

**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)

**INSTITUTIONAL PLAINTIFFS' MOTION TO INTERVENE FOR THE LIMITED
PURPOSE OF OBJECTING TO DEFENDANTS' REQUEST
FOR DISMISSAL WITH PREJUDICE**

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NOTICE OF MOTION AND MOTION

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that proposed intervenors Saratoga Advantage Trust Energy & Basic Materials Portfolio (“Saratoga”) and the City of Birmingham Retirement and Relief System (“Birmingham,” and together with Saratoga, the “Institutional Plaintiffs”), plaintiffs in the New Jersey Action,¹ by and through their undersigned counsel, hereby move this Court for an order allowing the Institutional Plaintiffs to intervene in the above-captioned consolidated shareholder derivative action (the “Texas Action”)² pursuant to Rule 24 of the Federal Rules of Civil Procedure (“FRCP”) for the sole purpose of filing a limited opposition to the request for dismissal *with prejudice* filed by Nominal Defendant Exxon Mobil Corp. (“Exxon” or the “Company”) and the Individual Defendants (together, “Defendants”) (Texas Action, Dkt. No. 46).³

The Institutional Plaintiffs seek an order allowing them to intervene in this Texas Action, as of right, pursuant to FRCP Rule 24(a), or permissively, pursuant to FRCP Rule 24(b), for the sole purpose of filing a limited opposition to Defendants’ Motion to Dismiss and Brief in Support (Texas Action, Dkt. No. 46, the “Motion to Dismiss”). The pending Motion to Dismiss will affect the Institutional Plaintiffs’ claims in their shareholder derivative action, which is currently pending

¹ The “New Jersey Action” refers to the proposed intervenors’ consolidated shareholder derivative action that is currently pending before the Honorable Judge Esther Salas in the United States District Court for the District of New Jersey, captioned: *In re Exxon Mobil Corporation Derivative Litigation*, Case No. 2:19-cv-16380-ES-SCM (filed August 6, 2019).

² The “Texas Action” refers to this consolidated derivative action, including Case Nos. 3:19-cv-1067-K, 3:19-cv-1068-K, 3:19-cv-2267-K, and 3:20-cv-1280-K. The “Texas Plaintiffs” refer collectively to the plaintiffs in the Texas Action.

³ Individual Defendants refers to: Darren W. Woods, Andrew P. Swiger, David S. Rosenthal, Jeffrey J. Woodbury, Steven S. Reinemund, Michael J. Boskin, Samuel J. Palmisano, Kenneth C. Frazier, Ursula M. Burns, Henrietta H. Fore, William C. Weldon, Rex W. Tillerson, William W. George, Larry R. Faulkner, Douglas R. Oberhelman, and Peter Brabeck-Letmathe. See Dkt. No. 12, ¶¶31-46.

before the Honorable Judge Esther Salas in the New Jersey Action. This Motion is based on this Notice of Motion and Motion filed herewith, and the [Proposed] Order Granting Proposed Intervenor's Motion to Intervene for the Limited Purpose of Objecting to Defendants' Request for Dismissal with Prejudice, also filed herewith, and the pleadings and papers on file in this action.

MEMORANDUM IN SUPPORT OF PROPOSED INTERVENORS' MOTION

I. PRELIMINARY STATEMENT

The Institutional Plaintiffs should be granted intervention as of right pursuant to FRCP 24(a) as they have a "significantly protectable interest" that is related to the Institutional Plaintiffs' claims in the New Jersey Action on behalf of Exxon, and will suffer a practical impairment of such interest if not permitted to intervene and challenge the proposed dismissal of those claims with prejudice.

The Institutional Plaintiffs and the Texas Plaintiffs both assert derivative claims on behalf of Exxon. Defendants have moved to dismiss the Texas Action on the basis that, among other things, the Texas Plaintiffs' amended complaint fails to allege with sufficient particularity that demand was wrongfully refused under FRCP 23.1. However, the Institutional Plaintiffs' operative complaint contains critical, outcome determinative allegations regarding the demand refusal that are absent from the Texas Plaintiffs' amended complaint.

