COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO.:
1984-CV-03333-BLS1

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

EXXON MOBIL CORPORATION,

Defendant.

Service Via E-mail

MEMORANDUM OF DEFENDANT EXXON MOBIL CORPORATION IN SUPPORT OF ITS MOTION TO DISMISS THE AMENDED COMPLAINT

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PRELIMINARY STATEMENT

The Office of the Massachusetts Attorney General (the "Attorney General") accuses Exxon Mobil Corporation ("ExxonMobil") of concealing the link between fossil fuels, carbon emissions, and climate change. According to the Attorney General, consumers and investors were misled because ExxonMobil did not affix labels on its products warning about climate change and did not constantly remind the public about climate change in its corporate communications. Acknowledging ExxonMobil's numerous public disclosures about the risks climate change presents to its business, the Attorney General nevertheless claims that ExxonMobil has not done enough to disclose "the full extent of the risks of climate change to the world's people and economies." (Am. Compl. ¶ 18.) But what industry could satisfy the Attorney General's standard? Have the automotive industry, airlines, or technology companies—all of whom rely heavily on carbon-emitting sources of energy—done "enough" to warn consumers and investors about how their products contribute to climate change? ExxonMobil has concealed nothing, misled no one, and is a defendant in this action only because it refuses to genuflect to the Attorney General's climate policy orthodoxy.

Chief among that orthodoxy's tenets is the belief that society must transition immediately from traditional sources of energy to renewables. ExxonMobil has its own perspective on the issue and recognizes important tradeoffs between the benefits of abundant, affordable energy and the imperative to take action on climate change. The Attorney General argues that, but for ExxonMobil's refusal to embrace climate orthodoxy, consumers and investors would have abandoned fossil fuels long ago. That argument is impossible to square with Massachusetts' own conduct over the last two decades.

Seventeen years ago, the Attorney General filed suit to compel the Environmental

Protection Agency ("EPA") to regulate GHG emissions under the Clean Air Act. *See Massachusetts* v. *EPA*, 549 U.S. 497, 510-11, 514 (2007). The Attorney General certainly knew enough about the risks of climate change to bring that action in 2003. But now, nearly two decades later, Massachusetts is as dependent on fossil fuel as ever. Natural gas supplies over two-thirds of Massachusetts' electricity, and Massachusetts' use of renewable energy sits well below the national average. The Attorney General has even opposed private civil actions to compel the Commonwealth to reduce emissions. Massachusetts cannot excuse its inaction by deflecting blame on a single out-of-state corporation, even if the Attorney General might find it politically expedient to do so. The Attorney General seeks headlines, not solutions, in this lawsuit. Betraying that motive, the pleadings include repeated, contrived references to the "coronavirus pandemic," despite its irrelevance to the Attorney General's claims. These claims should be dismissed for multiple reasons.

First, the Amended Complaint should be dismissed for lack of personal jurisdiction. ExxonMobil is not "at home" in Massachusetts and the Attorney General's claims do not arise from ExxonMobil's contacts with Massachusetts. Instead, its claims are based on ExxonMobil's statements of opinion regarding future energy demand, its products, and the Company's corporate activities, all of which were conceived, developed, and published outside of Massachusetts.

Second, despite spanning more than 200 pages, the Amended Complaint fails to plausibly allege any deception of investors or consumers. The Attorney General's investor deception claim is nothing more than a difference of opinion about (i) the attractiveness of ExxonMobil as a long-term investment, and (ii) projected demand for oil and natural gas decades from now. The Attorney General concedes that ExxonMobil publicly disclosed its opinions about these forward-looking risks. And it does not allege ExxonMobil's opinions about future demand are not honestly

held or that reasonable investors have been deprived of any relevant facts. In fact, the Amended Complaint identifies investors who have decided based on publicly available information that they will not invest in ExxonMobil or other energy companies. That the Attorney General agrees with those investors and disagrees with those who remain optimistic about ExxonMobil's prospects is not a basis for a Chapter 93A claim.

The Attorney General's allegations of consumer deception fare no better. The Attorney General contends that any advertisement for fossil fuel products is misleading unless it includes cautionary language about the causes and impacts of climate change and extols the benefits of renewable energy. The law requires no such thing. Courts routinely dismiss Chapter 93A claims premised, as here, exclusively on the omission of information. The Attorney General also fails to plausibly allege that a reasonable consumer would be deceived by entirely accurate advertisements or statements discussing ExxonMobil's investments in new technologies to reduce emissions or by efforts to enhance its corporate image. The Attorney General claims such brand promotion is inherently misleading because ExxonMobil did not simultaneously remind consumers of the unremarkable and well-known fact that it also develops and produces traditional fossil fuels. Chapter 93A neither imposes liability for routine corporate promotion nor obligates businesses to state the obvious.

Finally, under the guise of protecting against investor or consumer deception, the Attorney General seeks to compel ExxonMobil to either disseminate its preferred ideological messages on climate change or remain silent. But the First Amendment forbids the state from compelling speech. The Amended Complaint expressly targets protected petitioning activity that is entitled to the highest rung of constitutional protection. Even in the context of commercial speech, the state must show, at a minimum, the disclosures are "purely factual and uncontroversial." *Zauderer* v.

Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985). The dire warnings and moral imperatives the Attorney General seeks do not satisfy either criteria. Nor can the Attorney General show they "directly advance[]" and are "narrowly" tailored to a substantial government interest. *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

At bottom, the Attorney General opposes ExxonMobil's continued production and sale of a lawful product that is essential to modern life, including in Massachusetts where consumption of natural gas has only grown despite longstanding knowledge of climate risks. It might be tempting to blame ExxonMobil for the dual challenge every government faces across the globe: how to meet an ever expanding demand for energy while responding to the risks of climate change. But the Attorney General may not use a civil lawsuit to make ExxonMobil its political scapegoat. The Amended Complaint should be dismissed.

STATEMENT OF FACTS[1]

I. ExxonMobil Is a Publicly Traded Corporation That Provides Energy to Meet Growing Global Demand.

ExxonMobil is a publicly traded energy company incorporated in New Jersey, with its principal place of business in Texas. (Am. Compl. ¶ 45.) It operates three core businesses: "'upstream' exploration and production operations; 'downstream' refinery and retail operations; and its chemical business." (*Id.* ¶ 54.) As an integrated oil and gas company, ExxonMobil manufactures fossil fuel products at various locations (all of which are outside Massachusetts) that

[1] Defendants adopt the facts alleged in the Amended Complaint for purposes of this motion only. *See Marram* v. *Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 (2004). On a motion to dismiss, a court may consider the pleadings as augmented by "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint." *Reliance Ins. Co.* v. *City of Bos.*, 71 Mass. App. Ct. 550, 555 (2008), as well as documents upon which the plaintiff relied in framing the complaint, *see Marram*, 442 Mass. at 45 n.4. On a motion to dismiss for lack of personal jurisdiction, the court may also consider uncontroverted "facts set forth in . . . the affidavits of defendant." *REMF Corp.* v. *Miranda*, 60 Mass. App. Ct. 905 (2004); *Am. Paper Recycling, Inc.* v. *Renew Bahamas, Ltd.*, 2016 WL 6635939, at *3 n.3 (Mass. Super. Ct. 2016).

are then sold worldwide. (*Id.* ¶¶ 21, 51-58, 267, 334, 357, 598, 649 (discussing "extraction projects around the world"), 659 (discussing "Canadian oil sands").)

ExxonMobil securities, such as common stock and corporate bonds, are publicly traded on the open market. (*Id.* ¶¶ 1, 272, 281-82.) In addition, ExxonMobil issues "short-term, fixed-rate notes," which are commonly referred to as commercial paper, directly to certain institutional investors. (*Id.* ¶ 281.) Like any publicly traded company, ExxonMobil regularly communicates with investors and the holders of its securities through its website, corporate reports, "standard securities filings with the U.S. Securities and Exchange Commission," shareholder meetings, earnings calls, and calls and meetings with institutional investors. (*Id.* ¶¶ 257, 280, 284-85, 450.)

ExxonMobil does not sell its products directly to Massachusetts consumers and has not owned or operated service stations in Massachusetts since 2010. (*Id.* ¶ 544.) Instead, ExxonMobil-branded products, like Mobil 1 motor oil, are sold in Massachusetts by third-party retailers, like Target, Home Depot, and Walmart. (*Id.* ¶ 567.) ExxonMobil-branded gasoline, including Synergy gasoline, is sold by "independently owned" retail gas stations in the Commonwealth that operate pursuant to a Brand Fee Agreement ("BFA"). (*Id.* ¶¶ 544-51, 567.) These "BFA Holders" "create" the gasoline products that are "sold at the pump" to consumers "by combining unbranded gasoline with ExxonMobil-approved additives," which the BFA Holders obtain from "approved suppliers." (*Id.* ¶ 551.) ExxonMobil promotes its retail products, like Synergy and Mobil 1, on its website, on social media, through smartphone applications, and through advertising on national television and in national and regionally circulated newspapers. (*See, e.g.*, *id.* ¶¶ 565, 568, 573.)

II. Oil and Natural Gas Are Legal, Highly Regulated, and Essential to Modern Life.

The Attorney General does not deny that the oil and natural gas ExxonMobil produces and sells are perfectly legal and subject to myriad and stringent regulations. Those regulations, which

arise under federal and state law, govern the composition, manufacturing, transportation, distribution, promotion, and sale of the products themselves. *See, e.g.*, 40 C.F.R. § 80.1; G.L. c. 94, § 295B; 202 C.M.R. § 2.00 *et seq*. Greenhouse gas emissions are similarly regulated by numerous federal and state agencies. *See, e.g.*, 42 U.S.C. § 7401; G.L. c. 21A, § 22; G.L. c. 111, § 142K; 310 C.M.R. §§ 7.40, 7.70. The Attorney General does not allege ExxonMobil failed to comply with any existing regulations or misrepresented their impact on its business.

