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; and 3:20-cv-2302-K) (Consolidated Derivative Action)

NOMINAL DEFENDANT'S AND DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO CONDUCT "LIMITED" DISCOVERY

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Nominal Defendant Exxon Mobil Corporation ("ExxonMobil") and the Individual Defendants (together "Defendants") respectfully submit this opposition to Plaintiff's Motion for Leave to Conduct "Limited" Discovery (ECF No. 53) ("Pl. Mem.").

PRELIMINARY STATEMENT

This is a shareholder derivative action in which the plaintiff shareholder seeks to assert claims that belong to ExxonMobil. After a thorough investigation—involving independent legal counsel, review of over 1.25 million pages of documents, 25 witness interviews, and with the benefit of a post-trial opinion rejecting the same allegations asserted by the New York Attorney General ("NYAG")—ExxonMobil's board of directors (the "Board") determined that the derivative litigation is not in ExxonMobil's best interests. Accordingly, ExxonMobil moved to dismiss this action under the New Jersey Business Corporation Act (the state where ExxonMobil is incorporated), making the requisite showing that (i) a majority of ExxonMobil's directors were independent, and (ii) those directors conducted a reasonable inquiry and determined in good faith that Plaintiff's lawsuit is not in ExxonMobil's best interests.

Defendants provided Plaintiff with a copy of the detailed, 275-page investigative report (the "Report") that the law firm Simpson Thacher & Bartlett LLP ("Simpson Thacher") prepared for the Board, which was the basis for the Board's decision, and a copy of the minutes of the meeting where the Board made its decision to reject Plaintiff's litigation demand. After that decision, Plaintiff's lawsuit was properly subject to dismissal under New Jersey law, and the burden shifted to Plaintiff to show that a majority of the Board was not independent, or that the Board did not conduct a reasonable, good faith investigation. Plaintiff responded by seeking discovery, but he has not, and cannot, satisfy his burden for obtaining any such discovery.

Plaintiff's discovery demand fails whether analyzed under the New Jersey statute that governs dismissal of derivative actions or Federal Rule of Civil Procedure 56(d). Under the

governing New Jersey statute, all discovery is stayed pending resolution of the motion to dismiss, and a plaintiff may only obtain "specified and limited" discovery if he can "**make a good cause showing of alleged facts which evidence a lack of independence . . . or a lack of a good faith determination**." Rule 56(d) similarly demands more than speculation and conclusory assertions about the Board's independence, good faith, and reasonableness of its investigation, requiring that a plaintiff "set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome" of the pending motion. *Am. Family Life Assur. Co. of Columbus* v. *Biles*, 714 F.3d 887, 894 (5th Cir. 2013). Plaintiff has done neither. Plaintiff seeks discovery merely to "test and verify" the statements made in the Report and Board minutes, but offers no specific factual allegations that call into question the Board's independence, good faith, or the reasonableness of its investigation.

Significantly, Plaintiff never addresses the statute New Jersey's Legislature passed in 2013, which substantially limits the availability of discovery in derivative cases against New Jersey corporations, and expressly applies to lawsuits filed in either state or federal court. Instead, Plaintiff relies on superseded precedent and irrelevant decisions, such as the 2002 *PSE&G* case's "mandatory" discovery rule, which represented New Jersey law before the Legislature overturned it as too permissive. Plaintiff also relies on the *Zapata* case, which was decided under Delaware law and under which courts must determine whether to substitute their own business judgment for the directors'—contrary to substantive New Jersey law which focuses only on the directors' *process* not its *result*. New Jersey's statute imposes a much more exacting standard for discovery, and Plaintiff makes no attempt to satisfy it.

Finally, Plaintiff's discovery demands are seriously overbroad and not "limited," as represented. Plaintiff does not seek "limited" discovery designed to test discrete factual issues regarding the Board's process, such as its independence and good faith, or the reasonableness of its investigation. Instead, the litany of discovery sought confirms that Plaintiff is a litigant in search of a theory, as he seeks production of "all documents" reviewed during the Board's investigation, "all documents" regarding the Board's "disinterest [and] independence," and unlimited depositions of "the [Board's] Working Group, its counsel, and anyone who may have personal knowledge about the independence of the Working Group's members and its good faith investigation." Rather than making the required factual showing, and seeking discovery relating to that showing, Plaintiff seeks to embark on a protracted and expensive "fishing expedition" in the hope that by casting a wide net he might catch something. This approach, untethered to any factual showing, is precisely what that New Jersey law and Rule 56(d) were designed to prevent.

Defendants respectfully request that the Court reject Plaintiff's demand for discovery.

SUMMARY OF RELEVANT FACTS

A. Plaintiff Makes a Pre-Suit Litigation Demand and Seeks to Assert Claims That Belong to ExxonMobil.

ExxonMobil is a multinational oil and gas company incorporated under New Jersey law and headquartered in Irving, Texas. (*See* ECF No. 12 ("Am. Compl.") ¶ 30.)

Plaintiff is an ExxonMobil shareholder who purports to bring this action on its behalf. He thus seeks to assert claims that belong to ExxonMobil (not Plaintiff individually) and for which any recovery would go to ExxonMobil. (*Id.* ¶¶ 300, 328–333.)

On July 7, 2017, Plaintiff's counsel submitted a pre-suit litigation demand on ExxonMobil's Board, which was one of several, related pre-suit litigation demands (the "Demands") that the Board received between November 2016 and August 2019. (*Id.* Ex. C.)

Plaintiff claimed that ExxonMobil's public statements contained false and misleading statements regarding (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. (*Id.*) Plaintiff's allegations were based principally on the same allegations the New York Attorney General ("NYAG") made in its investigation of ExxonMobil. (*Id.*) Plaintiff's Demand also noted that a federal securities action, *Ramirez* v. *Exxon Mobil Corp.*, No. 3:16-cv-03111-K (N.D. Tex.), was filed in this Court. (*Id.*)

B. ExxonMobil's Board Undertakes a Robust, Independent Investigation Led by Independent, Outside Directors and Independent, Outside Counsel.

