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; 3:20-cv-2302-K; 3:20-cv-2295-K & 3:21-cv-0430-K) (Consolidated Derivative Action) **ORAL ARGUMENT REQUESTED**

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

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PRELIMINARY STATEMENT

Nominal defendant Exxon Mobil Corporation ("ExxonMobil" or the "Company") and the individual defendants move to dismiss this action with prejudice under New Jersey substantive law because the independent directors on ExxonMobil's board of directors (the "Board") unanimously decided in good faith, based on a reasonable inquiry, that this shareholder derivative lawsuit is not in ExxonMobil's best interests. New Jersey law (which applies because ExxonMobil is incorporated there) gives deference to the independent Board's business judgment and requires dismissal here because an independent board of directors—not certain of its shareholders—has the authority to decide whether claims should be asserted on behalf of a New Jersey corporation.

In demands sent between November 2016 and July 2017 (the "Demands"), Plaintiffs asked the Board to investigate, and take suitable action regarding, alleged misconduct relating to (i) assertions ExxonMobil's assets would be "stranded" due to government climate change policies; (ii) ExxonMobil's use of, and public statements regarding, proxy costs of carbon or greenhouse gas costs employed in its business planning decisions; (iii) its asset impairment analyses; and (iv) its proved reserves estimates. The Board has done just that.

In response, 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 Demands' allegations. 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. The Working Group and Simpson Thacher ultimately 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 the decision of the New York Attorney General ("NYAG") to withdraw its related scienter-based fraud claims against ExxonMobil at the end of a 12-day trial; the detailed post-trial opinion in that action, which dismissed NYAG's remaining claims with prejudice; and the SEC's termination of its related two-year investigation. The post-trial opinion in the NYAG suit not only found NYAG's claims and allegations to be meritless, "hyperbolic," and based on "politically motivated" statements, but also held that ExxonMobil's officers and other employees acted appropriately at all times. This is particularly significant because Plaintiffs' Demands had uncritically adopted NYAG's claims and theories, as had the Massachusetts Attorney General ("MAAG") and others.[1]

At a meeting on January 29, 2020, at which the inquiry's findings and conclusions were carefully discussed and considered, ExxonMobil's Board determined unanimously that maintenance of this action was not in ExxonMobil's best interests and thus rejected the Demands. When ExxonMobil's 11-member Board made its decision, 10 of the 11 Board members were independent, outside directors who were not ExxonMobil employees. They had neither any disabling conflict nor any economic interest in the subject matter of the Demands. Those independent directors made their decision in good faith based on the Working Group's and Simpson Thacher's findings and conclusions from their thorough (and more than reasonable) inquiry. Under controlling New Jersey law, the Board's decision requires dismissal of this action.

[1] When Plaintiffs submitted their Demands, NYAG's allegations had not been tested, and Plaintiffs may have assumed that NYAG's allegations would have been made in good faith and with evidentiary support. If so, that assumption is now untenable both because NYAG's much publicized allegations were completely discredited in a detailed post-trial opinion from which NYAG did not even appeal, and the Working Group and Simpson Thacher have independently investigated the facts underlying those allegations and found them baseless.

Seeking to avoid dismissal, Plaintiffs raise a series of meritless challenges to the Board's independence, good faith, and the reasonableness of its investigation. The vast majority of these challenges are substantially the same as those this Court rejected as insufficient to warrant discovery. Plaintiffs also now downplay their Demands' reliance on NYAG's claims and theories. Instead, Plaintiffs purport to rely on MAAG's claims and theories, including ones MAAG first raised in an October 2019 complaint—years after Plaintiffs sent their Demands to the Board. Plaintiffs' reliance on MAAG's complaint is misplaced because it largely advanced the same defective and politically motivated allegations as NYAG. And MAAG's new theories, regarding alleged misstatements about the environmental benefits of ExxonMobil's products and purported "greenwashing campaigns," are not properly raised here because Plaintiffs never asked the Board to investigate these matters in their Demands.

