

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

INSTITUTIONAL SHAREHOLDER  
SERVICES INC.,

Plaintiff,

V.

KEN PAXTON, in his official capacity as  
Attorney General of Texas,

Defendant;

THE TEXAS STOCK EXCHANGE and  
THE TEXAS ASSOCIATION OF  
BUSINESS,

**Intervenor-Defendants.**

Civil Action No. 25-cv-01160-ADA

**PLAINTIFF’S MOTION TO COMPEL INTERVENORS’ COMPLIANCE WITH  
FEDERAL RULE OF CIVIL PROCEDURE 26(a)(1)**

Plaintiff Institutional Shareholder Services Inc. (“ISS”) respectfully files this Motion to Compel pursuant to Federal Rules of Civil Procedure 26 and 37, to require Intervenor-Defendants The Texas Stock Exchange LLC (“TXSE”) and The Texas Association of Business (“TAB” and, collectively, “Intervenors”) to supplement their deficient initial disclosures.

### **INTRODUCTION**

Intervenors’ initial disclosures are blatantly deficient under Rule 26, as they fail to identify *any* individuals associated with Intervenors, or any of Intervenors’ documents, that they “may use to support [their] claims or defenses.” Fed. R. Civ. P. 26(a). Intervenors are taking the position that discovery into them, and particularly their claims that ISS’ misleading speech has harmed their listees or members, is inappropriate and that only discovery produced by ISS will be used to litigate this case. The notion that Intervenors could voluntarily intervene in this case, wave around allegations of fraud, claim that Intervenors and their future listees and members are harmed by ISS’ conduct, and then wholly avoid *any* discovery to test those assertions strains credulity. After all, Intervenors have repeatedly touted that “[d]iscovery is essential.” ECF No. 46 at 16. Discovery into Intervenors’ assertions of fraud and resulting harm is clearly warranted, and Intervenors should be ordered to supplement their initial disclosures to allow the parties to engage in meaningful discovery.

### **BACKGROUND**

ISS claims that Texas Senate Bill No. 2337 (“SB 2337”) is unconstitutional under the First and Fourteenth Amendments, as applied to ISS. *See* ECF Nos. 1 & 48. On August 22, 2025, TXSE and TAB moved to intervene in this lawsuit on behalf of their future listees and members to defend SB 2337. *See* ECF No. 30 at 10 (representing companies TXSE “will soon list and regulate,” and moving “on behalf of [TAB’s] public-company members”). Intervenors claim a “substantial

interest” in Texas’s regulation of ISS, and specifically in preventing ISS from “speaking falsely about matters of corporate governance that directly impact the Texas companies that TXSE and TAB represent and those companies’ shareholders.” *Id.* at 6, 9. In support of their intervention request, TXSE and TAB submitted declarations asserting that they “will be harmed if ISS obtains its requested relief.” *See* ECF Nos. 30-1 ¶ 13 & 30-2 ¶ 13.

Intervenors argue that SB 2337 is constitutional because ISS’ speech is supposedly “false” and ISS allegedly engages in “commercial deception that is unprotected by the First Amendment.” ECF No. 46 at 14. Intervenors doubled down on this position during the Court’s August 29 hearing:

- “[S]tatements that the proxy advisors have made to the public are false,” ECF No. 44 at 121:21-22;
- ISS “speak[s] falsely to the market about their products,” *id.* at 122:2;
- ISS is engaged in “ongoing deception,” *id.* at 122:12;
- ISS is engaged in “false commercial speech,” *id.* at 124:1;
- “[P]roxy advisors say one thing to the public and one thing to this Court and then say the exact opposite,” *id.* at 124:19-21; and
- “[I]nvestors are not getting the truth,” *id.* at 124:24-25.

Based on ISS’ supposed “falsehoods,” Intervenors claim that “Texas public companies—including TXSE’s prospective listees and TAB’s members—and their shareholders will continue to be harmed by false and misleading proxy advice” if the Attorney General is enjoined from enforcing SB 2337 against ISS. ECF No. 30 at 1, 16; *see also* ECF No. 46 at 11-12.

