COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.	SUPERIOR COURT CIVIL ACTION NO.: 1984-CV-03333-BLS1
COMMONWEALTH OF MASSACHUSETTS, Plaintiff, v. EXXON MOBIL CORPORATION, Defendant.	**Service Via Email**

MEMORANDUM OF LAW OF EXXON MOBIL CORPORATION IN OPPOSITION TO THE COMMONWEALTH'S MOTION TO PERMIT THE DEPOSITIONS OF CERTAIN WITNESSES PENDING APPEAL

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PRELIMINARY STATEMENT

The Attorney General opened its investigation of Exxon Mobil Corporation ("ExxonMobil") six years ago.[1] Since 2016, it has had the ability to issue compulsory process to obtain documentary and testimonial evidence. The Attorney General has exercised that authority repeatedly and assured multiple courts that its investigation of ExxonMobil has been "exhaustive." But all of this discovery has been one-sided. The Attorney General has built its case for six years and disclosed none of its purported evidence to ExxonMobil.

By asking this Court to approve "emergency" trial depositions under Rule 27(b), the Attorney General endeavors to lock in its advantage and obtain trial testimony at a point in the case when ExxonMobil is unable to effectively cross-examine the Attorney General's witnesses. The proposed deponents are Martin Hoffert and Richard Werthamer, neither of whom are alleged to have had any association with ExxonMobil for more than three decades. The Attorney General's motion does not disclose whether it obtained documents, testimony, or other evidence from Dr. Hoffert or Dr. Werthamer over the last six years or whether the other evidence it has obtained over the last six years pertains to their anticipated testimony. ExxonMobil has certainly not received any discovery from the Attorney General about these individuals—and not for lack of asking. The Attorney General rejected ExxonMobil's request prior to filing this motion.

If permitted to proceed, the Attorney General will be able to obtain trial testimony from these individuals before it has shared its discovery with ExxonMobil. That would not promote the interests of justice, as Rule 27(b) requires. Only the Attorney General would have the benefit of third-party document discovery, including from the two witnesses. ExxonMobil

[1] "Attorney General" refers to the Office of the Attorney General.

would not have a meaningful opportunity to cross-examine the witnesses or refresh their recollections with documents. The resulting testimony likely would be inadmissible at trial and would need to be supplemented with follow-up depositions. Therefore, it would not serve the interests of justice for the Attorney General to take trial depositions at this time.

The Attorney General has likewise failed to demonstrate any legitimate urgency for taking the depositions now. Although the age and health of a witness can be relevant to a Rule 27(b) motion, these factors do not establish an urgent and immediate need for a deposition here. As the Attorney General concedes, Dr. Werthamer is in "good health." And Dr. Hoffert does not have any alleged health condition that precludes him from testifying at trial. In fact, recent news interviews and photoshoots suggest that Dr. Hoffert continues to maintain an active lifestyle. The Attorney General has thus failed to justify the Rule 27(b) depositions based on the witnesses' age and health.

The Attorney General has also failed to show that the depositions would be material to the litigation, distinctly useful, and admissible at trial, as Rule 27(b) requires. The Attorney General cannot establish that the witnesses' testimony would be material to this litigation given that it appears to pertain to aspects of the complaint the Attorney General has characterized as mere "context" and would cover events that occurred more than three decades outside the statute of limitations. The Attorney General has also failed to establish anything unique about these witness or the admissibility of the hearsay statements the Attorney General identifies in its brief.

Even if the Attorney General's motion would serve the interests of justice, it must fail because it is procedurally infirm. Rule 27(b) only authorizes depositions pending the appeal of a final judgment, but no final judgment has been entered in this case. To the contrary, the case

remains live in this Court. While ExxonMobil is appealing the denial of its anti-SLAPP motion to dismiss, that appeal is an interlocutory one, and is not within the scope of Rule 27(b).

The Attorney General's motion is pure gamesmanship and should be rejected.