The Institutional Plaintiffs assert claims that are based on a more fulsome factual record and that contain more particularized allegations than those alleged by the Texas Plaintiffs, having already pursued documents related to the conduct of Exxon's internal investigation into the underlying claims, and having received the 275-page report (the "Investigation Report") detailing that inquiry and investigation conducted at the Exxon Board of Directors' (the "Board") request. The Institutional Plaintiffs promptly filed a consolidated amended complaint in the New Jersey Action alleging with particularity the details of the Investigation Report, how the Board's

investigation was procedurally deficient and lacked the requisite independence, and challenging the Board's decision to refuse the litigation demanded as a breach of its fiduciary duties under New Jersey law. New Jersey Action, Dkt. No. 56.⁴ Dismissal with prejudice of the Texas Action, in which the operative complaint was filed without the benefit of the review of the investigation and Investigation Report, would have a preclusive effect on the Institutional Plaintiffs' action. Thus, if this Court grants dismissal, it should do so without prejudice, or alternatively, with prejudice to the named Texas Plaintiffs only.

Absent a finding as of right to intervene, the Court should grant the Institutional Plaintiffs permissive intervention under FRCP Rule 24(b). The Institutional Plaintiffs have a comparatively greater interest in the Company, and thus the outcome of the litigation, and also have more vigorously prosecuted the claims at issue, having already incorporated the Board's 275-page Investigation Report into an amended complaint in the New Jersey Action. Intervention in the Texas Action will not expand this Court's jurisdiction. Instead, this Court will consider limited arguments on whether dismissal should be with or without prejudice, or a dismissal with prejudice as to named Texas Plaintiffs only. No undue delay or prejudice to any party will result from the Institutional Plaintiffs' intervention. Indeed, the actions will move forward on their merits and the interests of Exxon will remain protected, as well as the interests of shareholders suing on the Company's behalf.

For all of these reasons, and consistent with the liberal construction of FRCP Rule 24 favoring intervention, the motion to make a limited objection to Exxon's Motion to Dismiss with prejudice should be granted.

⁴ Reference to "Consol. Cpt." herein refers to the foregoing consolidated complaint filed by the Institutional Plaintiffs in the New Jersey Action.

II. STATEMENT OF FACTS

Prior to filing a consolidated amended complaint in the New Jersey Action, in November 2018, the Institutional Plaintiffs demanded that Exxon investigate whether Exxon's officers and directors committed non-exculpable violations and/or breaches of fiduciary duties or other violations of applicable law with respect to, *inter alia*, Exxon's processes for evaluating enterprise risks with respect to climate change (the "November 2018 Demands"). Consol. Cpt. at ¶¶239-40, 248-49. Subsequently, the Institutional Plaintiffs sought additional information regarding the nature and progress of the investigation, and continued to communicate with Company counsel regarding the same. *Id.* at ¶¶241-45. The Institutional Plaintiffs then agreed to a limited stay of the New Jersey Action, through January 15, 2020, to allow time for the Board to make a decision on the November 2018 Demands, and to access and review the Investigation Report. *Id.* at ¶¶252-54.

In February and March 2020, the Institutional Plaintiffs were granted access to the Investigation Report and the Institutional Plaintiffs thereby properly investigated the facts and circumstances surrounding the Board's investigation, and allowed the Board the time it required to conclude its investigation with the eventual Investigation Report into the underlying wrongdoing alleged in both the New Jersey Action and the Texas Action. As a result of the foregoing efforts, on April 17, 2020, the Institutional Plaintiffs were able to allege with particularity in the Consolidated Complaint how the Board wrongfully refused the November 2018 Demands, and to further allege why such refusal was not a valid exercise of business judgment. Consol. Cpt. at ¶¶254-86.

