General has legitimate grounds for this action. (pp.51-58).

ARGUMENT

The right to petition the government is guaranteed, but the right to engage in deceptive business practices is not. Here, ExxonMobil invokes the anti-SLAPP statute to immunize its unlawful efforts to deceive Massachusetts investors and consumers. This Court should affirm the Superior Court's denial of ExxonMobil's attempt to weaponize the anti-SLAPP statute to thwart the Commonwealth's Chapter 93A enforcement action. First, the anti-SLAPP statute does not apply to government law enforcement actions. Second, even if the statute were to apply, ExxonMobil has failed to satisfy its threshold, merits-based burden to show that the Commonwealth's three claims are solely based on ExxonMobil's petitioning. Third, the Commonwealth's suit is, in all events, not a SLAPP suit because its claims are both colorable and non-retaliatory.

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.

ExxonMobil's invocation of the anti-SLAPP statute fails for a fundamental reason: the Legislature did not authorize parties to invoke the anti-SLAPP statute's *private* remedy to thwart government law enforcement actions. While the Superior Court was certainly correct that the Commonwealth's claims cannot be dismissed under the statute because they are not solely based on ExxonMobil's petitioning, *infra* Pt.II, the statute's text, structure, and purpose reveal that the Legislature did not intend it to apply to law enforcement actions at all. This Court should resolve that important question to prevent other defendants from invoking the statute, like ExxonMobil has here, to delay the Commonwealth's ability to protect the public from conduct the Legislature has made unlawful.

A. The Legislature Did Not Make the Requisite Clear Statement to Subject the Commonwealth to the Anti-SLAPP Statute's Remedy.

"[I]t is a widely accepted rule of statutory construction that general words in a statute ... will not ordinarily be construed to include the State." *Hansen v. Commonwealth*, 344 Mass. 214, 219 (1962). Accordingly, if the Legislature intends a statute to apply to the government, it must say so with "clear and unequivocal language." *Id*. at 220; *see Donohue v. City of Newburyport*, 211 Mass. 561, 567 (1912) ("plain words to that effect"); 3 Shambie Singer, Statutes and Statutory Construction § 62:1, at 514 (8th ed. 2020) ("Provisions written in general language

that reasonably could apply both to the government and private parties exempt the government."). That widely accepted rule applies to both remedial and procedural statutes. *Hansen*, 344 Mass. at 219 (citing *Westchester Cty. v. Westchester Cty. Fed'n of Labor*, 115 N.Y.S.2d 144, 146 (1952) (statute "prescribing in general terms procedural requirements is held not applicable to the state ... [because] such entities are not specifically mentioned in the statute.")). And Massachusetts courts have consistently applied it. *E.g.*, *Bretton v. State Lottery Comm'n*, 41 Mass. App. Ct. 736, 738-39 (1996) (state commission not subject to Chapter 93A where statute "contains no explicit indication that governmental entities" come within "its provisions"); *Kilbane v. Secretary of Human Servs.*, 14 Mass. App. Ct. 286, 287-89 (1982) (same as to different statute).

That venerable rule derives from the fact that the government does not act to "restrain or diminish any of [its own] rights and interests" "without a clear expression or implication to that effect." *United States v. Wittek*, 337 U.S. 346, 358-59 & n.16 (1948). "[T]he rule [thus] ... insulate[s]" the government from "unclear statutory language that might encroach harmfully upon governmental affairs." Singer, *supra*, § 62:1, at 516; *cf. New Hampshire Ins. Guar. Ass'n v. Markem Corp.*, 424 Mass. 344, 351 (1997). That rationale carries special force here, where the Attorney General's express authority to enforce state law to protect and promote the public interest is at stake. G.L. c. 93A, § 4; *Exxon*, 479 Mass. at 323 ("manifest

interest in enforcing" Chapter 93A). That is "a core executive constitutional function," *United States v. Armstrong*, 517 U.S. 456, 465 (1996), and one cannot assume the Legislature intended to authorize private interference with that core function without making its intent clear. Indeed, it would defy logic for the Legislature to give the Attorney General the "specific power ... to enforce" Chapter 93A, *Mass. CRINC*, 392 Mass. at 88, and then authorize defendants to invoke the anti-SLAPP statute to impede it. Absent a clear statement expressing such an intent, this Court should not infer it—thereby sanctioning "an intolerable interference by the judiciary in the executive department of the government." *Shepard v. Attorney Gen.*, 409 Mass. 398, 401 (1991).

B. The Anti-SLAPP Statute's Text, Structure, and Purpose Confirm that the Statute Does Not Apply to Government Law Enforcement Actions.

The clear legislative intent required to include the government within the anti-SLAPP statute's scope is not evident in its text, structure, or purpose. The Legislature authorized a "party" to a civil action to file a "special motion to dismiss" the other "party['s]" claims against it "[i]n any case" where the other party's affirmative "claims ... are based on" the moving "party's exercise of its right of petition." G.L. c. 231, § 59H.[8] Absent from that text is any "clear ... language"

[8] *Compare Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780-82 (2000) (statute authorizing a private person to sue "[a]ny person" insufficient to include States).

reflecting an intent to apply the anti-SLAPP statute to the government. *See Hansen*, 344 Mass. at 120. While the general terms "any case" and "party" could otherwise be susceptible of an all-encompassing interpretation, such an interpretation must yield to the settled rule that "general language that reasonably could apply both to the government and private parties exempt[s] the government" in the absence of a clear, contrary intent. *See* Singer, *supra*, § 62:1, at 514; *cf. Trustees of Health & Hosps. v. MCAD*, 65 Mass. App. Ct. 329, 338 (2005) ("remedy ... appl[ies] to the Commonwealth" only "by virtue of the appropriate statutory definition"), *aff'd*, 449 Mass. 675 (2007).[9] Indeed, the Legislature has expressly defined the term "party" to include the government when it has intended that result. *E.g.*, G.L. c. 161C, § 6(c) (defining "[a]ny party" to include "the commonwealth"); G.L. c. 231, § 6E (same in same chapter as anti-SLAPP statute).

"[S]tatute[s] must [also] be read as a whole." *Commonwealth v. Adams*, 389 Mass. 265, 273 (1983). Here, two other provisions in the anti-SLAPP statute indicate that the Legislature did not intend the general term "party" to include the government. First, the Legislature specified an express role for the Attorney General to further the anti-SLAPP statute's purpose: it authorized "[t]he attorney general" to "intervene to defend or otherwise support the moving party" seeking dismissal. G.L.

[9] Due to this "widely accepted" rule, *Hansen*, 344 Mass. at 219, at least one state has expressly *included* the government in its anti-SLAPP statute. Fla. Stat. § 768.295(2)(b) (statute applies to "[g]overnmental entit[ies]").

c. 231, § 59H. Because "language should not be implied" where it is "employed [] in one paragraph, but not in another," *Beeler v. Downey*, 387 Mass. 609, 616 (1982), there is no basis for implying that the term party in the phrase "the party against whom such special motion is made" may include the Attorney General when acting to enforce state law, where just two sentences later the parties plainly do *not* include the Attorney General, because the Attorney General is granted the right to intervene to *support* "the moving party." Second, the Legislature authorized a prevailing special movant to recover its "costs and reasonable attorney's fees," G.L. c. 231, § 59H, but it did not also *expressly* authorize a prevailing party to recover attorney's fees from the Commonwealth, as this Court's opinions require, *e.g.*, *Judge Rotenberg Educ. Ctr. v. Commissioner of the Dep't of Mental Retardation*, 424 Mass. 430, 470 (1997). If the Legislature had intended the statute to apply to the government, then it would have been incongruous for it not also to afford a prevailing party the statute's complete remedy. Those textual provisions thus confirm the interpretation demanded by the clear statement rule.

The anti-SLAPP statute's historical context cements what the statute's text makes clear. "States adopt laws to address the problems that confront them." *Burson v. Freeman*, 504 U.S. 191, 207 (1992). Accordingly, this Court also discerns legislative intent from the "cause of [the statute's] enactment, the mischief or imperfection to be remedied and the main object to be accomplished." *Pesa*, 488

Mass. at 339 (citation omitted). Here, this Court previously found that "[o]ne lawsuit appears to have been an impetus for introduction of the anti-SLAPP legislation." *Duracraft*, 427 Mass. at 161. Significantly, that lawsuit involved only *private* parties. *Id.* That context is undoubtedly what led this Court to conclude that "[t]he typical mischief that the legislation intended to remedy was [meritless] lawsuits directed at individual citizens" by "large private interests." *Id.* (citation omitted). Indeed, the statute's context and history do not even hint that the Legislature was concerned about government law enforcement actions; that is, state law enforcement actions were neither the "mischief" nor the "imperfection" the Legislature sought to remedy in enacting the statute. *See Pesa*, 488 Mass. at 339.

