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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 EXPLAIN WHY IT BELIEVES EXXONMOBIL'S STATEMENTS, ACTS, AND PRACTICES WERE DECEPTIVE

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PRELIMINARY STATEMENT

The Commonwealth's theory of this case is that ExxonMobil has deceived Massachusetts consumers and investors because it did not say enough about the risks of climate change. The Commonwealth has identified hundreds of statements, acts, and practices that it alleges to be deceptive, but it alleges only generally and formulaically that those statements, acts, and practices were deceptive because ExxonMobil did not include a sufficient articulation of information about "systemic" climate change risks. Having brought this lawsuit with much fanfare, trumpeting an alleged "decades-long campaign to deceive consumers and investors about the climate-related impacts of its products that continues to this day,"[1] the Commonwealth should be able to readily identify the specific information it believes ExxonMobil failed to disclose. And it should be equally effortless for the Commonwealth to specify the corrective statements it believes would end this purported long-running campaign and protect Massachusetts consumers and investors who were allegedly deceived. Instead, the Commonwealth has refused to provide discovery on the very information it believes should have been disclosed as part of each allegedly deceptive statement, act, or practice, thereby forcing ExxonMobil to bring this motion.

This motion primarily arises from the Commonwealth's deficient responses to ExxonMobil's Interrogatory Nos. 6 and 11, which seek information the Commonwealth believes was necessary to make those statements, acts, and practices not deceptive.[2] Also implicated is the

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[1] *See* Ex. 2 (Oct. 24, 2019 Press Release).

[2] Interrogatory No. 11 asks the Commonwealth to "identify what specific disclosure or disclosures [it] contends ExxonMobil was required to make in order to make its advertisements to Massachusetts consumers not deceptive or misleading." Interrogatory No. 6 seeks, as to any deceptive statements or practices that "continued beyond, or remain ongoing" after June 2020, the "corrective disclosures or actions you contend ExxonMobil should be required to undertake to remedy the alleged statutory violations." A complete list of the statements, acts, and practices for which allegedly omitted information is required, but has not yet been identified by the

Commonwealth's refusal to produce any documents in response to Request for Production ("RFP") Nos. 48-49 and 72, which seek documents reflecting statements, such as those in gasoline and motor oil advertisements, that the Commonwealth believes sufficiently disclose climate change risks. By refusing to explain what information about climate change risks is purportedly missing from ExxonMobil's statements, acts, and practices, and by refusing to provide exemplars of documents it considers non-deceptive, the Commonwealth leaves ExxonMobil to guess exactly what the Commonwealth contends it did wrong.

This refusal is part of a heads-I-win-tails-you-lose strategy. The Commonwealth previously resisted ExxonMobil's legal challenges to this case largely on the grounds that ExxonMobil was raising "fact-issues" not suited for resolution at an early stage of the case.[3] Yet, now that discovery has commenced, the Commonwealth steadfastly refuses to provide the facts in response to ExxonMobil's discovery requests, preventing ExxonMobil from developing the record necessary for its arguments at summary judgment or trial.

The Commonwealth's refusal to provide this information, particularly in a case based upon material omissions, is fundamentally unfair, contrary to law, and directly hinders ExxonMobil's ability to develop the factual record needed to defend itself. For example, ExxonMobil cannot ask

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Commonwealth, is set forth in Exhibit 1. Because the Commonwealth will not explain which of the hundreds of allegedly deceptive statements, acts, and practices it views as continuing, it should respond as to each alleged statement, act, and practice included in its response.