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. Plaintiffs Seek to Assert Claims That Belong to ExxonMobil.

ExxonMobil is a multinational oil and gas company incorporated under the laws of New Jersey and headquartered in Irving, Texas. (ECF No. 86-1 ("CC") ¶ 30.) The 20 individual defendants are current or former ExxonMobil directors or officers. (*Id.* ¶¶ 41–60.)

Plaintiffs purport to bring this action on ExxonMobil's behalf. They seek to assert claims that belong to ExxonMobil (not Plaintiffs individually), and for which any recovery would go to ExxonMobil. (*Id.* ¶¶ 346, 443–448.)

B. Plaintiffs Submit Pre-Suit Litigation Demands to the Board.

Between November 2016 and July 2017, Plaintiffs Montini, Hays, and Assad ("Plaintiffs") sent their respective Demands to ExxonMobil's Board, asking that it inquire into allegations of

corporate misconduct regarding certain of ExxonMobil's public statements and business practices. (App. 46–47; CC Exs. A–C.) Plaintiffs' Demands (and related demands by other shareholders) advanced four primary theories of alleged wrongdoing:

- "Stranded" Assets Theory: Plaintiffs claimed that ExxonMobil should have disclosed that its reserves were overstated because, "given the risks associated with global warming and climate change," and governmental regulations to address those risks, "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."

- General Proxy Costs/Greenhouse Gas ("GHG") Costs Theory: Plaintiffs alleged that ExxonMobil 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," and further claimed that ExxonMobil conflated proxy costs of carbon with GHG costs and, in some instances, failed to use such metrics at all.

- Proved Reserves Theory: Plaintiffs charged that ExxonMobil failed to warn investors appropriately that certain of its proved reserves would need to be "de-booked" as of year-end 2016, including because ExxonMobil allegedly did not appropriately consider proxy costs of carbon and GHG costs in connection with its proved reserves determinations.

- Impairment Theory: Plaintiffs alleged that ExxonMobil failed to recognize an impairment to certain Rocky Mountain Dry Gas assets at year-end 2015 and did not appropriately use projected future proxy costs of carbon and GHG costs in its impairment determinations.

(CC Ex. A at 2, 10–13, Ex. B at 2, & Ex. C at 3–14.)[2] The Demands asked the Board to investigate the conduct of certain ExxonMobil directors, officers, and employees concerning these theories.

[2] The Assad Demand also alleged that ExxonMobil's executive compensation structure incentivized inflating proved reserves estimates. (CC Ex. B 2.) That allegation was evaluated by the Board and found meritless. (App. 234–38.) Plaintiffs' Complaint does not reference this allegation. Other shareholders' demands made other allegations that were also evaluated and found to be meritless, and which Plaintiffs' Complaint does not reference. For example, one of the demands alleged that ExxonMobil's fiduciaries had improperly violated Russia-Ukraine sanctions. (App. 238–252.) Like the NYAG's defective allegations, these sanctions-related allegations were separately discredited in an opinion by Judge Jane Boyle granting summary judgment in ExxonMobil's favor. *See Exxon Mobil Corp.* v. *Mnuchin*, 430 F. Supp. 3d 220 (N.D. Tex. 2019).

C. The Board Commences an Exhaustive, Independent Inquiry.

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. (App. 69, 288–89.) The Board further resolved that the Working Group shall "receive full cooperation from all officers, employees and representatives of the Company." (*Id.* 289.)

The three independent directors appointed to the Working Group were Angela Braly, Kenneth Frazier, and William Weldon. (App. 69, 288.) 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 in Board Chair and CEO roles before). Ms. Braly and Mr. Frazier are lawyers by training and had served in General Counsel roles:

- **Angela F. Braly** was first elected to the 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. 260, 303.)

- **Kenneth C. Frazier** was first elected to the Board in 2009. Mr. Frazier also held numerous roles at Merck & Co., Inc., including serving as Merck's General Counsel, President, CEO, and, since 2011, its Chairman. (App. 261, 304.)