"General expressions" like "any case" and "party" "may [also] be restrained by relevant circumstances showing a legislative intent that they be narrowed and used in a particular sense." *Duracraft*, 427 Mass. at 163 n.11 (citation omitted). Here, again, the Legislature enacted the anti-SLAPP statute to create a remedy for the quick, inexpensive dismissal of meritless lawsuits filed by *private* interests to chill the valid exercise of the constitutional right to petition. *Id.* at 161; *see* 1994 House Doc. No. 1520 (Add-101). The Attorney General is not a private interest; she is the Commonwealth's chief law enforcement officer with a "common law duty to represent the public interest," *Secretary of Admin. & Fin.*, 367 Mass. at 163, and broad discretion to decide when, and against whom, to enforce state law, *Shepard*,

409 Mass. at 401. *A fortiori*, this Court should restrain the general terms "any case" and "party" to embrace only those lawsuits that caused the Legislature to enact the statute—lawsuits by *private* parties, not the government. If the Legislature had intended to include the government within the statute's scope, it would have said (and *needed* to say) so expressly. *See United States v. Cooper Corp.*, 312 U.S. 600, 607 (1941). Having failed to do so, this Court may "not add words to" supply the omitted intent. *Wallace W. v. Commonwealth*, 482 Mass. 789, 794 (2019) (quoting *Commonwealth v. McLeod*, 437 Mass. 286, 294 (2002)).

C. Public Policy Counsels Against Applying the Anti-SLAPP Statute to Civil Law Enforcement Actions.

Sound public policy also points strongly against interpreting the anti-SLAPP statute to apply to government law enforcement actions. 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). Maine's highest court reached the very same conclusion when it held that "[n]othing in" Maine's anti-SLAPP statute, which is materially identical to the Commonwealth's statute, "or its history expresses or even implies that it would protect" law-enforcement targets from government law enforcement actions. *Town of Madawaska v. Cayer*, 103 A.3d 547, 550 (Me. 2014); *see id.* at 552 ("statute does not apply in the circumstances of this case"). ExxonMobil's reliance on the Massachusetts anti-SLAPP statute illustrates why the

Legislature could not have intended to subject state law enforcement actions to the anti-SLAPP statute's powerful remedy.

The anti-SLAPP statute creates a "'procedural remedy for early dismissal of the disfavored' lawsuits." *Blanchard*, 477 Mass. at 147. The statute is "poten[t]," *id*. at 155, and its mere invocation has immediate consequences. First, a special motion to dismiss "shall" stay "[a]ll discovery" in the case." G.L. c. 231, § 59H. While a court may permit "specified discovery," typically limited to matters at issue in the special motion, *see id.*, it forbids the nonmoving party, here, the Commonwealth, from engaging in full discovery to which it is otherwise entitled as a matter of right. Mass. R. Civ. P. 26. Second, the statute "shift[s] the normal burden of proof on a motion to dismiss," *Duracraft*, 427 Mass. at 162, by, *inter alia*, eliminating the defendant moving party's obligation to demonstrate that a plaintiff has failed to allege a plausible entitlement to relief and instead placing on the plaintiff non-moving party the obligation to satisfy this Court's more burdensome "fair assurance" test. *Blanchard v. Steward Carney Hosp., Inc.*, 483 Mass. 200, 205 (2019). Third, a party may immediately appeal an interlocutory decision on a special motion to dismiss. *Id.* at 213. Together, the mere filing of a special motion to dismiss will delay meaningful advancement of the Commonwealth's claims—here, for at least a year.

ExxonMobil thus seeks improperly to invoke a statute intended to eliminate spurious *private* litigation as a tool to delay a government law enforcement action. That simply cannot be a use envisioned by the Legislature when it enacted the statute, because "[s]ubjecting" government law enforcement actions to an anti-SLAPP statute "unduly hinder[s] and undermine[s]" the government's "efforts to protect the ... citizenry at large by delaying an enforcement action." *People v. Health Labs. of N. Am.*, 87 Cal. App. 4th 442, 450-51 (2001).[10] The nature of the Commonwealth's claims in this case brings that risk into sharp relief because "[f]alse advertising enforcement actions [are] ... particularly susceptible to delay by the ... easy assertion that the prosecutor's action interfered with [the defendant's] commercial free speech rights," as ExxonMobil has, in effect, claimed here. *Id.* at 451.

The potential harm to the public interest is obvious when considering that many Chapter 93A actions brought by the Attorney General target false and misleading statements to Massachusetts investors and consumers. For example, the Attorney General filed actions on behalf of the Commonwealth against Volkswagen for deceptively marketing its "clean diesel" vehicles, IV-JA:51-52, and Purdue

[10] 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. California Citizens for Neighborhood Empowerment*, 111 Cal. App. 4th 302, 307 (2003).

Pharma for deceptively marketing its opioids, IV-JA:46-49. Each of those defendants, too, could have delayed Chapter 93A liability—for years—simply by filing special motions to dismiss. The path to such misuse of the anti-SLAPP statute has now been lit in this very public case[11] and unless extinguished will likely become a model for widespread abuse in the future. Indeed, if the anti-SLAPP statute applies to state law enforcement actions, defendants in myriad other actions brought by the Commonwealth to enforce consumer protection, civil rights, antitrust, environmental protection, and other laws will likely deploy the anti-SLAPP statute to delay those actions too. The anti-SLAPP statute would thus become a weapon for harassment, abuse, and wastefulness. In the absence of a clear statement to the contrary, this Court simply cannot conclude that the Legislature intended to encumber state law enforcement actions in this way.

That conclusion is reinforced by the fact that defendants to civil law enforcement actions already can raise—without the anti-SLAPP statute—a claim that the government's law enforcement action was brought to retaliate against their petitioning by means of a defense or counterclaim. *See Madawaska*, 103 A.3d at 552; *cf. Exxon*, 316 F. Supp. 3d at 703 (noting that ExxonMobil "could have raised its Section 1983 [First Amendment] claims in state court"). In contrast, defendants

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

in private lawsuits cannot raise such a defense or counterclaim because the federal and Massachusetts constitutions do not bar "*private* abridgment of speech." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019); *Commonwealth v. Hood*, 389 Mass. 581, 584-85 (1983). The anti-SLAPP statute thus extends a protection to private litigants that was *already* available against the government. But when defendants in state enforcement actions raise a petitioning clause retaliation claim or defense, it should be evaluated under the well-developed governing standards. *See Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019); *Hartman v. Moore*, 547 U.S. 250, 265-66 (2006). That rubric appropriately accounts for the presumption of regularity that applies to prosecutorial decisions, *Hartman*, 547 U.S. at 263, and requires a defendant, like ExxonMobil here, to affirmatively demonstrate that the Attorney General lacked legitimate grounds to file a lawsuit, *see Nieves*, 139 S. Ct. at 1725.

ExxonMobil is well-aware of the actual mechanisms for raising a First Amendment defense or counterclaim in response to a purportedly unconstitutional *government* action. Indeed, it has already utilized those mechanisms and decisively lost. *E.g.*, *Exxon*, 316 F. Supp. 3d at 691-92 (summarizing ExxonMobil's 42 U.S.C. § 1983 constitutional tort claims, including First Amendment claim, against

Attorney General).[12] Now, undeterred, ExxonMobil has "deployed" the anti-SLAPP statute "not to limit 'strategic litigation,' but as an additional litigation tactic." *Duracraft*, 427 Mass. at 163. As this case illustrates, ExxonMobil has utilized the statute to great effect, effectively stalling meaningful advancement of the Commonwealth's Chapter 93A action against it, including full discovery, even though the Superior Court has already held that the Commonwealth has stated viable claims against it. Add-88-97. To preserve the Attorney General's authority to "institute ... suits ... [s]he deems necessary for the enforcement of [state law] ..., the preservation of order, and the protection of public rights," *Commonwealth v. Kozlowsky*, 238 Mass. 379, 390-91 (1921), this Court should hold that the anti-SLAPP statute does not apply to the Commonwealth.

II. Even if the Anti-SLAPP Statute Does Apply, the Superior Court Correctly Held that the Commonwealth's Three Chapter 93A Claims Are Not Solely Based on ExxonMobil's Petitioning.

Even if the anti-SLAPP statute applied, ExxonMobil's special motion to dismiss, as the Superior Court held, fails immediately on the merits-based threshold inquiry. That inquiry—the first stage in the now familiar two-stage burden shifting framework—requires ExxonMobil to demonstrate, "by a preponderance of the evidence that" each of the Commonwealth's three claims are "solely based on"

[12] In fact, ExxonMobil has raised its First Amendment grievances as affirmative defenses in its amended answer, and the Commonwealth has moved to strike those defenses because they are barred by *res judicata*. *See* I-JA:15.

ExxonMobil's "own petitioning activities," *Blanchard*, 483 Mass. at 203, and "that [each] claim has no other substantial basis," *477 Harrison Ave., LLC v. JACE Boston, LLC*, 483 Mass. 514, 518 (2019). That is, ExxonMobil must show that each "claim itself arises only from and complains only of" ExxonMobil's "petitioning activity." *Blanchard*, 477 Mass. at 160 n.25. And that, as the Superior Court held, Add-70-71, ExxonMobil cannot do.

A. The Commonwealth's Three Chapter 93A Claims Are Not Solely Based on ExxonMobil's Petitioning.

The Commonwealth's three Chapter 93A claims—as written and not as ExxonMobil mischaracterizes them—are plainly not "solely based on" ExxonMobil's petitioning. In fact, as the Massachusetts federal district court already found, "[t]he complaint, fairly read, 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." *Massachusetts*, 462 F. Supp. 3d at 43; *see id.* at 43-44 (rejecting ExxonMobil's mischaracterization of complaint). Indeed, ExxonMobil concedes that the Commonwealth's claims are based on the company's "statements in corporate reports and investor communications," Br. 28, advertising "promoting ExxonMobil [fossil-fuel] products," *id*. at 31, and "media campaigns[] and social media," *id.* at 34. ExxonMobil's oft-repeated refrain that the claims are premised on

"ExxonMobil's public advocacy on energy policy," *e.g.*, *id.* at 15, 17, 20, 35, 46, strains credulity.

