UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE EXXON MOBIL CORPORATION DERIVATIVE LITIGATION	Civil Action No: 2:19-cv-16380-ES-SCM Hon. Steven C. Mannion Oral Argument: July 22, 2020

PLAINTIFFS' OPPOSITION TO NOMINAL DEFENDANT AND DEFENDANTS' MOTION TO TRANSFER VENUE OR, ALTERNATIVELY, TO STAY PROCEEDINGS

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PRELIMINARY STATEMENT

Defendants and Nominal Defendant Exxon Mobil Corporation ("ExxonMobil" or the "Company") have not met their considerable burden to disturb Plaintiffs' choice of forum through transfer to the Northern District of Texas or to stay these proceedings. Transferring these proceedings is not warranted under either the first-to-file rule or the factors traditionally considered by the Third Circuit, as explained in *Jumara v. State Farm Ins. Co.*, 55 F.3d 873 (3d Cir. 1995). Although the Company focuses on litigation pending in the Northern District of Texas to argue for transfer to that forum, the great weight of equitable factors, whether considered under the first-to-file rule or *Jumara*, militate toward allowing these claims to proceed in this Court, including that: (i) related litigation important to the facts alleged by Plaintiffs has been pending in several jurisdictions since 2016, so that the Northern District of Texas is not a particularly appropriate forum; (ii) Plaintiffs are the only Exxon shareholders to have adequately alleged wrongful refusal of their demand, significantly advancing their claims past any other shareholder seeking to pursue the derivative claims alleged; and (iii) this Court is best situated to decide the critical issues of New Jersey corporate derivative law raised in the present litigation.

First, under the first-filed rule, the Court should exercise its discretion and apply an equitable analysis on whether transfer would be appropriate. *E.E.O.C. v. Univ. of Pa.*, 850 F.2d 969, 978 (3d Cir. 1988). Plaintiffs should not be penalized for allowing the Company enough time to properly consider and respond to their litigation demands and avoiding the "unseemly race to the courthouse." *Id.* at 977-78 ("foremost among the equitable considerations are the timing and circumstances surrounding the filing of the first suit")(internal citation omitted). Plaintiffs' Complaint is the only derivative complaint on file which adequately alleges the Company's response to wrongfully refuse

the litigation demanded by Plaintiffs. In contrast, the derivative proceedings in the Northern District of Texas were filed before the Company could investigate and issue a report in response. As a result, Plaintiffs' Complaint is the only derivative complaint on file that successfully pleads that demand was wrongfully refused under New Jersey law, and these claims should be allowed to proceed in this District.

Second, under *Jumara*, both the private and public factors to consider in deciding a motion to transfer weigh heavily in Plaintiffs' favor.

For the private factors, Plaintiffs' forum preference is appropriate, and the Defendants' preference does not outweigh Plaintiffs' justified choice of New Jersey as a proper forum. As a New Jersey corporation, New Jersey is ExxonMobil's "home turf." *Acuity Brands, Inc. v. Cooper Indus., Inc.*, 2008 WL 2977464, at *2 (D. Del. July 31, 2008). Having received the benefits of incorporating in New Jersey, ExxonMobil cannot now complain that two of its shareholders has chosen to sue it here. *Id.*; *Auto. Techs. Int'l, Inc. v. Am. Honda Motor Co*., 2006 WL 3783477, at *2 (D. Del. Dec. 21, 2006). The misrepresentations at issue here relate to the Company's operations *worldwide*. When they focus on misrepresentations about particular operations, they did not involve misrepresentations about business in Texas. Plaintiffs' choice to litigate the action in New Jersey should, therefore, not be disturbed. The convenience of the parties and witnesses, and the location of company books and records, which are other factors under *Jumara*, similarly are of no avail to Defendants in their motion to transfer, as they either suggest that New Jersey is the appropriate forum, or are at best neutral.

And for the public factors, States have "an interest in litigation regarding companies incorporated within [their] jurisdiction." *Oracle Corp. v. epicRealm Licensing, LP*, 2007 U.S. Dist.

LEXIS 21095, at *12 (D. Del. Mar. 26, 2007). Exxon is perhaps the longest standing, most well-known New Jersey corporation in the country. The issues here relate to fundamental principles of corporate governance under New Jersey law and their intersection with disclosure requirements in the age of climate change. Litigation concerning the wrongdoing alleged here is being carried out in courts across the country. Nothing about the litigation counsels that Defendants would be prejudiced by proceeding in this District. Conversely, Plaintiffs' choice of forum is appropriate to decide important issues of New Jersey corporate derivative law.

Finally, a stay is not warranted under the circumstances for the same equitable considerations the Court should consider in analyzing the transfer motion. Plaintiffs, being the only Exxon shareholders to have adequately alleged wrongful refusal of their litigation demands, are best situated to challenge any motion to dismiss under New Jersey's state law demand requirement. N.J.S.A. 14A:3-6.3 (2013). Plaintiffs' claims should be allowed to proceed, and New Jersey is simply the best venue to litigate this case. As a result, Defendants fall well short of the significant showing required to obtain the "extraordinary remedy" of a complete stay of this action. *Akishev v. Kapustin*, 23 F. Supp. 3d 440, 445 (D.N.J. 2014).

