COMMONWEALTH OF MASSACHUSETTS

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

COMMONWEALTH OF MASSACHUSETTS,	)
Plaintiff,	)
v.	)
EXXON MOBIL CORPORATION,	)
Defendant.	)

OPPOSITION OF THE COMMONWEALTH TO EXXONMOBIL'S MOTION TO DISMISS PURSUANT TO G.L. c. 231, § 59H (THE ANTI-SLAPP STATUTE)

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INTRODUCTION

In its latest improper attempt to dispatch the Commonwealth's G.L. c. 93A, § 4 enforcement action against it, Exxon Mobil Corporation (ExxonMobil), one of the world's most powerful companies, now invokes a statute intended to shield people of modest means from meritless suits by large private interests that seek to punish those people for exercising their right to petition the government. But ExxonMobil is not a person of modest means and the Commonwealth is not a large private interest. The Attorney General, by contrast, is exercising her express statutory authority to enforce c. 93A in the public interest to protect Massachusetts investors and consumers from ExxonMobil's repeated and ongoing unlawful deception.

The Court should deny ExxonMobil's Special Motion because G.L. c. 231, § 59H, does not apply to actions brought by the Commonwealth to enforce c. 93A; the Commonwealth's action is not a strategic lawsuit against public participation (SLAPP); and the First Amendment does not protect ExxonMobil's deceptive marketing—in product advertisements, promotional materials, communications with investors and private meetings with the senior management of Boston investment firms—which, in any event, do not constitute petitioning under § 59H.

BACKGROUND AND PROCEDURAL HISTORY

ExxonMobil's Special Motion is the most recent in a series of baseless procedural maneuvers—repeatedly rejected by state and federal courts—designed to forestall first the Attorney General's investigation of ExxonMobil and now litigation of the Commonwealth's c. 93A claims. Over four years ago, in April 2016, the Attorney General issued a civil investigative demand (CID) to ExxonMobil. Instead of responding, ExxonMobil sued the Attorney General in this Court and in a Texas federal district court, claiming that the CID violated its First Amendment and other rights and that Commonwealth courts lacked personal jurisdiction over it.

This Court rejected ExxonMobil's challenges to the CID and granted the Attorney General's cross-motion to enforce it. The Court held that ExxonMobil is subject to personal jurisdiction in Massachusetts, the Attorney General had initiated her investigation on a belief that ExxonMobil had violated c. 93A, and there was no basis whatsoever to disqualify the Attorney General's Office from continuing the investigation. *See In re Civil Investigative Demand No. 2016-EPD-36*, 2017 WL 627305, at *4-6 (Super. Ct. Jan. 11, 2017) (Brieger, J.). The Supreme Judicial Court (SJC) then affirmed this Court's opinion in all respects. *See Exxon Mobil Corp. v. Att'y Gen.*, 479 Mass. 312, 327-28 (2018), *cert. denied*, 139 S. Ct. 794 (2019).

ExxonMobil's federal action was transferred from Texas to the Southern District of New York. That court then dismissed ExxonMobil's complaint, flatly rejecting the Company's conspiracy theory that Attorney General Healey issued her CID in bad faith to deprive ExxonMobil of its rights, finding ExxonMobil's constitutional and other claims to be based on "extremely thin allegations and speculative inferences," and therefore "implausible," and characterizing ExxonMobil's tactics as "[r]unning roughshod over the adage that the best defense is a good offense." *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 686-87 (S.D.N.Y. 2018), *appeal pending sub nom. Exxon Mobil Corp. v. Healey*, No. 18-1170 (2d Cir. 2018).[1]

Meanwhile, the Commonwealth proceeded with its investigation and filed its complaint in this Court in October 2019.[2] Although the Commonwealth alleges only state-law violations,

[1] Signaling its desperation, ExxonMobil ignores the court decisions that rejected its conspiracy narrative and relies instead on a since *reversed* Texas state court opinion adopting (nearly verbatim) findings that ExxonMobil itself drafted. Exxon Mem. 10 (suggesting wrongly that factual findings in reversed lower court decision still controlling).

[2] Should the Court require additional information regarding the Commonwealth's investigation, the Commonwealth requests an opportunity to supplement its response. For further background about the Amended Complaint, see, e.g., Opposition of the Commonwealth to ExxonMobil's Motion to Dismiss Commonwealth's Amended Complaint (MTD Opp.) 1-7.

ExxonMobil removed the case to federal court, and, in March 2020, Judge Young remanded, rejecting each of ExxonMobil's far-fetched removal arguments, echoing the New York court's "running roughshod" observation, and finding that, "[c]ontrary to ExxonMobil's caricature of the complaint, ... [i]t alleges only corporate fraud." *Mass. v. Exxon Mobil Corp.*, 2020 WL 2769681, at *10, *15 (D. Mass. May 28, 2020). ExxonMobil did not appeal.

Now, nine months after the Commonwealth filed its Complaint, and after it lost its removal gambit, ExxonMobil continues to run "roughshod" through meritless attempts to derail this case: this time by filing a Special Motion to Dismiss the Amended Complaint, which repeats its tired, thrice-rejected claim that the Commonwealth is targeting ExxonMobil in bad faith.

ARGUMENT

I. The Anti-SLAPP Statute Does Not Apply to Civil Enforcement Actions by the Attorney General on behalf of the Commonwealth.

ExxonMobil's attempt to weaponize the anti-SLAPP statute to thwart a duly-filed action by the Commonwealth to enforce c. 93A stumbles immediately. First, ExxonMobil's motion is incongruous with the anti-SLAPP statute and c. 93A because (i) the anti-SLAPP statute's text and purpose make clear that the Legislature did not intend to allow defendants to use the statute to impede a government enforcement action and (ii) applying the statute here would conflict with the Legislature's decision to authorize the Attorney General to enforce c. 93A to protect the public interest. Second, allowing ExxonMobil's meritless motion to advance at all would light the path for every defendant in a consumer protection, securities, or similar statutory action by the Commonwealth to pursue the same tactic to delay the enforcement of Massachusetts laws. For that reason, too, denying ExxonMobil's motion *ab initio* is necessary in this case.

A. The Text and Purpose of the Anti-SLAPP Statute, Which Was Enacted to Deter Abusive Litigation by Private Parties, Make Clear that It Does Not Apply to Actions by the Attorney General Under G.L. c. 93A, § 4.

Nothing in the text of the anti-SLAPP statute demonstrates that it extends to actions by the Attorney General, expressly authorized by c. 93A, § 4, to protect consumers and investors from unfair and deceptive acts and practices and advance the public interest. *Exxon*, 479 Mass. at 323; *Moronta v. Nationstar Mortg., LLC*, 476 Mass. 1013, 1015 (2016) ("c. 93A is a broad remedial statute"). Against this backdrop, ExxonMobil cannot show that the Commonwealth is a "party" encompassed by the anti-SLAPP statute. The statute authorizes a "party" to a civil action to file a "special motion to dismiss" the other "party['s]" claims against it if the other party's affirmative "claims ... are based on" the moving "party's exercise of its right of petition." G.L. c. 231, § 59H. But § 59H does not define the term "party," and it is settled that general words in a statute like "party," "person," or "whoever" do *not* "ordinarily ... include the State." *Hanson v. Commonwealth*, 344 Mass. 214, 219 (1962); *see Town of Boxford v. Mass. Highway Dep't*, 458 Mass. 596, 605 (2010) ("whoever"). Instead, "[w]hen the Legislature ... intend[s] to include both" the government and private parties within a statute's scope, it must do so expressly. *Donohue v. City of Newburyport*, 211 Mass. 561, 567 (1912).[3] And, indeed, where the Legislature has so intended, it has done so expressly. G.L. c. 161C, § 6 (defining "party" to include "the commonwealth"). There being no express indication in the anti-SLAPP statute, the statute's use of the term "party" cannot include the Commonwealth.

Longstanding separation-of-powers principles reinforce that conclusion. In c. 93A, § 4, the Legislature delegated broad authority to the Attorney General to "bring an action in the name

[3] *See also Bretton v. State Lottery Comm'n*, 41 Mass. App. Ct. 736, 738-39 (1996) (c. 93A does not expose state commission to suit where the statute "contains no explicit indication that governmental entities" come within "its provisions" (citation omitted)).

of the commonwealth against" a person when she "has reason to believe" the person has violated c. 93A and prosecuting the action is "in the public interest." "As Massachusetts's chief law enforcement officer, the Attorney General has a manifest interest in enforcing" c. 93A, *Exxon*, 479 Mass. at 323, and "broad [prosecutorial] discretion," *Shepard v. Att'y Gen.*, 409 Mass. 398, 401 (1991); *see Commonwealth v. Pellegrini*, 414 Mass. 402, 404 (1993) (Art. 30 of the Declaration of Rights "essentially grant[s] the prosecutor exclusive power to decide whether to prosecute a case."). As a matter of both statutory construction and separation-of-powers, it thus makes no sense to overlay § 59H's requirements onto c. 93A, § 4's clear directive that the Attorney General may file an action whenever she believes there is a reasoned basis for doing so. A contrary conclusion "would constitute an intolerable interference by the judiciary in the executive department of the government and would" violate "art. 30." *Shepard*, 409 Mass. at 401 (citation omitted).[4] Applying § 59H in these circumstances would compromise the Commonwealth's ability to secure compliance with state law. *See infra* Pt.I.B.

The fact that the Legislature created an express role for the Attorney General in § 59H confirms both points. The statute states that "[t]he attorney general ... may intervene to defend or otherwise support the moving party on such special motion." G.L. c. 231, § 59H. That express role would make no sense if the Legislature intended to include the Commonwealth or its agencies within the "parties" potentially subject to the statute. It is well established "that where the Legislature has employed specific language in one paragraph, but not in another, the

[4] Sovereign immunity principles also support that conclusion because, they, too, protect the Commonwealth's administration and law enforcement "from interference by the courts at the behest of litigants except" where the Legislature has expressly or by necessary implication included the Commonwealth within a statute's scope. *New Hampshire Ins. Guar. Ass'n v. Markem Corp.*, 424 Mass. 344, 351 (1997); *see Boxford*, 458 Mass. at 601. ExxonMobil's reliance on the anti-SLAPP statute here has already interfered, and will continue to interfere, with the Attorney General's administration of her discretionary authority to enforce c. 93A.

language should not be implied where it is not present." *Beeler v. Downey*, 387 Mass. 609, 616 (1982). And it is equally well established that courts should reject an interpretation of a statute that defies "common sense" or "produce[s] absurd ... results." *Dillon v. MBTA*, 49 Mass. App. Ct. 309, 316 (2000). This is such an instance, because the Attorney General is "Massachusetts's chief law enforcement officer," *Exxon*, 479 Mass. at 323, and by statute she must "appear [in court] for the [C]ommonwealth" and its agencies and officers, G.L. c. 12, § 3; *see id.* § 10 (Attorney General may "prosecute ... actions" "[w]henever it appears" that a person is engaged in "unlawful practices in restraint of trade or for the suppression of competition"). A contrary conclusion would indeed be absurd, as this case highlights, because the Attorney General would be placed in the position of both defending an anti-SLAPP motion against the Commonwealth and deciding—as the statute expressly contemplates—whether to intervene to support the party that filed that motion against the Commonwealth. The Legislature, of course, could not have intended such an incongruous predicament.

Section 59H's history, context, and purpose undeniably confirm the conclusion that the Legislature did not intend for private parties to employ the statute against the Commonwealth. *See Commonwealth v. Ray*, 435 Mass. 249, 250 (2001). By all accounts, the statute's genesis was the Legislature's concern with a "disturbing increase in [meritless] lawsuits," 1994 House Doc. No. 1520 (preamble), "brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so," *Duracraft Corp. v. Holmes Prods. Corp*., 427 Mass. 156, 161 (1998) (citation omitted).[5] But the Commonwealth is

[5] In *Duracraft*, the SJC identified "[o]ne lawsuit" as "hav[ing] been the impetus for" § 59H, 427 Mass. at 161, but there were others, *e.g.*, Doris Sue Wong, *Bill to Discourage Suits by Developers Returns to House*, Boston Globe, May 1, 1994, at 34 (describing lawsuit by developer against biologist for opinion on pier construction's impacts). In that case, the Attorney

not a "large private interest[]," *id.*, and courts must construe § 59H to "appl[y] only to SLAPPs," not "suits arising in wholly different circumstances," *id.* at 163 n.11. A state law enforcement action presents such circumstances since there is no indication whatsoever that the Legislature intended private parties, like ExxonMobil, to use § 59H to impede an action by the Attorney General under her express authority to enforce c. 93A, because the "disturbing increase" in meritless lawsuits the Legislature sought to address was, specifically, cases by "large private interests" against "common citizens," *see id.* at 161; *see also Kilbane v. Sec'y of Human Servs.*, 14 Mass. App. Ct. 286, 290 (1982). Maine's highest court reached a similar conclusion when it held that Maine's anti-SLAPP statute, one nearly identical to the Commonwealth's, cannot "be invoked to thwart a ... government enforcement action commenced to address [a] defendant['s] alleged violations of law." *Town of Madawaska v. Cayer*, 103 A.3d 547, 548 (Me. 2014). Given § 59H's language and purpose, this Court should do the same.

B. Applying § 59H Here Would Severely Compromise the Attorney General's Authority to Use Her Statutory Authority to Protect Consumers and Investors from Deceptive Acts and Practices.

ExxonMobil's Special Motion will cause unjustified delay and waste judicial resources by interfering with the Attorney General's exercise of her law enforcement authority. First, service of the Special Motion prevented the Commonwealth from serving any discovery. *See* G.L. c. 231, § 59H. While the statute permits a court to allow a motion for "specified discovery," *id.*, that means the Commonwealth must engage in motion practice to do what it normally could have done as of right under Mass. R. Civ. P. 26. Second, ExxonMobil's Special

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General helped to defend the biologist. *Id.* More broadly, the nationwide push for anti-SLAPP laws was based on a study of wealthy pro-development entities' efforts to quash project opposition through litigation. Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 Law & Soc'y Rev. 385, 388-90 (1988).

Motion will unjustifiably delay the resolution of this action and consume additional judicial resources because the Court must now resolve both this Motion and ExxonMobil's separately filed forty-page motion to dismiss. Third, denial of the Special Motion will not end those unintended consequences if, true to form, ExxonMobil immediately appeals. *Blanchard [II] v. Steward Carney Hosp., Inc.*, 483 Mass. 200, 213 (2019) (allowing interlocutory appeal of anti-SLAPP motion denial). The SJC has invited parties to ask appellate courts to expedite such appeals, *id.* at 213 n.16, but that is cold comfort where the filing of an improper anti-SLAPP motion has already had the effect of stymieing the Commonwealth's enforcement action.

ExxonMobil thus seeks improperly to invoke a statute intended to eliminate spurious private litigation as a tool to undermine a government law enforcement action brought to protect the public interest. If § 59H actually applied, defendants in myriad other actions brought by the Commonwealth to enforce consumer protection, civil rights, antitrust, environmental protection, and other laws could deploy the anti-SLAPP statute to impede and delay law enforcement actions. *See People v. Health Labs. of N. Am.*, 87 Cal. App. 4th 442, 450-51 (2001) ("Subjecting" government enforcement actions to anti-SLAPP statute "could unduly hinder and undermine ... efforts to protect the ... citizenry at large by delaying an enforcement action.").[6] That is obviously not what the Legislature intended. *Duracraft*, 427 Mass. at 161.

Indeed, ExxonMobil's invocation of § 59H, if permitted, could easily lead to widespread abuse. That is so because many c. 93A enforcement actions by the Attorney General target false

[6] Unlike § 59H, California's anti-SLAPP law expressly excludes "enforcement action brought in the name of the people of ... California," Cal. Civ. Proc. § 425.16(d), but that exclusion was included merely "to confirm the existence of the prosecutorial exemption assumed by the [statute's] drafters," *City of Long Beach v. Cal. Citizens for Neighborhood Empowerment*, 111 Cal. App. 4th 302, 307 (2003); *see Madawaska*, 103 A.3d at 548, 551-52 (holding that Maine's anti-SLAPP statute does not apply to government law enforcement actions notwithstanding lack of express exclusion of such actions from statute's scope).

and misleading statements to investors and/or consumers. Applying § 59H to such actions would open the door to defendants, like ExxonMobil here, to mischaracterize false and misleading commercial tactics as "petitioning" activities, undermining c. 93A. *See Health Labs.*, 87 Cal. App. 4th at 451 ("False advertising enforcement actions could be particularly susceptible to delay by the moving manufacturer's easy assertion [in anti-SLAPP motion] that the prosecutor's action interfered with its" First Amendment rights.). A contrary result would establish § 59H itself as an instrument of harassment and abuse since defendants in law enforcement actions would routinely file anti-SLAPP motions and subsequent interlocutory appeals to delay government enforcement actions for years. That, of course, would undermine the protection of investors and consumers under c. 93A while failing to advance the anti-SLAPP statute's purpose to protect "common citizens" from abusive litigation that frustrates their petitioning activity. *Duracraft*, 427 Mass. at 167. ExxonMobil is not the first entity to misuse an anti-SLAPP statute to delay consumer protection actions, but it should be the last in this state.[7]

II. Even if the Special Motion Is Not Barred Ab Initio, It Must be Denied Because the Commonwealth's Chapter 93A Action Is Not a SLAPP Suit and ExxonMobil Has Failed to Establish that Its Deceptive Marketing and Sales Constitute Petitioning.

A consumer protection action by the Attorney General to remedy ExxonMobil's deceptive conduct is plainly not a SLAPP suit. *Blanchard II*, 483 Mass. at 213 (affirming denial of § 59H motion because defamation suit not SLAPP suit). SLAPP suits "are by definition meritless suits." *Id*. at 207. A "meritorious case means one that is worthy of presentation to a court, not one which is sure of success." *Id*. The Commonwealth's c. 93A claims are far more than "colorable," were not brought to chill ExxonMobil's right to petition, and, rather, were

[7] *See* John G. Osborn & Jeffrey A. Thaler, *Maine's Anti-SLAPP Law: Special Protection Against Improper Lawsuits Targeting Free Speech and Petitioning*, 23 Me. B.J. 32, 39 (2008).

asserted to stop ExxonMobil's unlawful commercial practices. Because this action is not a SLAPP suit, the Court need go no further. But, in any event, the Special Motion fails because the First Amendment does not protect ExxonMobil's false and misleading commercial advertisements, product promotional materials, and investor communications—all designed to sell products and secure investors, and none of which constitute petitioning.

A. The Commonwealth's c. 93A Claims Are Colorable and Asserted to Halt ExxonMobil's Unlawful Commercial Practices.

1. The Commonwealth is Presumed to Be Acting in Good Faith in Enforcing the Consumer Protection Laws Against ExxonMobil.

The determination whether to investigate ExxonMobil, and then whether to file a c. 93A action, is expressly delegated to the Attorney General. *Supra* Pt.I.A. Courts must also presume that the government acts "in good faith" when it initiates a law enforcement action, *see Commonwealth v. Franklin*, 376 Mass. 885, 894 (1978), and that the Attorney General "ha[s] broad discretion" in deciding when an action under c. 93A is both appropriate and in the public interest, *Shepard*, 409 Mass. at 401; *see* G.L. c. 93A, § 4. Under the "presumption of regularity accorded to prosecutorial decisionmaking," courts thus assume that the "prosecutor has legitimate grounds for the action [s]he takes," unless proven otherwise. *Hartman v. Moore*, 547 U.S. 250, 263 (2006); *see Arrigo v. Planning Bd. of Franklin*, 12 Mass. App. Ct. 802, 811 (1981) (defendant has burden to rebut presumption). Here, too, this Court must therefore presume that the Commonwealth's action is legitimate and thus colorable. *See generally Blanchard [I] v. Steward Carney Hosp., Inc.*, 477 Mass. 141, 161 (2017).

2. This Action Is Not a SLAPP Suit Under *Blanchard I & II.*

The SJC recently adopted a new framework to protect plaintiffs from dismissal of their legitimate claims under the anti-SLAPP statute. *Blanchard I*, 477 Mass. at 159-61. Under that

framework, ExxonMobil must first establish "by a preponderance of the evidence that" the Commonwealth's c. 93A suit was "solely based" on ExxonMobil's "own petitioning activities." *Blanchard II*, 483 Mass. at 203. If it meets that burden, then the Commonwealth must either (1) establish that ExxonMobil's right to petition was "devoid of any reasonable factual support or any arguable basis in law" and that its "acts caused actual injury" to the non-movant Commonwealth ("first path") or (2) demonstrate such that a "judge may conclude with fair assurance" that its suit is colorable and not retaliatory, i.e., "not brought primarily to chill" ExxonMobil's "legitimate exercise of its right to petition" ("second path"). *Id*. at 204. The "fair assurance" standard requires the Court to assess the "totality of the circumstances pertinent to the nonmoving party's asserted primary purpose in bringing its claim" to ascertain whether the nonmoving party's claim constitutes an actual SLAPP suit. *Id*. at 205.