Oil and natural gas are also still essential to modern life, as the Commonwealth itself has recognized over the last two decades when it significantly increased its use of natural gas as a source of energy.[2] (Am. Compl. ¶¶ 55-58.) Massachusetts has known of the "harms associated with climate change" and their "connection [to] manmade greenhouse gas emissions" during that time period—at least since 2003, when it filed the action that the Supreme Court ultimately decided in the landmark case of *Massachusetts* v. *EPA*, 549 U.S. 497, 521, 523 (2007). At Massachusetts' invitation, the Supreme Court held that "[t]he harms associated with climate change are serious and well recognized" and confirmed EPA's authority to regulate greenhouse gas emissions. *Id.* at 521. The following year, Massachusetts enacted the Global Warming Solutions Act, in response to "perceptions in the Commonwealth that national and international efforts to reduce those emissions are inadequate." *See Kain* v. *Dep't of Env. Protection*, 474 Mass. 278, 281 (2016). But the Massachusetts Department of Environmental Protection unlawfully refused to set "limits for .

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[2] Massachusetts' 2010 emissions-reduction strategy advocated a "shift[] toward natural gas"—a "cleaner fossil fuel[]"—to "act as a bridge to a clean energy future" and to continue to supply electricity through at least 2050. *See* Exec. Off. of Energy & Envtl. Affs., *Massachusetts Clean Energy and Climate Plan for 2020* at 39, 47, 89, 101 (Dec. 29, 2010), https://www.greenneedham.org/blog/wp-content/uploads/2011/02/2020-clean-energy-plan.pdf (*cited in Kain*, 474 Mass. at 281–82, 284, 289 n.12). The 2015 update to that plan confirmed that "[a] significant shift from oil and coal to natural gas as a fuel for power generation accounts for a net [emissions] reduction." *See* Exec. Off. of Energy & Envtl. Affs., *Massachusetts Clean Energy and Climate Plan for 2020*, at 9, 14, 19, 30, 32, 33 (Dec. 31, 2015), https://www.mass.gov/doc/clean-energy-and-climate-plan-for-2020/download (noting "policies . . . projected to reduce GHG emissions" include "replacement of coal-fired power plants with natural-gas fired power plants whose fuel has a lower carbon content, and whose generation technology is more efficient").

. . sources that emit greenhouse gas emissions" as required by the Act, a position the Attorney General unsuccessfully defended just a few years ago. *See id.* at 290.

In the decade since *Massachusetts* v. *EPA* was decided, the Commonwealth has adopted policies to promote natural gas. Today, natural gas supplies almost 70% of Massachusetts' electricity, making it one of the most natural-gas dependent states in the country.[3] Meanwhile, Massachusetts' use of renewable energy lags behind the national average; in 2018, it made up only 7.2% of Massachusetts' total energy consumption, placing it 34th in the country.[4] It therefore comes as no surprise that Governor Baker issued an executive order during the COVID-19 Pandemic, recognizing petroleum, natural gas, and propane workers to be "essential" "based on federal guidance [that was] amended to reflect the needs of Massachusetts' unique economy."[5]

III. ExxonMobil Provides Disclosures About Climate Risks to Its Investors.

For years, ExxonMobil has analyzed the potential risks of climate change on its business and made disclosures about those risks. (Am. Compl. ¶¶ 284-85, 365-79, 674.) As the Attorney General acknowledges, ExxonMobil "is among the only energy companies in the world that compile and produce" projections about "future economic conditions and energy sources," which it makes available to the public. (*Id.* ¶ 488.) In its *Outlook for Energy* report, ExxonMobil has expressed its long-term view of global energy demand and supply. (*Id.* ¶ 365.) In ExxonMobil's opinion, fossil fuels like oil and natural gas will continue to supply a significant portion of the world's energy over the next two to three decades "to meet the energy needs of the world's growing population and increasing middle-class." (*Id.* ¶ 514; *accord id.* ¶ 27.)

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[3] Jude Clemente, *Elizabeth Warren's Massachusetts Loves Natural Gas*, Forbes Magazine (Dec. 10, 2019).

[4] *Massachusetts State Energy Profile,* U.S. Energy Info. Admin. (July 18, 2019), https://www.eia.gov/state/print.php?sid=MA.

[5] Office of the Governor, Commonwealth of Massachusetts, Exhibit A of COVID-19 Order No. 13 (Mar. 23, 2020), https://www.mass.gov/doc/covid-19-essential-services/download.

ExxonMobil's opinion is informed by a number of considerations it discloses to the public. ExxonMobil has disclosed its view that "renewable sources, such as solar and wind, despite very rapid growth rates, cannot scale up quickly enough to meet global demand growth while at the same time displacing more traditional sources of energy." (*Id.* ¶¶ 492-93.) In addition, ExxonMobil's 2018 *Outlook* addresses uncertainty concerning the impact of a potential "market transition to light-duty electric vehicles" by evaluating an "electric vehicle sensitivity case." (*Id.* ¶ 505.) ExxonMobil concluded that even if all light-duty vehicles were 100% electric by 2040, "total liquids demand in 2040 could be similar to levels seen in 2013 as growth in chemicals and commercial transportation would mostly offset a decline in light-duty vehicle demand." (*Id.*)

ExxonMobil also discloses its view on "theoretical" scenarios that would limit global temperature increases to 2°C. (*Id.* ¶¶ 506-10, 513-14.) ExxonMobil has recognized that "society is not currently on a 2°C pathway" (*id.* ¶ 513), and ExxonMobil does "not believe a scenario consistent with reducing GHG emissions by 80 percent by 2050, as suggested by the 'low carbon scenario,' lies within the 'reasonably likely to occur' range." (*Id.* ¶ 493.) ExxonMobil also notes that this "low carbon scenario"—even if achievable—might "harm those least economically developed populations who are most in need of affordable, reliable and accessible energy."[6] Nevertheless, ExxonMobil has stated that "[r]elative to our Outlook, a theoretical 2°C pathway would generally lower demand for oil, natural gas and coal, and increase use of nuclear and renewables." (*Id.* ¶ 508.) It maintains, however, that "even under a 2°C pathway, significant investments will be required in oil and natural gas capacity. In this scenario, according to the [International Energy Agency], cumulative oil and natural gas investments could exceed $13 trillion by 2040." (*Id.*) ExxonMobil thus opines that "[p]roduction from our proved reserves and

[6] *See Managing the Risks* at 11 (cited in Am. Compl. ¶¶ 373-75), Ex. 26 to July 30, 2020 Affidavit of Justin Anderson.

investment in our resources continue to be needed to meet global requirements and offset natural field decline." (*Id.*)

For years, ExxonMobil has "embedded" a "proxy cost of carbon" in the demand projections reflected in its *Outlook for Energy*. (*Id.* ¶¶ 366, 373, 379.) The proxy cost seeks to represent the potential future "cost of regulations and policies to reduce greenhouse gas emissions," by projecting how such costs might "trigger a reduction in demand" for certain energy sources. (*Id.* ¶¶ 366, 378.) ExxonMobil has explained that its proxy cost "in *some areas may* approach $80/ton over the *Outlook* period" (*id.* ¶ 373 (emphasis added)), but it has not broadly disclosed the specific figures it uses to represent the proxy costs during specific time periods or in specific regions and has not "disclos[ed] its internal practices" for applying these costs "with any specificity." (*Id.* ¶ 384.) ExxonMobil also evaluates the direct costs future regulations might impose on its global projects using "GHG costs." (*Id.* ¶ 385.) In its 2014 *Managing the Risks* report, ExxonMobil disclosed (at a high level) its use of these GHG costs, stating that ExxonMobil "require[s] that all our business segments include, *where appropriate*, GHG costs in their economics when seeking funding for capital investments." (*Id.* ¶ 373 (emphasis added).)

IV. ExxonMobil Communicates with Consumers About the Attributes of Its Products.

ExxonMobil promotes its consumer products, such as Synergy gasoline and Mobil 1 motor oil, through a variety of media including radio, print media, television, and the internet. (*See, e.g.*, Am. Compl. ¶¶ 570-75, 587, 611-14.) In its advertising, ExxonMobil represents that using Synergy gasoline and Mobil 1 oil tends to increase engine efficiency and reduce engine emissions relative to the use of standard gasoline and motor oil. (*Id.* ¶¶ 587, 590-97, 611-17.)

The Attorney General does not allege that ExxonMobil's statements concerning its Synergy and Mobil 1 products are inaccurate. To the contrary, the Attorney General assumes it is

"true that Synergy™ and Mobil 1™ improve internal combustion engine performance and/or efficiency relative to prior or other products"—as ExxonMobil represents. (*Id.* ¶¶ 582, 619.) For example, ExxonMobil states that Synergy gasoline products "improve gas mileage and performance," and "[i]ncrease fuel economy." (*Id.* ¶ 591.) Similarly, the advertisements for Mobil 1 note it "can help enhance engine performance and improve fuel economy." (*Id.* ¶ 614.) ExxonMobil expressly states that these fuel economy improvements are measured *relative to other fossil fuel products*. (*Id.* ¶ 587 n.5) ("Fuel economy improvement is based on Synergy-branded gasoline compared to gasoline meeting minimum U.S. government standards. Actual benefits will vary based on factors such as vehicle type, driving style and gasoline previously used.").

V. ExxonMobil Issues Statements about Its Environmental Stewardship.

ExxonMobil has widely acknowledged the challenges presented by climate change and the steps it is taking to address those challenges. (Am. Compl. ¶¶ 257-59.) On its website, on social media, in corporate publications, and in nationally circulated advertising, ExxonMobil discusses its efforts to lower its own emissions and its research and investment into "climate change solutions" such as "algae biofuel" and "carbon capture." (*Id.* ¶¶ 640, 645, 652, 660.) ExxonMobil has collectively termed these initiatives, "Protect Tomorrow. Today." (*Id.* ¶¶ 587, 640-43.) ExxonMobil has dedicated resources to researching alternative energy sources that could one day help support society's energy needs, while at the same time reducing its environmental impact and energy-related GHG emissions. The Attorney General does not challenge the truthfulness of ExxonMobil's disclosures about its research and investments in biofuels or other alternative energies. (*Id.* ¶¶ 650, 658.) For instance, the Amended Complaint concedes that ExxonMobil has made accurate disclosures about its investments in these areas, including that its investments in biofuels totaled $600 million in 2009. (*Id.* ¶ 655.)