- **William C. Weldon** was first elected to the Board in 2012. He previously served as Chairman and Chief Executive Officer of Johnson & Johnson from 2002 to 2012 and as a director of CVS Caremark and JPMorgan Chase. (App. 263, 306.)

None of these directors had been employed by ExxonMobil, and none had engaged in (or proposed) any business transactions with ExxonMobil. (App. 70–71, 260–61, 263.)

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. 70.) 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 serving as independent counsel in connection with complex shareholder demand investigations. (App. 320–23.)

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. 73–89.) The Working Group actively directed the scope of the inquiry. (*Id.* 88.) It also consulted frequently with Simpson Thacher on the status of the inquiry and proposed next steps. (*Id.* 88–89.) The Working Group and Simpson Thacher held 12 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 Plaintiffs' Demands (and related shareholder demands), and focused primarily on the time period 2010 through 2017. (App. 14–15, 73.) 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. 11, 49–54.)

At the Working Group's direction, Simpson Thacher reviewed and analyzed over 1.25 million pages of relevant documents, including documents from ExxonMobil's internal files and 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. (App. 14–15, 73–74, 79–84.) Simpson Thacher also interviewed 25 individuals, including current and former ExxonMobil officers, directors, and employees. (*Id.* 14–15, 84–85.) In total, Simpson Thacher devoted more than 5,000 hours to the inquiry. (*Id.* 15.) ExxonMobil's officers, employees, and representatives cooperated fully with the Working Group's requests for documents, information, and interviews. (*Id.* 15, 73, 79.)

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

The Working Group and Simpson Thacher also recognized that the Demands had not been formulated in isolation. As Plaintiffs acknowledge (CC ¶ 378), the Demands' theories of misconduct were based—often verbatim—on theories first espoused by NYAG and adopted by others. For this reason, the Working Group and Simpson Thacher monitored these and related government investigations and pending lawsuits.

NYAG Investigation and Lawsuit. In 2015, NYAG was the first to pursue a civil subpoena against ExxonMobil, soliciting a wide range of documents regarding "ExxonMobil's climate-related research, evaluation of the effects of climate change on future business decisions, Proved Reserves quantities, impairment analyses, and disclosures pertaining to the foregoing topics." (App. 20; *id.* 28–29.) These theories corresponded to each of the four theories advanced in the Demands. (*Id.* 202, 219, 228.) NYAG subsequently abandoned certain of these theories of misconduct. (*Id.* 20.) Ultimately, 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. 28–35.) The NYAG Action broadly alleged that ExxonMobil violated certain New York state securities laws relating to 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 regard to ExxonMobil's proved reserves estimates and asset impairment analyses. (*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. *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"). The court exposed NYAG's allegations as "hyperbolic" and "the result of an ill-conceived initiative" that originated with "politically motivated statements by former New York Attorney General Eric Schneiderman." *Id.*, at *1, *2, *26. He rejected the testimony of NYAG's *lead* witness as biased, *id.*, at *16 n.7, and found the testimony of NYAG's expert witnesses had been "eviscerated on cross-examination and by ExxonMobil's expert witnesses." *Id.*, at *31. The court further noted that NYAG had uncovered no evidence of wrongdoing despite "three and one-half years of investigation and pre-trial discovery that required ExxonMobil to produce millions of pages of documents and dozens of witnesses for interviews and depositions." *Id.*, at *1. In addition, 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.
- NYAG "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.

Importantly, the court also found that ExxonMobil's officers and employees were "uniformly committed to rigorously discharging their duties in the most comprehensive and meticulous manner possible." *Id.*, at *21. 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 its 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.

SEC Investigation. Also in 2016, the SEC commenced an investigation that focused on ExxonMobil's reserves reporting and asset impairment practices. (App. 37–38.) During the investigation, ExxonMobil produced over 4 million pages of documents, made seven employees available for interviews, 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. (*Id.*; App. 298.)