ExxonMobil has not met its threshold burden to show that the c. 93A claims in this action are "solely based" on legitimate ExxonMobil petitioning. *See infra* Pt.II.B. This Court, however, may pass over that question, since, following *Blanchard II*'s "second path," and applying each of the seven, non-dispositive factors set forth by the SJC, the Commonwealth's action is clearly *not* a SLAPP suit: (1) "whether the case presents as a 'classic' or 'typical' SLAPP suit"; (2) "whether the lawsuit was commenced close in time to the petitioning activity"; (3) "whether the anti-SLAPP motion was filed promptly"; (4) "the centrality of the challenged claim in the context of the litigation as a whole"; (5) "the relative strength of the nonmoving party's claim"; (6) "evidence that the petitioning activity was chilled"; and (7) "whether the damages sought by the nonmoving party will burden the moving party's right to petition." 483 Mass. at 206-07. The application of these factors dictates denial of the Special Motion.

Absence of Classic SLAPP Suit Indicia

This case presents none of the indicia of a "classic" or "typical" SLAPP suit, since the Commonwealth's c. 93A enforcement action is not a lawsuit that bears even a remote resemblance to the types of suits the statute was enacted to remedy, i.e., lawsuits "directed at individual citizens of modest means for speaking publicly against development projects." *See Blanchard II*, 483 Mass. at 206 (citing cases).

Timing of the Commonwealth's Suit

The Attorney General initiated her investigation of ExxonMobil in 2016. It was not until October 24, 2019, however, following an extensive multi-year investigation, that the Commonwealth filed in this Court its 205-page, 830-paragraph complaint setting forth detailed factual allegations in support of its legal claims that ExxonMobil misled and deceived Massachusetts investors and consumers over the course of several years. Unlike SLAPP suits, which are typically filed close in time to, and as a means to retaliate against, genuine petitioning activity, here the Commonwealth took substantial time to conduct an exhaustive investigation, as reflected in the complaint's factual allegations regarding ExxonMobil's historic knowledge of climate change, its climate denial campaign, and its particular, ongoing deceptive commercial practices and representations to Massachusetts investors and consumers. This factor thus weighs heavily against a finding that the Commonwealth's suit is a SLAPP suit.

Timing of ExxonMobil's Special Motion

A defendant's delay in filing a § 59H motion also counsels against treating a plaintiff's suit as a SLAPP suit because § 59H is meant to provide *expedited* relief to those forced to defend costly and meritless lawsuits as a consequence of the legitimate exercise of their right to petition. *Duracraft*, 427 Mass. at 161. ExxonMobil's delay in filing its Special Motion demonstrates that

obstruction is its aim—not expedited relief. ExxonMobil has had the Commonwealth's complaint since October 2019 and did not file its Special Motion until the end of July 2020, *nine months* later. Strategic delay in filing a § 59H motion is disfavored because such tactics unduly burden plaintiffs. *See Blanchard II*, 483 Mass. at 211. That admonition is amplified here, where ExxonMobil's delay tactics not only burden the Commonwealth, but also burden this Court with a frivolous filing in the middle of a pandemic.

ExxonMobil could have filed its Special Motion in this Court following the docketing of the Complaint in October 2019. Instead, it removed the case to federal court, where it also chose not to seek dismissal under the anti-SLAPP statute, and imposed delay with that meritless action.[8] ExxonMobil then could have moved in this Court as soon as the case was remanded in March 2020. But ExxonMobil did none of those things. ExxonMobil's strategic delay shows that its Special Motion is not a serious effort, but rather one designed, again, to delay and stonewall. This factor indicates strongly that the Commonwealth's suit is not a SLAPP suit.

Centrality of Challenged Claim

ExxonMobil's Special Motion seeks to dismiss all three counts in the Commonwealth's Amended Complaint. The Commonwealth's action—the fruit of a multi-year investigation—would be terminated in its entirety if the Court were to grant the unprecedented relief sought by ExxonMobil—a result that would allow ExxonMobil to evade the very serious allegations of unlawful deception in violation of c. 93A the Commonwealth has leveled against it.

[8] While the Commonwealth would vigorously have opposed such a motion, First Circuit law would not currently have categorically barred it. *E.g.*, *Jobs First Indep. Expenditure Pol. Action Comm. v. Coakley*, 2016 WL 6661142 (D. Mass. 2016) (granting Attorney General's motion to dismiss on other grounds and holding federal court will apply § 59H to state law claims).

Strength of the Non-Movant Commonwealth's Claims

The Commonwealth's claims certainly "offer[] some reasonable possibility" of a favorable decision, *Blanchard I*, 477 Mass. at 161, and that is all that is required to demonstrate that they are colorable.[9] As in *Blanchard II*, where the colorability of the nurses' claim was supported by an arbitration panel's finding on the same facts, 483 Mass. at 208-09, the colorability of the Commonwealth's claims is bolstered by Judge Young's observation that "[t]he [C]omplaint, fairly read, alleges that ExxonMobil hid or obscured the scientific evidence of climate change and thus duped its investors about the long-term health of its corporation and defrauded consumers of its fossil fuel products" and "that [t]he Commonwealth's analogy to the [wrongful conduct of the] tobacco industry is apt." *See Mass.*, 2020 WL 2769681 at *8. And the Commonwealth's claims are supported by an exhaustive investigation. *See* MTD Opp. 1-7.[10]

Most significantly, this Court's and the SJC's decisions rejecting ExxonMobil's challenge to the Attorney General's CID also support a colorability finding. Those decisions are relevant because each court found the Attorney General's investigation was lawful because the facts of ExxonMobil's historic knowledge about climate change supported her belief that ExxonMobil violated c. 93A. *Exxon*, 479 Mass. at 327-28; *In re Civil Investigative Demand*,

[9] *See also* MTD Opp. 19-38 (describing why the Commonwealth has plausibly alleged c. 93A claims against ExxonMobil).

[10] Further, in October 2020, leaked ExxonMobil internal documents show that, due to its expanded fossil fuel production growth strategy, the Company was projecting (pre-pandemic) a 17% *increase* in greenhouse gas emissions by 2025 (not including emissions from consumer use of its products). Kevin Crowley & Akshat Rathi, *Exxon's Plan for Surging Carbon Emissions Revealed in Leaked Documents, Internal Projections From One of World's Largest Oil Producers Show an Increase in Its Enormous Contribution to Global Warming*, Bloomberg, Oct. 5, 2020 (Add-39) ("drive to expand both fossil-fuel production and planet-warming pollution"). This revelation further demonstrates the colorability of the Commonwealth's claim that ExxonMobil is deceiving Massachusetts consumers through its misleading representations that it is a clean energy leader whose products help consumers reduce emissions.

2017 WL 627305 at *5 ("Attorney General has assayed sufficient grounds—her concerns about Exxon[Mobil]'s possible misrepresentations to Massachusetts consumers—upon which to issue the CID."). Considering claims that might arise from that investigation, the SJC noted that "[a] person may violate ... c. 93A through false or misleading advertising ... [and] that advertising need not be totally false in order to be deemed deceptive"; "[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." *Exxon*, 479 Mass. at 320 (citation omitted). The SJC also found that Exxon's historic documents (dating as far back as 1976) are relevant to a determination whether ExxonMobil currently is violating c. 93A. *Id.* at 326 (documents "created more than four years ago ... still probative of Exxon's present knowledge on the issue of climate change, and whether Exxon[Mobil] disclosed that knowledge to the public."). Both courts also rejected ExxonMobil's conspiracy theory that the Attorney General acted in bad faith—in essence, the basis for its Special Motion. *E.g.*, *id.* at 327-28. This factor, too, indicates strongly that the Commonwealth's suit is not a SLAPP suit.

Absence of Evidence that Movant ExxonMobil's Petitioning Activity Was Chilled

ExxonMobil has not even claimed that the Commonwealth's suit has chilled any of its purported petitioning activities. *See* Mem. 1-20. That is no surprise, since there is no such evidence; indeed, ExxonMobil essentially admitted in its federal challenge to the CID that its speech has not been chilled, claiming it would "continue to" make public statements on the topic of climate change. Br. of Att'y Gen. Healey at 29-30, *Exxon Mobil Corp. v. Healey*, No. 18-1170 (2d Cir. Oct. 5, 2018), 2018 WL 4863426.

And, ExxonMobil has done just that—since the filling of the Complaint, ExxonMobil has continued to develop and release misleading promotional materials, including a YouTube video

released in August 2020 deceptively representing that ExxonMobil's natural gas, comprised largely of methane, a potent greenhouse gas that is 86 times more potent that carbon dioxide in the near term, is a clean fuel that goes together with renewables like "peanut butter and jelly."[11] ExxonMobil continues to have a pervasive media presence—it airs advertisements, saturates social media with its promotional materials, and, in 2020 alone, issued dozens of press releases, including several concerning its purported clean energy developments.[12] ExxonMobil's purported petitioning activity has not been chilled.

Potential Burden on Movant ExxonMobil of Damages Sought

The relief sought by the Commonwealth does not include damages; the Commonwealth seeks only injunctive relief and the statutory penalties available under c. 93A. The Legislature has already determined that a party that violates c. 93A may be liable for up to $5,000 for each instance of unlawful conduct—an amount deemed an appropriate remedy by the Legislature. Nor, for that matter, will the non-monetary relief requested in the Commonwealth's Amended Complaint impair ExxonMobil's ability to lobby legislatures or executive agencies or express its view in court. Instead, it seeks only to ensure that ExxonMobil stops deceptively marketing its securities and fossil fuel products to Massachusetts investors and consumers—a value the First Amendment promotes. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). This factor also demonstrates that the Commonwealth's suit is not a SLAPP suit.

No Retaliation

Lastly, the Commonwealth's claims were not brought in "retaliation" against

[11] *See Peanut Butter & Jelly, Natural Gas & Renewables*, ExxonMobil, https://www.youtube.com/watch?v=6K9f2uy2JzU (last viewed Oct. 24, 2020).

[12] *See* ExxonMobil Newsroom, https://corporate.exxonmobil.com/News/Newsroom/News-releases.

ExxonMobil, that is, to chill any legitimate petitioning activity. Rather, the Commonwealth has brought this action to protect Massachusetts investors and consumers from ExxonMobil's deceptive and misleading representations. The Commonwealth routinely undertakes such actions, including recent c. 93A actions against Equifax, Purdue Pharma, Volkswagen and others where deceptive acts and practices have harmed Massachusetts consumers and/or investors.[13] When the Commonwealth files such suits, it is enforcing the law, not *retaliating* against defendants for their unlawful acts.[14] Unfair or deceptive acts or practices proscribed by c. 93A are not protected by § 59H. *See, e.g.*, *Duracraft*, 427 Mass. at 158-60, 168 (affirming dismissal of § 59H motion where petitioning alleged to violate non-disclosure agreement).

The totality of the facts demonstrates unequivocally that the Commonwealth's suit is not a SLAPP suit, and ExxonMobil's Special Motion must be denied.

B. ExxonMobil's Misleading and Deceptive Representations and Omissions Made in the Course of Marketing and Selling Its Securities and Fossil Fuel Products in Massachusetts Do Not Constitute Petitioning.

Even if ExxonMobil's misleading and deceptive representations were "petitioning" covered by § 59H, which they are not, *infra* pp.18-20, the First Amendment does not protect them, since "[n]either the [First Amendment's petitioning clause] nor the First Amendment more generally protects petitions predicated on fraud or deliberate misrepresentation." *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1123 (D.C. Cir. 2009) (citation omitted); *see also id.* at

[13] Press Release, AG Healey Secures $18 Million Payment from Equifax over Data Breach that Affected Nearly Three Million Massachusetts Residents (Apr. 17, 2020) (Add-48); Press Release, AG Healey Sues Purdue Pharma, Its Board Members and Executives for Illegally Marketing Opioids and Profiting From Opioid Epidemic (June 12, 2018) (Add-51); Press Release, AG Healey Announces Record-Setting $20 Million Settlement by Volkswagen, Audi, and Porsche for Knowingly Selling Illegally Polluting Cars and SUVs (Mar. 30, 2017) (Add-56).

[14] *See, e.g.*, *In re Discipline of Att'y*, 442 Mass. 660, 674 (2004) (denying anti-SLAPP motion where action was initiated to discipline attorney, not "intimidate" petitioning right despite dismissal of disciplinary charge).

1123-24 (rejecting First Amendment petitioning defense because tobacco companies' statements were false and misleading); MTD Opp. 38-40.[15] The Commonwealth alleges that ExxonMobil has engaged in and continues to engage in the very conduct the First Amendment does not protect—false and misleading communications to market its securities and fossil fuel products to Massachusetts investors and consumers. *E.g.*, Am. Compl. ¶¶ 1-2; *see* MTD Opp. 3-7, 9-12, 38-40. The relief sought by ExxonMobil in its Special Motion—to shield its deceptive acts and practices from c. 93A enforcement via dismissal of the Commonwealth's action—is therefore impermissibly broader than that afforded by the First Amendment and, by extension, § 59H, which "protects only the 'right of petition,'" *Cardno ChemRisk, LLC v. Foytlin*, 476 Mass. 479, 484 n.11 (2017) (citation omitted).

In any event, ExxonMobil has failed to show that the Commonwealth's c. 93A claims are based solely on ExxonMobil petitioning activities. A "communication must be made to influence, inform, or at the very least, reach governmental bodies—either directly or indirectly" to qualify as petitioning under § 59H, and courts look to whether statements are "closely and rationally related to the [governmental proceeding] and in furtherance of the objective served by governmental consideration of the issue under review." *Blanchard I*, 477 Mass. at 149. Absent a plausible nexus between a statement and a government proceeding, the statement does not fall within the definition of petitioning, *id.*,[16] and § 59H will not apply.[17] Because the ExxonMobil

[15] ExxonMobil's reliance on *Baker v. Parsons* to suggest a contrary rule is wrong: *Baker* does not say § 59H protects deceptive petitioning. 434 Mass. 543, 553-54 (2001); Mem. 20.

[16] The "archetypical" example of such a nexus "involves a party's statement regarding an ongoing governmental proceeding made directly to a governmental body" to secure a "favorable outcome." *Blanchard I*, 477 Mass. at 149 (citation omitted); *see Duracraft*, 427 Mass. at 161-62.

[17] *See Fustolo v. Hollander*, 455 Mass. 861, 871 (2010) (newspaper articles about controversial real estate project not protected by anti-SLAPP statute); *Cadle Co. v. Schlichtmann*, 448 Mass. 242, 254 (2007) (lawyer's non-petitioning statements not protected);

communications that form the bases for the Commonwealth's claims do not concern its statements to legislative, executive, or judicial bodies and also do not have a plausible nexus to any specific government proceeding, they do not constitute petitioning.

The Commonwealth's First Cause of Action concerns ExxonMobil's misleading and deceptive representations to investors. Am. Compl. ¶¶ 358-402, 470-536. For example, ExxonMobil's senior management made statements behind closed doors to top officials at Boston's major investment firms for the fundamental purpose of assuring those firms that purchasing and holding ExxonMobil securities is a sound investment strategy. *Id.* ¶¶ 452, 456, 458-467. ExxonMobil failed to disclose its knowledge of the systemic, global financial risk of climate change and downplayed concerns about climate change by, *inter alia*, misleadingly representing it was prudently managing climate-change-related risk through the application of an aggressively priced proxy cost of carbon—when, as it turns out, the so-called proxy cost of carbon was a slick subterfuge and ExxonMobil recently admitted its carbon regulation cost assumptions "had no impact on [its] income statement, balance sheet, or other financial disclosures." *See id.* ¶¶ 260, 384-402. None of these misleading statements to investors constitute petitioning. To the extent the Commonwealth's claims are based on ExxonMobil's misleading representations to investors during public meetings, on earnings calls, and in reports like Managing the Risks, ExxonMobil's Energy Outlooks, and its corporate reports that may have reached regulators, *see, e.g.*, *id.* ¶¶ 258, 368-76, 380-81, 491-495, 497, ExxonMobil has not

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Kobrin v. Gastfriend, 443 Mass. 327, 341 (2005) (physician's expert testimony for government in regulatory proceeding not petitioning); *Burley v. Comets Cmty. Youth Ctr.*, 75 Mass. App. Ct. 818, 823 (2009) (no protection for incidental observations not tied directly to petitioning activity); *Global NAPS, Inc. v. Verizon New England, Inc.*, 63 Mass. App. Ct. 600, 607 (2005) (comments to newspaper with oblique references to petitioning activity not protected).

identified a single plausible nexus between such statements and any specific government proceeding. *Blanchard I*, 477 Mass. at 149. They thus do not constitute petitioning.[18]

The Second and Third Causes of Action concern ExxonMobil's deceptive marketing. The purpose of ExxonMobil's marketing and branding campaigns is to create a positive consumer perception of ExxonMobil and persuade consumers to purchase its fossil fuel products.[19] ExxonMobil pours millions into market research and advertising campaigns, hawking its Synergy brand gasoline as "clean" and capable of reducing carbon dioxide emissions, with the objective of selling more gasoline, *see* Am. Compl. ¶¶ 117-18, 538, 552, 570-96, 624-33, 663, 673, 697-704, 706, not to influence some yet-to-be identified government proceeding. Accordingly, ExxonMobil's marketing representations do not constitute petitioning. Indeed, a contrary finding—that ExxonMobil's marketing through the airwaves, Internet, television, and print media constitute petitioning because they *may* reach representatives of some government body—would eviscerate c. 93A's remedial objectives, since every purveyor of misleadingly marketed goods would claim the protection of § 59H in response to Attorney General enforcement, a profoundly troubling result that this Court should summarily reject.

CONCLUSION

This Court should deny ExxonMobil's Special Motion without an evidentiary hearing.

[18] Allegations regarding any ExxonMobil lobbying efforts in the Amended Complaint are included only for context and/or demonstrate why its current representations are deceptive.

[19] *See, e.g.*, Deven Desai & Spencer Waller, *Brands, Competition and the Law*, 2010 B.Y.U. L. Rev. 1425, 1436 ("From the birth of modern branding to today, businesses have used brands as a way to create demand, extract value from the supply chain, and control price.").

Dated: October 30, 2020

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS,

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CERTIFICATE OF SERVICE

I, Seth Schofield, certify that on October 30, 2020, I served the foregoing document, 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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Addendum

34 Mass. L. Rptr. 104
Only the Westlaw citation is currently available.
Superior Court of Massachusetts, Suffolk County.

IN RE CIVIL INVESTIGATIVE DEMAND NO. 2016–EPD–36, Issued by the Office of the Attorney General

SUCV20161888F
|
January 11, 2017

ORDER ON EMERGENCY MOTION OF EXXONMOBIL CORPORATION TO SET ASIDE OR MODIFY THE CIVIL INVESTIGATIVE DEMAND OR ISSUE A PROTECTIVE ORDER AND THE COMMONWEALTH'S CROSS MOTION TO COMPEL EXXONMOBIL CORPORATION TO COMPLY WITH CIVIL INVESTIGATIVE DEMAND NO. 2016–EPD–36

Heidi E. Brieger, Associate Justice of the Superior Court

***1** On April 19, 2016, the Massachusetts Attorney General issued a Civil Investigative Demand ("CID") to ExxonMobil Corporation ("Exxon") pursuant to G.L.c. 93A, § 6. The CID stated that it was issued as:

> [P]art of a pending investigation concerning potential violations of M.G.L.c. 91A, § 2, and the regulations promulgated thereunder arising both from (1) the marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth ...; and (2) the marketing and/or sale of securities, as defined in M.G.L.c. 110A, § 401(k), to investors in the Commonwealth, including, without limitation, fixed- and floating-rate notes, bonds, and common stock, sold or offered to be sold in the Commonwealth.

Appendix in Support of Petition and Emergency Motion of Exxon Mobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, Exhibit B. The CID requests documents generally related to Exxon's study of CO2 emissions and the effects of these emissions on the climate from January 1, 1976 through the date of production.

On June 16, 2016, Exxon commenced the instant action to set aside the CID. The Attorney General has cross-moved pursuant to G.L.c. 93A, § 7 to compel Exxon to comply with the CID. After a hearing and careful review of the parties' submissions, and for the reasons that follow, Exxon's motion to set aside the CID is DENIED and the Commonwealth's motion to compel is ALLOWED, subject to this Order.

DISCUSSION

General Laws c. 93A, § 6 authorizes the Attorney General to obtain and examine documents "whenever he believes a person has engaged in or is engaging in any method, act or practice declared to be unlawful by this chapter." Among the things declared to be unlawful by chapter 93A are unfair and deceptive acts or practices in the conduct of any trade or commerce. G.L.c. 93A, § 2(a).

