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-01067-K
GAIL WALKOVER, Derivatively on Behalf of Exxon Corporation, Plaintiff, v. DARREN W. WOODS, ANDREW P. SWIGER, DAVID S. ROSENTHAL, JEFFREY J. WOODBURY, STEVEN S. REINEMUND, MICHAEL J. BOSKIN, SAMUEL J. PALMISANO, KENNETH C. FRAZIER, URSULA M. BURNS, HENRIETTA H. FORE, WILLIAM C. WELDON, REX W. TILLERSON, WILLIAM W. GEORGE, LARRY R. FAULKNER, DOUGLAS R. OBERHELMAN, and PETER BRABECK-LETMATHE, Defendants.	Case No. 3:20-cv-02302-K

GAIL WALKOVER'S MOTION TO VACATE EXISTING LEADERSHIP STRUCTURE, AND APPOINT WALKOVER AS LEAD PLAINTIFF AND HER COUNSEL AS LEAD COUNSEL

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MOTION AND NOTICE OF MOTION

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that Plaintiff Gail Walkover ("Walkover"), by and through her undersigned counsel, hereby moves this Court for an order (i) vacating the existing leadership structure in this consolidated stockholder derivative litigation (the "Consolidated Derivative Action") and (ii) appointing Walkover as Lead Plaintiff, Bragar Eagel & Squire, P.C. ("Bragar") as Lead Counsel, and The Briscoe Law Firm, PLLC ("Briscoe") as Local Counsel. This Motion is based on this Notice of Motion and Motion and Memorandum filed herewith, the Declaration of Willie Briscoe, the [Proposed] Order Granting Walkover's Motion to Vacate the Existing Leadership Structure and Appoint Lead Plaintiff, Lead Counsel, and Liaison Counsel, and the pleadings and papers on file in this action.

MEMORANDUM IN SUPPORT OF MOTION

I. PRELIMINARY STATEMENT

Exxon Mobil Corporation ("Exxon" or the "Company") is one of the most prolific oil producers in history. Yet in response to global warming, shifting consumer preferences, and worldwide economic and political instability, the Company privately reevaluated its commitment to hydrocarbons. Nevertheless, for years Exxon lied to the investing public about the negative effect that climate change already had and would continue to have on the Company's business. As Exxon's competitors wrote off or abandoned more than $200 billion worth of oil and gas reserves, Exxon brazenly and steadfastly assured investors that the Company's superior investment processes and project management uniquely positioned the Company to avoid the consequences hitting all the other oil and gas companies around the world. Eventually, however, Exxon publicly admitted its susceptibility to climate change and recorded massive write-downs on certain assets, after which the Company's stock price dropped.

Class action lawsuits and other litigation ensued, exposing Exxon to significant damage. Germane here, in accordance with the applicable law of New Jersey, where the Company is incorporated, Walkover sent a demand (the "Litigation Demand") to Exxon's board of directors (the "Board"), demanding that the Board investigate potential misconduct and commence litigation against corporate fiduciaries responsible for damaging the Company. Fellow plaintiff Samuel Montini ("Montini") apparently sent a similar demand. That's where the similarities end.

After making her demand, Walkover maintained regular contact with Exxon to keep abreast of any material developments in the Board's purported investigation. Not wishing to create any undue hardship on the Company—in whose name an eventual derivative suit would be brought—Walkover awaited the results of the Board's purported investigation rather than short-circuiting the process and prematurely filing a lawsuit. Only after receiving the Board's wrongful

refusal of her Litigation Demand did Walkover decide to commence her action against Exxon's officers and directors, filing a well-pled complaint that specifically pleads why the Board's refusal of Walkover's demand was wrongful based on applicable New Jersey law.

Montini and his counsel showed no such restraint, the consequences of which are evident in their most recent filings. Before receiving a substantive response to his litigation demand, Montini filed a suit in this Court and then sought to coordinate with other shareholders who similarly refused to wait for the Board's refusal of their demands. Indeed, Montini's litigation efforts have focused more on securing and preserving his own leadership position than pursuing his claims against Defendants. After the Board formally refused the various demands earlier this year, Montini idled, choosing not to amend his pleading to acknowledge the Board's refusal and the related materials provided by Exxon. Nevertheless, now staring down the barrel of a motion to dismiss, Montini belatedly seeks broad pre-answer discovery regarding the Board's refusal.