Securities Action. In November 2016, an ExxonMobil shareholder commenced a federal securities lawsuit, styled *Ramirez* v. *Exxon Mobil Corp.*, No. 3:16-cv-03111-K (N.D. Tex.), against ExxonMobil and certain current and former officers based on the same theories advanced by NYAG, including the general proxy/GHG cost, impairment, and proved reserves theories. (App. 38–40, 100–234.) The Working Group and Simpson Thacher specifically investigated the substantive merits and facts underlying each of the theories and allegations advanced in the operative *Ramirez* complaint because, as the Report notes, the Demands "challenge substantially the same disclosures cited by the NYAG and the *Ramirez* Plaintiff." (*Id.* 49.)

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. 89.) The Working Group and Simpson Thacher found no evidence of any wrongdoing to support the Demands' allegations. (*Id.* 15–26, 100–01, 136–38, 184–88, 233–34.) 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. (*Id.* 257.) They further found that ExxonMobil's public statements were neither misleading nor intended to be so. (*Id.* 257–58.) The Working Group and Simpson Thacher concluded that their findings were corroborated by, among other things, (i) the NYAG's "extraordinary" voluntary dismissal of its own scienter-based fraud claims; (ii) the post-trial decision in the NYAG Action that dismissed NYAG's remaining non-scienter-based claims with prejudice; and (iii) the SEC's termination of its two-year long investigation. (App. 86–87, 258.) Based on their extensive and detailed findings, the Working Group and Simpson Thacher

determined that the litigation contemplated by the Demands on ExxonMobil's behalf would be meritless. (App. 259.)

The Working Group and Simpson Thacher also considered a broad range of practical factors in assessing whether derivative litigation would be in ExxonMobil's best interests. Because the Demands' allegations lacked merit, the Working Group and Simpson Thacher found that the costs of pursuing derivative litigation would "substantially outweigh" any benefit to ExxonMobil. (App. 255.) They also found that litigation would divert the attention of key witnesses, 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." (*Id.* 257.) They also considered that authorizing 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." (*Id.* 256–57.)

After discussing these findings and conclusions with Simpson Thacher, the Working Group recommended that the Board reject the Demands as contrary to ExxonMobil's best interests and direct ExxonMobil to take all appropriate steps to dismiss this lawsuit. (*Id.* 11–12, 89, 259.)

D. The Board Rejects the Demands.

At a January 29, 2020 Board meeting, Mr. Curnin reported on the Working Group's inquiry, findings, and conclusions. (App. 292–94.) Before 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.* 293.) 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.* 293–94.) The Board unanimously endorsed the Working Group's recommendation and adopted a resolution that rejected the Demands and directed that the Company seek the dismissal of all pending derivative lawsuits. (*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: (i) Dr. Susan Avery (App. 260, 302); (ii) Ursula Burns (*id*. 261, 303); (iii) Joseph Hooley (*id*. 304); (iv) Steven Kandarian (*id*. 261, 305); (v) Douglas Oberhelman (*id*. 262, 305); (vi) Samuel Palmisano (*id*. 262, 306); (vii) Steven Reinemund (*id*. 262–63); and (viii) Darren Woods (*id*. 263–64, 307). 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. 70–71, 260–64.) The Working Group and Simpson Thacher specifically found that a majority of the Board was independent under New Jersey law when the Board voted to reject the Demands. (*Id*. 70–71, 260–64, 293–94.)

On February 5, 2020, Simpson Thacher advised Plaintiffs of the Board's decision. (App. 309–10; CC ¶ 382.) After executing a confidentiality agreement in May 2020, Lead Plaintiff's counsel were also permitted to review the Working Group's report. (App. 312–19.)

E. Plaintiffs File a Consolidated Complaint Relying on New Allegations and Theories from MAAG's Politically Motivated Lawsuit.

On August 10, 2020, ExxonMobil and the individual defendants moved to dismiss this action under New Jersey law and attached a copy of the Report to the motion. (ECF No. 46.) On August 18, 2020, Lead Plaintiff moved for leave to conduct discovery before responding to that motion. (ECF No. 51.) This Court denied Lead Plaintiff's motion on August 13, 2021, but permitted him to file a consolidated complaint. (ECF No. 85.)

