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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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

NOMINAL DEFENDANT'S AND DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO TRANSFER VENUE OR, ALTERNATIVELY, TO STAY PROCEEDINGS

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Plaintiffs fail to meaningfully contest the arguments set out by Defendants that warrant transfer of this action to Texas. They concede, as they must, that this action raises substantially identical legal and factual issues and involves the same parties as the two first-filed actions pending before Judge Ed Kinkeade in the Northern District of Texas. Plaintiffs also do not seriously dispute that Texas has the greatest connection to the parties and conduct at issue in these actions as ExxonMobil's senior executives who are named as defendants in these cases, business functions, and personnel responsible for preparing the public statements that are at issue in these cases are located in Texas, not New Jersey.

Instead, Plaintiffs attempt to resist transfer based on arguments that are contrary to law, have been repeatedly rejected, or are simply irrelevant. Nothing in Plaintiffs' response changes the facts that (i) this action is substantially identical to the first-filed Texas actions; (ii) the relevant conduct at issue here occurred in Texas; and (iii) the burdens and needless waste of duplicative litigation can be avoided entirely by a transfer. These are the most significant factors in deciding this motion. All of them decisively favor a transfer or, at the very least, a stay.

ARGUMENT

I. The First-Filed Rule Supports Transferring This Action to Texas.

Plaintiffs argue that this action should not be transferred to the Northern District of Texas pursuant to the first-filed rule because (i) they have recently

amended their Complaint to add new allegations that ExxonMobil's Board wrongfully refused their litigation demands; (ii) they purportedly have a "greater interest in the outcome of the derivative litigation" because they own more ExxonMobil stock than the Texas derivative plaintiffs; and (iii) New Jersey legal issues should be resolved by this Court. (*See* Ans. Br. 9–11.)

Plaintiffs' arguments are misplaced. None of them constitutes an "exceptional circumstance[]" against applying the first-filed rule, which Plaintiffs bear the burden to show. *E.E.O.C.* v. *Univ. of Pa.*, 850 F.2d 969, 979 (3d Cir. 1988), *aff'd*, 493 U.S. 182 (1990); *see Maximum Human Performance, Inc.* v. *Dymatize Enters., Inc.*, No. 09-cv-235 (PGS), 2009 WL 2778104, at *3 (D.N.J. Aug. 27, 2009) (Salas, M.J.), *report and recommendation adopted*, No. 09-cv-235 (PGS), 2009 WL 2952034 (D.N.J. Sept. 14, 2009).

First, the fact that Plaintiffs' amended Complaint added a few allegations regarding why Plaintiffs believe their pre-suit litigation demands were wrongfully refused is irrelevant to the first-filed analysis. The first-filed rule applies where the *subject matter* of the actions substantially overlaps, and is "not limited to mirror image cases." *Miller* v. *CareMinders Home Care, Inc.*, No. 13-cv-5678 (JAP), 2014 WL 1779362, at *3 (D.N.J. Apr. 30, 2014) (internal quotations omitted). Plaintiffs do not—and cannot—deny that the subject matter of this action is substantially the same as that of *Ramirez* and the Texas Derivative Action.

(Op. Br. 13–14.) Moreover, whether pre-suit litigation demands were appropriately refused by ExxonMobil's Board is one of many issues common to the Texas Derivative Action and this action. (*Id.* 4, 10.)

Plaintiffs' contention that they sought to avoid an "unseemly race to the courthouse" is misguided. (Ans. Br. 1.) Plaintiffs do not deny that they both filed their initial complaints, on August 6, 2019 and December 2, 2019, well before ExxonMobil's Board completed its investigation in January 2020. (Op. Br. 9–10.) Those complaints copied, and the amended Complaint retained, the same allegations made in the Texas Derivative Action and *Ramirez*. As courts have found, *Plaintiffs'* decision to file in this Court appears to be improper forum shopping. *See Panitch* v. *Quaker Oats Co.*, No. 16-cv-4586, 2017 WL 1333285, at *5 (E.D. Pa. Apr. 5, 2017) (granting transfer under first-filed rule, finding plaintiffs "appear to be forum shopping," where they filed their class action complaint "months after the other six actions were initiated and after four of those actions had been consolidated in Illinois").