Having consolidated Walkover's action with the Consolidated Derivative Action, the Court should now (i) vacate its prior order appointing Montini as Lead Plaintiff and Johnson Fistel, LLP as Lead Counsel and Ron Wells Law Office as Local Counsel and (ii) appoint Walkover, Bragar, and Briscoe as Lead Plaintiff, Lead Counsel, and Local Counsel, respectively.

Montini's and his counsel's leadership positions emanate from their status as first-filers, yet courts have consistently repudiated the "race to the courthouse" when such haste comes at the expense of filing quality pleadings. Indeed, any claim that Montini has acted vigorously is undermined by his inexplicable failure to amend his "demand refused" complaint after the Board, in fact, refused his demand. Montini strangely rested on his "constructive refusal" argument yet now seeks discovery into the Board's actual refusal.

Walkover and her counsel represent a better choice to lead this case. Indeed, Walkover's decision to wait for a response to her demand resulted in a superior complaint. Walkover is also a long-term Exxon shareholder, having held shares since 2006, and is represented by counsel who has helped secure some of the largest ever recoveries in shareholder derivative litigation. Walkover, Bragar, and Briscoe and, therefore, are best suited to prosecute this case as Lead Plaintiff, Lead Counsel, and Local Counsel.

II. BACKGROUND

A. Underlying Facts of the Related Actions

For years, Exxon's officers and directors made material misrepresentations to the market and Exxon shareholders concerning the negative effect that climate change and anticipated climate change regulations have had and will have on Exxon's business operations and financial performance. The Individual Defendants mislead the market and Exxon shareholders as to how Exxon accounted for the projected impact of climate change in its internal analyses and evaluations. As a result of such misrepresentations, Exxon's public disclosures painted a much rosier picture about the current and projected value of its business than was warranted. Further, in order to maintain an artificially inflated stock price, Exxon failed to recognize impairments of the value of billions of dollars of oil and gas reserves, despite knowing that such reserves could not be economically exploited. (Walker Compl. ¶ 2.)

On March 31, 2014, Exxon publicly released a report titled "Energy and Carbon – Managing the Risks" (the "MTR Report"). Exxon released the MTR Report as part of an agreement to settle negotiations with certain shareholders concerning the shareholders' demand for a shareholder vote on a climate-change related resolution. In exchange for the report, the shareholders agreed to withdraw their proposed shareholder resolution, which sought additional

disclosures concerning the potential risks global climate change posed to Exxon's reserves and long-term business prospects. (*Id.* at ¶ 6.)

The MTR Report provided that it was intended to "address important questions raised recently by several stakeholder organizations on the topics of global energy demand and supply, climate change policy, and carbon asset risk." The MTR Report stated that "[Exxon] makes long-term investment decisions based in part on our rigorous, comprehensive annual analysis of the global outlook for energy" (the "Outlook for Energy" reports). (*Id.* at ¶ 7.)

The MTR Report assured investors that, "[b]ased on this analysis, we are confident that none of our hydrocarbon reserves are now or will become "'stranded.'" (*Id.* at ¶ 8.)

On the same date, March 31, 2014, Exxon also issued a report entitled "Energy and Climate" (the "E&C Report"). The E&C Report represented that "in the OECD nations [which include Canada and the United States], we apply a proxy cost that is about $80 per ton in 2040." This means, for example, that Exxon's internal analyses for projects in OECD nations assume that the "cost of carbon" in the year 2040 will be "$80T". If Exxon were to utilize a lower cost of carbon in 2040 or no cost of carbon at all, its analyses would lead to a much rosier conclusion. (*Id.* at ¶ 10.)

