COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO.: 16-1888F

IN RE CIVIL INVESTIGATIVE DEMAND NO. 2016-EPD-36, ISSUED BY THE OFFICE OF THE ATTORNEY GENERAL

REPLY MEMORANDUM IN SUPPORT OF THE COMMONWEALTH'S CROSS-MOTION TO COMPEL EXXON MOBIL CORPORATION TO COMPLY WITH CIVIL INVESTIGATIVE DEMAND NO. 2016-EPD-36

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Exxon's Consolidated Memorandum opposing the Commonwealth's Cross-Motion To Compel rehashes the conclusory allegations set forth in its Petition and Emergency Motion and provides no new support for its arguments in favor of setting aside or modifying the Attorney General's Civil Investigative Demand ("CID").[1] Further, as Exxon's own papers make clear, this Court has personal jurisdiction for the purposes of ordering Exxon's compliance with the CID.

I. Facts That Exxon Concedes or Does Not Dispute Establish This Court's Personal Jurisdiction over Exxon

Exxon admits to engaging in a wide range of commercial contacts with Massachusetts consumers, including individuals and other entities, and with Massachusetts investors. These contacts with Massachusetts satisfy the constitutional and statutory requisites for personal jurisdiction. *See Bulldog Inv'rs Gen. P'ship v. Sec'y of Commonwealth*, 457 Mass. 210, 215-19 (2010); *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 772-73 (1994).

In particular, Exxon admits to engaging in innumerable transactions with Massachusetts wholesalers and retailers of its fossil fuel products, including through its Massachusetts fossil fuel terminals, with the obvious object of reaching Massachusetts consumers. Exxon Consol. Mem. at 7-8; Petition Supplemental Appendix ("Pet. Supp. App."), Doescher August Affidavit ("Doescher Aug. Aff.") ¶ 3.[2] Under its franchise arrangements with Exxon-branded

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[1] On September 8, 2016, Exxon served a Consolidated Memorandum in Further Support of Its Emergency Motion and in Opposition to Respondent's Motion To Compel Compliance with the Civil Investigative Demand ("Exxon Consol. Mem."). The Commonwealth previously served a Consolidated Memorandum opposing the Emergency Motion and in support of its Cross-Motion To Compel ("Comm. Consol. Mem."). On September 19, the Texas federal district court heard argument on Exxon's motion for preliminary injunction and the Attorney General's motion to dismiss. That court has not acted to enjoin the Massachusetts proceedings.

[2] Exxon incorrectly contends that its contacts with Massachusetts businesses do not support jurisdiction to enforce the CID because the CID references "consumers." Exxon Consol. Mem. at 7. The Attorney General may investigate violations of Chapter 93A affecting individuals, businesses, or both. G.L. c. 93A, §§ 2, 4, 6. In this case, Exxon retailers are customers of Exxon

Massachusetts retailers, Exxon provides "routine service support" and "brand guidelines"; "reserves the right to review trademark usage for compliance"; and uses a "quarterly quality monitoring program" to "ensure" fossil fuel product quality and a "mystery shopper program" to "ensure the quality of the *customer* experience." Doescher Aug. Aff. ¶¶ 3, 4, 5, 7 (emphasis added).[3] Thus, the franchise agreements permit Exxon to manage the marketing and sales practices of its franchisees to target Massachusetts consumers.[4]

In addition, Exxon admits to placing "Massachusetts-specific" advertisements for its fossil fuel products in Massachusetts media outlets. Exxon Consol. Mem. at 9; Pet. Supp. App., Bustard Aff. ¶ 3. These advertisements establish all that this Court needs to assert jurisdiction for the purposes of enforcing a CID investigating Exxon's marketing. And Exxon also has aimed advertisements at Massachusetts consumers and engaged in marketing through its franchisees and subsidiaries in Massachusetts—including ubiquitous Exxon signage and other advertising—all of which would support this Court's jurisdiction.[5] Moreover, Exxon does not dispute that it hosts dynamic company websites where Massachusetts consumers can enter their zip codes to identify nearby Massachusetts retailers and Exxon-branded service stations that sell its products,

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and are therefore "persons" for whom the Attorney General may seek redress under G.L. c. 93A, § 4.

