UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BOCA RATON POLICE and FIRE FIGHTERS' RETIREMENT SYSTEM, Plaintiff, v. EXXON MOBIL CORPORATION, a New Jersey Corporation, Defendant.	Case No. 3:25-cv-18060-ZNQ-TJB **Motion Day: March 2, 2026** **ORAL ARGUMENT REQUESTED**

PLAINTIFF'S MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

Exxon's motion to dismiss should be denied. Congress enacted Section 14(a) of the Exchange Act to "prevent[] the recurrence of abuses which . . . [had] frustrated the free exercise of the voting rights of stockholders," and to ensure that each shareholder is informed "of the real nature of the questions for which authority to cast his vote is sought." *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964) (citing H.R. Rep. No. 1383, at 14; S. Rep. No. 792, 73rd Cong., 2d Sess., at 12 (1934)).[1]

Nearly a century later, Exxon seeks to resurrect those "abuses" through its Automatic Voting Program: a scheme to procure automatic shareholder votes for nominees and outcomes recommended by Exxon's Board. Once shareholders sign up for the Program, their votes will automatically be cast in favor of the Board on all issues—including disputed elections and major transactions—in perpetuity.

Contrary to Exxon's misleading rhetoric, the Program is ***not*** a content-neutral way to increase voting by retail investors. Rather, the Program's core feature is that it ***only*** allows automatic voting in line with the Board's recommendations.

No democracy—and no public company in the modern era—has implemented such a radical system of one-party voting. Nor has any court ever approved one. That is unsurprising, since Exxon's Program squarely violates both federal and state

[1] "¶"citations refer to the Complaint (ECF 1); capitalized terms have the meanings stated therein. Emphasis is added and citations are omitted unless otherwise noted.

law: (1) Section 14(a) and numerous proxy rules thereunder; and (2) the New Jersey statute governing the legal use of voting proxies, N.J.S.A. 14A:5-19.

First, Plaintiff amply alleges Exxon's violations of Section 14(a), which prohibits proxy solicitations in violation of SEC rules. Exxon initially tries to avoid the merits by disputing Plaintiff's Article III standing and trying to re-cast Plaintiff's direct claims as derivative. These arguments violate the Court's order that expressly "limited" Exxon's motions "to the arguments set forth in" its "pre-motion letter[]" (ECF 11), which made no mention of either issue (ECF 9). Beyond that, Exxon is wrong: Plaintiff alleges direct injuries to its federally-protected voting rights that were caused by Exxon's violations and are redressable by this Court, including through declaratory and injunctive relief. Nothing more is required.

Exxon makes little effort to defend its actual violations of the SEC proxy rules. For example, there is no real dispute that Exxon has solicited proxies to vote after "the next annual meeting" and "with respect to more than one meeting," violating Rules 14a-4(d)(2) and (3). Under the Program's terms, proxies "will remain effective and in place for ***every*** shareholder meeting until you cancel the instruction." (ECF 1-5 at 8.) Exxon has also violated Rule 14a-12, which prohibits obtaining any "proxy, consent or authorization" before a "definitive proxy statement" is "sent or given to security holders." There is no dispute that Exxon has procured shareholders' consent and authorization to vote before disseminating a definitive proxy statement.

Exxon's primary response is asserting that Program proxies are temporally limited because shareholders can manually cancel or override their automatic votes. But Exxon ignores that unless shareholders take further action, by default, their shares will continue to be voted automatically in line with the Board's recommendations. And Exxon cites no authority for the notion that the mere option to manually "override" illegal votes somehow cures the illegality built into the Program's automatic voting. It does not. Moreover, the No Action Letter—which does not even address ten of Exxon's twelve federal violations—is not persuasive, much less binding, and cannot overcome the plain language of the proxy rules.

Unable to defend its unlawful Program on the merits, Exxon primarily attacks Plaintiff's allegations of "economic loss" and "loss causation." While Plaintiff alleges both, Exxon invokes the wrong standard: Section 14(a) only requires "injury," which includes "harm from the infringement of [Plaintiff's] corporate suffrage rights," *Ash v. GAF Corp.*, 723 F.2d 1090, 1094 (3d Cir. 1984), and does not require monetary damages to obtain injunctive relief. *Infra* at 33-36.

Second, under New Jersey law, the Program's purportedly perpetual proxies last only 11 months. N.J.S.A. 14A:5-19(1). Exxon's plan to vote the original proxies indefinitely without obtaining new proxies every 11 months violates New Jersey law.

Third, Exxon's attacks on Plaintiff's request for injunctive relief are premature and mistaken. Plaintiff will move for injunctive relief at the appropriate time.

FACTUAL ALLEGATIONS

A. Exxon Adopts the Unlawful Automatic Voting Program

Exxon's poor strategic choices have destroyed shareholder value and generated a series of disputes, including litigation against shareholders and a costly proxy contest that led to the election of three dissident director nominees. ¶¶29–46.

In the wake of these contentious events, Exxon decided to enact the Automatic Voting Program to solicit perpetual proxies in favor of Exxon's Board. ¶¶47–56. Exxon admittedly spent "years" developing the Program. (Br. at 7.)

Under the Program, once shareholders join, their shares will automatically vote in accordance with the Board's recommendations at ***all*** future shareholder meetings. ¶48. Since the Program never expires, Program shares will continue to vote for the Board's recommendations decades in the future. Notably, the Program has no mechanism to determine whether participating shareholders are still alive. And Exxon is soliciting perpetual proxies that are extraordinarily broad. They include votes on ***all*** issues—including contested director elections, votes to approve mergers, and votes for directors who have yet to be identified (much less disclosed to shareholders) to fill new Board seats created in the future.[2] ¶48.

The Program is a naked entrenchment device. ¶¶50-51. Its clear purpose is

[2] Specifically, the Program allows shareholders to apply the perpetual proxy to "all matters." (ECF 1-3 at 3 of 7.)

to amass "sticky," perpetual, and automatic votes in favor of Exxon's current Board, and thereby squash shareholder dissent. Exxon's own marketing materials tout the Program as a device to "***align your vote with the Board's recommendations***." (ECF 1-5 at 4 of 11.) Notably, Exxon itself previously asserted that "automatic submissions" of votes "undermine shareholder engagement efforts" and "short-circuit the shareholder engagement process"—yet that is precisely what Exxon's illegal Program now seeks to accomplish. ¶55. Instead of winning elections on the merits, Exxon's Board has resorted to locking up the vote in advance.

Exxon is the first public company in the modern era to adopt such a scheme. The point of voting is that shareholders decide how to vote in each election based on the merits and issues at the time—not that they commit in advance to supporting the Board in perpetuity, regardless of new facts that emerge in the future. *See* ¶¶5–7.

Exxon's claims that it implemented the Program to bolster retail shareholder participation and encourage "shareholder democracy" are gaslighting. If the Program were truly about "shareholder democracy," why does it only allow automatic voting for one party? Tellingly, Exxon offers no answer.

To be sure, Exxon has argued that shareholders can purportedly override the automatic default votes under the Program. But that is an illusion because they are unlikely to do so, like individuals that forget to cancel subscriptions that auto-renew. ¶¶17, 49. The Program targets shareholders who have not consistently voted, then

capitalizes on the fact that—once enrolled—they are unlikely to spend further time and effort to manually withdraw or manually vote against the Board. *Id.*

B. The Program Violates Multiple Federal Proxy Rules

On September 17, 2025, Exxon publicly filed proxy materials related to the Program. As detailed further below (*infra* at 17-26), these solicitation materials violated numerous SEC rules pursuant to Regulation 14A. ¶¶66–78. For example:

Rule 14a-4(d)(1) prohibits proxies from voting "for the election of any person to any office for which a bona fide nominee is not named in the proxy statement"—yet Exxon is unlawfully soliciting perpetual proxies to elect directors to Board seats where ***no*** bona fide nominee has been named in the proxy statement. ¶67.