As the Superior Court found, one need only "[r]eview ... just a few of the Commonwealth's allegations" to understand "that each of [the] claims is not based *solely* on Exxon[Mobil]'s petitioning activities." Add-69. In count I, the Commonwealth alleges that ExxonMobil has, in violation of Chapter 93A, misrepresented and failed to disclose material facts (the reality ExxonMobil has long understood, not its "viewpoints") about the risk climate change creates for financial markets and ExxonMobil's value. I-JA:215-17(¶¶734-46). That claim is based on corporate reports like *Managing the Risks*, which was written "to address the concerns of investors," I-JA:117(¶370), and "downplay ... assertions of [asset] impairment and carbon asset risk," I-JA:117(¶372); *see* I-JA:119-20(¶380). It is based on the *Outlook for Energy*, which ExxonMobil "tells investors ... it uses to guide its own business strategies, planning, and project investment decisions," I-JA:116(¶365), and similarly downplays risks to its business, I-JA:151-52(¶505). The claim is also based on ExxonMobil's deceptive in-person misrepresentations and omissions about climate risk to Massachusetts investors—some made by ExxonMobil executives who traveled to Boston for investor-marketing purposes. I-JA:140(¶¶463-65). The Commonwealth's investor claim is thus based on

ExxonMobil's "ongoing communications with Massachusetts investors," not petitioning. I-JA:216(¶737).

In count II, the Commonwealth alleges that ExxonMobil has, in violation of Chapter 93A, deceived Massachusetts consumers by misrepresenting the purported environmental benefits of using its Synergy™ motor fuels and "green" Mobil 1™ engine oil and failing to disclose to Massachusetts consumers the fact that using its products causes climate change. I-JA:217-20(¶747-60). That claim is based on what ExxonMobil communicates directly to Massachusetts consumers through its promotional marketing, including at its Massachusetts ExxonMobil-branded service stations, I-JA:162(¶¶549), 166(¶569), 178(¶608), 181(¶¶616-17); its consumer-facing Rewards+ point-of-sale app, I-JA:164(¶561), 174-75(¶¶593-95); and its consumer-directed product promotional website, I-JA:174-75(¶¶593, 595). In those advertising materials, ExxonMobil tells Massachusetts consumers that using its fossil fuel products will "reduce greenhouse gas emissions." I-JA:170-71(¶¶587-88). But ExxonMobil fails to disclose that it is increasing fossil fuel production (thereby increasing greenhouse gas emissions), I-JA:175-76(¶ 598), and that "the production and consumer use of fossil fuel products like Synergy™ and 'green' Mobil 1™ are a leading cause of climate change that endangers public health and consumer welfare," I-JA:169(¶581). The Commonwealth's consumer claim is thus

likewise based on ExxonMobil's product marketing to Massachusetts consumers, not petitioning. I-JA:218-19(¶¶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, I-JA:220-22(¶¶761-70),[13] which falsely and misleadingly promote the ExxonMobil'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,'" I-JA:220(¶762); *see* I-JA:220-22(¶¶761-70). That claim is based on brand-marketing campaigns such ExxonMobil's "Protect Tomorrow. Today," which the company states "defines [its] approach to the environment," and falsely proclaims its commitment to "protect the environment for future generations," I-JA:189(¶643), while failing to disclose the facts that production and use of its fossil fuel products are a leading cause of climate change that, if unabated, will condemn future generations to catastrophe, I-JA:45-46(¶¶90, 96), 48(¶105). The Commonwealth's greenwashing claim, too, is thus

[13] Brand marketing uses "design, packaging, graphics, logos, advertising, promotion, public relations ... and other strategies to create a durable identify and loyalty with [a company's] consumers." Deven Desai & Spencer Waller, *Brands, Competition, and the Law*, 2010 B.Y.U. L. Rev. 1425, 1431. And companies, like ExxonMobil, "use[] brands as a way to *create* demand, extract value from within the supply chain, and control prices." *Id.* at 1436.

based on ExxonMobil's "advertising and promotional materials directed to Massachusetts consumers," not petitioning. I-JA:221(¶766).

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) (citation omitted). ExxonMobil cannot satisfy that standard because, as the Superior Court found and the foregoing examples demonstrate, ExxonMobil cannot show that the Commonwealth's claims are solely based on its petitioning. Add-69-71. Indeed, none of the challenged ExxonMobil statements can even fairly be described as petitioning. Instead, as the Superior Court also found, the foregoing statements serve wholly commercial goals: (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* Add-71. Thus, if the Court disagrees with the Commonwealth on whether the statute applies, which it should not for the reasons stated above, then it should still clearly affirm.

B. The Commonwealth's Claims Are Based on Commercial Disclosures, Representations, Advertising, and Brand-Marketing.

ExxonMobil wrongly criticizes the Superior Court's finding that ExxonMobil's statements were not protected petitioning because it failed to show "that it made any of the [foregoing] statements solely, or even primarily, to influence, inform, or reach any governmental body, directly or indirectly." Br. 37-

37; Add-70-71. It is true that commercially motivated speech may constitute petitioning, *North Am. Expositions Co. v. Corcoran*, 452 Mass. 852, 863 (2009), but it is equally true that "a commercial motive may provide *evidence* that particular statements" are not petitioning, *Fustolo v. Hollander*, 455 Mass. 861, 870 n.11 (2010). Courts thus "look to objective indicia of a party's intent to influence a governmental proceeding," *Blanchard*, 477 Mass. at 149, based on "the over-all context in which the[] [statements] were made," *North Am.*, 452 Mass. at 862. But the mere fact that "a statement concerns a topic that has attracted governmental attention ... does not give the statement the [petitioning] character contemplated by the statute." *Global NAPS, Inc. v. Verizon New England, Inc.*, 63 Mass. App. Ct. 600, 605 (2005).

The Superior Court's finding was not, as ExxonMobil suggests, Br. 39, based on an assessment of ExxonMobil's subjective motivation. The court instead considered the obvious and conceded audiences for ExxonMobil's statements—investors and consumers—and the context in which they were made. With respect to the investor claim, the court cited, as one example, ExxonMobil's representation "*to investors* that it will 'face virtually no meaningful transition risks from climate change.'" Add-69 (quoting I-JA:149(¶497). The court did not need to consider ExxonMobil's subjective motivation in assessing that and other statements, because both the company's own words and the allegations in the amended complaint

supplied an objective answer. In ExxonMobil's 2018 *Energy Outlook*, for example, the company told investors that it "use[s] the *Outlook* to help inform ... long-term business strategies and investment plans." II-JA:41. And the complaint informed the court that "ExxonMobil specifically prepared *Managing the Risks* and *Energy and Climate* to address the concerns of investors." I-JA:117(¶370). Unsurprisingly, investment firms read these reports in precisely that way, *e.g.*, I-JA:119-21(¶¶380-82).

The court also did not need to struggle to discern that the Commonwealth's consumer deception and consumer greenwashing deception claims are not based on petitioning. Here, for example, the court focused on an *advertisement* appearing on ExxonMobil's "*promotional website*," which tells consumers that the company's "Synergy™ gasolines are 'engineered for ... [l]ower emissions,'" I-JA:174(¶595), and that ExxonMobil's "Synergy Diesel Efficient™ fuel" "helps '[r]educe emissions,'" I-JA:174(¶593); *see* Add-70. The court also considered ExxonMobil's "Protect Tomorrow. Today" marketing campaign, which—under an image of water, mountains, and the sun—the company falsely says "defines [its] approach to the environment" "to protect the environment for future generations." I-JA:188-90(¶¶640-43); *see* Add-70. In response, the only claim ExxonMobil can muster is that those and other related statements were made in "the larger context of [a] ... public policy debate" about climate change. Br. 40. But that is a long way from

showing that those clearly profit-oriented statements to its customers were made to influence that debate. And, in fact, ExxonMobil described those communications below as "branding and marketing efforts," "corporate messaging," and "statements highlighting the positive features of its business."[14]

ExxonMobil's attempt to distinguish *Cadle* is misplaced; indeed, *Cadle* dooms ExxonMobil's self-serving arguments here. There, this Court held that the at-issue statements did not qualify as petitioning because they were intended to advertise a service and solicit customers. 448 Mass. at 250. It was "the palpable commercial motivation behind the" statements, the Court continued, "that ... definitively undercut[] the petitioning character of the statements." *Id.* at 252. So, too, here, where the at-issue statements were intended to convince investors to buy and retain ExxonMobil's securities and consumers to purchase ExxonMobil's products.

And, contrary to ExxonMobil's suggestion, Br. 37, the facts of this case are far afield from those in *Blanchard*. There, this Court held that the defendant hospital president's statements to the Boston Globe "went to the heart of a government agency's [pending] decision whether to terminate the hospital's license to operate the [at-issue] unit." 477 Mass. at 150-51. The statements were thus linked to the

[14] ExxonMobil Mem. in Supp. of Mot. to Dismiss Amended Compl. at 33-35, *Commonwealth v. Exxon Mobil Corp.*, C.A. No. 1984-CV-03333-BLS1 (Suffolk Super. Ct. Aug. 5, 2020) (No. 30), https://tinyurl.com/2p8z9suv.

agency decision, both in substance and time. Here, however, ExxonMobil alludes only to a vague "public policy debate." Br. 40. In short, beyond the conclusory statements in its brief, ExxonMobil has not provided any support for the notion that the Superior Court was wrong.

