COMMONWEALTH OF MASSACHUSETTS

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

MEMORANDUM IN SUPPORT OF EXXON MOBIL CORPORATION'S MOTION TO COMPEL THE COMMONWEALTH TO PRODUCE ADVERTISEMENTS FOR FOSSIL FUEL PRODUCTS BY INDUSTRY COUNTERPARTS

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PRELIMINARY STATEMENT

The Commonwealth's core theory in this case is that ExxonMobil's allegedly deceptive statements were material to the decisions of Massachusetts consumers to purchase Synergy gasoline, Mobil 1 motor oil, and other ExxonMobil products, "rather than" similar products from other companies. And the Commonwealth has conceded the obvious: under its theory, at least some such consumers would have considered advertisements from those other companies, as well as from ExxonMobil, in making their purchasing decisions. In other words, there is no question that what other companies said to Massachusetts consumers about their own gasoline and motor oil products bears directly on the relevant purchasing decisions of Massachusetts consumers allegedly deceived in this case, as the Commonwealth has articulated those decisions.

As a result, ExxonMobil served RFP Nos. 137–38 on the Commonwealth.[1] Those RFPs seek documents and communications concerning "advertisements for gasoline by companies other than ExxonMobil" and "advertisements for motor oil by companies other than ExxonMobil." Ex. 6 at 11. But, despite its own effort to frame this case as focused on the choice by Massachusetts consumers among various brands of gasoline and motor oil, the Commonwealth has refused to produce documents responsive to these RFPs. Instead, the Commonwealth has regurgitated the same objections it has trotted out before to avoid producing other discoverable material, including that production would be overly burdensome and that the records relate only to the so-called "stricken defenses." The Court should reject this stonewalling and order the Commonwealth to comply with these straightforward requests.

[1] ExxonMobil served these RFPs on the Commonwealth, and refers to the Commonwealth in this brief, because the Commonwealth is the plaintiff in this action. *See* Am. Compl. ¶ 2. ExxonMobil acknowledges, but disagrees with, the Court's order as to the scope of the Commonwealth's document discovery obligations in this case, *see* Dkt. No. 158 at 8–9, and reserves all rights and objections thereto.

BACKGROUND

I. The Commonwealth Alleges That ExxonMobil Deceived Massachusetts Consumers Into Purchasing Gasoline And Other Fossil Fuel Products From ExxonMobil Rather Than From Other Companies

The Commonwealth is seeking a finding of liability for approximately 250 allegedly deceptive statements by ExxonMobil to Massachusetts consumers and investors relating to Synergy gasoline, climate change, the challenges of transitioning from fossil fuels, and fossil fuel demand. *See* Ex. 2.[2] The Commonwealth's primary theory of consumer deception is that ExxonMobil made statements about its fossil fuel products—including Synergy gasoline—that purportedly failed to disclose the climate-change risks of those products and misrepresented that consumer use of such products would reduce greenhouse gas emissions. *See, e.g.*, Am. Compl. ¶¶ 577–83. The Commonwealth also alleges that ExxonMobil "knows, knew, or should have known" its advertisements were (supposedly) deceptive. *See, e.g.*, *id.* ¶ 756.

The Commonwealth's theory is that, but for the deceptive advertisements, "consumer[s] might purchase fewer ExxonMobil fossil fuel products, or none," *see, e.g.*, *id.* ¶¶ 694–98, 710, and that, "if [they] were aware of ExxonMobil's" alleged deception, some consumers might "prefer to purchase [fossil fuel] products from oil companies other than ExxonMobil." *Id.* ¶¶ 710–11. In interrogatory responses, the Commonwealth has alleged that ExxonMobil's statements to Massachusetts consumers were material to five specific "purchasing" decisions:

- "Purchasing gasoline from ExxonMobil *rather than gasoline from competitors*";
- "Purchasing ExxonMobil premium gasoline rather than purchasing ExxonMobil regular gasoline";

[2] The Commonwealth previously alleged more than 1,100 deceptive statements, acts, and practices, but has since refined its list to approximately 250 statements, reserving the right to modify that list. Affidavit of Jack W. Pirozzolo, Ex. 2. Citations to "Ex. __" refer to exhibits to the Affidavit of Jack W. Pirozzolo.