ARGUMENT

I. ExxonMobil Is Not Subject to Personal Jurisdiction in Massachusetts.

The Amended Complaint should be dismissed for lack of personal jurisdiction because ExxonMobil is an out-of-state resident and the Attorney General's claims challenge ExxonMobil's statements and activities outside this forum.

The plaintiff bears the burden of establishing that personal jurisdiction exists over a defendant. *See Droukas* v. *Divers Training Acad., Inc.*, 375 Mass. 149, 151 (1978). To meet that burden on a motion to dismiss, the plaintiff must make a prima facie showing of jurisdiction. *Fern* v. *Immergut*, 55 Mass. App. Ct. 577, 579 (2002). The plaintiff must "proffer[] evidence that, if credited, is enough to support findings of all facts essential to personal jurisdiction." *Cepeda* v. *Kass*, 62 Mass. App. Ct. 732, 737 (2004). "The prima facie showing of personal jurisdiction must be based on evidence of specific facts set forth in the record." *Id.* A reviewing court need not "credit conclusory allegations or draw farfetched inferences." *See Negrón-Torres* v. *Verizon Commc'ns, Inc.*, 478 F.3d 19, 23 (1st Cir. 2007); *Fern*, 55 Mass. App. Ct. at 580 n.7 (court may consider "specific, non-conclusory facts").

Personal jurisdiction over a party can arise in only two forms consistent with the Due Process Clause: general or specific. General jurisdiction permits a court to hear any suit against an entity whose "unique" forum ties render it "at home" in the forum. *See Daimler AG* v. *Bauman*, 571 U.S. 117, 137 (2014). To be "at home" in Massachusetts, an entity must have "unique" ties to Massachusetts, such as being incorporated in or having its principal place of business there. *See id.* Here, the Supreme Judicial Court of Massachusetts already determined that "[t]he total of [ExxonMobil's] activities in Massachusetts does not approach the volume required for an assertion of general jurisdiction." *Exxon Mobil Corp.* v. *Att'y Gen.*, 479 Mass. 312, 314 (2018), *cert. denied*

sub nom. Exxon Mobil Corp. v. *Healey*, 139 S. Ct. 794 (2019).[7]

Only specific personal jurisdiction is at issue here. "For a State to exercise [specific] jurisdiction consistent with due process," a plaintiff must show that its cause of action "arise[s] out of" the defendant's contacts with the forum. *Walden* v. *Fiore*, 571 U.S. 277, 284 (2014); *Fletcher Fixed Income Alpha Fund, Ltd.* v. *Grant Thornton LLP*, 89 Mass. App. Ct. 718, 723 (Mass. App. Ct. 2016). To satisfy this nexus requirement, the Attorney General must show the injury would not have occurred "but for" the defendant's forum-state activity. *B. Bullen* v. *Cohnreznick, LLP*, No. 1884CV03802BLS2, 2019 WL 3331280, at *6 (Mass. Sup. Ct. June 17, 2019) (quoting *Tatro* v. *Manor Care, Inc.*, 416 Mass. 763, 771 (1994)); *Scottsdale Cap. Advisors Corp.* v. *The Deal, LLC*, 887 F.3d 17, 21 (1st Cir. 2018). Where, as here, a claim is premised on Chapter 93A, the only "wrongful conduct to be considered for purposes of personal jurisdiction . . . is that conduct which violated 93A." *Roche* v. *Royal Bank of Can.*, 109 F.3d 820, 827 (1st Cir. 1997) (citation omitted). In addition, the Attorney General must comply with the Massachusetts long-arm statute, which requires but-for causation between plaintiff's claim and the defendant's "transacting of any business" or "causing tortious injury" in the Commonwealth. G.L. c. 223A, § 3(a), (c), (d). The Attorney General has failed to satisfy the requirements of the Due Process Clause or the long-arm statute.

A. The Investor Deception Claim (Count 1) Does Not Arise Out of ExxonMobil's Forum Contacts.

This Court lacks jurisdiction over the investor deception claim because it does not arise out of ExxonMobil's contacts with the forum. The Attorney General alleges that, in a handful of

[7] By contrast, the Massachusetts Supreme Judicial Court did not determine whether the claims asserted in this action support personal jurisdiction over ExxonMobil. The specific jurisdiction inquiry is claim-specific, and no claims had yet been asserted in the investigative proceedings before the Supreme Judicial Court. In fact, the Court expressly premised its ruling on "[t]he investigatory context," which it held required the court to "broaden [its] analysis" of jurisdictional contacts. *See Exxon Mobil Corp.*, 479 Mass. at 315.

reports published in Texas, ExxonMobil deceived investors about (i) the impact of climate risks on future demand for oil and natural gas and (ii) ExxonMobil's processes for assessing those risks. The Amended Complaint does not allege these reports originated in or have any special nexus with Massachusetts. Instead, the Attorney General seeks to premise jurisdiction on contacts that are not ExxonMobil's or that bear no causal relationship to the purportedly "wrongful conduct" that the Attorney General alleges "violated 93A." *Roche*, 109 F.3d at 827.

First, the Attorney General attempts to base personal jurisdiction on the passive ownership of ExxonMobil securities by Massachusetts investors who purchased them on the open market from third parties. (Am. Compl. ¶¶ 272-79.) It is well established that a plaintiff's claims "must arise out of contacts that the 'defendant *himself*' creates with the forum." *Walden*, 571 U.S. at 284. Purchases and sales in the secondary market between Massachusetts investors and securities brokers who trade in ExxonMobil stock or bonds do not constitute in-state activity *by ExxonMobil*. That others located in Massachusetts might trade or hold ExxonMobil securities (which are freely transferable in the open market) does not establish that *ExxonMobil* engaged in any conduct in the forum that might subject it to jurisdiction. Accordingly, any transactions between third-party Massachusetts investors and third-party brokers or underwriters that led "Massachusetts-based institutional investors [to] hold ExxonMobil common stock [or bonds]" (Am. Compl. ¶¶ 274, 286-89) do not support jurisdiction. The bond offerings referenced in the Amended Complaint fall into this category. (*Id.* ¶¶ 284-89.) ExxonMobil's only sale of bonds in the past decade has been through registered offerings to underwriters. No sales were made directly to Massachusetts-based investors. (Affidavit of Joel P. Webb ("Aff.") ¶ 12.) If those bonds landed in the portfolios of Massachusetts investors, it was due to the actions of a third party, not ExxonMobil.

Second, ExxonMobil's purported sales of "short-term," fixed-rate notes (*i.e.*, commercial

paper) to sophisticated Massachusetts investors do not support jurisdiction because they cannot give rise to the claims asserted here concerning climate risks. (Am. Compl. ¶ 281; Aff. ¶ 11.) It is well established that "specific jurisdiction" cannot be based on "contacts with the forum" that are "unrelated" to the claims. *See Grant Thornton*, 89 Mass. App. Ct. at 722; *United Elec., Radio & Mach. Workers of Am.* v. *163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992).

Here, the Attorney General's investor deception claim alleges ExxonMobil deceived investors about the long-term health of the Company by failing to disclose the full extent of risks associated with climate change and climate regulation. This claim cannot plausibly arise out of the sale of commercial paper, which is, by definition, a short-lived asset with maturity dates no longer than 270 days. *See SEC* v. *Coffey*, 493 F.2d 1304, 1312-13 (6th Cir. 1974). The long-term health of a company is irrelevant to the purchasers of such notes, since their value depends solely on the issuer's "short-term" ability to make payments on the instrument. *See, e.g.*, *id.* at 1313 n.21; Joseph C. Long et al., 12 Blue Sky Law § 6:48 (2019) ("[M]ost purchasers move in and out of the commercial paper market rapidly, often holding a particular investment no more than 24 hours."). Accordingly, any commercial paper transactions in the Commonwealth cannot support personal jurisdiction over ExxonMobil for the Attorney General's investor deception claim. [8]

Third, the handful of meetings ExxonMobil allegedly attended with institutional investors in Boston cannot support jurisdiction because they are not a "but-for" cause of the Attorney General's claim. *See B. Bullen*, 2019 WL 3331280, at *6; *Grant Thornton*, 89 Mass. App. Ct. at 723-24. "The relatedness requirement is not met merely because a plaintiff's cause of action arose out of the general relationship between the parties; rather, the action must *directly arise* out of the

[8] To the extent personal jurisdiction is premised on ExxonMobil's sale of short-term commercial paper, the Attorney General's claims must be limited accordingly to claims concerning representations made in connection with those sales or concerning the Company's near-term ability to make payments on those instruments. *See Phillips Exeter Acad.* v. *Howard Phillips Fund*, 196 F.3d 284, 289 (1st Cir. 1999).

specific contacts between the defendant and the forum state." *Fern*, 55 Mass. App. Ct. at 584. Thus, specific jurisdiction cannot be based on a "me[e]t[ing] . . . in Boston" if "there is no allegation that the discussion was part of the wrongs alleged in the Complaint or that it inflicted any of the alleged harm." *See Paradigm BioDevices, Inc.* v. *Viscogliosi Brothers*, No. 10-11915-JLT.LLC, 2011 WL 1793346, at *5 (D. Mass. May 11, 2011). Here, the Amended Complaint does not allege ExxonMobil made any allegedly *deceptive* statements at the referenced meetings in Boston. Instead, it claims investors were deceived by statements in reports ExxonMobil prepared and published in Texas, which means the Attorney General's claim would be the same even if none of the Boston meetings had occurred. (Am. Compl. ¶¶ 365-79, 486-522.) It is "textbook" law that an action "is not regarded as a cause of an event if the particular event would have occurred without it." *Univ. of Texas Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 347 (2013). These "brief contacts with [investors] in Massachusetts" therefore "do not give rise to personal jurisdiction." *See Fern*, 55 Mass. App. Ct. at 582-83.

