IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE EXXON MOBIL CORPORATION DERIVATIVE LITIGATION This Document Relates to: ALL ACTIONS	Lead Case No. 3:19-cv-1067-K (Consolidated with Nos. 3:19-cv-1068-K; 3:19-cv-2267-K & 3:20-cv-1280-K) (Consolidated Derivative Action) **ORAL ARGUMENT REQUESTED**

NOMINAL DEFENDANT'S AND DEFENDANTS'
MOTION TO DISMISS AND BRIEF IN SUPPORT

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Nominal defendant Exxon Mobil Corporation ("ExxonMobil" or the "Company") and all defendants respectfully move to dismiss this action with prejudice pursuant to N.J.S.A. 14A:3-6.5 because a majority of ExxonMobil's independent board of directors (the "Board") determined in good faith following a reasonable inquiry that maintenance of this lawsuit is not in ExxonMobil's best interests.

PRELIMINARY STATEMENT

This is a consolidated shareholder derivative action. The plaintiff shareholder seeks to assert claims that belong to ExxonMobil—not to him individually. Under New Jersey substantive law (which applies because ExxonMobil is incorporated there), dismissal is required where, as here, a majority of the board's independent directors has determined in good faith, on the basis of a reasonable inquiry, that derivative litigation is not in the corporation's best interests. The New Jersey Business Corporation Act gives deference to the independent board's business judgment and requires dismissal because an independent board of directors has the authority to decide whether claims should be asserted on behalf of the corporation.

Before filing suit, Plaintiff Samuel Montini sent a pre-suit litigation demand to ExxonMobil's Board. That demand asked the Board to investigate, and take suitable action with respect to, certain alleged misconduct relating to (i) ExxonMobil's use of, and public statements regarding, proxy costs of carbon or greenhouse gas costs employed in its business planning decisions; (ii) its asset impairment analyses; and (iii) its proved reserves estimates. The Board has done just that.

In response to Plaintiff's demand, and related demands by other purported shareholders, the Board created a Working Group comprised of three independent, outside directors. On behalf of the Board, the Working Group retained and directed a well-respected,

independent law firm, Simpson Thacher & Bartlett LLP ("Simpson Thacher"), to assist the Board's investigation into the allegations in the demands and related derivative lawsuits. That comprehensive inquiry involved the review of over 1.25 million pages of documents, interviews with 25 relevant individuals (including ExxonMobil directors and officers), and over 5,000 hours of Simpson Thacher's time. At the end of the inquiry, the Working Group and Simpson Thacher found the allegations to be entirely without merit and memorialized their findings and conclusions in a comprehensive 275-page report. Their conclusion that the allegations lacked merit was supported by, and consistent with, the SEC's termination of its related two-year investigation, the NYAG's decision to withdraw its related scienter-based fraud claims against ExxonMobil at the end of a 12-day trial, and the detailed post-trial opinion in that action to dismiss NYAG's remaining claims against ExxonMobil with prejudice. Indeed, that post-trial opinion not only completely repudiated all of NYAG's claims and allegations as meritless and "hyperbolic," but also found that ExxonMobil's officers and other employees acted appropriately at all times:

> What the evidence at trial revealed is that ExxonMobil executives and employees were uniformly committed to rigorously discharging their duties in the most comprehensive and meticulous manner possible. . . . The testimony of these witnesses demonstrated that ExxonMobil has a culture of disciplined analysis, planning, accounting, and reporting.

At a meeting on January 29, 2020, at which the inquiry's findings and conclusions were carefully discussed and considered, ExxonMobil's Board unanimously determined that maintenance of this action was not in ExxonMobil's best interests and rejected the demands accordingly. When ExxonMobil's 11-member Board made its decision, 10 of the 11 Board members were independent, outside directors who are not employees of ExxonMobil. They had neither any disabling conflict nor any economic interest in the subject matter of the demands. Those independent directors made the decision in good faith based on the Working Group and

Simpson Thacher's findings and conclusions from their thorough (and more than reasonable) inquiry. Under controlling New Jersey law and the circumstances present here, Plaintiff is not entitled to continue prosecuting this action on ExxonMobil's behalf.

ExxonMobil and all Defendants therefore respectfully request that this Court, consistent with the Board's business judgment, dismiss this action with prejudice.

SUMMARY OF RELEVANT FACTS

A. Plaintiff Seeks to Assert Claims That Belong to ExxonMobil.

Nominal defendant ExxonMobil is a multinational oil and gas company incorporated under the laws of New Jersey and headquartered in Irving, Texas. (*See* ECF No. 12 ("Am. Compl.") ¶ 30.) The 16 individual defendants are current or former ExxonMobil directors or officers. (*See id.* ¶¶ 31–46.)

Plaintiff Samuel Montini, as the trustee and beneficiary of the Montini Family Trust, alleges that he has held ExxonMobil common stock since 2013. (*See id.* ¶¶ 29, 302.) Plaintiff asserts that he held 623 shares as of May 30, 2019, or approximately 0.0000000147% of the 4.2 billion shares outstanding around that time.[1] (*See* ECF No. 8, Ex. B ¶ 3.)

Plaintiff purports to bring this action on ExxonMobil's behalf. He seeks to assert claims that belong to ExxonMobil (not Plaintiff individually) and for which any recovery would go to ExxonMobil. (Am. Compl. ¶¶ 300, 328–333.)