STATEMENT OF FACTS

I. PROCEDURAL POSTURE

On November 2, 2018, Plaintiff City of Birmingham Retirement and Relief System ("Birmingham") served a litigation demand pursuant to New Jersey law on ExxonMobil's Board. ¶ 248.[1] As of its demand, Birmingham owned over 65,000 shares of ExxonMobil stock. *See*

[1] Citations to "¶ _" refer to the Amended Verified Consolidated Shareholder Derivative Complaint (the "Complaint"), filed under seal on April 17, 2020, ECF No. 53. Citations to "ECF No. _," not preceded by a docket number or case name refer to docket entries in this action, *In re Exxon Mobil Corp. Deriv. Litig.,* C.A. No. 3:19-cv-16380-ES-SCM.

Declaration of Donald A. Ecklund ("Ecklund Decl."), Ex. 1 On November 16, 2018, Saratoga Advantage Trust Energy & Basic Materials Portfolio ("Saratoga") served a litigation demand on ExxonMobil's Board. ¶ 239. As of its litigation demand, Saratoga owned approximately 1,700 shares of ExxonMobil stock. Ecklund Decl., Ex. 2. Under New Jersey law, the Board had 90 days to investigate and respond to the demands. N.J.S.A. 14A:3-6.3 (2013). The 90-day period having long since expired, on August 6, 2019, Saratoga filed its action. ECF No. 1. Following an extended failure by the Board to respond to its demand, Birmingham filed its complaint in this Court, on December 2, 2019, C.A. No. 2:19-cv-20949. Saratoga allowed more time for the Board to respond to the demand and agreed to a limited stay of the action until January 15, 2020 so that the Board could investigate the allegations of the demand. ECF No. 35.

When the Board had not responded to the demand by January 15, 2020, Saratoga stipulated to another stay until ten days after the Board's decision. ECF No. 37. On February 5, 2020, Plaintiffs received a two-page letter from the Board's outside counsel stating that the Board had decided to refuse the demands and would provide Plaintiffs the opportunity to review a copy of the 275-page investigation report on which the refusal was based, subject to execution of a confidentiality agreement. ¶ 253. Saratoga's counsel executed and returned the confidentiality agreement on February 7, 2020 but was not given access to the report until February 28, 2020. *Id.* Birmingham's counsel executed and returned the confidentiality agreement on March 18, 2020 and gained access to the report on the same day. *Id.*

Meanwhile, before either Plaintiffs reviewed the report, on February 26, 2020, ExxonMobil filed a letter with the Court seeking leave to file its motion to transfer. ECF No. 40. On March 3, 2020, Saratoga filed a letter opposing the Company's request for leave to move to transfer. ECF

No. 43. The Court set a telephonic conference for March 26, 2020. ECF No. 45.

On March 18, 2020, the parties filed a stipulation consolidating the Saratoga and Birmingham actions, appointing Birmingham and Saratoga Co-Lead Plaintiffs, and appointing Glancy Prongay & Murray LLP and Scott + Scott LLP as Co-Lead Counsel, ECF No. 46, which the Court so ordered on March 26, 2020. ECF No. 50.

During the telephonic conference on March 26, 2020, the Court directed the parties to meet and confer on a schedule for filing an amended complaint and directed the Company to file its motion to transfer by April 27, 2020. On April 17, 2020, Plaintiffs filed under seal their Amended Consolidated Complaint, and on April 27, 2020, the Company moved to transfer. ECF Nos. 53, 55.

II. EXXONMOBIL'S 138 YEAR HISTORY AS A NEW JERSEY CORPORATION

Plaintiffs sued in New Jersey because ExxonMobil is incorporated in New Jersey. New Jersey law will govern the substantive issues, and Plaintiffs believe that New Jersey's courts, state or federal, are most familiar with issues arising under New Jersey law.

That "ExxonMobil has been incorporated in New Jersey since 1882" is a fact so central to the Company's corporate identity that it has been the first sentence of every annual Form 10-K filed for at least the last twenty-five years.[2] Unsurprisingly, as the Board explained in ExxonMobil's 2010 proxy statement, the Company's reasons for maintaining its New Jersey incorporation are much more than just convenience. In 2010, ExxonMobil faced a shareholder proposal to "Reincorporate

[2] *See, e.g.,* Exxon Corporation's 1995 Form 10-K, at 1 (first sentence of report, "Exxon Corporation was incorporated in the State of New Jersey in 1882") (available at http://getfilings.com/o0000930661-96-000138.html) and Exxon Mobil's 2020 Form 10-K, at 1 (same first sentence) (available at https://www.sec.gov/ix?doc=/Archives/edgar/data/34088/000003408820000016/xom10k2019.htm).

in a Shareowner-Friendly State." In the Company's definitive proxy statement issued on April 13, 2010, the Board recommended that shareholders vote against the proposal because of the benefits to the Company of its incorporation in New Jersey, writing the following in part:

> **The Board recommends you vote AGAINST this proposal for the following reasons:**
>
> Exxon Mobil Corporation has been incorporated in New Jersey for over 125 years. New Jersey corporate law is well-developed and has served the Company and its shareholders well over this period.… New Jersey law currently supports a wide range of sound governance practices such as those already implemented by ExxonMobil.