General Laws c. 93A, § 6 "should be construed liberally in favor of the government," see *Matter of Civil Investigative Demand Addressed to Yankee Milk, Inc.*, 372 Mass. 353, 364 (1977), and the party moving to set aside a CID "bears a heavy burden to show good cause why it should not be compelled to respond," see *CUNA Mutual Ins. Soc. v. Attorney Gen.*, 380 Mass. 539, 544 (1980). There is no requirement that the Attorney General have probable cause to believe that a violation of G.L.c. 93A has occurred; she need only have a belief that a person has engaged in or is engaging in conduct declared to be unlawful by G.L.c. 93A. *Id.* at 542 n.5. While the Attorney General must not act arbitrarily or in excess of her statutory authority, she need not be confident of the probable result of her investigation. *Id.* (Citations omitted.)

I. Exxon's Motion to Set Aside the CID

A. Personal Jurisdiction

Exxon contends that this court does not have personal jurisdiction over it in connection with any violation of law contemplated by the Attorney General's investigation. Memorandum of Exxon Mobil Corporation in Support of its Emergency Motion to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, page 2. Exxon is incorporated in New Jersey and headquartered in Texas. All of its central operations are in Texas.

***2** Determining whether the court has personal jurisdiction over a nonresident defendant involves a familiar two-pronged inquiry: (2) is the assertion of jurisdiction authorized by the longarm statute, G.L.c. 223A, § 3, and (2) if authorized, is the exercise of jurisdiction under State law consistent with basic due process requirements mandated by the United States Constitution? *Good Hope Indus., Inc. v. Ryder Scott Co.*, 378 Mass. 1, 5–6 (1979). Jurisdiction is permissible only when both questions draw affirmative responses. *Id.* As the party claiming that the court has the power to grant relief, the Commonwealth has the burden of persuasion on the issue of personal jurisdiction. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 612 n.28 (1979).

The Commonwealth invokes jurisdiction under G.L.c. 223A, § 3(a), which permits the court to assert jurisdiction over a defendant if the defendant "either directly or through an agent transacted any business in the Commonwealth, and if the alleged cause of action arose from such transaction of business." *Good Hope Indus., Inc.*, 378 Mass. at 6. The "transacting any business" language is to be construed broadly. See *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 767 (1994). "Although an isolated (and minor) transaction with a Massachusetts resident may be insufficient, generally the purposeful and successful solicitation of business from residents of the Commonwealth, by a defendant or its agent, will suffice to satisfy this requirement." *Id.* Whether the alleged injury "arose from" a defendant's transaction of business in Massachusetts is determined by a "but for" test. *Id.* at 771–72 (jurisdiction only proper if, *but for* defendant's solicitation of business in Massachusetts, plaintiff would not have been injured).

The CID says that the Attorney General is investigating potential violations arising from Exxon's marketing and/or sale of energy and other fossil fuel derived products to Commonwealth consumers. The Commonwealth argues that Exxon's distribution of fossil fuel to Massachusetts consumers "through more than 300 Exxon-branded retail service stations that sell Exxon gasoline and other fuel products" satisfies the transaction of business requirement. Exxon objects because it contends that for the past five years, it has

neither (1) sold fossil fuel derived products to consumers in Massachusetts, nor (2) owned or operated a retail store or gas station in Massachusetts. According to the affidavit of Geoffrey Grant Doescher ("Doescher"), the U.S. Branded Wholesale Manager, ExxonMobil Fuels, Lubricants and Specialties Marketing Company at Exxon, any service station or wholesaler in Massachusetts selling fossil fuel derived products under an "Exxon" or "Mobil" banner is independently owned and operated pursuant to a Brand Fee Agreement ("BFA"). Doescher says that branded service stations purchase gasoline from wholesalers who create ExxonMobil-branded gasoline by combining unbranded gasoline with ExxonMobil-approved additives obtained from a third-party supplier. The BFA also provides that Exxon agrees to allow motor fuel sold from these outlets to be branded as Exxon- or Mobil-branded motor fuel.

Exxon provided to the court and the Commonwealth a sample BFA. By letter dated December 19, 2016, the Commonwealth argued that many provisions of the BFA properly give rise to this court's jurisdiction. The Commonwealth contends that the BFA provides many instances in which Exxon retains the right to control both the BFA Holder and the BFA Holder's franchisees.[1] For example, Section 15(a) of the BFA states:

> BFA Holder agrees to diligently promote and cause its Franchise Dealers to diligently promote the sales of Products, including through advertisements, all in accordance with the terms of this Agreement. BFA Holder hereby acknowledges and agrees that, notwithstanding anything set forth herein to the contrary, to insure the integrity of ExxonMobil trademarks, products and reputation, ExxonMobil shall have the authority to review and approve, in its sole discretion, all forms of advertising and sales promotions that will use media vehicles for the promotion and sale of any product, merchandise or services, in each case that (i) uses or incorporates and Proprietary Mark, or (ii) relates to any Business operated at a BFA Holder Branded outlet ... BFA Holder shall expressly require all Franchise Dealers to (a) agree to such review and control by ExxonMobil ...

[1] The BFA mandates that all BFA Holders require their outlets to meet minimum facility, product, and service requirements, Section 13, and provide a certain level of customer service, Section 16. Moreover, Exxon requires that the BFA Holder enter into written agreements with each of its Franchise Dealers and in the agreement, the Franchise Dealer must commit to Exxon's "Core Values." Section 19. "Core Values" is defined on page one of the BFA:

> BHA Holder acknowledges that ExxonMobil has established the following core values ("Core Values") to build and maintain a lasting relationship with its customers, the motoring public:
> (1) To deliver quality products that

consumers can trust.
(2) To employ friendly, helpful people.
(3) To provide speedy, reliable service.
(4) To provide clean and attractive retail facilities.
(5) To be a responsible, environmentally-conscious neighbor.

***3** By letter dated December 27, 2016, Exxon disputes that any of the BFA's provisions establish the level of control necessary to attribute the conduct of a BFA Holder to Exxon. See *Depianti v. Jan–Pro Franchising Int'l, Inc.*, 465 Mass. 607, 617 (2013) (citation omitted) ([T]he marketing, quality, and operational standards commonly found in franchise agreements are insufficient to establish the close supervisory control or right of control necessary to demonstrate the existence of a master/servant relationship for all purposes or as a general matter"); *Lind v. Domino's Pizza, LLC*, 87 Mass.App.Ct. 650, 654–55 (2015) ("The mere fact that franchisors set baseline standards and regulations that franchisees must follow in an effort to protect the franchisor's trademarks and comply with Federal law, does not mean that franchisors have undertaken an agency relationship with the franchisee such that vicarious liability should apply"); *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 1999 Mass.App.Div. 14, 17 (1999) (obligations to render prompt and efficient service in accordance with licensor's policies and standards and to satisfy other warranty related service requirements did not constitute evidence of agency relationship because they were unrelated to licensee's day-to-day operations and specific manner in which they were conducted).

Here, though, Section 15 of the BFA evidences a retention of more control than necessary simply to protect the integrity of the Exxon brand. By Section 15, Exxon directly controls the very conduct at issue in this investigation—the marketing of Exxon products to consumers. See *Depianti*, 465 Mass. at 617 ("right to control test" should be applied to franchisor-franchisee relationship in such a way as to ensure that liability will be imposed only where conduct at issue properly may be imputed to franchisor). This is especially true because the Attorney General's investigation focuses on Exxon's marketing and/or sale of energy and other fossil fuel derived products to Massachusetts consumers. Section 15(a) makes it evident to the court that Exxon has retained the right to control the "specific policy or practice" allegedly resulting in harm to Massachusetts consumers. See *id.* (franchisor vicariously liable for conduct of franchisee only where franchisor controls or has right to control specific policy or practice resulting in harm to plaintiff). The quantum of control Exxon retains over its BFA Holders and the BFA Holders' franchisees as to marketing means that Exxon retains sufficient control over the entities actually marketing and selling fossil fuel derived products to consumers in the Commonwealth such that the court may assert personal jurisdiction over Exxon under G.L.c. 223A, § 3(a).

To determine whether such an exercise of personal jurisdiction satisfies—or does not satisfy—due process, "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). The plaintiff must demonstrate (1) purposeful availment of commercial activity in the forum State by the defendant; (2) the relation of the claim to the defendant's forum contacts; and (3) the compliance of the exercise of jurisdiction with "traditional notions of fair play and

substantial justice." *Bulldog Investors Gen. Partnership v. Secretary of the Commonwealth*, 457 Mass. 210, 217 (2010) (citations omitted). Due process requires that a nonresident defendant may be subjected to suit in Massachusetts only where "there was some minimum contact with the Commonwealth which resulted from an affirmative, intentional act of the defendant, such that it is fair and reasonable to require the defendant to come into the State to defend the action." *Good Hope Indus., Inc.*, 378 Mass. at 7 (citation omitted). "In practical terms, this means that an assertion of jurisdiction must be tested for its reasonableness, taking into account such factors as the burden on the defendant of litigating in the plaintiff's chosen forum, the forum State's interest in adjudicating the dispute, and the plaintiff's interest in obtaining relief." *Tatro*, 416 Mass. at 773.

***4** The court concludes that in the context of this CID, Exxon's due process rights are not offended by requiring it to comply in Massachusetts. If the court does not assert its jurisdiction in this situation, then G.L.c. 93A would be "de-fanged," and consequently, a statute enacted to protect Massachusetts consumers would be reduced to providing hollow protection against non-resident defendants. Compare *Bulldog Investors Gen. Partnership*, 457 Mass. at 218 (Massachusetts has strong interest in adjudicating violations of Massachusetts securities law; although there may be some inconvenience to non-resident plaintiffs in litigating in Massachusetts, such inconvenience does not outweigh Commonwealth's interest in enforcing its laws in Massachusetts forum). Also, insofar as Exxon delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in all states, including Massachusetts, it is not overly burdened by being called into court in Massachusetts. See *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980) (forum State does not exceed its powers under Due Process Clause if it asserts personal jurisdiction over corporation that delivers its products into stream of commerce with expectation that they will be purchased by consumers in forum State).

For all of these reasons, the court concludes that it has personal jurisdiction over Exxon with respect to this CID.

B. Arbitrary and Capricious

Exxon next contends that the CID is not supported by the Attorney General's "reasonable belief" of wrongdoing. General Laws c. 93A, § 6 gives the Attorney General broad investigatory powers to conduct investigations whenever she *believes* a person has engaged in or is engaging in any conduct in violation of the statute. *Attorney Gen. v. Bodimetric Profiles*, 404 Mass. 152, 157 (1989); see *Harmon Law Offices P.C. v. Attorney Gen.*, 83 Mass.App.Ct. 830, 834 (2013). General Laws c. 93A does not contain a "reasonable" standard, but the Attorney General "must not act arbitrarily or in excess of his statutory authority." See *CUNA Mut. Ins. Soc.*, 380 Mass. at 542 n.5 (probable cause not required; Attorney General "need only have a belief that a person has engaged in or is engaging in conduct declared to be unlawful by G.L.c. 93A").

Here, Exxon has not met its burden of persuading the court that the Attorney General acted arbitrarily or capriciously in issuing the CID. See *Bodimetric Profiles*, 404 Mass. at 157 (challenger of CID has burden to show that Attorney General acted arbitrarily or capriciously). If Exxon presented to consumers "potentially misleading information about the risks of climate change, the viability of alternative energy sources, and the environmental attributes of its products and services," see CID Demand Nos. 9, 10, and 11,

the Attorney General may conclude that there was a 93A violation. See *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 395 (2004) (advertising is deceptive in context of G.L.c. 93A if it consists 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"); *Commonwealth v. DeCotis*, 366 Mass. 234, 238 (1974) (G.L.c. 93A is legislative attempt to "regulate business activities with the view to providing proper disclosure of information and a more equitable balance in the relationship of consumers to persons conducting business activities"). The Attorney General is authorized to investigate such potential violations of G.L.c. 93A.

Exxon also argues that the CID is politically motivated, that Exxon is the victim of viewpoint discrimination, and that it is being punished for its views on global warming. As discussed above, however, the court finds that the Attorney General has assayed sufficient grounds—her concerns about Exxon's possible misrepresentations to Massachusetts consumers—upon which to issue the CID. In light of these concerns, the court concludes that Exxon has not met its burden of showing that the Attorney General is acting arbitrarily or capriciously toward it.[2]

[2] The court does not address Exxon's arguments regarding free speech at this time because misleading or deceptive advertising is not protected by the First Amendment. *In re Willis Furniture Co.*, 980 F.2d 721, 1992 U.S.App. LEXIS 32373 *2 (1992), citing *Friedman v. Rogers*, 440 U.S. 1, 13–16 (1979). The Attorney General is investigating whether Exxon's statements to consumers, or lack thereof, were misleading or deceptive. If the Attorney General's investigation reveals that Exxon's statements were misleading or deceptive, Exxon is not entitled to any free speech protection.

C. Unreasonable Burden and Unspecific

***5** A CID complies with G.L.c. 93A, §§ 6(4)(c) & 6(5) if it "describes with reasonable particularity the material required, if the material required is not plainly irrelevant to the authorized investigation, and if the quantum of material required does not exceed reasonable limits." *Matter of a Civil Investigative Demand Addressed to Yankee Milk, Inc.*, 372 Mass. at 360–61; see G.L.c. 93A, § 6(4)(c) (requiring that CID describe documentary material to be produced thereunder with reasonable specificity, so as fairly to indicate material demanded); G.L.c. 93A, § 6(5) (CID shall not "contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of the commonwealth; or require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of the commonwealth").

Exxon argues that the CID lacks the required specificity and furthermore imposes an unreasonable burden on it. With respect to specificity, Exxon takes issue with the CID's request for "essentially all documents related to climate change," and with the vagueness of some of the demands. Memorandum of Exxon Mobil Corporation in Support of its Emergency Motion to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, page 18. In particular, Exxon objects to producing documents that relate to its "awareness," "internal considerations," and "decision making" on climate change issues and its "information exchange" with other companies.

The court has reviewed the CID and disagrees that it lacks the requisite specificity. The CID seeks information related to what (and when) Exxon knew about the impacts of burning fossil fuels on climate change and what Exxon told consumers about climate change over the years. Some of the words used to further describe that information—awareness and internal considerations—simply modify the "what" and "when" nature of the requests.

With respect to the CID being unreasonably burdensome, an effective investigation requires broad access to sources of information. See *Matter of a Civil Investigative Demand Addressed to Yankee Milk, Inc.*, 372 Mass. at 364. Documentary demands exceed reasonable limits only when they "seriously interfere with the functioning of the investigated party by placing excessive burdens on manpower or requiring removal of critical records." *Id.* at 361 n.8. That is not the case here. At the hearing, both parties indicated that Exxon has already complied with its obligations regarding a similar demand for documents from the New York Attorney General. In fact, as of December 5, 2016, Exxon had produced 1.4 million pages of documents responsive to the New York Attorney General's request. It would not be overly burdensome for Exxon to produce these documents to the Massachusetts Attorney General.

Whether there should be reasonable limitations on the documents requested for other reasons, such as based upon confidentiality or other privileges, should be discussed by the parties in a conference guided by Superior Court Rule 9C. After such a meeting, counsel should submit to the court a joint status report outlining disagreements, if any, for the court to resolve.

II. Disqualification of Attorney General

Exxon requests the court to disqualify the Attorney General and appoint an independent investigator because her "public remarks demonstrate that she has predetermined the outcome of the investigation and is biased against ExxonMobil." Memorandum of Exxon Mobil Corporation in Support of its Emergency Motion to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, page 8. In making this request, Exxon relies on a speech made by the Attorney General on March 29, 2016, during an "AGs United for Clean Power" press conference with other Attorneys Generals. The relevant portion of Attorney General Healey's comments were:

> ***6** Part of the problem has been one of public perception, and it appears, certainly, that certain companies, certain industries, may not have told the whole story, leading many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts. Fossil fuel companies that deceived investors and consumers about the dangers of climate change should be, must be, held accountable. That's why I, too, have joined in investigating the practices of Exxon Mobil. We can all see today the troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public.

General Laws c. 93A, § 6 gives the Attorney General power to conduct investigations whenever she believes a person has engaged in or is engaging in any conduct in violation of G.L.c. 93A. *Bodimetric Profiles*, 404 Mass. at 157. In the Attorney General's comments at the press conference, she identified the basis for her belief that Exxon may have violated G.L.c. 93A. In particular, she expressed concern that Exxon failed to disclose relevant information to its Massachusetts consumers. These remarks do not evidence any actionable bias on the part of the Attorney General; instead it seems logical that the Attorney General inform her constituents about the basis for her investigations. Cf. *Buckley v. Fitzsimmons*, 509 U.S. 259, 278 (1993) ("Statements to the press may be an integral part of a prosecutor's job ... and they may serve a vital public function"); *Goldstein v. Galvin*, 719 F.3d 16, 30 (1st Cir. 2013) ("Not only do public officials have free speech rights, but they also have an obligation to speak out about matters of public concern"); see also *Commonwealth v. Ellis*, 429 Mass. 362, 372 (1999) (due process provisions require that prosecutor be disinterested in sense that prosecutor must not be—nor appear to be—influenced in exercise of discretion by personal interests). It is the Attorney General's duty to investigate Exxon if she believes it has violated G.L.c. 93A, § 6. See also G.L.c. 12, § 11D (attorney general shall have authority to prevent or remedy damage to the environment caused by any person or corporation). Nothing in the Attorney General's comments at the press conference indicates to the court that she is doing anything more than explaining reasons for her investigation to the Massachusetts consumers she represents. See generally *Ellis*, 429 Mass. at 378 ("That in the performance of their duties [the Attorney General has] zealously pursued the defendants, as is [his or her] duty within ethical limits, does not make [his or her] involvement improper, in fact or in appearance").

III. Stay

On June 15, 2016, Exxon filed a complaint and a motion for preliminary injunction in the United States District Court for the Northern District of Texas alleging that the CID violates its federal constitutional rights. Exxon Mobil requests this court to stay its adjudication of the instant motion pending resolution of the Texas federal action. See G.L.c. 223A, § 5 ("When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just"); see *WR Grace & Co. v. Hartford Accident & Indemnity Co.*, 407 Mass. 572, 577 (1990) (decision whether to stay action involves discretion of motion judge and depends greatly on specific facts of proceeding before court). The court determines that the interests of substantial justice dictate that the matter be heard in Massachusetts.

This matter involves the Massachusetts consumer protection statute and Massachusetts case law arising under it, about which the Massachusetts Superior Court is certainly more familiar than would be a federal court in Texas. See *New Amsterdam Casualty Co. v. Estes*, 353 Mass. 90, 95–96 (1967) (factors to consider include administrative burdens caused by litigation that has its origins elsewhere and desirability of trial in forum that is at home with governing law). Further, the plain language of the statute itself directs a party seeking relief from the Attorney General's demand to the courts of the commonwealth. See G.L.c. 93A, § 6(7) (motion to set aside "may be filed in the superior court of the county in which the person served resides or has his usual place of business, or in Suffolk county"); see also G.L.c. 93A, § 7 ("A person upon whom notice is served pursuant to the provisions of section six shall comply with the terms thereof unless otherwise provided by the order of a court of the

commonwealth"). The court declines to stay this proceeding.

ORDER

***7** For the reasons discussed above, it is hereby *ORDERED* that the Emergency Motion of ExxonMobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order is *DENIED* and the Commonwealth's Cross Motion to Compel ExxonMobil Corporation to Comply with Civil Investigative Demand No. 2016–EPD–36 is *ALLOWED* consistent with the terms of this Order. The parties are *ORDERED* to submit a joint status report to the court no later than February 15, 2017, outlining the results of a Rule 9C Conference.

All Citations

Not Reported in N.E.3d, 34 Mass.L.Rptr. 104, 2017 WL 627305

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2020 WL 2769681
Only the Westlaw citation is currently available.
United States District Court, D. Massachusetts.

Commonwealth of MASSACHUSETTS, Plaintiff,
v.
EXXON MOBIL CORPORATION, Defendant.

CIVIL ACTION NO. 19-12430-WGY
|
Filed 05/28/2020

Synopsis

Background: Massachusetts filed state court action under Massachusetts Consumer Protection Act alleging that oil and gas company fraudulently concealed and misrepresented risks posed by increasing greenhouse gas emissions from consumers and investors in state. After removal, state moved to remand.

Holdings: The District Court, William G. Young, J., held that:

[1] action was not governed by federal common law;

[2] action was not subject to removal pursuant to *Grable*, 125 S.Ct. 2363, exception to well-pleaded complaint rule;

[3] action was not subject to removal pursuant to federal officer removal statute; and

[4] action was not "class action" subject to removal pursuant to Class Action Fairness Act (CAFA).