[3] *See, e.g.*, Comm.'s Opp. to Mot. to Dismiss, Dkt. No. 32 at 20, 35 n.25, 37, 40 (arguing that ExxonMobil raised "fact-issues," and made "factual argument" and "factual claim[s]" that could not be considered for a motion to dismiss, and contending that "resolving the legality of any future potential corrective statements is a fact-bound exercise"). The Court declined to dismiss the claims in part on these same grounds. *See Comm.* v. *Exxon Mobil Corp.*, 2021 WL 3493456, at *10 (Mass. Super. June 22, 2021) ("This [allegation] is enough to survive a motion to dismiss"); *id.* at *12 ("Whether statements made by Exxon would have misled a reasonable consumer" is a "question[] ill-suited for resolution on a motion to dismiss."); *id.* at *13 (determining "whether statements are actionable misrepresentations . . . is not appropriate at a motion to dismiss stage").

an investor in a deposition whether information omitted from a statement about methane emissions was important to that investor unless ExxonMobil can identify the allegedly omitted information. And ExxonMobil cannot ask a consumer if she was deceived by the omission of information about climate change risks from a statement about Synergy or Mobil 1 without being able to explain what was (supposedly) omitted.

The Commonwealth has cited no legal authority to justify its refusal to provide the information and records sought. Nor could there be any valid justification for its refusal. The Commonwealth must know what specific information it believes was omitted from each alleged statement (or across all statements). Otherwise, it could not have alleged each statement was deceptive by virtue of the omission. And the information the Commonwealth refuses to provide cannot be divined by looking at statements, acts, and practices that the Commonwealth has identified as deceptive. For example:

- The Commonwealth alleges that this statement from ExxonMobil's 2020 Sustainability Report is deceptive: "As of August 2019, methane emissions from our U.S. unconventional production and midstream operations were down by nearly 20 percent, compared to 2016, and we are on track to meet our company-wide methane reduction commitments by 2020." *See* Ex. 3 at 41-42 (Third Set of Responses to ExxonMobil's First Interrogatories). There is no deception apparent in this statement about historical emissions calculations and future reduction commitments.

- The Commonwealth alleges that ExxonMobil's Form 10-K filings deceptively "omit disclosures relating to climate risk and ExxonMobil's response to climate change." *See id.* at 53, 112. But those Form 10-K filings do contain such disclosures. *See* Ex. 4 at 4-5 (excerpt of ExxonMobil 2023 Form 10-K identifying "Climate Change and the

Energy Transition" as a "Risk Factor" and describing how climate change risks may impact ExxonMobil). Unless the Commonwealth identifies what additional or corrective information allegedly should have been provided, neither ExxonMobil nor the Court can possibly know why the Commonwealth contends that disclosure is supposedly deficient and deceptive.

Withholding discovery here also appears to be part of the Commonwealth's broader effort to resist defining its case. For example, the Commonwealth alleged more than 10 times in the complaint that Massachusetts consumers and investors have been deceived by ExxonMobil. *See, e.g.*, Am. Compl. p. 196, 199. Yet the Commonwealth recently conceded in response to Interrogatory Nos. 9 and 10, which seek the identities of any consumers and investors allegedly deceived, that it has identified at most *one*—an activist investor who "does not invest in or recommend ExxonMobil stock" and whom a judge found to be "manifestly biased against ExxonMobil" after she testified at the New York Attorney General trial in 2019. *People* v. *Exxon Mobil Corp.*, 2019 WL 6795771, at *16 n.7 (N.Y. Sup. Ct. 2019). And, as discussed, the Commonwealth previously asked this Court to delay ruling on "fact issues" at an earlier procedural stage, and now continues to resist addressing those same issues. It is hard to imagine when the Commonwealth believes it is obligated to provide discovery on these crucial issues, given that the Commonwealth has sought to prevent ExxonMobil from making *any* further discovery requests of the Commonwealth after July 31, 2024.

This Court should order the Commonwealth to comply promptly with Interrogatory Nos. 6 and 11—by identifying, for each allegedly deceptive statement, act, and practice, the alleged deceptive omission—and to produce documents responsive to RFP Nos. 48-49 and 72.