[3] *See also* Comm. Consol. Mem. at 16 n.51; Exhibit ("Ex.") 52, Comm. Opposition App. 781 (CEO statement that, with respect to branded stations, "we do have a fair amount of *control* over the quality of how the brand is presented to the customer. . . . *[I]t's us* and we got to protect that brand . . . ." (emphases added)).

[4] A 2002 Chapter 93A Assurance between Exxon and the Attorney General filed in this Court confirms that Exxon exerts significant control over its franchisees' marketing practices. Ex. 1, Commonwealth Supplemental Appendix ("Comm. Supp. App.") (requiring Exxon to ensure appropriate marketing of tobacco products at branded service stations, including franchises).

[5] The fact that Exxon may not mention climate change in certain communications with Massachusetts consumers and investors is itself a potential basis for liability under Chapter 93A, which includes failures to disclose and material omissions. *See, e.g.*, 940 C.M.R. §§ 3.05(1), 3.16(2); Comm. Consol. Mem. at 8-11, 25-27 (discussing public record of Exxon's apparent failures to disclose climate change risks).

Comm. Consol. Mem. at 16 & Exhibits ("Exs.") 42- 44, Comm. Opposition App. 712-38—an activity that can support personal jurisdiction, especially in connection with Massachusetts advertising. *See Bulldog Inv'rs Gen. P'ship*, 457 Mass. at 215-19 (jurisdiction where interactive website and email solicited investor). Contrary to Exxon's assertions, it has targeted significant commercial activities specifically at Massachusetts; this is not a case involving the mere introduction of products into the general stream of commerce.

With regard to investors, Exxon admits that it recently has sold securities to Massachusetts investors, *see* Pet. App., Luettgen Aff. ¶ 10, and does not dispute that Massachusetts-based investment managers hold millions of shares of Exxon common stock, worth billions of dollars, and that the Massachusetts Pension Reserves Investment Trust has made a significant investment in Exxon securities, purchased through its Massachusetts-based investment manager. Comm. Consol. Mem. at 17-18.[6] Exxon also does not dispute that it actively *markets* its securities to Massachusetts investors.[7]

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[6] Exxon avers that it has not marketed or sold securities "to the general public in Massachusetts." Luettgen Aff. ¶ 7. The location of sales, however, does not control the jurisdictional analysis when the counterparties or a significant audience for related marketing are in the forum state. *See Hahn v. Vermont Law School*, 698 F.2d 48, 52 (1st Cir. 1983) (contacts conferring jurisdiction "part of [law school's] efforts to serve the market for legal education in Massachusetts"). And there is no requirement that marketing be directed to the "general public" before it can trigger Chapter 93A liability. If Exxon limited its sales, either by offering the securities only to sophisticated investors or otherwise making a private placement, the marketing directed at this smaller audience of potential purchasers is still subject to Chapter 93A. *See Marram v. Kobrick*, 442 Mass 43, 61-63 (2004) (regarding Chapter 93A liability for misrepresentations in private offering memorandum and private sale).

[7] Instead, Exxon argues that Chapter 93A could not reach Exxon misstatements that facilitated the sale of securities by others in the secondary market rather than by Exxon itself. *See* Exxon Consol. Mem. at 11. Actions brought by the Attorney General under G.L. c. 93A, § 4, however, do not require a completed sale. *See Commonwealth v. AmCan Enterprises, Inc.*, 47 Mass. App. Ct. 330, 338 (1999) ("[E]ach deceptive solicitation may be viewed as a separate statutory violation for which a judge may, under G.L. c. 93A, § 4, impose a separate civil penalty."). Exxon misstatements in securities filings, as well as misstatements in press releases or other public statements, are therefore sufficient to trigger Chapter 93A liability. *Cf. Plotkin v. IP Axess*

In sum, Exxon's extensive contacts with Massachusetts unequivocally establish this Court's personal jurisdiction over Exxon to compel CID compliance.

II. Exxon Misconstrues the Requirements for Personal Jurisdiction

Exxon contends that its Massachusetts contacts are not sufficiently suit-related to support this Court's personal jurisdiction. *See* Exxon Consol. Mem. at 6-11. Exxon is wrong. The CID is premised on Attorney General Healey's belief that Exxon has violated Chapter 93A in Massachusetts. To the extent Attorney General Healey's investigation yields facts supporting claims of consumer and investor deception under Chapter 93A, such claims indisputably would "arise from" Exxon's in-state contacts discussed above. *See* Comm. Consol. Mem. at 15-21.