Rules 14a-4(d)(2) and (3) prohibit proxies to "vote at any annual meeting other than the next annual meeting" and proxies to "vote with respect to more than one meeting." ¶¶68–69. The Program squarely violates these rules by unlawfully allowing perpetual proxies to vote at annual meetings far into the future. *Id.*

Rule 14a-4(d)(4) provides that proxies may only authorize "the action proposed to be taken in the proxy statement." ¶70. However, the Program unlawfully allows perpetual proxies to vote for actions and matters not listed in the current proxy statement, including votes for new directors and other matters. *Id.*

Further, Exxon violated Rule 14a-9's prohibition on solicitations that contain "false or misleading" statements or material omissions, since Exxon is soliciting

proxies from shareholders without providing ***any*** information about the specific matters on which the Board will cast their votes. ¶74. Exxon has also violated numerous other rules by (among other things) soliciting undated, perpetual proxies before disseminating any proxy statement or current annual report. ¶¶71–73, 76–78.

Aware of these extensive violations, on September 15, 2025, Exxon requested and received an SEC "no action" letter, which narrowly stated that the reviewing SEC staff would not recommend an enforcement action against the Program under Rule 14a-4(d)(2) and Rule 14a-4(d)(3) (the "No Action Letter"). ¶¶57–58. As discussed below, the No Action Letter—which is a non-binding statement by SEC staff, not the Commission itself—addresses only two of the twelve federal proxy violations at issue and does not cure any of Exxon's violations. *Infra* at 20-22.

C. Recent Developments Threaten Ongoing Harm

Even as Exxon attempts to delay this litigation and avoid the merits, Exxon is moving quickly to implement the unlawful Program in advance of its 2026 annual meeting just three months from now.

By mid-October 2025, individual shareholders began receiving "invitations" to opt into the Program. ¶18. Exxon has resorted to misleading statements to market the Program, such as exaggerating the time required for proxy voting. ¶52.

Exxon has already enlisted investors in the Program, and the first tainted votes pursuant to the Program are imminent: they will likely occur in March or April 2026,

in advance of Exxon's next annual meeting in May 2026. ¶84.

ARGUMENT

Exxon's motion should be denied because the Complaint alleges "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court must "assume all . . . factual allegations to be true, construe those truths in the light most favorable to the plaintiff, and then draw all reasonable inferences from them." *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 790 (3d Cir. 2016).

I. EXXON'S SOLICITATION OF PERPETUAL PROXIES VIOLATES SECTION 14(A) AND THE FEDERAL PROXY RULES

Plaintiff alleges Exxon's violations of Section 14(a) and the proxy rules thereunder. Under Section 14(a), it is "unlawful for any person" to "solicit any proxy or consent or authorization in respect of any security" in "contravention of such rules and regulations as the Commission may prescribe[.]" 15 U.S.C. § 78n(a)(1). Those proxy rules (17 C.F.R. § 240.14a-1, *et seq.*) prescribe limits on proxies' duration and restrict how proxy solicitations may be conducted, among other relevant provisions.

Section 14(a) was enacted in response to "great corporate frauds [that] had been perpetrated through management solicitation of proxies that did not indicate to the shareholders the nature of any matters to be voted upon." 3 Thomas Lee Hazen, Treatise on the Law of Securities Regulation § 10.1[1] (6th ed. 2009) (cited in *Trinity Wall St. v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 334-35 (3d Cir. 2015)).

The Supreme Court held over 60 years ago that Section 14(a) provides a private right of action to redress violations. *See Borak*, 377 U.S. 426. "The language of section 14(a) . . . contains no suggestion of a scienter requirement[.]" *Gould v. American–Hawaiian S.S. Co.*, 535 F.2d 761, 777 (3d Cir. 1976).

A. Plaintiff Has Article III Standing

Exxon first attempts to dispute Plaintiff's Article III standing—an argument not raised in its pre-motion letter (ECF 9)—in violation of this Court's Order (ECF 11). Exxon concedes its violation in a footnote (Br. at 12 n.6).

In any event, Exxon's standing argument is specious because Plaintiff readily satisfies the elements of Article III standing: injury-in-fact, causation, and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Injury-in-fact: Plaintiff amply alleges that it "suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice[.]" *Lujan*, 504 U.S. at 561. Here, Plaintiff alleges three distinct injuries.

First, Plaintiff has suffered a direct injury to its voting rights. Plaintiff is entitled to vote in elections that comply with applicable law—yet the Program's violations taint every election while it is in effect. ¶80. Thus, "Exxon's violations of Section 14(a) and Regulation 14A are impairing Plaintiff's voting rights." ¶91.

That specific injury to Plaintiff's federally-protected voting rights is a classic "invasion of a legally protected interest" that confers Article III standing. *Spokeo*, 578 U.S. at 339 & n.7. There is no question that Plaintiff's voting rights are expressly protected by Section 14(a) and the federal proxy rules thereunder. Indeed, the Third Circuit has recognized—in a decision Exxon itself cites—that "harm from the infringement of [Plaintiff's] corporate suffrage rights" is sufficient under Section 14(a), which has a "prophylactic purpose" and "must protect the shareholders' right of corporate suffrage." *GAF Corp.*, 723 F.2d at 1094;[3] *see also Greenlight Capital, L.P. v. Apple, Inc.*, 2013 WL 646547, at *9 (S.D.N.Y. Feb. 22, 2013) (granting preliminary injunction where plaintiffs otherwise would be "denied their legal right to an unbundled vote" in violation of Section 14(a) and proxy rules). As the Third Circuit has explained, the proxy rules "must protect investors, preserve their role in directing the future of the corporation, and assist them in keeping management accountable to the corporate populus." *GAF Corp.*, 723 F.2d at 1094.

In response, Exxon merely denies that it "deprived or interfered with Plaintiff's ability to vote its shares" (Br. at 14). But that is a red herring because the Program inherently taints Exxon's elections and infringes Plaintiff's "legal right" to

[3] *GAF Corp.* found injury absent where the plaintiff never voted in the election and there was no evidence that the defendant's violations "injured [other shareholders'] fundamental rights of corporate suffrage" or "impaired the integrity of the election." *Id.* at 1095. Nonetheless, the Circuit recognized that if the defendant "continued the same" violations, "a district court could enjoin them from such practices." *Id.* n.1.

vote in elections that comply with the proxy rules. *Greenlight Capital*, 2013 WL 646547, at *9. The Court should reject Exxon's myopic argument that voters suffer no harm from rigged elections because they can still cast their own votes.

Contrary to Exxon's position, the injury to Plaintiff's federally-protected voting rights is not "speculative" (Br. at 14): Exxon already started to solicit perpetual proxies under the facially illegal Program, the first tainted votes are imminent, and Exxon's next annual meeting will take place in three months.

The law is clear that Plaintiff is not required to wait until ***after*** an illegal election to seek redress. *See Friends of the Earth, Inc. v. Laidlaw Env'tal Servs.*, 528 U.S. 167, 185-86 (2000) ("for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress").