In the MTR Report and the E&C Report, Exxon materially misrepresented how it utilized the "proxy cost" of carbon in its planning and valuation of reserves. According to internal Exxon documents produced to the New York Office of the Attorney General ("NYOAG") and subsequently made public, the complaint in the NYAG Action, and a sworn affirmation provided by the NYOAG under penalty of perjury, Exxon's actual use of a proxy cost in its assessment and asset valuation differed significantly from what was disclosed. Exxon frequently used no proxy cost at all or used a much lower proxy cost of carbon that was represented to the public. As a result,

although investors were misled into believing that Exxon's projections accounted for a high proxy cost in the future, Exxon's reported metrics were actually based on a much lower, undisclosed proxy cost or none at all, resulting in a much rosier picture of the future. (*Id.* at ¶ 12.)

Shortly after Exxon issued the MTR Report and E&C Report in 2014, world-wide oil and gas prices declined swiftly. The reported causes for the dramatic price decline included, among other things, a shift in the global economy to become "less fuel intensive" as a result of the information technology revolution and "[c]oncerns over climate change." (*Id.* at ¶ 16.)

Exxon did not disclose these facts in a timely fashion because doing so would contradict Exxon's repeated assertions that it was unaffected by the problems plaguing its competitors, and more importantly, would place the Company's prized AAA credit rating in significant jeopardy. The AAA credit rating was particularly important to Exxon at that time given the Company's upcoming $12 billion public debt offering scheduled for March 2016. (*Id.* at ¶ 21.) Eventually, negative news began to seep out. In October 2016, Exxon belatedly admitted it was not immune to the impacts of the oil and gas price declines dating back to 2014. (*Id.* at ¶ 24.) On January 31, 2017, Exxon revealed that it would record an impairment charge of $2 billion. (*Id.* at ¶ 26.)

As a result of the foregoing misrepresentations and revelations, Exxon shareholders filed the Securities Class Action. On August 14, 2018, the Court issued a Memorandum Opinion and Order in the Securities Class Action, sustaining the claims for securities fraud claims under Section 10(b), Rule 10b-5, and Section 20(a) against the Company, Tillerson, Defendant Andrew P. Swiger ("Swiger"), and David S. Rosenthal ("Rosenthal"), and under Section 20(a) against Jeffrey J. Woodbury ("Woodbury"). (*Id.* at ¶ 27.)

B. Background of the Consolidated Derivative Action

On May 2, 2019, Montini and another stockholder filed verbatim identical complaints against Defendants. (ECF No. 1; *Montini* ECF No. 1). On August 6, 2019, pursuant to an agreed-

upon motion, the Court consolidated the two actions and appointed Samuel Montini as Lead Plaintiff, Ron Wells as Local Counsel, and Johnson Fistel, LLP as Lead Counsel. (ECF No. 19). On September 20, 2019, Montini filed an Amended Complaint that largely tracked Montini's original complaint. (ECF No. 12.) Since Exxon's Board communicated in February that it had refused Montini's demand, Montini has taken no steps to update and amend his complaint to reflect the Board's refusal.

On August 10, 2020, Defendants moved to dismiss Montini's complaint, citing the fact that the Board had decided to refuse Montini's demand. (ECF No. 46.) Montini has since sought discovery regarding the Board's consideration and eventual refusal of his demand. Defendants objected to this request.

On September 4, 2020, the plaintiffs from a related action pending in the District of New Jersey moved to intervene in the Consolidated Derivative Action, seeking to oppose Defendants' motion to dismiss insofar as it sought dismissal "with prejudice," which could preclude the New Jersey federal plaintiffs' ability to pursue their claims. (ECF No. 61).

C. Walkover's Demands and Subsequent Litigation

On July 26, 2018, Plaintiff's counsel sent a demand, pursuant to Section 14A:5-28(4) of the New Jersey Revised Statutes, to inspect certain books and records of the Company ("First Books and Records Demand"). By letter dated August 24, 2018, the Company rejected Plaintiff's demand. On September 28, 2018, Plaintiff commenced an action in the Superior Court of New Jersey, Chancery Division, to compel Exxon to comply with the First Books and Records Demand ("First Books and Records Action"). (Walkover Compl. ¶ 34.)