On September 10, 2021, Plaintiffs filed their Consolidated Complaint, which largely repeats the same defective allegations challenging the Board's January 2020 decision that this Court concluded did not warrant discovery. (*Supra*, p. 3.) Tellingly, the new Complaint also downplays the degree to which Plaintiffs' Demands relied on NYAG's theories and allegations.

Instead, Plaintiffs now parrot allegations in a June 2020 amended complaint MAAG filed in a lawsuit it brought against ExxonMobil in Massachusetts state court on October 24, 2019. (App. 324–532.) Relying on MAAG's recent filing, Plaintiffs' Consolidated Complaint includes new alleged misstatements and omissions from the period 2017-2020 (CC ¶¶ 144–149, 258–282, 429–431) and espouses entirely new theories of wrongdoing, namely that ExxonMobil purportedly (i) misrepresented the environmental benefits of using certain of its products, and (ii) launched "greenwashing campaigns" to mislead consumers about the steps ExxonMobil was taking to mitigate climate change. (*Id.*; App. 35–36, 525–30, 739–43.) Plaintiffs' new allegations and theories are procedurally improper because they appear nowhere in Plaintiffs' Demands (or any related demand).

ARGUMENT

Plaintiffs are not entitled to prosecute this action on ExxonMobil's behalf. The full, thorough, and independent inquiry into the Demands' allegations found that those allegations lack merit and that maintenance of this action would disserve ExxonMobil's interests. And Plaintiffs' reliance on new allegations and theories they never asked the Board to investigate in their Demands is procedurally improper and does not rescue their deficient Complaint. This action should thus 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 there, New Jersey substantive law governs whether this derivative suit should proceed after the Board's rejection of Plaintiffs' Demands. N.J.S.A. 14A:3-6.9(a) (statute applies to derivative actions "brought in state or federal court both within and outside of the State of New Jersey"). While Federal Rule of Civil Procedure 23.1 contains

certain procedural requirements, federal courts "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 has sole authority to decide whether "to bring a lawsuit or to refrain from litigating a claim on behalf of the corporation" because that "is a decision concerning the management of the corporation." *In re Prudential Ins. Co. Deriv. Litig.*, 659 A.2d 961, 970 (N.J. Super. Ct. Ch. Div. 1995). The New Jersey statute thus requires shareholders to submit a pre-suit demand on the corporation before commencing derivative litigation. 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.").

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 statute 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 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).[3] This motion satisfies that initial burden, which

[3] Where, as here, a majority of the board consisted of independent directors at the time of the determination, plaintiffs bear 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:3-6.5(4) is a substantive aspect of

requires dismissal of this action unless Plaintiffs pleaded "with particularity" facts rebutting the Board's independence, good faith, and the reasonableness of its inquiry. N.J.S.A. 14A:3-6.5(5)(b)(ii). Plaintiffs have failed to do so.

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 fully satisfied. After an in-depth, good faith investigation, the Board unanimously determined that this action was not in ExxonMobil's best interests. A majority of ExxonMobil's 11 directors who made that decision were independent, outside directors. (*Supra*, pp. 5, 11–12.) Only one director, ExxonMobil's Chair and CEO, Mr. Woods, was a member of ExxonMobil management. (*Id.*) The 10 independent, outside directors who made that decision each made a good faith decision to reject the Demands and seek the dismissal of this action based on the Working Group's and Simpson Thacher's exhaustive inquiry, findings, and conclusions. (*Id.*)

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

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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. 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 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").

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). 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. (*Supra*, pp. 11–12.) When the Board made its 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.*) The first prong of N.J.S.A. 14A:3-6.5(5) is thus 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 Board's independence.