Indeed, under Section 14(a), courts have repeatedly enjoined proxy rule violations before unlawful elections.[4] "That the court could later undo the damage caused by an illegal proxy by voiding the results of the election is not an adequate

[4] *See, e.g.*, *Greenlight Capital*, 2013 WL 646547, at *9; *Lone Star Steakhouse & Saloon, Inc. v. Adams*, 148 F. Supp. 2d 1141, 1150 (D. Kan. 2001) ("[m]onetary damages cannot restore the right of shareholders to effectively exercise their corporate suffrage rights," and "post-vote relief [cannot] be considered an effective remedy"); *Cap. Real Est. Invs. Tax Exempt Fund Ltd. P'ship v. Schwartzberg*, 917 F. Supp. 1050, 1064–65 (S.D.N.Y. 1996) (enjoining proxy solicitation in "apparent violation of Rules 14a–3 and 14a–6," although the "vote on the mergers is weeks and perhaps months away").

alternative where, as here, the court can prevent in advance a shareholder vote to be taken on potentially misleading and incomplete information." *Chambers v. Briggs & Stratton Corp.*, 863 F. Supp. 900, 906 (E.D. Wis. 1994).

Second, the Program dilutes Plaintiff's vote by creating a large block of automatic votes in favor of the Board, requiring a supermajority of non-Program shares to defeat Board proposals. ¶¶81-82. Plaintiff's "diminution in voting power" is not a "natural consequence" of other "shareholders exercising their existing voting rights." (Br. at 15.) Rather, it is the artificial—and illegal—result of Exxon locking up the vote with perpetual, automatic proxies. There is nothing "natural" about that, especially since Exxon has misled investors into joining the Program. ¶52. And Exxon's claim that the Program encourages "voting *by all shareholders*, regardless of the outcome of the vote" (Br. at 17 (emphasis in original)), is false. The Program is not outcome-neutral—it ***only*** allows automatic voting in favor of the Board.

Exxon's claim that no court has recognized injury-in-fact from encouraging "other shareholders" to vote (Br. at 15) is another red herring—that is not what the Program does—and ignores that no other company has attempted such blatant violations of the proxy rules. Exxon also ignores the case law enjoining proxy rule violations under Section 14(a), *supra*, and wrongly conflates the injury-in-fact requirement for Article III standing with the pleading requirements for Section 14(a) claims. None of Exxon's cases address injury-in-fact from proxy violations.

Exxon's cited federal cases also bear no resemblance to the facts here. In *General Electric Co. ex rel. Levit v. Cathcart*, 980 F.2d 927, 933 (3d Cir. 1992), proxy statements allegedly enabled the re-election of directors who "continued to mismanage the company." *See also In re Affiliated Comput. Servs. Derivative Litig.*, 540 F. Supp. 2d 695, 704 (N.D. Tex. 2007) (same). *Kelley v. Rambus, Inc.*, 2008 WL 5170598, at *8 (N.D. Cal. Dec. 9, 2008), involved an "unsupported theory"—raised for the first time in an opposition brief—about hypothetical dilution.

Exxon's citations to Delaware cases are equally off-base: Exxon's election-rigging has nothing to do with permissible voting restrictions in charters, *Providence & Worcester Co. v. Baker*, 378 A.2d 121, 123 (Del. 1977), or dilution from good-faith corporate transactions, *Feldman v. Cutaia*, 956 A.2d 644, 656 (Del. Ch. 2007). And Exxon's own citation to *Pell v. Kill*, 135 A.3d 764 (Del. Ch. 2016), refutes its assertion that a "stockholder's voting *power* is not sacrosanct" (Br. at 16 (emphasis in original)). In fact, *Pell* held the opposite. There, a "Board Reduction Plan" eliminated two of three board seats up for re-election. 135 A.3d at 787. Although shareholders could still vote for one seat, the court held that "[t]his loss of voting power constitutes irreparable injury" and enjoined the "Plan." *Id.* at 793.

Third, the dilution of Plaintiff's vote and entrenchment of the current Board are value-destructive for Plaintiff. ¶83. Whether Exxon's stock price has declined is irrelevant, since it is well established that conflicted blockholders tend to harm

shareholder value. *Id.*

Causation and Redressability: Satisfying the remaining elements of Article III standing, Plaintiff's injuries (1) are fairly traceable to the unlawful Program and (2) will be redressed by a favorable decision from this Court. The Program is the direct cause of the injury to Plaintiff's federally-protected voting rights, the dilution of Plaintiff's vote, and the devaluation of Plaintiff's shares. And Exxon does not dispute that this Court has the power to decide whether the Program is legal. "It is likely that a declaratory judgment stating that the [Program] is [unlawful] and an injunction enjoining [Exxon] from enforcing it would prevent Plaintiff['s] injuries." *Kim v. Hanlon*, 2024 WL 1342568, at *4 (D.N.J. Mar. 29, 2024) (Quraishi, J.) (collecting authority), *aff'd*, 99 F.4th 140 (3d Cir. 2024).

B. Plaintiff's Federal Claims Are Direct, Not Derivative

Exxon further argues that Plaintiff's claims are derivative—another argument absent from Exxon's pre-motion letter (ECF 9) that Exxon now raises in violation of the Court's Order (ECF 11).

In any event, Exxon is wrong. Under New Jersey law, claims are direct (and not derivative) where a "special injury exists." *Strasenburgh v. Straubmuller*, 683 A.2d 818, 829 (N.J. 1996). A special injury exists (1) "where there is a wrong suffered by [a] plaintiff that was not suffered by all stockholders generally," ***or*** (2) "where the wrong involves a contractual right of the stockholders, ***such as the right***

to vote." *Id.* (quoting *In re Tri–Star Pictures, Inc.*, 634 A.2d 319, 330 (Del. 1993)).

While either type of special injury is independently sufficient to assert a direct claim, Plaintiff alleges both.

First, Plaintiff's claims are direct because Exxon's unlawful Program violates Plaintiff's voting rights. The law is settled that infringements of voting rights establish special injury and give rise to direct claims. That is because violations of shareholders' voting rights do not implicate the corporation's own rights or "derive" from harm to the corporation. The Supreme Court of New Jersey recognized as much in *Strasenburgh*, 683 A.2d at 829-30 (special injury exists where there is a "wrong involving a contractual right of a shareholder, such as the right to vote, . . . which exists independently of any right of the corporation"). *See also In re Tyson Foods, Inc.*, 919 A.2d 563, 601 (Del. Ch. 2007) ("Where a shareholder has been denied one of the most critical rights he or she possesses—the right to a fully informed vote—the harm suffered is almost always an individual, not corporate, harm."); *In re JPMorgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 772 (Del. 2006) ("where it is claimed that a duty of disclosure violation impaired the stockholders' right to cast an informed vote, that claim is direct"). Exxon simply ignores Plaintiff's special injury from violations of its voting rights.

Second, Plaintiff has separately suffered a special injury because the impact of Exxon's violations "was not suffered by all stockholders generally."

Strasenburgh, 683 A.2d at 829. Because the Program is a one-way ratchet—it ***only*** generates votes in favor of Exxon's Board—shareholders who continue to support Exxon's Board are not directly harmed. By contrast, Plaintiff has suffered a distinct harm from the dilution of its vote and Exxon's efforts to secure a large block of perpetual "sticky" votes in the Board's favor. This distinction—which Exxon ignores—confirms Plaintiff's special injury because the Program does not harm all shareholders equally. *See Tri–Star*, 634 A.2d at 330 ("a claim of stock dilution and a corresponding reduction in a stockholder's voting power is an individual claim").