B. ExxonMobil's Board Receives Several Related Pre-Suit Litigation Demands.

Between November 16, 2016 and August 26, 2019, several purported ExxonMobil shareholders sent pre-suit litigation demands (the "Demands") to ExxonMobil's Board, asking the Board to inquire into allegations of misconduct stretching back many years.

[1] As of June 30, 2019, ExxonMobil had 4,231,106,294 shares of common stock outstanding. (App. 21.)

(App. 64–65.) One of these Demands, dated July 7, 2017, was submitted on behalf of the Montini Family Trust by Gregory Del Gaizo of the law firm Robbins Arroyo LLP. (App. 65, App. 304–21.)

Plaintiff's Demand claimed ExxonMobil's public statements were false and misleading because:

- ExxonMobil allegedly misrepresented "to investors and the public that it was incorporating higher costs of [greenhouse gas] regulation into its business decisions than documents indicate that it actually was using."
- ExxonMobil purportedly failed to warn investors appropriately that certain of its proved reserves would need to be "de-booked" as of year-end 2016.
- ExxonMobil allegedly failed to recognize an impairment to certain assets at year-end 2015 and did not appropriately use projected future proxy costs of carbon and greenhouse gas ("GHG") costs in its impairment analyses.
- ExxonMobil allegedly did not disclose information in its possession showing "the environmental risks caused by global warming."
- ExxonMobil allegedly did not disclose that its reserves were overstated because, "given the risks associated with global warming and climate change, the Company would be unable to extract all of its existing hydrocarbon reserves and, therefore, a material portion of those reserves were stranded and should have been written down."
- ExxonMobil allegedly employed an "inaccurate 'price of carbon' . . . when evaluating the value of certain of its future oil and gas prospects, causing the Company to materially overstate the value of its reserves."

(App. 316–319.) After receiving Plaintiff's Demand, the Board received six additional Demands raising related allegations. (App. 65–72.)

C. ExxonMobil's Board Commences an Exhaustive, Independent Inquiry into the Allegations Made in the Demands and Five Related Derivative Lawsuits.

The Board responded by authorizing an independent inquiry into the Demands' allegations. By resolution dated January 25, 2017, the Board created a Working Group comprised of three independent directors to (i) assist the Board with its assessment of the Demands, (ii) recommend to the Board the appropriate action to take with respect to the

Demands, and (iii) retain and direct independent, outside counsel. (*See* App. 87, 324–25.) The Board further resolved that the Working Group "shall, in response to its requests for information and assistance, receive full cooperation from all officers, employees, and representatives of the Company." (App. 325.)

The three independent directors appointed to the Working Group were Angela F. Braly, Kenneth C. Frazier, and William C. Weldon. (App. 87, 324.) Each of these directors was eminently qualified to serve on the Working Group and direct a comprehensive inquiry of ExxonMobil's management. Each had substantial prior experience leading boards and management of other major corporations (all having served previously in Board Chair and CEO roles). And two of the directors, Ms. Braly and Mr. Frazier are lawyers by training and had previously served in General Counsel roles:

- **Angela F. Braly** was first elected to ExxonMobil's Board in 2016. Ms. Braly served as Chairman of WellPoint, Inc. from 2010 to 2012, and President and Chief Executive Officer from 2007 to 2012. She also served as Executive Vice President, General Counsel, and Chief Public Affairs Officer of WellPoint from 2005 to 2007, and President and Chief Executive Officer of Blue Cross Blue Shield of Missouri from 2003 to 2005. (App. 278.)

- **Kenneth C. Frazier** was first elected to ExxonMobil's Board in 2009. Mr. Frazier held numerous roles at Merck & Co., Inc., including serving as Merck's General Counsel and President, before becoming its Chairman and CEO in 2011. (App. 279.)

- **William C. Weldon** was first elected to ExxonMobil's Board in 2012. Mr. Weldon previously served as Chairman and Chief Executive Officer of Johnson & Johnson from 2002 to 2012. He also served as Worldwide Chairman, Pharmaceuticals Group, from 1998 to 2001. In addition to his Directorship at ExxonMobil, Mr. Weldon currently serves on the Board of Directors of CVS Caremark and JPMorgan Chase. (App. 281.)

None of these directors had been employed by ExxonMobil, and none had engaged in (or proposed) any business transactions with ExxonMobil. (App. 88–89, 279–82.)

Five days after its creation, on January 30, 2017, on behalf of itself and the Board, the Working Group retained Simpson Thacher as independent, outside counsel to help conduct

the inquiry and to provide independent legal advice. (App. 88.) Simpson Thacher was selected because of its independence from both ExxonMobil and all of the individuals named in the Demands as purported wrongdoers, its credentials, and its depth of experience in conducting internal corporate inquiries relating to shareholder pre-suit litigation demands and derivative lawsuits. (*Id.*) The Simpson Thacher team was led by Paul C. Curnin, the firm's Global Co-Chair of its Litigation Department. Mr. Curnin's practice routinely involves representing corporations as independent counsel in connection with complex shareholder demand investigations. (App. 455–56.)