In response to the Demands, the Board created an administrative Working Group of three independent directors: Angela Braly, Kenneth Frazier, and William Weldon. The Working Group was tasked with (i) assisting the Board in assessing the Demands, (ii) recommending to the Board the appropriate action to take as to the Demands, and (iii) directing independent, outside counsel. (ECF Nos. 47, 50 ("MTD App.") at 87, 324–25.) Simpson Thacher was retained as independent, outside counsel to the Board and Working Group to help conduct the investigation and provide independent legal advice. (*Id.* 88.) Simpson Thacher was selected because of its independence from ExxonMobil and the individuals named in the Demands as purported wrongdoers, its credentials, and its experience in conducting investigations relating to pre-suit litigation demands and derivative lawsuits. (*Id.*)

The Working Group and Simpson Thacher extensively investigated the Demands' allegations. (*Id.* 29, 67–72.) Simpson Thacher reviewed more than 1.25 million pages of documents from ExxonMobil's files, and a broad range of SEC and court filings, regulatory correspondence, news reports, and hard copy materials created between 2010 and 2017. (*Id.* 32–

33, 91–92, 97–102.) They also interviewed 25 current and former ExxonMobil employees and directors, and reviewed the deposition transcripts of 42 witnesses from the NYAG Action. (*Id.*)

As part of the investigation, the Working Group and Simpson Thacher also monitored pending lawsuits and government investigations related to the Demands' allegations, including an investigation of ExxonMobil by the United States Securities and Exchange Commission ("SEC") and an investigation of, and lawsuit against, ExxonMobil by the NYAG. (*Id.* 97.) In August 2018, after investigating for two years, the SEC informed ExxonMobil that it had closed its investigation without recommending an enforcement action. (*See id.* 97, 334.) In December 2019, after a 12-day bench trial, 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"). 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. The court also found that NYAG's abandoned claims would have failed, even if not withdrawn, because NYAG did not show a misstatement or omission of any material fact—as required by the Martin Act and Executive Law § 63(12) (neither of which has a scienter requirement). *Id.* NYAG did not appeal so that decision is now final.

C. The Working Group Submits Its Conclusions and Recommendations to the Board, and the Board Decides to Reject the Demands.

On January 6, 2020, the Working Group and Simpson Thacher met to discuss the findings and conclusions of the investigation, which were memorialized in the comprehensive 275-page Report. (MTD App. 107.) The Working Group and Simpson Thacher found no evidence of any wrongdoing to support the allegations in the Demands or the related derivative

lawsuits. (*Id.* 33–38, 119, 154–55, 202–03, 251–52.) 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 scienter-based fraud claims; and (iii) the decision of the judge in the NYAG Action to dismiss NYAG's remaining non-scienter-based, claims with prejudice. (*Id.* 104–05, 276.) Based on extensive and detailed findings, the Working Group and Simpson Thacher concluded that the litigation sought by the Demands would be meritless and recommended that the Board reject the Demands and take all appropriate steps to dismiss the related derivative lawsuits. (*Id.* 277.)

At a January 29, 2020 Board meeting, Paul Curnin of Simpson Thacher reported on the investigation's findings and conclusions, and discussed the Report's executive summary. (*Id.* 328–31.) Beforehand, the full Board had received a copy of the Report on January 22. (*Id.*) All 11 directors present at the meeting carefully considered and discussed with Mr. Curnin and each other the investigation's findings, conclusions, and recommendations. (*Id.*) The Board then unanimously endorsed those recommendations and adopted a resolution that rejected the Demands and directed that steps be taken to have all pending derivative lawsuits dismissed. (*Id.*)

D. The Board Permits Plaintiff to Review the Report.

On February 5, 2020, Simpson Thacher advised Plaintiff of the Board's decision. (*Id.* 443–44.) Subject to a confidentiality agreement, the Board offered Plaintiff, and other shareholders who made Demands, an early opportunity to review the Report to "be transparent about the Board's process, and the bases for its conclusions" and to explain why this case should be dismissed. (ECF No. 53, Ex. I.) All shareholders who executed the confidentiality agreement were permitted to review the Report. (*Id.*) Plaintiff, however, refused to dismiss this action.

E. ExxonMobil and All Defendants Move to Dismiss and Provide Plaintiff with Copies of the Report and Relevant Meeting Minutes.

On August 10, 2020, Defendants moved to dismiss this action under the New Jersey statute discussed below (the "Motion to Dismiss"). (ECF No. 46.) With the motion, Plaintiff received copies of the Report and the minutes of the Board's meetings where the Working Group was created and the Board decided to reject the Demands. (MTD App. 23–303, 322–332.)

ARGUMENT

Under both current New Jersey substantive law, which Plaintiff ignores, and Rule 56(d), on which Plaintiff attempts to rely, Plaintiff was required to make a particularized factual showing to obtain "limited discovery." Plaintiff has wholly failed to satisfy his burden under either standard, suggesting only in a declaration by his counsel that broad-based discovery is needed to "test and verify" the assertions in the Report and Board minutes. In addition, the discovery he seeks is patently overbroad under both New Jersey law and cases applying Rule 56(d). Plaintiff's motion should be denied.

I. New Jersey Substantive Law Generally Prohibits Discovery in Demand-Refused Derivative Actions, Requiring a Plaintiff to Show Cause, with Specific Factual Allegations, to Seek Even Limited Discovery.

ExxonMobil is incorporated in New Jersey, so there is no dispute that its law controls whether this derivative suit may proceed after the Board determined it is not in ExxonMobil's best interests. Plaintiff's discovery demand is also governed by New Jersey law because the limitations on the availability of discovery are an integral part of New Jersey's statute governing the dismissal of such lawsuits. New Jersey law requires Plaintiff to provide specific factual allegations that raise questions about the Board's independence or good faith investigation before Plaintiff may seek limited discovery. No such allegations are made here.