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 a 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. Where, as here, a board retains independent, outside counsel, "the critical question is whether [the board] demonstrated bad faith or acted unreasonably in relying on [counsel's] investigation." *Id.*

Here, the Board indisputably acted in good faith on the basis of a thorough inquiry into the merits of the allegations in the Demands and this action. 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. (*Supra*, pp. 5–12.) 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 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 NYAG's decision to dismiss its related fraud claims at the end of trial, the decision of the judge in the NYAG Action to dismiss NYAG's remaining claims with prejudice, and the SEC's closure of its investigation. (*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 decided in good faith to reject the Demands. (*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 inquiry 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. 2014 WL 2889741, at *2. Other courts applying New Jersey law have agreed. *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* v. *Gilmartin*, No. 03-cv-2631 (SRC), 2004 WL 5835749, at *12 (D.N.J. Aug. 20, 2004) (holding inquiry was reasonable where board retained independent law firm that found no impropriety).

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 Demands' allegations were meritless, the Board appropriately considered that the costs of pursuing litigation against certain of ExxonMobil's directors and officers would "substantially outweigh" any benefit to ExxonMobil. (*Supra*, p. 11.) The Board also considered the finding that litigation would unnecessarily distract key witnesses and could cause unwarranted reputational harm. (*Id.*) They further considered that a lawsuit by the Company against its directors and officers could undermine its own defenses in other related lawsuits and government investigations. (*Id.*)

C. Plaintiffs Fail to Allege Particularized Facts Suggesting the Board Lacked Independence or Did Not Act in Good Faith Following a Reasonable Inquiry.

Plaintiffs' Complaint does not provide any particularized factual allegations to support their challenge to the independence, good faith, or reasonableness of the Board's process. Instead, the Complaint relies on a series of conclusory and otherwise defective allegations that have been routinely rejected by courts and settled New Jersey law, including substantially the same allegations this Court already rejected as insufficient to warrant discovery under both New Jersey and federal law in its August 13, 2021 order. (ECF No. 85.)

Naming Directors as Defendants/Targets and Challenging Statements They Approved Does Not Undermine Their Independence. Plaintiffs allege that all 11 directors lack independence because (i) they are named as defendants in this action and some were targets of the Demands, and (ii) some of the outside directors approved public statements that Plaintiffs

challenge here. (CC ¶¶ 407–408, 417, 419.) Those allegations are unavailing under settled New Jersey law. The New Jersey statute expressly provides 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 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"). Plaintiffs also overlook that *none* of the 11 directors were named as defendants in the NYAG Action, the MAAG Action, or *Ramirez*. Finally, Plaintiffs' allegation that the Board should have conducted an independence assessment (CC ¶ 414) fails because Plaintiffs admit the Report explained why the Board consisted of a majority of independent directors (App. 70–71).[4] Plaintiffs' disagreement with that conclusion cannot impugn the Board's independence, especially because Plaintiffs failed to plead particularized facts to do so.

The Working Group and Simpson Thacher Did Not Have "Conflicting Responsibilities." Plaintiffs' allegation that the Working Group and Simpson Thacher had "conflicting responsibilities" in both "reviewing" the Demands and "reviewing" the NYAG Action and *Ramirez* is baseless. (CC ¶¶ 409, 415–416.) 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. (App. 69–70,

[4] Plaintiffs' allegation that Mr. Weldon lacked independence under New Jersey law in January 2020 because he was not elected to ExxonMobil's Board in June 2021 is not only misguided, but absurd. (CC ¶¶ 53, 418.) That after-the-fact occurrence bears no relevance to whether, and in no way shows that, Mr. Weldon had a material economic interest in any challenged transaction or material personal or business relationships with anyone who may have had such an interest, when he voted to reject the Demands.

288–89.) 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.* 288.) Neither the Working Group nor Simpson Thacher was tasked with ExxonMobil's or any individual's defense in the NYAG Action or *Ramirez*—other law firms were. That the Working Group and Simpson Thacher chose to monitor ongoing litigation related to the issues they investigated only confirms their diligence, not the existence of any conflict.