None of Exxon's cases transform Plaintiff's direct claims into derivative ones.

To start, Exxon's cases involving breaches of fiduciary duty, waste, and other corporate injuries are irrelevant because Plaintiff asserts no such claims.[5]

As to Section 14(a), Exxon cites only two unpublished out-of-Circuit cases. Neither supports its attempt to misclassify Plaintiff's direct claims as derivative.

First, Exxon states that *Vogel v. Jobs*, 2007 WL 3461163, at *3 (N.D. Cal. Nov. 14, 2007), held that a Section 14(a) dilution claim was derivative. But Exxon misleadingly fails to mention that the Ninth Circuit expressly ***reversed*** that holding because the allegation that "shareholders were deprived of the right to a fully informed vote" asserted an injury "independent of any injury to the corporation,"

[5] *See, e.g.*, *Onyx Enters. Canada, Inc. v. Royzenshteyn*, 2025 WL 62834, at *6 (D.N.J. Jan. 8, 2025); *Kramer v. Western Pacific Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988).

such that the plaintiff's "claim for injury to its right to a fully informed vote is a direct claim." *N.Y.C. Emps.' Ret. Sys. v. Jobs*, 593 F.3d 1018, 1022-23 (9th Cir. 2010) (collecting Delaware authority). The same is true here.

Second, in *Rambus*, 2008 WL 5170598, at *8, the court merely ruminated in a footnote that "there remain substantial questions" about whether certain Section 14(a) claims were direct.

Finally, Exxon notes that Plaintiff "sues *only* ExxonMobil, not its Board." (Br. at 20 (emphasis in original).) That is the point: This is not a derivative suit "to protect the interests of the corporation from the misfeasance and malfeasance of 'faithless directors and managers.'" *Strasenburgh*, 683 A.2d at 829. Instead, Plaintiff seeks to hold ***Exxon itself*** accountable for its violations of federal and New Jersey law, which have injured Plaintiff. Those claims are direct, not derivative.

C. Plaintiff Adequately Alleges Exxon's Proxy Rule Violations

As detailed below, Exxon committed twelve violations of proxy rules under Section 14(a)—ten of which the No Action Letter does not even address.

1. Exxon Violated Rule 14a-4(d)

Exxon violated four separate subsections of Rule 14a-4(d). "Rule 14a-4(d) was promulgated to eliminate a practice of soliciting proxies for the election of directors without making disclosure of the persons who would be nominated and for whom the proxies would be voted." *Aegis Corp. v. Goldman*, 523 F. Supp. 1273,

1279 (S.D.N.Y. 1981) (citing E. R. Aranow & H. A. Einhorn, Proxy Contests for Corporate Control (2d ed. 1968) at 165-66). Exxon's Program resurrects that practice by unlawfully soliciting perpetual proxies without any "disclosure of the persons who would be nominated and for whom the proxies would be voted." *Id.*

First, Rule 14a-4(d)(1) prohibits proxies from voting "for the election of any person to any office for which a bona fide nominee is not named in the proxy statement"—yet Exxon is unlawfully soliciting perpetual proxies ***now*** to elect directors to Board seats where ***no*** bona fide nominee is named in the proxy statement. ¶67. Exxon has yet to file a proxy statement for 2026 (much less subsequent years). Notably, the No Action Letter does not address this Rule.

Second, Rule 14a-4(d)(2) prohibits proxies to "vote at any annual meeting other than the next annual meeting." ¶68. The Program violates this Rule by unlawfully allowing perpetual proxies to vote at annual meetings far into the future. *Id.* Indeed, the Tenth Circuit has noted that this Rule "seems to clearly bar use of a proxy for shareholder votes after the next annual meeting." *Genberg v. Porter*, 882 F.3d 1249, 1257 (10th Cir. 2018).

Third, Rule 14a-4(d)(3) prohibits proxies to "vote with respect to more than one meeting." ¶69. Again, the Program's perpetual proxies violate this Rule.

Fourth, the Program violates Rule 14a-4(d)(4), which provides that proxies may only authorize "the action proposed to be taken in the proxy statement." ¶70.

The Program unlawfully allows perpetual proxies to vote for actions and matters not listed in the current proxy statement, including votes for new directors and other matters. *Id.* The No Action Letter does not address this Rule.

Exxon's violations directly contradict the letter and purpose of these Rules. For example, Rule 14a-4(d)(2) was enacted "to prevent the premature solicitation of proxies at a time when material information has not yet become available." 13 Fed. Reg. 6679 (Nov. 13, 1948). The Program does exactly that by soliciting perpetual proxies before Exxon has made material information available to shareholders.

Exxon's only response is to suggest that "participating shareholders are required to make [a] choice each year" of whether to "reaffirm" or "override" their standing voting instructions. But that is simply not true—no "choice" is "required." By default, Program shares are ***automatically*** voted in accordance with the Board's recommendations every year. ¶48. Shareholders are ***not*** required to "reaffirm" their votes; absent further action, their shares will be voted automatically in line with the Board's recommendations. As Exxon's own marketing materials state, Program "shares will be automatically voted according to the Board's recommendations—***no further action is needed on your part***." (ECF 1-5 at 10 of 11.)

Indeed, that is the point: once shareholders sign up, they are unlikely to manually withdraw from the Program or change their automatic votes. ¶49. Exxon cannot claim that the Program is necessary because manual voting "is inconvenient

and potentially overwhelming" (Br. at 1–2), then excuse the Program's illegality by speculating that shareholders might manually override their perpetual proxies.

As such, Exxon's attempt to recharacterize the Program as involving "proxy votes limited only to 'the next annual meeting,'" and to "action[s] proposed to be taken in the proxy statement" (Br. at 25), fails. That is not how the Program works.

a. The Non-Binding No Action Letter Is Not a Defense

In a footnote (Br. at 25 n.11), Exxon implies that the No Action Letter immunizes certain proxy rule violations. Exxon is wrong.

First, the No Action Letter is narrow and qualified. Exxon's broad assertion that the No Action Letter confirmed "that the Program complied with Rule 14a-4(d), as well as the other Proxy Rules" (Br. at 25 n.11), is false. In truth, the No Action Letter merely states that "the Division of Corporation Finance will not recommend enforcement action to the Commission under Exchange Act Rule 14a-4(d)(2) or Rule 14a-4(d)(3)." (ECF 1-4 at 2 of 3.) It "does not express . . . any views on any other questions that [Exxon's] request may raise, including compliance with other provisions of the federal proxy rules or the federal securities laws." ¶61. Thus, it says nothing about ***ten other violations*** at issue here. ¶¶67, 70–78. The fact that Exxon omitted these clearly relevant rules from its request indicates that it understood the SEC would not grant a no-action letter as to those rules. ¶¶17, 58. The No Action Letter also does not address Exxon's violation of New Jersey law.

Second, on the narrow issues it purports to address, the No Action Letter is not even persuasive, much less binding. Beyond the fact that it "provides neither authority nor rationale," *Gryl ex rel. Shire Pharms. Group PLC v. Shire Pharms. Group PLC*, 298 F.3d 136, 145 (2d Cir. 2002), the No Action Letter itself makes clear that it "does not express any legal conclusion on the questions presented." ¶61. And as Exxon concedes, the No Action Letter is not binding on this Court. (Br. at 25 n.11.) The Third Circuit has recognized that SEC "no-action letters are not binding—they reflect only informal views of the staff and are not decisions on the merits"—and expressly rejected "the view" that they hold "any persuasive value." *Trinity Wall St.*, 792 F.3d at 331 & 342 n.11.