BACKGROUND

I. The Attorney General Gathered Evidence Against ExxonMobil for Nearly Six Years and Refused to Disclose Any of It to ExxonMobil

A. The Attorney General's Three-Year Investigation of ExxonMobil

In March 2016, Attorney General Healey appeared at a press conference with a coalition of partisan attorneys general that had been organized with New York Attorney General Eric Schneiderman. Attorney General Healey announced that her office had joined the coalition "in investigating the practices of ExxonMobil." Transcript of "AGs United for Clean Power" Press Conference (Mar. 29, 2016).[2] Even though the Attorney General had not yet issued a Civil Investigative Demand ("CID") to the Company, it announced its conclusion at the press conference that there was a "troubling disconnect between what Exxon knew . . . and what the company and the industry chose to share with investors and with the American public." *Id.* The Attorney General issued a CID to ExxonMobil the following month.[3]

At the Attorney General's request, the parties executed a tolling agreement two months later that relieved ExxonMobil of any obligation to comply with the CID.[4] The tolling agreement did not, however, preclude the Attorney General from taking other investigative steps, and the Attorney General claims that it conducted a "detailed" investigation into

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[2] Available at https://www.mass.gov/files/documents/2017/01/mx/mtd-opp-app.pdf. For a detailed account of the Attorney General's collaboration with attorneys general and activists in a campaign against ExxonMobil that culminated in this lawsuit, ExxonMobil respectfully refers the Court to Brief and Special App'x for Plaintiff-Appellant, at 7-18, *Exxon Mobil Corp.* v. *Healey*, 2018 WL 3729342 (2d Cir. 2018).

[3] *See* Mem. of Exxon Mobil in Support of Special Mot. to Dismiss the Am. Compl., Ex. 9, Dkt. No. 30.

[4] *See* Mem. of ExxonMobil in Support of its Emergency Mot. to Extend Time, Ex. 4, *In re Civil Investigative Demand No. 2016-EPD-36 Issued by the Office of the Attorney General* (hereinafter, "*Civil Investigative Demand*"), Mass. Sup. Ct., No. 16-1888F (Oct. 17, 2019).

ExxonMobil.[5] Indeed, the Attorney General has admitted that it issued multiple CIDs to third parties during its investigation.[6] The Attorney General was also authorized to pursue depositions during its investigation, *see* G.L. c. 93A, § 6. But the Attorney General has refused to share with ExxonMobil any discovery it obtained through CIDs, depositions, interviews, or other means during its investigation—including any discovery related to the witnesses who are the subject of its pending Rule 27(b) motion. *See* Exs. 1–2. ExxonMobil therefore has not been able to prepare a defense based on these materials.

B. The Attorney General's 200-Page Complaint

In October 2019, the Attorney General filed its complaint to strategically coincide with the start of trial in a related action brought by the New York Attorney General ("NYAG") as well as the attendant publicity. *See* Compl., Dkt. No. 1. The NYAG complaint, from which the Attorney General borrowed generously, was found by the New York Supreme Court to be "politically motivated," "hyperbolic," and the "result of an ill-conceived initiative." *People* v. *Exxon Mobil Corp.*, 2019 WL 6795771, at *1, 2, 26 (N.Y. Sup. Ct. Dec. 10, 2019).

After ExxonMobil's complete vindication at the NYAG trial, the Attorney General amended its complaint. *See* Am. Compl., Dkt. No. 24. The amended complaint is over 200 pages long and covers a broad range of theories—including allegations that ExxonMobil is not talking enough about climate change, that it is talking too much about climate change, and that it has committed fraud upon shareholders by doing both. *Id*.

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[5] Commonwealth's Opp. to ExxonMobil's Emergency Mot. to Meet and Confer Under G.L. c. 93A, § 4 at *3, *Civil Investigative Demand*, Mass. Sup. Ct., No. 16-1888F (Oct. 18, 2019).

[6] Affidavit of I. Andrew Goldberg ¶¶ 4, 9, 10-13, dated October 30, 2020, Dkt. No. 34.

Two months after the Attorney General amended its complaint, ExxonMobil moved to dismiss the action under Rule 12(b) and the Massachusetts anti-SLAPP statute.[7] Those motions were briefed simultaneously, argued at the same hearing, and decided together in June 2021.[8] ExxonMobil filed a timely appeal as of right from the adverse ruling on the anti-SLAPP motion, which will be argued on March 9, 2022. *See* Notice of Entry of Appeal, Dkt. No. 52; Order, *Commonwealth* v. *Exxon Mobil Corp.*, No. SJC-13211 (Dec. 7, 2021).

