COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION No. 1984-CV-03333-BLS1

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

EXXON MOBIL CORPORATION,

Defendant.

Service by E-Mail

OPPOSITION OF THE COMMONWEALTH TO EXXONMOBIL'S MOTION TO COMPEL THE COMMONWEALTH TO IDENTIFY ANY ALLEGEDLY DECEPTIVE STATEMENTS IT CONTENDS ARE FALSE

The Attorney General's Office (AGO) has explained to Exxon Mobil Corporation (ExxonMobil) in exceeding detail how and why the company has been violating G.L. c. 93A. The AGO has served ExxonMobil with a 201-page Amended Complaint, nearly 1,000 pages of interrogatory responses, 440 pages of responses to 630 Requests for Admission, a 181-page chart explaining each deceptive act or practice, and has further detailed its allegations in multiple court filings. ExxonMobil knows the allegations and is on notice regarding how to defend against those allegations. ExxonMobil's Opening Brief here, however, ignores the AGO's detailed explanations and asserts that ExxonMobil is somehow unable to defend itself because the AGO has not categorized ExxonMobil's deceptive acts and practices as either "false" or "literally true." But the AGO's detailed explanations make clear that ExxonMobil's deceptive acts and practices are not amenable to categorization as discretely "false" or "literally true." And, in any event, Chapter 93A does not recognize the artificial distinction that ExxonMobil is attempting to draw; instead, Chapter 93A prohibits deceptive acts and practices regardless of whether they are

"false" or "literally true." The Court, therefore, should deny ExxonMobil's latest attempt to impose unnecessary and unduly burdensome discovery obligations on the AGO.

BACKGROUND

ExxonMobil Interrogatory No. 15 states:

> Irrespective of the time period set forth in Instruction No. 8, for each and every Allegedly Deceptive Action that is a statement, including those statements indicated in Exhibit 1 by the absence of an asterisk, identify any information in the Allegedly Deceptive Action that is false or inaccurate, and identify all evidence that supports or substantiates your contention that the information is false or inaccurate.

Pirozzolo Affidavit, Ex. 2 at 117. The AGO objected to responding to that Interrogatory on a number of grounds, including that the AGO need not prove whether any act or practice was "false" or "inaccurate" only that the act or practice was deceptive, and that ExxonMobil had not explained whether it "intends for the standard of a 'false' or 'inaccurate' statement to differ from the standard for an 'unfair' or 'deceptive' statement." *Id.* at 118. ExxonMobil eventually dropped the request for the AGO to label its acts and practices as "inaccurate," and ExxonMobil appears to have dropped its request that the AGO identify all evidence that supports or substantiates the "false" or "inaccurate" designation. But ExxonMobil continues to insist that the AGO must identify the acts and practices that the AGO deems "false."

The AGO has repeatedly asked ExxonMobil to explain why the AGO has an obligation to distinguish between acts and practices that are "false" and those that are "literally true" but deceptive. *E.g.*, Pirozzolo Affidavit, Ex. 5 at 3. The AGO has further asked ExxonMobil to provide a definition of "false," given that the word "false" has a range of definitions, including many definitions similar to the definition of "deceptive." *Id.* at 4. ExxonMobil refused to provide any further rationale as to why labeling an act or practice as "false" is relevant in a Chapter 93A case. ExxonMobil also refused to provide any definition of "false" other than citing *Aspinall*, which held that an advertisement does not need to be "totally false in order to be

deemed deceptive" and that an advertisement that is "true as a literal matter" can violate Chapter 93A if it "create[s] an over-all misleading impression." *See id.* at 3 (quoting *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 394 (2004)).

I. The AGO's Detailed Explanations Clarify That ExxonMobil's Deceptive Acts and Practices Are Not Amenable to Categorization as "False" or "Literally True."