The parties served initial disclosures on September 12, 2025. Despite the above, Intervenors did not identify anyone from TXSE (or its listees or potential listees) or TAB (or its members) that may have information relevant to Intervenors’ claims or defenses. *See* Ex. 1, Intervenors’ Initial Disclosures at 2. Nor did Intervenors identify any documents or categories of documents that may support their case, aside from those attached to their preliminary injunction

briefing and discovery “produced by any party or any third parties in this case.” *Id.* at 3.

ISS identified these deficiencies in a September 29, 2025 letter to Intervenor and requested that they supplement their disclosures to comply with Rule 26. *See* Ex. 2, B. Oakley Ltr. to M. Rasmussen (Sept. 29, 2025). The parties met and conferred on October 3, 2025, during which Intervenor advised that they do not intend to supplement their initial disclosures.

### **ARGUMENT**

Under Rule 26(a)(1), initial disclosures must identify both (i) individuals and (ii) documents (or a description of the categories of documents) “that the disclosing party may use to support its claims or defenses.” Fed. R. Civ. P. 26(a)(1)(A)(i), (a)(1)(A)(ii); *see* Fed. R. Civ. P. 37(a)(3)(A) (permitting motion to “compel disclosure” required by Rule 26(a)). The purpose of this rule is simple: “get out the basic information at an early point.” *See* 8A Wright & Miller’s Federal Practice & Procedure § 2053 (3d. ed. 2025). ISS otherwise cannot “access the information [Intervenor] may use to build [their] case and probe it,” undermining the purpose of Rule 26 altogether. *Open Cheer & Dance Championship Series, LLC v. Varsity Spirit, LLC*, 2025 WL 2053286, at \*3 (N.D. Tex. July 21, 2025); *see also Joe Hand Promotions, Inc. v. Chios, Inc.*, 544 F. App’x 444, 446 (5th Cir. 2013) (“The basic purpose of Rule 26 is to prevent prejudice and surprise.”) (citation modified).

Intervenor mount two main defenses to SB 2337. First, they claim that First Amendment scrutiny should not even apply in this case because ISS is engaged in “false” and “deceptive” speech. ECF No. 46 at 12. Second, Intervenor assert that, if ISS’ speech constitutes commercial speech, SB 2337 is subject to and survives strict scrutiny because “Texas has a compelling interest in remedying the proxy advisors’ false statements, and the required disclosures are narrowly tailored to achieve that interest.” *Id.* at 14 n.4. Intervenor insist that “[r]edressing the harm the

proxy advisors' deception has caused, and the reliance their false statements have engendered, is constitutional." *Id.* at 12.

It goes without saying that Intervenors will need to back up these remarkable claims with evidence showing that Intervenors, or the entities they represent, have actually been harmed by ISS' supposedly "false," "misleading," and "deceptive" speech. *See, e.g.*, ECF No. 46 at 1, 12-14; Aug. 29, 2025 Hr'g Tr. at 114:23-25, 121:21-124:25; ECF No. 46 at 1-2, 5-6, 9, 11, 13, 14-15. If Intervenors intend to argue that ISS' alleged fraudulent conduct removes First Amendment protection altogether, ISS is entitled to test the foundation of these allegations through discovery, which ISS believes will reveal that they are entirely baseless.<sup>1</sup> ISS must be allowed to probe who Intervenors believe is supposedly misled, what supposedly misled them, and whether they were in fact misled. *See Express Oil Change, L.L.C. v. Miss. Bd. of Licensure for Prof. Eng'rs & Surveyors*, 916 F.3d 483, 488 (5th Cir. 2019) (noting that, under commercial speech doctrines, "[s]tatements that are only *potentially* misleading, however, are safeguarded by the First Amendment"). That includes discovery not only into TXSE and TAB, but also into the entities they claim to represent in connection with their intervention.