Thus, courts in this Circuit have regularly rejected SEC no-action letters and similar guidance. For example, in *SEC v. Fierro*, 2023 WL 4249011, at *6 (D.N.J. June 29, 2023), Judge Castner rejected the defendants' argument that they were not dealers under the Exchange Act based on factors derived from "SEC guidance" and "No-Action Letters," since these materials were not "binding authority," and "the Court need not look past the clear statutory language of the Exchange Act in favor of a factors-based approach to determine if Defendants were engaged in dealer activity." *Id.* And Exxon's own cited case, *Vorchheimer v. Phila. Owners Ass'n*, 903 F.3d 100, 111 (3d Cir. 2018), held that a joint statement from the Department of Housing and Urban Development and the DOJ was "unpersuasive" and "cannot

overcome the plain meaning" of a statutory term.

The same is true here. The No Action Letter simply ignores—and cannot overcome—the plain language of Rule 14a-4(d)(2) and Rule 14a-4(d)(3), which expressly prohibit proxies to "vote at any annual meeting other than the next annual meeting" and proxies to "vote with respect to more than one meeting." ¶¶68-69.

2. Exxon Violated Numerous Other Proxy Rules

Exxon also violated numerous other proxy rules that the No Action Letter does not address.

Rule 14a-3 and 14a-12: Rule 14a-3 bars solicitations until shareholders receive a publicly filed proxy statement containing (among other things) various "current" information and information for the "last fiscal year," and an "annual report" with audited financial statements for the "most recent fiscal years." ¶71. Exxon violated this Rule by conducting a proxy solicitation before disseminating this required information. Exxon also violated Rule 14a-12, which establishes strict requirements for solicitations before a definitive proxy statement is filed. ¶77.

Exxon's initial response is the mistaken assertion, addressed above, that manual voting overrides cure the Program's illegality. Again, Exxon is wrong because (1) absent further action, the Program automatically votes shares by default, (2) manual overrides do not cure prior violations, and (3) Exxon is soliciting proxies before disseminating the required information, and any purported future distribution

of proxy materials cannot cure the illegal solicitation that has already occurred.

Beyond that, Exxon wrongly argues that Rule 14a-12 somehow "overrid[es]" Rule 14a-3's disclosure requirements by allowing certain "solicitation before furnishing a proxy statement." (Br. at 26.) That argument fails because Exxon violated Rule 14a-12 itself, which prohibits solicitations that furnish or request "the forms of proxy, consent or authorization" before a "definitive proxy statement" is "sent or given to security holders." 17 C.F.R. § 240.14a-12.

Here, in violation of the Rule, Exxon has prematurely furnished a "form[] of proxy" and requested shareholders' "proxy, consent or authorization" before disseminating any definitive proxy statement. *Id.* Specifically, Exxon's emails and letters to shareholders urge them to "**Opt In Now**" via a button, link, and QR code for the Program website. (ECF 1-5 at 4-7 of 11.) In turn, the website allows shareholders to submit a "standing voting instruction" by which they "are agreeing" that their shares will be "voted at all future shareholders' meetings consistent with the recommendations of ExxonMobil's Board of Directors." (ECF 1-5 at 8 of 11.) Once the voting instruction is submitted, no further action is required. All of this is active: the Program website (https://qa.tinybfs.com/t/aJLMhy) is operational now.

Thus, Exxon's solicitation improperly includes a "form of proxy" and seeks shareholders' "consent or authorization" to cast votes, which is a "proxy" under the

Rules.[6] 17 C.F.R. § 240.14c-1(g). Yet Exxon has failed to disseminate any definitive proxy statement—a facial violation of Rule 14a-12. Because Exxon did not comply with Rule 14a-12, it cannot hide behind that Rule to excuse its other violations. As Exxon admits, Rule 14a-12 only allows solicitations "provided the conditions of the rule are complied with." (Br. at 26 (quoting *Rabbani v. Enzo Biochem, Inc.*, 682 F. Supp. 2d 400, 415 (S.D.N.Y. 2010)).) Crucially, Exxon essentially concedes that the Program violates SEC rules if its Rule 14a-12 arguments fail. (*See* Br. at 31.)

Rule 14a-5 and -6: These Rules require proxy statements to disclose deadlines for submitting shareholder proposals and nominees (Rule 14a-5(e)) and specify deadlines and requirements for filing proxy materials (Rule 14a-6). ¶¶72-73. It is undisputed that Exxon has not provided any of the information, or complied with the deadlines, required by these Rules.

Exxon's first response is its mistaken argument that Rule 14a-12 somehow "overrides" these Rules. Not so. Beyond the fact that Exxon violated Rule 14a-12 itself (as explained above), Rule 14a-12 does not "override" any of the other proxy rules that Exxon violated. For example, the narrow ability to conduct limited solicitation before filing a proxy statement does not authorize making material misstatements (Rule 14a-9) or securing proxies for multiple annual meetings (Rule

[6] A "form of proxy," "when executed by a shareholder, provides to the party soliciting the proxy the authority to act for the shareholder." *Chambers*, 863 F. Supp. at 905. The Program's standing voting instructions plainly do so.

14a-4(d)(2)-(3)). Indeed, in adopting Rule 14a-12, the SEC made clear that "[t]he revised rule does ***not***, however, expand a company's . . . ability to secure promises to vote a certain way before a proxy statement is provided." 64 Fed. Reg. 61414 (Nov. 10, 1999). Thus, regardless of Rule 14a-12, issuers cannot secure votes for management before disseminating a proxy statement—yet Exxon has done so.

Exxon's improper factual argument that it will purportedly "comply with the requirements" by sending proxy materials before future shareholder meetings cannot erase the illegal solicitation that has already occurred, as explained above. Exxon is locking up votes ***now*** that will remain in effect for years or decades. Distributing proxy materials ***after*** that unlawful solicitation of automatic votes in favor of the Board is too little, too late. And Exxon's assertion that shareholders can "vote differently on any issue at any time" (Br. at 29) does not cure Exxon's violations, since Program shares are automatically voted by default, as explained above.

Rule 14a-9: Exxon violated Rule 14a-9's prohibition on proxy solicitations that contain "false or misleading" statements or material omissions by soliciting proxies from shareholders while omitting ***any*** information about the specific matters on which their votes will be cast. ¶74. There is no dispute that Exxon's solicitation materials omit the actual matters to be voted. Exxon's main response—that it does not know "whether and which such matters will come up for a vote" (Br. at 29)—concedes the point. Again, Section 14(a)'s purpose is to ensure that each shareholder

is informed "of the real nature of the questions for which authority to cast his vote is sought." *Borak*, 377 U.S. at 431. Exxon has done the opposite by soliciting proxies without disclosing "the real nature of [those] questions," *id.*, such as the directors being nominated. And again, Exxon's promise to provide proxy statements ***after*** its unlawful solicitation, and hypothetical future manual voting overrides, cannot cure its prior violations.