A. New Jersey's Legislature Passed a Law to Facilitate Dismissal of Meritless Derivative Actions and Significantly Limit the Availability of Discovery.

Plaintiff incorrectly relies on the "mandatory" discovery rule announced by the New Jersey Supreme Court in *In re PSE&G S'holder Litig.*, 801 A.2d 295 (N.J. 2002). (Pl. Mem. 10.) Plaintiff ignores that the New Jersey Legislature enacted a comprehensive statute in 2013 that altered and superseded *PSE&G*, including the availability of discovery.

In *PSE&G*, the New Jersey Supreme Court adopted the "modified business judgment rule" to govern whether a demand-refused shareholder derivative action should be dismissed. *In re PSE&G*, 801 A.2d at 312. The court held that a corporation and the defendants have "an initial burden" to show that "in deciding to reject or terminate a shareholder's suit the members of the board (1) were independent and disinterested, (2) acted in good faith and with due care in their investigation of the shareholder's allegations, and that (3) the board's decision was reasonable." *Id.* The court also created what has been called a "mandatory" discovery rule, holding that shareholders should "be permitted access to corporate documents and other discovery 'limited to the narrow issue of what steps the directors took to inform themselves of the shareholder demand and the reasonableness of its decision.'" *Id.*

Concerned that the *PSE&G* standard was too permissive, and seeking to reduce the costs of derivative litigation on New Jersey corporations, the New Jersey Legislature enacted a comprehensive statute governing shareholder derivative proceedings that altered and superseded the *PSE&G* standard. *See* N.J.S.A. 14A:3-6.1, *et seq.* The stated purpose of the New Jersey statute "is to allow corporations to avoid derivative lawsuits that impose excessive and unnecessary costs on New Jersey corporations." N.J.S.A. 14A:3-6.1 (Senate Commerce Committee Statement). To ensure uniform application of the statute (and highlighting its

substantive nature), the Legislature made the entire statute applicable "to actions brought in state or federal court both within and outside of the State of New Jersey." N.J.S.A. 14A:3-6.9(a).

The statute altered both the standards for obtaining dismissal of a derivative suit after an investigation and the standards for obtaining discovery. As to dismissal, the Legislature eliminated any inquiry into the substance or reasonableness of a board's decision. The corporation and defendants bear only 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). After that motion is filed, dismissal is *required* unless a plaintiff can identify facts "with particularity" that rebut the corporation's showing. N.J.S.A. 14A:3-6.5(5)(b)(ii).

The Legislature also eliminated *PSE&G*'s "mandatory" discovery rule, providing instead that discovery "shall be stayed" after the motion to dismiss is filed, unless the plaintiff "makes a good cause showing of alleged facts which evidence a lack of independence" or "a lack of a good faith determination," in which case the plaintiff may obtain "limited discovery" concerning those alleged facts. N.J.S.A. 14A:3-6.5(5)(c). The statute's limits on the availability of discovery are intended to prevent fishing expeditions where, as here, a plaintiff does not provide concrete factual allegations demonstrating a need for limited discovery.

Significantly, the New Jersey statute expressly rejects the Delaware approach, set out in *Zapata Corp.* v. *Maldonado*, 430 A.2d 779 (Del. 1981), which requires a court to inquire not only into the directors' independence and investigatory diligence, but also to "determine, applying its own business judgment," whether the directors' decision should be upheld. *Id.* at

789. *Zapata* applies to the special litigation committee context where the full board "is disqualified from acting" due to conflicts. *Spiegel* v. *Buntrock*, 571 A.2d 767, 777 (Del. 1990). Thus, Plaintiff's reliance on both *PSE&G* and cases applying a *Zapata* analysis is misplaced.[1]

B. The New Jersey Statute's Standards Governing Limited Discovery Should Be Applied to Plaintiff's Discovery Demand.

Plaintiff seeks to avoid the New Jersey statutory standards by arguing that discovery is generally a procedural matter governed by the Federal Rules of Civil Procedure. (Pl. Mem. 9.) But Plaintiff is mistaken. The discovery component of the New Jersey statute is an integral part of the substantive standards governing dismissal of demand-refused derivative lawsuits and the *availability* of discovery in that context. The issue here does not involve the procedure or mechanics of *how* discovery should be conducted.

The U.S. Supreme Court has characterized laws placing conditions on derivative actions as substantive—governed by state law—rather than procedural—governed by federal law. *See Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 555–56 (1949) (characterizing New Jersey security-for-costs statute that placed conditions on shareholder's ability to maintain a derivative action as substantive); *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96–99 (1991) ("[T]he function of the demand doctrine in delimiting the respective powers of the individual shareholder and of the directors to control corporate litigation clearly is a matter of 'substance,' not 'procedure.'"). This makes sense as these conditions are an integral part of how a state legislature carefully draws the balance of authority between directors and shareholders.

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[1] Plaintiff's reliance on the following cases is therefore unavailing. *Stepak* v. *Addison*, 20 F.3d 398 (11th Cir. 1994); *Joy* v. *North*, 692 F.2d 880 (2d Cir. 1982); *In re Trident Microsystems Deriv. Litig.*, No. 5:06-cv-03440-JP (N.D. Cal. Apr. 17, 2009); *Klein* v. *FPL Grp., Inc.*, No. 02-cv-20170, 2003 WL 22768424 (S.D. Fla. Sept. 26, 2003); *Strougo* v. *Padegs*, 1 F. Supp. 2d 276 (S.D.N.Y. 1998); *Zitin* v. *Turley*, No. 89-cv-2061-PHX-CAM, 1991 WL 283814 (D. Ariz. June 20, 1991); *Peller* v. *The S. Co.*, 707 F. Supp. 525 (N.D. Ga. 1988); *Peller* v. *S. Co.*, No. 1:86-cv-975-RCF, 1988 WL 90840 (N.D. Ga. Mar. 25, 1988); *Abella* v. *Universal Leaf Tobacco Co.*, 546 F. Supp. 795 (E.D. Va. 1982); *Sutherland* v. *Sutherland*, 968 A.2d 1027 (Del. Ch. 2008); *Sutherland* v. *Sutherland*, No. 2399-VCL, 2007 WL 1954444 (Del. Ch. July 2, 2007); *In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917 (Del. Ch. 2003); *Kindt* v. *Lund*, No. 17751, 2001 WL 1671438 (Del. Ch. Dec. 14, 2001).