1. The Working Group and Simpson Thacher Conduct a Broad and Thorough Inquiry.

The Working Group and Simpson Thacher then commenced a full inquiry into the issues raised in the Demands. (App. 91–107.) The Working Group actively directed the scope of the inquiry. (App. 106.) It also consulted frequently with Simpson Thacher on the status of the inquiry and proposed next steps. (App. 106–07.) The Working Group and Simpson Thacher held twelve formal meetings relating to the inquiry from February 1, 2017 to January 6, 2020. (*Id.*)

The scope of the inquiry was comprehensive, included all of the alleged misconduct in Plaintiff's Demand, and focused primarily on the time period 2010 through 2017. (App. 32–33, 91.) Among other things, the inquiry reviewed (i) ExxonMobil's internal controls concerning proved reserves estimation, impairment analyses, and reporting related to each; (ii) ExxonMobil's use of, and public statements regarding, proxy costs of carbon and GHG costs in capital planning and asset impairment determinations; and (iii) the Board's oversight and monitoring of the foregoing. (App. 29, 67–72.) Moreover, the scope of the inquiry was broadened to include additional allegations made in each related Demand sent to the Board and

in five related derivative lawsuits filed by ExxonMobil shareholders from May 2, 2019 through December 2, 2019, including this action.[2] (App. 64–65, 72–74.)

At the Working Group's direction, Simpson Thacher reviewed and analyzed over 1.25 million pages of documents, including documents from ExxonMobil's internal files, as well as a broad range of SEC filings, media articles, court filings, regulatory correspondence, deposition and examination testimony (including testimony given by personnel from ExxonMobil and its independent outside auditor, PricewaterhouseCoopers ("PwC")), and Board materials relating to the issues raised in the Demands. (App. 32–33, 91–92, 97–102.) Simpson Thacher also interviewed 25 individuals, including current and former ExxonMobil officers, directors, and employees. (App. 32–33, 102–03.) In total, Simpson Thacher expended more than 5,000 hours in connection with the inquiry. (App. 33.) ExxonMobil's officers, employees, and representatives consistently cooperated with the Working Group's requests for documents, interviews, and related information, and the Working Group had access to all of the information it sought. (App. 33, 91.) For example, Simpson Thacher had "full access to an electronic database used by Company counsel in the NYAG investigation and Action and SEC investigation" that "contained emails and other electronic data produced to both the NYAG and SEC" by ExxonMobil. (App. 97.)

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[2] The five related derivative lawsuits are *Von Colditz* v. *Woods*, No. 3:19-cv-1067-K (N.D. Tex.); *Montini* v. *Woods*, No. 3:19-cv-1068-K (N.D. Tex.); *Stourbridge Investments LLC* v. *Avery*, No. 19-cv-13924 (Tex. Dist. Ct. Sept. 5, 2019); *Saratoga Advantage Trust Energy & Basic Materials Portfolio* v. *Woods*, No. 2:19-cv-16380-ES-SCM (D.N.J.); and *City of Birmingham Retirement & Relief System* v. *Tillerson*, No. 2:19-cv-020949-BRM-SCM (D.N.J.). *Von Colditz*, *Montini*, and *Stourbridge* were all consolidated into this action. *Saratoga* and *Birmingham* have been consolidated with each other in the U.S. District Court for the District of New Jersey. (App. 11–19.) ExxonMobil and all defendants have moved to transfer to this Court or, in the alternative, stay the consolidated New Jersey action pending resolution of this action. (App. 7–9.) That motion remains pending decision.

2. The Working Group and Simpson Thacher Monitored Related Lawsuits and Investigations.

The Working Group and Simpson Thacher also monitored pending lawsuits and government investigations related to the Demands' and derivative lawsuits' allegations, including an investigation by the United States Securities and Exchange Commission ("SEC") and a lawsuit filed by the New York Attorney General ("NYAG"). (*Id.*)

The SEC's investigation commenced in 2016 and focused on ExxonMobil's reserves reporting and asset impairment practices. (App. 55–56.) During the investigation, ExxonMobil produced over 4 million pages of documents, made seven employees available for interviews by the SEC's staff, and provided several presentations to the SEC's staff. (*Id.*) After two years, the SEC did not identify any violation of the federal securities laws or Generally Accepted Accounting Principles. On August 2, 2018, the SEC informed ExxonMobil that it had closed its investigation. (*See id.*; App. 334.)

On October 24, 2018, following a three-year investigation, the NYAG filed a lawsuit in New York state court, styled *People* v. *Exxon Mobil Corporation*, 452044/2018 (N.Y. Sup. Ct.) (the "NYAG Action"). (App. 46–53, 336–432.) The NYAG Action broadly alleged that ExxonMobil violated certain New York state securities laws in connection with its use of, and representations about its use of, proxy and GHG costs to manage the risks to its business posed by potential future climate policies and regulations, including in regards to ExxonMobil's proved reserves estimates and asset impairment analyses. (*See id.*)

Following a 12-day bench trial, on December 10, 2019, the judge in the NYAG Action issued a lengthy post-trial decision that categorically rejected all of NYAG's claims and exonerated ExxonMobil, its officers, and employees. *See People* v. *Exxon Mobil Corp.*, 119

N.Y.S.3d 829 (TABLE), No. 452044/2018, 2019 WL 6795771 (N.Y. Sup. Ct. Dec. 10, 2019) ("NYAG Decision"). In particular, the court found that:

- "[T]he Office of the Attorney General failed to prove, by a preponderance of the evidence, that ExxonMobil made any material misstatements or omissions about its practices and procedures that misled any reasonable investor." *Id.*, at *30.

- ExxonMobil's disclosures regarding proxy costs of carbon and greenhouse gas costs were "[n]ot [m]isleading." *Id.*, at *5, *11, *16–19.