Second, Plaintiffs' stockholdings are irrelevant to the first-filed analysis because this action and the Texas Derivative Action are both asserted on behalf of *ExxonMobil*—the real party in interest. *See Ross* v. *Bernhard*, 396 U.S. 531, 538 (1970) (in a derivative action, the corporation "is the real party in interest" and the action's proceeds "belong to the corporation"); *In re PSE&G S'holder Litig.*, 801

A.2d 295, 307 (N.J. 2002) (same). Plaintiffs thus have no personal interest in this action or its outcome.

Finally, the fact that New Jersey law will apply to Plaintiffs' state law claims and certain other issues in this derivative action is no reason to depart from the first-filed rule. In *DePuy Synthes Sales, Inc.* v. *Gill*, the court rejected an argument that the first-filed rule should not apply because New Jersey law governed a contractual dispute. No. 13-cv-04474, 2013 WL 5816328, at *13 (D.N.J. Oct. 29, 2013). The court reasoned that "a federal judge in the Eastern District of Washington is completely capable of interpreting and applying New Jersey law." *Id.*; *see Yocham* v. *Novartis Pharm. Corp.*, 565 F. Supp. 2d 554, 560 (D.N.J. 2008) (federal judges are "regularly called upon to interpret the laws of jurisdictions outside of the states in which they sit.").[1]

[1] Plaintiffs' reliance on *Sensient Colors Inc.* v. *Allstate Insurance Co.* is misplaced. 939 A.2d 767, 779 (N.J. 2008). In that case, the court did not hold that the application of New Jersey law was itself a "special equity" that warranted denying a transfer. *Id.* Rather, the court found that New Jersey had a "strong interest" in the remediation of an environmental waste site *physically located* in New Jersey that should have been considered in deciding the transfer motion. *Id.* Nothing of the sort is at issue here.

II. Transfer Remains Warranted under 28 U.S.C. § 1404(a) and *Jumara*.

A. Plaintiffs' Forum Preference Deserves No Weight Because This Is a Representative Action Asserted on ExxonMobil's Behalf.

Plaintiffs argue that transfer is not warranted because their choice of forum "weighs heavily in favor of New Jersey." (Ans. Br. 13.) That is not the law in representative actions, like this derivative action. As Defendants previously outlined (Op. Br. 22–23), "in a shareholder's derivative suit, a plaintiff's choice of forum is entitled to little weight." *Weisler* v. *Barrows*, No. 06-cv-362 GMS, 2006 WL 3201882, at *3 (D. Del. Nov. 6, 2006); *see Nottenkamper* v. *Modany*, No. 14-cv-672-GMS, 2015 WL 1951571, at *2 (D. Del. Apr. 29, 2015) (same). Indeed, *Lawrence* v. *Xerox Corp.*, 56 F. Supp. 2d 442 (D.N.J. 1999), a class action case that Plaintiffs cite, supports Defendants' position. In that case, the court granted a motion to transfer, reasoning that the plaintiffs' choice of forum—which "must be viewed in light of the national scope of the instant action"—was "limited . . . by the fact that maintaining the instant action in the District of New Jersey will result in duplicative litigation." *Id.* at 453 & n.7.

Further, neither of the Plaintiffs is a New Jersey citizen, and "deference to a plaintiff's choice of forum is curbed where the plaintiff has not chosen his or her home forum." *Kim* v. *BMW of N. Am., LLC*, No. 2:12-cv-02917 CCC, 2013 WL 655198, at *4 (D.N.J. Feb. 20, 2013). Plaintiffs' reliance on *Shutte* v. *Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970) and *Market Transition Facility of New*

Jersey v. *Twena*, 941 F. Supp. 462, 466 (D.N.J. 1996) is thus misplaced because the plaintiffs in those actions were New Jersey citizens.

Plaintiffs' argument that this duplicative, later-filed action should not be transferred to Texas, where ExxonMobil's headquarters is located, because ExxonMobil is incorporated in New Jersey is baseless. (Ans. Br. 13–14.) Courts have previously rejected precisely this same argument. In *Nottenkamper*, the court transferred a later-filed derivative action to the district where the first-filed securities and derivative actions were already pending and the corporation's headquarters was located. 2015 WL 1951571, at *5. In so doing, the court rejected the plaintiff's argument that transfer should be denied because he sued in the corporation's state of incorporation, reasoning that "it is a corporate entity's actual, physical location—and not its state of incorporation—that is the driving factor in the transfer analysis." *Id.*, at *3.[2]

