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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION No. 1984-CV-03333-BLS1

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| COMMONWEALTH OF MASSACHUSETTS,<br>*Plaintiff,*<br>v.<br>EXXON MOBIL CORPORATION,<br>*Defendant.* | E-FILED 1/31/2022<br>SL<br>**Service by e-mail** |

2/8/22 After hearing, ALLOWED. See Memorandum and Order of same date

**COMMONWEALTH'S MOTION TO PERMIT THE DEPOSITIONS OF CERTAIN WITNESSES PENDING APPEAL**

The Commonwealth respectfully requests, pursuant to Rule 27(b) of the Massachusetts Rules of Civil Procedure, that this Court permit the Commonwealth to perpetuate the testimony of two expected witnesses, who are in their 80s, during the pendency of the defendant Exxon Mobil Corporation's (ExxonMobil) appeal of the denial of its special motion to dismiss pursuant to the anti-SLAPP statute.[1]

The witnesses are Professor Martin Hoffert of 8961 SW 86th Loop, Ocala, FL 34481 and Dr. Richard Werthamer, of 38 Cedar Point Lane, Sag Harbor, NY 11963.

As grounds for this motion, and as set forth in the Greer Affidavit (enclosed), the Commonwealth states that Professor Hoffert, an emeritus professor of physics at New York University who researched climate change as an Exxon consultant between approximately 1979 and 1985, is now 83 years old and suffers from multiple life-threatening, chronic conditions. Dr. Werthamer, a physicist who worked for Exxon Research and Engineering Company, including as

[1] *See* G.L. c. 231, § 59H.

a manager, from approximately 1979-1982, is now 86 years old and will turn 87 in a matter of weeks.

Each witness's expected testimony is uniquely important to showing ExxonMobil's prior knowledge about climate change and explaining its actions and omissions based on that knowledge. The substance of the witnesses' expected testimony relies on internal Exxon documents, which have been published in the media and scientific journals; is publicly available (including to ExxonMobil) through their press interviews and/or Congressional testimony; and was described in the Amended Complaint. There is a real risk that each witness could become unavailable by death or illness by the time ExxonMobil's appeal of this Court's denial of its special motion to dismiss is resolved. Because of the unique testimonial evidence which the Commonwealth expects each witness to provide, any such unavailability would constitute a failure of justice under Rule 27(b).

For the reasons described further in the accompanying Memorandum of Law, the Commonwealth respectfully requests that the Court allow this motion and enter orders permitting the Commonwealth to depose each of Professor Hoffert and Dr. Werthamer as soon as possible.

Respectfully Submitted,

COMMONWEALTH OF MASSACHUSETTS,

By its attorney,

MAURA HEALEY
ATTORNEY GENERAL

/s/ David A. Wittenberg

David A. Wittenberg, BBO No. 685254
*Assistant Attorney General, Energy & Environment Bureau*
david.wittenberg@mass.gov
Richard A. Johnston, BBO No. 253420
*Chief Legal Counsel*
richard.johnston@mass.gov
James A. Sweeney, BBO No. 543636
*State Trial Counsel*
jim.sweeney@mass.gov
Sigmund J. Roos, BBO No. 5417854
*Special Assistant Attorney General*
sigmund.roos@mass.gov

OFFICE OF THE ATTORNEY GENERAL
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108
(617) 727-2200

Dated: January 10, 2022

**CERTIFICATE OF SERVICE**

I, David A. Wittenberg, counsel for Plaintiff Commonwealth of Massachusetts, hereby certify that, on this 10th day of January 2022, I served a copy of the foregoing document by sending a copy thereof by electronic service to:

Thomas C. Frongillo
Campbell Conroy & O'Neil, PC
1 Constitution Wharf, Suite 310
Boston, MA 02129
tfrongillo@campell-trial-lawyers.com