- "ExxonMobil's public disclosures in its Form 10-K submissions were true and correct with respect to ExxonMobil's proved reserves." *Id.*, at *19.

- ExxonMobil did not improperly fail to recognize asset impairments. *Id.*, at *26–30.

- "The Office of the Attorney General produced no testimony either from any investor who claimed to have been misled by any disclosure, even though the Office of the Attorney General had previously represented it would call such individuals as trial witnesses." *Id.*, at *30.

- "The **testimony of all the present and former ExxonMobil employees** who were called either as adverse witnesses by the Office of the Attorney General or as defense witnesses by ExxonMobil was **uniformly favorable to ExxonMobil**." *Id.*, at *31 (emphases added).

- "The testimony of the expert witnesses called by the Office of the Attorney General was **eviscerated** on cross-examination and by ExxonMobil's expert witnesses." *Id.* (emphasis added).

Importantly, the court also found that, far from misleading its investors and shareholders, ExxonMobil's officers and employees were "uniformly committed to rigorously discharging their duties in the most comprehensive and meticulous manner possible." *Id.*, at *21. Indeed, at the end of the trial, NYAG conceded the weakness of its own allegations when it withdrew its common law fraud claim—the only claim alleging ExxonMobil acted in bad faith—and equitable fraud claim. *Id.*, at *2–3. The court further found that NYAG's abandoned claims would have failed, even if they had not been withdrawn, because NYAG did not demonstrate a misstatement or omission of any material facts—as required by the much more lenient Martin

Act and Executive Law § 63(12) (which do not have scienter requirements). *Id.*, at *2. NYAG did not appeal.

3. The Working Group and Simpson Thacher Find No Evidence of Wrongdoing and Recommend That the Board Reject the Demands.

On January 6, 2020, the Working Group and Simpson Thacher met to discuss the findings and conclusions of the inquiry, which are memorialized in a comprehensive 275-page report completed on January 22, 2020. (App. 107.) The Working Group and Simpson Thacher found no evidence of any wrongdoing to support the allegations made in the Demands or the related derivative lawsuits. (App. 33–38, 119, 154–56, 202–04, 251–52.) On the contrary, they found that ExxonMobil "has well-defined internal controls over financial reporting," which were rigorously tested by ExxonMobil's internal audit department and PwC. (App. 275.) They further found that ExxonMobil's public statements were neither misleading nor intended to be so. (App. 275–76.) The Working Group and Simpson Thacher found that their findings were corroborated by, among other things, (i) the SEC's termination of its two-year long investigation; (ii) the NYAG's "extraordinary" voluntary dismissal of its own scienter-based fraud claims; and (iii) the decision of the judge in the NYAG Action to dismiss NYAG's remaining more lenient, non-scienter-based, claims with prejudice. (App. 104–05, 276.) Based on their extensive and detailed findings, the Working Group and Simpson Thacher concluded that the litigation contemplated by the Demands on ExxonMobil's behalf would be meritless. (App. 277.)

In addition, the Working Group and Simpson Thacher considered a broad range of practical factors in determining whether derivative litigation would serve ExxonMobil's best interests. Given the lack of merit to the allegations in the Demands and derivative lawsuits, the Working Group and Simpson Thacher first found that the costs of pursuing derivative litigation would "substantially outweigh" any benefit to ExxonMobil. (App. 44–45, 273–75.) They also

found that litigation would divert the attention of key witnesses—including ExxonMobil engineers, economists, and accountants—whose work is fundamental to ExxonMobil's core operations and could further cause "unwarranted reputational harm" by "creat[ing] the misimpression of corporate and managerial malfeasance." (App. 44–45, 275.) Moreover, they considered that proceeding with a lawsuit on ExxonMobil's behalf against its directors and officers would harm ExxonMobil "by undermining its defenses in related civil suits and government investigations." (App. 44–45, 274–75.)

After discussing these findings and conclusions with Simpson Thacher, the Working Group recommended that the Board both reject the Demands in their entirety as contrary to ExxonMobil's best interests and direct ExxonMobil to take all appropriate steps to dismiss all related derivative lawsuits. (App. 29–30, 107, 277.)

D. The Board Rejects the Demands and Determines That All Derivative Lawsuits Should Be Dismissed.

At a January 29, 2020 meeting of ExxonMobil's Board, Paul Curnin of Simpson Thacher reported on the inquiry and the Working Group's findings and conclusions. (App. 329–31.) In advance of the meeting, the full Board received a copy of the executive summary of the Working Group's 275-page report detailing its inquiry and recommendations to the Board. (*Id.*) All 11 directors present at the meeting carefully considered and discussed with Mr. Curnin and each other the Working Group's findings and conclusions and its recommendation to the Board. (*Id.*) The Board unanimously endorsed the Working Group's recommendation and adopted a resolution that rejected the Demands in their entirety and directed that steps be taken to have all pending derivative lawsuits dismissed. (*Id.*)

In addition to the three members of the Working Group, the following highly accomplished members of ExxonMobil's 11-member Board made that decision:

- **Dr. Susan K. Avery**, who was first elected to ExxonMobil's Board on January 25, 2017, served as the President and Director of the Woods Hole Oceanographic Institution from 2008 to 2015. She also served as interim Dean of the graduate school, Vice Chancellor for research, interim Provost, and Executive Vice Chancellor for academic affairs, at the University of Colorado Boulder from 2004 to 2008. (App. 278, 436.)