C. The Attorney General's Rule 45 Subpoenas

Since filing its complaint, the Attorney General has invoked Rule 45 to issue subpoenas on at least 13 third parties and has received documents in response to a number of those subpoenas. Anderson Affidavit at ¶ 3. ExxonMobil has requested copies of those third-party document productions, but the Attorney General has taken the position that at this time its "only Rule 45 obligation is to provide notice that [it] received discovery from third parties." Ex. 1. In an email to the Attorney General, ExxonMobil stated that it considers the Attorney General's refusal to share such documents to be a violation of "the spirit, if not the letter, of Rule 45." *Id.* It would be "highly unfair," ExxonMobil urged, to conduct trial depositions when only the Attorney General has access to "relevant, discoverable documents." *Id.* ExxonMobil expressed concern that this would amount to a "trial by ambush" and would violate its due process rights. *Id.* In response, the Attorney General did not directly address ExxonMobil's concerns regarding trial by ambush, violation of due process, or violation of the spirit of Rule 45. *See* Ex. 2. The Attorney General instead insisted that it can unilaterally withhold third-party discovery until the parties enter agreements on confidentiality and electronically stored

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[7] ExxonMobil's Mot. to Dismiss the Am. Compl., Dkt. No. 32; ExxonMobil's Special Mot. to Dismiss the Am. Compl., Dkt. No. 30.

[8] *See Commonwealth* v. *Exxon Mobil Corp.*, 2021 WL 3493456 (Mass. Super. June 22, 2021); *Commonwealth* v. *Exxon Mobil Corp.*, 2021 WL 3488414 (Mass. Super. June 22, 2021).

information—even if third-party documents were produced to the Attorney General without any such stipulations or court orders being in place. *Id*. Moreover, the Attorney General claimed that the third-party documents were "wholly unrelated to the two depositions" and that ExxonMobil had "identified no pressing need for the documents." *Id*.

II. Hoffert and Werthamer Are in Good Health, Have Not Had Any Connection to ExxonMobil for 35 Years, and Are Not the Subject of Any Disclosures or Discovery Provided by the Attorney General

Dr. Hoffert is a physics professor at the Aspen Global Change Institute.[9] From approximately 1979 until 1985, Dr. Hoffert allegedly consulted for Exxon Research and Engineering Company ("Exxon Research") on climate research. Mot. 5. Dr. Hoffert is not alleged to have had any association with ExxonMobil for the past 37 years. *See* Mot. 5-7. The Attorney General seeks to depose Dr. Hoffert about his alleged experiences working on a climate modeling program while consulting for Exxon Research over 35 years ago. Mot. 6, 12.

The Attorney General has not shared with ExxonMobil any disclosures or discovery relating to Dr. Hoffert, including any information the Attorney General obtained over the last six years using compulsory process. *See* Ex. 2. The affidavit in support of the Attorney General's brief—which is sworn to by an investigator on the Attorney General's staff rather than a medical professional—alleges that Dr. Hoffert has previously experienced health conditions for which he was treated and from which he recovered. *See* Greer Aff. ¶ 6. Press coverage from this past summer suggests that Dr. Hoffert maintains an active lifestyle.[10]

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[9] *See Martin I. Hoffert*, Aspen Glob. Change Inst., https://www.agci.org/redhen/contact/1364 (last visited Jan. 20, 2022).

[10] *See, e.g.*, Emma Pattee, *The Scientists Hired by Big Oil who Predicted the Climate Crisis Long Ago*, The Guardian (Jul. 2, 2021), https://www.theguardian.com/environment/2021/jul/02/scientists-climate-crisis-big-oil-climate-crimes.

A September 2021 interview with *Stabroek News* reports that Dr. Hoffert enjoys "zoom[ing] around" on a three-wheeled pedal- and solar-powered vehicle.[11]

Dr. Werthamer is a retired physicist who was allegedly involved with an Exxon Research carbon dioxide research program from approximately January 1979 until January 1982. Mot. 7. Since that alleged engagement 40 years ago, there is no allegation that Dr. Werthamer has had any association with ExxonMobil. *See* Mot. 7-8. The Attorney General seeks to depose Dr. Werthamer about a project he allegedly worked on for Exxon Research, as well as conversations he had with a supervisee named Dr. Henry Shaw during the same period. Mot. 8.

The Attorney General has not shared with ExxonMobil any disclosures or discovery relating to Dr. Werthamer, including any information the Attorney General obtained over the last six years using compulsory process. *See* Ex. 2. Dr. Werthamer is allegedly in "good health" and currently resides in the Hamptons. Mot. 8.

