

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,

Intervenors.

Civil Action No. 25-cv-01160-ADA

INTERVENORS' RESPONSE IN OPPOSITION TO PLAINTIFF'S
MOTION TO COMPEL INTERVENORS' COMPLIANCE WITH FRCP 26(A)(1)

Intervenors the Texas Stock Exchange and the Texas Association of Business oppose Plaintiff's *Motion to Compel Intervenors' Compliance with Federal Rule of Civil Procedure 26(a)(1)*, Dkt. 56 (the "Motion"). In the Motion, Institutional Shareholder Services Inc. ("ISS") seeks to mandate what witnesses and documents Intervenors should use to defend this case. But this contradicts Rule 26(a)(1), which requires disclosure of information "that *the disclosing party* may use to support its claims and defenses." Fed. R. Civ. P. 26(a)(1)(i)-(ii) (emphasis added). Intervenors complied with the rule by identifying ISS's witnesses, documents ISS and third parties will produce, and public documents attached to Intervenors' filings in this case.

Intervenors expect this will provide the core evidence in defense of SB 2337, which was enacted to prevent ISS and other proxy advisors from falsely telling their clients that their proxy voting recommendations are based on impartial financial analysis. The public information that is available provides evidence of that deception; however, further evidence of ISS's false and misleading statements is expected to be contained in ISS's reports and recommendations, as well as in the methodologies, analysis, and communications underlying those recommendations. That information is not publicly available and is in the possession of ISS, not Intervenors. It is therefore unsurprising that Intervenors expect to use ISS's documents and witnesses, in addition to information from public sources and third parties, to support their defense of SB 2337. None of ISS's red herring arguments about the proper scope of merits discovery or discovery into Intervenors' standing have any merit. Therefore, the Motion should be denied.

Finally, to address ISS's complaint and refocus this expedited case on the issues that are actually of consequence, Intervenors have served amended initial disclosures to identify two individuals employed by Intervenors.

ARGUMENT

The Motion should be denied because ISS is not allowed to dictate what documents and witnesses Intervenor intend to rely on to defend this case. Rule 26(a)(1) requires only disclosure of information that the *disclosing party* “may use to support its claims and defenses.” Fed. R. Civ. P. 26(a)(1)(i)-(ii). “The plain, unambiguous language of [Rule 26(a)(1)] makes it clear that such disclosures are based on what the *disclosing party* believes it will use to support its claims or defenses at trial, not what the *opposing party* believes to be relevant.” *Meltzer/Austin Rest. Corp. v. Benihana Nat’l Corp.*, 2013 WL 75762, at *2 (W.D. Tex. Jan. 4, 2013) (emphasis in original). *See also Porterfield v. JP Morgan Chase*, 2013 WL 12392525, at *1 (W.D. Tex. Feb. 15, 2013). In short, under Rule 26(a)(1), Intervenor—and not ISS—are entitled to determine what they will rely on to support their defenses and are required to disclose only that information.

It should come as no surprise to ISS that Intervenor intend to rely principally on ISS’s witnesses and information, as well as information from public sources and third parties, to defend the statute. The Fifth Circuit recently observed that, in resolving First Amendment challenges to statutes, a district court must consider “fact-intensive” questions “after thorough discovery” into the “*covered actors*” that are regulated by the statute. *See NetChoice, L.L.C. v. Paxton*, 121 F.4th 494, 497 (5th Cir. 2024) (emphasis added). Here, the “covered actor” is ISS. As Intervenor have made clear, a core part of their defense is to show that SB 2337 is constitutional because it addresses the false and misleading statements made by ISS to its clients in connection with the proxy voting recommendations ISS makes about Texas public companies. *See Intervenor’s Resp. in Opp. to Pl. ISS’s and Pl. Glass Lewis’s Mots. for a Prelim. Inj.*, Dkt. 46, at 14-15.