- **Ursula M. Burns**, who was first elected to ExxonMobil's Board in 2012, serves as Chairman and CEO of VEON. She previously served as Chairman of Xerox Corporation from 2010 to June 2017. She was also elected CEO in 2009 and President of Xerox Corporation in 2007, and relinquished these roles in 2016 and 2009, respectively. At Xerox, she also served as Senior Vice President, Corporate Strategic Services; Senior Vice President, Document Systems and Solutions Group; and Senior Vice President, Business Group Operations. She was a director at American Express Company from January 2004 until May 2018. (App. 279, 437.)

- **Joseph L. Hooley**, who first joined ExxonMobil's Board in January 2020, held numerous roles at State Street Corporation, including serving as its Chairman from 2011 to 2019, its CEO from 2010 to 2018, its President and COO from 2008 to 2014, its Executive Vice President and head of Investor Services Division from 2002 to 2008; and its Vice Chairman and Global Head of Investment Servicing and Investment Research and Trading in 2006. Previously, he served as President and CEO of Boston Financial Data Services from 1990 to 2000; and as President and CEO of National Financial Data Services from 1988 to 1990. Mr. Hooley also currently serves as a director of Aptiv PLC. (App. 438.)

- **Steven A. Kandarian**, who was first elected to ExxonMobil's Board in 2018, was elected Chief Executive Officer, President, and Chairman of MetLife Inc. in 2011 and 2012, respectively, and relinquished these roles in May 2019. Prior to joining MetLife, Mr. Kandarian served as Executive Director of the Pension Benefit Guaranty Corporation. Mr. Kandarian also serves as a director of AECOM. (App. 279, 439.)

- **Douglas R. Oberhelman**, who was first elected to ExxonMobil's Board in 2015, was previously Chairman and Chief Executive Officer of Caterpillar Inc., but relinquished these roles in 2017 and 2016, respectively. Mr. Oberhelman also served as a Director at Eli Lilly and Company between December 2008 and February 2015. (App. 280, 439.)

- **Samuel J. Palmisano**, who was first elected to ExxonMobil's Board in 2006, previously served as the Chairman, President, and Chief Executive Officer of IBM from 2003 to 2012. He also previously served on the Board of Directors of American Express Company but relinquished that role in 2019. (App. 280, 440.)

- **Steven S. Reinemund**, who was first elected to ExxonMobil's Board in 2007, previously served as the Dean of the Calloway School of Business and Accountancy at Wake Forest University between 2008 and 2014. Prior to his role at Wake Forest, Mr. Reinemund served as the Executive Chairman of the Board of PepsiCo, Inc. from 2006 to 2007, as the President and CEO of Frito-Lay, Inc. in 1992, and as the President and CEO of Pizza Hut in 1986. In addition to his Directorship at ExxonMobil, Mr. Reinemund currently

serves on the Board of Directors of Marriott International and Walmart, Inc. He was previously a Director at American Express Company from 2007 to 2015. (App. 280–81.)

- **Darren W. Woods**, who was elected President and Director of ExxonMobil in January 1, 2016, has held a number of domestic and international assignments for ExxonMobil Refining & Supply Company, ExxonMobil Chemical Company, and Exxon Company International since joining the ExxonMobil organization in 1992, including Vice President of Supply and Transportation; Director of Refining for Europe, Africa and the Middle East for ExxonMobil Refining & Supply Company; and Vice President of ExxonMobil Chemical Company. Mr. Woods became Chairman and Chief Executive Officer of ExxonMobil on January 1, 2017. (App. 281–82, 441.)

With the exception of Mr. Woods, all of the Board members are non-management, outside directors and all are "independent" under the listing standards of the New York Stock Exchange, on which ExxonMobil's stock is listed. (App. 88–89, 278–82.) The Working Group and Simpson Thacher specifically found that a majority of the Board was independent under New Jersey law at the time the Board voted to reject the Demands and seek dismissal of the derivative lawsuits. (App. 88–89, 278–82; App. 329–31.)

On February 5, 2020, Simpson Thacher advised Plaintiff and the other shareholders who sent Demands of the Board's decision. (App. 443–44.) After executing a confidentiality agreement in May 2020, Plaintiff's counsel were also permitted to review the Working Group's report. (App. 446–53.)

ARGUMENT

Plaintiff is not entitled unilaterally to prosecute this action on ExxonMobil's behalf. The full, thorough, and independent inquiry into the allegations in Plaintiff's Demand and the Complaint in this action found that none of Plaintiff's allegations have any merit and that maintenance of this action would not serve ExxonMobil's best interests. Accordingly, as explained below, this action should be dismissed with prejudice pursuant to New Jersey law.