C. ExxonMobil Cannot Meet Its Threshold Burden by Merely Pointing to Some Isolated References of Potential Petitioning in the Amended Complaint.

ExxonMobil's focus on the fact that the Commonwealth may have referenced some petitioning in the complaint is a red herring and, contrary to ExxonMobil's assertion, Br. 50-56, cannot justify either dismissal or partial dismissal of the Commonwealth's claims. This Court's opinions reject such a drastic, counterintuitive result based on a party's mere reference to some petitioning in its complaint. *Infra* pp.49-51. ExxonMobil nevertheless seizes on the Superior Court's statement, made in a footnote, that "the anti-SLAPP inquiry produces an all or nothing result as to each count in the complaint," Br. 50 (quoting Add-69 n.5), and argues that if "the Commonwealth's claims are based partially on ExxonMobil's petitioning, [then] those claims should have been dismissed"—the same all-or-nothing result that it says the Superior Court got wrong, but in reverse, *id*. Alternatively, ExxonMobil argues, for the first time, that the "court erred by refusing to grant a partial dismissal of the Commonwealth's claims." *Id*. Both arguments are misplaced.

First, ExxonMobil claims wrongly that the court should have dismissed the Commonwealth's claims if "based partially on ExxonMobil's petitioning." Br. 50. As the threshold test's "solely based on" terminology makes clear, "the fact that both petitioning and nonpetitioning activities are together alleged as the basis of a single cause of action ... is not dispositive." *Reichenbach*, 92 Mass. App. Ct. at 573. That is because a special movant *cannot* satisfy its threshold burden where a claim has a "substantial basis other than or in addition to" petitioning. *Office One, Inc. v. Lopez*, 437 Mass. 113, 122 (2002). *477 Harrison* makes that point clear. There, this Court affirmed the denial of a special motion to dismiss a Chapter 93A claim premised on both petitioning and two non-petitioning activities, because the *two* non-petitioning acts "provide[d] a substantial nonpetitioning basis for [the] G.L. c. 93A claim." 477 Mass. at 171-72. While ExxonMobil leans on two references in the 201-page amended complaint that might constitute petitioning, Br. 52, the Commonwealth's three claims, as described above, each have a substantial non-petitioning basis.

ExxonMobil's reliance on those two petitioning activities—a covert Facebook campaign urging weaker federal vehicle fuel economy standards and urging the European Union to abandon strict emission standards, I-JA:199-200(¶¶667-72)—is perplexing because both activities are *evidence* of liability for other acts, not the unlawful acts themselves. A claim is not based on petitioning if the petitioning is "just evidence of liability." *Park v. Board of Trustees*, 393 P.3d 905, 907 (Cal.

2017). Even so, ExxonMobil "cannot 'obtain dismissal ... just because *some* of the allegations ... are directed at conduct by the defendants that constitutes petitioning.'" Add-69 (quoting *Haverhill*, 99 Mass. App. Ct. at 634). Indeed, contrary to ExxonMobil's assertion, the Commonwealth does not "target" those activities in its amended complaint. ExxonMobil is free to engage in whatever lawful petitioning it likes, but it cannot engage in deceptive marketing to convince investors to buy and hold its securities and consumers to buy its products based on *false* claims that it is accounting for climate change risks to its business and working to reduce emissions.

Second, the Superior Court was, in any event, correct that the anti-SLAPP inquiry—*in this case*—presents an "all or nothing result." Add-69 n.5. That is because, unlike in *Blanchard*, where the plaintiffs "readily could have ... pleaded" a single defamation count as two counts—one based on allegedly defamatory statements to the Boston Globe and one based on allegedly defamatory statements made in internal e-mails—the Commonwealth's three claims could not "readily ... have been pleaded as separate counts." 477 Mass. at 155. To draw a workable line between a claim that "could have been pleaded as separate counts" and one that cannot, the Appeals Court "[r]ead" *Blanchard* and *477 Harrison* "together" and held that "where a *course of conduct* is the basis of the claim, *such as is typical of c. 93A claims* ..., then the acts should not be parsed one from the other." *Reichenbach*, 92 Mass. App. Ct. at 573-74 (emphasis added). Here, the Commonwealth has alleged

only Chapter 93A claims and those claims are based on "a decades-long, intentional, tobacco-industry style effort to deceive investors and consumers." I-JA:26(¶12). And the Commonwealth described that course of conduct in detailed allegations spanning 770 paragraphs. I-JA:22-222. ExxonMobil's attempt to escape the force of that cogent rule, Br. 55 n.8, which, again, yields an "all or nothing result" in this case, is meritless.

Finally, ExxonMobil makes the similarly flawed argument that this Court should remand to the Superior Court so that it can consider dismissing *parts* of each claim—an argument it waived by not raising it below. I-JA:224-52; *Boss v. Town of Leverett*, 484 Mass. 553, 562-63 (2020) (waiver rule is a "fundamental rule of appellate practice"). Even so, while there is no doubt that such a remand would work in ExxonMobil's favor by causing continued delay in the advancement of the Commonwealth's claims, its request, as the preceding discussion makes clear, finds no support in law (or in fact). Since the Commonwealth's three claims *could not* have been readily pleaded as separate counts as in *Blanchard* and because each is not solely based on ExxonMobil's petitioning, ExxonMobil simply cannot satisfy its threshold burden.

III. The Commonwealth's Chapter 93A Enforcement Action Is Not A SLAPP Suit.

The Commonwealth's law enforcement action is not, in any event, a meritless SLAPP suit. If the Court finds that the anti-SLAPP statute applies here and also

finds that the Commonwealth's claims are solely based on conduct that the Court views as petitioning, it should nonetheless affirm the Superior Court's decision under the second path in stage two of the anti-SLAPP statute's burden-shifting inquiry, since the record makes clear that the Commonwealth's law enforcement action is not a SLAPP suit. *Clair*, 464 Mass. at 214 (courts may affirm "on any ground apparent on the record."). Under the second path, the Commonwealth must "demonstrate, 'such that the ... [Court] may conclude with fair assurance,' two elements: (a) that its suit [i]s 'colorable'; and (b) that the suit was not 'brought primarily to chill'" ExxonMobil's "legitimate exercise of its right to petition, i.e., that it was not retaliatory." *Blanchard*, 483 Mass. at 204 (citation & quotations omitted).

A. The Commonwealth's Claims Are Colorable.

The Commonwealth's claims are colorable; that is, they are "worthy of being presented and considered by the court" because each of the claims "offers some reasonable possibility of a decision in the [Commonwealth's] favor." *Blanchard*, 483 Mass. at 207-08. Under Chapter 93A, an act or practice is deceptive if it "has the [tendency or] capacity to mislead [investors or] 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 v. Philip Morris Cos.*, 442 Mass. 381, 396 (2004). Marketing may violate Chapter 93A

where it "consist[s] of a half-truth, or even" where it is "true as a literal matter, but still create[s] an over-all misleading impression through [a] failure to disclose material information," *Exxon*, 479 Mass. at 320 (citation omitted), and a company may also violate Chapter 93A by "failing to disclose to a buyer a fact that might have influenced the buyer to refrain from the purchase," *Greenery Rehab. Grp. v. Antaramian*, 36 Mass. App. Ct. 73, 78 (1994). Here, the conclusion that the Commonwealth has alleged three colorable Chapter 93A claims is inescapable.

First, the Commonwealth, following an extensive investigation, filed a detailed complaint alleging the facts that: (i) ExxonMobil has known for more than forty years that fossil-fuel consumption causes climate change and that curtailment of fossil fuel use would be necessary to stem climate change's most catastrophic effects, I-JA:22-36, 40-50; and (ii) despite that knowledge, the company "engaged in a decades-long, intentional, tobacco-industry style effort to deceive investors and consumers ... by sowing doubt about the very climate science Exxon[Mobil] itself helped to develop and by advertising alleged environmental benefits—not the risks—associated with normal use of its fossil fuel products." I-JA:26(¶12). Those claims depend, in part, on ExxonMobil's internal historic documents, which this Court previously recognized are a "probative" source concerning "Exxon[Mobil's] present knowledge on the issue of climate change, and whether Exxon[Mobil] disclosed that knowledge to the public." *Exxon*, 479 Mass. at 326. And the

Commonwealth has alleged facts that satisfy the elements for Chapter 93A liability for each of its claims. I-JA:22-222. If ExxonMobil's marketing and other communications to Massachusetts investors and consumers were deceptive, as the Commonwealth plausibly claims, then ExxonMobil's statements are of the type that may reasonably give rise to liability under Chapter 93A. Under *Blanchard*, that is all that is required. 483 Mass. at 208.

