COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION No. 1984-CV-03333-BLS1

COMMONWEALTH OF MASSACHUSETTS, *Plaintiff,* v. EXXON MOBIL CORPORATION, *Defendant*.	)	**Service by e-mail**

MEMORANDUM OF LAW IN SUPPORT OF THE 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's appeal of the denial of its special motion to dismiss pursuant to the anti-SLAPP statute.[1] The two witnesses' ages, and one's existing or potential health issues, create imminent risks that they could become unavailable to provide testimony relevant to the Commonwealth's claims.

The witnesses, Professor Martin Hoffert and Dr. Richard Werthamer, worked for defendant Exxon Mobil Corporation ("ExxonMobil") in the 1970s and 1980s, and played meaningful, yet distinct, roles in ExxonMobil's efforts to research the impacts of fossil fuel development and consumption on climate change. [2] The substance of the witnesses' expected

[1] *See* G.L. c. 231, § 59H.
[2] Some of the information in this memorandum dates to a time prior to Exxon's merger with Mobil; for the purposes of this memorandum, ExxonMobil refers both to the current company (*i.e.*, the successor entity), and to Exxon and its subsidiary companies prior to the merger.

testimony relies on internal ExxonMobil 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. Their expected testimony is also unique: the Commonwealth has not to date identified other living former ExxonMobil witnesses who could provide the same evidence in support of its claims.

PROCEDURAL HISTORY

In its amended complaint, the Commonwealth alleges that ExxonMobil has violated the Massachusetts Consumer Protection Act, G.L. c. 93A, §§ 1-11, by engaging in deceptive misrepresentations and omissions to Massachusetts investors about the existential threat climate change poses for the company's economic viability and misleading Massachusetts consumers about the reality that the production and consumer use of the company's fossil fuel products are major contributors to the devastating effects of climate change.

The Commonwealth filed its complaint on October 24, 2019 and its amended complaint on June 5, 2020. Prior to filing suit, the Commonwealth began its investigation of ExxonMobil's climate change-related business practices in the Commonwealth with a Civil Investigative Demand ("CID") in April, 2016. Throughout both the investigation and this litigation, ExxonMobil has attempted to block the Commonwealth's pursuit of information about the company's business practices through a series of ultimately-unsuccessful tactics in this Court and multiple federal courts, including two separate suits to quash the CID, a motion to delay filing of the complaint, removal to federal court, a motion to dismiss, and a special motion to dismiss this lawsuit under the anti-SLAPP statute.[3]

[3] *See In re Civil Investigative Demand No. 2016-EPD-36*, 34 Mass. L. Rptr. 104, 2017 WL 627305 (Mass. Super. Jan. 11, 2017), *aff'd sub nom. Exxon Mobil Corp.* v. *Att'y Gen.*, 479 Mass. 312 (2018), *cert. denied* 139 S. Ct. 794 (2019) (denying ExxonMobil's requests to set aside CID,

ExxonMobil continues these tactics today. In its latest effort, ExxonMobil appealed this Court's decision to deny ExxonMobil's anti-SLAPP motion for its failure to meet even the threshold showing for such a motion.[4] It remains uncertain when the Supreme Judicial Court will decide ExxonMobil's appeal, which is scheduled for argument on March 9, 2022. Meanwhile, ExxonMobil has declined the Commonwealth's request to permit these two depositions pending the appeal. The Commonwealth, therefore, is seeking the Court's authorization to depose Professor Hoffert and Dr. Werthamer under Rule 27(b).