On, November 19, 2018, Plaintiff sent a litigation demand to the Board of Directors of Exxon (the "Board") demanding that the Board: (i) investigate the foregoing facts and claims arising from them, and (ii) commence litigation against the corporate fiduciaries responsible for

damaging Exxon, including certain of the Company's current and former officers and directors (the "Litigation Demand"). Plaintiff subsequently provided evidence of her direct ownership of Exxon stock. (*Id.* at ¶ 35.)

On December 28, 2018, counsel for the Board responded to the Litigation Demand, advising that the Board had designated a working group of outside directors (the "Working Group") to investigate certain issues including reserves, the impact of climate change, and the Company's disclosures regarding climate change regulation. The Working Group was given a copy of the Litigation Demand in connection with their investigation. (*Id.* at ¶ 36.)

By letter dated January 14, 2019, Plaintiff requested the names of the members of the Working Group and asked whether the Working Group was a "special committee" or a "special litigation committee." Plaintiff also asked for a copy of any resolution forming the Working Group and outlining its duties. (*Id.* at ¶ 37.)

On January 23, 2019, counsel for the Board responded by identifying non-party Angela F. Braly, and defendants Kenneth C. Frazier and William C. Weldon as the members of the Working Group. Counsel asserted that the Working Group was neither a special committee nor a special litigation committee, and that it was "an administrative body whose role is to interact with independent counsel in this matter and to assist the Board in assessing and determining the appropriate actions to take with respect to the demand letters." (*Id.* at ¶ 38.)

Despite the Board's designation and Defendants' description of the Working Group as expressly *not* being a committee, the Board relinquished its oversight role to the Working Group and failed to take an independently active role to investigate Plaintiff's Litigation demand. In other words, the Board refused to make its own independent, informed, good-faith determination whether to commence litigation in response to Plaintiff's Litigation Demand. (*Id.* at ¶ 39.)

On May 28, 2019, Plaintiff voluntarily dismissed the First Books and Records Action in light of the Superior Court, Appellate Division's decision in *City of Birmingham Relief and Retirement System v. ExxonMobil Corporation*, Docket No. 1-42790-17T3, 2019 N.J. Super. Unpub. LEXIS 1030, New Jersey Superior Court, Appellate Division (May 6, 2019). (*Id.* at ¶ 40.)

On June 19, 2019, Plaintiff sent a new books and records demand to Exxon ("Second Books and Records Demand"). In support of this demand, Plaintiff took the time to transfer ownership of her Exxon stock from "book entry" at her brokerage firm to her own name in an account held at Computershare. The Second Books and Records Demand contained detailed non-hearsay allegations of fact sufficient to meet the standard set forth in the *City of Birmingham Relief and Retirement System* decision and elsewhere. Nonetheless, by letter dated July 26, 2019, Exxon still rejected the demand. (*Id.* at ¶ 41.)

On October 23, 2019, Plaintiff commenced a second action in the Superior Court of New Jersey, Chancery Division, to compel Exxon to comply with the June 2019 books and records demand (the "Second Books and Records Action"). *Walkover v. Exxon Mobil Corporation*, Civil Action No. UNN-C-146 19. (*Id.* at ¶ 42.)

At some point in time in late January 2020—Defendants did not specify the date—the Working Group compiled a report titled "Report and Conclusions of the Working Group of the Board of Directors of ExxonMobil Corporation." The report is dated January 22, 2020, and appears to be authored by its outside counsel. In the report, the Working Group recommended that the Board should not pursue any pending or potential litigation against Defendants. (*Id.* at ¶ 43.)

Shortly thereafter—again, Defendants did not say when—the Working Group passed its report along to the full Board. (*Id.* at ¶ 44.)

On January 29, 2020—less than a week after the date of the Working Group's report—the Board purportedly resolved to reject the Litigation Demand in its entirety. The Board's resolution was conveyed to Plaintiff's counsel on February 5, 2020. That communication did not assert that the Board met, whether in person or otherwise, to discuss and review the report, the Working Group's investigation or its conclusions. On February 10, 2020, Plaintiff voluntarily dismissed her second books and records demand. (*Id.* at ¶ 45, 46.)