Second, prior decisions in this matter reinforce the Commonwealth's claims' colorability. In fact, this Court previously validated the theory on which the Commonwealth's claims are based. *Exxon*, 479 Mass. at 313, 315-24, 327. And, in rejecting ExxonMobil's removal of the case to federal court, the district court found "[t]he Commonwealth's analogy to the tobacco industry ... apt." *Massachusetts*, 462 F. Supp. 3d at 43. That conclusion was justified. Indeed, the tobacco companies were found liable where, as here, "a pattern of corporate research reveal[ed] a particular proposition" and "the corporation acknowledg[ed]" that proposition internally, only to then make public statements asserting a position "contrary to th[at internal] knowledge." *Philip Morris*, 566 F.3d at 1121. But that is not all: the Superior Court has already held—after an exhaustive review of the amended complaint—that the Commonwealth has alleged sufficient facts to demonstrate a plausible entitlement to relief on each claim. Add-88-97. Together, those decisions

demonstrate that the Commonwealth's claims are "worthy of being ... considered by the court." *Blanchard*, 477 Mass. at 160-61 (citation omitted).

B. The Commonwealth's Claims Are Not Retaliatory.

It is similarly clear that the Commonwealth's action was not filed to retaliate against ExxonMobil for lawful petitioning. *See Blanchard*, 483 Mass. at 209. Here, this Court must evaluate the Commonwealth's "'primary purpose in bringing [its] claim[s]' ... in light of the objective facts presented and any reasonable inferences that may be drawn from them." *Id.* at 209-10. While ExxonMobil asserts that the Commonwealth's actions—first to investigate and then to sue—are "politically motivated efforts to silence ExxonMobil's public advocacy on climate change," Br. 20, both this Court and a federal court have rejected that wild assertion. *Exxon*, 316 F. Supp. 3d at 686-87, 689, 704; *Exxon*, 479 Mass. at 327-28. To the extent any doubt remains, the Commonwealth's amended complaint states, explicitly, the Commonwealth's objective in filing this action—"to hold ExxonMobil accountable for" violating Chapter 93A, I-JA:22(¶2)—and that purpose is reinforced by the unrebutted presumption of regularity that attaches to the Attorney General's decision to sue ExxonMobil.

First, courts rejected the same argument amidst ExxonMobil's attempts to halt the investigation that led to this lawsuit. In a refrain that is strikingly familiar, ExxonMobil contended in those cases that "the investigation[]" was "being

conducted to retaliate against [it] for its views on climate change." *Exxon*, 316 F. Supp. 3d at 686. But this Court held that the Attorney General's investigation was not based on "a pretext" or any "actionable bias." *Exxon*, 479 Mass. at 327-28. And, after reviewing an extensive record, the federal district court, too, found that ExxonMobil had failed plausibly to show that the Attorney General was pursuing ExxonMobil based on "an improper purpose," *Exxon*, 316 F. Supp. 3d at 707, or "retaliat[ion]," *id.* at 708. Even if new factual allegations could change those binding findings (they cannot), ExxonMobil has not advanced any. In fact, the 2016 New York press conference remains "[t]he centerpiece of Exxon[Mobil's]" claim. *Compare id.* at 706, *and Exxon*, 479 Mass. at 328 ("press conference"), *with* ExxonMobil Br. 18 ("press conference"). In short, where the investigation was not initiated to retaliate against ExxonMobil's climate change viewpoints, then the lawsuit resulting from that investigation was not either.

Second, even if those prior decisions on the merits were not enough, the Commonwealth's amended complaint, "viewed as a whole," *Blanchard*, 477 Mass. at 161, makes clear the objective "primary purpose in bringing its claim[s]," *id.* at 160: "[t]he Commonwealth ..., through its Attorney General, brings this action pursuant to the Massachusetts Consumer Protection Act, G.L. c. 93A ... to hold ExxonMobil accountable for misleading the state's investors and consumers." I-JA:22(¶2). Later paragraphs, which appear in counts I, II, and III, drive that point

home, because they all state plainly that by deceiving Massachusetts investors and consumers, ExxonMobil has violated, and continues to violate, Chapter 93A. I-JA:215-22. No objective indicia of a contrary purpose exist in either the complaint or otherwise in the record before the Court here. Thus, just like in *In re Discipline of an Attorney*, 442 Mass. 660 (2004), the Attorney General's "objective [i]s not to 'intimidate [ExxonMobil's] exercise of rights of petitioning..., but to" hold ExxonMobil accountable for the company's Chapter 93A violations. *See id.* at 674.

Finally, the presumption of regularity that applies to the Attorney General's decision to sue ExxonMobil, which ExxonMobil has wholly failed to rebut, solidifies that conclusion. It is settled that courts must presume that the government acts in "good faith" when it initiates a law enforcement action. *Commonwealth v. Bernardo B.*, 453 Mass. 158, 167 (2009); *Hartman*, 547 U.S. at 263 ("presumption that a prosecutor has legitimate grounds for the action [s]he takes is one we do not lightly discard"). The presumption applies in the criminal and civil contexts. *See, e.g.*, *General Outdoor Advert. Co. v. Department of Public Works*, 289 Mass. 149, 192 (1935). Unlike a private plaintiff in an *actual* SLAPP suit who is "motivated by a retaliatory attempt to gain personal advantage over a defendant who has challenged his or her economic ambition," a "prosecutor's motive derives from the ... mandate to assure that the laws ... are uniformly enforced and to prosecute any violation of th[o]se laws, so that order is preserved and the public interest protected." *Health*

Labs., 87 Cal. App. 4th at 450; *see Kozlowsky*, 238 Mass. at 390-91. Here, where the complaint's foundation has been decisively affirmed and there is no contrary evidence, ExxonMobil cannot overcome the presumption that the Attorney General had legitimate grounds to institute this action.

CONCLUSION

For the foregoing reasons, this Court should affirm the denial of ExxonMobil's special motion to dismiss on the ground that the anti-SLAPP statute does not apply to government law enforcement actions or, alternatively, because ExxonMobil's motion fails under the statute.

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Respectfully submitted,

COMMONWEALTH OF
MASSACHUSETTS

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January 13, 2022

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. 16(a)(13) (addendum), Mass. R. App. P. 16(e) (references to the record), Mass. R. App. P. 18 (appendix to briefs), Mass. R. App. P. 20 (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. 20 because the brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point, Times New Roman-style font, and contains 10,996 words, excluding the parts of the brief exempted by Mass. R. App. P. 20(a)(3)(F), counted using the word count feature of Microsoft Word.

/s/ Seth Schofield

Dated: January 13, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2022, I served the Brief of Appellee Commonwealth of Massachusetts by the Electronic Filing System and electronic mail on:

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ADDENDUM

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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1984CV03333-BLS1

Notice Sent
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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

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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.
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> ...
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> 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

G.L. c. 231, § 59H (Westlaw 2022)

§ 59H. Strategic litigation against public participation; special motion to dismiss

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. The court shall advance any such special motion so that it may be heard and determined as expeditiously as possible. The court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

The attorney general, on his behalf or on behalf of any government agency or subdivision to which the moving party's acts were directed, may intervene to defend or otherwise support the moving party on such special motion.

All discovery proceedings shall be stayed upon the filing of the special motion under this section; provided, however, that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted. The stay of discovery shall remain in effect until notice of entry of the order ruling on the special motion.

Said special motion to dismiss may be filed within sixty days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper.

If the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters. Nothing in this section shall affect or preclude the right of the moving party to any remedy otherwise authorized by law.

As used in this section, the words "a party's exercise of its right of petition" shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; 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; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

Credits: Added by St. 1994, c. 283, § 1. Amended by St. 1996, c. 450, § 245.

HOUSE . . . . . No. 1520

By Mr. Cohen of Newton, petition of David B. Cohen and other members of the General Court for legislation to limit strategic litigation against public participation under the rights of freedom of speech. The Judiciary.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Ninety-Four.

AN ACT PROTECTING THE PUBLIC'S RIGHT TO PETITION GOVERNMENT.

Whereas, The legislature finds and declares that full participation by persons and organizations and robust discussion of issues before legislative, judicial, and administrative bodies and in other public fora are essential to the democratic process, that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, and that such litigation is disfavored and should be resolved quickly with minimum cost to citizens who have participated in matters of public concern.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 231 of the General Laws is hereby amended by inserting after section 59G the following section: —

Section 59H. 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. The court shall advance any such special motion so that it may be heard and determined with as little delay as possible. The court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right of petition was devoid of any reasonable factual support or any

arguable basis in law and (2) the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

The Attorney General on his behalf or on behalf of any government agency or subdivision to which the moving party's acts were directed may intervene to defend or otherwise support the moving party on such special motion.

All discovery proceedings shall be stayed upon the filing of the special motion under this section; provided, however, that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted. The stay of discovery shall remain in effect until notice of entry of the order ruling on the special motion.

Said special motion to dismiss may be filed within sixty days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper.

If the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters. Nothing in this section shall affect or preclude the right of the moving party to any remedy otherwise authorized by law.

As used in this section, "a party's exercise of its right of petition" shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; 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; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

SECTION 2. The provisions of this act shall apply to all claims, counterclaims, and cross claims that have not been fully adjudicated on, or subsequent to the effective date of this act.

A party may file a special motion to dismiss a claim, counterclaim, or cross claim in existence on the effective date of this act within sixty days of the effective date of this act.

SECTION 3. This act shall take effect upon passage.