The potential unavailability of one or both witnesses would be a gross failure of justice that would make worse ExxonMobil's decades-long deception of investors and consumers about the effect of fossil-fuel development and consumption on climate change and abet its efforts to delay the progress of this case. Rule 27 permits the Court to preserve important testimony given the risk of its loss. The Commonwealth's request here fits squarely within the purpose of the

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disqualify Attorney General, and issue stay); *Exxon Mobil Corp. v. Healey*, 316 F. Supp. 3d 679 (S.D.N.Y. 2018), *appeal pending* No. 18-1170 (2d Cir. Apr. 23, 2018) (granting Commonwealth's motion to dismiss ExxonMobil's federal lawsuit to quash investigation for failure to state claim); *In re Civil Investigative Demand No. 2016-EPD-36*, No. 1684CV01888 (Mass. Super. Oct. 24, 2019) (endorsed order on document 35, denying ExxonMobil's emergency motion to extend time for meet and confer with Attorney General under G.L. c. 93A, § 4) *Comm. v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020) (allowing Commonwealth's motion to remand to state court); *Comm. v. Exxon Mobil Corp*., No. 1984CV03333-BLS1, 2021 WL 3493456 (Mass. Super. Jun. 22, 2021) (document 42, order denying ExxonMobil's Motion to Dismiss); *Comm. v. Exxon Mobil Corp.*, No. 1984CV03333-BLS1, 2021 WL 3488414 (Mass. Super. Jun. 22, 2021) (document 43, order denying ExxonMobil's Special Motion to Dismiss) (holding, *inter alia*, that ExxonMobil "failed to meet its threshold burden" under the anti-SLAPP statute).

[4] Given this Court's exceedingly clear—and correct—rejection of ExxonMobil's claims in its motions to dismiss, the appeal is unlikely to succeed: in its decision denying ExxonMobil's anti-SLAPP motion to dismiss, this Court held, *inter alia*, that ExxonMobil "failed to meet its threshold burden" under the anti-SLAPP statute to "show that the Commonwealth's claims are based solely on Exxon[Mobil]'s petitioning activities." *Comm. v. Exxon Mobil Corp.*, No. 1984CV03333-BLS1, 2021 WL 3488414 (Mass. Super. Jun. 22, 2021) (document 43, order denying ExxonMobil's Special Motion to Dismiss).

rule: given the ages and/or health conditions of Professor Hoffert and Dr. Werthamer, ExxonMobil's appeal creates an imminent risk of the loss of important evidence in the form of the two witnesses' medical unavailability. Under the circumstances, the depositions should be permitted during the pendency of the appeal.

The Commonwealth reserves argument on whether it could simply notice the depositions of Professor Hoffert and Dr. Werthamer despite the pending appeal. But given ExxonMobil's opposition to the depositions during the appeal, invoking the clear procedure of Rule 27(b) appears to be the most certain, expeditious way to preserve the testimony of these important witnesses.

BRIEF SUMMARY OF THE COMMONWEALTH'S GROUNDS

Approximately 40 years ago, Professor Hoffert, Dr. Werthamer, and their respective research groups at ExxonMobil developed what turned out to be extremely accurate information and predictions about the effects of fossil-fuel development and consumption on greenhouse gas concentrations in the atmosphere and, ultimately, climate change. Both men's testimony also will provide contemporaneous observations of the development of the national scientific consensus on fossil-fuel-driven climate change. Dr. Werthamer's testimony will also show that ExxonMobil contemplated and ultimately rejected. a public relations campaign promoting its scientific work on fossil fuels, greenhouse gases and climate change.

Professor Hoffert and Dr. Werthamer are each, to the Commonwealth's knowledge, the only, or among the only, people alive today who can testify as percipient witnesses to the programs on which they worked. Each witness is also an octogenarian: Professor Hoffert is now 83 years old and suffers from multiple life-threatening, chronic health conditions. Dr. Werthamer

is now 86 years old, and will turn 87 next month. There is an imminent risk that these witnesses could become unavailable by death or illness by the time ExxonMobil's appeal is resolved.