To illustrate both the volume of information the AGO has provided to ExxonMobil explaining why the company's acts and practices violate Chapter 93A as well as the impracticability of labeling each act or practice as either "false" or "literally true," it is helpful to analyze the example that ExxonMobil uses in its Opening Brief regarding the company's "2X CLEANER" advertisements. The company plasters the words "2X CLEANER" (or "3X CLEANER") in big, bold-font lettering in and around ExxonMobil-branded gas stations as part of signs that sometimes have, in smaller lettering, the following text: "for better gas mileage," and/or "Go on. Go Premium."[1] ExxonMobil's digital advertisements also represent that its 2X CLEANER gasoline leads to "lower emissions." The AGO dedicated five full pages in the most recent interrogatory responses to explain why ExxonMobil's "2X CLEANER" advertisements are deceptive. Pirozzolo Affidavit, Ex. 6 at 6-11. Among other reasons, the advertisements are deceptive because:

- ExxonMobil displays the words "2X CLEANER" in large writing all over ExxonMobil-branded gas stations to convey that *all* Synergy brand gasoline sold at those stations has "2X Cleaner" properties, even though the overwhelming majority of customers viewing

[1] Variations of the advertisements sometimes have other language, such as "Supreme+ premium gas keeps your engine 2x cleaner" and sometimes have very small disclaimer language. ExxonMobil has started using the words "3X CLEANER" in the same way the company has been using the words "2X CLEANER." As the AGO has explained to ExxonMobil, the company's "3X CLEANER" advertisements are deceptive for the same reasons as the company's "2X CLEANER" advertisements.

such advertisements will purchase Synergy Regular gasoline, and Synergy Regular gasoline is the product that is comparatively two times *less clean* than Synergy Supreme+. In other words, ExxonMobil is using the advertised properties of its Synergy Supreme+ product to drive sales of its different, less clean Synergy Regular product.

- ExxonMobil uses the large words "2X CLEANER" to convey that every customer who fills a tank with Synergy branded gasoline will receive the "2x cleaner" benefits, but customers who occasionally use Synergy Supreme+ will not receive the advertised benefits.
- ExxonMobil uses the large words "2X CLEANER" to convey a substantial reduction in emissions associated with using its Synergy gasoline products—on the order of two times—when there is either no emissions benefit or only a miniscule emissions benefit associated with using Synergy Supreme+.
- ExxonMobil uses the large words "2X CLEANER" alongside the phrase "for better gas mileage" to convey a substantial improvement in gas mileage associated with using its Synergy gasoline products—on the order of two times—when there is either no mileage benefit or only a miniscule mileage benefit associated with using Synergy Supreme+.
- ExxonMobil places the large words "2X CLEANER" within advertisements that reference "lower emissions" and/or "better gas mileage" to convey that the words "2X cleaner" refer to fewer emissions rather than only the cleanliness of an engine.
- ExxonMobil's "2X CLEANER" advertisements for its Synergy gasoline products build on its brand marketing efforts that represent ExxonMobil as an environmentally friendly company that is part of the solution to climate change because of its efforts to reduce

greenhouse gas emissions, thereby further connecting that word "cleaner" to fewer emissions rather than solely engine cleanliness.

- ExxonMobil's "2X CLEANER" advertisements, which build on the company's climate-focused brand marketing efforts, convey that its Synergy gasoline products are climate-friendly products, when the Synergy gasoline products, even assuming some miniscule gas mileage benefit, are not climate-friendly products.

The AGO has, therefore, given ExxonMobil ample information to inform any defense the company can raise against the AGO's allegations regarding its 2X CLEANER advertising campaign. And categorizing the 2X CLEANER advertisements (or any variation of those advertisements) as either "false" or "literally true" provides ExxonMobil with no additional relevant information.

Moreover, ExxonMobil's 2X CLEANER advertisements are not amenable to classification as "false" or "literally true," because the advertisements are deceptive for multiple different reasons. Some of the explanations above tend to move toward the yet undefined meaning of "false"—ExxonMobil is representing that using its Synergy gasoline will result in two times fewer emissions—while other explanations are even harder to classify as "false" or not—ExxonMobil is tricking customers into thinking that Synergy Regular is 2x cleaner when Synergy Regular is 2x less clean. Still other bullet points straddle the line between "false" and "literally true" for other reasons, such as the representation that each time a customer fills up a tank of gas, the customer is receiving the 2x cleaner benefits. That may be accurate for certain customers who only use Synergy Supreme+, but it is not accurate for customers who also fill up with other gasoline.