According to a Form 8-K filed on May 26, 2010, the Board successfully persuaded an overwhelming majority of 97% of ExxonMobil's shareholders to maintain the Company's incorporation in New Jersey.

III. RELATED LITIGATION IN MASSACHUSETTS, NEW YORK, AND TEXAS

Although the Company focuses on litigation pending in the Northern District of Texas to argue for transfer to that forum, related litigation important to the facts alleged by Plaintiffs has been pending in several jurisdictions since 2016.

A. Government Actions in Massachusetts and New York and ExxonMobil's Countersuit

In November 2015, the New York Office of Attorney General ("NYAG") served ExxonMobil with a subpoena seeking documents related to its knowledge of climate change. ¶ 201. On October 14, 2016, the NYAG began an action to compel compliance with a subpoena *duces tecum* issued on August 19, 2016 to PricewaterhouseCoopers LLP as part of the NYAG's investigation of ExxonMobil. *People of the State of New York v. PriceWaterhouseCoopers LLP and Exxon Mobil Corporation*, Index No. 451962/2016 (New York Supreme). That action, which was

heavily litigated for years, ultimately led to a complaint filed on October 24, 2018 by the NYAG against ExxonMobil alleging violations of the Martin Act (New York General Business Law §§ 352 et seq.), persistent fraud and illegality (New York Executive Law § 63(12)), actual fraud, and equitable fraud. *People of the State of New York v. Exxon Mobil Corporation*, Index No. 0452044/2018 (New York Supreme) (the "NYAG Action"), Doc. No. 1. Following a bench trial, on December 10, 2019, Justice Barry Ostrager held that the NYAG had failed to establish its New York law claims by a preponderance of the evidence. NYAG Action, Doc. No. 567.

On April 19, 2016, the Massachusetts Office of Attorney General ("MassAG") issued a civil instigative demand to ExxonMobil. Litigation related to that investigation continues to this day in Suffolk County Superior Court in Massachusetts. *In re Civil Investigative Demand No. 2016-EPD-36*, C.A. No. 16-1888F. Following the investigation, on October 24, 2019, the Massachusetts Office of Attorney General ("MassAG") filed a separate complaint based on its own investigation into Exxon's practices, alleging further deceptive disclosures and unfair or deceptive trade practices. ¶ 14; *Commonwealth of Massachusetts v. ExxonMobil Corporation*, C.A. No 19-3333 (Mass. Super. Ct.). Litigation related to that investigation continues to this day in Suffolk County Superior Court in Massachusetts. The MassAG complaint asserts another swathe of claims against ExxonMobil for failing to adequately inform shareholders about the material risk that climate change posed to its business more broadly, on top of the claims made in the Securities Class Action and the NYAG Action. ¶¶ 15-20. The MassAG action is ongoing.

In response to the investigative proceedings begun by the MassAG and the NYAG, ExxonMobil sued them in the Southern District of New York on June 15, 2016, *Exxon Mobil Corp. v. Schneiderman and Healey*, C.A. No. 17-cv-2301 (the "Countersuit"). Following active litigation

for nearly two years, the court dismissed Exxon Mobil's claims with prejudice. Countersuit, ECF No. 265. Then ExxonMobil lodged an appeal in the U.S. Court of Appeals for the Second Circuit on April 23, 2018, Appeal No. 18-1170 (the "Countersuit Appeal"). During the appeal, the states of Delaware, Oregon, California, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota, Mississippi, New Jersey, New Mexico, North Carolina, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia filed amicus brief in support of the MassAG and NYAG's position. Countersuit Appeal, Dkt. No. 129. Argument on the appeal was heard on February 18, 2020 and a decision has not yet been issued. Countersuit Appeal, Dkt. No. 298.

B. The Securities Class Action

A consolidated securities class action arising from core facts that overlap with this action is pending in the Northern District of Texas, *Ramirez v. Exxon Mobil Corp.*, et al., C.A. No. 3:16-cv-03111-K (the "Securities Class Action"). In the Securities Class Action, ExxonMobil is a defendant against claims that it and certain of its officers defrauded investors. On August 14, 2018, the court in the Securities Class Action denied defendants' motion to dismiss. Securities Class Action, ECF No. 62. Currently, in the Securities Class Action, class certification briefing is complete, and on January 13, 2020, the court ordered the parties attend a mediation in an attempt to resolve the claims. Securities Class Action, ECF No. 118.