- "Purchasing ExxonMobil premium gasoline *rather than purchasing gasoline from competitors*";
- "Purchasing other ExxonMobil fossil fuel products, such as Mobil 1 motor oil, *rather than similar products from competitors*"; and
- "Purchasing an electric vehicle rather than a vehicle with an internal combustion engine."

Ex. 3 at 137 (emphases added).

Further confirming that advertising by other brands directly bears on the issues in this case, the Commonwealth admitted in responses to ExxonMobil's Requests for Admission that statements and advertisements relating to other companies' gasoline and motor oil products would be important to the purchasing decisions of at least some of those consumers. For example, the Commonwealth admitted that "it is a reasonable assumption that at least one Massachusetts consumer":

- "when deciding which brand of gasoline to purchase, *considers advertisements from different companies*";
- "when deciding which brand of diesel fuel to purchase, *considers advertisements from different companies*";
- "*would consider, among other things, what ExxonMobil's competitors have said publicly about their products* when determining whether to purchase Motor 1 motor oil rather than purchasing motor oil from competitors";
- "*would consider, among other things, what ExxonMobil's competitors have said publicly about their gasoline* when determining whether to purchase ExxonMobil premium gasoline rather than purchasing gasoline from competitors"; and/or
- "*would consider, among other things, what ExxonMobil's competitors have said publicly about their products* when determining whether to purchase Motor 1 motor oil rather than purchasing motor oil from competitors."

Ex. 4 at 111–13, 292–94 (emphases added).

Despite identifying these consumer purchasing decisions as the ones allegedly affected by ExxonMobil's statements—that is, the decisions to which allegedly false,[3] misleading, or omitted information was material—the Commonwealth has also conceded that it is "not aware of specific consumers" for whom any allegedly false, misleading, or omitted information was material to the decision to purchase any ExxonMobil product. Ex. 5 at 101; *see also* Ex. 4 at 150.

II. The Commonwealth Refuses To Produce Advertisements For Fossil Fuel Products By Companies Other Than ExxonMobil

ExxonMobil served RFP Nos. 137 and 138 on the Commonwealth so that it can defend itself against the Commonwealth's victimless and unsupported claim that ExxonMobil's statements were material to consumer purchasing decisions. Those RFPs seek documents and communications concerning advertisements for gasoline and for motor oil by companies other than ExxonMobil. Ex. 6 at 11. Documents responsive to the RFPs will bear on the Commonwealth's materiality theory, given the Commonwealth's repeated acknowledgments that a reasonable consumer "considers advertisements from different companies" in deciding which gasoline or motor oil to purchase, *see* Ex. 4 at 111–13, and that ExxonMobil's statements were material to Massachusetts consumers' decisions to purchase "gasoline from ExxonMobil rather than gasoline from competitors," Ex. 3 at 137. *See also* Am. Comp. ¶¶ 710–11 (consumers might "prefer to purchase those [fossil fuel] products from oil companies other than ExxonMobil").

The parties have met and conferred about these RFPs several times. The Commonwealth has refused to search for or produce documents responsive to them, asserting lack of relevance and

[3] ExxonMobil's Interrogatory No. 15 requires the Commonwealth to identify the false information (if any) in the ExxonMobil statements that the Commonwealth alleges to be deceptive. The Commonwealth has refused to identify that information. As a result, ExxonMobil has moved to compel the Commonwealth to respond in full to Interrogatory No. 15. That motion is now fully briefed to this Court, with the Rule 9A package having been filed on May 29, 2025. *See* Dkt. No. 233 *et seq.*

burden, invoking ExxonMobil's stricken defenses, questioning the "incremental value" of ExxonMobil obtaining responsive documents from the Commonwealth, and citing work product protection. *See* Ex. 7 at 1. Accordingly, the parties are at an impasse.