BACKGROUND

I. The Commonwealth Refuses to Respond to Interrogatory Nos. 6 and 11.

In July 2022, ExxonMobil served its initial interrogatories. In relevant part, those interrogatories sought the identification of exactly what the Commonwealth believed ExxonMobil had done wrong (Nos. 2, 6, and 7), as well as the identification of any corrective disclosures or actions the Commonwealth believed ExxonMobil should make (No. 6).

Between July 2022 and December 2023, the Commonwealth identified approximately 800 statements, acts, and practices that it alleges are deceptive, including more than 400 specific statements ExxonMobil allegedly made. *See, e.g.*, Ex. 3 at 20-115, 123-128; Ex. 1. But the Commonwealth refused in its response to Interrogatory No. 6 to identify the corrective information missing from any of those statements that allegedly rendered the statement deceptive, stating: "it is premature" to "provide the AGO's full list of corrective disclosures and remedial actions," but "ExxonMobil should, at minimum, immediately cease violating c. 93A." *Id.* at 159.

In November 2023, ExxonMobil served additional interrogatories. In relevant part, those interrogatories required the Commonwealth to identify any Massachusetts consumers or investors who have been deceived by ExxonMobil (Nos. 9 and 10) and to identify the specific disclosure or disclosures the Commonwealth contends ExxonMobil was required to provide in order to make its advertisements to Massachusetts consumers not deceptive (No. 11). The Commonwealth refused to answer these interrogatories fully. *See* Ex. 5 at 10 (Commonwealth's First Set of Responses to ExxonMobil's Second Interrogatories).

On March 6, 2024, the parties met and conferred. The Commonwealth conceded that, despite alleging countless times that Massachusetts consumers and investors "have been deceived" by ExxonMobil, it has not definitively identified *anyone* who has actually been deceived by

ExxonMobil, except possibly for one "manifestly biased" activist investor from the New York Attorney General trial.[4] The Commonwealth also confirmed that the list of statements, acts, and practices identified in its interrogatory responses was the *complete* list of conduct it is alleging to be deceptive, as of that date. But the Commonwealth stood firm on its refusal to answer Interrogatory Nos. 6 and 11, declining to identify any information that ExxonMobil allegedly should have, but did not, provide in order to make its statements not deceptive. The Commonwealth argued that the categories of deceptive conduct it did identify in response to other interrogatories provided sufficient "context" about the information allegedly omitted from ExxonMobil's statements, despite ExxonMobil's contention that the response was deficient because that "context" is untethered from the specific statements, acts, and practices. Thus, the parties are now at an impasse.

II. The Commonwealth Refuses to Produce Records Responsive to RFP Nos. 48-49, 72.

In November 2023, ExxonMobil served additional RFPs on the Commonwealth. These included: (1) RFP No. 48, seeking advertisements to Massachusetts consumers "about gasoline, motor oil, or other fossil fuel products that the Commonwealth contends sufficiently disclose the risks of climate change posed by fossil fuels so as not to be deceptive or misleading"; (2) RFP No. 49, seeking documents concerning statements to Massachusetts investors by energy companies that the Commonwealth "believes sufficiently disclose the risks of climate change posed by fossil fuels, or the risks to those companies' business, so as not to be deceptive or misleading"; and (3) RFP No. 72, seeking public statements by Commonwealth officials that the Commonwealth contends "appropriately and sufficiently disclose the risks of climate change posed by the

[4] This concession is particularly startling in light of the Commonwealth's recent assertion that "[t]he claims in this case are that the public, consumers, and investors *were deceived*." Ex. 6 at 26:24-25 (March 21, 2024 Status Conference and Hearing Transcript) (emphasis added).

Commonwealth's use of fossil fuels."[5] During a January 2024 meet-and-confer, the Commonwealth stated that it would not produce any documents responsive to these RFPs. The parties are therefore at an impasse, as memorialized in ExxonMobil's February 15, 2024 letter to the Commonwealth. Ex. 7 (February 15, 2024 Letter from J. Rhee to R. Johnston).