Further, as Plaintiff acknowledges, the New Jersey statute's provision governing the availability of discovery does not directly conflict with the Federal Rules of Civil Procedure. (Pl. Mem. 11 (acknowledging that Rule 23.1, which applies to derivative actions, "does not address discovery, neither allowing it nor prohibiting it," much less require limited discovery) (quoting *Fagin* v. *Gilmartin*, 432 F.3d 276, 285 n.2 (3d Cir. 2005)).) Absent a direct conflict, federal courts must apply the state law where, as here, failure to apply state law would likely lead to improper "forum-shopping" by a plaintiff. *Gasperini* v. *Ctr. for Humanities, Inc.*, 518 U.S. 415, 428 (1996); *Weatherly* v. *Pershing, L.L.C.*, 945 F.3d 915, 926 n.53 (5th Cir. 2019). This standard mandates application of state law standards governing the availability of discovery in derivative actions. Not applying the statute's discovery component would affect the other substantive standards governing dismissal of a demand-refused derivative action, such as the burden-shifting courts have held are substantive,[2] affect the balance of power between boards of directors and shareholders, and also lead to improper forum-shopping, as plaintiffs would likely select federal courts over state courts that would apply the discovery component.

Curbow Family LLC v. *Morgan Stanley Investment Advisors*, 950 N.Y.S.2d 845 (N.Y. Sup. Ct. July 18, 2012), a New York case involving the Massachusetts statute on which New Jersey's is modeled, is instructive. The New York court "conclude[d] that the discovery component of the substantive Massachusetts derivative action statute should be applied in this

[2] N.J.S.A. 14A:3-6.5 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"). Thus, the Massachusetts statute's purpose and case law applying it are instructive. Courts construing section 7.44 of the Massachusetts statute have held the statute's 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' & 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) (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").

forum." 950 N.Y.S.2d at 849–50. The court reasoned that the discovery component of the statute "is part of the pleading requirement in a demand-refused derivative lawsuit" because it is located in the same subsection of the statute as the provisions governing burdens and requirements for a motion to dismiss. *Id.* at 849. The court also found that the discovery component "is an integral" part of the statute and "it is evident that this statute is designed to implicate the authority of the state of Massachusetts to regulate the internal affairs of a corporation organized under its laws." *Id.*

The same is true of the subsection of the New Jersey Business Corporation Act here, which governs the *availability* of discovery and not procedural rules governing the *conduct* of discovery. As in the Massachusetts statute, all of the components relating to the corporation's motion to dismiss are contained in the same subsection, N.J.S.A. 14A:3-6.5(5), including what must be shown in a corporation's filing seeking dismissal, the criteria for the court to assess the motion to dismiss, the stay of discovery, and the plaintiffs' burden to obtain "specified and limited discovery." It is a comprehensive, substantive statutory regime that applies to derivative suits in federal and state courts within and outside of New Jersey. N.J.S.A. 14A:3-6.9(a).

By contrast, Plaintiff relies on inapposite cases. (Pl. Mem. 10–11.) In *Fagin*, the court's footnote statement that discovery in a derivative case is procedural is distinguishable because *Fagin* predated, and thus did not analyze, the comprehensive New Jersey statute. *Fagin*, 432 F.3d at 285 n.2. Similarly, in *Halebian* v. *Berv*, the court assumed that federal law applied. 869 F. Supp. 2d 420, 442 (S.D.N.Y. 2012), *aff'd*, 548 F. App'x 641 (2d Cir. 2013). Notably, the *Halebian* court, in applying Rule 56(d), denied the plaintiff any discovery and took "some measure of confidence from the fact that our decision is supported by [the Massachusetts

statute], which plainly contemplates that discovery need not occur at all in cases before a court may decide whether to allow a derivative suit to proceed." *Id.*[3]

In short, the New Jersey statute relating to availability of discovery when a corporation seeks dismissal of a derivative action is a substantive part of the state's law relating to derivative actions. That statute requires that plaintiffs come forward with specific factual allegations that place at issue either the directors' independence or the board's good faith in conducting its investigation before a court may grant plaintiffs limited discovery.

II. Even if Rule 56(d) Applied, It Would Require Plaintiff to Show Facts Exist That Undermine Director Independence or the Good Faith Nature of The Board's Investigation Before Allowing Limited Discovery.

Plaintiff also mistakenly contends that Rule 56(d) permits him to obtain limited discovery. Not so. Defendants did not move for summary judgment on the underlying merits of Plaintiff's claims. Instead, they moved to dismiss this case based on the dismissal provisions of the New Jersey statute.

In any event, to obtain discovery under Rule 56(d), Plaintiff must "show[] by affidavit or declaration that, for specified reasons, [he] cannot present facts essential to justify [his] opposition." Fed. R. Civ. P. 56(d). As the Fifth Circuit has held, the declaration must "set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome" of the pending motion. *Biles*, 714 F.3d at 894 (affirming denial of Rule 56(d) request) (internal quotations omitted). A party cannot rely on "vague assertions that additional discovery will produce needed, but unspecified, facts." *Id.* (internal quotations omitted).