Finally, ExxonMobil's statements in corporate reports published on its website and in SEC filings, which are available in every state via the internet, are insufficient to establish specific jurisdiction in Massachusetts. (*See, e.g.*, Am. Compl. ¶¶ 284-85, 368-69, 373-76, 497-513.) Statements on a defendant's website that do not specifically target the forum, do not constitute jurisdictional contacts with the state. *See A Corp.* v. *All Am. Plumbing, Inc.*, 812 F.3d 54, 60 (1st Cir. 2016); *Cossaboon* v. *Maine Med. Ctr.*, 600 F.3d 25, 35 (1st Cir. 2010). To the extent the Attorney General seeks to establish jurisdiction for the investor deception claims by alleging that "ExxonMobil filed with the SEC a Form S-3 shelf-registration statement" for certain bond offerings, which were eventually purchased by Massachusetts investors (Am. Compl. ¶ 284), courts have held that "the offering of . . . bonds" through "nationally distributed papers" cannot

support jurisdiction. *See Federated Rural Elec. Ins. Corp.* v. *Kootenai Elec. Coop.*, 17 F.3d 1302, 1305 (10th Cir. 1994). In sum, the Attorney General cannot establish specific jurisdiction over ExxonMobil for the investor deception claim because the only conduct alleged to violate Chapter 93A is speech made outside Massachusetts that did not expressly target the forum.

B. The Consumer Deception Claim (Count 2) Does Not Arise out of ExxonMobil's Forum Contacts.

The second cause of action, which alleges consumer deception, must also be dismissed for lack of personal jurisdiction because the Attorney General again fails to allege that the purportedly deceptive statements were made in Massachusetts or specifically targeted the state.

1. The Purportedly Deceptive Statements Were Made Outside Massachusetts and Were Not Specifically Aimed at the Forum.

Specific jurisdiction is lacking here because "all the conduct giving rise to the [Attorney General's] claim occurred elsewhere." *Bristol-Myers Squibb Co.* v. *Super. Ct. of Cal.*, 137 S. Ct. 1773, 1782 (2017). The Attorney General claims ExxonMobil deceived Massachusetts consumers by representing that the "use of its Synergy and 'green' Mobil 1 products reduces greenhouse gas emissions." (Am. Compl. ¶ 752.) But the Amended Complaint concedes that ExxonMobil did not make the challenged representations in Massachusetts. Rather, the Attorney General admits that the challenged statements "appear[] on ExxonMobil's website," (*id.* ¶¶ 587-88, 592, 595, 611), and on YouTube (*id.* ¶¶ 612-14), which the Attorney General states are merely "accessible in Massachusetts"—as they are in the rest of the country (*id.* ¶ 587).

It is well established that a website that does not specifically target Massachusetts and "affords no mechanism for Massachusetts residents to order any goods or services" is insufficient to support personal jurisdiction. *A Corp.*, 812 F.3d at 61; *Cossaboon*, 600 F.3d at 35; *accord be2 LLC* v. *Ivanov*, 642 F.3d 555, 559 (7th Cir. 2011) ("even a 'highly interactive' website, that is

accessible from, but does not target, the forum state" is insufficient). The Attorney General does not allege that ExxonMobil's "[w]ebsite did anything beyond providing information." *Roberts* v. *Legendary Marine Sales*, 447 Mass. 860, 865 (2006). It does not claim that consumers could purchase ExxonMobil's Synergy and Mobil 1 products from its webpage. Nor does the Attorney General allege that the content of the website was specifically tailored to Massachusetts.

At most, the Amended Complaint alleges ExxonMobil's website includes a commonplace store locator function. (Am. Compl. ¶¶ 548, 568.) But numerous courts have held that a store locator function on a defendant's website does not suffice to support specific jurisdiction. *See, e.g.*, *Fidrych* v. *Marriot Int'l, Inc.*, 952 F.3d 124, 142-43 (4th Cir. 2020); *NexLearn, LLC* v. *Allen Interactions, Inc.*, 859 F.3d 1371, 1378 (Fed. Cir. 2017). "[G]iven the 'omnipresence' of internet websites" with such functionality, a contrary rule would "improperly erode important limits on personal jurisdiction over out-of-state defendants." *See A Corp.*, 812 F.3d at 61.

The Attorney General's reference to a Mobil 1 YouTube advertisement is equally irrelevant to personal jurisdiction. (Am. Compl. ¶ 612-14.) It is settled law that "advertisements and websites that do not specifically target a forum state, without more, are insufficient to meet the minimum contacts standard." *Zuraitis* v. *Kimberden, Inc.*, No. 071238, 2008 WL 142773, at *3 (Mass. Super. Ct. Jan. 2, 2008) (citing *Droukas*, 375 Mass. 149 at 153). Not only does the YouTube video fail to target Massachusetts, it does not even target the United States; the video refers consumers to a website with a domain in the United Kingdom.[9] (Am. Compl. ¶ 613.)

The Attorney General also vaguely alleges that ExxonMobil runs "Massachusetts-specific advertisements." (*Id.* ¶¶ 571, 589.) This too is insufficient because the Attorney General fails to

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[9] *See* https://www.youtube.com/watch?v=dga50ik0euU (cited in Am. Compl. ¶ 612.)

allege that the content of any in-state advertisements gives rise to its deception claim.[10] As the First Circuit explained when affirming the dismissal of Chapter 93A claims in *Copia Commc'ns, LLC* v. *AMResorts, L.P.*, even where a defendant "advertise[s] in Massachusetts, ha[s] Massachusetts residents among its customers, and ha[s] some arrangements with travel agents in Massachusetts," such contacts "are not relevant to [the] specific jurisdiction analysis" if the claim does not "arise out of or relate directly to any of these contacts." 812 F.3d 1, 5 (1st Cir. 2016). The Supreme Court has likewise concluded that due process precludes exercising specific jurisdiction over misleading advertising claims, "regardless of the extent of a defendant's unconnected activities in the State" (including in-state sales and marketing), where plaintiffs' injuries arose out of conduct that, although "similar" to these in-state activities, "occurred elsewhere." *See Bristol-Myers Squibb*, 137 S. Ct. at 1782. The Attorney General fails to allege that any in-state advertising for Synergy or Mobil 1 contained the purportedly deceptive statements at issue here.

The Attorney General's remaining hodgepodge of miscellaneous contacts, including Smart Card credit cards (Am. Compl. ¶¶ 557-59), gift cards (*id*. ¶ 560), the Rewards+ smart phone application (*id*. ¶¶ 555-56, 561-63), a 2018 sweepstakes event that was run by a third party (*id*. ¶¶ 574, 616), and ExxonMobil's partnership with the Boston Celtics (*id*. ¶ 572), is unavailing for exactly the same reason. Even assuming these allegations amounted to contacts with the forum by ExxonMobil, which they do not, *see Intercarrier Commc'ns LLC* v. *WhatsApp Inc.*, No. 3:12-CV-776-JAG, 2013 WL 5230631, at *4 (E.D. Va. Sept. 13, 2013), the Attorney General has not alleged

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[10] The only in-state advertising the Attorney General even describes is purported "labeling on gasoline pumps" allegedly stating that Synergy fuel "takes you further" and that it has been certified "Top Tier" because it "contains more detergents than required by the Environmental Protection Agency." (Am. Compl. ¶ 589.) Even assuming ExxonMobil is responsible for these advertisements, they still do not give rise to the Attorney General's claims. The identified advertisements do not state that Synergy fuel "reduces greenhouse gas emissions"—which is the only representation that the Attorney General claims is deceptive. (*Id.* ¶ 581.) And they say nothing about Mobil 1.

that any of them are a source, much less the but-for cause, of its consumer deception claims.

2. Massachusetts Service Stations Do Not Support Specific Jurisdiction.

The existence in Massachusetts of service stations branded "Exxon" and "Mobil" is also insufficient to support personal jurisdiction over ExxonMobil for the Attorney General's claims. For the past decade, ExxonMobil did not own or operate any of those service stations, all of which are "independently owned" by third-party "BFA holders." (*Id.* ¶¶ 544-45, 551.) In the context of the Attorney General's investigation, the Supreme Judicial Court held that ExxonMobil's purported "control over franchisee advertising" could support personal jurisdiction if the claims asserted arose from statements "disseminated *through Exxon's franchisees*." *Exxon Mobil Corp.*, 479 Mass. at 320 (emphasis added). But the Attorney General has failed to satisfy that predicate here. The Amended Complaint does not identify any purportedly deceptive advertising at branded gas stations in the state. They are therefore inadequate to support personal jurisdiction.

It is no answer for the Attorney General to argue that its claim arises from ExxonMobil's activities in the forum merely because ExxonMobil failed to affirmatively require in-state gas stations to "disclose that the development, refining, and consumer use of ExxonMobil fossil fuel products emit large volumes of greenhouse gases." (Am. Compl. ¶ 538.) While an omission might form the basis for imposing *liability* under certain circumstances, it cannot confer *jurisdiction*. It is well established that "an omission" or "a failure to act" cannot "furnish the minimum contact with that state that is needed to confer jurisdiction." *Chlebda* v. *H. E. Fortna & Bro., Inc.*, 609 F.2d 1022, 1023-24 (1st Cir. 1979). Thus, "[a] failure to act outside the state cannot be considered an act or omission in Massachusetts" for purposes of personal jurisdiction. *Fiske* v. *Sandvik Mining*, 540 F. Supp. 2d 250, 254 (D. Mass. 2008).

C. The "Greenwashing" Claim (Count 3) Does Not Arise out of ExxonMobil's Forum Contacts.

The Attorney General's third cause of action alleges that ExxonMobil deceived consumers by "falsely depicting ExxonMobil as a leader in addressing climate change through technical innovation and various 'sustainability' measures." (Am. Compl. ¶ 541.) ExxonMobil allegedly conveyed this so-called "greenwashing" through its corporate speech in nationally distributed publications like its corporate citizenship and sustainability reports (*id.* ¶¶ 605-07, 666, 673-75, 678-80, 683, 685-86), on the internet (*id.* ¶¶ 639-44, 653-54, 660-62), and in advertising in national publications (*id.* ¶¶ 573, 642, 645, 651-52). None of these statements have a sufficient nexus to the Commonwealth because they were not made in Massachusetts, they were not specifically directed at Massachusetts, and they do not concern a subject matter specific to Massachusetts.

First, all of the statements identified in the Amended Complaint were made outside Massachusetts. For example, the Attorney General claims that ExxonMobil's Corporate Citizenship Report had a tendency to deceive consumers because it did not reference "the potentially 'catastrophic' impacts of climate change." (Am. Compl. ¶ 680.) But that report is developed and published at ExxonMobil's headquarters in Texas. (Aff. ¶ 7.) At its most extreme, the Amended Complaint takes issue with the name ExxonMobil assigned to an oil sands project in Alberta, Canada—over 1,800 miles from the Massachusetts border. (Am. Compl. ¶ 648.)