34 Mass.L.Rptr. 104
Superior Court of Massachusetts,
Suffolk County.

IN RE CIVIL INVESTIGATIVE DEMAND NO. 2016–EPD–36, Issued by the Office of the Attorney General

SUCV20161888F
|
January 11, 2017

ORDER ON EMERGENCY MOTION OF EXXONMOBIL CORPORATION TO SET ASIDE OR MODIFY THE CIVIL INVESTIGATIVE DEMAND OR ISSUE A PROTECTIVE ORDER AND THE COMMONWEALTH'S CROSS MOTION TO COMPEL EXXONMOBIL CORPORATION TO COMPLY WITH CIVIL INVESTIGATIVE DEMAND NO. 2016–EPD–36

Heidi E. Brieger, Associate Justice of the Superior Court

***1** On April 19, 2016, the Massachusetts Attorney General issued a Civil Investigative Demand ("CID") to ExxonMobil Corporation ("Exxon") pursuant to G.L.c. 93A, § 6. The CID stated that it was issued as:

> [P]art of a pending investigation concerning potential violations of M.G.L.c. 91A, § 2, and the regulations promulgated thereunder arising both from (1) the marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth ...; and (2) the marketing and/or sale of securities, as defined in M.G.L.c. 110A, § 401(k), to investors in the Commonwealth, including, without limitation, fixed- and floating-rate notes, bonds, and common stock, sold or offered to be sold in the Commonwealth.

Appendix in Support of Petition and Emergency Motion of Exxon Mobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, Exhibit B. The CID requests documents generally related to Exxon's study of CO2 emissions and the effects of these emissions on the climate from January 1, 1976 through the date of production.

On June 16, 2016, Exxon commenced the instant action to set aside the CID. The Attorney General has cross-moved pursuant to G.L.c. 93A, § 7 to compel Exxon to comply with the CID. After a hearing and careful review of the parties' submissions, and for the reasons that follow, Exxon's motion to set aside the CID is DENIED and the Commonwealth's motion to compel is

ALLOWED, subject to this Order.

DISCUSSION

General Laws c. 93A, § 6 authorizes the Attorney General to obtain and examine documents "whenever he believes a person has engaged in or is engaging in any method, act or practice declared to be unlawful by this chapter." Among the things declared to be unlawful by chapter 93A are unfair and deceptive acts or practices in the conduct of any trade or commerce. G.L.c. 93A, § 2(a). General Laws c. 93A, § 6 "should be construed liberally in favor of the government," see *Matter of Civil Investigative Demand Addressed to Yankee Milk, Inc.*, 372 Mass. 353, 364 (1977), and the party moving to set aside a CID "bears a heavy burden to show good cause why it should not be compelled to respond," see *CUNA Mutual Ins. Soc. v. Attorney Gen.*, 380 Mass. 539, 544 (1980). There is no requirement that the Attorney General have probable cause to believe that a violation of G.L.c. 93A has occurred; she need only have a belief that a person has engaged in or is engaging in conduct declared to be unlawful by G.L.c. 93A. *Id.* at 542 n.5. While the Attorney General must not act arbitrarily or in excess of her statutory authority, she need not be confident of the probable result of her investigation. *Id.* (Citations omitted.)

I. Exxon's Motion to Set Aside the CID

A. Personal Jurisdiction

Exxon contends that this court does not have personal jurisdiction over it in connection with any violation of law contemplated by the Attorney General's investigation. Memorandum of Exxon Mobil Corporation in Support of its Emergency Motion to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, page 2. Exxon is incorporated in New Jersey and headquartered in Texas. All of its central operations are in Texas.

***2** Determining whether the court has personal jurisdiction over a nonresident defendant involves a familiar two-pronged inquiry: (2) is the assertion of jurisdiction authorized by the longarm statute, G.L.c. 223A, § 3, and (2) if authorized, is the exercise of jurisdiction under State law consistent with basic due process requirements mandated by the United States Constitution? *Good Hope Indus., Inc. v. Ryder Scott Co.*, 378 Mass. 1, 5–6 (1979). Jurisdiction is permissible only when both questions draw affirmative responses. *Id.* As the party claiming that the court has the power to grant relief, the Commonwealth has the burden of persuasion on the issue of personal jurisdiction. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 612 n.28 (1979).

The Commonwealth invokes jurisdiction under G.L.c. 223A, § 3(a), which permits the court to assert jurisdiction over a defendant if the defendant "either directly or through an agent transacted any business in the Commonwealth, and if the alleged cause of action arose from such transaction of business." *Good Hope Indus., Inc.*, 378 Mass. at 6. The "transacting any business" language is to be construed broadly. See *Tatro v. Manor Care, Inc.*, 416 Mass.

763, 767 (1994). "Although an isolated (and minor) transaction with a Massachusetts resident may be insufficient, generally the purposeful and successful solicitation of business from residents of the Commonwealth, by a defendant or its agent, will suffice to satisfy this requirement." *Id*. Whether the alleged injury "arose from" a defendant's transaction of business in Massachusetts is determined by a "but for" test. *Id.* at 771–72 (jurisdiction only proper if, *but for* defendant's solicitation of business in Massachusetts, plaintiff would not have been injured).

The CID says that the Attorney General is investigating potential violations arising from Exxon's marketing and/or sale of energy and other fossil fuel derived products to Commonwealth consumers. The Commonwealth argues that Exxon's distribution of fossil fuel to Massachusetts consumers "through more than 300 Exxon-branded retail service stations that sell Exxon gasoline and other fuel products" satisfies the transaction of business requirement. Exxon objects because it contends that for the past five years, it has neither (1) sold fossil fuel derived products to consumers in Massachusetts, nor (2) owned or operated a retail store or gas station in Massachusetts. According to the affidavit of Geoffrey Grant Doescher ("Doescher"), the U.S. Branded Wholesale Manager, ExxonMobil Fuels, Lubricants and Specialties Marketing Company at Exxon, any service station or wholesaler in Massachusetts selling fossil fuel derived products under an "Exxon" or "Mobil" banner is independently owned and operated pursuant to a Brand Fee Agreement ("BFA"). Doescher says that branded service stations purchase gasoline from wholesalers who create ExxonMobil-branded gasoline by combining unbranded gasoline with ExxonMobil-approved additives obtained from a third-party supplier. The BFA also provides that Exxon agrees to allow motor fuel sold from these outlets to be branded as Exxon- or Mobil-branded motor fuel.

Exxon provided to the court and the Commonwealth a sample BFA. By letter dated December 19, 2016, the Commonwealth argued that many provisions of the BFA properly give rise to this court's jurisdiction. The Commonwealth contends that the BFA provides many instances in which Exxon retains the right to control both the BFA Holder and the BFA Holder's franchisees.[1] For example, Section 15(a) of the BFA states:

> BFA Holder agrees to diligently promote and cause its Franchise Dealers to diligently promote the sales of Products, including through advertisements, all in accordance with the terms of this Agreement. BFA Holder hereby acknowledges and agrees that, notwithstanding anything set forth herein to the contrary, to insure the integrity of ExxonMobil trademarks, products and reputation, ExxonMobil shall have the authority to review and approve, in its

> sole discretion, all forms of advertising and sales promotions that will use media vehicles for the promotion and sale of any product, merchandise or services, in each case that (i) uses or incorporates and Proprietary Mark, or (ii) relates to any Business operated at a BFA Holder Branded outlet ... BFA Holder shall expressly require all Franchise Dealers to (a) agree to such review and control by ExxonMobil ...

[1] The BFA mandates that all BFA Holders require their outlets to meet minimum facility, product, and service requirements, Section 13, and provide a certain level of customer service, Section 16. Moreover, Exxon requires that the BFA Holder enter into written agreements with each of its Franchise Dealers and in the agreement, the Franchise Dealer must commit to Exxon's "Core Values." Section 19. "Core Values" is defined on page one of the BFA:

> BHA Holder acknowledges that ExxonMobil has established the following core values ("Core Values") to build and maintain a lasting relationship with its customers, the motoring public:
> (1) To deliver quality products that consumers can trust.
> (2) To employ friendly, helpful people.
> (3) To provide speedy, reliable service.
> (4) To provide clean and attractive retail facilities.
> (5) To be a responsible, environmentally-conscious neighbor.

***3** By letter dated December 27, 2016, Exxon disputes that any of the BFA's provisions establish the level of control necessary to attribute the conduct of a BFA Holder to Exxon. See *Depianti v. Jan–Pro Franchising Int'l, Inc.*, 465 Mass. 607, 617 (2013) (citation omitted) ([T]he marketing, quality, and operational standards commonly found in franchise agreements are insufficient to establish the close supervisory control or right of control necessary to demonstrate the existence of a master/servant relationship for all purposes or as a general matter"); *Lind v. Domino's Pizza, LLC*, 87 Mass.App.Ct. 650, 654–55 (2015) ("The mere fact that franchisors set baseline standards and regulations that franchisees must follow in an effort to protect the franchisor's trademarks and comply with Federal law, does not mean that franchisors have undertaken an agency relationship with the franchisee such that vicarious liability should apply"); *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 1999 Mass.App.Div. 14, 17 (1999) (obligations to render prompt and efficient service in accordance with licensor's policies and standards and to satisfy other warranty related service requirements did not constitute evidence of agency relationship because they were unrelated to licensee's day-to-day operations and specific manner in which they were conducted).