C. The Texas Derivative Action

On May 2, 2019, two shareholder derivative actions were simultaneously filed in the Northern District of Texas, *Von Colditz v. Woods, et al*., C.A. No. 3:19-cv-01067-K and *Montini v. Woods, et al*., C.A. No. 3:19-cv-01068-K. The two actions were eventually consolidated under the caption of the *Von Colditz* action (the "Texas Derivative Action"). The lead plaintiff in the Texas

Derivative Action owns approximately 623 shares of ExxonMobil stock combined. Texas Derivative Action, ECF No. 8-2, at ¶ 3. On September 20, 2019, prior to the Board refusing their demand, the plaintiffs in the Texas Derivative Action filed an amended complaint. Texas Derivative Action, ECF No. 12. On November 8, 2019, the Company moved to stay the Texas Derivative Action. Texas Derivative Action, ECF Nos. 20, 21. Briefing on the motion to stay is complete, but the court has not yet ruled. Since the Exxon Board refused the demands in February 2020, no litigation has occurred in the Texas Derivative Action, and the plaintiffs have not amended their complaint to include allegations related to the demand refusal. On January 13, 2020, the court in the Texas Derivative Action ordered the parties to attend a mediation in an attempt to resolve the claims. Texas Derivative Action, ECF No. 32.

ARGUMENT

I. THE EQUITIES COUNSEL AGAINST APPLICATION OF THE FIRST-FILED RULE

As Defendants' authority notes, the first-filed rule reflects principles of comity and equity, and "is not a rigid or inflexible rule to be mechanically applied." *E.E.O.C.*, 850 F.2d at 976 (internal citation omitted). Equity here counsels against application of the first-filed rule, as Plaintiffs should not be penalized for allowing the Company more time to consider their litigation demands and avoiding the "unseemly race to the courthouse." *Id*. at 978. Indeed, the Complaint is the only derivative complaint on file which adequately alleges the Company's response to wrongfully refuse the litigation demanded by Plaintiffs. ¶¶ 253-86; *cf.* Texas Derivative Action, ECF No. 12 (amended complaint filed by the Texas derivative plaintiffs before allowing the Board to respond to demand). As a result, Plaintiffs' Complaint is the only derivative complaint on file that successfully pleads that demand was wrongfully refused under New Jersey law. *See, e.g.*, *Fagin v. Gilmartin*, 2007 WL

2176482, at *15 (N.J. Super. Ct. Ch. Div. July 19, 2007) ("When a shareholder makes a demand on a corporation's board of directors and the board refuses the demand, it is the court's task to review the response of the board. New Jersey applies the modified business judgment rule in evaluating the decision to refuse a shareholder's demand.").

Plaintiffs' combined holdings in Exxon stock are also far larger than the combined holdings of the plaintiffs to the Texas Derivative Action. Birmingham and Saratoga together own over 66,500 shares of ExxonMobil stock, while the lead plaintiff in the Texas Derivative Action owns less than 1% of that amount. This larger relative interest also counsels that Plaintiffs' choice of forum should not be disturbed, as Plaintiffs have a far greater interest in the outcome of the derivative litigation.

Further, this Court has an interest in deciding the internal corporate affairs of New Jersey corporations, including for state law derivative claims. *See Fagin v. Gilmartin*, 432 F.3d 276, 282 (3d Cir. 2005) (holding that, "the law of the state of incorporation governs internal corporate affairs," and discussing New Jersey's demand requirement for derivative claims). Before the Court are unique facts about the Board's wrongful refusal of Plaintiffs' litigation demands to consider, including allegations: (a) resulting from Plaintiffs' review of the 275-page investigation report assembled in response to their litigation demands; (b) regarding the Board's lack of independence in considering the litigation demands, including the failure to appoint a special litigation committee; (c) concerning the circumstances surrounding the investigation raising further doubt that the directors acted in good faith and with due care; and (d) describing further deficiencies in the Board's process and substantive decision not to pursue the litigation demanded by Plaintiffs. ¶¶ 253-86. New Jersey's interest in determining issues of New Jersey state derivative law, along with the unique allegations in this Action, constitute a "special equity" justifying non-application of the first-filed

rule. *See, e.g.*, *Sensient Colors Inc. v. Allstate Ins. Co.*, 193 N.J. 373, 394, 939 A.2d 767, 779 (2008) (holding that New Jersey has a strong public policy interest in deciding issues which have an effect within its borders, and where the New Jersey action has progressed more than a first-filed action outside this District).