ARGUMENT

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.*, 667 N.E.2d 1137, 1141 (Mass. 1996). Thus, Rule 26(b)(1) authorizes discovery as to "any matter . . . relevant to the subject matter involved in the" case.

I. The Commonwealth Should Identify What Information Was Supposedly Omitted from Statements, Acts, and Practices It Alleges To Be Deceptive (Rog. Nos. 6, 11).

Under Chapter 93A, the Commonwealth must prove that ExxonMobil's statements, acts, and practices were both deceptive and material to Massachusetts consumers and investors. *E.g.*, *Comm.* v. *AmCan Enters.*, 47 Mass. App. Ct. 330, 335-36 (1999). A statement is deceptive only 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)." *Tomasella* v. *Nestle USA, Inc.*, 962 F.3d 60, 71 (1st Cir. 2020) (quoting *Aspinall* v. *Philip Morris Companies, Inc.*, 442 Mass. 381, 396 (2004)). Whether a statement is deceptive therefore depends, at least in part, on whether it would have misled consumers who were "interpreting the message reasonably under the circumstances," *Tomasella*, 962 F.3d at 72, rather than whether it would have misled an "an ignoramus," *Aspinall*, 442 Mass. at 395. Thus, for example, a statement is not deceptive if it omits information that is "obvious." *Lechoslaw* v. *Bank*

[5] The text of RFP Nos. 48-49 and 72 is set forth in Appendix A, and the Commonwealth's objections to those RFPs are attached as Exhibit 10.

of Am., 618 F.3d 49, 58-59 (1st Cir. 2010).[6] Information is "material" for purposes of Chapter 93A if it would have been "important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *AmCan*, 47 Mass. App. Ct. at 335. Identification of the specific information that ExxonMobil supposedly omitted from each allegedly deceptive statement or practice, as sought by Interrogatory Nos. 6 and 11, is relevant to both the deception and the materiality elements of Chapter 93A, and so is a valid subject of discovery.

With respect to the element of deception, ExxonMobil cannot develop the record as to whether statements that supposedly omitted information would have misled reasonable consumers or investors unless it knows what information was supposedly omitted. For example, ExxonMobil cannot draft discovery requests or take deposition testimony concerning whether specific information about climate change risks was widely understood without knowing what information about those risks it should be trying to establish was widely understood. Put another way, only once the Commonwealth identifies the information that ExxonMobil supposedly omitted from a specific statement, can ExxonMobil adequately and fairly develop the record to show that the allegedly omitted information was so well understood or so obvious that its omission would not have deceived reasonable consumers. These factual questions are precisely what this Court held should be addressed during discovery. *See Comm.* v. *Exxon Mobil Corp.*, 2021 WL 3493456 at

[6] In *Lechoslaw*, the First Circuit rejected a claim that Bank of America had violated Chapter 93A by deceiving the plaintiff in his purchase of an official check by "fail[ing] to disclose" that such a check "could be lost in transit" and "payment would therefore be delayed." 618 F.3d at 58-59. The court held the bank "did not need to state the obvious" by advising of "the risk that letters may be lost in the mail." *Id.* Similarly, in *Becerra* v. *Dr Pepper*, the court held that an advertisement for "Diet Dr. Pepper" did not need to disclose that the soda does not help with weight loss because "diet" in the context of soda is "understood as a relative claim about the calorie content . . . compared to the same brand's 'regular'" soda. 945 F.3d 1225, 1229 (9th Cir. 2019). Thus, a statement that does not disclose a well-known fact is not deceptive by virtue of the non-disclosure.

*12 ("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.").