The Board Was Entitled to Rely on Simpson Thacher. Plaintiffs' allegation that the Board cannot rely on Simpson Thacher's work is contrary to New Jersey law. (CC ¶¶ 408, 421.) In *PSE&G*, the New Jersey Supreme Court held that a board is entitled to "entrust its investigation to a law firm" provided it 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. Simpson Thacher was retained exclusively as independent investigative counsel, which Plaintiffs cannot dispute, meaning there was no disabling conflict.

Plaintiffs' allegations that Simpson Thacher lacked independence because it represented other corporations for which certain ExxonMobil directors served as officers or directors in unrelated lawsuits similarly do not remotely compromise Simpson Thacher's independence. (CC ¶¶ 422–427.) 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 their individual capacities in any litigation. The fact that Simpson Thacher had been retained by *other corporations* in unrelated matters did not render Simpson Thacher conflicted here. 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 same is true here.

The Board Appropriately Considered the Report's Findings and Conclusions. Plaintiffs' allegations that the full Board did not (i) "meaningfully review the Report," (ii) "thoughtfully consider" the Report, or (iii) "participate in the investigation" do not provide particularized facts suggesting the Board lacked independence, good faith, or did not rely on a reasonable inquiry. (CC ¶¶ 388, 410, 412–413.) The Report and Board minutes make clear that the Board did meaningfully review and thoughtfully consider the Report. The Board received the Report seven days before the January 29, 2020 Board meeting. (App. 293.) At the meeting, the Board also received a presentation from Mr. Curnin and discussed with him and each other the Report and the Working Group's conclusions and recommendations. (*Id.*) Plaintiffs' allegation that the Board's decision was unreasonable because it supposedly acted precipitously is baseless. *Morefield* v. *Bailey*, 959 F. Supp. 2d 887, 902 (E.D. Va. 2013) ("Even assuming the Board met for a period of one hour or shorter, that fact, by itself, 'fails to vitiate the reasonableness of the Board's investigation, or the deference to which that investigation is entitled.'"). Plaintiffs also ignore that when the Board met it already knew that the Demands' core allegations had been discredited after trial on the merits in the NYAG Action. *Id.* (finding board decision reasonable "in light of what may have already been known or under consideration as a result of pending litigation and government investigation"). Nor was the Board required to attend every Working Group meeting or interview because the Board was entitled to rely on the extensive investigation performed by the Working Group and Simpson Thacher.

The Board Was Not Required to Create a Special Committee Empowered to Act on the Demands. Plaintiffs' allegation that the Working Group should have been a formal committee empowered to act on the Demands does not implicate the Board's independence, good faith, or the reasonableness of its investigation. (CC ¶¶ 387–388, 420.) The governing New Jersey statute expressly permitted the Board to decide whether to reject shareholder demands without creating a formal committee empowered to do so. N.J.S.A. 14A:3-6.5(2)(a). The Board was also permitted to select the best method for informing itself of the Demands' allegations because "there is 'no prescribed procedure that a board must follow'" in investigating shareholder demands. *PSE&G*, 801 A.2d at 315.

Plaintiffs' Disagreement with the Decision Not to Seek Tolling Agreements Is Insufficient. Plaintiffs' complaint that the Board did not "enter into tolling agreements" with the *Ramirez* defendants is insufficient to challenge the Board's independence, good faith, and the reasonableness of its investigation. (CC ¶¶ 433–434.) Plaintiffs admit that the Report did not rely on the statute of limitations to reject the Demands. (CC ¶ 434.) It relied on the absence of evidence of underlying wrongdoing, meaning tolling agreements were not viewed as necessary. Plaintiffs' real disagreements are with the Report's *conclusions*, but "such a disagreement does not equate to particularized facts creating a reasonable doubt about what is relevant here: the good faith and [reasonableness]" of the decision to refuse the Demands based on the investigation. *Busch* v. *Richardson*, No. 2017-0868-AGB, 2018 WL 5970776, at *9 (Del. Ch. Nov. 14, 2018) (holding that disagreement with decision not to seek tolling agreements cannot challenge independence, good faith, or reasonableness of investigation).