II. TRANSFER IS NOT WARRANTED UNDER THE *JUMARA* FACTORS TYPICALLY CONSIDERED BY COURTS IN THE THIRD CIRCUIT

The law of this Circuit is clear that "'transfer is not to be liberally granted'" and "'unless the balance of convenience of the parties is strongly in favor of defendant, the plaintiff's choice of forum should prevail.'" *Shutte v. Armco Steel Corp*., 431 F.2d 22, 25 (3rd Cir. 1970). "It is black letter law that a plaintiff's choice of a proper forum is a paramount consideration in any determination of a transfer request, and that choice '. . . should not be lightly disturbed.'" *Shutte*, 431 F.2d at 25 (quoting *Ungrund v. Cunningham Bros*., *Inc.,* 300 F. Supp. 270, 272 (S.D. Ill. 1969)); *see also Jumara*, 55 F.3d at 879. "'The decision to transfer is in the court's discretion, but a transfer is not to be liberally granted.'" *Shutte*, 431 F.2d at 24 (quoting *Handlos v. Litton Indus*., Inc., 304 F. Supp. 347, 352 (E.D. Wis. 1969)). "The burden is on the moving party to establish that a balancing of proper interests weigh in favor of the transfer." *Everprest, Inc. v. Phillips-Van Heusen Corp*., 300 F. Supp. 757 (M.D. Ala. 1969), and '''unless the balance of convenience of the parties is strongly in favor of defendant, the plaintiff's choice of forum should prevail.'" *Shutte*, 431 F.2d at 25 (quoting *Owatonna Mfg. Co. v. Melroe Co*., 301 F. Supp. 1296, 1307 (D. Minn. 1969) (emphasis is original)).

In *Jumara*, the Third Circuit established several factors to consider in deciding a motion to transfer. First, courts look to the following private interest factors: "[i] plaintiff's forum preference as manifested in the original choice; [ii] the defendant's preference; [iii] whether the claim arose elsewhere; [iv] the convenience of the parties as indicated by their relative physical and financial

condition; [v] the convenience of the witnesses—but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and [vi] the location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum)." 55 F.3d at 879 (internal citations omitted).

Second, courts look to the following public interest factors: "[i] the enforceability of the judgment; [ii] practical considerations that could make the trial easy, expeditious, or inexpensive; [iii] the relative administrative difficulty in the two fora resulting from court congestion; [iv] the local interest in deciding local controversies at home; [v] the public policies of the fora; and [vi] the familiarity of the trial judge with the applicable state law in diversity cases." *Id*. at 879-80 (internal citations omitted).

Here, both sets of factors weigh heavily in favor of New Jersey as the best venue to litigate this case. Defendants fail to prove that "the balance of convenience of the parties is *strongly* in favor of defendant . . . ." *Shutte*, 431 F.2d at 25.

III. THE PRIVATE INTEREST FACTORS DISFAVOR TRANSFER

Plaintiffs' choice of forum is proper because Exxon is a longstanding New Jersey corporation. The acts prompting this suit took place around the world, in Canada, in the American Rockies, and in courtrooms in New York and Massachusetts. They did not take place exclusively within the Northern District of Texas. The private factors, including the "paramount consideration" of Plaintiffs' choice of forum, and the three "convenience" factors (convenience of the parties, convenience of the witnesses, and availability of books and records), do not favor transfer. Defendants have not met their burden of proving that private *Jumara* factors strongly favor their choice of forum.

A. Plaintiffs' Forum Preference Weighs Strongly in Favor of New Jersey

The first private factor to be considered is the plaintiff's choice of forum, which weighs heavily in favor of New Jersey. Courts in this District have held that the choice of forum by a plaintiff is considered presumptively correct. *See, e.g., Lawrence v. Xerox Corp.*, 56 F. Supp. 2d 442, 452 (D.N.J. 1999). Exxon has been domiciled in New Jersey continuously for 138 years and has been headquartered in Texas since 1989. Ecklund Deck., Ex. 3. When, as here, more than one proper venue is available, a plaintiff has a right to choose the location in which to file. *See Leroy v. Great W. United Corp*., 443 U.S. 173, 185 (1979)). The deference owed to Plaintiffs' choice of forum is considerable: "It is black letter law that a plaintiff's choice of a proper forum is a paramount consideration in any determination of a transfer request, and that choice '* * * should not be lightly disturbed.'" *Shutte*, 431 F.2d at 25 (internal citation omitted; asterisks in original); *Mkt. Transition Facility of New Jersey v. Twena*, 941 F. Supp. 462, 467 (D.N.J. 1996) ("in deciding transfers under § 1404(a), courts generally assign the plaintiff's choice of forum significant weight.").

In general terms, the simple fact that a company is incorporated in New Jersey is a legitimate basis for suing in New Jersey. The Company's choice to maintain New Jersey as its state of incorporation since 1882 was an affirmative act to avail itself of the benefits of New Jersey corporate law. The Board has also affirmatively opposed reincorporation because New Jersey law, and presumably the New Jersey courts, are favorable to it.

The first, and most important factor, Plaintiffs' choice of forum, weighs heavily in favor of New Jersey.