Second, the purportedly deceptive statements "d[id] not specifically target" Massachusetts. *Zuraitis*, 2008 WL 142773, at *3. They appeared in corporate reports, nationally distributed newspapers (Am. Compl. ¶¶ 573, 642, 645, 651-52), or on ExxonMobil's globally accessible website (*id.* ¶¶ 639-44, 653-54, 660-62). This is insufficient because neither "nationally distributed papers or journals," *Kootenai Elec. Coop.*, 17 F.3d at 1305, nor statements on a company's website constitute contacts with the forum. *See A Corp.*, 812 F.3d at 60.

Third, the challenged disclosures do not contain any information that is specific to Massachusetts. They concern ExxonMobil's environmental performance and investment and research into alternative energy sources. (2016 Corporate Citizenship Report.) But these decisions and activities did not take place in Massachusetts (Aff. ¶¶ 4-5) and the Amended Complaint does not contain any allegations to the contrary.

D. The Long-Arm Statute Is Not Satisfied.

The Massachusetts long-arm statute precludes personal jurisdiction because the Attorney General failed to allege that ExxonMobil "cause[d] tortious injury" in Massachusetts that is the but-for cause of the asserted claims.[11] *B. Bullen*, 2019 WL 3331280, at *6; *Fern*, 55 Mass. App. Ct. at 582 n.9. The Attorney General appears to proceed under G.L. c. 223A, §§ 3(c) & (d), which both require a plaintiff to show that its "cause of action aris[es] from the [defendant's] . . . causing tortious injury. . . ." (*See* Am. Compl. ¶ 48.) Not only has the Attorney General failed to plead "tortious injury," it has not alleged injury at all. Indeed, it seeks only statutory damages. Even if the Attorney General had sufficiently alleged an injury, it would not qualify as a "tortious" injury. An injury suffered in a Chapter 93A action "is a monetary injury" and does "not constitute 'tortious injury' as contemplated" by the long-arm statute. *See Roberts*, 447 Mass. at 864.

II. The Attorney General Fails to State Claims under Chapter 93A.

The Attorney General's failure to state plausible claims provides an independent basis to dismiss the Amended Complaint. To withstand dismissal, a complaint must allege facts "'plausibly suggesting (not merely consistent with)' an entitlement to relief." *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008). The factual allegations "must be enough to raise a right to relief above the speculative level." *Id.* "Mere 'labels and conclusions'" are not sufficient to meet

[11] For the reasons stated above, any business in the state is also not the "but-for" cause of the plaintiff's injury.

this standard. *Galiastro* v. *Mortgage Elec. Registration Sys., Inc.*, 467 Mass. 160, 165 (2014). Nor are "legal conclusions cast in the form of factual allegations." *Edwards* v. *Commonwealth*, 477 Mass. 254, 260 (2017). Assessing the plausibility of the plaintiff's allegations is a context-specific inquiry that "draw[s] on . . . judicial experience and common sense." *Trychon* v. *Mass. Bay Transp. Auth.*, 90 Mass. App. Ct. 250, 251 (2016).

The Attorney General's allegations fall well short of that standard. The Amended Complaint nowhere alleges that ExxonMobil made a factual representation that was false. Nor does it identify any statement that would mislead a reasonable consumer or investor about the characteristics of ExxonMobil's products or securities. Instead, the Attorney General calls upon this Court to establish—in a ruling without precedent—that ExxonMobil may not speak or even permit the sale of its products and securities unless accompanied by an exposition on the causes and potential future impacts of climate change, while parroting the Attorney General's view on energy policy that the world must rapidly transition away from the use of fossil fuel products and divest from fossil fuel securities. Chapter 93A imposes no such requirement.

A. The Attorney General Fails to Plausibly Allege Deceptive Conduct.

To state a claim under Chapter 93A, the Attorney General must plausibly allege that ExxonMobil engaged in "unfair or deceptive acts or practices." G.L. c. 93A, §§ 2, 4.[12] A representation "is deceptive when it has the capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted (*i.e.*, to entice a reasonable consumer to purchase the product)." *Aspinall* v. *Philip Morris Cos., Inc.*, 442 Mass. 381, 396 (2004). A representation is not actionable if it would deceive only the "ignorant,

[12] ExxonMobil need not address the "unfair" prong of Chapter 93A because the Amended Complaint focuses exclusively on purportedly "deceptive" conduct. (Am. Compl. ¶ 722.)

[the] unthinking, and the credulous." *Id.* at 395-96.

The representation also must be "material"; it must contain information important to consumers such that it is likely to affect their choice of, or conduct regarding, a product. *Com.* v. *AmCan Enterprises, Inc.*, 47 Mass. App. Ct. 330, 334 (1999); 940 C.M.R. § 3.05(1). If a plaintiff pursues a theory of omission, the plaintiff must also establish that the omission was "knowing," not merely negligent. *Underwood* v. *Risman*, 414 Mass. 96, 100 (1993). That is, the undisclosed information must have been known to the party at the time of the transaction. *See id.*; *Mayer* v. *Cohen-Miles Ins. Agency, Inc.*, 48 Mass. App. Ct. 435, 443 (2000) (Chapter 93A "requires a 'material, knowing, and willful nondisclosure.'").

1. It Is Implausible That ExxonMobil's Statements Would Materially Mislead Reasonable Investors about the Risks of Climate Change.

In its first cause of action, the Attorney General claims that ExxonMobil's extensive disclosures concerning its assessment of potential climate risks are deceptive because they "failed to disclose the full extent of the risks . . . to the world's people and economies, the fossil fuel industry, and the Company." (Am. Compl. ¶ 18.) In particular, the Attorney General takes issue with ExxonMobil's public statements concerning potential climate risks because they predict "[i] fossil fuel demand will continue to grow in the coming decades, [ii] clean energy alternatives are not and will not in the near future be competitive with fossil fuels, and [iii] the world's governments are unlikely to constrain fossil fuel use to limit global warming to the level those governments have agreed is necessary to avert the most harmful potential consequences of climate change." (Am. Compl. ¶ 471; *accord id.* ¶¶ 20, 22, 27, 265, 318, 329, 363, 470-76, 492.) The Attorney General does not allege that ExxonMobil's forward-looking opinions on these issues are not honestly held or are unsupported. The Attorney General simply quarrels with ExxonMobil's

projections, faulting them for not aligning with its belief that renewable energy sources must displace oil and natural gas immediately to address climate change. (*Id.*) This disagreement over energy policy is insufficient to state a claim for at least three reasons.

First, the challenged statements are not actionable as a matter of law because they entail what the Attorney General itself describes as ExxonMobil's "forward-looking" statements of opinion. (*Id.* ¶ 488.) It is well established that "'only statements of fact are actionable.'" *NPS, LLC* v. *Ambac Assur. Corp.*, 706 F. Supp. 2d 162, 171-74, 179-80 (D. Mass. 2010). As for statements of opinion, an "honest and reasoned judgment" does not support Chapter 93A liability even if—contrary to this case—that judgment is based on "inaccurate assumptions." *See Bachini* v. *A.G. Edwards*, 24 Mass. L. Rptr. 192, 2008 WL 2359727, at *13 (Mass. Super. Ct. 2008). Statements of opinion include "forward-looking statement[s]" concerning future events, which "cannot, as a matter of law, form the basis" of a deception claim. *Houston* v. *Greenwald*, No. CV961385C, 2000 WL 1273373, *4 (Mass. Super. Ct. June 1, 2000); *accord von Schonau-Riedweg* v. *Rothschild Bank AG*, 95 Mass. App. Ct. 471, 496 (2019). Such statements cannot be deceptive because "they are not 'susceptible of actual knowledge.'" *NPS*, 706 F. Supp. 2d at 173.

Here, the Attorney General takes issue with ExxonMobil's forward-looking opinions that: (i) "aggressive regulatory action is unlikely," including regulations restricting hydrocarbon production to reduce GHG emissions by 80 percent over the next two decades; (ii) "renewable energy sources are uncompetitive" in the near term with oil and natural gas; and (iii) "fossil fuel demand and investment will continue to grow," including that "global natural gas demand will grow 'by about 40 percent . . . between 2016 and 2040.'" (Am. Compl. ¶¶ 19, 20, 22, 265, 318, 329, 363, 471, 483, 492-93, 497, 499.) These statements do not constitute a "statement[] of fact" and therefore cannot be "deceptive" as a matter of law. *NPS*, 706 F. Supp. 2d at 171, 179. Rather,

"[t]hese are representations of opinion because they express only 'the belief of the maker, without certainty, as to the existence of fact.'" *Id.* at 173. ExxonMobil's "expectation[s], estimate[s], [or] opinion[s]" about future conditions decades away cannot support liability for deception because such statements fail to express any factual proposition that could mislead a reasonable investor. *Stigman* v. *Nickerson Enters.*, 2000 Mass. App. Div. 223, 224 (Mass. Dist. Ct. 2000).

Second, Chapter 93A does not require a company to disclose "information [that is] readily available to consumers." *Tomasella* v. *Nestlé USA, Inc.*, 962 F.3d 60, 81-82 (1st Cir. 2020). And a defendant does not violate Chapter 93A by "failing to disclose to [the plaintiff] information that was already public." *Hauck* v. *Advanced Micro Devices, Inc.*, No. 18-CV-00447-LHK, 2019 WL 1493356, at *13 (N.D. Cal. Apr. 4, 2019). The United States government has been debating climate policy since the 1960s, and climate change has been a subject of discussion in the mainstream media for just as long. *See* Nathaniel Rich, *Losing Earth: The Decade We Almost Stopped Climate Change*, N.Y. Times Magazine (2018). At the very least, the risks of climate change were widely publicized by the time the Supreme Court decided *Massachusetts* v. *EPA*, 549 U.S. 497 (2007). While the Attorney General baldly accuses ExxonMobil of "fail[ing] to disclose the full extent of the risks of climate change," its own pleadings confirm that ExxonMobil has repeatedly and extensively addressed these risks with the public. (*See, e.g.*, Am. Compl. ¶¶ 18, 23, 26, 41, 476.)