Similar to the Institutional Plaintiffs, the Texas Plaintiffs assert claims against certain officers and directors of Exxon for breach of fiduciary duty, waste of corporate assets, unjust

enrichment, and violations of Sections 10(b), 21D, and 29(b) of the Securities Exchange Act of 1934 (the “Exchange Act”). *Compare* Consol. Cpt. at ¶¶287-318 with Texas Action Dkt. No. 12 (the “Texas Amended Complaint”) at ¶¶334-65. However, the Texas Amended Complaint was filed on September 20, 2019, before the Board had refused the Texas Plaintiffs’ demand or completed its investigation. The Texas Amended Complaint is therefore completely devoid of any information regarding the process taken by the Board to investigate the underlying wrongdoing, allegations regarding the Board’s independence, or even information concerning the investigation or its outcome. Instead, the Texas Plaintiffs state only that “the Board has failed to provide [the Texas Plaintiffs] with any information concerning any attempt to investigate the Demand, reach a conclusion, and take appropriate action,” without detailing *any effort* taken by the Texas Plaintiffs to obtain such information from Company counsel. Texas Complaint at ¶312. In lieu of the detailed process, independence, and factual deficiencies and inconsistencies identified by the Institutional Plaintiffs, the Texas Plaintiffs rely solely on the fact that they received no information regarding the Company’s investigation as a “*de facto* refusal,” despite the fact that the Company’s investigation was ongoing and the Texas Plaintiffs took no apparent action to receive further information. *Compare* Consol. Cpt. at ¶¶254-86 with Texas Complaint at ¶¶312-19.

FRCP 23.1 requires that allegations regarding demand refusal be alleged with particularity. Unsurprisingly, Defendants’ Motion to Dismiss argues that the Texas Amended Complaint, which lacks any allegations about the Board’s investigation or decision, fails to plead with particularity that the Board’s demand refusal was unreasonable under New Jersey law. Motion to Dismiss at 14-22. Significantly, the Motion to Dismiss makes, as a primary argument, that the Board acted in good faith after conducting a reasonable inquiry, in conformity with New Jersey law, to reject the demands at issue herein. *Id.* at 16, 19-22. The Texas Plaintiffs cannot effectively answer these

arguments because their Amended Complaint alleges no facts about the investigation or refusal, and they apparently have not reviewed the Investigation Report, in contrast to the vigorous prosecution of the Institutional Plaintiffs. The Motion to Dismiss further requests that the Texas Action be dismissed with prejudice under New Jersey law as a result of these shortcomings. *Id.* at 1, 13, 16, 22.

In response, the Texas Plaintiffs now belatedly move to conduct limited discovery into the Defendants' refusal of the litigation demands, presumably to conduct a review of the Investigation Report that the Institutional Plaintiffs reviewed in February, and further have moved for an extension of time to respond to the Motion to Dismiss. Texas Action, Dkt. Nos. 53-54. The Texas Plaintiffs have not directly opposed Exxon's specific request for dismissal with prejudice, which could potentially prevent other Exxon shareholders from pursuing derivative claims on behalf of the Company. *Id.*

III. LEGAL ARGUMENT

Absent an order from this Court dismissing the Texas Action without prejudice or with prejudice as to the named Texas Plaintiffs only, the Institutional Plaintiffs will be potentially prejudiced. The Institutional Plaintiffs have pursued and reviewed Company documents in an effort to allege particularized factual allegations of deficiencies in the process, controls, and independence of the Board in carrying out its investigation into both the Texas Plaintiffs' and Institutional Plaintiffs' demands. The Institutional Plaintiffs have an interest in the property subject to the Texas Action, and without FRCP Rule 24 intervention, could be estopped in their ability to protect the interests of Exxon and its shareholders. Thus, the Court should permit the Institutional Plaintiff's intervention as of right under FRCP Rule 24(a)(2) for the limited purpose of objecting to Exxon's request for dismissal of the underlying claims with prejudice.

In the alternative, this Court may also grant permissive intervention under FRCP Rule 24(b)(1)(B). The claims of the Institutional Plaintiffs and the Texas Plaintiffs share common questions of law and fact. As the Court has not yet ruled on Exxon's Motion to Dismiss, and the Texas Plaintiffs have requested additional time to conduct limited discovery in order to respond to the Motion to Dismiss, the Institutional Plaintiffs' limited intervention purposes of objecting to a dismissal with prejudice will not cause undue delay or prejudice to the parties to this action.