B. Defendants' Preference Does Not Outweigh Plaintiffs' Preference

Courts in this Circuit have disregarded this factor because defendants' mere preference, as

distinguished from the substantive reasons underlying it, does not bear on the convenience of the parties. *See Affymetrix, Inc. v. Synteni, Inc*., 28 F. Supp. 2d 192, 201 (D. Del. 1998) ("The Court… affords no weight to [defendants'] mere preference to be elsewhere."). As a New Jersey corporation, New Jersey is ExxonMobil's "home turf." *Acuity*, 2008 WL 2977464, at *2 (a company's state of incorporation is its "home turf" for purposes of the transfer inquiry). Having received the benefits of New Jersey incorporation, ExxonMobil cannot now complain that one of its shareholders has chosen to sue it here. *Id*.; *Auto. Techs. Int'l,* 2006 WL 3783477, at *2.

Litigation arising from the same core facts as this action has occurred in at least these four jurisdictions, *on top of* this Court: (1) New York state court; (2) the Southern District of New York, and now the Second Circuit; (3) Massachusetts state court; and (4) the Northern District of Texas. Pending are Exxon's appeal in the Second Circuit, the MassAG action, this action, and the Texas litigation. It is not as if there is an action pending in one other jurisdiction and all related litigation can be administered by the same judge.

Acknowledging as much, the Company ignores its own lawsuit in the Southern District of New York and the MassAG action, arguing that the Court should only look to the litigation in Texas. That said, the presence of the Securities Class Action in the Northern District of Texas does not support transfer. Although this action and the Securities Class Action depend on substantially similar facts, there are vast legal and factual differences between the two cases. First, the real parties in interest are materially different. A federal securities class action is brought against a corporation on behalf of investors who purchased shares of the corporation's stock during a prescribed class period. The relief sought in such an action is money to be distributed to the members of that class. A shareholder derivative action, on the other hand, is brought by current shareholders on behalf of

the corporation against the corporation's former and/or current officers and directors and seeks both financial and therapeutic relief exclusively for the benefit of the corporation. In short, this action is brought on behalf of ExxonMobil for its benefit, while the Securities Class Action is brought against ExxonMobil as the primary target.

This action alleges New Jersey state law claims for breach of fiduciary duty, waste, and unjust enrichment, as well as contribution claims for violating §§10(b) and 21D of the Securities Exchange Act of 1934 (the "Exchange Act") and claims for violating § 29(b) of the Exchange Act against 20 individual defendants. The Securities Class Action, by contrast, exclusively alleges violations of §§10(b) and 20(a) of the Exchange Act against, five defendants, including the Company. Each of these are separate claims brought by different plaintiffs for the benefit of different entities under different legal theories and judged against materially different pleading standards.

Most critically, no finding in the Securities Class Action will resolve even a single derivative claim asserted here, as the Securities Class Action will not determine whether defendants here – many of whom are not defendants in the Securities Class Action – breached their fiduciary duties to ExxonMobil, committed waste, or were unjustly enriched. That no finding in the Securities Class Action will have a preclusive effect on this action demonstrates that these are independent and separate matters. Recognizing these fundamental distinctions, courts in this Circuit have refused to so much as stay (let alone transfer) shareholder derivative actions in favor of earlier-filed securities class actions even when the cases are pending before the same court. See *In re Universal Health Servs., Inc., Deriv. Litig.*, 2018 WL 8758704, at *1 (E.D. Pa. Dec. 10, 2018).

Finally, the presence of the Texas Derivative Action does not support transfer. The Plaintiffs are large, institutional holders of ExxonMobil stock. They have a much greater financial interest in

the Company than the plaintiffs in Texas do. This action is more advanced than the Texas Derivative Action, Plaintiffs here having recently amended their complaint to include critical allegations regarding the demand refusal. There is no reason why a properly instituted and vigorously prosecuted action by two large Plaintiffs, like this one, should be transferred to Texas in favor of the Texas Derivative Action.

Defendants' preference for Texas as a forum is not based on legitimate substantive reasons, and at most is neutral.

C. Texas is Not the Center of Gravity

As evidenced by the NYAG and MassAG litigations in New York and Massachusetts, respectively, the conduct at issue has affected consumers and investors throughout the United States and the world.[3] Further, the misrepresentations at issue relate to the Company's operations *worldwide*, and to the extent that they focus on misrepresentations about particular operations, they did not involve misrepresentations about business in Texas. *See, e.g.,* ¶¶ 129 (alleging misrepresentations related to proxy cost of carbon worldwide); 81-87 (misrepresentations related to Canadian bitumen operations); 89 (misrepresentations related to natural gas business, primarily located in U.S. Rocky Mountain region).

The Company's argument on this point relies on a factual inaccuracy, that "the activities relevant to Plaintiffs' claims took place" in Texas. Motion to Transfer at 17. This is not a case in

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[3] ExxonMobil is a multinational corporation that, according to its 2019 Form 10-K, had ongoing operations in the following places: (1) 11.5 million acres of the United States, that vast majority of which are outside Texas; (2) the Americas, including Canada, Argentina, and Guyana; (3) Europe, including Germany, Netherlands, and the United Kingdom; (4) Africa, including Angola, Chad, Equatorial Guinea, Mozambique, and Nigeria; (5) Asia, including Azerbaijan, Indonesia, Iraq, Kazakhstan, Malaysia, Qatar, Russia, Thailand, United Arab Emirates; and (6) Australia and Papua New Guinea.

which a financial fraud occurred only in the company's headquarters. Rather, the Company misrepresented its activities around the globe, using information from operations worldwide.