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[3] Plaintiff also cites inapt cases about lifting the PSLRA discovery stay in a derivative action and general discovery issues in non-derivative case. *See Melzer* v. *CNET Networks, Inc.*, No. 06-cv-03817 WHA, 2006 WL 3716477, at *4 (N.D. Cal. Dec. 15, 2006) (declining to lift the PSLRA stay); *Univ. of Texas at Austin* v. *Vratil*, 96 F.3d 1337, 1339 (10th Cir. 1996) (concerning antitrust action); *Corser* v. *Cty. of Merced*, No. 1:05-CV-00985 OWW DLB, 2006 WL 2536622, at *2 (E.D. Cal. Aug. 31, 2006) (concerning whether to follow federal rules governing subpoena and scope of discovery).

In fact, before the New Jersey Legislature enacted its comprehensive and more restrictive statute, federal courts applying Rule 56(d) in derivative actions governed by New Jersey and Massachusetts law repeatedly denied Rule 56(d) requests like Plaintiff's. In *In re George Leon Family Trust* v. *Coleman*, for example, the court considered whether further discovery was warranted under Rule 56(d) before dismissing a derivative suit under the more lax *PSE&G* standard. No. 12-cv-4401(JAP), 2014 WL 2889741, at *10 (D.N.J. June 25, 2014). The court denied discovery, explaining that it was "unpersuaded that the additional discovery sought will validate Plaintiff's claims against the Board," given an independent law firm's investigative report and the resolutions explaining the board's decision was based on that report. *Id.* In *Fagin* v. *Gilmartin*, the court denied a Rule 56(d) request, where the court was "unpersuaded that discovery . . . will validate plaintiffs[']claims" and instead would only "encourage[e] speculative shareholder demands on boards to gain otherwise unattainable discovery." 2004 WL 5835749, at *13–14 (D.N.J. Aug. 20, 2004). Similarly, in *Halebian*, the court terminated a derivative action under Massachusetts law and denied discovery under Rule 56(d). 869 F. Supp. 2d at 442. The court reasoned that plaintiff's Rule 56(d) application was insufficient because his "apparent inability to identify the facts that he seeks with any particularity reveals that his motion for discovery is a *de facto* application for a fishing expedition." *Id.* at 440. The court further found that the plaintiff merely asserted that discovery was needed based on "speculation." *Id.* at 441.

III. Plaintiff Has Not Made the Showing Necessary to Obtain "Limited" Discovery under Either the New Jersey Statute or Rule 56(d).

Plaintiff has failed to show that discovery is warranted under either N.J.S.A. 14A:3-6.5(5)(c) or Rule 56(d). Under the New Jersey statute, Plaintiff's submission fails to make a "good cause showing of alleged facts which evidence a lack of independence" or "a lack of a good faith determination." N.J.S.A. 14A:3-6.5(5)(c). Nor does Plaintiff "set forth a plausible

basis" to believe "specified facts" exist that will "influence the outcome" of Defendants' Motion to Dismiss, as required under Rule 56(d). *Biles*, 714 F.3d at 894.

The Report and the Board's minutes of its January 29, 2020 meeting are sufficient to establish that (i) the Board commenced a robust, independent investigation into the Demands' allegations conducted by independent counsel at Simpson Thacher and supervised by a Working Group of three independent directors; and (ii) after careful deliberation, the independent Board unanimously endorsed the Working Group and Simpson Thacher's conclusions and recommendations and, on that basis, resolved to reject the Demands.

Plaintiff does not provide any plausible factual allegations to support his request for discovery to challenge the independence, good faith, or reasonableness of the Board's process. Instead, he raises a host of challenges to Defendants' Motion to Dismiss, which are without merit and certainly do not justify discovery.

The Mere Naming of Directors as Defendants Does Not Undermine Their Independence. Plaintiff argues that 10 of the 11 directors (all but Mr. Hooley) lack independence because they were named as defendants in this lawsuit or are "targets" in the Demands. (Pl. Mem. 21.) But settled New Jersey law *forecloses* Plaintiff's argument. The New Jersey statute, which Plaintiff mischaracterizes in his brief, expressly provides that "[n]one of the following shall by itself cause a director to be considered not independent," including "the naming of [a] director as a defendant in [a] derivative proceeding or as a person against whom action is demanded." N.J.S.A. 14A:3-6.5(7)(b) (emphasis added); *see also PSE&G*, 801 A.2d at 314 (a director does not lack independence "merely because . . . a shareholder alleges that the director would be reluctant to sue a fellow corporate decision-maker"). And, Plaintiff overlooks that *none* of the 11 directors were named as defendants in the NYAG Action or *Ramirez*.

The Working Group and Simpson Thacher Did Not Have "Conflicting Responsibilities" or Misidentify the Demands' Allegations. Plaintiff's argument that the Working Group and Simpson Thacher had "conflicting responsibilities" is baseless. (Pl. Mem. 15, 21–23.) As reflected in the Report and Board minutes, the Board tasked the Working Group with evaluating the Demands' allegations, assisting the Board with its assessment of the Demands, and recommending to the Board the appropriate actions to take regarding the Demands. (MTD App. 87–88, 324–325.) Simpson Thacher was similarly tasked with "conducting an independent investigation" into the Demands, and advising and assisting the Board in relation to the Demands. (*Id.* 324.) Neither the Working Group nor Simpson Thacher was tasked with ExxonMobil's or any individual's defense in the NYAG Action, *Ramirez*, or in this case. That the Working Group and Simpson Thacher chose to monitor ongoing litigation related to the issues being investigated does not somehow create "conflicting responsibilities."

Nor did the Board, Working Group, or Simpson Thacher improperly identify the claims at issue in the Demand. (Pl. Mem. 14–15.) As the Report makes clear, the investigation focused on all allegations made, including in the NYAG Action and *Ramirez* (which was founded on NYAG's allegations). (MTD App. 67–72.) Plaintiff argues the Report "brushed aside" the denial of a motion to dismiss in *Ramirez* (Pl. Mem. 14), but Plaintiff ignores that the Working Group and Simpson Thacher investigated the underlying substantive merits of the *Ramirez* allegations in detail. (*See, e.g.*, MTD App. 56–58, 67–72, 96–97, 121–122, 150.) Plaintiff also ignores that *Ramirez* does not involve the New Jersey fiduciary duty claims asserted in this case and does not name any of the 11 Board members as defendants.