As to their argument regarding strict scrutiny, Intervenors have taken the position that SB 2337 is supported by a compelling state interest in preventing fraud. Discovery into Intervenors, who are making these fraud allegations, is wholly appropriate, as even Attorney General Paxton recognized in his initial disclosures when he identified representatives of both TXSE and TAB as individuals who may have information regarding "the specific state interests that SB 2337 helps

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<sup>1</sup> By representing to the Court that their future listees and members have been harmed at all, they have opened the door to discovery into that issue, at a minimum. *See* Fed. R. Civ. P. 11(b) (noting that counsel must certify that, when making representations to the Court, "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support *after a reasonable opportunity for further investigation or discovery*" (emphasis added)).

promote and is designed to protect.” *See* Ex. 3, Paxton’s Initial Disclosures at 3-4.

That same discovery will also be squarely relevant to ISS’ request for permanent injunctive relief, where ISS “must demonstrate” that, “considering the balance of hardships” between the parties, “a remedy in equity is warranted” and “that the public interest would not be disserved by a permanent injunction.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). And Intervenor may be required to separately establish their standing in this case, including on appeal, requiring discovery into Intervenor’s purported injuries. *See, e.g., Louisiana v. Haaland*, 86 F.4th 663, 666 (5th Cir. 2023) (“[T]o appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing.”) (citation omitted).

Intervenor’s initial disclosures are thus deficient on their face. It is simply not believable that, given Intervenor’s charges, they cannot identify *any* individuals, entities, or categories of documents that may be used in support of their case. Intervenor made various representations about the impact ISS has supposedly had on TXSE and TAB, as well as their respective potential listees and members. If those representations were genuine, then there must have been some factual basis for making them, whether because certain companies or individuals contacted Intervenor, or because Intervenor are aware of documents that they believe substantiate their claims. That is precisely the type of information that should be included in their initial disclosures. Absent such information, ISS has no way of knowing where to direct its discovery efforts or what facts it needs to develop to prosecute its claims and rebut Intervenor’s defenses.

Furthermore, in light of the expedited schedule in this case, and the compressed discovery period, Intervenor cannot delay compliance with Rule 26 to a later date without causing substantial prejudice to ISS. It is insufficient to simply put off supplementing initial disclosures for some undefined time in the future, at which point the discovery process may be nearly finished.

*Hughes v. Uber Techs., Inc.*, 2025 WL 1000688, at \*2 (E.D. La. Apr. 3, 2025) (noting that Rule 26’s “disclosure requirements operate ‘to accelerate the exchange of basic information about the case’”) (citing Fed. R. Civ. P. 26(a) advisory committee’s note (1993 amendment)); *Jones v. RealPage, Inc.*, No. 19-2087, 2020 WL 6149969, at \*2 (N.D. Tex. Oct. 19, 2020) (“Under Rule 26(a)(1) . . . a party must make certain initial disclosures within the early stages of litigation without awaiting a discovery request.”). In that case, ISS would have no meaningful opportunity to pursue any additional discovery in response to Intervenor’s supplemental initial disclosures without jeopardizing either (i) the case schedule or (ii) ISS’ ability to prove its claims through discovery. In either instance, ISS is unduly prejudiced by Intervenor’s failure to comply with foundational litigation rules.

### **CONCLUSION**

For the foregoing reasons, the Court should grant this motion and direct Intervenor to immediately supplement their initial disclosures.

Respectfully submitted,

/s/ Bruce D. Oakley

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*Counsel for Plaintiff Institutional Shareholder Services Inc.*

Dated: October 10, 2025

**CERTIFICATE OF CONFERENCE**

I certify that Plaintiff's counsel has conferred with Intervenor's counsel regarding their initial disclosures during the parties' meet and confer on October 3, 2025. Intervenor's counsel confirmed that they do not intend to amend their deficient initial disclosures at this time.

Respectfully submitted,

/s/ Bruce Oakley  
Bruce Oakley

**CERTIFICATE OF SERVICE**

I certify that on October 10, 2025, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

Respectfully submitted,

/s/ Bruce Oakley  
Bruce Oakley