ARGUMENT

A party is entitled to discovery "regarding any matter" that "is relevant to the subject matter" of the case. Mass. R. Civ. P. 26(b)(1); *see, e.g.*, *Lin Yang* v. *Mauzy*, 2020 WL 2176925, at *2 (Mass. App. Ct. May 6, 2020) ("The [Massachusetts] rules of procedure permit broad discovery of 'any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.'" (quoting *Cronin* v. *Strayer*, 392 Mass. 525, 534 (1984))). A "party resisting discovery bears the burden of showing that the subpoena imposes an undue burden." *Green* v. *Cosby*, 152 F. Supp. 3d 31, 36 (D. Mass. 2015) (citation omitted). It "cannot rely on a mere assertion that compliance would be burdensome and onerous without showing the manner and extent of the burden and the injurious consequences of" compliance. *Id.* (citation omitted).

The Commonwealth should produce documents responsive to RFP Nos. 137–38, which bear on whether ExxonMobil's allegedly deceptive statements were material to consumers' purchasing decisions and whether ExxonMobil "should have known" that its statements were (supposedly) deceptive. None of the Commonwealth's arguments in support of its attempt to resist discovery is persuasive.

I. Advertisements For Other Gasoline And Motor Oil Products Are Relevant To The Commonwealth's Theory Of Materiality

To prove its Chapter 93A claims, the Commonwealth must show, among other things, that ExxonMobil's allegedly deceptive statements were "material, that is likely to affect consumers' conduct or decision with regard to a product." *Tomasella* v. *Nestlé USA, Inc.*, 962 F.3d 60, 72 (1st

Cir. 2020) (quotation marks and citation omitted). Massachusetts courts have held that "material" information under Chapter 93A is "information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *Commonwealth* v. *AmCan Enters., Inc.*, 47 Mass. App. Ct. 330, 335 (1999). This Court has further recognized that "[t]he materiality of [ExxonMobil's] representations, *and other information generally known to consumers* and investors, *is obviously relevant.*" Dkt. No. 158 at 7 (emphases added). Courts have also routinely allowed discovery into documents that bear on materiality in consumer deception cases. *See, e.g.*, *Precision IBC, Inc.* v. *PCM Capital, LLC*, 2012 WL 750744, at *2–4 (S.D. Ala. Mar. 5, 2012) (affirming order compelling the production of documents that were relevant to "whether the alleged deception had a material effect on purchasing decisions"); *Pappas* v. *Naked Juice Co. of Glendora, Inc.*, 2012 WL 12885109 at *5 (C.D. Cal. Dec. 5, 2012) (compelling the production of documents concerning plaintiff's endorsement of other products similar to defendant's, where plaintiff alleged that defendant's representations of its products as "all natural" and "non-GMO" were "'material' to his 'decision to purchase'" these products).[4]

Here, the Commonwealth has identified specific consumer decisions to purchase "gasoline from ExxonMobil *rather than gasoline from competitors*" and to purchase "ExxonMobil fossil fuel products, such as Mobil 1 motor oil, *rather than similar products from competitors*" as the decisions for which allegedly deceptive statements were material. Ex. 3 at 137 (emphases added). The Commonwealth has also conceded the obvious point that, under its theory, at least some Massachusetts consumers consider "advertisements from different companies" in making those

[4] The Commonwealth itself has sought documents in this case "concerning the materiality of any climate-related issues . . . to ExxonMobil investors," including "documents concerning whether, how, or why they are material." Dkt. No. 136, Ex. 12 ¶ 9 (June 13, 2022 Commonwealth's Subpoena to BlackRock Fund Advisors).

purchasing decisions. Ex. 4 at 111–13, 292–94; *see also* Ex. 3 at 137. As a result of the Commonwealth's theory of liability in this case, discovery of advertisements from other companies bears on the allegations of materiality that the Commonwealth has made and the ability of ExxonMobil to mount its defense.

For example, the Commonwealth alleges that ExxonMobil's advertisements about Synergy gasoline purportedly failed to disclose "that the production and consumer use of fossil fuel products . . . are a leading cause of climate change that endangers public health and consumer welfare." Am. Compl. ¶ 581. The extent to which competitors' advertisements for fossil fuel products do disclose such information bears on whether a reasonable Massachusetts consumer would choose to purchase ExxonMobil's products in the absence of such a disclosure. Stated another way, if none of ExxonMobil's competitors were disclosing the information that the Commonwealth believes ExxonMobil should have disclosed, then that omission would not be a point of differentiation among products and would not have been material to a consumer's decision to purchase gasoline from ExxonMobil rather than "from competitors." Ex. 3 at 137.