As the Amended Complaint recounts, ExxonMobil has issued numerous climate risk disclosures, regularly publishes the assumptions underlying its forecasts concerning energy demand, and has disclosed its analysis regarding the feasibility of a low-carbon scenario and its assessment of the likelihood of clean energy alternatives displacing fossil fuels in the near future. (*See, e.g.*, Am. Compl. ¶¶ 472, 505-13, 736.) Indeed, the Attorney General admits "ExxonMobil's

energy projections comprise a *comprehensive*, forward-looking set of expectations about future economic conditions and energy resources" and that ExxonMobil "*is among the only energy companies in the world that compile and produce such detailed projections*." (*Id.* ¶ 488 (emphasis added).) ExxonMobil's shortcoming, according to the Attorney General, does not appear to be an absence of disclosures, but the absence of a climate disclosure in each and every public statement ExxonMobil makes. Having "made such information readily available," however, ExxonMobil was not obliged to rehash these disclosures in every public statement to avoid deceiving the reasonable investor. *Nestlé,* 962 F.3d at 82; *see also Pelman* v. *McDonald's Corp.*, 237 F. Supp. 2d 512, 528-29 (S.D.N.Y. 2003).

Third, to the extent the Attorney General accuses ExxonMobil of deceptive omission by failing to affirmatively warn investors of systemic climate risks, the Attorney General has not plausibly alleged that the nondisclosure was "knowing[] and willful," as Chapter 93A requires. *Mayer*, 48 Mass. App. Ct. at 443. Chapter 93A might impose a duty "to disclose material facts *known* to a party at the time of a transaction," but "[t]here is no liability for failing to disclose what a person does not know." *Risman*, 414 Mass. at 99 (emphasis added) Here, the Attorney General faults ExxonMobil for not warning the public that continued use of its products will purportedly lead to "the collapse of elements of human societies, including financial markets." (Am. Compl. ¶¶ 263-65, 329.) The Attorney General's wildly speculative prediction is not known to be true by anyone, not even the Attorney General. Predictions about future events—even far less outlandish than those alleged here—cannot support the knowledge necessary for a nondisclosure claim. *See Greenery Rehab. Grp., Inc.* v. *Antaramian*, 36 Mass. App. Ct. 73, 78 (1994) ("[A] predictive insight about the future operations of a going business in relation to changing market conditions would hardly fit under the heading of 'fact' and would seem at most in the nature of opinion.").

2. It Is Implausible That ExxonMobil's Statements Would Materially Mislead Reasonable Investors about Its Use of a Proxy Cost of Carbon.

The Attorney General attempts to bolster its investor deception claim by repeating allegations made by its ally, the New York Attorney General—a fellow member of the self-proclaimed "Green 20."[13] While the Amended Complaint repeatedly references testimony from the New York trial (Am. Compl. ¶¶ 21, 384, 396, 402), it materially omits the trial's outcome. Once the evidence was in, the New York state court rejected the allegations in a complete defense verdict that the New York Attorney General chose not to appeal. *See People* v. *Exxon Mobil Corp.*, No. 452044/2018, 2019 WL 6795771, at *1 (N.Y. Sup. Ct. Dec. 10, 2019).

The Attorney General nevertheless rehashed that discredited theory here, accusing ExxonMobil of deceiving investors by stating that it uses the "proxy costs of carbon set forth in its Outlook for Energy" as an assumption when projecting future energy demand "[w]ithout disclosing its internal practices with any specificity." (Am. Compl. ¶¶ 377, 384.) According to the Attorney General, ExxonMobil's voluntary disclosure of its use of a proxy cost was misleading because "ExxonMobil's actual practices in applying proxy costs were at best uneven and haphazard, and no meaningful potential financial impacts were ever identified as a result of ExxonMobil's application of" the proxy cost. (*Id.* ¶ 487.) The challenged statements (i) were neither false nor misleading, and (ii) were not material.

First, ExxonMobil's disclosures about its proxy cost were neither false nor misleading. To be misleading, a statement must be "sufficiently precise," *Massingill* v. *EMC Corp.*, 449 Mass. 532, 544 (2007), such that it is "verifiable . . . when made," *Maffei* v. *Roman Catholic Archbishop of Boston.*, 449 Mass. 235, 252 (2007). By contrast, statements that are "so general" that it would be difficult "to raise from them any implications of falsity" cannot constitute a material

[13] *See* Memo. of Exxon Mobil Corp. in Supp. of Its Special Mot. to Dismiss Pursuant to G.L. c. 231, § 59H at 5-6.

misrepresentation. *Greenery Rehab. Grp.*, 36 Mass. App. Ct. at 75.

Here, ExxonMobil's entirely accurate statements about its use of the proxy cost were presented at such a high level and expressed with such generality that they lack sufficient precision to be misleading. ExxonMobil provided only conceptual information—not proprietary or technical detail—about how it managed the risks of climate change in its business planning. As alleged in the Amended Complaint, the "proxy cost of carbon" seeks "to reflect all types of actions and policies" that may suppress demand for carbon-based energy and "is embedded in" ExxonMobil's "Outlook for Energy," which represents "an analysis of long-term future global energy supply and demand." (Am. Compl. ¶¶ 365, 373.) In other words, ExxonMobil disclosed that it used the proxy cost as an input in its "macroeconomic projections of energy demand and energy pricing," but provided no details about how it did so. (*Id.* ¶ 361.) ExxonMobil did not even disclose the values assigned to the proxy cost of carbon, other than to say "in *some areas* [it] *may* approach $80/ton over the Outlook period." (*Id.* ¶ 373 (emphasis added).)

Such representations do not guarantee "some concrete fact or outcome" that could give rise to liability for deception. *City of Pontiac Policemen's & Firemen's Ret. Sys.* v. *UBS AG*, 752 F.3d 173, 185 (2d Cir. 2014). In *City of Pontiac*, the court held that UBS's representations concerning "'*adequate* diversification of risk' and 'avoidance of *undue* concentrations'" in the residential mortgage-backed securities market were "too open-ended and subjective to constitute a guarantee" and nothing like "*specific* risk limits" that could support a claim for securities fraud. *Id.* at 186. The same conclusion should be reached here. As the New York Supreme Court explained, ExxonMobil's "proxy cost of carbon is an attempt to make provision for all the *possible* regulations and policies that all of the countries of the world *may* enact to suppress the use of oil and gas, and it reflects *anticipated* technological innovations that would also suppress the need for oil and gas."

Exxon Mobil Corp., 2019 WL 6795771, at *12 (emphasis added). "These unquantifiable impacts of innumerable potential *future* climate change policies and regulations" are merely "planning tools that cannot be depended upon to reflect what will actually happen in the distant future." *Id.* at *12, 13. The court concluded that the proxy costs "were not disclosed with any specificity, other than to indicate variation by time in the distant future and by region." *Id.* at *15.

Second, the Attorney General fails to plausibly allege that a reasonable investor would have considered it material whether ExxonMobil evaluated potential investments in the year 2030 or 2040 using a particular figure as a planning assumption to account for highly uncertain regulatory costs that no one claims to be able to estimate reliably. The Attorney General attempts to bolster its materiality allegations with the testimony of "Arjuna representative" Natasha Lamb from the New York trial. (Am. Compl. ¶ 394.) But the judge in that case rejected Ms. Lamb's testimony because she "does not invest in or recommend ExxonMobil stock" and was "manifestly biased against ExxonMobil." *Exxon Mobil Corp.*, 2019 WL 6795771, at *17 n.7, 30.

In this case, the Attorney General claims that ExxonMobil's proxy cost disclosures were material due to "growing investor attention to climate change risks," among other things. (Am. Comp. ¶ 403.) In other words, the Attorney General argues that investor concern about climate change *generally* somehow establishes that ExxonMobil's proxy cost disclosures *specifically* would tend to influence investor behavior. But a topic's general "importance" to investors "does not render a particular statement [regarding that topic] per se material." *ECA, Local 134 IBEW Joint Pension Trust of Chicago* v. *JP Morgan Chase Co.,* 553 F.3d 187, 206 (2d Cir. 2009); *see also City of Pontiac*, 752 F.3d at 185. Here, the overall "importance" to investors of managing climate change risk does not establish the materiality of ExxonMobil's representations about proxy costs. The Attorney General does not allege that investors factored these speculative assumptions

into their investment decisions, or that they even had the ability to evaluate how ExxonMobil internally applied these proprietary cost assumptions. Having claimed deception in ExxonMobil's proxy cost disclosures, the Attorney General must plausibly allege that the disclosures themselves tend to influence investor behavior. Alleging a general concern for climate change is insufficient.

In any event, ExxonMobil's proxy cost disclosures were completely immaterial to its bottom line. *See Exxon Mobil Corp.*, 2019 WL 6795771, at *15. Even the Attorney General concedes that the proxy cost had "no impact on ExxonMobil's income statement, balance sheet, or other financial disclosures." (Am. Compl. ¶¶ 260, 388.) That is not a flaw, but an inherent feature of this metric, given that income statements, balance sheets, and regulatory filings tend to report a company's *current* or *past* financial performance, whereas the admitted purpose of a proxy cost is to represent potential "*future* impacts of greenhouse gas regulations on the Company's business" decades in the future. (Am. Compl. ¶ 358 (emphasis added).) Without any allegation that ExxonMobil's proxy cost disclosures impacted the Company's financials or the market writ large, the Attorney General fails to plausibly allege materiality.

3. The Amended Complaint Does Not Plausibly Allege Deceptive Statements About Synergy or Mobil 1.

In its second cause of action, the Attorney General accuses ExxonMobil of deceiving consumers about the ability of Synergy gasoline and Mobil 1 motor oil to "reduce greenhouse gas emissions," relative to other gasoline products, and improve fuel economy. (Am. Compl. ¶¶ 581-82, 665.) Those allegations are insufficient to state a claim because the Amended Complaint does not identify any falsity or materially misleading half-truths in those statements.