I. New Jersey Law Provides the Criteria for Determining Whether This Derivative Action Should Be Dismissed.

Because ExxonMobil is incorporated in New Jersey, New Jersey law provides the applicable substantive law of whether a derivative suit should proceed after a shareholder has made a pre-suit demand. *See* N.J.S.A. 14A:3-6.9(a) (applying provisions concerning derivative proceedings "to actions brought in state or federal court both within and outside of the State of New Jersey"); *see Operative Plasterers' & Cement Masons' Local Union Officers' & Emps.' Pension Fund* v. *Hooley*, No. 12-cv-10767-GAO, 2013 WL 5442366, at *5 (D. Mass. Sept. 30, 2013) (dismissing derivative action brought on behalf of Massachusetts corporation, applying criteria of Massachusetts statute that is analogous to provision in the New Jersey Business Corporation Act). By contrast, Federal Rule of Civil Procedure 23.1 contains certain procedural requirements applicable to derivative actions in federal court. As the United States Supreme Court has long recognized, Rule 23.1 "does not create a [pre-suit] demand requirement of any particular dimension" but instead "speaks only to the adequacy of the shareholder representative's pleadings." *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96 (1991) (emphasis omitted); *see Blasband* v. *Rales*, 971 F.2d 1034, 1047 (3d Cir. 1992) ("The substantive requirements [relating to a pre-suit] demand are a matter of state law.") (citing *Kamen*, 500 U.S. at 96-99). For this reason, "federal courts should apply state law governing the authority of independent directors to discontinue derivative suits." *Burks* v. *Lasker*, 441 U.S. 471, 486 (1979).

A bedrock principle of the New Jersey Business Corporation Act is that the "business and affairs of a corporation shall be managed by or under the direction of its board," not its shareholders. N.J.S.A. 14A:6-1(1). The board thus has sole authority to decide whether to pursue lawsuits on the corporation's behalf. *See In re Prudential Ins. Co. Deriv. Litig.*, 659

A.2d 961, 970 (N.J. Super. Ct. Ch. Div. 1995) ("The decision to bring a lawsuit or to refrain from litigating a claim on behalf of the corporation is a decision concerning the management of the corporation and is thus normally the responsibility of the directors.") (citations omitted). For this reason, the New Jersey Business Corporation Act requires shareholders to submit a pre-suit demand on the corporation before commencing derivative litigation and allows the board to commence an inquiry into the demand's allegations to determine whether derivative litigation would be in the corporation's best interests. *See* N.J.S.A. 14A:3-6.3 ("No shareholder may commence a derivative proceeding until . . . a written demand has been made upon the corporation to take suitable action"); N.J.S.A. 14A:3-6.4 (permitting court to stay proceedings pending resolution of an inquiry into the allegations made in the pre-suit demand or complaint).

If an independent majority of the board's directors determines in good faith after conducting a reasonable inquiry that it is not in the corporation's best interests to maintain the derivative litigation sought by a pre-suit demand, the New Jersey Business Corporation Act provides that any derivative action "shall be dismissed by the court on motion by the corporation" because that exercise of the board's business judgment is entitled to deference. N.J.S.A. 14A:3-6.5(1). To obtain dismissal, the corporation bears an initial burden to "submit a written filing with the court" containing facts showing that (i) "a majority of the board of directors was independent at the time of the determination by the independent director[s]"; and (ii) the independent directors "made the determination in good faith after conducting a reasonable inquiry upon which the conclusions are based." N.J.S.A. 14A:3-6.5(5)(a).[3] As discussed herein, this motion satisfies that initial burden.

[3] Where, as here, a majority of the board of directors consisted of independent directors at the time of the determination, the plaintiff bears the ultimate burden of proof and persuasion. N.J.S.A. 14A:3-6.5(4). The burden shifting provided for in N.J.S.A. 14A:6.5(4) is also a

II. This Derivative Action Should Be Dismissed Under N.J.S.A. 14A:3-6.5.

The criteria requiring dismissal under N.J.S.A. 14A:3-6.5 are all satisfied here. Following an in-depth, good faith investigation, the Board unanimously determined that this action was not in ExxonMobil's best interests. At the time of that determination, a majority of ExxonMobil's 11-member Board consisted of independent, outside directors. (*See supra*, Sections I.C–D.) Only one director, ExxonMobil's Chair and CEO, Mr. Woods, was a member of ExxonMobil management. (*See supra*, Sections I.C–D.) The 10 independent, outside directors who made that decision each made a good faith determination to reject Plaintiff's Demand and seek the dismissal of this action based on the Working Group's and Simpson Thacher's exhaustive inquiry and their detailed findings and conclusions. *Id.* In accordance with N.J.S.A. 14A:3-6.5, this action should be dismissed with prejudice.

A. A Majority of the Board's Directors Was Independent.

Under N.J.S.A. 14A:3-6.5, a director "shall be considered independent" if: (a) the director has "no economic interest in the challenged act or transaction material to him or her, other than an economic interest that is shared by all shareholders generally"; and (b) the director has "no material, personal, or business relationships with the defendant directors or officers who have a material interest in the act or transaction challenged." N.J.S.A. 14A:3-6.5(7)(a)(i)-(ii).

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substantive aspect of New Jersey law. This section of the New Jersey Business Corporation Act is based on section 7.44 of Chapter 156D of the Massachusetts Business Corporation Law. *See* N.J.S.A. 14A:3-6.1 (Senate Commerce Committee Statement) (explaining the statute contains "substantial additions based on section 7.44 of Chapter 156D of the Massachusetts Business Corporation Law"). Courts construing section 7.44 of the Massachusetts statute have specifically held this burden shifting is a substantive aspect of Massachusetts law. *See, e.g.*, *Rotz* v. *Van Kampen Asset Mgmt.*, 5 N.Y.S.3d 330 (TABLE), No. 651060/2010, 2014 WL 5431156, at *5–6 (N.Y. Sup. Ct. Oct. 22, 2014) (holding that "the burden-shifting provision of section 7.44 [of the Massachusetts statute] is substantive"); *Operative Plasterers'*, 2013 WL 5442366, at *5 (holding that because defendants demonstrated "*prima facie*, that the voting directors who rejected the plaintiff's demand were independent within the meaning of § 7.44 . . . it falls to the plaintiff to rebut that showing").