*Counsel of Record for ExxonMobil Corporation*

**/S/ DAVID A. WITTENBERG**
DAVID A. WITTENBERG

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

**SUPERIOR COURT**
**Civil No. 19-3333-BLS1**

**COMMONWEALTH OF MASSACHUSETTS**
**Plaintiff**

**vs.**

**EXXON MOBIL CORPORATION**
**Defendant**

# MEMORANDUM AND ORDER ON MOTION TO PERMIT DEPOSITIONS OF CERTAIN WITNESSES PENDING APPEAL

The Commonwealth brings this case under G.L. c. 93A, alleging, among other things, that Exxon Mobil Corporation ("Exxon") misrepresented and failed to disclose material facts about the risks of climate change to Massachusetts investors and misrepresented the environmental benefits of using certain of its products. See generally Commonwealth v. Exxon Mobil Corp., 2021 WL 3493456 (Mass. Super. June 22, 2021) (Green, J.) (denying motion to dismiss under Mass. R. Civ. P. 12(b)(2) and 12(b)(6)); Commonwealth v. Exxon Mobil Corp., 2021 WL 3488414 (Mass. Super. June 22, 2021) (Green, J.) (denying special motion to dismiss under anti-SLAPP statute). What Exxon knew about climate change and its effects on Exxon's business model, and when it knew it, is central to the case.

The case is before me on the Commonwealth's motion under Superior Court Rule 9A for leave to take the depositions of two elderly witnesses to preserve their testimony pursuant to Mass. R. Civ. P. 27(b). No party seeks a hearing on the motion. For the following reasons, the motion is allowed.

## DISCUSSION

Although the Commonwealth filed this case more than two years ago, the case has been mired in pretrial motion practice. Exxon removed the case to federal court only to have it remanded, and then unsuccessfully litigated motions to dismiss. Although it has filed an answer, Exxon is now prosecuting an appeal from the denial of its special motion to dismiss under the Massachusetts anti-SLAPP statute, G.L. c. 231, § 59H. Exxon's appeal is before the Supreme Judicial Court, with oral argument scheduled in March. Although in the ordinary case, the parties would have already begun discovery, formal discovery apparently has yet to begin. See G.L. c. 231, § 59H, para. 3 ("All discovery proceedings shall be stayed upon the filing of the special motion under this section . . . until notice of entry of the order ruling on the special motion," absent order of the court "for good cause shown"). See also Blanchard v. Steward Carney Hosp., Inc., 483 Mass. 200, 211-212 (2019) (discovery before resolution of special motion to dismiss "generally is inconsistent with the expedited procedural protections established by the anti-SLAPP statute").

Rule 27(b) of the Massachusetts Rules of Civil Procedure states:

> If an appeal has been taken from a judgment of a court of this Commonwealth . . . , the court in which a judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in that court. . . . [On motion, i]f the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken . . . .

The court and the parties have been unable to find any reported decisions construing Rule 27(b).[1]

[1] With no reported appellate cases decided under Mass. R. Civ. P. 27(b), the court looks to interpretations of the analogous federal rule, which is similar to the Massachusetts rule.

Exxon has taken advantage of the doctrine of present execution to appeal the denial of the special motion to dismiss. Under that doctrine, a decision denying a special motion to dismiss under the anti-SLAPP statute is immediately appealable because the rights the anti-SLAPP statute protects could not otherwise be safeguarded on appeal from a final judgment. Fabre v. Walton, 436 Mass. 517, 521-522 (2002). Accord Blanchard, 483 Mass. at 203 (defendant "appealed from the denial of their anti-SLAPP motion, as is their right") (emphasis added). The denial of Exxon's special motion to dismiss is a judgment of this court within the meaning of Rule 27(b).[2]

The Commonwealth seeks to depose Professor Martin Hoffert, who is 83 years old and lives in Ocala, Florida; and Dr. Richard Werthamer, who is approximately 87 years old and lives in Sag Harbor, NY. Prof. Hoffert has suffered from a number of ailments which make his health questionable. Both men, by virtue of their age or prior conditions, are also vulnerable to COVID-19. Penn Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1375 (D.C. Cir. 1995) ("age of a proposed deponent may be relevant in determining whether there is sufficient reason to perpetuate testimony") (and cases cited regarding witnesses in their 70s). See also, e.g., In re Town of Amenia, N.Y., 200 F.R.D. 200, 202-203 (S.D.N.Y. 2001). Exxon cites no cases where a motion to perpetuate testimony was denied where the witness was over age 80.