Accordingly, the Institutional Plaintiffs respectfully request that the Court grant this Motion to Intervene for this limited purpose.

A. The Institutional Plaintiffs Should Be Granted Intervention as of Right Pursuant to FRCP Rule 24(a)

FRCP Rule 24(a) permits a party to intervene as of right if: (i) the application is timely; (2) the applicant has an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; and (4) the applicant's interest is inadequately represented by the existing parties to the suit. FRCP Rule 24(a)(2); *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 834 F.3d 562, 565 (5th Cir. 2016); *Texas v. U.S.*, 805 F.3d 653, 657 (5th Cir. 2015); *GNL Ridglea, LLC v. Guang Dong Hailea Group Co., Ltd.*, C.A. No. 4:18-cv-00286, 2018 WL 5259657, at *4 (N.D. Tex. Oct. 5, 2018). "Although the movant bears the burden of establishing its right to intervene, Rule 24 is to be liberally construed." *Texas*, 805 F.3d at 656, n.2 (citing *Brumfield v. Dodd*, 749 F.3d 339, 341 (5th Cir. 2014)). "Federal courts should allow intervention when no one would be hurt and the greater justice could be attained." *Wal-Mart*,

834.3d at 565, n.2 (citing *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994)). The Institutional Plaintiffs meet all elements to intervene as of right.⁵

First, the Institutional Plaintiffs' intervention is timely. As here, where intervention is sought before discovery has begun and does not seek to delay or reconsider phases of the litigation that have already concluded, a motion is timely. *Wal-Mart*, 834 F.3d at 565-66 (citing *Flying J. Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009)). Exxon and the Individual Defendants filed the Motion to Dismiss on August 10, 2020. Dkt. Nos. 46-47. The Institutional Plaintiffs sought to intervene promptly, as soon as they knew that their derivative claims would be impacted by a request to dismiss with prejudice, and can be considered alongside the Court's deliberation on the Motion to Dismiss the proceedings herein, eliminating the possibility of prejudice to the original parties through delay. *See Pomeroy, Inc. v. Border Opportunity Saver Systems, Inc.*, No. DR-10-CV-10, 2011 WL 13324298, at *3 (W.D. Tex. May 12, 2011) (citing *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977)) ("the prejudice to the original parties to the litigation that is relevant to the question of timeliness is only that prejudice which would result from the would-be intervenor's failure to request intervention as soon as he knew or reasonably should have known about his interest in the action.").

Second, the Institutional Plaintiffs have a legally protectable interest in the claims at issue against Exxon's senior executives and Board. A "legally protectable" interest is sufficient for intervention "if it is of the type that the law deems worthy of protection, even if the intervenor does not have an enforceable legal entitlement or would not have standing to pursue her own

⁵ In the Fifth Circuit, not all factors need to be met in order for a motion to intervene under FRCP Rule 24(a) to yet be successful. *See, e.g., Texas*, 805 F.3d at 664 ("Because we hold that the Jane Does have rebutted the presumption of adequate representation by showing adversity of interest, we need not opine on whether these developments in the district court have impaired the Government's ability to adequately represent the Jane Does' interests.").

claim.” *Wal-Mart*, 834 F.3d at 566, n.7 (citing *Texas*, 805 F.3d at 659). The Institutional Plaintiffs have such an interest, as they have demonstrated standing to pursue shareholder derivative claims on behalf of Exxon in the New Jersey Action – indeed, a significantly stronger interest than those of the Texas Plaintiffs. The Institutional Plaintiffs also have approximately 100 times the financial interest in Exxon that the Texas Plaintiffs do. As of the dates of their demands, the Institutional Plaintiffs owned approximately 66,700 shares of Exxon stock, while the Texas Plaintiffs together owned 623 shares as of their demands. *Compare* New Jersey Acton, Dkt., No. 57-1, Exs. 1-2 *with* Texas Action, Dkt. No. 8-2, at ¶3.