Subsequently, counsel for the Board made the Working Group's 275-page report (the "Report") available to Plaintiff's counsel, pursuant to a confidentiality agreement, for just seven days, on an electronic platform. Plaintiff was not able to download or save any portion of the Report. (*Id.* at ¶ 47.)

III. ARGUMENT

A. The Court Should Vacate the Existing Leadership Structure

A district court has the inherent "authority to regulate its flow of cases." *Coastal (Bermuda), Ltd. v. E.W. Saybolt & Co.*, 761 F.2d 198, 204 n.6 (5th Cir. 1985); *see also Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.")). Consistent with that power is the Court's ability to revise interim, stipulated orders like the Court's prior order appointing Montini as Lead Plaintiff, Johnson Fistel as Lead Counsel, and Ron Wells Law Office as Local Counsel. *See Colli v. S. Methodist Univ.*, 2011 U.S. Dist. LEXIS 92073, at *2 (N.D. Tex. Feb. 14, 2011) (noting that a district court "possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient"); *see also Melancon v. Texaco, Inc.*, 659 F.2d 551, 553 (5th Cir. 1981) (noting that "[a]s long as a district . . . court has jurisdiction

over the case, then . . . it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient").

There are two distinct reasons for vacating the existing leadership order. *First*, Walkover was not a party to the arrangement that resulted in the unopposed leadership motion (ECF No. 14) and corresponding order (ECF No. 19). Thus, Walkover cannot be bound by that agreement. *Kneeland v. Luce*, 141 U.S. 437, 440 (1891) (explaining that a stipulation was "not binding" on parties who did not sign it); *United States v. Terminal Transp. Co.*, 1976 U.S. Dist. LEXIS 17058, at *4 n.4 (N.D. Ga. Jan. 21, 1976) (holding that a stipulation was "not binding" on parties who "were not signatory parties to that agreement"); *Pena v. State Farm Lloyds*, 2017 U.S. Dist. LEXIS 218711, at *9 (S.D. Tex. Aug. 17, 2017) (explaining that "a stipulation is a bi-lateral agreement" and non-binding on parties who are not signatories)

Second, a change in circumstances necessitates revisiting the Court's original order. In exercise of their inherent power, courts can and should disregard earlier private agreements to appoint lead counsel when another contestant appears. *See, e.g., In re Delphi Fin. Group S'holder Litig.*, 2012 Del. Ch. LEXIS 22, at *11 (Del. Ch. Feb. 7, 2012) (vacating previous stipulated order regarding leadership and appointing new lead plaintiff and lead counsel to lead the shareholder litigation). There have been numerous material developments since the Court first appointed Montini and his counsel, including most notably the Board's refusal of both Montini's and Walkover's litigation. Although Montini did nothing, Walkover filed a case that addresses the Board's response to her demand and details why the Board's refusal was wrongful under applicable New Jersey law.

These reasons give the Court ample justification to vacate its prior leadership order.

B. The Court Should Appoint Walkover as Lead Plaintiff, Bragar as Lead Counsel, and Briscoe as Local Counsel

Rule 23.1 of the Federal Rule of Civil Procedure provides as a baseline that any plaintiff in a shareholder derivative action must "fairly and adequately represent the interests of shareholders . . . who are similarly situated in enforcing the right of the corporation." *See also Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (explaining that a plaintiff who leads a shareholder derivative suit occupies a position "of a fiduciary character," in which "[t]he interests of all in the redress of the wrongs are taken into his hands, dependent upon his diligence, wisdom and integrity"). The Fifth Circuit has not established specific criteria for appointing lead plaintiff and lead counsel, but courts have considered a variety of factors, including: (i) the quality of the pleadings, (ii) the adequacy and financial interest of the plaintiffs involved, (iii) the vigorousness of prosecution, and (iv) the quality of the plaintiffs' respective counsel. *See In re OCA Sec. & Derivative Litig.*, No. 05-2165, 2005 U.S. Dist. LEXIS 49978, at *36 (E.D. La. Nov. 18, 2005) (discussing what factors to apply); *In re Life Ptnrs. Holdings, Inc.*, No. DR-11-CV-43-AM, 2012 U.S. Dist. LEXIS 192825, at *7 (W.D. Tex. May 9, 2012) (same); *see also In re Bank of America Corp. Sec. Derivative and ERISA Lit.*, 258 F.R.D. 260, 272 (S.D.N.Y. 2009) (referring to the factors set forth in Rule 23(g)). "The 'guiding principle' is who will 'best serve the interests of the plaintiffs.'" *Millman v. Brinkley*, No. 1:03-cv-3831-WSD, 2004 U.S. Dist. LEXIS 20113, at *9 (N.D. Ga. Oct. 1, 2004) (quoting *Rich v. Reisini*, 25 A.D.2d 32, 34 (N.Y. App. Div. 1966)).