Motion granted.

Procedural Posture(s): Motion for Remand.

West Headnotes (18)

[1] Federal Courts Governmental bodies and officers

State is not "citizen" for purposes of diversity jurisdiction.

[2] Removal of Cases Nature and source of jurisdiction

Right of removal is entirely creature of statute, and suit commenced in state court must remain there until cause is shown for its transfer under some act of Congress.

[3] Removal of Cases Constitutional and statutory provisions

Removal statutes generally are to be strictly construed.

[4] Removal of Cases Evidence

Burden to prove that federal question has been pled lies with party seeking removal, and any ambiguity as to source of law ought to be resolved

against removal. 28 U.S.C.A. §§ 1331, 1441.

[5] **Removal of Cases** Evidence

When removal is based on class action or federal officer involvement, no presumption against removal applies. 28 U.S.C.A. §§ 1442(a)(1), 1453(b).

[6] **Federal Courts** "Well-pleaded complaint" rule

Presence or absence of federal-question jurisdiction is governed by well-pleaded complaint rule, which provides that federal jurisdiction exists only when federal question is presented on face of plaintiff's properly pleaded complaint. 28 U.S.C.A. § 1331.

[7] **Federal Courts** "Well-pleaded complaint" rule

Well-pleaded complaint rule makes plaintiff the master of claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.

[8] **Removal of Cases** Allegations in Pleadings

Case may not be removed to federal court on basis of federal defense, including defense of preemption, even if defense is anticipated in plaintiff's complaint.

[9] **Removal of Cases** Allegations in Pleadings

As general rule, absent diversity jurisdiction, case will not be removable if complaint does not affirmatively allege federal claim. 28 U.S.C.A. § 1441.

[10] **Federal Courts** Complete preemption
States Preemption in general

Linchpin of complete preemption analysis is whether Congress intended that federal law provide exclusive cause of action for claims asserted by plaintiff.

[11] **Removal of Cases** Allegations in Pleadings

State's action alleging that oil and gas company violated Massachusetts Consumer Protection Act by fraudulently concealing and

misrepresenting risks posed by increasing greenhouse gas emissions from state's consumers and investors was not governed by federal common law, and thus was not subject to removal on that basis; nothing about state's allegations implicated uniquely federal interests. 28 U.S.C.A. § 1441; Mass. Gen. Laws Ann. ch. 93A, §§ 2, 4.

[12] Federal Courts Federal common law

Federal common law may be created where there is overriding federal interest in need for uniform rule of decision or where controversy touches basic interests of federalism.

[13] Federal Courts State-law claims and causes of action

Federal jurisdiction over state law claim will lie if federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting federal-state balance approved by Congress.

[14] Removal of Cases Allegations in Pleadings

State's action alleging that oil and gas company violated Massachusetts Consumer Protection Act by fraudulently concealing and misrepresenting risks posed by increasing greenhouse gas emissions from state's consumers and investors did not necessarily raise any federal issue, and thus was not subject to removal pursuant to *Grable*, 125 S.Ct. 2363, exception to well-pleaded complaint rule, despite company's contentions that complaint touched on foreign relations, and that adjudication of complaint would require factfinder to question careful balance Congress and federal agencies struck between greenhouse gas regulation and nation's energy needs. Mass. Gen. Laws Ann. ch. 93A, §§ 2, 4.

[15] Removal of Cases Actions against or for acts of United States officers

To remove case under federal officer removal statute, private defendant must show that: (1) it acted under federal officer, (2) it has colorable federal defense, and (3) charged conduct was carried out for or in relation to asserted official authority. 28 U.S.C.A. § 1442(a)(1).

[16] Removal of Cases Actions against or for acts of United States officers

Oil and gas company's marketing and

sale tactics were not plausibly related to its drilling and production activities supposedly done under federal government's direction, and thus state's action alleging that company violated Massachusetts Consumer Protection Act by fraudulently concealing and misrepresenting risks posed by increasing greenhouse gas emissions from state's consumers and investors was not subject to removal pursuant to federal officer removal statute, despite company's contention that state's ultimate intention was to stop or reduce production and sale of fossil fuel products from federal leases, where state sought only fines for alleged deceptions. 28 U.S.C.A. § 1442(a)(1); Mass. Gen. Laws Ann. ch. 93A, §§ 2, 4.

[17] Removal of Cases Constitutional and statutory provisions

State's parens patriae action alleging that oil and gas company violated Massachusetts Consumer Protection Act (MCPA) by fraudulently concealing and misrepresenting risks posed by increasing greenhouse gas emissions from state's consumers and investors was not "class action" subject to removal pursuant to Class Action Fairness Act (CAFA), even though Massachusetts Appeals Court had stated that action brought by Attorney General under MCPA "is comparable to a class action"; MCPA did not contain procedures similar to those under federal class action rule, and authorized injunctive relief and civil penalty payable to state. 28 U.S.C.A. §§ 1332(d), 1453(b); Fed. R. Civ. P. 23.

[18] Removal of Cases Constitutional and statutory provisions

Similar state statute or rule need not contain all conditions and administrative aspects of federal class action rule in order for action brought under that statute or rule to qualify as "class action" under Class Action Fairness Act (CAFA), but it must at minimum, provide procedure by which class member whose claim is typical of all class members can bring action not only on his own behalf but also on behalf of all others in class. 28 U.S.C.A. § 1332(d)(1)(B); Fed. R. Civ. P. 23.

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MEMORANDUM OF DECISION

YOUNG, D.J.

I. INTRODUCTION

***1** The parties offer the Court sharply diverging theories of this case. As Exxon Mobil Corporation tells it, Massachusetts has brought this suit to hold a single oil company liable for global climate change. To the Commonwealth, this case is about seismic corporate fraud perpetrated on millions of consumers and investors. Yet as it reaches this Court on a motion to remand, this case is about the well-pleaded complaint rule -- nothing more and nothing less. That rule, in turn, implicates the fault lines dividing the federal and state judiciaries.

After oral argument and careful consideration, the Court remanded the case to state court for want of federal jurisdiction. This memorandum fully explicates the Court's reasoning. In brief, the Commonwealth's well-pleaded complaint pleads only state law claims, which are not completely preempted by federal law and do not harbor an embedded federal question. Additionally, contrary to the defendant's assertions, the statutory grants of federal jurisdiction for cases involving federal officers or for class actions do not apply here.

A. Procedural Background

This case has a complex pre-history dating back to April 19, 2016, when Massachusetts Attorney General Maura Healey ("the Attorney General") issued a Civil Investigative Demand ("CID") to Exxon Mobil Corporation ("ExxonMobil") for potentially defrauding ExxonMobil's consumers and investors, requesting ExxonMobil's internal documents since 1976 relating to carbon dioxide emissions. See Office of the Attorney General, Civil Investigative Demand No. 2016-EPD-36 (Apr. 19, 2016), https://www.mass.gov/files/documents/2016/10/op/ma-exxon-cid-.pdf. This investigation was presaged with fanfare by the "AG's United for Clean Power Press Conference" held on March 29, 2016, in which the Attorney General (joined by several counterparts from other states and former Vice President Al Gore) announced a band of twenty attorneys general -- dubbed "the Green 20" -- and noted "the troubling disconnect between what Exxon knew [about climate change] ... and what the company and industry chose to share with investors and with the American public." Notice of Removal ("Notice"), Ex. 2, AGs United for Clean Power Press Conference 1-2, 12-13, ECF No. 1-2.[1]

[1] The Attorney General's focus on ExxonMobil followed a barrage of investigative exposés alleging that the company knew for decades of the destructive climate consequences of its products yet publicly represented otherwise. Notice, Ex. 13, Compl. ¶ 3, ECF No. 1-13; see, e.g., Katie Jennings, Dino Grandoni & Susanne Rust, How Exxon Went from Leader to Skeptic on Climate Change Research, L.A. Times (Oct. 23, 2015), https://graphics.latimes.com/exxon-research/ (all internet sources last accessed May 27, 2020); Sara Jerving, Katie Jennings, Masako Melissa Hirsch & Susanne Rust, What Exxon Knew about the Earth's Melting Artic, L.A. Times (Oct. 9, 2015), https://graphics.latimes.com/exxon-arctic/; Neela Banerjee, Lisa Song & David Hasemyer, Exxon's Own Research

Confirmed Fossil Fuels' Role in Global Warming Decades Ago, InsideClimate News (Sept. 16, 2015), https://insideclimatenews.org/news/15092015/Exxons-own-research-confirmed-fossil-fuels-role-in-global-warming; Finalist: InsideClimate News, Pulitzer.org, https://www.pulitzer.org/finalists/insideclimate-news (collecting 2015 InsideClimate News series of articles for 2016 Pulitzer Prize Finalist in Public Service).

***2** Hardly a potted plant, ExxonMobil swiftly countered the CID with lawsuits in state and federal court. See In re Civil Investigative Demand No. 2016-EPD-36, 34 Mass. L. Rptr. 104, 2017 WL 627305, at *1 (Mass. Super. Ct. Jan. 11, 2017) (Brieger, J.), aff'd sub nom. Exxon Mobil Corp. v. Attorney General, 479 Mass. 312, 94 N.E.3d 786 (2018), cert. denied, —— U.S. ——, 139 S. Ct. 794, 202 L.Ed.2d 570 (2019); Exxon Mobil Corp. v. Schneiderman, 316 F. Supp. 3d 679, 686 (S.D.N.Y. 2018) ("Running roughshod over the adage that the best defense is a good offense, [ExxonMobil] has sued the Attorneys General of Massachusetts and New York ... each of whom has an open investigation of Exxon."), appeal docketed sub nom. Exxon Mobil Corp. v. Healey, No. 18-1170 (2d Cir. Apr. 23, 2018); Exxon Mobil Corp. v. Healey, Civ. A. No. 16-CV-469-K (N.D. Tex. March 29, 2017); Exxon Mobil Corp. v. Healey, 215 F. Supp. 3d 520 (N.D. Tex. 2016). When these efforts to quash the subpoenas failed in New York and Massachusetts,[2] ExxonMobil fought through a bench trial in New York and won a favorable decision. People of New York v. Exxon Mobil Corp., No. 452044/2018, 2019 WL 6795771 (Sup. Ct. N.Y. Dec. 10, 2019).

[2] ExxonMobil did, however, successfully induce the attorney general of the U.S. Virgin Islands to withdraw its subpoena. See Joint Stipulation Dismissal, Exxon Mobil Corporation v. Walker, Civ. A. No. 16-CV-00364-K (N.D. Tex. June 29, 2016), ECF No. 40; Terry Wade, U.S. Virgin Islands to Withdraw Subpoena in Climate Probe into Exxon, Reuters.com (June 29, 2016 7:55 pm), https://www.reuters.com/article/us-exxon-mobil-climatechange/u-s-virgin-islands-to-withdraw-subpoena-in-climate-probe-into-exxon-idUSKCN0ZF2ZP.

In this case, the Attorney General filed her 205-page complaint in Massachusetts Superior Court on October 24, 2019. Notice, Ex. 13, Compl., ECF No. 1-13. ExxonMobil removed the case to this Court on November 29, 2019, ECF No. 1, and the Commonwealth filed a motion to remand on December 26, 2019, ECF No. 13. The parties briefed this motion. Mem. L. Comm. Mass. Supp. Mot. Remand ("Mem. Remand"), ECF No. 14; ExxonMobil's Opp'n Pl.'s Mot. Remand ("Opp'n"), ECF No. 18; Reply Comm. Mass. Supp. Mot. Remand ("Reply"), ECF No. 21. After a hearing on March 17, 2020, conducted telephonically due to the coronavirus pandemic, the Court ALLOWED the motion to remand and the case was remanded to Suffolk County Superior Court. ECF Nos. 28-29.

B. Facts Alleged[3]

[3] The following facts are drawn from the complaint. See Ortiz–Bonilla v. Federación de Ajedrez de Puerto Rico, Inc., 734 F.3d 28, 34 (1st Cir. 2013) ("The jurisdictional question is determined from what appears on the

plaintiff's claim, without reference to any other pleadings.").

[1]Spawned from the marriage of oil leviathans Exxon Corporation ("Exxon") and Mobil Oil Corporation ("Mobil") in 1999, ExxonMobil is "the world's largest publicly traded oil and gas company." Compl. ¶¶ 1, 47. It is a New Jersey corporation with its principal place of business in Texas. Id. ¶ 46.[4] Id. ¶¶ 52-53. As an integrated oil and gas company, ExxonMobil "locates, extracts, refines, transports, markets, and sells fossil fuel products." Id. ¶ 54. Its business may be divided into three segments: " 'upstream' exploration and production operations; 'downstream' refinery and retail operations; and its chemical business, which include[s] the manufacturing and sale of various fossil fuel products that it advertises and sells to Massachusetts consumers." Id. ¶ 55. Business has been good. Recent assessments placed ExxonMobil's market capitalization at $343.43 billion and counted approximately 4.27 billion shares of its common stock issued and outstanding. Id. ¶ 53. Selling over 42 billion barrels of petroleum products and taking in more than $5.6 trillion in revenue from 2001-2017, ExxonMobil's sale of petroleum products in those years averaged roughly 8% of the world's daily petroleum consumption. Id. ¶¶ 58-59.

[4] Though ExxonMobil is not a Massachusetts citizen, diversity jurisdiction is unavailable because the Commonwealth "is not a 'citizen' for purposes of the diversity jurisdiction." Moor v. Alameda County, 411 U.S. 693, 717, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973).

1. Greenhouse Gases and Climate Change

***3** Production and use of fossil fuels, including ExxonMobil's products, emit greenhouse gases such as carbon dioxide and methane. Id. ¶ 65. Between 1988 and 2015, ExxonMobil was the single largest emitter of greenhouse gases of all U.S. companies, when consumer use of the products is factored in, and it was the fifth largest emitter among all non-governmentally owned fossil fuel producers worldwide. Id. ¶ 67. According to the Intergovernmental Panel on Climate Change, carbon dioxide emissions from fossil fuels "contributed about seventy-eight percent of the total greenhouse gas emissions increase from 1970 to 2010." Id. ¶ 202. Our Earth is plainly getting hotter, and scientists have reached a consensus that this is largely due to rising carbon dioxide concentrations and other greenhouse gas emissions. Id. ¶¶ 196-199. This fact threatens our planet and all its people, including those in Massachusetts, with intolerable disaster: "The atmosphere and oceans are warming, snow and ice cover is shrinking, and sea levels are rising." Id. ¶ 201.

The Commonwealth alleges that ExxonMobil knew these basic scientific facts decades ago -- that, in fact, ExxonMobil's scientists "were among the earliest to understand the risks posed by increasing greenhouse gas emissions" -- and yet devised a "systematic effort ..., reminiscent of the tobacco industry's long denial campaign about the dangerous effects of cigarettes, to mislead both investors and consumers in Massachusetts." Id. ¶¶ 4-5. Nearly forty years ago, the Commonwealth asserts, ExxoMobil already "knew that climate change presented dramatic risks to human civilization and the environment as well as a major potential constraint on fossil fuel use." Id. ¶ 115.

2. ExxonMobil's Campaign of Deception

Despite this knowledge, "[a]n August 1988 Exxon internal memorandum, captioned 'The Greenhouse Effect,' captures Exxon's intentional decision to misrepresent both its knowledge of climate change and the role of Exxon's products in causing climate change." Id. ¶ 118. This memorandum "set forth an 'Exxon Position' in which Exxon would '[e]mphasize the uncertainty in scientific conclusions regarding the potential enhanced Greenhouse effect,' " and it "made clear that Exxon 'has not modified its energy outlook or forecasts to account for possible changes in fossil fuel demand or utilization due to the [g]reenhouse effect.' " Id. ¶ 120 (alterations in original).

In order to advance this position, ExxonMobil and other fossil-fuel-affiliated corporations and trade groups formed the "Global Climate Coalition" in 1989, which generally represented to "investors and consumers of fossil fuels ... that, contrary to Exxon's internal knowledge, the role of greenhouse gases in climate change was not well understood." Id. ¶¶ 125-126. Through the Global Climate Coalition, both Exxon and Mobil pushed a false narrative that climate science was plagued with doubts. Id. ¶¶ 127-147. In 1998, Exxon and other corporations established the "Global Climate Science Communications Team" in cahoots with a veteran of Philip Morris' tobacco-misinformation campaign. Id. ¶¶ 148-149. Using a panoply of doubt-sowing tactics -- including "advertorials" in the New York Times typically published every Thursday for decades -- this organization, and ExxonMobil in particular, sought to publicly shroud the devastating facts that it internally knew. Id. ¶¶ 157-170. ExxonMobil continued this effort "to downplay and obscure the risks posed by climate change" through the 2000s and 2010s. Id. ¶¶ 187-196.

3. ExxonMobil's Misrepresentations to Investors

The Commonwealth alleges that ExxonMobil has deceived its Massachusetts investors through misrepresentations and omissions, both general and specific. In general, "ExxonMobil's supposed climate risk disclosures together assert that ExxonMobil has accounted for and is responsibly managing climate change risks and that, in any event, they pose no meaningful threat to the Company's business model, its assets, or the value of its securities." Id. ¶ 416. Yet "[t]hese communications are deceptive because they deny or ignore the numerous systemic risks that climate change presents to the global economy, the world's financial markets, the fossil fuel industry, and ultimately ExxonMobil's own business." Id. ¶ 417. Indeed, the Commonwealth claims that "ExxonMobil's affirmative disclosures, which incorporate its energy forecasts, not only fail to disclose these risks; in many cases, the disclosures deceptively deny and downplay these risks." Id. ¶ 430.

***4** More specifically, the Commonwealth alleges that "ExxonMobil has repeatedly represented to investors ... that ExxonMobil used escalating proxy costs" as a way to estimate the financial dangers of climate change to the corporation, yet often "ExxonMobil was not actually using proxy costs in this manner." Id. ¶¶ 472-473. Documents disclosed through other litigation revealed that ExxonMobil was internally using a lower proxy carbon cost than what it told investors, or that it failed entirely to use a proxy cost of carbon across many sectors of its business. Id. ¶¶ 473-589. By not internally applying the proxy cost as it publicly claimed to do, ExxonMobil avoided "project[ing] billions of dollars of additional climate-related costs." Id. ¶ 595.

4. ExxonMobil's Misrepresentations to Consumers

The Commonwealth alleges that "ExxonMobil has misled and continues to mislead Massachusetts consumers by representing that their use of ExxonMobil's Synergy™ fuels and 'green' Mobil 1™ motor oil products will reduce greenhouse gas emissions." Id. ¶ 601. In marketing these products, "ExxonMobil makes misleading representations about the products' environmental benefits and fails to disclose that the development, refining, and consumer use of ExxonMobil fossil fuel products emit large volumes of greenhouse gases." Id.

The Commonwealth also charges ExxonMobil with "greenwashing," which it defines as "advertising and promotional materials designed to convey a false impression that a company is more environmentally responsible than it really is, and so to induce consumers to purchase its products." Id. ¶ 603. In short, "ExxonMobil promotes its products by falsely depicting ExxonMobil as a leader in addressing climate change through technical innovation and various 'sustainability' measures, without disclosing (i) ExxonMobil's ramp up of fossil fuel production in the face of a growing climate emergency; (ii) the minimal investment ExxonMobil is actually making in clean energy compared to its investment in business-as-usual fossil fuel production; and (iii) ExxonMobil's efforts to undermine measures that would improve consumer fuel economy." Id. ¶ 604. The consequences of all these lies are dire, Massachusetts asserts, because "ExxonMobil's deceptive representations and omissions in its communications with consumers, as with its omissions and misrepresentations to investors, had the effect of delaying meaningful action to address climate change." Id. ¶ 767.

5. Causes of Action

The Commonwealth brings four causes of action against ExxonMobil under the Massachusetts Consumer Protection Act, two for defrauding investors and two for defrauding consumers:

(1) Count I alleges that ExxonMobil has misrepresented and failed to disclose material facts regarding systemic climate change risks to its investors, in violation of Mass. Gen. Laws ch. 93A, § 4 and 940 C.M.R. §§ 3.16(1)-(2). Compl. ¶¶ 781-793.

(2) Count II alleges that ExxonMobil has made materially false and misleading statements to Massachusetts investors regarding its use of a proxy cost of carbon, in violation of Mass. Gen. Laws ch. 93A, § 4. Id. 794-806.

(3) Count III alleges that ExxonMobil has deceived Massachusetts consumers by misrepresenting the purported environmental benefit of using its "Synergy™" and " 'green' Mobil 1™" products and failing to disclose the risks of climate change caused by its fossil fuel products, in violation of Mass. Gen. Laws ch. 93A, § 2. Compl. ¶¶ 807-820.