Further, courts have recognized that intervenors and plaintiffs hold the same interest in pursuing shareholder derivative claims for breach of fiduciary duty, misappropriation of assets, and corporate waste under the analogous Delaware Court of Chancery Rule 24(a). See *Smollar v. Potarazu*, C.A. No. 10287, 2016 WL 3910863, at *1 (Del. Ch. June 29, 2016); *see also In re Chemed Corp. S’holder Deriv. Litig.*, Civil Action No. 13-1854, 2017 WL 1712530, at *10 (D. Del. Apr. 25, 2017) (allowing intervention in a shareholder derivative action as “there is no doubt . . . that [proposed intervenor] has a legally cognizable interest relating to the property or transaction that is the subject of this action”). The Institutional Plaintiffs are pursuing the very same derivative causes of action as the Texas Plaintiffs, which Exxon and the Defendants seek to dismiss with prejudice. Motion to Dismiss at 1, 13, 16, 22. If the Court dismisses the Texas Action with prejudice, the Institutional Plaintiffs’ efforts to secure relief on behalf of Exxon against its officers and directors will be foreclosed. Compounding the potential prejudice, the Texas Plaintiffs have failed to challenge the Board’s response to the Texas Plaintiffs’ and Institutional Plaintiffs’ demands, severely limiting prosecution of the claims due to their failure to review the Investigation Report and amend the Texas Complaint.

Third, because the pending Texas Action may “impair or impede the movant’s ability to protect its interest,” intervention as of right is appropriate. FRCP Rule 24(a). The precedential effect of an adverse judgment is a sufficient impairment to justify intervention. *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994) (citing *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1204 (5th Cir. 1992)) ([A]n intervenor’s interest is impaired by the *stare decisis* effect of the district court’s judgment . . . because of the precedential effect of the district court’s decision, an adverse resolution of the action would impair [intervenors’] ability to protect their interest.”). As described *supra* Section II. Statement of Facts at p. 6, the Texas Plaintiffs have not reviewed and incorporated the Investigation Report into their pleadings, impeding the Institutional Plaintiffs’ ability to protect Exxon’s and its shareholders’ interests in this action.

If the Court grants dismissal with prejudice in the Texas Action, Defendants may argue that the Institutional Plaintiffs are collaterally estopped from pursuing the New Jersey Action. As a recent Delaware decision held, shareholders seeking derivative claims on behalf of a company are in privity with each other, justifying application of collateral estoppel to motions to dismiss derivative claims. *Cal. State Teachers’ Ret. Sys. v. Alvarez*, 179 A.3d 824, 829-30 (Del. 2018), *cert. denied*, No. 17-1695, 2018 WL 3093913 (U.S. Oct. 1, 2018). The shareholder in the dismissed action in *Alvarez*, like Texas Plaintiffs here, failed to inspect company books and records to aid in their pleadings, resulting in those claims being dismissed without the benefit of a fulsome investigation. *Id.*, 179 A.3d at 831. Absent limited intervention here to ensure dismissal of the Texas Action is without prejudice, or with prejudice only to the named Texas Plaintiffs, the Institutional Plaintiffs could similarly be estopped from pursuing their claims.

Fourth, the Institutional Plaintiffs easily make a showing that their interests may not be adequately represented. The burden for establishing inadequate representation is “minimal,” and

a potential intervenor need not even show actual inadequacy of representation, but “need only show that representation by the existing parties *may* be inadequate.” *Ross v. Marshall*, 426 F.3d 745, 761 (5th Cir. 2005) (citing *Heaton v. Monogram Credit Card Bank of Ga.*, 297 F.3d 416, 425 (5th Cir. 2002) (emphasis in original). Should the Court grant the Motion to Dismiss the Texas Action with prejudice, Exxon and the Institutional Plaintiffs ***will not be*** adequately represented, as the decision will have been made without the benefit of the Institutional Plaintiffs’ full investigation, allowing them to challenge the Board’s investigation and decision promulgated in response to plaintiffs’ demands.