As the New Jersey Supreme Court has explained, this standard seeks to ensure that the decision to reject a demand was not made by a majority of directors who "had divided loyalties, stood to receive any improper personal gain, or were unduly influenced by any improper motive." *In re PSE&G S'holder Litig.*, 801 A.2d 295, 315 (N.J. 2002).

An overwhelming majority of ExxonMobil's directors was independent as defined by N.J.S.A. 14A:3-6.5(7)(a)(i)-(ii) when they determined that maintenance of this action is not in ExxonMobil's best interests. The Working Group and Simpson Thacher investigated whether the Board members had any disabling conflicts, and found none. (*See supra*, Section I.C.) At the time of the Board's decision on January 29, 2020, only Mr. Woods was employed by ExxonMobil. (*Id.*) The remaining 10 directors were not, and never have been employed by ExxonMobil or its subsidiaries. *(Id.)* Each was also "independent" under the listing requirements of the New York Stock Exchange. (*Id.*) In light of these facts, the first prong of N.J.S.A. 14A:3-6.5(5) is satisfied.

Courts applying New Jersey law have held that a majority of the Board acts independently with respect to a pre-suit litigation demand where, as here, board minutes and resolutions show that the directors unanimously adopted the findings of a comprehensive investigation led by independent, outside counsel. *See George Leon Family Tr.* v. *Coleman*, No. 12-cv-4401 (JAP), 2014 WL 2889741, at *6–7 (D.N.J. June 25, 2014) (finding the board acted independently where "[t]he minutes and resolution from the Board's meeting . . . demonstrate that the Board unanimously adopted the recommendations of [independent counsel's report], and state that the 'shareholder demands considered by [counsel] are refused as contrary to the best interests of [the corporation.]'"); *Fagin* v. *Gilmartin*, 2007 WL 2176482, at *16 (N.J. Super. Ct. Ch. Div. July 19, 2007) (finding directors were independent where documents submitted to court

"unanimously show that each director based his or her decision to reject demand based on the recommendations of [counsel's investigation] and his or her view of the best interests of [the corporation] without regard to outside considerations"). The Board's decision to unanimously endorse the findings and conclusions of the investigation spearheaded by independent outside counsel at Simpson Thacher reinforces the fact that a majority of the Board's directors was independent.

Plaintiff's Complaint does not, and cannot, challenge the independent status of the Board. The Complaint fails to allege that *any* of the outside directors has any economic interest in the challenged actions material to him or her. Nor does the Complaint allege that the outside directors had any disabling relationships with each other or with the ExxonMobil officers and employees who were named as potential defendants in the Demand. Plaintiff's failure to offer a single allegation attacking the Board's independence alone is sufficient to find the Board independent here. *See, e.g.*, *Fagin* v. *Gilmartin*, No. 03-2631 (SRC), 2004 WL 5835749, at *7–11 (D.N.J. Aug. 20, 2004) (finding Board majority independent based solely on the weakness of plaintiff's allegations).

That Plaintiff named 6 of ExxonMobil's 10 outside directors as defendants in this action and alleged that they approved statements Plaintiff claims were false or misleading does not undermine their independence. (Am. Compl. ¶¶ 35, 37–39, 41, 45.) To the contrary, N.J.S.A. 14A:3-6.7(b)(ii)-(iii) makes clear that the (a) "naming of the director as a defendant in the derivative proceeding or as a person against whom action is demanded"; or (b) "the approval by the director of the act being challenged in the derivative proceeding or demand if the act resulted in no personal benefit to the director" shall not cause the director to lack independence. N.J.S.A. 14A:3-6.5(7)(b)(ii)-(iii); *see also PSE&G*, 801 A.2d at 314 (holding that a "director is

not to be viewed as being 'interested' merely because he or she may have approved the challenged transaction or because a shareholder alleges that the director would be reluctant to sue a fellow corporate decision-maker.") (citation omitted).

Accordingly, an overwhelming majority of the directors who determined to reject Plaintiff's Demand and seek the dismissal of this action was independent when they made that decision.

B. The Board Acted in Good Faith After Conducting a Reasonable Inquiry.

Under settled New Jersey law, a Board's decision to reject a pre-suit litigation demand is made in good faith following a reasonable inquiry if the Board's actions reflect an "earnest attempt to investigate a shareholder's complaint," and the inquiry must not have been "so restricted in scope, so shallow in execution, or otherwise so *pro forma* or half hearted as to constitute a pretext or sham." *PSE&G*, 801 A.2d at 315–16 (citation omitted). In reviewing the Board's actions, the "'court's inquiry is not into the substantive decision of the board, but rather is into the procedures employed by the board in making its determination.'" *Id.* at 315 (citation omitted). As the New Jersey Supreme Court has held, "[o]ne of a board's prerogatives . . . is 'to entrust its investigation to a law firm.'" *Id.* at 316; *see also* 2 *Principles of Corp. Governance* § 7.09(a)(2) (1994) (instructing that shareholder pre-suit litigation demands should be considered by board of directors with assistance of counsel of its choice). Where, as here, the Board retains independent, outside counsel to assist in the inquiry, "the critical question is whether [the Board] demonstrated bad faith or acted unreasonably in relying on [counsel's] investigation." *PSE&G*, 801 A.2d at 316.