The Company's reliance on *Gallagher v. Ocular Therapeutix, Inc.*, 2017 WL 4882488 (D.N.J. Oct. 27, 2017) is misplaced. First, the plaintiffs in *Gallagher* sued in this District even though the Company was incorporated in Delaware and *all* of its operations were in Massachusetts. *Id*. at *1. Supporting transfer was not only the lack of a connection to New Jersey and that the Company was headquartered in Massachusetts, but its "sole manufacturing facility is in Massachusetts," the individual defendants "work or reside in Massachusetts," and critically, the plaintiffs alleged that "the FDA found issues during inspections of Ocular's Massachusetts manufacturing facility that could prevent FDA approval of DEXTENZA." *Id*. The same is true of *Weisler v. Barrows*, 2006 WL 3201882, at *3 (D. Del. Nov. 6, 2006)("all aspects of [nominal defendant's] day-to-day business occur in Chelmsford, Massachusetts."). Here, the declaration submitted by ExxonMobil in support of its motion makes no similar assertion.. In fact, the declaration of Patrice Childress, ECF No. 55-2, specifically acknowledges that ExxonMobil has operations in New Jersey (¶ 11), that only four of the twenty named defendants in this Action reside in Texas (¶ 12), and while ExxonMobil's Corporate Controllers Organization, Corporate Strategic Planning Department, and Investor Relations Department are "located" in Texas, the declaration notably does not assert that the *Outlook for Energy* or *Energy and Carbon – Managing the Risks* were produced in Texas. ¶¶ 6-9.

This action involves alleged misrepresentations by a sprawling global corporation with operations on six continents. The misrepresentations relate to descriptions of its business and risks around the world, and specifically in Canada and the American Rockies. The core facts have been

litigated in New York, Massachusetts, and Texas. The Company's assertion that Texas is the center of gravity is incorrect.

D. The Convenience of the Parties Does Not Favor Transfer

Under this analysis, "the plaintiff's choice of forum will prevail, unless the party moving for the transfer can convince the court that 'its alternative forum is not only adequate, but more convenient than the present forum.'" *Hudson United Bank v. Chase Manhattan Bank*, 832 F. Supp. 881, 888 (D.N.J. 1993), a*ff'd*, 43 F.3d 843 (3d Cir. 1994). "A court will not grant a transfer simply because the transferee court is more convenient for the defendants.... If the transfer would merely switch the inconvenience from defendant to plaintiff, the transfer should not be allowed." *Twena*, 941 F. Supp. at 467 (quoting *Ballard Med. Prods. v. Concord Labs., Inc.*, 700 F. Supp. 796, 801 (D. Del.1988)). Courts in this District deny transfer where, "even assuming that some inconvenience exists," transfer would "simply switch the burden to plaintiffs." *Twena*, 941 F. Supp. at 468 ("[t]his the Court will not do."). "In evaluating the convenience of the parties, a district court should focus on the parties' relative physical and financial condition." *Collabo Innovations, Inc. v. OmniVision Techs., Inc.*, 2017 U.S. Dist. LEXIS 10199, at *13 (D. Del. Jan. 25, 2017) (citing *C.R. Bard, Inc. v. Angiodynamics, Inc.*, 156 F. Supp. 3d 540, 546 (D. Del. 2016)) (additional citations omitted). Here, the Company fails to put forth any "unique or unexpected burden." Thus, this factor weighs against transfer.

E. The Convenience of the Witnesses Does Not Favor Transfer

In practice, "discovery can be conducted at any location convenient to the parties," and "the only event that will take place in [the forum] is the trial." *Oracle Corp., 2*007 U.S. Dist. LEXIS 21095, at *13. The relevant inquiry on convenience of the witnesses is not whether witnesses are

inconvenienced by litigation, but whether witnesses "may actually be unavailable for trial in one of the fora." *Jumara*, 55 F.3d at 879. The inconvenience of travel does not prove that witnesses would "actually be unavailable for trial . . . ." *Id*.

Here, the Company has provided no evidence showing that witnesses would be unavailable for trial in New Jersey or that appearing for trial in New Jersey would be an undue burden and has thus failed to satisfy its burden on this point. *See Bachmann Software & Servs. v. Intouch Grp., Inc.*, 2008 U.S. Dist. LEXIS 55719, at *39 (D.N.J. July 21, 2008) ("The party seeking transfer should support its motion with affidavits and other documentation that establishes that the interests of justice and convenience of the parties would best be served by a transfer.") (citing *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 756-57 (3d Cir. 1973)).