First, the Amended Complaint does not plausibly allege that ExxonMobil's representations about the benefits of Synergy and Mobil 1 were misleading because it never alleges that these

statements are *false*. (*See, e.g.*, *id.* ¶¶ 538, 578-79, 581-82.) The Attorney General does not deny that ExxonMobil "accurately described" its products. *See Ortiz* v. *Examworks*, *Inc*., 470 Mass. 784, 794 (2015) (holding statements that "accurately described" defendant's qualifications were not misleading under Chapter 93A). It does not, for instance, dispute that Synergy fuels "help improve fuel economy" (*id.* ¶ 587), or that they "contain[] significantly higher quantities of detergents than required by the [EPA] and ha[ve] passed key performance tests resulting in [them] being certified TOP TIER" (*id.* ¶ 589). Nor does the Attorney General contest that an engine running more efficiently because of these products uses less fuel, thus reducing GHG emissions. To the contrary, the Attorney General assumes "it is technically true that Synergy™ and Mobil 1™ improve internal combustion engine performance and/or efficiency relative to prior or other products." (Am. Compl. ¶¶ 582, 619.)

Second, ExxonMobil's representations about Synergy and Mobil 1 did not amount to misleading half-truths. Half-truths are actionable as deception "where a seller fails to disclose qualifying information necessary to prevent one of his affirmative statements from creating a misleading impression." *Nestlé,* 962 F.3d at 72; *see also Aspinall*, 442 Mass. at 395. Here, the Attorney General claims ExxonMobil's statements concerning Synergy and Mobil 1 were misleading because (i) these statements "convey[ed] a false impression that using the products results in environmental benefits," and (ii) ExxonMobil purportedly "fail[ed] to disclose the fact that the production and consumer use of fossil fuel products like Synergy™ and 'green' Mobil 1™ are a leading cause of climate change." (*Id.* ¶¶ 581-82.)

ExxonMobil's statements conveyed no "misleading impression" in the absence of these proposed qualifications. *Nestlé,* 962 F.3d at 72. As an initial matter, a reasonable consumer would not be misled about the environmental benefits of Synergy and Mobil 1 motor oil because

ExxonMobil's statement that these products "reduce[] CO_2 emissions" when "compared to gasoline meeting minimum U.S. government standards" (*e.g.*, Am. Compl. ¶ 587 & n.5), necessarily implies that these products produce *some* CO_2 emissions. Moreover, no consumer during the applicable time period who was "acting reasonably under the circumstances" would be unaware of the connection between fossil fuels and climate change. *See Aspinall*, 442 Mass. at 395-96 (reasonable consumers are not "the ignorant, the unthinking, and the credulous"). A reasonable consumer would have understood that using any fossil fuel products could contribute to climate change, but Synergy and Mobil 1 might help mitigate those effects.

Third, to the extent the Attorney General alleges that ExxonMobil deceived consumers by failing to affirmatively discuss the risks of climate change or the process by which it manufactures its products, rejection is in order because a "pure omission" is generally not a recognized basis for liability under Chapter 93A. *See, e.g.*, *Nestlé,* 962 F.3d at 73-74. A "pure omission" entails the omission of facts that have nothing to do with the "central characteristics of the . . . products sold, such as their physical characteristics, price, or fitness for consumption." *Id*. at 68; 940 C.M.R. § 3.05(1). Thus, the Attorney General cannot establish a "duty to disclose" based merely on "subjective preferences" that do "not relate to the central functionality" of Defendant's products or services. *See Hall* v. *SeaWorld Entertainment, Inc.*, 747 Fed. Appx. 449, 453 (9th Cir. 2018). When construing the federal analogue to Chapter 93A, the Federal Trade Commission observed that the "number of facts that may be material to consumers—and on which they may have prior misconceptions—is literally infinite." *Nestlé*, 962 F.3d at 73 (quoting *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1059-60 (1984)). Pure omissions are therefore excluded from liability because they would result in "ad[s] . . . completely buried under such disclaimers." *Id.*

Following this rule, the First Circuit in *Nestlé* affirmed the dismissal of a Chapter 93A

claim alleging failure to "disclose the existence of 'child and/or slave labor in the [cocoa] supply chain' on the packaging of the chocolate products" because the omission was "tangential to its fitness for use." 962 F.3d at 66, 72; *accord Hodson* v. *Mars, Inc.*, 891 F.3d 857, 868 (9th Cir. 2018). The First Circuit explained that "[b]y not disclosing on the packaging of their chocolate products that there are known labor abuses in their cocoa supply chains, Defendants stay silent on the subject in a way that does not constitute a half-truth or create any misleading impressions about the upstream labor conditions in the cocoa supply chain." *Nestlé,* 962 F.3d at 74. The same is true here. The Attorney General's claim that ExxonMobil was required to affirmatively warn consumers about climate risks on its Synergy and Mobil 1 products is a theory of pure omission. The existence of climate change and the link between fossil fuel and climate change are "tangential" to Synergy and Mobil 1's fitness for use. *Id.* at 72. A theory of "pure omission" therefore cannot salvage this fundamentally flawed cause of action.

4. The Amended Complaint Lacks Plausible Allegations That ExxonMobil Engaged in Deceptive Greenwashing.

The Attorney General's allegations of greenwashing also fail to state a claim under Chapter 93A. In its third cause of action, the Attorney General takes issue with ExxonMobil's corporate mantra "Protect Tomorrow. Today." (Am. Compl. ¶¶ 640-44); advertising that discusses ExxonMobil's research and investment into algae biofuels (*id.* ¶¶ 651-55); and the Company's annual reports, which describe ExxonMobil's commitment to providing energy in a safe, risk-adverse manner (*id.* ¶¶ 673-79, 685-86). Those statements cannot support a claim because they "were truthful at best and mere puffery at worst." *von Schönau-Riedweg*, 95 Mass. App. Ct. at 497; *accord Ortiz*, 470 Mass. at 794.

Generic corporate branding and marketing efforts are most appropriately construed as non-

actionable "'permissible puffery,' which is distinct from actionable conduct under [Chapter] 93A." *See Hansmann* v. *Nationstar Mortg., LLC*, 85 Mass. App. Ct. 1128 (2014). "[A] statement that an article is made of the finest material obtainable, that a particular automobile is the most economical car on the market, or that a certain investment is sound and will yield a handsome profit, and similar claims are generally understood to be matters of opinion and if reliance is placed on them and they turn out otherwise the law does not afford a remedy." *von Schönau-Riedweg*, 95 Mass. App. Ct. at 497-98. For instance, a defendant's representation about its "time-tested business model of stringent underwriting practices" and the "remote risk of loss" were held to be non-actionable "generalizations regarding [its] business practices." *NPS*, 706 F. Supp. 2d at 174.

The Attorney General's "greenwashing" claim is grounded in mere corporate imaging that amounts to inactionable "puffery at worst." *von Schönau-Riedweg*, 95 Mass. App. Ct. at 497. It challenges logos depicting the sun (Am. Compl. ¶¶ 587-88, 641, 644), naming a Canadian project using "the Cree word for 'bear'" (*id.* ¶ 648), and broad corporate messaging, including the assertion "we need to be very considerate of what we do today in order to protect the environment for future generations." (*Id.* ¶¶ 643, 652-53.) These "generalizations regarding . . . business practices" cannot support liability because they are "too general and vague to be capable of being proven true or false." *NPS*, 706 F. Supp. 2d at 174.

The only factual statements pleaded in support of the Attorney General's greenwashing claim also cannot support Chapter 93A liability because they are entirely accurate and the Attorney General does not allege otherwise. *See von Schönau-Riedweg*, 95 Mass. App. Ct. at 497-98. The Attorney General takes issue with corporate statements and "advertisments promoting [ExxonMobil's] investment in algae and biofuels." (*Id.* ¶¶ 645, 651-53, 659-62.) But the Attorney General does not dispute that ExxonMobil is in fact engaged in the activities described. The

Amended Complaint acknowledges that "[a]s of 2009, ExxonMobil had made a $600 million investment in algae biofuels." (*Id.* ¶ 655.) While the Attorney General asserts that these activities comprise a relatively small portion of ExxonMobil's total business, Chapter 93A does not impose liability on a company for making accurate statements highlighting the positive features of its business, which could easily be placed in context by other disclosures made by the company. *See, e.g.*, *Gillette Co.* v. *Norelco Consumer Prods. Co.*, 946 F. Supp. 115, 120 n.3, 130-31 (D. Mass 1996). Moreover, the Attorney General fails to plausibly allege that a reasonable consumer would be misled into believing that ExxonMobil, one of the world's largest oil and natural gas companies, had abandoned its core business in favor of algae biofuels. Such an inference is absurd and unworthy of being credited on a motion to dismiss.

B. The Amended Complaint Lacks Plausible Allegations That the Challenged Conduct Was in "Trade or Commerce."

The Attorney General's first and third causes of action should be dismissed because they fail to plausibly allege that the purportedly deceptive acts or practices occurred while ExxonMobil was engaged in "trade or commerce," as required under Chapter 93A. *See* G.L. c. 93A, § 2.

Chapter 93A applies only to deceptive acts or practices "in the conduct of any trade or commerce." *Id.* As relevant here, "'[t]rade' and 'commerce'" is defined to include the "advertising, the offering for sale . . . , the sale . . . or distribution of any services and any property," including "any security." G.L. c. 93A, § 1; *Planned Parenthood Fed'n of Am., Inc.* v. *Problem Pregnancy of Worcester, Inc.*, 398 Mass. 480, 490-91 (1986). This element requires a preliminary finding that the parties engaged in a commercial transaction. *See Frishman* v. *Maginn*, 21 Mass. L. Rptr. 41, 2006 WL 1075600, at *13 (Mass. Super. Ct. Apr. 12, 2006). In the securities context, "trade or commerce" specifically requires that "the defendant [be] engaged in the actual sale of

securities," including advertising securities for sale. *Reisman* v. *KPMG Peat Marwick LLP*, 965 F. Supp. 165, 174 (D. Mass. 1997). Mere "[p]ublic[] disseminat[ion] [of] statements reflecting confidence in the company's future[ ], simply do[es] not constitute 'trade or commerce' as defined under 93A when stock is purchased by investors through open markets." *Salkind* v. *Wang*, No. 93-CV-10912, 1995 WL 170122, at *9 (D. Mass. Mar. 30, 1995).