Massachusetts investors, consumers, the Commonwealth, and the interests of justice would be greatly harmed the loss of these witnesses' testimony. ExxonMobil's historic knowledge of, and subsequent deception campaigns regarding, the effects of fossil-fuel development and consumption on climate change is highly relevant to the Commonwealth's claims in this case. The loss of one or more direct witnesses to ExxonMobil's longstanding knowledge of the truth would, in part, exacerbate its deception. By preserving the witnesses' testimony for trial, the relief the Commonwealth seeks is integral to its rights in this case and to the public interest, and, most importantly, would prevent a serious failure of justice should the witnesses in fact become unavailable.

THE WITNESSES

Martin Hoffert

Professor Hoffert is an emeritus professor of physics at New York University who researched climate change as an ExxonMobil consultant. Greer Affidavit at ¶ 3 (Greer Aff.). As part of his work conducted for ExxonMobil between approximately 1979 and 1985, Professor Hoffert's research group predicted the current rate of global warming with great precision. Amended Complaint at ¶ 7 (Am. Compl.). In later years, corporate management promoted the public disinformation that the connection between fossil fuels and climate was too uncertain a ground on which to modify its heavy reliance on fossil fuels as a primary business strategy. In an April, 2020 interview, for example, Professor Hoffert recalled, "even though we were writing all these papers which were basically supporting the idea that climate change from CO_2 emissions was going to change the climate of the earth according to our best scientific understanding, the

front office [of ExxonMobil], which was concerned with promoting the products of the company, was also supporting people that we called climate change deniers . . . to support the idea that the CO_2 Greenhouse was a hoax." Am. Compl. at ¶ 173. Professor Hoffert previously offered similar recollections on October 23, 2019, in the United States Congress, in sworn testimony before the Civil Rights and Civil Liberties Subcommittee of the Committee on House Oversight and Reform. *Id.*[5].

In the same April 2020 interview, Professor Hoffert stated that ExxonMobil had a tremendous amount of data showing that the carbon dioxide in the atmosphere was increasing, even though the temperature of the earth had not increased yet. He recalled that "[w]e had various mathematical models, very advanced computer models, from which we could sort of figure out how the climate of the earth might change in some future time if we kept burning hydrocarbons for energy." Am. Compl.at ¶ 174.

Professor Hoffert's expected testimony, therefore, is extremely relevant to what ExxonMobil knew about fossil fuel use and climate change, and when ExxonMobil knew it. Because of his responsibility for the modeling project and the unavailability of other percipient witnesses, his testimony is unique, and significantly differentiated from that of other potential witnesses for the Commonwealth.

As previously stated, Professor Hoffert is 83 years old. Since 1991, he has dealt with numerous serious, life-threatening health conditions including heart disease, lung cancer, diverticulitis, unexplained internal bleeding, and a broken neck. Greer Aff. at ¶ 5. Professor Hoffert suffered heart attacks in 1991 and 2003; he had a quadruple bypass in 1992; he has had a

[5] *See also* Martin Hoffert, *Written Testimony*, at https://docs.house.gov/meetings/GO/GO02/20191023/110126/HHRG-116-GO02-Wstate-HoffertM-20191023.pdf, last accessed January 7, 2021.

total of four electronic devices implanted in his chest to regulate his heartrate. *Id*. at ¶ 6. Professor Hoffert experienced cardiac events that triggered electric shocks from his implanted devices twice, on July 28, 2007 and March 28, 2020. *Id*. He had a new implant installed most recently on April 29, 2021. *Id*. Professor Hoffert was diagnosed with and surgically treated for lung cancer in 2008. *Id*. He fell walking on the street in Lower Manhattan in 2013, resulting in hairline fractures to his C3 and C4 vertebrae. *Id*. He was diagnosed with and surgically treated for diverticulitis in 2016. *Id*. And on May 31, 2021, Professor Hoffert went to the emergency room with symptoms of internal bleeding that was so severe he received a blood transfusion. Physicians were unable to determine the cause of the bleeding. *Id*.