B. Texas Is The Center of Gravity of This Dispute.

Plaintiffs do not dispute that relevant conduct in this action centers around substantially the same alleged misrepresentations in the same public statements at

[2] Plaintiffs' reliance on *Acuity Brands, Inc.* v. *Cooper Industries, Inc.*, No. 07-cv-444-GMS, 2008 WL 2977464 (D. Del. July 31, 2008) and *Automotive Technologies International, Inc.* v. *American Honda Motor Co., Inc.*, No. 06-cv-187 GMS, 2006 WL 3783477 (D. Del. Dec. 21, 2006) is misplaced because both were patent infringement cases—not representative suits—where no substantially similar, earlier-filed case was pending in another district.

issue in *Ramirez* and the Texas Derivative Action and the ExxonMobil Board's response to all derivative plaintiffs' pre-suit litigation demands. (Ans. Br. 16–18.) In all of these cases, substantially the same individual defendants are alleged to have violated the federal securities laws or breached their fiduciary duties by disseminating, approving, or failing to supervise ExxonMobil's public disclosures. (Op. Br. 6–7, 8–10.)

Defendants have already illustrated that Texas is the most relevant venue for these claims. Texas is where the Company's senior executives named as defendants in this action performed their work; where the relevant Board and committee meetings took place; and where all of the employees responsible for preparing and approving all of the public statements containing alleged misrepresentations largely performed their work. (*Id.* 11–12, 18.) In stark contrast, ExxonMobil's employees in New Jersey focus on research and development support—not ExxonMobil's public statements. (*Id.* 12–13.) And *none* of the individual defendants in this action reside in New Jersey.

Plaintiffs do not seriously dispute any of this.[3] Instead, Plaintiffs argue that Texas is not the center of gravity because the alleged misrepresentations *related* to

[3] Plaintiffs contend that there is no assertion that the *Outlook for Energy* and *Energy and Carbon – Managing the Risks* were produced in Texas. (Ans. Br. 17.) That is incorrect. As Defendants showed, the Corporate Strategic Planning Department and Investor Relations Departments, which are located at

"activities around the globe" and "*affected* consumers and investors throughout the United States and the world." (Ans. Br. 16–17 (emphasis added).) That argument misapplies the law. Where, as here, misstatements are alleged, the relevant conduct for purposes of the transfer analysis occurs where the defendants allegedly *made* the misstatements. *See Job Haines Home for the Aged* v. *Young*, 936 F. Supp. 223, 233 (D.N.J. 1996) (transferring securities action to California, where the defendants allegedly made false and misleading statements); *Gallagher* v. *Ocular Therapeutix, Inc.*, No. 17-cv-5011(SDW)(LDW), 2017 WL 4882488, at *4 (D.N.J. Oct. 27, 2017) ("Securities fraud claims arise in the district from which the misrepresentations and omissions originated."); *Weisler*, 2006 WL 3201882, at *3 (transferring derivative action to district where the relevant public statements were "prepared, reviewed, signed and issued"). That is Texas.

C. Practical Considerations Favor a Transfer Because Litigating Substantially Similar Cases in Different Districts Will Impose Unnecessary Burdens That Transfer Would Avoid.

Defendants showed that simultaneously litigating this action and the substantially similar first-filed Texas cases in two different federal districts will necessarily impose considerable burdens on the courts and the parties. (Op. Br.

ExxonMobil's headquarters in Texas, were "responsible for developing" these reports. (ECF No. 55 Declaration of Patrice Childress ¶¶ 6, 8–9.)

16–17 (citing cases).) Duplicative motion practice, discovery, and hearings will waste judicial and party resources and risk inconsistent rulings on common issues.

Plaintiffs, who purport to litigate on ExxonMobil's behalf, offer no justification for imposing these needless burdens on both courts and the parties. Citing no case law or other authority, they contend that motion practice and discovery can be coordinated to "ensure that any burden on Defendants is minimal." (Ans. Br. 20.) Plaintiffs ignore the fact that a transfer will entirely *eliminate* those burdens and the burdens on this Court, ensuring that all related federal derivative actions can proceed in Texas together before the same judge who also presides over *Ramirez*. As courts recognize, a "strong public policy favors avoiding duplicative litigation," and warrants transfer here, "[w]here the parties and issues are the same, or similar, and another court is already familiar with the case." *Young*, 936 F. Supp. at 233.

Plaintiffs have no serious response. None of their makeweight arguments has any merit.