The Attorney General's securities fraud claim (Count 1) cannot satisfy this standard because it fails to allege that the purportedly deceptive statements, which were communicated primarily in annual corporate reports, were made in connection with a sale of or offer to sell securities. The Attorney General relies on three prospectus supplements filed with SEC (Am. Compl. ¶¶ 284-85), as purported support for its conclusory allegations that ExxonMobil "offers its securities, including its common stock and debt documents, directly to Massachusetts investors" and "actively markets its securities and sells its securities in Massachusetts." (*Id.* ¶¶ 270-71.) The prospectus supplements, however, refute those allegations because they show that ExxonMobil sold securities to underwriters, not directly to Massachusetts investors.[14] That ExxonMobil communicates with Massachusetts investors, who have purchased its securities on the open market, does not amount to trade or commerce under Chapter 93A.

The greenwashing claim (Count 3) fails for a similar reason: the challenged statements were not made in connection with the sale or offer to sell any "services" or "property." G.L. c. 93A, § 1; *see Planned Parenthood Fed'n of Am.*, 398 Mass. at 493. The statements and activities challenged in Count 3 concern ExxonMobil's efforts to "solv[e] the problem of climate change"

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[14] *See* Prospectus Supplement of Exxon Mobil Corp. (Feb. 29, 2016), https://www.sec.gov/Archives/edgar/data/34088/000119312516488833/d135825d424b2.htm; Prospectus Supplement of Exxon Mobil Corp. (Mar. 3, 2015), https://www.sec.gov/Archives/edgar/data/34088/000119312515077273/d881148d424b2.htm; Prospectus Supplement of Exxon Mobil Corp. (Mar. 17, 2014), https://www.sec.gov/Archives/edgar/data/34088/000119312514104504/d692921d424b2.htm.

through, for instance, research into technologies to reduce emissions, such as algae biofuels and carbon capture sequestration. (Am. Compl. ¶¶ 658, 693, 762.) These statements do not even concern ExxonMobil "property" or available "services." And they certainly do not promote the "sale" of new technologies to Massachusetts investors. Such statements are not made in "trade or commerce" and cannot support a claim under Chapter 93A.

III. The Attorney General Cannot Compel ExxonMobil to Disseminate Its Preferred Opinions on Climate Change.

The Amended Complaint should be dismissed because the Attorney General not only seeks to impermissibly chill protected petitioning activity, but also seeks to interpret Chapter 93A to compel speech in violation of the First Amendment.[15] According to the Attorney General's theory of "omission," ExxonMobil engages in deception whenever it sells or promotes its products or securities without simultaneously disseminating certain ideological messages concerning the "existential risk[]" of climate change. (Am. Compl. ¶ 687.) In other words, ExxonMobil must publicly espouse the Attorney General's particular worldview concerning "the need for . . . immediate action to mitigate climate change" (*id.* ¶¶ 38, 41, 663, 693, 710-19), or forfeit its right to speak. The First Amendment forbids government-compelled speech that expresses ideological opinions, particularly on controversial issues of public concern. *See Nat'l Inst. of Family & Life Advocs.* v. *Becerra*, 138 S. Ct. 2361, 2372 (2018).

It is well established that "[c]ompelling individuals to mouth support for views they find objectionable violates [the First Amendment], and in most contexts, any such effort would be universally condemned." *Janus* v. *Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct.

[15] For the reasons stated in ExxonMobil's Anti-SLAPP motion, the Attorney General's complaint should be dismissed at the outset because its sole purpose is to impermissibly chill ExxonMobil's petitioning activity. To the extent any allegations remain, they cannot survive constitutional scrutiny. Chapter 93A should not be construed in a manner that would render it unconstitutional. *See Edmond* v. *United States*, 520 U.S. 651, 658 (1997).

2448, 2463 (2018); *see also Wooley* v. *Maynard*, 430 U.S. 705, 717 (1977) ("[T]he State's interest . . . to disseminate an ideology . . . cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."). The government may not "require corporations to carry the message of third parties" that "are biased against or are expressly contrary to the corporation's views." *Pac. Gas & Elec. Co.* v. *Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 15 n.12, 16 (1986) (plurality opinion).

Here, the targeting of ExxonMobil's petitioning activity is based on the content of its message. As such, it is entitled to the highest standard of protection under the First Amendment. *See Com.* v. *Lucas*, 472 Mass. 387, 392 (2015) ("[A]ny attempt by the government to restrict speech 'because of its message, its ideas, its subject matter, or its content' is presumptively invalid") (quoting *United States* v. *Alvarez*, 567 U.S. 709, 715 (2012)); *R.A.V.* v. *St. Paul*, 505 U.S. 377, 384-86 (1992). But even in the inapplicable context of commercial speech, the Attorney General's broad construction of Chapter 93A cannot pass constitutional muster. The Supreme Court has articulated two standards for testing the constitutionality of restrictions on commercial speech. "Purely factual and uncontroversial" compelled disclosures are tested under the *Zauderer* standard, which permits the state to compel disclosures if they are "reasonably related to the State's interest in preventing deception of consumers" and not "unjustified or unduly burdensome." *Zauderer*, 471 U.S. at 651. Commercial speech restrictions that do not satisfy the prerequisite for *Zauderer* review are instead judged under the *Central Hudson* test, which applies intermediate scrutiny. *See Mass. Ass'n of Private Career Sch.* v. *Healey*, 159 F. Supp. 3d 173, 190, 206 (D. Mass. 2016) (citing *Cent. Hudson*, 447 U.S. at 566).

Here, the disclosures sought are neither "purely factual" nor "uncontroversial." *See Zauderer*, 471 U.S. at 651. Compelled disclosures that would imply to consumers that "products

are ethically tainted" or a company is "moral[ly] responsible" for complex geopolitical issues are not "purely factual and uncontroversial." *Nat'l Ass'n of Mfrs.* v. *S.E.C.*, 800 F.3d 518, 530 (D.C. Cir. 2015) (holding SEC could not compel mining entities to issue "not conflict free" disclosures because this "convey[ed] moral responsibility for the Congo war" and was "hardly factual or non-ideological"). Similarly here, the Attorney General seeks to compel ExxonMobil to communicate its belief that it is "necessary to . . . rapidly transition[] away from fossil fuel use" (Am. Compl. ¶ 663); that climate risks will cause specific long-term, speculative impacts on local geographies, the economy, and society (*id.* ¶¶ 503, 578, 617, 681, 684, 714); and that the public should adopt certain state-approved policy responses (*id.* ¶¶ 621, 658, 664). These disclosures are not "purely factual"; they contain subjective views pertaining to uncertain future events.[16] Moreover, the Supreme Court has expressly stated that "climate change" is a "controversial subject." *Janus*, 138 S. Ct. at 2476; *see Nat'l Ass'n of Mfrs.*, 800 F.3d at 528, 530. *Zauderer* therefore does not apply.[17]

Accordingly, any commercial speech claims are subject to the heightened scrutiny of *Central Hudson*, which requires the Attorney General to show that the restriction (1) "directly and materially advances," (2) a "substantial" government interest, and (3) that the restriction is narrowly tailored to that interest. *Greater New Orleans Broadcasting Ass'n, Inc.* v. *U.S.*, 527 U.S. 173, 187-88 (1999) (citing *Cent. Hudson*, 447 U.S. at 564, 566). "This burden is not satisfied by mere speculation or conjecture." *Id.* But that is all the Attorney General offers. The desired disclosures would not "directly advance" the goal of reducing actual deception, which is not plausibly alleged. *See Cent. Hudson*, 447 U.S. at 564. At best, the Attorney General speculates

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[16] Courts routinely strike down efforts to compel companies to adopt the state's perspective on subjective, uncertain matters. *See, e.g.*, *Video Software Dealers Ass'n* v. *Schwarzenegger*, 556 F.3d 950, 966-67 (9th Cir. 2009); *Ent. Software Ass'n* v. *Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006).

[17] Even assuming *Zauderer* applies (which it does not), the compelled speech is "unjustified or unduly burdensome" and not "reasonably related to the State's interest." *Zauderer*, 471 U.S. at 651; *Becerra*, 138 S. Ct. at 2377.

that the disclosures "might" encourage consumers to "boycott" ExxonMobil and purchase products "from [other] oil companies" or "forgo driving" altogether. (Am. Compl. ¶¶ 710-711.) This speculation is plainly insufficient under even the most lenient standard. *See Cent. Hudson*, 447 U.S. at 564, 566; *Nat'l Ass'n of Mfrs.*, 800 F.3d at 526. Given the complexity of choices that surround climate policy, compelling ExxonMobil to affirmatively discourage use of its lawful products is also "more extensive than is necessary to serve" the interest of reducing emissions. *Cent. Hudson*, 447 U.S. at 564. The First Amendment does not permit the Attorney General to "drown[] out" ExxonMobil's "own message," *Becerra*, 138 S. Ct. at 2378, by converting it into a pulpit for the Attorney General's ideological orthodoxy.

CONCLUSION

The Attorney General is entitled to its view that the world should immediately cease production and consumption of oil and natural gas, notwithstanding that neither the Commonwealth it represents nor its residents have remotely done so. But it cannot state a viable claim of investor or consumer deception under Chapter 93A absent plausible allegations that ExxonMobil made statements that would tend to materially mislead reasonable consumers or investors, who are already well aware of the risks of climate change. Nor can the Attorney General premise personal jurisdiction over ExxonMobil on statements and conduct that did not occur in Massachusetts, or on in-state contacts that do not give rise to its claims. It is equally impermissible for the Attorney General to violate the First Amendment by compelling ExxonMobil to parrot its view on climate policy. The Amended Complaint does not allege that ExxonMobil made a single deceptive statement in or targeting the Commonwealth. It should be dismissed with prejudice.

Dated: August 5, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas C. Frongillo, counsel for Defendant Exxon Mobil Corporation, hereby certify that on August 5, 2020, I served a copy of the Memorandum of Defendant Exxon Mobil Corporation in Support of Its Motion to Dismiss the Amended Complaint on counsel of record by electronic service in accordance with the Joint Motion to Set Pleading Deadlines, allowed by the Court on April 14, 2020.

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