Lead Plaintiff Has Had Ample Time to Review the Report. As this Court's order denying his discovery motion (ECF No. 85) recognized, Lead Plaintiff received an unredacted

electronic copy of the Report when Defendants initially moved to dismiss in August 2020, and, importantly, had over one year to consider the Report before filing his new Complaint. The manner in which the Board permitted Lead Plaintiff to view the Report in May-June 2020 is thus irrelevant and certainly has no bearing on whether the Board's January 2020 decision was made by independent directors acting in good faith based on a reasonable inquiry. (CC ¶¶ 384, 411, 432.)

The Investigation's Scope Was Complete Because It Encompassed the Demands' Allegations. Plaintiffs claim the investigation's scope was incomplete because its "primary focus was on the NYAG Action," and it purportedly "failed' to investigate claims made in *Ramirez* and the MAAG Action. That allegation is contradicted by the Report itself, and is insufficient to rebut the reasonableness and good faith of the Board's process. (CC ¶¶ 389–406, 428–431.) As the Report makes clear, the investigation properly focused on the *Demands'* allegations, as required under New Jersey law. (App. 69–70.) The Demands' allegations consisted of the four core theories relating to (i) "stranded" assets, (ii) ExxonMobil's proxy/GHG costs, (iii) its proved reserves estimates, and (iv) its impairment analyses, each during the period 2010-17. (*Supra*, pp. 4, 6–10.) The investigation's findings as to each of these theories are detained in the Report in Section 7(D) (proved reserves estimates), (E) (impairment analyses) & F ("stranded" assets theory and proxy/GHG costs). Each of these theories had been espoused by NYAG and the *Ramirez* plaintiff, so the investigation also encompassed them. (App. 49 (noting the Demands challenged "substantially the same disclosures cited by the NYAG and the *Ramirez* Plaintiff")). These theories are also substantively identical to the first and second causes of action in MAAG's October 2019 complaint, and so were also investigated. (*Supra*, pp. 12–13.)

III. Plaintiffs' New Allegations and Theories Must Be Disregarded for Lack of Demand.

There can be no dispute that the Working Group and Simpson Thacher investigated in painstaking detail the underlying substantive merits of the alleged misconduct identified in the

Demands that Plaintiffs sent to the Board between November 2016 and July 2017. Hoping to evade dismissal, Plaintiffs now seek to bring derivative claims regarding (i) new alleged misconduct from 2017–2020, and (ii) new theories of purported wrongdoing, namely the MAAG Action's claims that ExxonMobil allegedly misrepresented the environmental benefits of using certain of its products and purportedly launched "greenwashing" campaigns. (*Supra*, pp. 12–13.) Those claims were not raised in Plaintiffs' Demands (or any related demand). (*Id.*) Plaintiffs' efforts are thus procedurally improper because the New Jersey statute requires that a demand be sent to the Board concerning all claims that are the subject of a derivative lawsuit *before* it is filed. N.J.S.A. 14A:3-6.3 (requiring written demand before lawsuit commenced); *Hirschfeld* v. *Beckerle*, 405 F. Supp. 3d 601, 610–11 (D.N.J. 2019) (dismissing derivative complaint for failure to make a pre-suit demand to investigate the alleged misconduct because such a demand was "mandatory").

CONCLUSION

ExxonMobil and the Defendants respectfully request that the Court dismiss this action in its entirety under N.J.S.A. 14A:3-6.5. The independent Board pursued a comprehensive inquiry into the Demands' allegations that was conducted by independent, outside counsel at Simpson Thacher and directed by a Working Group comprised of independent directors. That inquiry found the Demands' allegations had no merit and that this action would not be in ExxonMobil's best interests. The independent Board carefully discussed the inquiry's findings and conclusions and unanimously agreed. Under New Jersey law, the independent Board's good faith decision based on a reasonable investigation is entitled to deference. Plaintiffs' improper reliance on new allegations and theories they never urged the Board to investigate in their Demands does not alter that conclusion. Dismissal of this action with prejudice is thus warranted.

Dated: September 24, 2021

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 24th day of September, 2021.

/s/ Daniel J. Kramer
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