First, Plaintiffs argue that *Ramirez* and this action allege different claims and *Ramirez* will not resolve "even a single derivative claim asserted here." (Ans. Br. 14–15.) This argument is both false and irrelevant. It is false because Plaintiffs have asserted contribution and rescission claims (Counts IV & V) on behalf of ExxonMobil under the federal securities laws that are *directly contingent*

on a finding of liability in *Ramirez*. (ECF No. 53 ¶¶ 304–318.) It is irrelevant because *Ramirez* and this action concern the same underlying substantive allegations and would seek similar documents and testimony in discovery and rely on similar evidence at trial.[4] Moreover, Plaintiffs overlook that the Texas Derivative Action asserts the exact same claims as this action, which will be addressed by the same judge who is presiding over *Ramirez*.

Second, Plaintiffs argue they have a "much greater financial interest" in ExxonMobil and have prosecuted this case vigorously because they filed a consolidated amended Complaint. (Ans. Br. 15–16.) Again, Plaintiffs' stockholdings are irrelevant because Plaintiffs have no personal interest in this derivative action. The fact that Plaintiffs filed a consolidated amended Complaint on April 17, 2020 also does not mean this action has advanced past the Texas Derivative Action. As Plaintiffs acknowledge, the Texas derivative plaintiffs filed a consolidated amended complaint on September 20, 2019. (Ans. Br. 9.) Unlike this action, Judge Kinkeade granted a motion consolidating a third derivative action into the Texas Derivative Action and ordered the parties in the Texas

[4] Plaintiffs also cite *In re Universal Health Services, Inc., Derivative Litigation*, No. 17-cv-2187, 2018 WL 8758704, at *1 (E.D. Pa. Dec. 10, 2018) for the proposition that some courts in the Third Circuit have declined to *stay* derivatives cases in favor of earlier-filed securities cases. (Ans. Br. 15.) *Universal* is irrelevant here because it did not address a motion to transfer and because the derivative action was itself before the same court.

Derivative Action and *Ramirez* to mediation. (*See* Op. Br. 7–9.) Indeed, a fourth related derivative action containing allegations relating to the Board's refusal of the related pre-suit litigation demands was filed in the Northern District of Texas on May 16, 2020, which has already been transferred to Judge Kinkeade and will be consolidated with the existing case. (Reply Declaration of Matthew D. Stachel at Exs. 10–11.) Plaintiffs' argument also overlooks the fact that Judge Kinkeade has spent three years becoming familiar with the allegations underlying the derivative actions while presiding over *Ramirez*.

Finally, Plaintiffs seek to defeat transfer by pointing to two lawsuits involving state regulators and ExxonMobil (but *none* of the individual defendants here) that are pending before a Massachusetts state trial court and the U.S. Court of Appeals for the Second Circuit in New York. (Ans. Br. 14, 20.) This argument misses the mark. The efficiencies of transferring this action to Texas are necessarily advanced by reducing the number of courts where related cases are pending. Litigating these issues in four courts rather than three is not a preferable or efficient outcome versus consolidating all of the related federal securities and derivative actions in a single court.

D. Plaintiffs' Other Arguments Do Not Support Denial of Transfer.

Plaintiffs advance several other arguments in opposition to Defendants' motion to transfer, none of which has merit.

First, relying on a patent infringement case, Plaintiffs argue that the convenience of the parties as indicated by their relative physical and financial condition does not support a transfer because ExxonMobil has not identified a "unique or unexpected burden" in litigating this action in this District. (Ans. Br. 18.) Plaintiffs overlook that courts have found this factor actually supports transfer where defendants are faced with litigating duplicative *representative* actions—like this derivative action. *See Osborne* v. *Emp. Benefits Admin. Bd. of Kraft Heinz*, No. 2:19-cv-00307, 2020 WL 1808270, at *8 (W.D. Pa. Apr. 9, 2020) (finding this factor supported transfer of derivative action where corporation would have to litigate substantially similar claims in two districts); *Panitch*, 2017 WL 1333285, at *7 (transferring class action because "the burden imposed on the company by litigating identical nationwide class claims in two districts would be considerable"). Plaintiffs also do not contend that litigating in Texas would burden them at all, nor can they. *See Catanese* v. *Unilever*, 774 F. Supp. 2d 684, 690 (D.N.J. 2011) (finding "very little burden on the plaintiffs" in class action because "[t]hey will have little, if any, documentary evidence to contribute"); *Osborne*, 2020 WL 1808270, at *8 (same).