(4) Count IV alleges that ExxonMobil has deceived Massachusetts consumers by promoting a false and misleading "greenwashing" campaign, in violation of Mass. Gen. Laws ch. 93A, § 2. Id. ¶¶ 821-830.

The Commonwealth seeks declaratory and injunctive relief, the statutory penalty of $5,000 for each violation of the Massachusetts Consumer Protection Act, and an award of costs and attorneys' fees. Id. 204-05.

II. ANALYSIS

***5** ExxonMobil asserts four possible bases for federal jurisdiction in this case: (1) complete preemption; (2) embedded federal question; (3) federal officer removal; and (4) the Class Action Fairness Act. After first canvassing the legal framework of removal, the well-pleaded complaint rule, and other judicial opinions in similar cases, the Court will analyze these four potential grounds for federal jurisdiction.

A. Removal Jurisdiction

[2] [3] [4] [5]A defendant may remove a case to federal court when the federal district court would have original jurisdiction, 28 U.S.C. § 1441, such as federal-question jurisdiction, id. § 1331. "The right of removal is entirely a creature of statute and 'a suit commenced in a state court must remain there until cause is shown for its transfer under some act of Congress.' " Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32, 123 S.Ct. 366, 154 L.Ed.2d 368 (2002) (quoting Great Northern Ry. Co. v. Alexander, 246 U.S. 276, 280, 38 S.Ct. 237, 62 L.Ed. 713 (1918)). Removal statutes generally "are to be strictly construed." Id. "[T]he burden to prove that a federal question has been pled lies with the party seeking removal," and "any ambiguity as to the source of law ... ought to be resolved against removal." Rossello-Gonzalez v. Calderon-Serra, 398 F.3d 1, 11 (1st Cir. 2004). When removal is based on class action or federal officer involvement, however, no presumption against removal applies. See Dart Cherokee Basin Operating Co., LLC v. Owens, 574 U.S. 81, 135 S. Ct. 547, 554, 190 L.Ed.2d 495 (2014) (no presumption against removal under the Class Action Fairness Act); Watson v. Philip Morris Co., 551 U.S. 142, 150, 127 S.Ct. 2301, 168 L.Ed.2d 42 (2007) (federal officer removal statute must be "liberally construed").

B. The Well-Pleaded Complaint Rule

[6] [7] [8] [9]"The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). "The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." Id. Thus, "a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint." Id. at 393, 107 S.Ct. 2425. "As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim." Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003).

C. The Complete Preemption Exception

[10]The Supreme Court has articulated several exceptions to the well-pleaded complaint rule. One such exception occurs "when a federal statute wholly displaces the state-law cause of action through complete pre-emption." Id. at 8, 123 S.Ct. 2058; López–Muñoz v. Triple–S Salud, Inc., 754 F.3d 1, 5 (1st Cir. 2014) (describing "complete preemption," also called "the artful pleading doctrine," as "a narrow exception to the well-pleaded complaint rule"). The First Circuit has explained that "[c]omplete preemption is a short-hand for the doctrine that in certain matters Congress so strongly intended an exclusive federal cause of action that what a plaintiff calls a state law claim is to be recharacterized as a federal claim." Fayard v. Northeast Vehicle Servs., LLC, 533 F.3d 42, 45 (1st Cir. 2008). For a court to so recharacterize -- or "transmogrif[y]," Lawless v. Steward

Health Care Sys., LLC, 894 F.3d 9, 18 (1st Cir. 2018) -- a purported state claim, there must be "exclusive federal regulation of the subject matter of the asserted state claim coupled with a federal cause of action for wrongs of the same type." Fayard, 533 F.3d at 46 (citations omitted). "The linchpin of the complete preemption analysis is whether Congress intended that federal law provide the exclusive cause of action for the claims asserted by the plaintiff." López–Muñoz, 754 F.3d at 5.

D. The Five District Court Decisions

***6** Five district courts have faced similar motions to remand from governmental plaintiffs suing oil companies on state law grounds related to climate change. Four of those courts (in four separate circuits) have remanded, including the District Court for the District of Rhode Island, a decision now on appeal before the First Circuit.[5] The Fourth and Ninth Circuits recently affirmed two such remands, though their analyses were confined to the federal officer removal issue because appellate jurisdiction over the other issues decided by the district courts was foreclosed by precedent. County of San Mateo v. Chevron Corp., 960 F.3d 586, 602-03 (9th Cir. 2020); Mayor & City Council of Baltimore v. BP P.L.C., 952 F.3d 452, 456 (4th Cir. 2020).

[5] Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142 (D.R.I. 2019), appeal docketed, No. 19-1818 (1st Cir. Aug. 20, 2019); Board of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947 (D. Colo. 2019), appeal docketed, No. 19-1330 (10th Cir. Sept. 9, 2019); Mayor & City Council of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019), aff'd, 952 F.3d 452 (4th Cir. 2020), petition for cert. docketed, No. 19-1189 (Mar. 31, 2020); County of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934 (N.D. Cal. 2018), aff'd in part, 960 F.3d 586 (9th Cir. 2020).

In contrast, Judge Alsup of the District Court for the Northern District of California denied the motion to remand of Oakland and San Francisco. California v. BP P.L.C., Nos. C 17-06011 WHA, 2018 WL 1064293, at *5 (N.D. Cal. Feb. 27, 2018), vacated and remanded sub nom. City of Oakland v. BP PLC, 960 F.3d 570 (9th Cir. 2020). Judge Alsup reasoned that removal was proper because the cities' "nuisance claims -- which address the national and international geophysical phenomenon of global warming -- are necessarily governed by federal common law." Id. at *2. Though he did not use the term, Judge Alsup's holding is intelligible only as an application of the complete preemption doctrine. See Gil Seinfeld, Climate Change Litigation in the Federal Courts: Jurisdictional Lessons from California v. BP (hereinafter "Jurisdictional Lessons"), 117 Mich. L. Rev. Online 25, 32 (2018) ("Despite Judge Alsup's failure to say so ... California v. BP is best understood as a complete preemption case.").[6] Judge Alsup then held that the court could not create a federal common law remedy in this case due to separation-of-powers concerns and dismissed the claims. City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017 (N.D. Cal. 2018), vacated and remanded, 960 F.3d 570 (9th Cir. 2020). One other district court has followed Judge Alsup's logic in holding that New York City's state law claims are preempted by federal common law (which, in turn, is displaced by the Clean Air Act), though that case was filed originally in federal court on diversity jurisdiction and so does not address the well-pleaded complaint rule. City of New

York v. BP P.L.C., 325 F. Supp. 3d 466, 471-76 (S.D.N.Y. 2018), appeal docketed, No. 18-2188 (2d Cir. July 26, 2018).

[6] In truth, Judge Alsup's confusion is due to the Ninth Circuit precedent he was following, which seems to consider "federal common law" to be a distinct category of removability apart from "complete preemption." See Wayne v. DHL Worldwide Express, 294 F.3d 1179, 1183-84 (9th Cir. 2002). Yet removability on the basis of federal common law, if it exists at all, must rest on the same theory of "complete preemption" articulated by the Supreme Court. In vacating and remanding Judge Alsup's decision, the Ninth Circuit analyzed the issue under the complete preemption framework but failed to clarify its earlier case law. See City of Oakland, 960 F.3d at 581-83. In any event, the proper inquiry must follow the Supreme Court's "complete preemption" line of cases.

***7** The courts that disagreed with Judge Alsup's reasoning offered two primary objections. First, that the federal common law relating to pollution from greenhouse gases has been displaced, see American Elec. Power Co. v. Connecticut ("AEP"), 564 U.S. 410, 424, 131 S.Ct. 2527, 180 L.Ed.2d 435 (2011); Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 854–58 (9th Cir. 2012), and thus the case may not be "removed to federal court on the basis of federal common law that no longer exists." County of San Mateo, 294 F. Supp. 3d at 937; Baltimore, 388 F. Supp. 3d at 557 (noting that "any such federal common law claim has been displaced by the Clean Air Act").[7] Judge Alsup, however, distinguished AEP and Kivalina on the grounds that San Francisco's and Oakland's federal common law claims (1) attacked the production and sale of fossil fuels, not their emissions; and (2) alleged a tort based on global conduct, not simply domestic behavior, as "foreign emissions are out of the EPA and Clean Air Act's reach." California, 2018 WL 1064293, at *4.

[7] A related question is whether Judge Alsup is correct that federal common law may completely preempt state law even where (as he subsequently ruled in this case) a federal common law cause of action never springs into existence due to separation-of-powers constraints. Indeed, even Judge Alsup acknowledged that this bait-and-switch "may seem peculiar." City of Oakland, 325 F. Supp. 3d at 1028. On the other hand, the First Circuit has explained that, in complete preemption cases, "the superseding federal scheme may be more limited or different in its scope and still completely preempt," such that the federal cause of action may not provide relief and the state claim "simply disappears." Fayard, 533 F.3d at 46. Even so, it is far from clear that this reasoning would apply when the federal scheme is not simply "more limited" but has not been created at all.
The parties obliquely debate this issue before this Court. Mem. Remand 17; Opp'n 15-16. Since other considerations in this case counsel against adopting Judge Alsup's conclusion, however, the Court need not settle this question.

Second, that complete preemption must emanate from a congressional directive; judge-made law simply cannot do the trick. This is the criticism articulated by Professor Seinfeld, Jurisdictional Lessons 32-38, and echoed by the district courts

that have parted ways with Judge Alsup. See Baltimore, 388 F. Supp. 3d at 556-58; Rhode Island, 393 F. Supp. 3d at 148-49; Boulder County, 405 F. Supp. 3d at 973; County of San Mateo, 294 F. Supp. 3d at 937-38. On this view, Judge Alsup committed a categorical error in extending the complete preemption doctrine beyond statutory terra firma to ethereal federal common law.

The Ninth Circuit recently vacated and remanded Judge Alsup's ruling. City of Oakland v. BP P.L.C., 960 F.3d 570 (9th Cir. 2020). The panel held that the Clean Water Act does not completely preempt state causes of action. Id. at 581-83. Oddly, the Ninth Circuit did not address Judge Alsup's rationale that federal common law, not the Clean Water Act, is the source of complete preemption. In its silent dismissal of this notion, the Ninth Circuit panel apparently assumed, along with Professor Seinfeld and the other district courts, that complete preemption may flow only from a statute. The panel also rejected an alternative basis for federal jurisdiction not reached by Judge Alsup, namely the embedded federal question doctrine, which will be discussed below. See id. at 579-81.

E. Federal Common Law Does Not Govern These Claims

[11]ExxonMobil argues that this case is removable because, following Judge Alsup's lead in California, these claims arise under federal common law which completely preempts the state causes of action. Notice 12-14; Opp'n 14-16. In resolving the present motion to remand, the Court need not decide the major points of dispute between Judge Alsup and the other courts.[8] Even if Judge Alsup is correct that (1) federal common law may completely preempt state causes of action and (2) the Clean Air Act would not displace any federal common law claims here, the Court would still lack jurisdiction. That is because the Commonwealth's claims simply do not implicate federal common law in the first place. Accordingly, complete preemption fails because these claims do not arise under federal common law.

[8] In a nutshell, Professor Seinfeld argues that complete preemption is applicable only to statutes, not federal common law. Jurisdictional Lessons 32-38. The district courts in Rhode Island, Baltimore, Boulder County, and County of San Mateo have rapidly embraced this theory -- and the Ninth Circuit's opinion in City of Oakland, 960 F.3d at 581-83, appears to rest on this assumption. This Court is not persuaded. The main evidence for Professor Seinfeld's view appears to be that case law generally refers to congressional intent as the touchstone of complete preemption. See López–Muñoz, 754 F.3d at 5; Rhode Island, 393 F. Supp. 3d at 148-49 (collecting citations). Yet that language reflects little more than the fact that the cited cases all involved statutory interpretation. Those opinions were not addressing federal common law at all.
Moreover, two reasons support applying the complete preemption doctrine in federal common law cases. First, the Supreme Court appears to have done so in at least one scenario. See Beneficial Nat'l Bank, 539 U.S. at 8 n.4, 123 S.Ct. 2058 (acknowledging complete preemption for "possessory land claims under state law brought by Indian tribes because of the uniquely federal 'nature and source of the possessory rights of Indian tribes.' " (quoting Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 667, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974))); County of

Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226, 233-36, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) (explaining that the tribe's cause of action for possession arose under "federal common law"). Another example may be removal under the federal common law of foreign relations, which some circuits have recognized and analogized to complete preemption. See Republic of Philippines v. Marcos, 806 F.2d 344, 353-54 (2d Cir. 1986). But see Patrickson v. Dole Food Co., 251 F.3d 795, 802 n.5 (9th Cir. 2001) (questioning the Second Circuit's analogy).

The second reason to reject Professor Seinfeld's sharp distinction between statutes and federal common law goes to first principles. In our post-Erie world, the "new" federal common law exists only at the direction of Congress "or where the basic scheme of the Constitution so demands." AEP, 564 U.S. at 421, 131 S.Ct. 2527. It is not a creature of judicial inventiveness. If so, on what grounds can federal common law be categorically excluded from the complete preemption doctrine? Just as a congressional policy may sometimes require the federal cause of action to be exclusive and thus completely preempt state law, so too the "basic scheme of the Constitution" may sometimes require an exclusively federal cause of action.

***8** [12]The Supreme Court recently reiterated that federal common law may exist only when certain "strict conditions" are met, "one of the most basic" being "that "common lawmaking must be 'necessary to protect uniquely federal interests.' " Rodriguez v. FDIC, —— U.S. ——, 140 S. Ct. 713, 717, 206 L.Ed.2d 62 (2020) (quoting Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981) & Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964)). In other words, federal common law may be created "where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism." Illinois v. City of Milwaukee, 406 U.S. 91, 105 n.6, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972). In particular, the Supreme Court has repeatedly recognized that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." AEP, 564 U.S. at 421, 131 S.Ct. 2527 (quoting Milwaukee, 406 U.S. at 103, 92 S.Ct. 1385).[9] The Ninth Circuit has surely overstated matters in saying that "federal common law includes the general subject of environmental law," Kivalina, 696 F.3d at 855, but federal public nuisance law undoubtedly applies to certain serious environmental injuries.[10]

[9] Contra City of Oakland, 960 F.3d at 579-80 (overbroad dictum that "the Supreme Court has not yet determined that there is a federal common law of public nuisance relating to interstate pollution"). What the Supreme Court left undecided is whether private and municipal plaintiffs may bring such a claim, and whether the "scale and complexity" of global warming distinguish it "from the more bounded pollution giving rise to past federal nuisance suits." AEP, 564 U.S. at 422-23, 131 S.Ct. 2527.

[10] The Supreme Court "has not defined the type of harm that might give rise to a federal public nuisance claim," but it has

> suggested that such a claim is appropriate "when 'the health and comfort of the inhabitants of a State are threatened' to the point where a sovereign would be tempted to go to war." Note, The Sovereign Self-Preservation Doctrine in Environmental Law, 133 Harv. L. Rev. 621, 622-23, 632 (2019) (quoting Missouri v. Illinois, 180 U.S. 208, 241, 21 S.Ct. 331, 45 L.Ed. 497 (1901)). Such a definition "would likely restrict the federal public nuisance claim to environmental or public health threats, although severe economic injuries are conceivably included as well." Id. at 632.

The allegations in this complaint are far afield of any "uniquely federal interests." The complaint, fairly read, alleges that ExxonMobil hid or obscured the scientific evidence of climate change and thus duped its investors about the long-term health of its corporation and defrauded consumers of its fossil fuel products. The Commonwealth's analogy to the tobacco industry, e.g., Compl. ¶¶ 116-117; Mem. Remand 13, is apt. As part of the tobacco multi-district litigation, Bolivia and Venezuela sued 18 tobacco companies in state court on common law claims "that the tobacco industry fraudulently concealed the dangers of smoking." In re Tobacco/Governmental Health Care Costs Litig., 100 F. Supp. 2d 31, 34 (D.D.C. 2000). The tobacco companies argued for removal on the grounds that the complaint implicated the federal common law of foreign relations. Id. at 35. Rejecting this argument, the court succinctly explained that "[t]he question is whether the tobacco industry or the named defendants engaged in negligence, fraud, misrepresentation, concealment, or deceit. That question is not governed by a federal common law at all, but by state common law." Id. at 37. This analysis holds for the claims against ExxonMobil. In short, there is no federal common law here because "[n]othing about the allegations in these lawsuits implicates interests that are 'uniquely federal.' " Id.

In this respect, this case is distinguishable from California and City of New York in that both of those cases involved public nuisance claims with a theory of damages tied to the impact of climate change. On those allegations, Judge Alsup concluded that "a uniform standard of decision is necessary," adding:

> ***9** If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints, a problem centuries in the making (and studying) with causes ranging from volcanoes, to wildfires, to deforestation to stimulation of other greenhouse gases—and, most pertinent here, to the combustion of fossil fuels. The range of consequences is likewise universal -- warmer weather in some places that may benefit agriculture but worse weather in others, e.g., worse hurricanes, more drought, more crop failures and -- as here specifically alleged -- the melting of the ice caps, the rising of the oceans, and the inevitable flooding of coastal lands. Taking the complaints at face value, the scope of the worldwide predicament demands the most comprehensive view available, which in our

> American court system means our federal courts and our federal common law. A patchwork of fifty different answers to the same fundamental global issue would be unworkable.

California, 2018 WL 1064293, at *3; see also Robert L. Glicksman & Richard E. Levy, A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change, 102 Nw. U. L. Rev. 579, 598-600, 606-10 (2008) (evaluating value of uniform environmental regulations).

Without expressing an opinion on Judge Alsup's reasoning, the Court notes that it does not apply to the Commonwealth's claims against ExxonMobil since they do not prompt this Court or any other to provide "answers" to the "fundamental global issue" of climate change. Much more modestly, the Commonwealth wants "to hold ExxonMobil accountable for misleading the state's investors and consumers." Compl. ¶ 2. No one doubts that this task falls within the core of a state's responsibility. See, e.g., Edenfield v. Fane, 507 U.S. 761, 769, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) ("[T]here is no question that [a state's] interest in ensuring the accuracy of commercial information in the marketplace is substantial."); Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982) ("[A] State has a quasi-sovereign interest in the health and well-being -- both physical and economic -- of its residents in general."). States routinely enforce consumer protection and securities laws alongside the federal government.[11] Nor has ExxonMobil provided any reason why protecting Massachusetts consumers and investors from fraud implicates "uniquely federal interests." It does not.

[11] See generally James J. Park, Rules, Principles, and the Competition to Enforce the Securities Laws, 100 Cal. L. Rev. 115 (2012); Jared Elosta, Dynamic Federalism and Consumer Financial Protection: How the Dodd-Frank Act Changes the Preemption Debate, 89 N.C. L. Rev. 1273 (2011).

Accordingly, the Court ruled that the complaint's state law claims are not completely preempted.

F. Grable Exception to the Well-Pleaded Complaint Rule

[13]ExxonMobil invokes another exception to the well-pleaded complaint rule found in Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005). Grable established that, in a "slim category" of cases, "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." Gunn v. Minton, 568 U.S. 251, 258, 133 S.Ct. 1059, 185 L.Ed.2d 72 (2013). The Grable inquiry seeks to unearth "an embedded federal question" in a facially state-law complaint. Rhode Island Fishermen's All., Inc. v. Rhode Island Dep't of Envtl. Mgmt., 585 F.3d 42, 48 (1st Cir. 2009)

ExxonMobil asserts that two "federal issues" embedded in the complaint fall within Grable's reach: (1) the complaint " 'touches on foreign relations' and therefore 'must yield to the National Government's policy,' " Opp'n 7 (quoting American Ins. Ass'n v. Garamendi,

539 U.S. 396, 413, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003)); and (2) adjudication of the complaint "would require a factfinder to question the careful balance Congress and federal agencies have struck between greenhouse gas regulation and the nation's energy needs," id. at 9. Massachusetts responds that "[n]one of those policies is implicated by and no determination of federal law need be made in the Commonwealth's action ... since this case is about Exxon's marketing and sales misrepresentations about its products and securities to Massachusetts consumers and investors." Mem. Remand 12.