Here, though, Section 15 of the BFA evidences a retention of more control than necessary simply to protect the integrity of the Exxon brand. By Section 15, Exxon directly controls the very conduct at issue in this investigation—the marketing of Exxon products to consumers. See *Depianti*, 465 Mass. at 617 ("right to control test" should be applied to franchisor-franchisee relationship in such a way as to ensure that liability will be imposed only where conduct at issue properly may be imputed to franchisor). This is especially true because the Attorney General's investigation focuses on Exxon's marketing and/or sale of energy and other fossil fuel derived products to Massachusetts consumers. Section 15(a) makes it evident to the court that Exxon has retained the right to control the "specific policy or practice" allegedly resulting in harm to Massachusetts consumers. See *id.* (franchisor vicariously liable for conduct of franchisee only where franchisor controls or has right to control specific policy or practice resulting in harm to plaintiff). The quantum of control Exxon retains over its BFA Holders and the BFA Holders' franchisees as to marketing means that Exxon retains sufficient control over the entities actually marketing and selling fossil fuel derived products to consumers in the Commonwealth such that the court may assert personal jurisdiction over Exxon under G.L.c. 223A, § 3(a).

To determine whether such an exercise of personal jurisdiction satisfies—or does not satisfy—due process, "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). The plaintiff must demonstrate (1) purposeful availment of commercial activity in the forum State by the defendant; (2) the relation of the claim to the defendant's forum contacts; and (3) the compliance of the exercise of jurisdiction with "traditional notions of fair play and substantial justice." *Bulldog Investors Gen. Partnership v. Secretary of the Commonwealth*, 457 Mass. 210, 217 (2010) (citations omitted). Due process requires that a nonresident defendant may be subjected to suit in Massachusetts only where "there was some minimum contact with the Commonwealth which resulted from an affirmative, intentional act of the defendant, such that it is fair and reasonable to require the defendant to come into the State to defend the action." *Good Hope Indus., Inc.*, 378 Mass. at 7 (citation omitted). "In practical terms, this means that an assertion of jurisdiction must be tested for its reasonableness, taking into account such factors as the burden on the defendant of litigating in the plaintiff's chosen forum, the forum State's interest in adjudicating the dispute, and the plaintiff's interest in obtaining relief." *Tatro*, 416 Mass. at 773.

***4** The court concludes that in the context of this CID, Exxon's due process rights are not offended by requiring it to comply in Massachusetts. If the court does not assert its jurisdiction in this situation, then G.L.c. 93A would be "de-fanged," and consequently, a statute enacted to protect Massachusetts consumers would be reduced to providing hollow protection against non-resident defendants. Compare *Bulldog Investors Gen. Partnership*, 457

Mass. at 218 (Massachusetts has strong interest in adjudicating violations of Massachusetts securities law; although there may be some inconvenience to non-resident plaintiffs in litigating in Massachusetts, such inconvenience does not outweigh Commonwealth's interest in enforcing its laws in Massachusetts forum). Also, insofar as Exxon delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in all states, including Massachusetts, it is not overly burdened by being called into court in Massachusetts. See *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (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).

For all of these reasons, the court concludes that it has personal jurisdiction over Exxon with respect to this CID.

B. Arbitrary and Capricious

Exxon next contends that the CID is not supported by the Attorney General's "reasonable belief" of wrongdoing. General Laws c. 93A, § 6 gives the Attorney General broad investigatory powers to conduct investigations whenever she *believes* a person has engaged in or is engaging in any conduct in violation of the statute. *Attorney Gen. v. Bodimetric Profiles*, 404 Mass. 152, 157 (1989); see *Harmon Law Offices P.C. v. Attorney Gen.*, 83 Mass.App.Ct. 830, 834 (2013). General Laws c. 93A does not contain a "reasonable" standard, but the Attorney General "must not act arbitrarily or in excess of his statutory authority." See *CUNA Mut. Ins. Soc.*, 380 Mass. at 542 n.5 (probable cause not required; Attorney General "need only have a belief that a person has engaged in or is engaging in conduct declared to be unlawful by G.L.c. 93A").

Here, Exxon has not met its burden of persuading the court that the Attorney General acted arbitrarily or capriciously in issuing the CID. See *Bodimetric Profiles*, 404 Mass. at 157 (challenger of CID has burden to show that Attorney General acted arbitrarily or capriciously). If Exxon presented to consumers "potentially misleading information about the risks of climate change, the viability of alternative energy sources, and the environmental attributes of its products and services," see CID Demand Nos. 9, 10, and 11, the Attorney General may conclude that there was a 93A violation. See *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 395 (2004) (advertising is deceptive in context of G.L.c. 93A if it consists 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"); *Commonwealth v. DeCotis*, 366 Mass. 234, 238 (1974) (G.L.c. 93A is legislative attempt to "regulate business activities with the view to providing proper disclosure of information and a more equitable balance in the relationship of consumers to persons conducting business activities"). The Attorney General is authorized to investigate such potential violations of G.L.c. 93A.

Exxon also argues that the CID is politically motivated, that Exxon is the victim of viewpoint discrimination, and that it is being punished for its views on global warming. As discussed above, however, the court finds that the Attorney General has assayed sufficient grounds—her concerns about Exxon's possible misrepresentations to Massachusetts consumers—upon which to issue the CID. In light of these concerns, the court concludes that Exxon has not met its burden of showing that the Attorney General is acting arbitrarily or capriciously toward it.[2]

[2] The court does not address Exxon's arguments regarding free speech at this time because misleading or deceptive advertising is not protected by the First Amendment. *In re Willis Furniture Co.*, 980 F.2d 721, 1992 U.S.App. LEXIS 32373 *2 (1992), citing *Friedman v. Rogers*, 440 U.S. 1, 13–16 (1979). The Attorney General is investigating whether Exxon's statements to consumers, or lack thereof, were misleading or deceptive. If the Attorney General's investigation reveals that Exxon's statements were misleading or deceptive, Exxon is not entitled to any free speech protection.

C. Unreasonable Burden and Unspecific

***5** A CID complies with G.L.c. 93A, §§ 6(4)(c) & 6(5) if it "describes with reasonable particularity the material required, if the material required is not plainly irrelevant to the authorized investigation, and if the quantum of material required does not exceed reasonable limits." *Matter of a Civil Investigative Demand Addressed to Yankee Milk, Inc.*, 372 Mass. at 360–61; see G.L.c. 93A, § 6(4)(c) (requiring that CID describe documentary material to be produced thereunder with reasonable specificity, so as fairly to indicate material demanded); G.L.c. 93A, § 6(5) (CID shall not "contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of the commonwealth; or require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of the commonwealth").

Exxon argues that the CID lacks the required specificity and furthermore imposes an unreasonable burden on it. With respect to specificity, Exxon takes issue with the CID's request for "essentially all documents related to climate change," and with the vagueness of some of the demands. Memorandum of Exxon Mobil Corporation in Support of its Emergency Motion to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, page 18. In particular, Exxon objects to producing documents that relate to its "awareness," "internal considerations," and "decision making" on climate change issues and its "information exchange" with other companies.

The court has reviewed the CID and disagrees that it lacks the requisite specificity. The CID seeks information

related to what (and when) Exxon knew about the impacts of burning fossil fuels on climate change and what Exxon told consumers about climate change over the years. Some of the words used to further describe that information—awareness and internal considerations—simply modify the "what" and "when" nature of the requests.

With respect to the CID being unreasonably burdensome, an effective investigation requires broad access to sources of information. See *Matter of a Civil Investigative Demand Addressed to Yankee Milk, Inc.*, 372 Mass. at 364. Documentary demands exceed reasonable limits only when they "seriously interfere with the functioning of the investigated party by placing excessive burdens on manpower or requiring removal of critical records." *Id.* at 361 n.8. That is not the case here. At the hearing, both parties indicated that Exxon has already complied with its obligations regarding a similar demand for documents from the New York Attorney General. In fact, as of December 5, 2016, Exxon had produced 1.4 million pages of documents responsive to the New York Attorney General's request. It would not be overly burdensome for Exxon to produce these documents to the Massachusetts Attorney General.

Whether there should be reasonable limitations on the documents requested for other reasons, such as based upon confidentiality or other privileges, should be discussed by the parties in a conference guided by Superior Court Rule 9C. After such a meeting, counsel should submit to the court a joint status report outlining disagreements, if any, for the court to resolve.

II. Disqualification of Attorney General

Exxon requests the court to disqualify the Attorney General and appoint an independent investigator because her "public remarks demonstrate that she has predetermined the outcome of the investigation and is biased against ExxonMobil." Memorandum of Exxon Mobil Corporation in Support of its Emergency Motion to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, page 8. In making this request, Exxon relies on a speech made by the Attorney General on March 29, 2016, during an "AGs United for Clean Power" press conference with other Attorneys Generals. The relevant portion of Attorney General Healey's comments were:

> ***6** Part of the problem has been one of public perception, and it appears, certainly, that certain companies, certain industries, may not have told the whole story, leading many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts. Fossil fuel companies that deceived investors and consumers about the dangers of climate change should be, must be, held accountable.

> That's why I, too, have joined in investigating the practices of Exxon Mobil. We can all see today the troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public.