Here, the Board indisputably acted in good faith on the basis of a thorough inquiry into the merits of the allegations in Plaintiff's Demand and this action. In response to the Demands, the Board created a Working Group of three independent, outside directors to

supervise closely an independent inquiry spearheaded by Simpson Thacher, which was itself entirely independent from ExxonMobil. (*See supra*, Section I.C.) The scope of that inquiry was broad—covering all allegations of misconduct made in each of the Demands, spanning primarily the period 2010 through 2017. (*Id.*) The inquiry lasted almost three years and included, with full cooperation from the Board and ExxonMobil management, interviews with 25 individuals and a review of approximately 1.25 million pages of relevant documents. (*Id.*) Simpson Thacher alone spent over 5,000 hours working on the inquiry. (*Id.*) The Working Group and Simpson Thacher memorialized the inquiry's findings and conclusions in a 275-page report that found the allegations to be meritless. (*Id.*) That finding was corroborated by the SEC's closure of its own related investigation, NYAG's decision to dismiss its related fraud claims at the end of trial, and the decision of the judge in the NYAG Action to dismiss NYAG's remaining claims with prejudice. (*Id.*) Based on that thorough inquiry, which the Board's independent, outside directors carefully considered and discussed at the January 29, 2020 meeting, the Board made a good faith decision to reject the Demands and seek the dismissal of the derivative lawsuits. (*Id.*)

New Jersey federal and state courts have routinely upheld as reasonable similarly thorough inquiries by boards who retained independent outside law firms. In *PSE&G*, for example, the New Jersey Supreme Court concluded that an inquiry lasting several months was reasonable where the board retained independent counsel, the inquiry resulted in a 124-page report, and the scope of the inquiry included a review of "over 43,000 pages of documents" and "thirty interviews" with relevant individuals. 801 A.2d at 303. Similarly, in *George Leon Family Trust*, the District of New Jersey concluded that an inquiring lasting one and a half years was reasonable where the board retained independent counsel, the inquiry resulted in a 116-page report, and the inquiry's scope included the review of "17,000 pages of documents" and 24

interviews with 19 relevant individuals. *See* 2014 WL 2889741, at *2. Other courts applying New Jersey law have agreed. *See Fagin*, 2007 WL 2176482, at *19 (holding inquiry was reasonable where board retained independent law firm and based its decision "on a thorough review of a report prepared by outside counsel"); *Fagin*, 2004 WL 5835749, at *12 (holding inquiry was reasonable where board retained independent law firm that found no impropriety).

Moreover, in making its decision, the Board also appropriately considered and weighed additional practical factors that the Working Group and Simpson Thacher identified related to the litigation sought in the Demands. *See George Leon Family Tr.*, 2014 WL 2889741, at *8 (noting that courts consider "all relevant justifications" for a board's decision and that a board "is entitled to weigh and evaluate the chances of economic success of the derivative action against the financial and intangible costs of defending the suit") (citing *PSE&G*, 801 A.2d at 318). Particularly given its conclusion that the allegations in the Demands and derivative lawsuits had no merit, the Board appropriately considered that the costs of pursuing a lawsuit against certain of ExxonMobil's directors and officers would "substantially outweigh" any benefit to ExxonMobil.[4] (*Supra*, Section I.C.) The Board also considered the finding that litigation would be an unnecessary distraction to key witnesses whose work is fundamental to ExxonMobil's operations and could cause unwarranted reputational harm. (*See id.*) And, in light of additional, related lawsuits and government investigations pending against ExxonMobil,

[4] The Working Group and Simpson Thacher also found that the costs of pursuing a lawsuit on ExxonMobil's behalf "which are onerous in their own right, would be compounded by the indemnity that ExxonMobil is obligated to furnish" to the directors and officers who would be defendants in such a lawsuit and the fact that ExxonMobil's directors and officers are exculpated from personal monetary liability for breaches of the fiduciary duty of care. (App. 273–74.) Given that no meritorious claims had been uncovered, the Working Group and Simpson Thacher found that a lawsuit would not provide any economic benefit to ExxonMobil. (*Id.*)

they considered that a lawsuit by the Company against its directors and officers could undermine its defenses in those actions. (*See id.*)

The independent Board's decision to reject the Demands and seek the dismissal of this lawsuit was thus made in good faith on the basis of a thorough inquiry. Accordingly, the independent Board's business judgment is entitled to deference.

CONCLUSION

For the foregoing reasons, ExxonMobil and all Defendants respectfully request that the Court dismiss this action in its entirety under N.J.S.A. 14A:3-6.5. In response to the Demands, ExxonMobil's independent Board pursued a comprehensive, three-year inquiry into the Demands' allegations that was conducted by independent, outside counsel at Simpson Thacher and directed by a Working Group comprised of three independent directors. That inquiry found the Demands' allegations had no merit and that maintenance of this action, and related derivative lawsuits, would not be in ExxonMobil's best interests. On January 29, 2020, the independent Board carefully discussed the inquiry's findings and conclusions and unanimously endorsed the Working Group's recommendation. Under New Jersey law, the Board's decision is entitled to deference and dismissal of this action with prejudice is warranted.

Dated: August 10, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion has been served by electronic CM/ECF filing, on this 10th day of August, 2020.

/s/ Daniel J. Kramer
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