The Report's Findings and Conclusions Are Clear and Supported. Plaintiff's assertion that the Report's conclusions are "vague and unsupported" is meritless. (Pl. Mem. 13.)

In 147 pages of painstaking detail, Section 7 of the Report discusses each allegation investigated, provides citations to the documents and other materials reviewed, and provides the basis for the findings made as to each allegation. (MTD App. 108–256.) Contrary to Plaintiff's assertion, Defendants have not relied on "shallow metrics" such as the mere length of the Report, but on the detailed review and findings that Report reveals. (Pl. Mem. 16.) Plaintiff relies on irrelevant case law decided in the *Zapata* context where courts must consider whether to substitute their own business judgment for the directors'—an approach New Jersey law has squarely rejected. (Pl. Mem. 13–14, 16; *supra*, 9–10.) And Plaintiff relies on cases where, unlike here, the reports contained *no* record citations. (*See* Pl. Mem. 13–14.)

The Board Was Entitled to Rely on the Working Group and Act on the Demand. Plaintiff's argument that the Working Group should have been a formal committee empowered to act on the Demand is meritless, and does not have any impact on the Board's independence or the reasonableness of its investigation. (Pl. Mem. 15, 22.) Under the New Jersey statute, the full Board is expressly permitted to decide whether to reject shareholder demands. N.J.S.A. 14A:3-6.5(2)(a). There is no requirement to create a formal committee delegated with the power to make that decision. Moreover, the Board is permitted to select the best method for informing itself of the Demands' allegations, such as forming a Working Group, because there is "no single blueprint that a board must follow to fulfill its [fiduciary] duties." *Oldham* v. *Dendrite Int'l, Inc.*, No. SOM-C-12017-07, 2007 WL 1453482, at *14 (N.J. Super. Ct. Ch. Div. May 1, 2007).

The Board Was Entitled to Rely on Simpson Thacher. Plaintiff's argument that the Board cannot rely on Simpson Thacher's work is contrary to New Jersey law. (Pl. Mem. 16–17.) In *PSE&G*, the New Jersey Supreme Court held that a board is entitled to "entrust its investigation to a law firm" provided the law firm has no "disabling conflict," such as where the

same law firm is retained as investigative *and* litigation counsel. *PSE&G*, 801 A.2d at 316. But Simpson Thacher was retained exclusively as independent investigative counsel. *Stepak* v. *Addison*, 20 F.3d 398 (11th Cir. 1994), on which Plaintiff relies, is inapposite. In *Stepak*, unlike here, the investigative counsel also represented "the alleged wrongdoers in criminal proceedings involving the very subject matter of [the] demand." 20 F.3d 398, 404 (11th Cir. 1994).

Plaintiff contends that Simpson Thacher lacked independence because it represented other corporations for which certain ExxonMobil directors served as officers or directors in unrelated lawsuits. (Pl. Mem. 23–24.) But that claim does not remotely compromise Simpson Thacher's independence. Here, Simpson Thacher was unquestionably independent from ExxonMobil and its management, whose conduct Simpson Thacher was investigating, and had not represented the directors or anyone else in an individual capacity in any litigation. The fact that Simpson Thacher had been retained by *other corporations* in unrelated matters did not render Simpson Thacher conflicted. For example, in another derivative case, *Lowinger* v. *Oberhelman*, the court rejected the allegation that the investigative counsel was conflicted because that firm had represented two potential targets of the investigation in unrelated matters. 924 F.3d 360, 367 (7th Cir. 2019). The court reasoned that no conflict had been shown because there were no facts suggesting, among other things, that the representations were "in the same or a substantially related matter" or "materially limit[ed the advice to the board]." *Id.*

The Board Appropriately Considered the Report's Findings and Conclusions. Plaintiff's argument that the Board failed to meaningfully review and debate the Report is without merit. The Board received the Report on January 22, seven days in advance of the January 29 Board meeting. (MTD App. 329.) At the meeting, the Board also received a presentation from Paul Curnin at Simpson Thacher and discussed with him and each other the

Report and the Working Group's conclusions and recommendations. (*Id.*) As discussed above, the Board was entitled to rely on the extensive investigation performed by the Working Group and Simpson Thacher without recreating that investigation anew. Plaintiff's contention that the Board's decision was unreasonable because it supposedly acted precipitously is based on speculation and without merit. *See Halebian*, 869 F. Supp. 2d at 452 ("[T]here is a marked irony in plaintiff criticizing defendants for the length of the investigation . . . when we are certain that had the [directors] less thoroughly reviewed . . . in a shorter amount of time plaintiff would be asking us to draw a similarly negative though equally speculative inference from their 'haste.'"). Plaintiff also ignores that when the Board met it already knew that Plaintiff's allegations had been discredited after trial on the merits in the NYAG Action.

Permitting Plaintiff to Review the Report Does Not Affect the Board's Independence. The Board's offer to allow Plaintiff to view the Report before Defendants filed their Motion to Dismiss was not in bad faith, and is irrelevant to whether Plaintiff is entitled to discovery. (Pl. Mem. 17–21.) While under no legal obligation to do so, the Board allowed Plaintiff (and all shareholders who made Demands) to read the Report before Defendants filed the Motion to Dismiss, in the hope that Plaintiff would understand the weakness of his position and to avoid burdening the Court or the parties with additional litigation. Plaintiff received an unredacted electronic copy of the Report when Defendants moved to dismiss, and had more than adequate time with the Report to present his opposition. Any limitations and restrictions on the earlier review of the Report have no bearing on whether discovery is warranted and in no way serve to "insulat[e]" the investigation "from scrutiny by [P]laintiff and the Court." (*Id.* 19.) Plaintiff's review of the Report in no way impacts the Board's process in making its decision.