Courts have recognized the need for plaintiffs bringing fraud-by-omission claims—akin to the Commonwealth's theory that ExxonMobil's statements, acts, and practices "create an over-all misleading impression through failure to disclose material information," Ex. 3 at 13—to specify "precisely what [information] was omitted" when making allegations. *See Republic Bank* v. *Bear Stearns*, 683 F.3d 239, 255-56 (6th Cir. 2012) (affirming dismissal of fraud-by-omission claim where allegations offered "so little information" about omissions that it failed to "put defendants on notice of alleged misconduct" or to "narrow potentially wide-ranging discovery on relevant matters"); *Carroll* v. *Fort James Corp.*, 470 F.3d 1171, 1174 (5th Cir. 2006) (plaintiff alleging "omission of facts" must "plead the type of facts omitted" and "the way in which the omitted facts made the misrepresentations misleading"); *JFF Cecilia LLC* v. *Weiner Ventures, LLC*, 2020 WL 4464584, at *7 n.3 (Mass. Super Ct. July 30, 2020) (fraud claim must allege "the contents or substance of the misrepresentation or omission" to satisfy Rule 9(b)). The Commonwealth should be required to specify precisely the information it alleges to have been omitted.

The Commonwealth has also repeatedly argued that it was premature in the pre-discovery phase of the case to address "corrective statements" that it believes are required to remedy ExxonMobil's alleged omission of information about climate-change risks. *See* Comm.'s Opp. to Mot. to Dismiss, Dkt. No. 32 at 38 ("evaluating whether any particular corrective statements will comply with the First Amendment is premature"). But the parties are now in fact discovery, and there is no reason for the Commonwealth to withhold any of the information sought here.

With respect to materiality, ExxonMobil will not be able to develop the record as to

whether information that supposedly should have been disclosed was "important" to consumers or investors—as the Commonwealth must prove as to each alleged Chapter 93A violation—without knowing what that information is. *AmCan*, 47 Mass. App. Ct. at 335. For example, ExxonMobil cannot effectively ask an investor in a deposition whether information about "systemic" climate risks (that ExxonMobil supposedly omitted) would have been important to the investor without knowing what information to ask about. Nor can ExxonMobil effectively seek discovery as to whether allegedly omitted "systemic" climate risks were important to consumers of Mobil 1 motor oil, as the Commonwealth alleges, Am. Compl. ¶ 710, without knowing the risks at issue for a non-combusted fossil fuel lubricant like Mobil 1.

The Commonwealth's repeated references to the undefined concept of "systemic" risks compounds the problem further. *See, e.g.*, Ex. 3 at 15, 95; Opp. 30, 31, 32. The Commonwealth has offered no single, clear definition of which risks it alleges to be "systemic," hindering ExxonMobil's ability to take discovery on that concept. *See, e.g.*, Am. Compl. ¶ 472. Nor does the Commonwealth allege whether ExxonMobil was required to disclose all "systemic" risks every time it spoke about fossil fuels, or just some of those risks, some of the time.

There are a few of the 800 statements, acts, and practices for which the Commonwealth *does* seem to try to articulate the specific disclaimer or other information that it believes ExxonMobil should have provided. For example, the Commonwealth alleges that ExxonMobil engaged in a deceptive practice by "fail[ing] to instruct" gas station operators that "they should disclose to their customers that burning fossil fuel, diesel and ethanol contributes to climate change and otherwise can adversely affect human health." Ex. 3 at 122. But these limited, more-specific allegations do nothing to cure the lack of comparable and necessary information as to the hundreds of other alleged statements, acts, and practices.

II. The Commonwealth Should Produce Documents Containing Allegedly Sufficient Disclosures About Climate Change Risks Associated with Fossil Fuels (RFP Nos. 48-49 and 72).