***10** [14]The Commonwealth is correct. The Court need not reach the question whether ExxonMobil's two asserted "federal issues" would conjure Grable jurisdiction because those issues are simply absent in this case. Contrary to ExxonMobil's caricature of the complaint, the Commonwealth's allegations do not require any forays into foreign relations or national energy policy. It alleges only corporate fraud. Whether ExxonMobil was honest or deceitful in its marketing campaigns and financial disclosures does not necessarily raise any federal issue whatsoever. Cf. Atlantic Richfield Co. v. Christian, —— U.S. ——, 140 S. Ct. 1335, 1350 n.4, 206 L.Ed.2d 516 (2020). Every court to consider the question has rejected the oil-industry defendants' arguments for Grable jurisdiction. See City of Oakland, 960 F.3d at 579-81. Boulder County, 405 F. Supp. 3d at 965-68; Rhode Island, 393 F. Supp. 3d at 150-51; Baltimore, 388 F. Supp. 3d at 558-61; County of San Mateo, 294 F. Supp. 3d at 938.[12] That unanimity is all the more telling since those cases involved nuisance claims in which the states and local governments sought damages from oil companies to offset the disastrous effects of climate change. Such sweeping theories of liability and relief arguably implicate national and international climate policies, yet those courts still deemed Grable inapplicable. Here, in contrast, Massachusetts relies exclusively on mundane theories of fraud against consumers and investors, without seeking to hold ExxonMobil liable for any actual impacts of global warming. There is no federal issue embedded in this complaint.

[12] Judge Alsup did not reach the Grable question, though he did partially rely on entanglement with foreign affairs as requiring that federal law govern rather than state law. California, 2018 WL 1064293, at *5. For this same reason, Judge Alsup subsequently ruled that federal courts cannot make common law in this area but should leave the matter to the political branches. City of Oakland, 325 F. Supp. 3d at 1024-28; see also City of New York, 325 F. Supp. 3d at 475-76 (same). ExxonMobil also cites the United States' amicus brief before the Ninth Circuit contending that the claims of Oakland and San Francisco threaten to "undermine the exclusive grants of authority to the representative branches of the federal government to conduct the Nation's foreign policy." Opp'n 8 (quoting Brief of the United States as Amicus Curiae in Support of Appellees and Affirmance at 16, City of Oakland v. BP, P.L.C., No. 18-16663 (9th Cir. May 17, 2019)). These arguments do not persuade the Court.

In its opposing memorandum and at oral argument, ExxonMobil leaned heavily on the Fifth Circuit's decision in Board of Comm'rs of Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co., 850 F.3d 714 (5th Cir. 2017). Opp'n 9-10; Tr. Hr'g 15-16, ECF No. 31. That decision affirmed Grable jurisdiction over state law claims relating to dredging activities

by oil companies when "the scope and limitations of a complex federal regulatory framework [we]re at stake." Opp'n 9 (quoting Board of Commissioners, 850 F.3d at 725). Yet the passage of that opinion quoted by ExxonMobil relates to the substantiality prong of the Grable inquiry, not the "necessarily raised" or "actually disputed" prongs. Indeed, Board of Commissioners is palpably distinguishable because the state law claims at issue were predicated on duties arising from federal statutes, and the "complaint dr[ew] on federal law as the exclusive basis for holding [d]efendants liable for some of their actions." 850 F.3d at 721-22. Nothing of the kind is presented by the Commonwealth's complaint.

Accordingly, the Court declined to find Grable jurisdiction over the Commonwealth's claims.

G. Federal Officer Jurisdiction

[15]ExxonMobil next argues that this case is removable due to the federal officer removal statute, see Opp'n 16-18, which provides that an action may be removed when the suit is against "any officer (or any person acting under that officer) of the United States ... for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). As the Fourth Circuit recently stated the test in Baltimore: "to remove a case under § 1442(a)(1), a private defendant must show: '(1) that it "act[ed] under" a federal officer, (2) that it has "a colorable federal defense," and (3) that the charged conduct was carried out for [or] in relation to the asserted official authority.' " 952 F.3d at 461-62 (alteration in original) (quoting Sawyer v. Foster Wheeler LLC, 860 F.3d 249, 254 (4th Cir. 2017)).

***11** ExxonMobil argues that it was "acting under" federal officers because it "has explored for, developed, and produced oil and gas on federal lands pursuant to leases issued by the federal government," and those "federal leases contain many provisions that demonstrate ExxonMobil acted at the direction of a federal officer." Notice 14-15. ExxonMobil also asserts various colorable federal defenses, such as preemption, the foreign affairs doctrine, and violations of the Commerce Clause, Due Process Clause, and First Amendment. Id. at 16.

The Commonwealth offers no argument that ExxonMobil was not "acting under" federal officials in its drilling and oil production activities. But see Baltimore, 952 F.3d at 463-66 (holding that oil companies were not "acting under" federal officials, within the meaning of § 1442(a)(1), in developing oil and gas pursuant to federal leases); County of San Mateo, 960 F.3d at 601-03 (same); Boulder County, 405 F. Supp. 3d at 976 (same, with specific reference to ExxonMobil). Nor does it argue that ExxonMobil's purported federal defenses are not "colorable." Instead, the Commonwealth focuses its firepower on the "relating to" element, § 1442(a)(1), arguing that "there is simply no nexus, causal or otherwise, between the Commonwealth's causes of action and any Exxon conduct purportedly taken at the direction of federal officials." Mem. Remand 18-19.

This is the nub of the dispute. ExxonMobil seizes on a few lines here and there in the complaint to construe it as alleging that "ExxonMobil's federally-directed actions 'are a major cause of global climate change' and will have 'serious, life-threatening, and costly impacts on the people of the Commonwealth.' " Opp'n 18 (quoting Compl. ¶¶ 54-69, 222-252). Taking these and other lines out of context, ExxonMobil argues that this "suit is thus ultimately directed at stopping or reducing the actions federal leases obliged ExxonMobil to pursue, namely the production and sale of fossil fuels." Id. at 17; id. (quoting Compl. ¶¶

601-602, 645) ("Plaintiff alleges that ... ExxonMobil's fossil fuel products ... could never be considered 'safe and environmentally beneficial' because 'the development, production, refining, and consumer use of ExxonMobil fossil fuel products' increase 'greenhouse gas emissions.' "). Massachusetts insists that this reading of the complaint is a "sleight-of-hand," as "[t]he Complaint has nothing to do with efforts to stop or reduce Exxon's production or sale of its fossil fuel products" but, in truth, is only "a state action aimed at protecting consumers and investors from Exxon's deceptive representations in the marketplace." Mem. Remand 17-18.

Massachusetts is correct about the fairest reading of the complaint, though it erroneously describes the legal standard for federal officer removal. The Commonwealth mistakenly quotes Watson v. Philip Morris Cos. for the proposition that federal officer removal is permissible only if "the 'act[s]' that are the subject of the petitioner's complaint" were carried out under the direction of federal officers. Mem. Remand 18 (alteration and emphasis in original) (quoting 551 U.S. 142, 150, 127 S.Ct. 2301, 168 L.Ed.2d 42 (2007)). Yet Watson predates the Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545, of which section (b)(1)(A) amended the federal officer removal statute to add the words "or relating to" before "any act under color of such office." 28 U.S.C. § 1442(a)(1). This amendment was, plainly enough, "intended to broaden the universe of acts that enable Federal officers to remove to Federal court." H.R. Rep. No. 112-17, pt. 1, at 6 (2011). "By the Removal Clarification Act, Congress broadened federal officer removal to actions, not just causally connected, but alternatively connected or associated, with acts under color of federal office." Latiolais v. Huntington Ingalls, Inc., 951 F.3d 286, 292 (5th Cir. 2020) (en banc) (emphases in original).[13]

[13] The Rhode Island Court also relied upon the lack of a "causal connection" between the oil companies' marketing practices and the conduct governed by the federal leases in rejecting federal officer removal jurisdiction, uncritically citing pre-2011 case law. 393 F. Supp. 3d at 152 (citing Mesa v. California, 489 U.S. 121, 131–32, 109 S.Ct. 959, 103 L.Ed.2d 99 (1989)). For the reasons explained below, however, a properly up-to-date analysis reaches the same result.

***12** [16]Nonetheless, even under this more expansive standard, ExxonMobil's marketing and sale tactics were not plausibly "relat[ed] to" the drilling and production activities supposedly done under the direction of the federal government. ExxonMobil seeks to bridge this gap by overreading the complaint, arguing that the "ultimate[ ]" goal of the complaint is "stopping or reducing the actions federal leases obliged ExxonMobil to pursue, namely the production and sale of fossil fuels" -- and that these activities are "at the heart" of the complaint. Opp'n 16-17. A fair reading of the complaint tells a far different story.

The Fourth Circuit recently rejected a similar attempt by oil-industry defendants to establish removal on this basis:

> When read as a whole, the Complaint clearly seeks to challenge the promotion and sale of fossil fuel products without warning and abetted by a sophisticated disinformation campaign. Of course, there are many references to fossil fuel

> production in the Complaint, which spans 132 pages. But, by and large, these references ... [are] not the source of tort liability. Put differently, Baltimore does not merely allege that Defendants contributed to climate change and its attendant harms by producing and selling fossil fuel products; it is the concealment and misrepresentation of the products' known dangers -- and simultaneous promotion of their unrestrained use -- that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change.

Baltimore, 952 F.3d at 467; see also Boulder County, 405 F. Supp. 3d at 977.

In Baltimore, the actual production of fossil fuels was far more related to the complaint than it is here, because Baltimore sought damages for climate-related injuries while Massachusetts seeks only fines for the alleged deceptions. Even so, the Fourth Circuit found it easy to separate the properly pled misrepresentation allegations from the surrounding context of fossil fuel production, holding that the alleged "disinformation campaign" was the core of the complaint and was unrelated to any action under federal officials. 952 F.3d at 467. This Court similarly construed the Commonwealth's complaint and therefore rebuffed ExxonMobil's effort to remove the case on the grounds of the federal officer removal statute.

H. Class Action Jurisdiction

ExxonMobil's final argument is that the case is removable under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), because the complaint brought by the Attorney General is essentially a class action in disguise. Notice 16-17; Opp'n 18-20. A "class action" filed in state court is removable, 28 U.S.C. § 1453(b), provided there is minimal diversity and the aggregate amount in controversy exceeds $5,000,000. Mississippi ex rel. Hood v. AU Optronics Corp., 571 U.S. 161, 134 S. Ct. 736, 740, 187 L.Ed.2d 654 (2014). The statute defines the term "class action" to mean "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B).

The present complaint was not filed under Rule 23, of course, but ExxonMobil contends that Mass. Gen. Laws ch. 93A, § 4, which authorizes the Attorney General to bring these claims "in the public interest," amounts to a "similar State statute" and therefore establishes federal jurisdiction. Opp'n 18-20. Massachusetts retorts that its complaint "plainly falls within the category of parens patriae actions," which are not similar to a class action under Rule 23 because "a Chapter 93A claim requires none of the elements of a state or federal Rule 23 'class action' -- numerosity, typicality, commonality, or notice to all members of a class." Mem. Remand 20.[14]

[14] Massachusetts could have argued (but did not) that even if the complaint is a "class action" within the meaning of CAFA there is not even minimal diversity because the Commonwealth is not a

"citizen" for purposes of diversity jurisdiction, Moor v. Alameda County, 411 U.S. 693, 717, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), and the Commonwealth is "the real party in interest" rather than the purported class members. See AU Optronics Corp. v. South Carolina, 699 F.3d 385, 394 (4th Cir. 2012); Illinois v. AU Optronics Corp., 794 F. Supp. 2d 845, 856 (N.D. Ill. 2011). This argument is not unique to CAFA, and its corollary could have been raised by ExxonMobil on the basis of the general diversity statute; that is, that the individual consumers and investors are the real parties in interest (with Massachusetts being only a nominal party) and therefore there is complete diversity. See In re Standard & Poor's Rating Agency Litig., 23 F. Supp. 3d 378, 401-07 (S.D.N.Y. 2014). Since neither Massachusetts nor ExxonMobil raises these arguments based on divining the "real party in interest," the Court need not address them. But see West Virginia ex rel. McGraw v. CVS Pharmacy, Inc., 646 F.3d 169, 180 (4th Cir. 2011) (Gilman, J., dissenting) (collapsing the "similarity" inquiry into the "real party in interest" inquiry).

***13** [17] [18]The Commonwealth has the better of this argument. Admittedly, the statutory definition of "class action" is perplexing. For one thing, it states that "the term 'class action' means any civil action filed ... as a class action," 28 U.S.C. § 1332(d)(1)(B), which is hopelessly "circular." West Virginia ex rel. McGraw v. CVS Pharmacy, Inc., 646 F.3d 169, 179 (4th Cir. 2011) (Gilman, J., dissenting). For another, the statute does not disclose the criteria for evaluating when a state statute is "similar" to Rule 23. Id. In making sense of the statute, the Fourth Circuit reasoned that "Congress undoubtedly intended to define 'class action' in terms of its similarity and close resemblance to Rule 23." Id. at 174 (majority opinion). Somewhat differently, the Second Circuit explained that there are two separate elements, such that a state-law based CAFA class action "must be filed under a statute or rule that is both similar to Rule 23 and authorizes the action to proceed 'as a class action.' " Purdue Pharma L.P. v. Kentucky, 704 F.3d 208, 214 (2d Cir. 2013) (emphases supplied). However the sentence is parsed, courts have converged upon a test of similarity that looks to "the familiar hallmarks of Rule 23 class actions; namely, adequacy of representation, numerosity, commonality, typicality, [and] the requirement of class certification." Id.[15] A "similar" state statute or rule need not contain all of the other conditions and administrative aspects of Rule 23, but it must "at a minimum, provide a procedure by which a member of a class whose claim is typical of all members of the class can bring an action not only on his own behalf but also on behalf of all others in the class." Id. at 217 (alterations deleted) (quoting CVS, 646 F.3d at 175).

[15] The Second Circuit considers the certification requirement itself as a relevant factor in determining similarity, id. at 216 n.6, whereas the Fourth Circuit refers only to "the four criteria stated in Rule 23(a)," CVS, 646 F.3d at 175. Cf. West Virginia ex rel. McGraw v. Comcast Corp., 705 F. Supp. 2d 441, 453 (E.D. Pa. 2010) (identifying the "three baseline requirements" for protecting the interests of unnamed plaintiffs in class actions as "1) notice, 2) an opt-out opportunity, and 3) adequate representation").

On this basis, the Second, Fourth, Fifth, Seventh, and Ninth Circuits have held that CAFA generally does not confer federal jurisdiction over state parens patriae actions. Id.; CVS, 646 F.3d at 175-77 (holding that state attorney general's consumer protection claim was not removable under CAFA); Mississippi ex rel. Hood v. AU Optronics Corp., 701 F.3d 796, 798-99 (5th Cir. 2012), rev'd on other grounds, 571 U.S. 161, 134 S. Ct. 736, 739, 187 L.Ed.2d 654 (2014); LG Display Co. v. Madigan, 665 F.3d 768, 774 (7th Cir. 2011); Washington v. Chimei Innolux Corp., 659 F.3d 842, 848-49 (9th Cir. 2011). Though the First Circuit has not addressed the issue, it denied review when a district court in this circuit followed the consensus. New Hampshire v. Purdue Pharma, No. 17-cv-427-PB, 2018 WL 333824, at *2-3 (D.N.H. Jan. 9, 2018) (holding that a New Hampshire's suit alleging fraud by an opioid medication company is a "straightforward parens patriae action that bears no resemblance to a Rule 23 class action"), review denied, No. 17-8041 (1st Cir. Jan. 31, 2018).[16]

[16] The class action question did not come up in Rhode Island v. Chevron Corp., so the First Circuit will have no occasion to address the issue when it considers that case on appeal. Nor was class action removal raised in County of San Mateo, Boulder County, or Baltimore.

Here, the authorizing statute for the Attorney General's claims, Mass. Gen. Laws ch. 93A, § 4, contains no procedural requirements akin to those of Rule 23, such as adequacy, typicality, numerosity, commonality, or certification. It is not "similar" to Rule 23 within the meaning of CAFA, as the consensus of judicial authority construes that statute.

ExxonMobil argues that those cases are either wrongly decided or distinguishable. It notes that the Massachusetts Appeals Court has stated that "[a]n action brought by the Attorney General under G.L. c. 93A, § 4, is comparable to a class action." Commonwealth v. Chatham Development Co., Inc., 49 Mass. App. Ct. 525, 528, 731 N.E.2d 89 (2000). ExxonMobil further quotes the Supreme Judicial Court's holding that an Attorney General's action under section 4 of chapter 93A may obtain relief for unnamed similarly situated individuals because "[t]he very purpose of the Attorney General's involvement is to provide an efficient, inexpensive, prompt and broad solution to the alleged wrong," and there is "no logical reason" to distinguish the Attorney General's action from "a class action" in this respect. Commonwealth v. DeCotis, 366 Mass. 234, 245-46, 316 N.E.2d 748 (1974).

***14** Yet the fact that Massachusetts courts recognize chapter 93A, section 4 claims as in some ways analogous to class actions does not bring such claims within CAFA's federal jurisdiction unless the state statute contains procedures "similar" to those under Rule 23. Indeed, one court rejected class action removal for a consumer protection claim brought by the state's attorney general even though the authorizing statute expressly called the attorney general's suit "a class action." Nessel ex rel. Michigan v. Amerigas Partners, L.P., 421 F. Supp. 3d 507, 513 (E.D. Mich. 2019); see also National Consumers League v. Flowers Bakeries, LLC., 36 F. Supp. 3d 26, 35-36 (D.D.C. 2014) (holding that private attorney general action, even when brought under statute that authorizes claim "on behalf of the interests of ... a class of consumers," is not "similar" to

Rule 23 because there are no requirements of adequacy, numerosity, commonality, and typicality).

In addition to the absence of typical class-action procedures, chapter 93A, section 4 differs from class actions with respect to the available remedies. Although the statute does authorize damages paid to individuals who suffered loss, it also authorizes injunctive relief and "a civil penalty" payable to the Commonwealth -- which is the relief Massachusetts seeks here. Compl. 205. This underscores that the Commonwealth acts here not as a representative of a class of injured citizens but in its own right as a sovereign. Cf. Baumann v. Chase Inv. Servs. Corp., 747 F.3d 1117, 1123 (9th Cir. 2014) (holding that state statute authorizing class actions with civil penalties payable to both state and the class was not similar to Rule 23 for purposes of CAFA); Kokesh v. SEC, —— U.S. ——, 137 S. Ct. 1635, 1643, 198 L.Ed.2d 86 (2017) (holding that SEC's remedy of disgorgement is a "penalty" because violation was "committed against the United States rather than an aggrieved individual -- this is why, for example, a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution").[17]

[17] ExxonMobil argues that the Commonwealth's securities claims here are "brought only on behalf of a discrete, identifiable group of private individuals and institutions, i.e., Massachusetts investors in ExxonMobil securities." Opp'n 19 n.23. CAFA refers to the nature of the statute in general, though, and not to the circumstances of a particular action, so it is doubtful that the facts of the complaint at hand could bear upon whether the state statute is "similar" to Rule 23. Even were that so, it is clear enough that here the Attorney General's action under chapter 93A, section 4 is a sovereign act and not straightforwardly on behalf of the investors.

ExxonMobil further argues that CAFA's purpose and legislative history indicate that federal jurisdiction is appropriate here. Opp'n 20 (CAFA is to be "interpreted liberally" such that "lawsuits that resemble a purported class action should be considered class actions." (quoting S. Rep. No. 109-14, at 35 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 34)). Whatever the quoted portion of the Senate Report means, its authority is dubious. See College of Dental Surgeons v. Connecticut Gen. Life Ins. Co., 585 F.3d 33, 38 n.2 (1st Cir. 2009) (explaining that this Senate Report was not issued until ten days after enactment, so its "value as a means of discerning congressional intent is clouded"). Nor does this Court read much into the fact that Congress rejected an amendment to CAFA that would have exempted suits by state attorneys general. See CVS, 646 F.3d at 177 ("This legislative history is hardly probative."); cf. Central Bank, N.A. v. First Interstate Bank, N.A., 511 U.S. 164, 187, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." (quoting United States v. Wise, 370 U.S. 405, 411, 82 S.Ct. 1354, 8 L.Ed.2d 590 (1962))).

***15** Finally, nothing much is gained by ExxonMobil's citation of "CAFA's primary objective" as "ensuring 'Federal court consideration of interstate cases of national importance.' " Standard Fire Ins. Co. v. Knowles, 568 U. S. 588, 595, 133 S.Ct. 1345, 185 L.Ed.2d 439 (2013) (quoting CAFA §

2(b)(2), 119 Stat. 5). This is not an interstate case except in the trivial sense in which all diversity cases are interstate; nor is it of special national importance. On the contrary, since "[t]he [Massachusetts] Attorney General initially filed this action in a [Massachusetts] state court to enforce, on behalf of [Massachusetts] and its citizens, state consumer protection laws applicable only in [Massachusetts]," recognizing federal jurisdiction would "risk trampling on the sovereign dignity of the [Commonwealth] and inappropriately transforming what is essentially a [Massachusetts] matter into a federal case." CVS, 646 F.3d at 178.

Accordingly, the Court followed the unmistakable judicial consensus and ruled that the Commonwealth's action is not a "class action" under CAFA.