In sum, Plaintiff failed to provide specific factual allegations that call into question the Board's independence or good faith, or its investigation's reasonableness under either the New Jersey statute or Rule 56(d). Plaintiff has thus not met his burden to obtain limited discovery.

IV. In Addition, the Discovery Plaintiff Seeks Is Overbroad—Not "Limited."

Plaintiff's motion fails for the independent reasons that the discovery he seeks (i) does not qualify as "limited discovery" under N.J.S.A. 14A:3-6.5(5)(c) or even cases applying the more permissive New Jersey law before the statutory revision, (ii) constitutes information already provided to him with Defendants' Motion to Dismiss, or (iii) is otherwise unnecessary. Under the statute, the scope of "limited discovery" is cabined by specific alleged facts that would evidence relevant information about the Board's process, not its result—namely, either "a lack of independence" or "a lack of a good faith determination." N.J.S.A. 14A:3-6.5(5)(c). Further, "[l]imited discovery *shall not* include the work product, privileged communications, or testimony of attorneys who advised or assisted" the directors. *Id.* (emphasis added).

Indeed, even before the New Jersey Legislature's statutory revision, the New Jersey Supreme Court explained that discovery in a demand-refused derivative case is "limited to the narrow issue of what steps the directors took to inform themselves of the shareholder demand and the reasonableness of its decision." *PSE&G*, 801 A.2d at 312 (internal quotations & citation omitted). Shareholders are thus not entitled to "discovery on the merits of their claim[s] nor may they require defendants to produce documents which were utilized in making the decisions which resulted in alleged mismanagement." *In re PSE&G S'holder Litig.*, 718 A.2d 254, 261–62 (N.J. Super. Ct. Ch. Div. 1998), *aff'd*, 801 A.2d 295 (N.J. 2002).

Plaintiff Is Not Entitled to Documents Regarding the Underlying Merits of His Claims (Category 1). Courts considering whether to grant limited discovery in derivative actions governed by New Jersey and Massachusetts law also bar discovery into the underlying

merits of the plaintiff's claims. *See PSE&G*, 718 A.2d at 261 (barring discovery pre-dating date of demand); *Halebian*, 869 F. Supp. 2d at 439–40 (Massachusetts derivative action, denying Rule 56(d) request for "all documents reviewed by or on behalf of [board committee]"). For this reason, Plaintiff's request for "[a]ll documents made available to the Working Group during its evaluation and decision-making process that resulted in the Report" is improper. (Pl. Mem. 24 (Category 1).) Plaintiff relies on irrelevant cases. (Pl. Mem. 24.) *Strougo* v. *Padegs*, 1 F. Supp. 2d 276 (S.D.N.Y. 1998) concerned discovery under a *Zapata*-analysis, where the courts review the underlying documents to determine whether to apply their own business judgment for the directors'—which New Jersey law prohibits. *Grimes* v. *DSC Communications Corp.*, 724 A.2d 561 (Del. Ch. 1998), concerned the scope of a shareholder inspection under a Delaware statute, where the corporation had not previously provided *any* documents to the shareholder. In *Grimes*, the court only permitted inspection of the investigative report and certain meeting minutes. *Id.* at 567. Defendants have already provided Plaintiff the Report and relevant minutes here.

Moreover, Plaintiff has had access to numerous merits-related documents publicly available on the NYAG Action trial docket's website.[4] On that website, Plaintiff could access 18 unredacted deposition and witness examination transcripts, 106 ExxonMobil documents, and 14 documents produced by third-parties, many of which were cited in the Report. Plaintiff fails to explain why—with the benefit of publicly available documents, the Report, and the NYAG trial decision—more information is required to oppose Defendants' Motion to Dismiss.

Plaintiff Has the Document Relied on By The Board (Category 2). Plaintiff's request for "[a]ll documents relied upon by the Board in making its decision" fails because Plaintiff already has that document. (Pl. Mem. 24.) As reflected in the January 29, 2020 Board minutes attached to Defendants' Motion to Dismiss, the Board relied on the Report. (MTD App. 329–30.)

[4] *See* https://iapps.courts.state.ny.us/webcivil/FCASFAQ.

Plaintiff's request for this category of documents was thus satisfied before he filed this motion. *See PSE&G*, 718 A.2d at 262 (defining as limited discovery "any documents which were generated to inform the directors upon which they based their decision to reject the demand").

Plaintiff Is Not Entitled to All Board and Working Group Minutes (Category 3). Plaintiff's request for all Board and Working Group meeting minutes "discussing the creation, function, status, or decision of the Working Group and the preparation of the Report" is also improper. (Pl. Mem. 25.) State and federal cases concerning New Jersey derivative actions have held that "limited discovery" of meeting minutes should concern only those minutes where "the decision to either proceed with the litigation or reject the demand was discussed." *PSE&G*, 718 A.2d at 261; *see also George Leon Family Trust*, 2014 WL 2889741, at *10 (denying plaintiff's motion under Rule 56(d) seeking discovery of "all board and committee minutes related to shareholder demands" where plaintiff had copy of final resolutions where demand rejected).

With their Motion to Dismiss, Defendants provided a copy of the minutes of the January 29, 2020 meeting where the decision to reject the demand was discussed (and a copy of the minutes where the Working Group was formed). (*See supra*, 7.) Plaintiff is entitled to nothing more. Plaintiff's reliance on *Grimes* is unavailing because that case concerned the scope of discovery under a Delaware shareholder books-and-records statute where the corporation had not yet provided *any* minutes to the plaintiff. *Grimes*, 724 A.2d at 567.