A review of the relevant factors demonstrates that Walkover, BES, and Briscoe are better situated than the existing leadership structure to pursue this action as Lead Plaintiff, Lead Counsel, and Liaison Counsel, respectively.

1. Walkover Is a Long-Term Exxon Shareholder Who Has and Will Fairly and Adequately Represent the Interests of the Company's Shareholders

"Rule 23.1 contains two explicit standing requirements for instituting a derivative action. The plaintiff (1) must be a stockholder at the time of the suit, and (2) must have been a stockholder at the time of the wrong of which he complains." *Bangor Punta Operations, Inc. v. Bangor & A.R. Co.*, 417 U.S. 703, 708-09, 708 n.4 (1974); *Iron Workers Mid-South Pension Fund v. Davis*, 93 F. Supp. 3d 1092, 1098 n.3 (D. Minn. 2015). Further, New Jersey law imposes a universal demand requirement whereunder no shareholder may commence a derivative proceeding until a written demand has been made upon the corporation to take suitable action and at least ninety days have expired from the date of demand, barring earlier notice that demand was rejected. N.J. Rev. Stat. § 14A:5-28(4). Walkover easily satisfies these requirements.

Walkover is a current Exxon shareholder and has continuously held shares in the Company since 2006, well before the alleged misconduct began. As a long-term Exxon investor, Walkover endeavors to protect the long-term value of the Company and to ensure that Exxon is not damaged further by Defendants' conduct. Walkover also fully complied with New Jersey law by making a demand on the Board *and then waiting* for the Board to consider Walkover's demand. Thus, Walkover is ideally suited to serve as Lead Plaintiff in the Consolidated Derivative Action.

2. Walkover Filed the Highest Quality Complaint

In Delaware, where judges are often asked to resolve leadership contests, courts have emphasized the importance of focusing on who filed the best complaint.

> The quality of the pleadings is relevant for two reasons. The first is obvious, and it is that a demonstrably superior complaint is more likely to represent the interests of the plaintiff class and more likely to produce a successful outcome. The second reason the quality of the pleadings is relevant is because each complaint demonstrates the competence and investigative diligence of the counsel who filed it. As such, where one complaint is stronger than another, this Court will not discount that complaint's strength on the grounds that the "other plaintiffs' counsel could amend their complaints to incorporate its allegations." Allowing other

> lawyers to "free ride by copying a well-crafted complaint" diminishes the incentive for the lawyer filing the superior complaint to diligently investigate and plead good cases in the future.

In re Delphi Fin. Grp. S'holder Litig., 2012 Del. Ch. LEXIS 22, at *4-5 (Del. Ch. Feb. 7, 2012) (citations omitted).

Here, Walkover has assembled the best complaint, which gives shareholders the greatest chance of prevailing against Defendants derivatively on behalf of Exxon. Because the Company is a New Jersey Corporation, any shareholder wishing to bring a derivative suit first had to make a demand on the Board. Walker and Montini both made demands on the board, yet only Walkover waited for the Board to actually respond to her demand. Accordingly, Walkover's complaint is not only the sole complaint addressing the reality of what has transpired (i.e., the Board's refusal), but it's consequently also the only one alleging with particularity that the Board wrongfully refused Walkover's demand, which is essential for being able to pursue this litigation notwithstanding the Board's refusal.