A presumption of adequacy arises “when the would-be intervenor has the same ultimate objective as a party to the lawsuit.” *Texas*, 805 F.3d at 661 (citing *Edwards v. City of Houston*, 78 F.3d 983 (5th Cir. 1996)). Here, both the Texas Plaintiffs and Institutional Plaintiffs arguably have similar objectives in representing the Company in that they seek to assert similar claims on behalf of the Company to protect its interests against certain of its directors and officers. *See supra* Section II. Statement of Facts at p. 5. However, the presumption is defeated here because, in the context of a shareholder derivative action with multiple shareholders seeking to represent the interests of the Company, the difference engendered by the Institutional Plaintiffs’ vigorous prosecution and a full investigation of the Board’s conduct in responding to plaintiffs’ demands in comparison to the efforts taken by the Texas Plaintiffs defeats the presumption of adequacy. As recognized in *In re Intel Corp. S’holder Deriv. Litig.*, a recent decision concerning dismissal of derivative claims that threatened to preclude similar derivative claims from being pursued, such a difference in vigorousness of prosecution is a sufficient basis to find inadequacy of representation:

While the Court agrees as a general matter that disagreement as to litigation strategy would not be a sufficient basis to find [plaintiffs] inadequate, it disagrees that [proposed intervenors] seek intervention because they ‘believe they can litigate better on Intel’s behalf’ or ‘disagree with decisions by plaintiffs who filed in federal

court.’ *Rather, [proposed intervenors] seek to protect the interests of Intel and its shareholders in ensuring the derivative claims are fully investigated and litigated on their merits to obtain the best possible recovery for Intel. This represents more than mere difference in litigation strategy,* namely the fundamentally different points of view between [proposed intervenors] and [plaintiffs] on the litigation as a whole.

Case No. 18-cv-01489, 2018 WL 5777138, at *4, n.5 (N.D. Cal. Nov. 2, 2018).⁶ Applied to the present action, the Texas Plaintiffs’ failure to challenge, or even examine, the Investigation Report represents more than a mere difference in litigation strategy, but threatens to preclude prosecution of the Institutional Plaintiffs’ well-pled claims and threatens the litigation as a whole.

B. The Institutional Plaintiffs Should Be Granted Permissive Intervention Pursuant to FRCP Rule 24(b)

The Court may also exercise its discretion under FRCP Rule 24(b) upon a showing of (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a claim or defense shares a common question of law or fact in common with the main action. Fed. R. Civ. P. Rule 24(b); *In re Enron Corp. Sec., Deriv. & “ERISA” Litig.*, 229 F.R.D. 126, 130 (S.D. Tex. 2005). District courts are given “broad discretion” in considering motions for permissive intervention. *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 884 F.2d 185, 189 (5th Cir. 1989). When considering its discretion to exercise permissive intervention, courts should also consider “whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. Rule 24(b)(3); *Enron*, 229 F.R.D. at 131. The Court should grant the Institutional Plaintiffs’ request for permissive intervention because they have made the requisite showing and there would be no delay or prejudice to the adjudication of the rights of the parties to this action.

⁶ Unless otherwise noted, emphasis is added and citations are omitted.

By permitting the Institutional Plaintiffs' limited intervention, the Court will not disturb the jurisdictional basis of the Texas Action. The Institutional Plaintiffs seek the same claims on behalf of the Company as the Texas Plaintiffs, and so do not seek to expand the Court's jurisdiction past the present live case or controversy. *See, e.g., Allen-Pieroni v. Sw. Corr. LLC*, No. 3:13-CV-4089, 2017 WL 722200, at *3 (N.D. Tex. Jan. 26, 2017), *report and recommendation adopted*, No. 3:13-CV-4089, 2017 WL 728235 (N.D. Tex. Feb. 23, 2017), *aff'd sub nom. Allen-Pieroni v. White*, 694 F. App'x. 339 (5th Cir. 2017) (finding in the context of a third party intervention that, "[i]n cases where a valid Article III case-or-controversy is present, the court's jurisdiction vests"). The Institutional Plaintiffs seek only to appear and argue the impact that a dismissal with prejudice of the Texas Action may have on the New Jersey Action, and not to seek additional claims over those present in the Texas Action. Instead, the Institutional Plaintiffs request only that the Court consider supplemental argument regarding dismissal not otherwise presented here. Consequently, the Institutional Plaintiffs do not seek to expand the Court's jurisdiction or to claim a different basis for jurisdiction. *See Enron*, 229 F.R.D. at 130 (finding permissive intervention appropriate where "would-be intervenor is merely asking the court to exercise a power it already has").