Plaintiff Is Not Entitled to Unspecified Documents and Depositions of Unidentified Persons (Categories 4 & 5). Plaintiff's argument that he should be permitted to depose "anyone who may have personal knowledge about independence of the Working Group" and to obtain copies of unspecified documents relating to the Working Group and Board's "disinterest, independence and process" is baseless. (Pl. Mem. 25.) Again, Plaintiff seeks such vague and

non-specific discovery only to "test" the factual assertions in Defendants' Motion to Dismiss because such information is purportedly within Defendants' "exclusive possession." (*Id.*)

Courts have repeatedly rejected such requests as too vague to qualify as "specified and limited discovery." In *Halebian*, as here, the plaintiff sought broad discovery relating to "the issues of defendants' independence, good faith, and reasonableness of inquiry," including depositions of people "whose identity 'cannot be ascertained until after a review of documents.'" 869 F. Supp. 2d at 439–40. The plaintiff maintained this scope of discovery was required to "test" the factual assertions in the motion to dismiss and because he "expect[ed] discovery to reveal" evidence favorable to him. *Id.* at 440. The court rejected this request as "facially unreasonable." *Id.* The court reasoned that the plaintiff failed to identify his discovery requests "with any particularity." *Id.* The court further reasoned that "plaintiff's counsel merely identifies in a declaration the legal issues that are implicated as a threshold matter . . . and then requests all discovery that is remotely likely to touch upon these issues." *Id.* at 441. Likewise, in *George Leon Family Trust*, the court rejected a request for discovery premised, as here, on the plaintiff's mere assertion that "discovery into the relevant matters is expected . . . where the corporation controls the evidence." 2014 WL 2889741, at *10. The court explained it "was unpersuaded that the additional discovery sought will validate Plaintiff's claims against the Board." *Id.*

The cases Plaintiff relies on do not salvage his request. (Pl. Mem. 25.) *Parkoff* v. *General Telephone & Electronics Corp.*, 425 N.E.2d 820, 822–23 (N.Y. 1981) is inapt because, applying New York law, the court did not permit *any* discovery (nor had the defendants provided a copy of the investigative report), but rather affirmed dismissal of the derivative action on res judicata grounds. Similarly, in *Lichtenberg* v. *Zinn*, 243 A.D.2d 1045 (N.Y. App. Div. 1997), the court affirmed the denial of a motion to limit discovery under *New York law* which—unlike the New

Jersey statute and Rule 56(d)—does "nothing [to] specifically limit[] a party's ability to engage in discovery." 243 A.D.2d at 1047. In *Desaigoudar* v. *Meyercord*, 108 Cal. App 4th 173, 190–92 (Cal. App. Div. 2003), the court affirmed dismissal of a derivative action under California law where the plaintiff failed to make any showing of need to conduct discovery in an analysis similar to Rule 56(d). *Strougo* remains inapposite because it concerned discovery in the context of a derivative action under Maryland law, applying a more permissive *Zapata* analysis. *See* 1 F. Supp. 2d at 281. And, *Oberegger* v. *Gurr*, No. 2:14-cv-072-J, 2014 WL 11512901 (N.D. Tex. July 18, 2014) is irrelevant because it concerned the availability of discovery under the *Texas* derivative statute which—unlike the New Jersey statute and Rule 56(d)—specifically contemplates the availability of certain discovery following the corporation's motion to dismiss. 2014 WL 11512901, at *1; Tex. Bus. Orgs. Code Ann. § 21.556.

Plaintiff Is Not Entitled to Depose the Working Group Members (Category 5). Plaintiff's argument that he should be allowed to depose the three members of the Working Group is without merit. (Pl. Mem. 25.) Given that Plaintiff has the Report and its detailed discussion of the Working Group's conclusions and recommendations, Plaintiff does not explain why he needs these depositions, especially given his failure to set forth any legitimate issues concerning the Working Groups independence, good faith, or reasonableness of its investigation.

Federal courts presiding over derivative cases involving New Jersey and Massachusetts corporations have repeatedly denied requests substantially similar to Plaintiff's. In *George Leon Family Trust*, for example, the court held that the corporation and individual defendants had satisfied their initial burden under New Jersey's modified business judgment rule (pre-N.J.S.A. 14A:3-6.1) by submitting the independent law firm's report and the board resolutions stating the board's decision was based on the report. 2014 WL 2889741, at *6–7. The court further denied

the plaintiff's broad request for additional discovery, reasoning that "extensive documentation" had been submitted "and the Court is unpersuaded that the additional discovery sought will validate Plaintiff's claims against the Board." *Id.*, at *10. Similarly, in *Halebian*, the court denied a request for "depositions of the [demand review committee] members" in a derivative case governed by analogous Massachusetts law. 869 F. Supp. 2d at 440. The court reasoned that, given the plaintiff had provided the law firm's report and other documents, the plaintiff's "insist[ence]" that this additional discovery was needed to "test" the independence, good faith, and reasonableness of the investigation was "unreasonable." *Id.* at 439–40.

Plaintiff Is Not Entitled to the Work Product, Communications, or Testimony of Simpson Thacher (Categories 2 & 5). Plaintiff is expressly prohibited from seeking "the work product, privileged communications, or testimony of attorneys who advised or assisted" in the investigation. N.J.S.A. 14A:3-6.5(5)(c). Plaintiff's requests for "factual summaries of the interviews" by, and depositions of, Simpson Thacher are thus improper. (Pl. Mem. 24–25.) Plaintiff's reliance on *Strougo* and *Oberegger* is again misplaced because neither is relevant given the New Jersey statute's express prohibition on the discovery Plaintiff seeks.

CONCLUSION

ExxonMobil and all Defendants respectfully request that the Court deny Plaintiff's discovery demand. Plaintiff has failed to show that the discovery he seeks is warranted under either substantive New Jersey law or the federal law he improperly asks this Court to apply. His speculation that discovery will uncover facts to support his opposition to the Motion to Dismiss does not justify the fishing expedition he seeks, especially given that Plaintiff has the Report, the relevant Board minutes, and the publicly available record from the NYAG Action in which his allegations were rejected after a trial on the merits. Plaintiff is fully able to respond to the Motion to Dismiss.

Dated: September 8, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Opposition has been served by electronic CM/ECF filing, on this 8th day of September, 2020.

/s/ Daniel J. Kramer
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