By contrast, Montini filed his complaint well before the Board decided whether to take action in response to the demand, alleging that the mere passage of time was tantamount to a constructive refusal. As both a factual and legal matter, asserting a constructive refusal based solely on the passage of time—indeed, Exxon did not ignore Montini, advising that it had established a so-called "Working Group" and retained a law firm—is an extremely difficult strategy to execute. *See, e.g.*, *Lowinger ex rel. Caterpillar, Inc.* v. *Oberhelman*, No. 1:15-cv-01109-SLD-JEH, 2017 WL 1224524 (C.D. Ill. Mar. 31, 2017); *Mozes ex rel. General Electric Co.* v. *Welch*, 638 F. Supp. 215 (D. Conn. 1986). (*See also* Defs. Mot. to Stay (Dkt. No. 20) at 9 ("Plaintiff's contention that the Board has constructively refused his demand is also incorrect."). Moreover, given the Board's *actual* refusal, Montini's allegations are now obsolete. Indeed, despite the months that have passed since the Board refusal, Montini has taken no steps to amend his complaint to replace the constructive

refusal assertion to address the reality of Exxon's Board's actual refusal despite purportedly have access to the Working Group's report and certain non-public documents.

Given the unique quality of Walkover's complaint and the myriad problems with Montini's pleading, this factor strongly supports the appointment of Walkover and her counsel.

3. Walkover Has Pursued This Action with Effective Vigor

The Court should consider who has demonstrated a commitment to the long-term pursuit of their claims in an effective and reasonably aggressive manner. That said, vigor is not limited to considering who filed the first case. As the Delaware Court of Chancery has explained, "It is not the race to the courthouse door, however, that impresses the members of this Court when it comes to deciding who should control and coordinate litigation on behalf of the shareholder class." *TCW Tech. Ltd. P'ship v. Intermedia Communs.*, C.A. No. 18336, 2000 Del. Ch. LEXIS 147, at *9 (Del. Ch. Oct. 17, 2000) (adding that "none of the pending lawsuits in this litigation is entitled to any special status as the lead or coordinating lawsuit simply by virtue of having been filed earlier than any other pending action.").

This factor also supports Walkover, who remains the first and only litigant to allege any facts about the Board's refusal of her demand. By contrast, although Montini filed suit nearly a year and a half ago, the Consolidated Derivative Action remains only at the pleading stage. Moreover, given Montini's failure to amend his complaint after the Board refused his demand, the Consolidated Derivative Action is likely to remain at the pleading stage for some time, as Montini requested a stay so that he can conduct discovery into the Board's consideration of the litigation demand he still alleges was constructively refused.

Courts should reward action, not speed, and Walkover and her counsel have demonstrated through their actions that they will vigorously litigate the Consolidated Derivative Action through its completion.

4. Bragar and Briscoe Are Highly Qualified Counsel

Plaintiff has selected Bragar to serve as Lead Counsel and Briscoe to serve as Local Counsel. Both firms are well-regarded and have an impressive track record of obtaining substantial results on behalf of stockholders in class action and derivative litigation across the country.

Bragar's attorneys have decades of experience litigating shareholder derivative lawsuits, securities class actions, merger and acquisition actions, and consumer rights actions, obtaining well over a billion dollars in recoveries for clients and class members. The firm is comprised of highly skilled litigators who have secured excellent recoveries in shareholder derivative actions. Bragar has performed substantial work in identifying and investigating claims in this action, and possesses the requisite experience, knowledge, and resources required to pursue this action further. Bragar has the financial resources to fully prosecute this action, as it has done in similar actions many times over. Bragar's firm resume is attached as Exhibit 1 to the Briscoe Declaration and reflects the firm's credentials and significant experience in this regard.

Of particular note to this litigation, BES has successfully prosecuted and tried shareholder derivative actions. For example, in *In re Activision Blizzard, Inc. Stockholder Litigation*, 124 A.3d 1025 (Del. Ch. 2015), Bragar, as co-lead counsel, represented investors alleging that Activision's Chief Executive Officer Bobby Kotick and Chairman Brian Kelly put their own interests over those of other shareholders when an investment vehicle they controlled bought more than $2 billion worth of stock concurrent with Activision's $5.8 billion equity buyback from its former majority stakeholder. On the eve of trial, the firm secured a settlement of $275 million, by far the largest monetary settlement in the history of the Court of Chancery and the largest cash derivative settlement in the country. In addition, the settlement provided significant corporate governance benefits to the class. Vice Chancellor J. Travis Laster stated, "Lead Counsel brought a particular blend of expertise, initiative, and ingenuity to the case. In my view, few litigation teams could

have achieved this result against the determined, well-represented, and aggressive adversaries that Lead Counsel faced."