For that reason, Intervenor are seeking discovery from ISS on topics such as ISS’s reports and recommendations; the financial analysis (if any) that forms the basis of ISS’s recommendations; the marketing materials that contain ISS’s representations to the market; and ISS’s contracts with

clients. This information, which will show, among other things, how ISS develops its recommendations and what it relies on to formulate its voting advice, is in the possession of ISS (and third parties), not Intervenors. Intervenors sufficiently disclosed this information in their initial disclosures and therefore satisfied the requirements of Rule 26.

None of ISS's arguments compels a different conclusion. ISS argues that, unless Intervenors amend their initial disclosures, "ISS has no way of knowing where to direct its discovery efforts." Mot. at 5. But this misstates the scope and purpose of initial disclosures. Indeed, Rule 26(a)(1) "does not require [a party] to identify everyone with relevant information," but instead, "requires disclosure of individuals that the disclosing party 'may use to support its claims or defenses.'" *Kirkpatrick v. HomeAway.com, Inc.*, 2019 WL 7758917, at *2 (W.D. Tex. May 2, 2019) (citing *Meltzer*, 2013 WL 75762 at *2). Even if an opposing party argues that initial disclosures are inadequate, a disclosing party is "under no obligation to disclose information if they do not plan to use it to support their claims and/or defenses." *Porterfield*, 2013 WL 12392525 at *2. Whether ISS plans to seek additional discovery, or believes that additional documents or witnesses are relevant, has no bearing on the sufficiency of Intervenors' initial disclosures.

Further, ISS argues that it is entitled to probe into whether its actions have misled anyone. Mot. at 4. But that inquiry starts with ISS's own clients, who are the shareholders of Texas public companies that SB 2337 was enacted to protect. Moreover, ISS's argument carries no weight because it goes to the scope of discovery ISS might seek, not whether Intervenors' initial disclosures are sufficient. In addition, ISS argues that it needs to explore whether Intervenors have been sufficiently harmed to demonstrate standing. But that is at best speculative, as ISS itself admits. *See* Mot. at 5 (arguing that—if Intervenors appealed a ruling when the Attorney General did not, which has not happened here—"Intervenors *may* be required to separately establish their standing in this case") (emphasis added). In short, ISS's arguments are red herrings, irrelevant to the adequacy of Intervenors'

initial disclosures.

Finally, Intervenors are eager to show why SB 2337 is constitutional and necessary to protect shareholders of Texas public companies. To do so, Intervenors must obtain meaningful discovery from ISS on an expedited schedule. Given this reality, Intervenors prefer that the parties focus their time and attention on the real issues in this case—and not those manufactured by ISS. Therefore, Intervenors have amended their initial disclosures to add two individuals employed by Intervenors.¹

See Ex. A.

CONCLUSION

For the foregoing reasons, the Court should deny ISS's Motion.

¹ Intervenors preserve their right to further amend their initial disclosures as fact discovery progresses and to identify trial witnesses at the required time.

Dated: October 17, 2025

Respectfully submitted,

By: /s/ Mark W. Rasmussen

Mark W. Rasmussen
Attorney-in-charge
Texas State Bar No. 24086291
Sidney Smith McClung
Texas State Bar No. 24083880
Timothy M. Villari
Texas State Bar No. 24125870
JONES DAY
2727 N. Harwood St., Suite 500
Dallas, Texas 75201
mrasmussen@jonesday.com
smcclung@jonesday.com
tvillari@jonesday.com
Telephone: +1.214.220.3939
Facsimile: +1.214.969.5100

Noel J. Francisco (admitted *pro hac vice*)
D.C. Bar No. 464752
Brinton Lucas (admitted *pro hac vice*)
D.C. Bar No. 1015185
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
njfrancisco@jonesday.com
blucas@jonesday.com
Telephone: +1.202.879.3939
Facsimile: +1.602.626.1700

*Attorneys for Intervenors the Texas Stock
Exchange and the Texas Association of Business*

CERTIFICATE OF SERVICE

I certify that on October 17, 2025, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States District Court for the Western District of Texas.

/s/ Mark W. Rasmussen
Mark W. Rasmussen