Rule 14a-10: Rule 14a-10 prohibits the solicitation of "[a]ny undated or postdated proxy" and "[a]ny proxy which provides that it shall be deemed to be dated as of any date subsequent to the date on which it is signed by the security holder." 17 C.F.R. § 240.14a-10. Exxon violated this Rule by soliciting undated proxies that are voted on undisclosed dates in the future. ¶76. There is no dispute that the proxies are undated and will continue to be voted on future, undisclosed dates. Exxon's sole response is the mistaken assertion, refuted above, that the ability to manually "override" standing voting instructions somehow cures the prior violations.

Rule 14a-19: Finally, Rule 14a-19 requires special disclosures in contested elections, yet Exxon seeks proxies to vote in such elections without making the required disclosures. ¶78. Again, Rule 14a-12 does not "override" this Rule, and future disclosures and manual voting overrides cannot cure Exxon's prior violations.

3. All of the Relevant Proxy Rules Support a Private Right of Action

Unable to defend its violations on the merits, Exxon further argues that "most"

of the proxy rules at issue "do not create any implied private right of action."[7] This newly-minted argument again violates the Court's Order (ECF 11).

In all events, Exxon is wrong: Section 14(a) plainly provides a private right of action to challenge Exxon's violations of all the proxy rules at issue here.

Exxon's contrary argument—which ignores Section 14(a)'s text, history, and purpose—has been rejected by every Court of Appeals to consider the issue.

Start with the statutory text. Section 14(a) broadly prohibits proxy solicitations that violate "such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78n(a)(1). That language makes no distinction between individual proxy rules. Thus, as the SEC wrote nearly 30 years ago:

> ***There is no basis in the statutory language for limiting the Section 14(a) private right of action to particular Commission rules.*** To the contrary, the operative language of Section 14(a) prohibits the solicitation of proxies except in accordance with "such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." The explicit reference to Commission rules, and the absence of any limitation on the face of the statute, is thus ***inconsistent with any restriction of the Section 14(a) private right of action***.

Amicus Brief of the SEC, *Koppel v. 4987 Corp.*, 1998 WL 34088514, at *7.

Section 14(a)'s history confirms that the private right of action extends to all violations of Regulation 14A. As the SEC explained:

[7] Exxon concedes that Rule 14a-6 and 9 support private claims. (*See* Br. at 33.)

> The absence of any evidence of Congressional intent to limit the private right of action under Section 14(a) to a particular Commission rule is hardly surprising, since the statute was enacted well before the Commission promulgated the implementing rules. As noted by Judge (now Justice) Ruth Bader Ginsburg in the D.C. Circuit decision recognizing that the private right of action extends to cases involving Commission Rule 14a-8:
>
> "Because the Commission rules implement, and do not antedate, section 14(a), it is all the more artificial to attribute to Congress an intent to allow a private remedy for violation of Rule 14a-9, but not for violation of Rule 14a-8." *Roosevelt v. E.I. Du Pont de Nemours & Co.,* 958 F.2d 416, 423 n. 12 (D.C. Cir. 1992).

1998 WL 34088514, at *7–8. Indeed, Exxon's argument would create an arbitrary patchwork where only certain proxy rules under Section 14(a) are subject to private enforcement, while others are not. There is no basis for that "artificial" result, *id.*, especially since the rules at issue were all enacted in "a comprehensive proxy regulation scheme promulgated by the SEC pursuant to Section 14(a)." *MONY Grp., Inc. v. Highfields Capital Mgmt., L.P.*, 368 F.3d 138, 144 (2d Cir. 2004).

Section 14(a)'s purpose also confirms that Exxon is wrong. As the Supreme Court found in *Borak*, "among [Section 14(a)'s] chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result." 377 U.S. at 432. Indeed, "[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action," since "the possibility of civil damages or injunctive relief serves as a most effective weapon in the

enforcement of the proxy requirements." *Id.*

Thus, over 60 years ago, the Supreme Court held in *Borak* that Rule 14a-9 supports a private right of action. *Id.* at 431–33. Since *Borak*, federal courts have repeatedly recognized private rights of action under other proxy rules. As the SEC has explained, "[e]very court of appeals that has considered the issue has concluded that there is a private right under Section 14(a), ***regardless of the rule at issue***." 1998 WL 34088514 at *8 (citing *Roosevelt,* 958 F.2d at 425 (Rule 14a-8); *Rauchman v. Mobil Corp.*, 739 F.2d 205, 207-08 (6th Cir. 1984) (Rule 14a-8); *Haas v. Wieboldt Stores, Inc.,* 725 F.2d 71, 73 (7th Cir. 1984) (Rule 14a-7); *Greater Iowa Corp. v. McLendon,* 378 F.2d 783, 794-99 (8th Cir. 1967) (Rules 14a-1 through 14a-11)).

The Third Circuit is no exception. In *GAF Corp.*, 723 F.2d 1090, the Circuit held that a corporation's practice of mailing the annual report so it was likely to be received after the proxy materials violated Rule 14a-3(b).

And in *Koppel v. 4987 Corp.*, 167 F.3d 125, 134 (2d Cir. 1999), the Second Circuit held that "an implied private right of action exists under § 14(a) for violations of Rules 14a-4(a)(3) and 14a-4(b)(1)." As the *Koppel* court explained:

> [A] private right of action for the antibundling rules is appropriate. That is, such a right comports generally with the congressional intent identified in *Borak*, falls within the contours of similar private rights of action granted by the Supreme Court and other Circuits, and does not raise the policy concerns that motivated the Court to decline to extend a private right of action in *Virginia Bankshares*.

167 F.3d at 135. Here, Exxon cannot overcome Section 14(a)'s text, history, and purpose. Nor does Exxon offer any basis to ignore the numerous Courts of Appeals that have uniformly recognized private rights of action under multiple proxy rules. Indeed, Exxon cites ***no case*** where any court has declined to recognize a private right of action under ***any*** proxy rule pursuant to Section 14(a).[8]

Instead, Exxon merely offers generic citations to Supreme Court decisions that supposedly "caution[] against recognizing or expanding private rights of action." (Br. at 33.) None of Exxon's cases support its position. For example, *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), calls for evaluating whether a statute "displays an intent to create not just a private right but also a private remedy." But that ship has already sailed; the Supreme Court recognized over 60 years ago that Congress intended for Section 14(a) to support private claims.

And while Exxon cites *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991), for the proposition that "the breadth of the right once recognized should not, as a general matter, grow beyond the scope congressionally intended," *Virginia Bankshares* also recognized that where "a legal structure of private statutory rights

[8] *Varjebedian v. Emulex Corp.*, 888 F.3d 399, 409 (9th Cir. 2018), is irrelevant because it concerned a different statutory provision—Section 14(d)(4)—where a private right of action would be "redundant" because it would simply duplicate the existing private right of action to challenge misrepresentations and omissions in connection with a tender offer. No such duplication exists here. Exxon's remaining cases are even further removed from Section 14(a)'s well-established framework of private rights of action for proxy rule violations.

has developed . . . the contours of that structure ***need not be frozen absolutely*** when the result would be demonstrably inequitable to a class of would-be plaintiffs with claims comparable to those previously recognized." *Id.* at 1104.

Here, there is no dispute that a "legal structure of private statutory rights" under Section 14(a) has developed over the last six decades. *Id.* Indeed, as shown above, courts have recognized claims for, among other things, delayed mailings (Rule 14a-3(b)); bundling violations (Rule 14a-4(a) and (b)); failure to mail proxy materials (Rule 14a-7); failure to include shareholder proposals in proxy materials (Rule 14a-8); and misstatements in proxy solicitations (Rule 14a-9).