Richard Werthamer

Dr. Werthamer is a former ExxonMobil physicist who worked for Exxon Research and Engineering Company, including as a manager, from approximately 1979 to 1982. Greer Aff. at ¶ 8. From 1980 to 1981, Dr. Werthamer supervised Henry Shaw, who is now deceased. *Id*. at ¶ 11. Dr. Shaw was the key proponent of an ambitious ExxonMobil research program into the extent to which CO_2 greenhouse gases released into the atmosphere were absorbed into the world's oceans, an important factor in determining the rate at which CO_2 greenhouse gases would build up in the atmosphere. *Id*. at ¶ 12. The research program monitored oceanic and atmospheric CO_2 using sensors mounted to an ExxonMobil oil tanker that traversed the Atlantic Ocean from the Persian Gulf to the Gulf of Mexico, known as the "tanker project." *Id*. at ¶ 13. Dr. Werthamer discussed with Dr. Shaw the management and public relations strategy driving the tanker project. *Id.* at ¶ 14.

In a September 2015 interview, Dr. Werthamer recalled, "[t]he tanker project was intended to provide valid, legitimate, scientific data, unassailable hopefully, on key questions in

atmospheric chemistry [of] CO_2 emissions […] [Dr. Shaw's] additional goal was to make Exxon a credible participant in that research and in the dialogue that would inevitably follow … He wanted Exxon[Mobil] to be respected as a valid player and have Exxon[Mobil]'s opinions solicited, and participate in discussions on policy, rather than have the issue suddenly dumped with Exxon[Mobil]'s back turned."[6]

Dr. Werthamer also worked on an ambitious public-relations plan aimed at "achieving national recognition of Exxon[Mobil]'s CO_2 greenhouse research project," proposing the plan to the since-deceased head of Exxon Research & Engineering's Technology Feasibility Center, Harold Weinberg. Greer Aff. at ¶ 15. The tanker project was a key component of Dr. Werthamer's proposed public relations plan. *Id.* at ¶ 16. Because of Dr. Werthamer's conversations with Dr. Shaw at the time, the Commonwealth believes that Dr. Werthamer is one of the only living potential witnesses to ExxonMobil's management-level discussions surrounding its greenhouse gas public relations plan.

Dr. Werthamer's testimony will provide crucial insight into the objectives and strategic purposes of the tanker project, and into how, at one time, ExxonMobil considered embracing publicly the results of their cutting-edge climate science. This strategic, management-level information is known to Dr. Werthamer and is no longer available from Dr. Shaw.

Dr. Werthamer is now 86 years old and is weeks away from turning 87. Other than his advanced age, he reports that he is in good health. *Id*. at ¶ 9.

ARGUMENT

[6] Neela Bannerjee, et al., *Exxon Believed Deep Dive Into Climate Research Would Protect Its Business*, INSIDE CLIMATE NEWS (Sept. 17, 2015), https://insideclimatenews.org/news/17092015/exxon-believed-deep-dive-into-climate-research-would-protect-its-business/, last accessed January 7, 2021.

Rule 27(b) of the Massachusetts Rules of Civil Procedure authorizes trial courts to allow depositions to perpetuate testimony pending an appeal. "To perpetuate the testimony of a witness means to record, prior to trial and for use at trial, the witness' known testimony in a case where the witness may be unavailable for trial." *19th St. Baptist Church v. St. Peters Episcopal Church*, 190 F.R.D. 345, 347 (E.D. Pa. 2000).[7] The same policy considerations that inform the Court's judgment under Rule 27(a) also govern the Court's discretion under Rule 27(b). *Id.* at 348 (citing *Ash v. Cort*, 512 F.2d 909, 912 (3d Cir. 1975)). The rule states:

> If an appeal has been taken from a judgment of a court of this Commonwealth or before the taking of an appeal if the time therefor has not expired, 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.

Mass. R. Civ. P. 27(b).