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[2] Exxon argues that a party may only obtain discovery to preserve testimony under Rule 27(b) during appeal from a *final* judgment. I disagree. First, that is not what Rule 27(b) states. The rule does not use the phrase "final judgment." Second, Exxon's argument would lead to anomalous results and would create an incentive for unmeritorious appeals after a special motion to dismiss is denied. Rule 27 allows the courts to permit depositions to perpetuate testimony even before an action is filed, Mass. R. Civ. P. 27(a), and obviously, while an action is pending, discovery may be pursued under Mass. R. Civ. P. 26 and related rules. It would be strange, indeed, if the only time the court could not authorize discovery, or a party could not simply act, to preserve testimony, was during an appeal of an interlocutory ruling under the doctrine of present execution before meaningful discovery had begun.

Rule 27 does not require a party to wait to preserve testimony until a witness is in ill-health. As the Third Circuit wrote:

> The circumstance that [the witness] is 71 years old is quite meaningful. It would be ignoring the facts of life to say that a 71-year-old witness will be available, to give his deposition or testimony, at an undeterminable future date. . . . It is a fact of life, too, that the memory of events . . . grow dim with the inexorable march of time, even on the part of one on the sunny side of the proverbial three score and ten years.

Texaco, Inc. v. Borda, 383 F.2d 607, 609 (3d Cir. 1967).

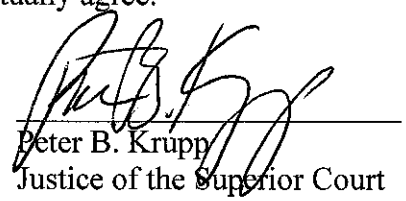
Both Prof. Hoffert and Dr. Werthamer did work or research for Exxon in the late 1970s and early-mid-1980s, studying the impacts of fossil fuel development and consumption on climate change. Their work is well-known to Exxon and has been the subject of public testimony. The Commonwealth has demonstrated that both men have information about what Exxon knew as much as 40 years ago about climate change, this information is relevant to plaintiff's allegations, and this information may not otherwise be discoverable by alternative means or through other witnesses.

Exxon's arguments against authorizing these depositions to proceed are far from compelling. There is nothing in our discovery rules that requires discovery to proceed in any particular sequence. Nor does the Commonwealth enjoy any particular advantage in preserving testimony from these two witnesses now, before document discovery has meaningfully begun. Both witnesses did work for Exxon, which presumably has considerable information as to both men and their research; and such information, to the extent it is only in Exxon's possession, has not yet been produced in discovery. Moreover, both men have given various public statements that are available to the parties, so it is rather hyperbolic to assert, as Exxon does, that the Commonwealth's efforts to preserve the testimony of these two witnesses at this time amounts to

"[t]rial by [a]mbush." Finally, both parties equally bear the risk that once discovery begins in earnest – whenever that may be – additional discovery may reveal other information related to the testimony that Prof. Hoffert and Dr. Werthamer would now offer. The speculative possibility that the parties may have to take a follow-up deposition of one or both witnesses once discovery runs its course, does not mean that their testimony should not be preserved at this time. A person who is 83 or 87 years old cannot take the future for granted.[3] Neither can a reasonably diligent litigant who wishes to have that person's testimony available for trial.

**ORDER**

The Commonwealth's Motion to Permit the Depositions of Certain Witnesses Pending Appeal (Docket #61) is **ALLOWED**. The depositions shall be taken within the next sixty (60) days, or at such time as the parties and the deponents mutually agree.



Dated: February 8, 2022

Peter B. Krupp
Justice of the Superior Court

[3] See, e.g., G.L. c. 231, § 59F (civil litigant 65 years of age or older entitled to "speedy trial" so the proceeding "may be heard and determined with as little delay as possible").