Exxon's attempt to have the "contours" of such claims "frozen absolutely" by barring private claims for the proxy rules at issue "would be demonstrably inequitable to a class of would-be plaintiffs with claims comparable to those previously recognized." 501 U.S. at 1104. There is no reason why shareholders should be able to sue for bundling violations, for example, but not Exxon's premature solicitation of perpetual proxies. Plaintiff's claims are fully consistent with Congress's intent to protect "fair corporate suffrage" and ensure that proxies advise each shareholder "of the real nature of the questions for which authority to cast his vote is sought." *Borak*, 377 U.S. at 431. By contrast, denying shareholders the ability to sue for such violations would grant corporations like Exxon free rein to violate the securities laws, secure in the knowledge that no shareholder could

challenge their illegal practices. That is not the law.

Finally, unable to find any precedent or policy to support its position, Exxon tries to parse the proxy rules based on whether they speak to "the form of proxy or solicitation," or the "obligations" of the company or the "rights" of investors. This also fails. For one thing, many of the Rules at issue are expressly directed to shareholders or Exxon. *See, e.g.*, Rule 14a-3 ("each person solicited"); Rule 14a-10 ("No person . . . shall solicit" any "undated or postdated proxy"). As to the remaining Rules, Exxon ignores that courts have recognized private rights of action to enforce proxy rules directed to the form of proxy or solicitation. *See, e.g.*, *Koppel*, 167 F.3d at 134–35 (sustaining private right of action for antibundling rules directed to "the form of proxy"). More importantly, Exxon ignores Section 14(a)'s overarching purpose of investor protection and ensuring current disclosure in advance of each vote. That purpose does not vary with the syntax of each individual proxy rule.[9]

D. Plaintiff Alleges Section 14(a) Injury and Causation

As discussed above, Exxon's illegal Program directly caused Plaintiff's injuries from the infringement of Plaintiff's voting rights, the dilution of Plaintiff's vote from a large block of automatic votes in favor of the Board, and the devaluation

[9] Indeed, Exxon's own case, *Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 302 n.19 (3d Cir. 2007), recognizes that "[t]he apparent 'focus' of a statute might have more to do with Congress's writing style than its intent," so "[w]e do not consider Congress's use of the passive voice a reliable guide to its intent to create personal rights."

of Plaintiff's Exxon shares. *Supra* at 9-14. That is more than sufficient to plead Section 14(a) "injury" and "a causal relationship between the violation of the rule or regulation and the injury." *GAF Corp.*, 723 F.2d at 1092–93.

First, Exxon wrongly asserts that Section 14(a) requires "economic loss." But Section 14(a) only requires "injury," which need not be economic: "harm from the infringement of [Plaintiff's] corporate suffrage rights" is sufficient. *GAF Corp.*, 723 F.2d at 1094. Similarly, the Supreme Court has recognized that "[i]n many suits under § 14(a), particularly where the violation does not relate to the terms of the transaction for which proxies are solicited, it may be impossible to assign monetary value to the benefit" achieved through litigation. *Mills v. Electric Auto–Lite Co.*, 396 U.S. 375, 396 (1970). That would make no sense if economic loss was required.

Second, Section 14(a) does not require economic loss or monetary damages to obtain injunctive relief. Indeed, "[m]onetary damages cannot restore the right of shareholders to effectively exercise their corporate suffrage rights." *Lone Star*, 148 F. Supp. 2d at 1150. That is especially true because it is difficult or impossible to quantify damages for many proxy violations. *See Mills*, 396 U.S. at 396; *cf. Polaroid Corp. v. Disney*, 862 F.2d 987, 1006 (3d Cir. 1988) ("[i]rreparable harm arises because of the difficulty of proving money damages" and causation "with concomitant quantifiable monetary loss").

Courts have repeatedly enjoined Section 14(a) proxy rule violations without

allegations of economic loss or monetary damages. For example, *Greenlight Capital*, 2013 WL 646547, at *9, found irreparable harm and granted a preliminary injunction against proxy proposals that violated anti-bundling rules under Section 14(a)—despite the fact that "***no monetary damages appl[ied]***." Similarly, *Aegis Corp.* enjoined a scheme in violation of Rule 14a-4(d) to create and fill board vacancies with directors who were not named in the proxy statement. As the court explained: "Although Goldman's two step process has not yet been successful, it is the process which is in question here, not the result." 523 F. Supp. at 1279-80. And in *CNW Corp. v. Japonica Partners, L.P.*, 874 F.2d 193, 194, 198 (3d Cir. 1989), the Third Circuit enjoined a proxy solicitation "for the upcoming meeting" that violated Section 14(a)'s disclosure requirements without requiring economic loss or damages. This established practice of enjoining Section 14(a) violations ***before*** unlawful elections confirms that economic loss is not required for injunctive relief. *See supra* n.4 (collecting authority).

Third, Exxon argues that the PSLRA requires loss causation to obtain injunctive relief. Not so: the PSLRA only requires proving loss causation as to "the loss for which the plaintiff seeks to recover ***damages***." 15 U.S.C. § 78u-4(b)(4). That narrow provision expressly applies only to "damages"—not declaratory or injunctive relief—and cannot be expanded beyond its plain language. "There is no support . . . for a departure from the plain meaning of the text that Congress enacted."

Bowen v. Massachusetts, 487 U.S. 879, 897 (1988). And "damages" are plainly not injunctive relief. *Id.* (noting "the time-honored distinction between damages and specific relief" and "the ordinary understanding of the term [money damages] as used in the common law for centuries").[10]

Further, Congress enacted the PSLRA in 1995 against the backdrop of federal courts' centuries-old equitable power, grounded in the Judiciary Act of 1789, to issue declaratory and injunctive relief. *See, e.g.*, *Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). The PSLRA's loss causation requirement "to recover damages" does not displace that equitable authority. Thus, since the PSLRA's enactment, courts have routinely granted injunctive relief under Section 14(a) without addressing loss causation or damages. *See, e.g.*, *Greenlight Cap.*, 2013 WL 646547 at *9 (S.D.N.Y. 2013); *MONY Grp.*, 368 F.3d at 147 (2d Cir. 2004) (distributing "duplicate proxy cards . . . during a closely contested shareholder vote without complying with Rule 14a-3(a) would cause [plaintiff] irreparable harm"); *Lone Star*, 148 F. Supp. 2d at 1150 (D. Kan. 2001);

[10] Legislative history confirms that the PSLRA's loss-causation provision only applies to damages: both the Senate and House Reports stated that it was directed to whether a "misstatement . . . caused the loss incurred by the plaintiff" and offered the example of a share price that "was artificially inflated as the result of the misstatement or omission." S. Rep. No. 104-98, at 15 (1995); H.R. Conf. Rep. No. 104-369, at 41 (1995). The Section 10(b) stock-drop concept does not apply to Section 14(a) claims based on violations such as Exxon's perpetual proxies and failure to timely disseminate proxy statements and annual reports.

Schwartzberg, 917 F. Supp. at 1064-65 (S.D.N.Y. 1996).

Exxon's citations cannot overcome this authority. Most significantly, the statement in *Jobs*, 593 F.3d at 1023–24—a Ninth Circuit decision that is not binding on this Court—that the "PSLRA does not differentiate between plaintiffs seeking legal and equitable remedies" is directly refuted by the PSLRA's text, which only requires loss causation to "recover damages." Bound by the Ninth Circuit's error, *Eisner v. Meta Platforms, Inc.*, 2024 WL 4545968, at *3 (N.D. Cal. Oct. 22, 2024), simply parroted *Jobs* and similarly ignored the PSLRA's language.