Advertisements for other brands of gasoline and motor oil are also relevant to the question of whether a reasonable consumer would have been deceived by ExxonMobil's allegedly deceptive statements. Courts have recognized that whether and how a word or phrase is commonly used in advertising to refer to a like product bears on the analysis of how reasonable consumers would have interpreted that word or phrase. For example, in *Geffner* v. *Coca-Cola Co.*, the court held that a soda's "diet" label carried the "primarily relative (rather than absolute) meaning" that the product was "*lower* in calories than the non-diet version," not that it conveyed a "general weight loss promise." 928 F.3d 198, 200–01 (2d Cir. 2019). The court also rejected the suggestion that "[t]he use of physically fit and attractive models" conveyed a weight-loss message, because

the use of such models is "so ubiquitous that it cannot be reasonably understood to convey any specific meaning at all"; in other words, the "ubiquity" of an advertising message bore directly on whether that message could be deceptive. *Id.* at 200. The same is true here. Evidence regarding the advertisements for other brands of gasoline and motor oil will bear on how reasonable consumers would have interpreted the words or phrases in ExxonMobil's own advertisements and the extent to which such words or phrases would have influenced purchasing decisions, and bears directly on the Commonwealth's theory of liability and ExxonMobil's defense.

For example, the Commonwealth alleges that ExxonMobil's statement that Synergy gasoline "[k]eeps your engine 2x cleaner for better gas mileage" is deceptive because it could (somehow) mislead consumers by giving "the impression that the word 'cleaner' refers to a reduction in emissions." Ex. 8 at 6, 10. Comparing ExxonMobil's statements to those of other brands of gasoline will situate the use of the word "cleaner" in the context of engine cleanliness and engine efficiency. *See, e.g.*, *City of New York* v. *Exxon Mobil Corp.*, 226 N.Y.S.3d 863, 880 (N.Y. Sup. Ct. 2025) (discussing statements by other gasoline brands that "a clean engine is more fuel efficient, produces fewer emissions," and "dirty deposits from ordinary fuels that form in engines can lead to a variety of problems—[including] increased emissions"). Discovery of advertisements for other brands of gasoline and motor oil will bear on what reasonable consumers would have encountered in the marketplace, how these consumers would have interpreted and differentiated ExxonMobil's alleged misstatements, and whether those interpretations would have had an effect on the specific "material" purchasing decisions the Commonwealth has identified in its interrogatory responses.

II. Advertisements For Other Gasoline And Motor Oil Brands Will Bear On Whether ExxonMobil "Should Have Known" That Its Statements Were (Supposedly) Deceptive

The Commonwealth apparently intends to seek civil penalties stemming from approximately 250 *separate* purported violations of Chapter 93A. But civil penalties are available for a violation of Chapter 93A only if the defendant "knew or should have known" that it "employed any method, act or practice . . . in violation of said section two" of Chapter 93A. G.L. c. 93A § 4. As a result, discovery is appropriate as to evidence bearing on whether ExxonMobil "should have known" that each of the allegedly deceptive statements was (supposedly) deceptive.

Advertisements for other companies' products will bear on whether ExxonMobil "should have known" its own statements were (supposedly) deceptive. The Commonwealth alleges that ExxonMobil deceived consumers through the use of references to "cleaner" engines or "fewer emissions," and by *omitting* information from its advertisements, including that the "development, refining, and consumer use of ExxonMobil's fossil fuel products [including gasoline and motor oil] emits large volumes of greenhouse gases" and the "supposed benefits and limitations of its fossil fuel products." *See* Ex. 9 at 11; Ex. 10 at 3–4. To the extent competitors made statements similar to those of ExxonMobil, or omitted similar information regarding climate-change risk from advertisements about their own products that ExxonMobil also omitted from its own advertising, that would tend to make it less probable that ExxonMobil "should have known" that its own alleged omissions rendered those statements (supposedly) deceptive.