III. CONCLUSION

The well-pleaded complaint rule governs this case and deprives this Court of jurisdiction over the Commonwealth's thoroughly state law claims. In the absence of any applicable statutory or doctrinal exception to this rule, the Court ALLOWED the motion to remand the case back to state court.

In disclaiming federal jurisdiction over this case, the Court does not quarrel with Judge Alsup's sensible and eloquent plea that "[i]f ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem" of climate change. California, 2018 WL 1064293, at *3. Rather, the Court concludes that the "problem" at issue in this complaint is not geophysical but economic -- namely, has ExxonMobil been sufficiently candid with its investors and customers in Massachusetts about the simmering calamity of global warming? That question is properly for the courts of the Commonwealth to decide.

SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 2769681

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G.L. c. 231, § 59H (Westlaw 2020)

§ 59H. Strategic litigation against public participation; special motion to dismiss

In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss. The court shall advance any such special motion so that it may be heard and determined as expeditiously as possible. The court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

The attorney general, on his behalf or on behalf of any government agency or subdivision to which the moving party's acts were directed, may intervene to defend or otherwise support the moving party on such special motion.

All discovery proceedings shall be stayed upon the filing of the special motion under this section; provided, however, that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted. The stay of discovery shall remain in effect until notice of entry of the order ruling on the special motion.

Said special motion to dismiss may be filed within sixty days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper.

If the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters. Nothing in this section shall affect or preclude the right of the moving party to any remedy otherwise authorized by law.

As used in this section, the words "a party's exercise of its right of petition" shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

Credits: Added by St. 1994, c. 283, § 1. Amended by St. 1996, c. 450, § 245.

HOUSE . . . . . No. 1520

By Mr. Cohen of Newton, petition of David B. Cohen and other members of the General Court for legislation to limit strategic litigation against public participation under the rights of freedom of speech. The Judiciary.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Ninety-Four.

AN ACT PROTECTING THE PUBLIC'S RIGHT TO PETITION GOVERNMENT.

Whereas, The legislature finds and declares that full participation by persons and organizations and robust discussion of issues before legislative, judicial, and administrative bodies and in other public fora are essential to the democratic process, that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, and that such litigation is disfavored and should be resolved quickly with minimum cost to citizens who have participated in matters of public concern.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 231 of the General Laws is hereby amended by inserting after section 59G the following section: —

Section 59H. In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss. The court shall advance any such special motion so that it may be heard and determined with as little delay as possible. The court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right of petition was devoid of any reasonable factual support or any

arguable basis in law and (2) the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

The Attorney General on his behalf or on behalf of any government agency or subdivision to which the moving party's acts were directed may intervene to defend or otherwise support the moving party on such special motion.

All discovery proceedings shall be stayed upon the filing of the special motion under this section; provided, however, that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted. The stay of discovery shall remain in effect until notice of entry of the order ruling on the special motion.

Said special motion to dismiss may be filed within sixty days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper.

If the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters. Nothing in this section shall affect or preclude the right of the moving party to any remedy otherwise authorized by law.

As used in this section, "a party's exercise of its right of petition" shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

SECTION 2. The provisions of this act shall apply to all claims, counterclaims, and cross claims that have not been fully adjudicated on, or subsequent to the effective date of this act.

A party may file a special motion to dismiss a claim, counterclaim, or cross claim in existence on the effective date of this act within sixty days of the effective date of this act.

SECTION 3. This act shall take effect upon passage.

Bill to discourage suits by developers returns to House

By Doris Sue Wong
GLOBE STAFF

When Katherine C. Parsons was asked by state officials to evaluate the work of a tree farmer seeking a permit to build a pier on Clark's Island off Plymouth, she responded that previous tree-cutting had been detrimental to a bird sanctuary on the island.

In fact, said Parsons, a biologist at the Manomet Bird Observatory, the farmer's work had resulted in fewer pairs of nesting herons.

But the tree farmer, whose permit application is now undergoing a comprehensive review process, struck back. He subsequently sued Parsons and the observatory for defamation, said Dorothy Anderson, deputy chief of the attorney general's public protection bureau.

To neighborhood groups, civil libertarians, environmentalists and Anderson, who filed a friend-of-the-court brief urging dismissal of the lawsuit, such cases underscore the need for legislation to curtail the ability of developers and others to use retaliatory lawsuits to silence critics.

A bill to do that is scheduled to be taken up by the Massachusetts House tomorrow. The House passed a similar bill last year by a vote of 114 to 24 and it sailed through the Senate on a voice vote, but it was pocket-vetoed by Gov. Weld. In his message to legislators, Weld said the measure was too broad and argued that citizens already have adequate remedies in the court to protect themselves against malicious lawsuits.

Unless this year's measure has been redrafted to address the governor's concerns, a spokesman for Weld said last week that the governor would be unlikely to sign it.

Sen. Marian Walsh (D-West Roxbury), a proponent of the so-called SLAPP suit bill – the acronym stands for "strategic litigation against public participation" – dismissed Weld's reasoning for the veto as "purely illusory" and "essentially double-talk."

The legislation, Walsh said, would do nothing more than allow defendants to seek a speedy review by the courts to weed out "bully lawsuits" from those raising legitimate claims.

'Every day without this is another day that citizens have to worry about frivolous . . . lawsuits.'

JAMES GOMES
Environmental League of Mass.

Walsh and Rep. David Cohen (D-Newton), another sponsor of the bill, said the measure did not become law last year because it was taken up late in the session, leaving the Legislature no time to override Weld's veto.

"Every day without this is another day that citizens have to worry about frivolous and expensive lawsuits," said James Gomes, head of the Environmental League of Massachusetts.

The legislation would enable defendants to bring a special motion to dismiss within 60 days after a lawsuit is filed asking a judge to rule whether the case has any merit. A judge would be required to order the plaintiff to pay the defendant's attorney fees and costs if he determines the case has no merit.

Under current court procedures, it can take months and multiple steps before such rulings and awards are obtained, resulting in higher legal and psychological costs and a chilling effect on the willingness of citizens to voice their opinions at public meetings and hearings.

The case of a Boston lawyer, who asked not be identified, illustrated the toll.

The lawyer was sued for libel after he sent a letter to an editor enumerating reasons to oppose a proposed commercial development in West Roxbury. Eight months lapsed before the case was dismissed.

"It was just a very distressing situation," the lawyer said. "There was a lot of worry because I felt I couldn't put forth my clients' case as I should. I believe it was done basically to silence me. I think they succeeded."

Energy & Science

Exxon's Plan for Surging Carbon Emissions Revealed in Leaked Documents

Internal projections from one of world's largest oil producers show an increase in its enormous contribution to global warming

By Kevin Crowley and Akshat Rathi
October 5, 2020, 5:00 AM EDT
Updated on October 5, 2020, 10:28 PM EDT

Exxon Mobil Corp. had plans to increase annual carbon-dioxide emissions by as much as the output of the entire nation of Greece, an analysis of internal documents reviewed by Bloomberg shows, setting one of the largest corporate emitters against international efforts to slow the pace of warming.

The drive to expand both fossil-fuel production and planet-warming pollution has come at a time when some of Exxon's rivals, such as BP Plc and Royal Dutch Shell Plc, are moving to curb oil and zero-out emissions. Exxon's own assessment of its $210 billion investment strategy shows yearly emissions rising 17% by 2025, according to internal projections.

Open the Data Dash

More from

Zeta Leaves Trail of Wreckage, Blackouts Across U.S. South

World's Top Wind Turbine Maker Ups the Stakes in Offshore Race

Cargill to Add Giant Sails to Cargo Ships to Curb Emissions

Another Year, Another Dismal Prognosis for Coal

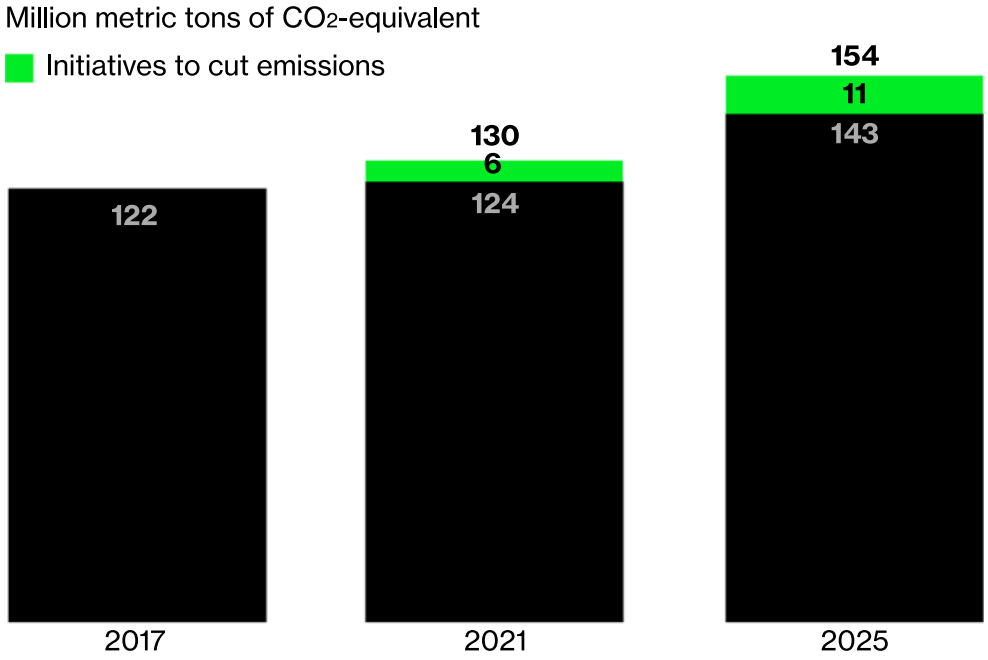
The emissions estimates predate the Covid-19 pandemic, which has slashed global demand for oil and thrown the company's finances into distress, making it unclear if Exxon will complete its plans for growth. The internal figures reflect only some of the measures Exxon would take to reduce emissions, the company said. The largest U.S. oil producer has never made a commitment to lower oil and gas output or set a date by which it will become carbon neutral. Exxon has also never publicly disclosed its forecasts for its own emissions.

But the internal documents show for the first time that Exxon has carefully assessed the direct emissions it expects from the seven-year investment plan adopted in 2018 by Chief Executive Officer Darren Woods. A chart in the documents lists Exxon's direct emissions for 2017—122 million metric tons of CO_2 equivalent—as well as a projected figure for 2025 of 143 million tons. The additional 21 million tons is a net result of Exxon's estimate for ramping up production, selling assets and undertaking efforts to reduce pollution by deploying renewable energy and burying carbon dioxide.

In a statement released after the publication of this story, Exxon said its internal projections are "a preliminary, internal assessment of estimated cumulative emission growth through 2025 and did not include the [additional] mitigation and abatement measures that would have been evaluated in the planning process. Furthermore, the projections identified in the leaked documents have significantly changed, a fact that was not fully explained or prominently featured in the article." Exxon declined to provide any details on the new projections.

Rising Emissions

Exxon's growth in production would have increased emissions 17% by 2025



Source: Internal Exxon Mobil documents seen by Bloomberg News

The internal estimates reflect only a small portion of Exxon's total contribution to climate change. Greenhouse gases from direct operations, such as those measured by Exxon, typically account for a fifth of the total at a large oil company; most emissions come from customers burning fuel in vehicles or other end uses, which the Exxon documents don't account for.

That means the full climate impact of Exxon's growth strategy would likely be five times the company's estimate—or about 100 million tons of additional carbon dioxide—had the company accounted for so-called Scope 3 emissions. If its plans are realized, Exxon would add to the atmosphere the annual emissions of a small, developed nation, or 26 coal-fired power plants.

The emissions projections are "an early assessment that does not include additional mitigation and abatement measures that would have been considered as the next step in the process," Exxon said in an earlier statement. "The same planning document illustrates how we have been successful in mitigating emissions in the past."

Exxon often defends its growth plans by citing International Energy Agency estimates that trillions of dollars of new oil and gas investments are needed by 2040 to offset depletion from existing operations, even under a range of climate scenarios. However, experts say a reduction

in global oil and production is necessary to limit warming to 1.5 degrees Celsius above pre-industrial levels.

Exxon Mobil CEO Darren Woods has adopted a growth plan that would raise emissions, according to internal estimates. *Photographer: Justin Chin/Bloomberg*

Exxon's ambitious growth plans, calling for higher cash flow and a doubling of earnings by 2025, are a vestige of pre-pandemic times, before global oil demand evaporated. In its earlier statement, Exxon maintained its intention to pursue growth plans in the future: "As demand returns and capital investments resume, our growth plans will continue to include meaningful emission mitigation efforts."

The collapse of oil demand forced Exxon to cut its spending budget by a third in April, and its share price is currently hovering near an 18-year low. Exxon was removed from the Dow Jones Industrial Average earlier this year. The company last week warned of a third consecutive quarterly loss, meaning it's relying on debt to pay capital expenditures and dividends.

As recently as July, however, Exxon indicated that it's merely delaying many projects to preserve cash during the downturn rather than canceling them. Fulfilling the plan would mean producing an additional 1 million barrels of oil a day. The emissions generated by the extra

drilling and refining would increase the company's greenhouse gas emissions to 143 million tons of CO_2 equivalent per year, the internal documents show.

Woods listens to President Donald Trump during a meeting with energy sector CEOs at the White House on April 3, 2020. *Photographer: Jim Watson/AFP via Getty Images*

"Exxon has repeatedly shopped for growth over the last 10 years, and their returns have suffered," said Andrew Grant, head of oil, gas and mining at Carbon Tracker, a financial think tank. "Exxon is explicit that their business plan is informed by their own business outlook, which assumes continued demand growth for fossil fuels."

The more than $30 billion-per-year investment plan was the centerpiece of Exxon's March 2018 Investor Day. Woods declared an ambition to build a suite of high-quality operations that would produce large volumes of oil and gas for decades into the future, regardless of changes in policy or price. After years of struggling with stagnant production, Woods zeroed in on five key projects: shale oil in the Permian Basin, offshore oil in waters belonging to Guyana and Brazil, and liquefied natural gas in Mozambique and Papua New Guinea.

"It's the richest set of opportunities since Exxon and Mobil merged," Woods told investors, a line executives have repeated ever since.

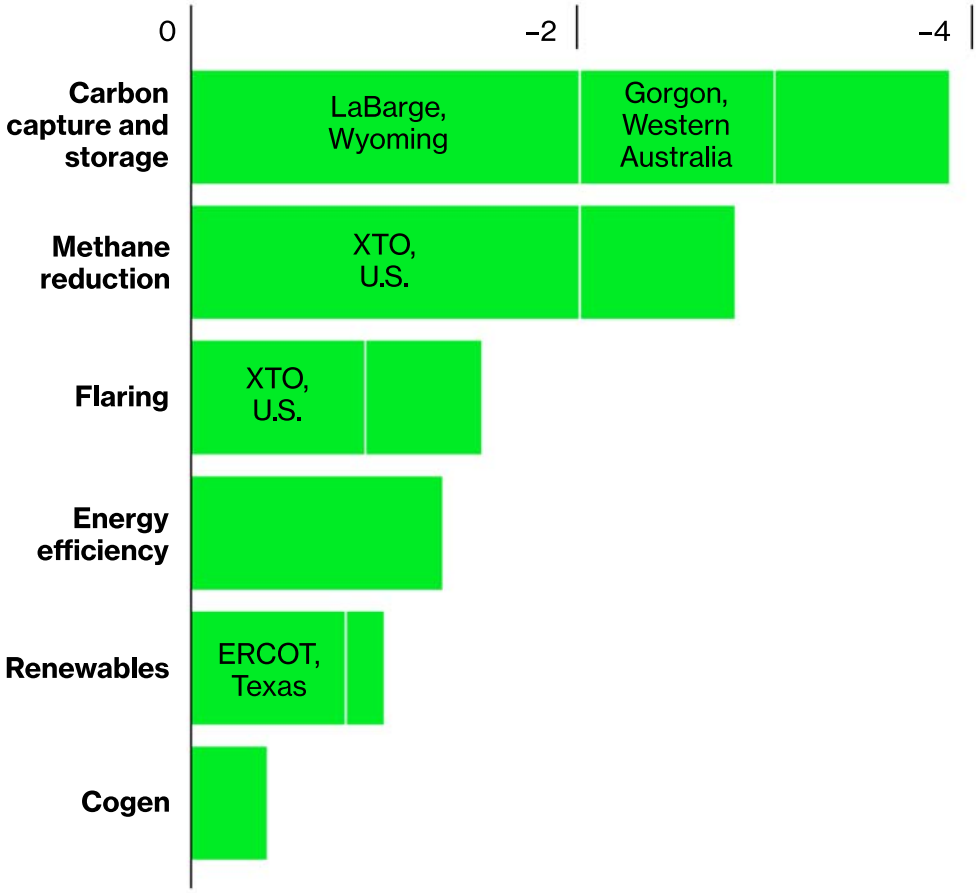
Even though Exxon lags far behind Europe's biggest oil companies in setting targets to address global warming, it recently stepped up efforts to curb methane, a super-potent greenhouse gas. The company has also joined a voluntary industry effort to lower its "carbon intensity," producing oil and gas on a cleaner per-barrel basis. "Emissions intensity reduction targets by a company that was setting out to dramatically increase its production won't result in lower absolute emissions," said Kathy Mulvey, a campaign director at the Union of Concerned Scientists.

Exxon's internal projections credit the company with the beneficial impact of two dozen emission-lowering measures, such as projects to capture carbon, reduce methane leaks and flaring, and use renewable energy. Without adjusting for these projects, which are termed "self-help" measures in the planning documents, Exxon's direct emissions in 2025 would surge to 154 million tons of CO_2 equivalent—a 26% increase from 2017 levels.

Exxon's "Self-Help" Measures

Without these projects, the company estimates its annual emissions would rise 26% by 2025

Million metric tons of CO_2-equivalent



Source: Internal Exxon Mobil documents seen by Bloomberg News

These emissions figures represent only a fraction of the total. Exxon doesn't disclose Scope 3 figures, unlike other big, publicly traded oil producers. A recent effort by Bloomberg Opinion to estimate the total emissions of the world's largest fossil-fuel producers put Exxon at 528 million metric tons of carbon dioxide equivalent in 2019. CDP, an independent group that tracks and encourages carbon disclosures, estimated Exxon's total emissions at 577 million metric tons for 2015. Exxon's most recent public disclosures for its direct emissions, called Scope 1 and Scope 2, recognized only 127 million metric tons in 2018.

Planning documents showing the surge in emissions that would result from the investment strategy were widely circulated in internal Exxon meetings as recently as early this year, before the coronavirus spread beyond China. Unlike earnings targets, Exxon never publicly announced its 2025 emissions goals, leading some employees to question whether the company was committed to reductions. More than a third of Exxon's self-help measures rely on carbon capture, an expensive process that stores carbon dioxide underground.

Allegations of inadequate disclosures related to the dangers of global warming have become a source of legal trouble for Big Oil. In June, Minnesota sued Exxon, Koch Industries Inc. and the American Petroleum Institute for allegedly withholding critical information about the impact of fossil fuel use on climate change. All told, Exxon and other oil companies are being sued by about a dozen cities, counties and states seeking compensation for consumers and taxpayers over the cost of adapting to climate change. (Exxon denies wrongdoing in the suits, which it says are baseless and politically motivated; at the end of last year, the company won a related case brought by New York's attorney general.)

The pandemic has accelerated European oil majors' transition toward cleaner sources of energy, while giving Exxon an opportunity for a different type of strategic reset. So far that has meant cutting headcount and employee benefits, shelving major projects and reducing its global capital expenditure by $10 billion this year. Exxon's dividend yield now tops 10%, an indication investors expect the payout to be cut for the first time in decades.

Exxon and its European peers have split over adaptation to a world in which major economies are moving to phase out fossil fuel. The U.S. oil giant has long aligned with the conservative wing of American politics: Woods's mentor and predecessor, Rex Tillerson, served as

President Donald Trump's first secretary of state, and earlier this year Woods joined fellow energy CEOs at the White House to discuss reopening the U.S. economy. Exxon has benefited from Trump's policy of "unleashing energy dominance." But the company also donates to candidates from both parties and rejected some of Trump's measures, such as rolling back methane regulations.

Whether or not Woods decides, in the wake of the pandemic or a political shift in the U.S., to follow his European peers toward net-zero emissions remains to be seen. But the trend from many of the world's largest countries and corporations is unmistakable, and it's not clear that Exxon's approach to growth reflects these big changes.

Just last month China pledged to be carbon neutral by 2060, a shift that would set into motion a more than 65% drop in its oil consumption and a 75% cut in gas, according to government-affiliated researchers. The EU is aiming to reach neutrality across all greenhouse gases by 2050, which will be partly funded by the Green Deal that invests in electrification of transport and the promotion of clean hydrogen. California announced a new plan to end the sale of gasoline-powered cars by 2035, in a state that alone accounts for 1% of global oil demand.

