

MS

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 Hand Delivery and E-Mail

**MEMORANDUM IN SUPPORT OF EXXON MOBIL CORPORATION'S
MOTION TO COMPEL THE COMMONWEALTH TO IDENTIFY ANY ALLEGEDLY
DECEPTIVE STATEMENTS IT CONTENDS ARE FALSE**

PRELIMINARY STATEMENT

The Commonwealth alleges that ExxonMobil made statements that are “false” and also statements that are “misleading.” *E.g.*, Am. Compl. ¶ 745 (seeking penalties for “each materially false, deceptive, or misleading statement”); Ex. 1 at 159 (ExxonMobil should “immediately cease . . . making false, misleading, and/or deceptive statements”). As the United States Supreme Court wrote just last month, “false and misleading are two different things. A misleading statement can be true,” and “‘false’ means ‘not true.’” *Thompson v. United States*, 145 S. Ct. 821, 826 (2025).

To understand which of the nearly 280 ExxonMobil statements at issue are alleged to be “false” rather than “misleading,” ExxonMobil served Interrogatory No. 15, which requires the Commonwealth to identify the information in each allegedly deceptive statement “that is false or inaccurate.” ExxonMobil is forced to bring this motion because the Commonwealth refuses to

answer, remarkably asserting that it does not know what “false” means. That response defies credulity. The Commonwealth’s complaint alleges that ExxonMobil made statements that are “false,” and so it obviously knows what that word means. And caselaw has further addressed this issue. Just as the United States Supreme Court did, the Supreme Judicial Court in *Aspinall v. Philip Morris* distinguished, for purposes of Chapter 93A, between information that is not “true as a literal matter” (*i.e.*, false) and information that is true but “misleading.” 442 Mass. 381, 394–95 (2004).

A full and complete answer to Interrogatory No. 15 is critical to ExxonMobil’s defense. The Commonwealth will need to offer different proof at summary judgment, or any trial, depending on whether a particular statement was false, as opposed to misleading, and ExxonMobil’s defenses as to each statement depend on what the Commonwealth intends to prove. For example, for allegedly “false” statements, ExxonMobil will offer evidence showing the information in each statement was true. The Commonwealth’s failure to plead or otherwise identify which statements it believes to be “false” demands an interrogatory response so ExxonMobil can properly prepare its defense through discovery.

The Commonwealth also refuses to answer Interrogatory No. 15 on the ground that it may prevail by proving that statements were “misleading,” even if not “false.” But that misses the point of the interrogatory, which is to require the Commonwealth to identify *which* theory of liability under Chapter 93A it is pressing for each statement. As discussed, ExxonMobil is entitled to know that information, so it can pursue appropriate discovery to develop its defense. Having alleged “false” statements in its complaint, and in subsequent responses, the Commonwealth cannot refuse to answer this interrogatory and stymie ExxonMobil’s ability to develop its defense.

Getting clarity about the Commonwealth’s theory of liability is particularly important now

that the Commonwealth has conceded that, after nine long years of investigation and litigation, it has yet to identify a single Massachusetts consumer or investor who was deceived by ExxonMobil's conduct. Thus the Commonwealth's case is apparently premised on its speculation that *some* consumers or investors *might* have been deceived by ExxonMobil's statements. The Commonwealth must provide this information now, while discovery remains open, not on the eve of trial (or at trial).

BACKGROUND

Interrogatory No. 15 seeks the identification of any information that the Commonwealth alleges to be "false or inaccurate" in the ExxonMobil statements at issue in this case. In December 2024, the Commonwealth refused to answer, asserting that "the AGO need not prove falsity to prevail" and that "a deceptive statement 'may be true as a literal matter, but still create an over-all misleading impression.'" Ex. 2 at 118 (quoting *Aspinall*, 442 Mass. at 394–95). It also objected that it did not know "whether ExxonMobil intends for the standard of a 'false' or 'inaccurate' statement to differ from the standard for an 'unfair' or 'deceptive' statement," but acknowledged "there can be a difference between outright falsehoods and statements that give a false impression." *Id.*

In January 2025, citing the *Aspinall* case on which the Commonwealth relied, ExxonMobil explained that Interrogatory No. 15 requires identification of "each allegedly deceptive statement, or portions thereof, that the Commonwealth alleges to be false, i.e., *not to be true as a literal matter*." Ex. 3 at 4 (emphasis added). In subsequent responses, the Commonwealth shifted gears, stating it "remain[ed] unclear how ExxonMobil is proposing to differentiate a 'false or inaccurate' statement from a 'unfair or deceptive' statement." Ex. 4 at 4. And, even after ExxonMobil explained what "false" meant, the Commonwealth maintained that it did not "understand how

ExxonMobil is defining the word ‘false,’” because the word “can mean ‘not genuine,’ ‘intentionally untrue,’ ‘adjusted or made so as to deceive,’ or ‘tending to mislead,’ among other definitions.” Ex. 5 at 4.

On February 24, 2025, the parties met and conferred. The Commonwealth steadfastly refused to respond further to Interrogatory No. 15.

LEGAL STANDARD

The purpose of discovery is to “make a trial less a game of blindman’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.” *Strom v. Am. Honda Motor Co.*, 423 Mass. 330, 335 (1996). Thus, Rule 26(b)(1) authorizes discovery as to “any matter . . . relevant to the subject matter involved in the” case. Interrogatories “must be answered separately and *fully*” by “furnish[ing] any and all information available.” *Donovan v. Sundstrom*, 2004 WL 1837665, at *2 (Mass. Super. Ct. July 1, 2004) (quoting Rule 33(a)(3)) (emphasis in original). “Evasive answers are considered failures to answer.” *Meyer v. King*, 1995 WL 1312543, at *2 (Mass. Super. Ct. Dec. 19, 1995).