Moreover, *Jobs* does not address injunctive relief (the plaintiff sought rescission) and solely addressed a Rule 14a-9 claim based on misstatements. There is no reason to apply the PSLRA's loss causation requirement to requests for injunctive and declaratory relief under other proxy rules, as here. Indeed, that is why courts have repeatedly granted injunctive relief under Section 14(a) after the PSLRA's enactment without addressing loss causation, as shown above. In a footnote (Br. at 23 n.10), Exxon tries to wave away such cases by asserting that they did not address loss causation, but that is the point: there was no need to, since the PSLRA's loss causation requirement does not apply to injunctive relief.

Finally, in all events, Plaintiff alleges economic loss and loss causation, and explicitly seeks "damages." (¶¶23, 91, 95 & Request for Relief.) Plaintiff is not required to quantify damages in its pleading, and need only allege "some indication

of the loss and the causal connection" to Exxon's violations. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). The Complaint does so: the illegal Program has diluted Plaintiff's votes (which have economic value), impaired Plaintiff's voting rights, and thereby devalued its shares. ¶¶82, 82 n.68, 83, 91. Exxon's premature attacks on these well-pleaded allegations are insufficient and merely raise fact issues for a later stage.

II. EXXON VIOLATED NEW JERSEY LAW

N.J.S.A. 14A:5-19(1) provides: "No proxy shall be valid for more than 11 months, unless a longer time is expressly provided therein." In violation of this plain language, Exxon's Program creates perpetual proxies with no expiration date.[11]

That shareholders can purportedly cancel the perpetual proxies does not mean they "expressly state[] the period of duration[.]" (Br. at 37.) For one thing, proxies in the Program that are ***not*** canceled will remain effective indefinitely. For another,

[11] Exxon's footnoted suggestion that N.J.S.A. 14A:5-19(1) does not support a private right of action fails. As an Exxon shareholder, Plaintiff is "a member of the class for whose special benefit the statute was enacted"; "the Legislature intended to confer a private right of action because [the statute] does not vest" a regulator, as opposed to private plaintiffs, "with the power of exclusive enforcement"; and "an implicit private right of action furthers rather than frustrates the legislative scheme." *Paterson Bd. of Educ. v. Pritchard Indus., Inc.*, 2025 WL 337796, at *9-10 (N.J. Super. Ct. App. Div. Jan. 30, 2025), *cert. denied*, 337 A.3d 910 (2025). Indeed, a key purpose of the statute is "to provide adequate protection for shareholders." Report of Corporation Law Revision Commission on the General Corporation Law of New Jersey (Senate, No. 884) (1968), at v.

the statute refutes Exxon's argument because it provides that, by default, proxies "shall be revocable at will." N.J.S.A. 14A:5-19(1). As a result, revocability alone cannot "expressly provide[]" a duration longer than 11 months. Otherwise, ***every*** proxy would automatically exceed 11 months, and the statute's 11-month limit and requirement that "a longer time [be] expressly provided therein" would both be superfluous. New Jersey courts "do not support interpretations that render statutory language as surplusage[.]" *Burgos v. State*, 118 A.3d 270, 287 (N.J. 2015).

Moreover, several courts have held that indefinite proxies violated analogous state proxy statutes. *Stein v. Capital Outdoor Advertising, Inc.*, 159 S.E.2d 351, 355 (N.C. 1968), addressed a North Carolina statute that provided: "A proxy is not valid after the expiration of eleven months from the date of its execution unless the person executing it specifies therein the length of time for which it is to continue in force." Under this statute, a proxy that did "not specify the length of time for which it was to continue in force . . . automatically expired [after] eleven months." *Id.* Notably, a provision that allowed the grantor "to withdraw or terminate" the proxy on certain conditions did not affect the court's conclusion: "It could not extend the life of the proxy beyond [11 months] since this provision is not a specification of the length of time for which the proxy was to continue." *Id.* The same is true here.[12]

[12] *See also Morris v. Herbert E. Orr Co.*, 1986 WL 3796, at *5 (Ohio Ct. App. Mar. 28, 1986) (Ohio statute invalidated proxies after eleven months "unless the writing

Exxon's citations do not change that result. For example, the statement in *Wadman v. McBirney*, 443 A.2d 978, 983 (Md. Ct. Spec. App. 1982), that "a proxy may be endless if the proxy, itself, so states" was dictum, since the proxy at issue expired after ten years. And unlike in *CII Parent, Inc.*, 2023 WL 2926571, at *11 (Bankr. Del. Apr. 12, 2023), and *Mainiero v. Microbyx Corp.*, 699 A.2d 320, 326 (Del. Ch. 1996), Exxon's perpetual proxies do not expire upon any external event.

Finally, Exxon's purported future distribution of proxy materials does not establish the proxies' duration or cure Exxon's violation. Exxon is soliciting proxies now that, by default, will be voted automatically every year in line with the Board's recommendations. *Supra* at 19. Those perpetual proxies violate N.J.S.A. 14A:5-19.

III. PLAINTIFF IS ENTITLED TO INJUNCTIVE RELIEF

The Court need not address Exxon's premature challenge to Plaintiff's request for injunctive relief, since Plaintiff has not yet moved for an injunction. Courts have regularly rejected such premature attacks, which "are not proper on a 12(b)(6) motion to dismiss, as they go to what evidence should be adduced on a motion for a

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specifies the date on which it is to expire or the length of time it is to continue in force"; indefinite proxy that "contained no specified period of time for which it was given nor any specified date on which it would terminate within itself" expired after 11 months); *Auto W., Inc. v. Baggs*, 678 P.2d 286, 290 (Utah 1984) (Utah statute invalidated proxies "after eleven months from the date of execution, unless otherwise provided in the proxy"; proxies that "did not state any time at which they would terminate; on their faces they were indefinite in length" were invalid).

preliminary injunction, rather than the sufficiency of the allegations in the operative complaint." *Ryerson v. New Jersey*, 2007 WL 749813, at *9 (D.N.J. Mar. 7, 2007); *see also Brewer v. Hayman*, 2007 WL 2688939, at *4 (D.N.J. Sept. 11, 2007) (same). Exxon cites no authority denying an injunction at this stage.

In any event, because Plaintiff's Complaint states valid claims—and Exxon's ongoing violations irreparably harm Plaintiff's "legal right" to a lawful vote—injunctive relief is warranted. *Greenlight Capital*, 2013 WL 646547, at *9. Indeed, "the public interest and investor protection are well-served when persons faced with solicitations that do not comply with the proxy rules are able to go to court to obtain equitable relief to assure that their opponents play by those rules." 1998 WL 34088514, at *15-16. And the equities do not favor Exxon's illegal Program. As explained above, Section 14(a)'s purpose is to prevent "abuses" that "frustrate[] the free exercise" of shareholders' "voting rights" and ensure that each shareholder is informed "of the real nature of the questions for which authority to cast his vote is sought." *Borak*, 377 U.S. at 431. By soliciting perpetual proxies—without disclosing information necessary to an informed vote—Exxon is doing the opposite.

CONCLUSION

For the reasons above, Exxon's motion to dismiss should be denied. Alternatively, Plaintiff requests leave to amend the Complaint to cure any deficiencies the Court may identify.

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Respectfully submitted,

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(*Pro Hac Vice* admissions pending)