Second, Plaintiffs contend that Defendants "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." (Ans. Br. 19.) Plaintiffs overlook

the fact that at least some potential third-party witnesses will be within the subpoena power of the Texas court, but not this court. As Defendants showed, the personnel relevant to Plaintiffs' allegations performed their work out of ExxonMobil's Texas headquarters, including ExxonMobil's independent outside auditor, PricewaterhouseCoopers. (Op. Br. 11–12, 19.) *See Osborne*, 2020 WL 1808270, at *8 (finding this factor favored transfer of derivative action where independent outside auditor was outside court's subpoena power).

Third, Plaintiffs argue that the location of books and records relevant to the dispute does not favor transfer because they can be transported to New Jersey. (Ans. Br. 19.) As Defendants explained (Op. Br. 19), while many documents relevant to these cases are in electronic form, to the extent there are relevant hardcopy materials, they are more likely to be in Texas than in New Jersey. *See Osborne*, 2020 WL 1808270, at *9 (finding this factor only "relatively neutral" where the activities challenged in the actions occurred outside the forum, "so the natural and likely inference is that any documents . . . to the extent they are paper rather than virtual" are outside the forum).

Fourth, relying on a single patent infringement case, Plaintiffs seek to defeat transfer by contending that New Jersey has an interest in this litigation because ExxonMobil is incorporated here and New Jersey law would apply to some issues. (Ans. Br. 20.) Courts have rejected this exact argument. In *Nottenkamper*, relying

on the fact the corporation was incorporated in Delaware, the plaintiff argued that "Delaware has a great interest in deciding this case, since it involves 'classic principles of Delaware law.'" 2015 WL 1951571, at *5. The court disagreed, finding "Delaware does not have any special interest in this case that would weigh against a transfer" because the New York federal court "is very capable of applying Delaware fiduciary law." *Id.* Plaintiffs also overlook that this action involves federal claims and federal question jurisdiction, reducing any perceived special interest by New Jersey. (Op. Br. 23.)

Finally, Plaintiffs contend that the relative administrative difficulty from court congestion in this District does not support transfer, although they do not deny that the Northern District of Texas is statistically less congested than this District. Plaintiffs are wrong. As Defendants explained (Op. Br. 20), under similar circumstances, courts in this District have found this factor to weigh in favor of transfer. Plaintiffs' reliance on *Park Inn International, L.L.C.* v. *Mody Enterprises, Inc.*, 105 F. Supp. 2d 370, 378 (D.N.J. 2000) is misplaced. There, the court denied transfer because the *plaintiff* was a New Jersey citizen and the defendants had signed a valid forum selection clause in favor of New Jersey federal and state courts. *Id.* Further, *Hernandez* v. *Graebel Van Lines*, which Plaintiffs also cite, supports Defendants' position. 761 F. Supp. 983 (E.D.N.Y. 1991). There, the court explained that "calendar congestion" is "accorded 'some

weight'" and granted a transfer, in part, because the transferee court was statistically less congested. *Id.* at 991.

III. Alternatively, A Stay of This Action Remains Warranted under Both the First-Filed Rule and This Court's Equitable Discretion.

Plaintiffs argue that this action should not be stayed for the same reasons they argue a transfer is not warranted. (Ans. Br. 21–22.) As shown above, Plaintiffs' arguments against transfer are baseless. Plaintiffs also overlook the fact that, absent a transfer, Defendants face substantial hardship from being required to litigate the same issues before this Court that will be litigated in the Texas Derivative Action and *Ramirez*, including the waste of resources and the substantial risk of inconsistent rulings. (*See* Op. Br. 23–25.) And, as Defendants emphasized and Plaintiffs did not contest, a stay of this action would result in no meaningful prejudice to Plaintiffs. (*Id.* 25.)

CONCLUSION

For all these reasons, this action should be transferred to the Northern District of Texas, which has the greatest connection to this dispute, or stayed in favor of the first-filed actions pending there. All of these actions involve substantially the same allegations, claims, and parties, and they should be decided by a single judge. Transferring or staying this action will avoid the needless burdens and costs of duplicative litigation. Plaintiffs, who purport to represent ExxonMobil's best interests, face no prejudice from either a transfer or a stay.

Dated: May 26, 2020

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