"It's past time for Exxon Mobil to take responsibility for the harmful impacts of its oil and gas products," said Mulvey of the Union on Concerned Scientists. "The world at large and its own investors would benefit from Exxon redirecting its strategy toward the energy we need in a low-carbon future."

— With assistance by Hayley Warren and Joe Carroll

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READ NEXT: Big Oil Is Looking for a Career Change

(Updates the first five paragraphs to reflect Exxon statement post-publication; also adds explanation of emissions calculation in the fourth paragraph.)

In this article

XOM
EXXON MOBIL CORP
32.26 USD ▲ +0.69 +2.19%

CL1
WTI Crude

36.16 USD/bbl. ▼ -1.23 -3.29%

BP/
BP PLC
193.50 GBp ▲ +0.06 +0.03%

RDSA
ROYAL DUTCH SH-A
934.90 GBp ▲ +34.90 +3.88%

INDU
DJIA
26,591.94 USD ▲ +71.99 +0.27%

PRESS RELEASE

AG Healey Secures $18 Million Payment from Equifax over Data Breach that Affected Nearly Three Million Massachusetts Residents

Settlement Includes One of the Largest Penalties Obtained by a Single State AG in a Data Breach Case

FOR IMMEDIATE RELEASE:
4/17/2020

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BOSTON — One of the largest consumer credit reporting agencies in the country has agreed to pay $18.2 million and undertake significant injunctive relief following a massive data breach in 2017 that compromised the personal information of nearly three million Massachusetts residents, Attorney General Maura Healey announced today.

The consent judgment (/doc/equifax-consent-judgment), approved by a Suffolk Superior Court judge on April 13, resolves the AG's 2017 lawsuit (/news/ag-healey-sues-equifax) alleging that Equifax failed to patch a known vulnerability in its network, allowing hackers to infiltrate its systems and access the sensitive personal information of least 147 million consumers nationwide.

"Equifax had a duty to protect the private information of our consumers and it failed massively – leading to the worst data breach in history," said AG Healey. "Our office secured a significant penalty from Equifax to ensure accountability for this inexcusable conduct. The company will implement stringent measures to strengthen its security practices and keep our data safe."

When Equifax announced the data breach in early September 2017, AG Healey immediately launched an investigation (http://wayback.archive-it.org/1101/20180102204625/http://www.mass.gov/ago/news-and-updates/press-releases/2017/2017-09-08-equifax-data-breach.html)

to determine the risk to consumers and whether the company had proper safeguards in place to protect consumer information. Within days, the **AG's Office sued Equifax** (/news/ag-healey-sues-equifax) under Massachusetts consumer protection and data privacy laws. According to the AG's complaint, unauthorized third parties infiltrated Equifax's computer system through its website for months without the company detecting them and stole sensitive and personal consumer information. The complaint alleges Equifax lacked sufficient safeguards to protect consumers' personal data in its system. The complaint further alleged that Equifax violated Massachusetts law by delaying notice of the breach. According to the AG's complaint, Equifax knew about the breach around July 29, 2017, yet did not notify the AG's Office or consumers until Sept. 7, 2017.

Under the terms of the proposed settlement, Equifax will pay a $18.2 million penalty to Massachusetts, a portion of which the AG's Office will use to support local consumer aid programs.

The settlement also requires Equifax to take significant steps to strengthen its security practices and bring them into compliance with Massachusetts law, including regular monitoring, identifying critical security updates, minimizing its collection of sensitive data, improving account management tools, and allowing third-party assessments of its data safeguards.

Massachusetts consumers affected by the breach can seek available relief under the settlements that Equifax reached in July 2019 with 50 states and U.S. territories, the Federal Trade Commission, the Consumer Financial Protection Bureau, along with a national consumer class action suit. Eligible consumers can file claims for relief from a Consumer Restitution Fund created under these settlements to obtain assistance in freezing and thawing their credit files, the opportunity to dispute inaccurate credit report information, and to seek payments and assistance in addressing to identity theft that results from the breach. More information about this consumer relief can be found **here** (https://www.ftc.gov/enforcement/cases-proceedings/refunds/equifax-data-breach-settlement). For more information on Equifax's Consumer Restitution Fund or on how to make a claim, visit **www.equifaxbreachsettlement.com/** (https://www.equifaxbreachsettlement.com/).

The AG's Consumer Protection Division has published **guidance** (/equifax-data-breach) for consumers impacted by the 2017 Equifax breach on its website, which includes more information about today's settlement.

If you believe that you have been the victim of identity theft, you will need to take additional steps to protect your credit and your personal information. For additional information, consumers may contact the AG's consumer hotline at 617-727-8400 or view the Federal Trade Commission's identity theft resource, available at **www.consumer.gov/idtheft/** (http://www.consumer.gov/idtheft/). Guidance for businesses on data breaches can be **found here** (/reporting-data-breaches).

This case was handled by Sara Cable, Director of Data Privacy & Security, and Assistant Attorneys General Jared Rinehimer and Elizabeth Cho, with assistance from Assistant Attorney General Sarah Petrie, all of the AG's Consumer Protection Division, and Investigator Anthony Crespi of the AG's Civil Investigations Division.

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Attorney General Maura Healey is the chief lawyer and law enforcement officer of the Commonwealth of Massachusetts.

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PRESS RELEASE

AG Healey Sues Purdue Pharma, Its Board Members and Executives for Illegally Marketing Opioids and Profiting From Opioid Epidemic

More than 670 Massachusetts Residents Prescribed Purdue Opioids Died from Opioid-Related Overdoses since 2009; Purdue Sales Reps Made 150,000 Visits to Medical Offices Since 2008, Sold 70 Million Doses Generating $500 Million in Revenue

FOR IMMEDIATE RELEASE:

6/12/2018

Office of Attorney General Maura Healey

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BOSTON — Attorney General Maura Healey today sued Purdue Pharma L.P. and Purdue Pharma Inc. (Purdue) for misleading prescribers and consumers about the addiction and health risks of their opioids, including OxyContin, to get more people to take these drugs, at higher and more dangerous doses, and for longer periods of time to increase the companies' profits.

The **complaint** (/doc/purdue-complaint-filed) alleges that Purdue contributed to the opioid epidemic, including the opioid-related deaths of more than 670 Massachusetts residents prescribed Purdue opioids since 2009 and thousands more who struggled with cycles of overdose and addiction. The AG's complaint also names 16

current and former directors and executives of the privately held Purdue, alleging that as leadership, these individuals directed Purdue's deception.

"The opioid epidemic is killing five people every day in Massachusetts," said AG Healey. "Purdue Pharma and its executives built a multi-billion-dollar business based on deception and addiction. The more drugs they sold, the more money they made, and the more people in Massachusetts suffered and died. These defendants must be held accountable for their role in the opioid epidemic that has ravaged our state and claimed so many lives."

The defendants in the **AG's complaint** (/doc/purdue-complaint-filed), filed today in Suffolk Superior Court, are Connecticut-based companies Purdue Pharma Inc. and Purdue Pharma L.P., current and former Purdue CEOs Craig Landau, John Stewart and Mark Timney and current and former members of Purdue Pharma Inc.'s board of directors Richard Sackler, Theresa Sackler, Kathe Sackler, Jonathan Sackler, Mortimer D.A. Sackler, Beverly Sackler, David Sackler, Ilene Sackler Lefcourt, Peter Boer, Paulo Costa, Cecil Pickett, Ralph Synderman, and Judy Lewent. The Sackler family has sole ownership of Purdue and holds the majority of the seats on Purdue Pharma Inc.'s board.

Purdue manufactures, markets and sells prescription opioids, including OxyContin, Butrans, and Hysingla. Since 2008, Purdue has sold more than 70 million doses of those opioids in Massachusetts, generating revenue of more than $500 million.

The lawsuit claims that Purdue, under the leadership and direction of the defendant directors and CEOs, deceived prescribers and patients to get more people to use Purdue's opioid products, at higher doses, for longer periods by, for example:

- **Misrepresenting the risks of opioid use to prescribers and patients.** Purdue disseminated and sponsored unbranded, promotional materials that lauded opioids as "the gold standard" of pain medications; purported to help consumers "overcome" "concerns about addiction;" warned prescribers against "unnecessary withholding of opioid medications;" and suggested to prescribers that patients showing signs of addiction could properly be treated with more opioids at higher doses. At the same time, Purdue deceptively downplayed the risks of addiction, overdose and death associated with its opioids.
- **Misrepresenting that Purdue's opioids provided more consistent, effective and even safer relief than acetaminophen and ibuprofen.** Purdue claimed that its opioids improved patients' quality of life, even when internal Purdue documents admit there were no clinical studies or other evidence to substantiate that claim.
- **Aggressively targeting marketing and promotional efforts at vulnerable populations** – including veterans, the elderly and people who were not taking opioids before – to increase profits.
- **Misleading prescribers and patients about the increased risks associated with prolonged use of its opioids in order to extend average treatment duration**. Purdue targeted patients who could be kept on opioids for more than a year. The Massachusetts Department of Public Health has determined that "continued prescription opioid use increase[s] risk of fatal overdose." Compared to the general population, a patient who receives three months of prescribed opioids is 30 times more likely to overdose and die.

The lawsuit further claims Purdue aggressively pushed its opioids at numerous medical practices where it knew improper prescribing, misuse and diversion were occurring and patients were overdosing and dying. According to the AG's complaint, to make sure doctors prescribed more of its drugs, Purdue tracked doctors' prescriptions, visited their offices hundreds of times, bought them meals, and asked doctors to "commit" to putting specific patients on Purdue's drugs.

Since 2008, Purdue has sent sales representatives to push its opioids in Massachusetts doctors' offices, clinics, and hospitals more than 150,000 times and has given money, meals, or gifts to more than 2,000 Massachusetts prescribers. Purdue also rewarded prescribers with consulting deals worth tens of thousands of dollars and kept promoting drugs to them even when the doctors wrote illegal prescriptions, lost their medical licenses, and their patients died.

Through **the lawsuit** (/doc/purdue-complaint-filed), the AG's Office seeks restitution, damages, and penalties for Purdue's illegal conduct and an order requiring Purdue to abate the harm it has caused. The AG's Office also seeks appropriate injunctive relief.

AG Healey **announced her investigation** (/ago/news-and-updates/press-releases/2017/2017-06-15-investigation-marketing-sale-opioids.html) into drug makers in June 2017, along with a national bipartisan coalition of attorneys general, to determine whether the companies sought to increase profits by misrepresenting the dangers of prescription painkillers and ignoring the public health risks of spiking opioid sales. In September 2017, the coalition **expanded that investigation** (/ago/news-and-updates/press-releases/2017/2017-09-19-opioid-investigation.html) to include other manufacturers and distributors.

AG Healey's investigation into the other opioid manufacturers and distributors, including Endo, Janssen, Teva, Allergan, AmerisourceBergen, Cardinal Health, and McKesson, remains ongoing.

This matter is being handled by Health Care Division Chief Eric Gold and False Claims Division Chief Gillian Feiner, Assistant Attorneys General Sandy Alexander, Stephen Vogel, Jeffrey Walker, Jenny Wojewoda and Michael Wong, Legal Analyst Julia Walsh, and Attorney Matthew Lashof-Sullivan, with assistance from Assistant Attorney General Jessica Acosta, Investigator Marlee Greer, and Paralegal Megan Lima.

Statements of Support

Governor Charlie Baker

"The Commonwealth must use every tool available to combat the opioid crisis, and holding Purdue Pharma accountable for allegations of overselling and over distributing these highly addictive drugs to reduce the number of pills on our streets is a critical step. Our administration will continue to implement reforms, including critical data collection on overdoses and prescriptions distributed through the updated Prescription Monitoring Program, and work with the Legislature on our latest bill to stem the tide of this public health epidemic. Lt. Governor Polito and I applaud the Attorney General's diligent work on this matter and look forward to partnering with her office on future reforms to reduce the use and distribution of opioids."

Joanne Peterson, Founder and Executive Director of Learn to Cope

"When I think back to that day in 2007 almost 15 years ago, in the federal courthouse in Abingdon, Virginia as one of those testifying at the Purdue Pharma sentencing, I truly had no idea how much worse this epidemic would become. On behalf of thousands of families across Massachusetts who have lost loved ones, have loved ones struggling or are fortunate to see recovery after years of hardship locally and nationally we thank Attorney General Healey and her staff for their work to make sure those in this industry causing harm for greed will be held accountable. We are fortunate in Massachusetts to have General Healey and Governor Baker who have hit this epidemic head on. Thank you and let's never forget those who have lost their lives or the families who have been ripped apart due to this plague."

Taunton Mayor Tom Hoye

"OxyContin barreled through Taunton and left a trail of addiction and heartbreak in its wake. I am proud to stand with Attorney General Maura Healey in our joint efforts to hold Purdue and its owners accountable."

Arlington Police Chief Frederick Ryan

"The opioid epidemic that has taken many lives and ruined so many more has many causes, but the evidence clearly demonstrates that Purdue Pharma played a major and shameful role in fueling this public health crisis. In fact, a recent New York Times story reports that Purdue knew about widespread abuse of its OxyContin product as far back as 1996. I am proud to stand with Attorney General Healey in this effort and I applaud her extraordinary leadership."

Dr. Andrew Kolodny, Co-Director of Opioid Policy Research at the Heller School for Social Policy and Management, Brandeis University

"The country's opioid epidemic can be directly tied to Purdue's campaign to maximize the sale of its dangerous and addictive painkillers. The company's deception and disregard for the health and safety of communities has left millions of Americans struggling with an opioid addiction. I thank Attorney General Healey for bringing this important case."

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Attorney General Maura Healey is the chief lawyer and law enforcement officer of the Commonwealth of Massachusetts.

More (/orgs/office-of-attorney-general-maura-healey)

PRESS RELEASE

AG Healey Announces Record-Setting $20 Million Settlement by Volkswagen, Audi, and Porsche for Knowingly Selling Illegally Polluting Cars and SUVs

Multistate Settlements Announced Today Include Unprecedented $157 Million in Payments to States for Environmental Violations, and Provide New Electric Zero-Emission Vehicles

FOR IMMEDIATE RELEASE:
3/30/2017
Office of Attorney General Maura Healey

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BOSTON — Attorney General Maura Healey announced today that Volkswagen, Audi, and Porsche, as well as their American subsidiaries, have agreed to pay $157 million to settle environmental claims by Massachusetts and 9 other states. The settlement provides a $20 million payment to Massachusetts, including the largest civil penalty ever obtained in an environmental enforcement case brought by the state. In addition, the automakers have agreed to increase the availability of new electric zero-emission vehicles in Massachusetts and other states.

A multistate investigation, led by AG Healey and New York Attorney General Eric Schneiderman, culminated last year with the filing of lawsuits against the automakers under state environmental laws for selling more than 570,000 2.0- and 3.0-liter diesel vehicles (including more than 15,000 in Massachusetts) fitted with undisclosed and illegal "defeat device" software that allowed the vehicles to pass formal emissions testing while concealing from consumers and regulators the vehicles' excessive emissions of harmful pollutants of up to 35 times the legal limit during normal driving.

"Volkswagen, Audi, and Porsche perpetrated one of the most egregious frauds in corporate history, and then repeatedly lied to the public and regulators to cover up their deceit. These companies' actions flagrantly violated the state laws that protect public health and polluted the air that we breathe," AG Healey said. "This record-setting settlement shows that state attorneys general will pursue enforcement against powerful interests that illegally deceive consumers and pollute the air."

Filed in July 2016, AG Healey's complaint (http://wayback.archive-it.org/1101/20180102205024/http://www.mass.gov/ago/docs/environmental/ma-ag-volkswagen-complaint-filed.pdf) file size5MB alleges Volkswagen, Audi, and Porsche resorted to the defeat devices because of their inability to develop diesel emissions control systems that would otherwise comply with applicable emissions standards, and knowing that what they doing was illegal. The complaint further alleges

that, as a result of the illegal defeat devices, which the automakers actively concealed from regulators for nearly a decade, the automakers caused thousands of additional tons of nitrogen oxides (NO_x) to be spewed onto streets around the country.

NO_x pollution presents grave risks to human health. It contributes to the formation of harmful ground-level ozone (smog) and soot. Exposure to smog and soot is linked to a number of respiratory- and cardiovascular-related health effects, including premature death. Children, older adults, people who are active outdoors (including outdoor workers), and people with heart or lung disease are particularly at risk for health effects related to smog or soot exposure. Nitrogen dioxide formed by NO_x emissions can aggravate respiratory diseases, particularly asthma, and may also contribute to the development of asthma in children. In Massachusetts, the Department of Environmental Protection (MassDEP) issues air quality alerts on numerous days every year because ozone levels make the air unhealthy to breathe.

"The actions of these automakers knowingly caused excess NOx emissions to pollute the air in communities across the Commonwealth," said MassDEP Commissioner Martin Suuberg. "This settlement requires VW to advance the sales of zero-emission vehicles in Massachusetts, which will help us meet our important emission reduction goals under the Clean Air Act and the Global Warming Solutions Act."

Under the terms of today's **settlement** (http://wayback.archive-it.org/1101/20180102205024/http://www.mass.gov/ago/docs/environmental/ecf-filed-remand-stipulation-with-executed-settlement-agreement.pdf) file size1MB, which was filed today in the U.S. District Court for the Northern District of California, the automakers admitted that the defeat device software rendered the vehicles' emissions control systems inoperative outside of emissions test conditions and that they did not disclose the existence of the software in their applications for permission to sell the vehicle in the States.

The lawsuits by AG Healey's office and other state attorneys general followed an extensive investigation by a multistate coalition of over 40 states and other jurisdictions, led by Massachusetts, New York, and four other states. Massachusetts's Department of Environmental Protection and other state environmental agencies provided important assistance with the investigation.

Today's settlement builds on the car companies' **June 2016 partial settlement** (http://wayback.archive-it.org/1101/20180102205024/http://www.mass.gov/ago/news-and-updates/press-releases/2016/2016-06-28-vw-settlement.html) with state attorneys general of claims for penalties for consumer deception totaling $570 million nationwide, including more than $20 million for Massachusetts, as well as the companies' agreement to establish a fund to mitigate the environmental damage caused by their admitted misconduct. Under that agreement, Massachusetts is designated to receive $75 million for diesel and electric vehicle projects to reduce NO_x emissions. Related federal and nationwide consumer class action settlements entered in **October 2016** (http://wayback.archive-it.org/1101/20180102205024/http://www.mass.gov/ago/consumer-resources/consumer-information/vw.html) included a comprehensive consumer relief program for 2.0-liter diesel vehicle owners and lessees, providing each consumer a restitution payment and a choice between a buy back of the affected vehicle at its pre-scandal value or a modification to the vehicle's emission system. Proposed federal and nationwide consumer class action settlements filed in December 2016 and January 2017 seek to expand the consumer relief program to include 3.0-liter diesel vehicles. In January 2017, Volkswagen agreed to plead guilty to various federal crimes and pay a $2.5 billion fine, as well as nearly $1.5 billion in Clean Air Act civil penalties for its conduct in this case.

For the states involved, today's settlement resolves claims that the companies' conduct violated state environmental laws and regulations. In Massachusetts, the settlement includes:

- A $20 million payment to the state of Massachusetts.
- A commitment to make new Volkswagen zero-emission electric vehicles available in Massachusetts to grow the market for such vehicles and further reduce vehicle air emissions.
- Comprehensive **factual admissions by the companies** (http://wayback.archive-it.org/1101/20180102205024/http://www.mass.gov/ago/docs/environmental/vw-statement-of-facts.pdf) file size1MB, including the admissions by Volkswagen AG attached to its federal guilty plea.

The case was handled in Massachusetts by Gillian Feiner, Chief of AG Healey's False Claims Division, Christophe Courchesne, Chief of AG Healey's Environmental Protection Division, and Peter Mulcahy, an Assistant Attorney General in AG Healey's Environmental Protection Division, with assistance from Assistant Attorney General Gary Klein, Investigator Anthony Crespi of AG Healey's Investigations Division and Financial Investigator Krista Roche. At the Massachusetts Department of Environmental Protection, Chief Bureau Counsel Laurel Mackay and Acting Assistant Commissioner Christine Kirby in the Bureau of Air and Waste also made important contributions to the case.

For consumer information on today's settlement **click here** (http://wayback.archive-it.org/1101/20180102205024/http://www.mass.gov/ago/consumer-resources/consumer-information/vw.html)

To view today's settlement **click here.** (http://wayback.archive-it.org/1101/20180102205024/http://www.mass.gov/ago/docs/environmental/ecf-filed-remand-stipulation-with-executed-settlement-agreement.pdf) file

size1MB

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