For the same reason it seeks responses to Interrogatory Nos. 6 and 11, ExxonMobil also seeks documents from the Commonwealth evidencing examples of statements to Massachusetts consumers and investors about fossil fuels that the Commonwealth contends *do* sufficiently disclose climate change risks. Specifically, ExxonMobil seeks supposedly non-deceptive statements in advertisements for gasoline and motor oil (RFP No. 48) and supposedly non-deceptive statements to investors by energy companies (RFP No. 49), as well as analogous public statements by the Commonwealth about its own use of fossil fuels (RFP No. 72). By comparing its allegedly deceptive statements with these allegedly non-deceptive ones, ExxonMobil can develop the record as to what (if any) additional information is present in the supposedly non-deceptive ones. As discussed above, identifying that additional information—which the Commonwealth alleges must be included in order to avoid making a statement deceptive—is relevant to ExxonMobil's defenses as to the deception and materiality elements of Chapter 93A.

In its quest to keep ExxonMobil playing blindman's bluff, the Commonwealth has objected to producing responsive records on the ground that it has no obligation to conduct legal analysis to respond to a discovery request. But ExxonMobil does not seek legal analysis; it seeks production of non-privileged documents in the Commonwealth's possession, custody, or control. The Commonwealth has also objected that responsive records are relevant only to ExxonMobil's "stricken" selective enforcement defense. Not so. ExxonMobil is not seeking to argue that the Commonwealth has improperly sued only ExxonMobil. Instead, ExxonMobil is seeking discovery to understand what the Commonwealth alleges ExxonMobil has done wrong, and to develop the record to defend itself against those claims.

CONCLUSION

For these reasons, ExxonMobil respectfully requests that this Court order the Commonwealth (1) to respond fully to Interrogatory Nos. 6 and 11 by identifying the specific information that ExxonMobil allegedly omitted from each allegedly deceptive statement, act, and practice set forth in Exhibit 1, and (2) to produce records responsive to RFP Nos. 48-49 and 72.

Dated: April 26, 2024

Respectfully submitted,

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Counsel for Exxon Mobil Corporation

Appendix A

ExxonMobil's Interrogatory No. 6

Identify any deceptive statements, acts or practices that continued beyond, or remain ongoing after, June 6, 2020, that you contend support your requests for relief and any corrective disclosures or actions you contend ExxonMobil should be required to undertake to remedy the alleged statutory violations.

Commonwealth's Responses and Objections to Interrogatory No. 6

Attached as Exhibits 3, 8, and 9 due to their length.

ExxonMobil's Interrogatory No. 11

Identify what specific disclosure or disclosures the Commonwealth contends ExxonMobil was required to make in order to make its advertisements to Massachusetts consumers not deceptive or misleading.

Commonwealth's Responses and Objections to Interrogatory No. 11

Attached as Exhibit 5 due to its length.

ExxonMobil's RFP No. 48

All written, audio, or video advertisements to consumers in Massachusetts about gasoline, motor oil, or other fossil fuel products that the Commonwealth contends sufficiently disclose the risks of climate change posed by fossil fuels so as not to be deceptive or misleading.

ExxonMobil's RFP No. 49

All documents and communications concerning statements to investors in Massachusetts by energy companies that the Commonwealth believes sufficiently disclose the risks of climate change posed by fossil fuels, or the risks to those companies' business, so as not to be deceptive or misleading.

ExxonMobil's RFP No. 72

All public documents and communications, including statements in speeches by Commonwealth officials, that the Commonwealth contends appropriately and sufficiently disclose the risks of climate change posed by the Commonwealth's use of fossil fuels.

Commonwealth's Responses and Objections to RFP Nos. 48-49 and 72

Attached as Exhibit 10 due to their length.

CERTIFICATE OF SERVICE

I, Jack W. Pirozzolo, counsel for Defendant Exxon Mobil Corporation, hereby certify that on April 26, 2024, I caused a copy of this Memorandum of Law in Support of Exxon Mobil Corporation's Motion to Compel the Commonwealth to Explain Why It Believes ExxonMobil's Statements, Acts, and Practices Were Deceptive to be served on the Massachusetts Office of the Attorney General by e-mail and hand delivery.

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