Courts have recognized the relevance of evidence about competitors' practices and industry standards, such as the discovery sought here, when evaluating Chapter 93A claims. For example, in *Anoush Cab* v. *Uber Technologies*, the First Circuit upheld the district court's determination that Uber's conduct was not unfair under Chapter 93A, based in part on its analysis that Uber's conduct was consistent with the "standards of the commercial marketplace." 8 F.4th 1, 20–22 (1st

Cir. 2021). In *USM Corp.* v. *Arthur D. Little Systems*, the Appeals Court upheld the Superior Court's determination that the defendant's alleged omissions from its financial reports were not deceptive under Chapter 93A, in part, because the defendant's financial reporting was in line with that of the business community. 28 Mass. App. Ct. 108, 125 (1989); *see also Merisant Co.* v. *McNeil Nutritionals, LLC*, 515 F. Supp. 2d 509, 512 (E.D. Pa. 2007) (noting that "advertisements for artificial sweetener products often associate artificial sweeteners or their ingredients with items that occur in nature such as fruit, meat, grains or vegetables" in analyzing a false advertising claim).

Thus, discovery related to advertisements for other gasoline and motor oil brands—evidence of industry practices—will bear on whether ExxonMobil "should have known" that its own statements were (supposedly) deceptive.

III. The Commonwealth's Objections To Producing Responsive Advertisements In Its Possession Are Unpersuasive

The Commonwealth has advanced four arguments for refusing to meet its discovery obligations. The Court should reject each of them.

First, the Commonwealth contends that this discovery relates solely to ExxonMobil's "stricken equity-based defenses." Ex. 1 at 27. As explained above, advertisements for other gasoline and motor oil brands are relevant for multiple reasons wholly unrelated to any stricken defenses. To be clear, ExxonMobil does not intend to use these documents to reinvigorate its stricken defenses.

Second, the Commonwealth asserts that producing responsive documents would be unduly burdensome. The party resisting discovery has the burden of showing "the manner and extent of the burden and the injurious consequences" of compliance. *Green*, 152 F. Supp. 3d at 36 (citation omitted). The Commonwealth has not met this burden. Aside from making the bare assertion of

burden, the Commonwealth does not suggest it possesses voluminous responsive records or offer any explanation for why searching for and producing such documents would result in an undue burden. *See* Ex. 1 at 26–27. ExxonMobil is not asking the Commonwealth to find documents that are not already in the Commonwealth's possession, custody, or control; ExxonMobil seeks only the responsive records the Commonwealth *does* possess.

Third, the Commonwealth argues that ExxonMobil should seek documents related to advertisements by other companies from those other companies. Putting aside the burden arguments such competitors could advance as third parties to this litigation, the Commonwealth is not absolved of its *party* discovery obligations because one or more *third parties* might also have responsive records. *See, e.g.*, *Swenson* v. *Mobilityless, LLC*, 2022 WL 2347113, at *3 (D. Mass. June 29, 2022) ("[T]hat Plaintiffs may have obtained relevant documents from other sources does not excuse Defendants' discovery obligations.") (citation omitted). This Court has even rejected the argument that one *third party*—with less of an obligation than the Commonwealth—may resist discovery because documents it possesses also could be obtained from *another* third party. Ex. 11 at 15:25–16:3 ("I guess I'm not following the necessity that if you've requested documents from PRIM and these relate to communications between the [T]reasurer and PRIM that somehow the [T]reasurer is excused from producing those documents.").

Fourth, the Commonwealth has stated that the request for other companies' advertisements attempts to invade its "work product." Ex. 1 at 26. But work product protection extends only to "documents . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative." Mass. R. Civ. P. 26(b)(3). By their very nature, these advertisements could not have been "prepared in anticipation of litigation by or for" the

Commonwealth, given that any responsive advertisements would have been prepared by other companies in the ordinary course of business. *Id.*

CONCLUSION

The Court should grant ExxonMobil's Motion to Compel and order the Commonwealth to search for and produce documents that are responsive to RFP Nos. 137–38.

Dated: June 13, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jack W. Pirozzolo, counsel for Defendant Exxon Mobil Corporation, hereby certify that on June 13, 2025, I caused a copy of this Memorandum in Support of Exxon Mobil Corporation's Motion To Compel The Commonwealth To Produce Advertisements for Fossil Fuel Products By Industry Counterparts to be served on the Massachusetts Office of the Attorney General by e-mail.

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