A motion to perpetuate testimony must show "the names and addresses of persons to be examined and the substance of the testimony which [the moving party] expects to elicit from each," and "the reasons for perpetuating their testimony." *Id*. The Court may permit such depositions to "avoid a failure or delay of justice." *Id*.

There are no reported Massachusetts cases construing or applying Rule 27(b) of the Massachusetts Rules of Civil Procedure. The Court looks to cases interpreting the parallel Federal Rules, where there are not "compelling reasons to the contrary or significant differences in content," which are not present here. *Comm'r of Revenue* v. *Comcast Corp*., 453 Mass. 293,

[7] "The concept of perpetuation of testimony has ancient roots deeply grounded in equity." *Id.* (citing Nicholas A. Kronfeld, Note, *The Preservation and Discovery of Evidence under Federal Rule of Civil Procedure 27*, 78 GEO. L.J. 593, 593–94 (1990) (tracing perpetuation of testimony to ancient Greece).

317 (2009) (citing *Rollins Env't Servs. v. Super. Ct.*, 368 Mass. 174, 179–80 (1975)). *Compare* Mass. R. Civ. P. 27(b), *with* Fed. R. Civ. P. 27(b).

I. The proposed deponents' ages and health pose serious risks that their testimony may be lost if they are not expeditiously deposed.

"Rule 27 properly applies only in that special category of cases where it is necessary to prevent testimony from being lost." *Deiulemar Compagnia Di Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473, 484 (4th Cir. 1999) (quotations omitted); *see also Ash*, 512 F.2d at 912; *Obalon Therapeutics, Inc.*, v. *Polyzen, Inc.*, 321 F.R.D. 245, 248 (E.D.N.C. 2017). "Rule 27 is not a substitute for broad discovery, nor is it designed as a means of ascertaining facts for drafting a complaint." *Deiulemar*, 198 F.3d at 485 (citations omitted). In other words, the purpose of the proposed depositions must be to preserve testimony for trial and not for any other reason. *See supra* p.484. Therefore, Rule 27 depositions are granted subject to a showing "that continued delay in granting discovery is likely to result in a loss of evidence." *Ash*, 512 F.2d at 913.

In this case, the loss of evidence could come in the form of the death or other unavailability of a live witness. Professor Hoffert and Dr. Werthamer are 83 and 86 years old, respectively. Their ages are, alone, sufficient reason for this Court to permit the Commonwealth to take their depositions pending ExxonMobil's appeal of this Court's denial of its anti-SLAPP motion. "The age of a proposed deponent may be relevant in determining whether there is sufficient reason to perpetuate testimony." *Penn Mut. Life Ins. Co. v. United States*, 68 F.3d 1371, 1374–75 (D.C. Cir. 1995). Indeed, this Court need not wait for an elderly witness to become infirm, nor for an ill witness to take a turn for the worse, to permit the taking of the witness's deposition. This is because "such illness or infirmity might well be of such proportion

as to make impossible the taking of his [or her, or their] deposition." *Texaco, Inc. v. Borda*, 383 F.2d 607, 610 (3d Cir. 1967) (overturning district court's denial of request to depose witness, finding district court incorrectly held that witness's age alone was "meaningless").

The Commonwealth urges this Court to permit the expeditious deposition of the two witnesses precisely because the time and mechanism by which age or illness might make the witnesses unavailable is unknown. "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 when [the pending appeal] will have been 'determined.'" *Penn Mut. Life Ins.* 68 F.3d at 1374–75 (quoting *Texaco*, 383 F.2d at 609).

Courts have credited specific allegations about the age and health of the proposed deponents, as the Commonwealth makes here, as distinct from vague or conclusory statements about the potential loss of testimony over time. While a "general allegation" that a witness is retired and "with the passage of time" may not recall relevant facts is not ordinarily enough to satisfy Rule 27 on its own, *id.* at 1375, here the Commonwealth proposes the deposition of just two witnesses for whom advanced age and serious illness may very well pose a barrier to live testimony prior to trial. Dr. Hoffert's age, and his extraordinary medical history, and Dr. Werthamer's age, each pose a threat to the future delivery, by each witness, of timely testimonial evidence that is highly relevant to the Commonwealth's claims.