As is evident, it is impractical to label the 2X CLEANER advertisements as either "false" or "literally true." And conducting the above analysis for each of the relevant advertisements in this case is not only unworkable; but such an extensive analysis would also result in no discernable benefit, given that the AGO has already explained to ExxonMobil why its acts and practices violate Chapter 93A, i.e., why they are deceptive. As such, Interrogatory No. 15 imposes an undue burden. *See* Mass. R. Civ. P. 26(c) (the unduly burdensomeness analysis takes into account "whether the likely burden or expense of the proposed discovery outweighs the likely benefit of its receipt.").

II. Chapter 93A Does Not Distinguish Between "False" and "Literally True" Deceptive Acts and Practices

Chapter 93A neither imposes any obligation on the AGO to distinguish between "false" and "literally true" acts and practices, nor provides any workable distinction between those two categories. Instead, Chapter 93A imposes liability on ExxonMobil for engaging in any form of "deceptive acts or practices in the conduct of any trade or commerce." G.L. c. 93A § 2. The Supreme Judicial Court (SJC) has made clear that "a practice is 'deceptive,' for purposes of G.L. c. 93A, 'if it could reasonably be found to have caused a person to act differently from the way he or she otherwise would have acted.'" *Aspinall*, 442 Mass. at 394 (2004) (quoting *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762, 777 (1980)). The SJC has further stated that "advertising need not be totally false in order to be deemed deceptive in the context of G.L. c. 93A," instead, "[t]he 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." *Id.* Therefore, contrary to ExxonMobil's peculiar reading of *Aspinall*, the case stands for the proposition that Chapter 93A does *not* distinguish between a "false" (or in the SJC's phrase, "totally false") advertisement and a "literally true" advertisement, so long as the

advertisement is deceptive. As such, ExxonMobil's motion is based on the faulty premise that there are separate theories of liability under Chapter 93A for "false" acts and practices as opposed to "deceptive" acts and practices. *See* ExxonMobil Mem. at 2 (emphasis in original) (arguing that the AGO must identify "*which* theory of liability under Chapter 93A it is pressing").

Chapter 93A's regulations also make clear that the statute does not distinguish between "false" and "literally true" but deceptive advertisements. The regulations define "False Advertising" as encompassing a variety of deceptive practices, including engaging in "a bait scheme to sell another product" and "attempting to obtain a rescission of the sale for the purpose of selling another product," such as by delaying delivery of the advertised product. 940 C.M.R. §§ 3.02(3), 3.02(4)(b). The conduct encompassed by the definition of "False Advertising," therefore, includes circumstances when the seller has made "literally true" statements, but engaged in deceptive conduct. The regulations further define "False Advertising" as "a statement or illustration . . . which creates a false impression" of the product, and the regulations clarify that "[e]ven though the true facts are subsequently made known to the buyer, the law is violated if the first contact or interview is secured by deception." *Id.* § 3.02(2). In other words, the regulations define False Advertising as encompassing half truths that create an over-all misleading impression through a failure to disclose material information. *See Aspinall*, 442 Mass. at 381.

It makes sense that neither Chapter 93A case law nor the regulations seek to distinguish between "false" advertising and other forms of deceptive advertising—a defendant is liable regardless of whether the conduct is "false" or "literally true," so long as it is deceptive. By contrast, the United States Supreme Court case that ExxonMobil cites applies a federal criminal

statute that specifically uses the phrase "false statement." *Thompson v. United States*, 145 S. Ct. 821, 824 (2025) (citing 18 U.S.C. § 1014). In that case, the defendant's criminal liability turned on whether the statements he made in loan applications were "false." *Id.* The AGO does not dispute that there are examples in American jurisprudence where there is an important distinction between "false" statements and "literally true" statements. But G.L. c. 93A is not one of them. As such, ExxonMobil's request that the AGO conduct an exercise to distinguish between ExxonMobil's "false" and "literally true" acts and practices seeks to impose an unduly burdensome and legally immaterial task on the AGO.

CONCLUSION

The AGO respectfully requests that the Court deny ExxonMobil's motion.

Dated: May 9, 2025

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS,

By its attorneys,

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CERTIFICATE OF SERVICE

I, Ezra D. Geggel, certify that on May 9, 2025, I served the foregoing by sending a copy thereof by electronic service in accordance with the Joint Motion to Set Pleading Deadlines, allowed by the Court on April 14, 2020, to:

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