Bragar, as lead counsel, also prosecuted and successfully tried claims on behalf of El Paso Pipeline Partners, L.P., a public Master Limited Partnership, and its unaffiliated partners against its general partner and sponsor, El Paso Corporation (now merged into Kinder Morgan, Inc.) in *In re El Paso Pipeline Partners, L.P. Derivative Action*, Case No. 7141-VCL (Del. Ch.). The claims arose out of a 2010 "drop down" of certain pipeline assets from the general partner to the partnership. Following trial, the Court of Chancery found that the Special Committee that recommended approval of the transaction did not form a subjective belief that the transaction was in the best interests of the partnership and, therefore, that the general partner breached the partnership agreement by engaging in the transaction. The Court of Chancery found that the partnership was harmed in the amount of $171 million. On February 4, 2016, the Court of Chancery entered a final judgment in favor of the unaffiliated limited partners of El Paso Pipeline Partners, L.P., and against its general partner in the amount of $100 million, plus pre- and post-judgment interest, in favor of the unaffiliated limited partners of El Paso Pipeline Partners, L.P., and against its general partner.

In addition, Bragar served as co-lead counsel in *In re Cornerstone Therapeutics Inc. Stockholder Litigation*, Cons. C.A. No. 8922-VCG (Del. Ch.). That action challenged the acquisition of Cornerstone by Chiesi Farmaceutici S.p.A., an Italian company that already owned a 65% stake, alleging that the Cornerstone board members were conflicted and tilted toward the interests of Chiesi, and that Cornerstone's outstanding shares were worth significantly more than the $9.50-per-share value put to a vote. The lawsuit resulted in a $17.9 million settlement, which

increased the consideration paid to shareholders by 25.3%, from the original $9.50-per-share public proposal to $11.90 per share.

In sum, the experience and prior success of Bragar unquestionably demonstrates the competence of the firm to lead this litigation. The firm possesses the financial resources, personnel, and substantive expertise necessary to litigate the case vigorously, and has served, and will continue to serve, the best interests of all derivative plaintiffs and the Company while at the same time achieving the efficiencies required by the core principles of multidistrict litigation.

Similarly, and as its firm resume reflects, attorneys at Briscoe are highly experienced in complex litigation and securities matters, among other practice areas. *See* Briscoe Decl., Ex. 2. Attorneys at Briscoe have experience in achieving substantial recoveries in class actions, and its attorneys have extensive familiarity with the Local Civil Rules and practice norms of this Judicial District. Moreover, Willie Briscoe is a former enforcement attorney for the United States Securities and Exchange Commission, the Enforcement Division ("SEC"). While at the SEC, Mr. Briscoe prosecuted and/or investigated more than forty cases involving corporate fraud, financial accounting fraud and earnings restatements, insider trading, and other general corporate malfeasance issues. Prior to joining the SEC, Mr. Briscoe was a criminal prosecutor for the Dallas County District Attorney's Office, where he tried more than 70 jury trials to judgment. Briscoe's firm resume is attached as Exhibit 2 to the Briscoe Declaration and reflects the firm's credentials and significant experience in this regard.

IV. CONCLUSION

For the foregoing reasons, Walkover respectfully requests the Court (i) vacate the existing leadership structure and (ii) appoint Walkover as Lead Plaintiff, Bragar as Lead Counsel, and Briscoe as Local Counsel.

Dated: September 11, 2020

Respectfully submitted,

/s/ Willie C. Briscoe

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on all counsel of record through the Court's CM/ECF system on this 11th day of September 2020.

/s/ Willie C. Briscoe
WILLIE C. BRISCOE