II. The Commonwealth has set forth the substance of the proposed deponents' testimony, and the proposed testimony is not cumulative.

Furthermore, the evidence the Commonwealth proposes to elicit from the witness is unique. The Commonwealth must also describe the "substance of the testimony which [it] expects to elicit from each [witness]." Mass. R. Civ. P 27(b); *see also Deiulemar*, 198 F.3d at

486 ("A petitioner must know the substance of the evidence it seeks before it can invoke Rule 27 perpetuation."). And the Commonwealth must explain why the testimony of Professor Hoffert and Dr. Werthamer "cannot easily be accommodated by other potential witnesses." *Deiulemar*, 198 F.3d at 486 (quotations omitted); *Obalon*, 321 F.R.D. at 249 (allowing petition to take deposition pending appeal where petitioner alleged detailed facts demonstrating immediate need to perpetuate testimony, and that there was not likely to be any other witnesses who could provide such evidence).

The proposed testimony must be "relevant, not simply cumulative, and likely to provide material distinctly useful to a finder of fact." *In re Bay Cty. Middlegrounds Landfill Site*, 171 F.3d 1044, 1047 (6th Cir. 1999); *see also Deiulemar*, 198 F.3d at 487 ("Evidence that throws a different, greater, or additional light on a key issue might well 'prevent a failure or delay of justice.'"); *Obalon*, 321 F.R.D. at 250.[8] Rule 27 does not, however, require that the proposed testimony be "absolutely unique." *Bay Cty.*, 171 F.3d at 1047.

Here, however, the testimony of each proposed deponent cannot likely be duplicated by any other potential witness. Each of the witnesses the Commonwealth seeks to depose was responsible for a distinct piece of ExxonMobil's climate research program in the 1970s and 1980s: Professor Hoffert, for the climate modeling program; and Dr. Werthamer, for the tanker program and the public relations strategy. Testimony as to each of these parts is "distinctly useful to a finder of fact" and as such would "prevent a failure or delay of justice." *Id*.

Put simply, these witnesses were there. They personally worked on two of the key programs through which ExxonMobil became painstakingly and precisely aware of the adverse

[8] Rule 27 does not require a showing that the testimony is essential, in itself, for success on a claim or defense. Nor does Rule 27 require a petitioner to disclose other corroborating evidence it may have. *Obalon*, 321 F.R.D. at 250.

effect its core business—the discovery, extraction, sale, and consumption of fossil fuels—would have on the global climate. Based on the Commonwealth's understanding of all available information, Professor Hoffert and Dr. Werthamer are the only, or among the only, living witnesses who can provide their unique perspectives on the ExxonMobil projects on which they worked and which – as the reasoning of the Supreme Judicial Court has already confirmed – are highly relevant to the Commonwealth's three claims. *See Exxon Mobil Corp. v. Att'y Gen.*, 479 Mass. at 326 (rejecting as without "support … either in law … or logic" ExxonMobil argument for irrelevance of "Attorney General's request for historic documents dating as far back as 1976" because such information is "still probative of Exxon[Mobil]'s present knowledge on the issue of climate change, and whether Exxon[Mobil] disclosed that knowledge to the public.").

Because the two witnesses the Commonwealth seeks permission to depose have direct, unique, personal knowledge of what ExxonMobil knew and how ExxonMobil came to know it, permitting their testimony to be lost to unavailability, medical or otherwise, would be a gross failure of justice, prejudicing the Commonwealth's case.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests the Court allow its motion.

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 ____, 2022

CERTIFICATE OF SERVICE

I, David A. Wittenberg, counsel for Plaintiff Commonwealth of Massachusetts, hereby certify that, on this 7th 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