Next, Institutional Plaintiffs submit that the Texas Action and the New Jersey Action share "a common question of law or fact," justifying intervention. Fed. R. Civ. P. Rule 24(b)(1)(B); *Adams v. CLDN Tankers PTE Ltd.*, No. 2:18-CV-177, 2018 WL 7821399, at *1 (S.D. Tex. Sept. 25, 2018) (citing *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 525 (5th Cir. 1994)) ("Intervention is appropriate when it prevents multiple lawsuits where common questions of law or fact are involved."). The Institutional Plaintiffs, like the Texas Plaintiffs, allege claims for breach of fiduciary duty, waste of corporate assets, unjust enrichment, and violations of Sections 10(b), 21D, and 29(b) of the Exchange Act, arising out of the Company's processes for evaluating enterprise

risks with respect to, and disclosures regarding, climate change. *Compare* Consol. Cpt. at ¶¶287-318 *with* Texas Complaint at ¶¶334-65. The New Jersey Action thus has questions of law and fact in common with the Texas Action, in that they seek to redress similar wrongs committed by Exxon's officers and directors on Exxon's behalf.

Finally, the Institutional Plaintiffs have submitted their motion for permissive intervention in a timely manner, so that intervention would pose no delay or prejudice to the original parties' rights. In the Fifth Circuit, the primary factors to be considered for timeliness include: "[t]he length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene;" and "[t]he extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case." *Edwards v. City of Houston*, 37 F.3d 1097, 1105 (5th Cir. 1994), *on reh'g en banc*, 78 F.3d 983 (5th Cir. 1996) (citing *Stallworth v. Monsanto Co.*, 588 F.2d 257, 263 (5th Cir. 1977)). The Institutional Plaintiffs moved to intervene shortly after learning of and reviewing Exxon's and the Individual Defendants' Motion to Dismiss. As discussed herein, the Institutional Plaintiffs propose a limited intervention, only to raise a limited argument regarding a pending motion recently submitted to the Court by an existing party. The Institutional Plaintiffs have filed this motion well in advance of the conclusion of briefing on the Motion to Dismiss, avoiding any delay in the prosecution of the Texas Action, and without disturbing scheduling for briefing or the Court's consideration of the motion.

IV. CONCLUSION

As set forth herein, the Institutional Plaintiffs' intervention meets the requirements of FRCP Rule 24. Accordingly, the Institutional Plaintiffs' motion to intervene for the limited purpose of ensuring that the Texas Action is not dismissed with prejudice should be granted.

Dated: September 4, 2020

Respectfully Submitted,

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CERTIFICATE OF CONFERENCE

On September 3, 2020, I conferred with Michael Fistel, attorney for Plaintiffs, and he indicated that Plaintiffs would reserve judgment on this motion until they can examine it. Counsel for Plaintiffs further stated that they currently planned to oppose the motion to intervene, but may decide to file a non-opposition on review of the motion. I also attempted to meet and confer with counsel for Defendants by reaching out through e-mail, but counsel for Defendants indicated that they were unavailable to confer prior to the filing of this motion. Defendants are accordingly presumed to oppose this motion under Local Rule 7.1(b)(3).

/s/Benjamin I. Sachs-Michaels
Benjamin I. Sachs-Michaels, Attorney
for Proposed Intervenors

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served upon all counsel of record via the Court's ECF filing system on this 4th day of September, 2020.

s/Theodore C. Anderson
Theodore C. Anderson