Further, Exxon misapplies the operative jurisdictional standard. The constitutional requirement "is disjunctive in nature, referring to suits 'aris[ing] out of, *or* relat[ing] to,' in-forum activities." *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 206 (1st Cir. 1994) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)). "Th[at] language portends added flexibility" and a "relaxation" of the "arising from" standard, *id.*, in order to examine "the nexus between the defendant's contacts and the plaintiff's cause of action," *Adelson v. Hananel*, 510 F.3d 43, 49 (1st Cir. 2007) (internal quotation marks omitted).[8] Here, Exxon's extensive fossil fuel business in Massachusetts and its relationships with investors unquestionably "relate to" the CID and to potential enforcement of Chapter 93A for Exxon's

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Inc., 407 F.3d 690, 697-99, 701-02 (5th Cir. 2005) (holding that fraudulent omissions and misleading statements in press releases may violate federal securities law and state consumer protection statute). For purposes of its jurisdictional analysis, this Court need not reach Exxon's liability in connection with secondary market sales since Exxon has already admitted that it sold securities in Massachusetts. Pet. App., Luettgen Aff. ¶ 10.

[8] Nor does the Massachusetts long-arm statute, G.L. c. 223A, § 3, impose a more exacting relatedness requirement. *See Adelson*, 510 F.3d at 49; *Lyle Richards Int'l, Ltd. v. Ashworth, Inc.*, 132 F.3d 111, 114 (1st Cir. 1997) ("arising from" clause in statute "is to be generously construed in favor of asserting personal jurisdiction").

misleading statements regarding its products and securities.

III. The Court Should Grant the Attorney General's Motion To Compel

On September 20, 2016, the U.S. Securities and Exchange Commission confirmed that it has opened an investigation into "how Exxon Mobil Corp. values its assets in a world of increasing climate change regulations." Ex. 2, Comm. Supp. App. (*SEC Probes Exxon Over Accounting for Climate Change*, THE WALL STREET JOURNAL, Sept. 20, 2016). Together with other investigations, *see* Comm. Consol. Mem. at 11-13, this development provides additional support for Attorney General Healey's belief that Exxon has engaged in conduct that is unlawful under Chapter 93A and demonstrates the reasonable basis for her investigation.

Attorney General Healey has made an extensive showing that the CID requests documents and testimony relevant to the Commonwealth's potential Chapter 93A claims. *See* Comm. Consol. Mem. at 25-32. Exxon, however, has failed to make any specific showing that the Court should set aside or modify any particular CID request.[9] The Court should therefore grant the Commonwealth's cross-motion and order full and expeditious compliance with the CID. *See id.* at 38-39; *cf.* Mass. R. Civ. P. 26(c) (in denying protective order, "court may, on such terms and conditions as are just, order that any party . . . provide or permit discovery").

[9] Exxon wrongly presses its argument that the CID generally constitutes impermissible viewpoint discrimination and targets political speech; disclosure requirements, however, do not violate a commercial speaker's First Amendment rights where the requirements "are reasonably related to the State's interest in preventing deception of consumers." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); *see also Milavets, Gallop & Milavets, P.A. v. United States*, 559 U.S. 229, 249-50 (2010) (applying *Zauderer*).

Respectfully submitted,

THE COMMONWEALTH OF
MASSACHUSETTS

By its attorney:

MAURA HEALEY
ATTORNEY GENERAL

Richard J. Johnston, BBO# 253420
Chief Legal Counsel
richard.johnston@state.ma.us
Melissa A. Hoffer, BBO# 641667
Chief, Energy and Environment Bureau
melissa.hoffer@state.ma.us
Christophe Courchesne, BBO# 660507
Chief, Environmental Protection Division
christophe.courchesne@state.ma.us
I. Andrew Goldberg, BBO# 560843
andy.goldberg@state.ma.us
Peter C. Mulcahy, BBO # 682958
peter.mulcahy@state.ma.us
Assistant Attorneys General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200

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CERTIFICATE OF SERVICE

I, I. Andrew Goldberg, hereby certify that on this 6th day of October, 2016, I caused a copy of the foregoing document to be served upon counsel of record by regular mail.

I. Andrew Goldberg