ARGUMENT

This should be simple. Interrogatory No. 15 requires the Commonwealth to identify any portion of the nearly 280 allegedly deceptive ExxonMobil statements that it believes to be “false,” meaning not “true as a literal matter.” The Commonwealth itself has accused ExxonMobil of making “false” statements—using the words “false” or “falsely” 47 times in the Amended Complaint alone—and has cited the *Aspinall* case that sets forth the not-true-as-a-literal-matter definition. For the reasons set forth below, the Commonwealth should either identify the information it believes to be “false” or concede that it is not aware of any such “false” information.

First, the Commonwealth’s professed ignorance about the difference between “false” and “misleading” should be rejected for the implausible contention that it is. The Supreme Judicial

Court has distinguished between statements that are “true as a literal matter,” but still misleading, and those that are not “true as a literal matter.” *See Aspinall*, 442 Mass. at 395 (“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.”). Similarly, the United States Supreme Court has explained that “false and misleading are two different things,” because “a misleading statement can be true,” “a true statement is obviously not false,” and “‘false’ means ‘not true.’” *Thompson*, 145 S. Ct. at 826. To respond to Interrogatory No. 15, the Commonwealth should simply follow this authoritative precedent and identify any information that it alleges is “false” or not “true as a literal matter.”

Second, the Commonwealth argues it is not required to prove that ExxonMobil made “false” statements in order to prove that ExxonMobil made deceptive statements in violation of Chapter 93A. Ex. 2 at 118; Ex. 5 at 3. Even assuming that is correct as an abstract legal proposition, it is not an acceptable answer to Interrogatory No. 15 because the Commonwealth *has* alleged “false” statements. For example, the Commonwealth alleges that “ExxonMobil’s *false and misleading* misrepresentations are material” to decisions of Massachusetts consumers, an allegation that distinguishes between “false” and “misleading.” Am. Compl. ¶ 537 (emphasis added). Similarly, the Commonwealth contends that “each materially *false, deceptive, or misleading* statement to a Massachusetts investor” is “a separate violation” of Chapter 93A, again distinguishing “false” and “misleading.” *Id.* ¶ 745 (emphasis added). Having alleged “false” statements—rather than simply “misleading” statements—the Commonwealth cannot hide behind the non-sequitur that it did not need to have done so.

Third, the Commonwealth’s refusal to identify which (if any) information in ExxonMobil’s statements is “false” is fundamentally unfair. ExxonMobil is not able to read the Commonwealth’s

mind as to which information the Commonwealth claims to be “false.” If the “false” information were identified during discovery, ExxonMobil could develop the fact and expert record necessary to rebut each allegation of falsity. By depriving ExxonMobil of this basic information about the substance of its claims, almost five years after filing its amended complaint, the Commonwealth is forcing ExxonMobil to rebut allegations that it made “false” statements without knowing which statements are alleged to be false and, therefore, without a full and fair opportunity to build the record for its defense. That cannot be permitted, both as a matter of fundamental fairness and also because the Commonwealth’s effort to prevent the disclosure of the facts “to the fullest practicable extent” runs counter to the most basic principles of discovery. *See Strom*, 423 Mass. at 335.

Consider, for example, one statement the Commonwealth has alleged to be “deceptive” in relation to ExxonMobil’s marketing of its fossil fuel products to Massachusetts consumers: “Exxon Supreme+ premium gas keeps your engine 2x cleaner for better gas mileage.” Ex. 6 at 10. The evidence the Commonwealth will introduce at trial will be very different if the Commonwealth’s contention is that this statement is “false”—*e.g.*, that engines do not get better mileage using Synergy Supreme Plus—or if the Commonwealth’s theory is instead that the statement is misleading because of its failure to warn—*e.g.*, based on the argument that “ExxonMobil has not been disclosing the impact of developing, refining, and using its fossil fuel products on climate change, the environment, public health, and consumer welfare,” *id.* at 7, or for another reason entirely. Interrogatory No. 15 thus seeks to clarify, for each ExxonMobil statement that the Commonwealth has alleged to be deceptive, whether the Commonwealth will proceed under a “falsity” theory, requiring ExxonMobil to develop the record to substantiate the accuracy of its factual claims, or under a “misleading” theory, requiring ExxonMobil to demonstrate the scope of public awareness of information about the combustion of fossil fuels and greenhouse gas

emissions such that a warning was not required, or something else.

Finally, if the Commonwealth is currently unable to identify any false information in the allegedly deceptive statements, then furnishing “any and all information available” requires that the Commonwealth acknowledge that it has identified no such information. *Donovan*, 2004 WL 1837665, at *2. The Commonwealth recently conceded, in response to other interrogatories, that it has not identified any Massachusetts consumers or investors who have actually been deceived. The same principle that required the Commonwealth to make that concession applies equally to Interrogatory No. 15. Answering this interrogatory fully and completely requires the Commonwealth either to identify the information it currently believes to be false in ExxonMobil’s allegedly deceptive statements, or to state that it has not identified any such false information.

CONCLUSION

This Court should order the Commonwealth to respond fully to Interrogatory No. 15.

Dated: April 18, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jack W. Pirozzolo, counsel for Defendant Exxon Mobil Corporation, hereby certify that on April 18, 2025, I caused a copy of this Memorandum of Law in Support of Exxon Mobil Corporation's Motion to Compel the Commonwealth to Identify Any Allegedly Deceptive Statements It Contends Are False to be served on the Attorney General by e-mail and hand delivery.

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