General Laws c. 93A, § 6 gives the Attorney General power to conduct investigations whenever she believes a person has engaged in or is engaging in any conduct in violation of G.L.c. 93A. *Bodimetric Profiles*, 404 Mass. at 157. In the Attorney General's comments at the press conference, she identified the basis for her belief that Exxon may have violated G.L.c. 93A. In particular, she expressed concern that Exxon failed to disclose relevant information to its Massachusetts consumers. These remarks do not evidence any actionable bias on the part of the Attorney General; instead it seems logical that the Attorney General inform her constituents about the basis for her investigations. Cf. *Buckley v. Fitzsimmons*, 509 U.S. 259, 278 (1993) ("Statements to the press may be an integral part of a prosecutor's job ... and they may serve a vital public function"); *Goldstein v. Galvin*, 719 F.3d 16, 30 (1st Cir. 2013) ("Not only do public officials have free speech rights, but they also have an obligation to speak out about matters of public concern"); see also *Commonwealth v. Ellis*, 429 Mass. 362, 372 (1999) (due process provisions require that prosecutor be disinterested in sense that prosecutor must not be—nor appear to be—influenced in exercise of discretion by personal interests). It is the Attorney General's duty to investigate Exxon if she believes it has violated G.L.c. 93A, § 6. See also G.L.c. 12, § 11D (attorney general shall have authority to prevent or remedy damage to the environment caused by any person or corporation). Nothing in the Attorney General's comments at the press conference indicates to the court that she is doing anything more than explaining reasons for her investigation to the Massachusetts consumers she represents. See generally *Ellis*, 429 Mass. at 378 ("That in the performance of their duties [the Attorney General has] zealously pursued the defendants, as is [his or her] duty within ethical limits, does not make [his or her] involvement improper, in fact or in appearance").

III. Stay

On June 15, 2016, Exxon filed a complaint and a motion for preliminary injunction in the United States District Court for the Northern District of Texas alleging that the CID violates its federal constitutional rights. Exxon Mobil requests this court to stay its adjudication of the instant motion pending resolution of the Texas federal action. See G.L.c. 223A, § 5 ("When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just"); see *WR Grace & Co. v. Hartford Accident & Indemnity Co.*, 407 Mass. 572, 577 (1990) (decision whether to

stay action involves discretion of motion judge and depends greatly on specific facts of proceeding before court). The court determines that the interests of substantial justice dictate that the matter be heard in Massachusetts.

This matter involves the Massachusetts consumer protection statute and Massachusetts case law arising under it, about which the Massachusetts Superior Court is certainly more familiar than would be a federal court in Texas. See *New Amsterdam Casualty Co. v. Estes*, 353 Mass. 90, 95–96 (1967) (factors to consider include administrative burdens caused by litigation that has its origins elsewhere and desirability of trial in forum that is at home with governing law). Further, the plain language of the statute itself directs a party seeking relief from the Attorney General's demand to the courts of the commonwealth. See G.L.c. 93A, § 6(7) (motion to set aside "may be filed in the superior court of the county in which the person served resides or has his usual place of business, or in Suffolk county"); see also G.L.c. 93A, § 7 ("A person upon whom notice is served pursuant to the provisions of section six shall comply with the terms thereof unless otherwise provided by the order of a court of the commonwealth"). The court declines to stay this proceeding.

ORDER

***7** For the reasons discussed above, it is hereby *ORDERED* that the Emergency Motion of ExxonMobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order is *DENIED* and the Commonwealth's Cross Motion to Compel ExxonMobil Corporation to Comply with Civil Investigative Demand No. 2016–EPD–36 is *ALLOWED* consistent with the terms of this Order. The parties are *ORDERED* to submit a joint status report to the court no later than February 15, 2017, outlining the results of a Rule 9C Conference.

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss — SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

EXXON MOBIL CORPORATION,

Plaintiff,

V.

OFFICE OF ATTORNEY GENERAL,

Defendant.

Docket No. 1684CV01888

MOTION HEARING
BEFORE THE HONORABLE HEIDI BRIEGER

APPEARANCES:
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Christophe Gagnon Courchesne, Esq.

Boston, Massachusetts
Courtroom 1006
October 24, 2019

Proceedings recorded by electronic sound recording, transcript produced by an Approved Court Transcriber.

(Case called.)

(2:06 p.m.)

THE CLERK: The next matter is Exxon Mobil Corporation vs. Office of Attorney General, Civil Action 2016-1888. This is on Exxon Mobil's emergency motion to extend time.

Counsel, could you please identify yourselves for the Court?

MR. FRONGILLO: Good afternoon, Your Honor. Thomas Frongillo on behalf of Exxon Mobil.

THE COURT: All right. Good afternoon, Mr. Frongillo.

MS. LINDBERG: Good afternoon, Your Honor. Christina Lindberg on behalf of Exxon Mobil.

THE COURT: Burk?

MS. LINDBERG: Christina Lindberg.

THE COURT: Lindberg. All right. Good afternoon, Ms. Lindberg.

MR. JOHNSTON: Your Honor, Richard Johnston for the Commonwealth.

THE COURT: All right. Good afternoon, Mr. Johnston.

MS. HOFFER: Melissa Hoffer for the Commonwealth.

THE COURT: Good afternoon, Ms. Hoffer.

MR. COURCHESNE: Good afternoon. Christophe Courchesne for the Commonwealth.

THE COURT: Courchesne? Good afternoon, Mr. Courchesne.

MR. GOLDBERG: I'm Andrew Goldberg for the Commonwealth.

THE COURT: All right. Good afternoon.

Let me tell you what I have received and reviewed. I have received, first of all, the emergency motion from Exxon Mobil to extend the timeframe for a meet and confer with the attorney general. I read the memorandum, including, I believe, eight separate -- nine separate attachments to that memorandum. I received and read the opposition from the Commonwealth, and then I received also a reply memorandum from Exxon Mobil to that opposition.

I have looked at all of these, and I understand the import of the motion and the opposition.

I'll hear from you.

MR. FRONGILLO: Your Honor, with your permission, I have a one-page diagram that I think might be helpful to the discussion. I've given a copy to the Attorney General's Office.

THE COURT: All right. Before you begin let me ask you a preliminary question. Is there anything that requires Exxon Mobil other than this obligation for the meet and confer five days ahead to consider other issues relating to Exxon Mobil before filing a lawsuit? Is there any -- anything else?

I gather the tolling agreement has been presented as an impediment to them bringing this action, and you're suggesting that they need to put it off, so that they can meet and confer in person with Exxon Mobil.

But I'm going to deny your motion to have an emergency stay of this, and I will say that in open court.

But I hope that you can schedule a meaningful meet and confer time within the next three days, because I think that the attorney general --

I cannot step in the way of their filing their lawsuit. I don't see I have any statutory authority whatsoever to suggest that the attorney general cannot file a suit after they've given a five-day notice under Section 4.

MR. FRONGILLO: Can I make a suggestion?

THE COURT: Yes.

MR. FRONGILLO: In situations where there are time deadlines in by statutes written of course by the legislature which I'm sure if the issue that you're thinking about, courts can extend the statutory time period based on --

THE COURT: I have to have good and sufficient reason to do so. The argument that you're giving me, that your client is giving me, is that it's too busy, it has litigation in a city that is a three-hour train ride or two-hour flight, and I can't stand in the way of a statutorily permitted lawsuit on the I'm too busy theory for Exxon Mobil.

As I said, the combination of your firm and Paul Weiss and all of the in-house counsel that they have doesn't suggest to me that that's an authentic basis for extending it.

So I'm asking that you agree to three days. I'm not

going to order it. In my view the attorney general has given its notice, and I think Mr. Johnston is correct that he can leave this courtroom and file a lawsuit. I don't think there's any way that I can order him not to. Nor would I.

But I do think that it would be wise and proper if you could have a meaningful meet and confer, whether that be with you or with somebody who flies up at night or in the morning and does that. I'm not going to suggest that, but that's my --

MR. FRONGILLO: Can I make one other --

THE COURT: Yes. Yeah.

MR. FRONGILLO: Mr. Johnston, one of his concerns was, that the company would use this time period to prepare a lawsuit and file it in some other jurisdiction. One of the points that I was going to make in response before we came up was I am relatively confident that that would not happen.

THE COURT: Well, I'm not going to get involved in that. Yeah.

MR. FRONGILLO: We're willing to get him an assurance that that wouldn't --

THE COURT: Yeah, I'm not going to get involved in that. That's beyond my jurisdiction.

All right. Thank you.

(End of discussion at sidebar.)

THE COURT: All right. I have had a conference with counsel at sidebar.

I have indicated at that conference that I intend to deny the emergency motion from Exxon Mobil.

I do not think that there is a sufficient basis for granting an extension under the statute, because as I have said, I don't believe that the extension is necessary for the reasons that have been offered.

I did suggest that the meaningful meet and confer requirement of Section 4 and Section 5 is important. It's in the statute for a reason. I do hope that it can occur.

But as I said to Mr. Frongillo, I think that Mr. Johnston is correct, under the statute, that he has given -- or rather, the attorney general has given the necessary five-day warning. I suggested that a meaningful meet and confer could occur within three days before filing the suit, but I cannot and will not stay the filing of a lawsuit under these circumstances.

I don't intend to write anything other than what has now been put on the record.

And have I covered everything, Mr. Frongillo?

MR. FRONGILLO: Yes, Your Honor.

THE COURT: All right. Mr. Johnston?

MR. JOHNSTON: I think so, Your Honor. Thank you.

THE COURT: All right. Thank you.

(Hearing adjourned at 2:49 p.m.)