F. The Location of Books and Records Does Not Favor Transfer

In *Jumara*, the Third Circuit explained that the location of books and records is determinative only if "the files c[an] not be produced in the alternative forum." 55 F.3d at 879. Courts in this Circuit have repeatedly recognized that recent technological advances have reduced the weight of this factor. *See, e.g.*, *Intellectual Ventures I LLC v. Checkpoint Software Techs. Ltd.*, 797 F. Supp. 2d 472, 485 (D. Del. 2011). Defendants' motion to transfer ignores the reality of discovery in the 21st century, where "virtually all businesses maintain their books and records in electronic format readily available for review and use at any location." *Angiodynamics*, 156 F. Supp. 3d at 546. Demonstrating as much, ExxonMobil has produced documents in the NYAG, MassAG, and Countersuit proceedings, all of which are the same distance from Texas as this Court. Because Defendants have not shown that relevant documents cannot be transported to New Jersey, this factor is neutral.

IV. THE PUBLIC INTEREST FACTORS ALSO DISFAVOR TRANSFER

A. Local Interests/Public Policies of Each Forum Do Not Favor Transfer

States have "an interest in litigation regarding companies incorporated within [their] jurisdiction." *Oracle*, 2007 U.S. Dist. LEXIS 21095, at *12. Exxon is perhaps the longest standing, most well-known New Jersey corporation in the country. The issues here relate to fundamental principles of corporate governance under New Jersey law and their intersection with disclosure requirements in the age of climate change. The legal issues are those arising under law created by New Jersey's legislature and courts. In fact, the New Jersey state legislature has shown significant interest in the state's law involving derivative actions and fiduciary principles, overhauling the N.J.S.A. 14A, Ch. 3 in April 2013 and making additional changes in January 2018. Rev. N.J.S.A. 14A, Ch. 3 (2018). Texas, by contrast, does not have a particular interest in the New Jersey law issues raised by this action.

B. Practical Considerations Do Not Favor Transfer

ExxonMobil's argument that transferring this action to the Northern District of Texas will allow for coordination of briefing and discovery and will streamline common issues ignores standard litigation practices in cases of this nature. Parties in multi-forum litigation often coordinate motion practice and discovery to ensure that any burden on Defendants is minimal. Moreover, regardless of the disposition of this motion, litigation relating to the allegations will occur in several jurisdictions. Any concern for inefficiency is purely speculative, and ExxonMobil cannot rely on baseless conjecture to carry the burden they bear for this motion.

C. Other Public Interest Factors Do Not Favor Transfer

As for the relative administrative difficulty of hearing the case, this Court is well-acquainted with the intricacies of complex corporate proceedings such as this one, a fact which minimizes the

potential for administrative difficulties. The Company's argument based on the relative congestion of the trial calendar in this District has been repeatedly rejected by courts in here:

> First, the calendar of this Court is not so overburdened that parties are denied a reasonably prompt day in court. Moreover, the Court has never found this 1404(a) factor to be among the most important, particularly when the argument is made to transfer to another district because this Court's own docket is heavier.

Park Inn Int'l, L.L.C. v. Mody Enters., Inc., 105 F. Supp. 2d 370, 378 (D.N.J. 2000) (citing *Moore v. St. Paul Cos*., 1995 WL 11187, at *11 (D.N.J. Jan. 3, 1995) and *Hernandez v. Graebel Van Lines*, 761 F. Supp. 983, 991 (E.D.N.Y. 1991)).

In sum, local interests and public policy unambiguously point towards retaining this case in New Jersey. Thus, the public factors favor allowing this case to remain in the district Plaintiffs have chosen, and the Company has failed to make the required showing that "the balance of convenience of the parties is *strongly* in favor" of transfer. *Shutte*, 431 F.2d at 25 (emphasis in original).

V. A STAY IS NOT WARRANTED FOR THE SAME REASONS THAT TRANSFER IS NOT WARRANTED

Defendants also move for a comity stay based on the first-filed rule. Motion at 23-25. This is an equitable analysis, as "courts must weigh competing interests and strive to maintain an even balance, mindful that the stay of a civil proceeding constitutes an extraordinary remedy." *Akishev*, 23 F. Supp. 3d at 445 (internal quotation omitted) (citing *Walsh Sec. Inc. v. Cristo Prop. Mgmt. Ltd.*, 7 F. Supp. 2d 523, 526 (D.N.J. 1998)). The equities *supra* in Section II (discussing the first-to-file rule) and Section III (discussing the *Jumara* factors) equally apply to counsel against the Court's imposition of a discretionary stay. *See Am. Home Prod. Corp. v. Adriatic Ins. Co.*, 286 N.J. Super. 24, 36-39, 668 A.2d 67, 73-74 (App. Div. 1995) (analyzing equitable factors that would prevent a party moving for a stay from demonstrating the requisite "clear entitlement" to the relief). Considerations such as convenience and fairness to the parties, connections with the forum of New

Jersey, and the relative posture of the litigations in question already discussed "mak[e] a stay in New Jersey unjust to the interests of the parties [and] an unfair and inefficient use of the courts of this State." *Id*. at 39.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny defendants' and ExxonMobil's motion to transfer in its entirety.

May 18, 2020

/s/ Donald A. Ecklund

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