LEGAL STANDARD

Rule 27(b) of the Massachusetts Rules of Civil Procedure permits parties to take depositions "in special circumstances to preserve testimony which could otherwise be lost." *Northrop Grumman Tech. Servs., Inc.* v. *DynCorp Int'l LLC*, 2016 WL 3346349, at *7 (E.D. Va. June 16, 2016) (quoting *Ash* v. *Cort*, 512 F.2d 909, 912 (3d Cir. 1975)).[12] A court may grant a motion under Rule 27(b) if "an appeal has been taken from a judgment" and the court "finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice." Mass. R. Civ. P. 27(b). Rule 27(b) imposes a "heavy" burden, *Barrows* v. *Am. Airlines, Inc.*,

[11] Indranie Deolall, *The Excellent Scientists*, Stabroek News (Sept. 2, 2021), https://www.stabroeknews.com/2021/09/02/features/first-person-singular/the-excellent-scientists/.

[12] The federal rule "substantially track[s]" the language of the Massachusetts rule. *See* 1973 Reporter's Note to Mass. R. Civ. P. 27.

164 F. Supp. 2d 179, 182 n.8 (D. Mass. 2001), because the rule allows testimony to be locked in for trial before discovery is had and the trial theories are known, *see* Harry P. Carroll, et al., 43 Mass. Prac., Trial Practice § 8:58 (3d ed.).

To meet this heavy burden, a party must show it has "an *immediate* and *urgent* need to take the deposition." *In re Certain Inv. in EFT Holdings Inc. to Perpetuate Testimony of Mr. Jack Qin Under FRCP Rule 27*, 2013 WL 3811807, at *5 (C.D. Cal. July 22, 2013) ("*In re Certain Inv.*") (emphasis in original). The party must also show not only that the testimony "cannot easily be accommodated by other potential witnesses," *Application of Deiulemar Compagnia Di Navigazione S.p.A.* v. *M/V Allegra*, 198 F.3d 473, 486 (4th Cir. 1999) (citation omitted), but also that the testimony will be admissible and "material in the determination of the matter in controversy." 8A Wright & Miller, *Federal Practice & Procedure Civil* § 2072 (3d ed. 2021); 6 J. Moore, *Moore's Federal Practice Civil* § 27.16 (3d ed. 2011). Accordingly, Rule 27 is "not a substitute for discovery" and may not be used by a party to learn facts that are not already known. *Mwani* v. *Al Qaeda*, 2021 WL 5800737, at *10 (D.D.C. Dec. 7, 2021) (citation omitted).

ARGUMENT

I. The Attorney General's Motion Amounts to Trial by Ambush

The Attorney General unjustly seeks to take trial depositions of two witnesses, for whom it has provided no discovery, in an effort to lock-in their testimony at a stage of the case when ExxonMobil is not prepared to conduct an effective cross-examination. If a party is not able to effectively cross-examine a witness during a trial deposition, that party "run[s] the risk of allowing the direct testimony to go into the record unchallenged" at trial. *See* Carroll, *supra*, § 8:58. Here, the Attorney General has had the opportunity to conduct compulsory discovery

both (i) during its investigation into ExxonMobil and (ii) following the filing of its complaint. But the Attorney General has refused to disclose any of that information to ExxonMobil.

To justify its stonewalling, the Attorney General asserts that the evidence it obtained through compulsory process is "wholly unrelated" to the two depositions it seeks and that ExxonMobil has presented "no pressing need" for these documents. Ex. 2. But it is not for the Attorney General to say what documents might be relevant to ExxonMobil's cross-examination of the Attorney General's witnesses. Forcing ExxonMobil to enter the depositions blind, only knowing what the Attorney General has allowed it to know, would run counter to the core tenet of civil discovery that both parties should have access to the same information before presenting a case to the factfinder.[13] The Attorney General should not be permitted to depose the witnesses when it refuses to share any of the one-sided discovery it has collected from third parties through CIDs and Rule 45 subpoenas.

A. ExxonMobil Will Be Severely Prejudiced If the Attorney General Is Allowed to Perpetuate the Witnesses' Testimony While It Withholds Discovery

If the Attorney General conducts trial depositions while withholding documents, ExxonMobil will be deprived of its right to cross-examine the witnesses and refresh their memories with contemporaneous documents. This state of affairs would not be just.

Deprivation of the right to cross-examine. If the Attorney General is allowed to take its requested trial depositions while withholding discovery, ExxonMobil will be forced to cross-examine the witnesses before it has had the opportunity to collect and review relevant

[13] The Attorney General argues that the substance of the witnesses' expected testimony will rely on publicly available documents that have been "published in the media and scientific journals." Mot. 2. But this vague reference to publicly available materials is insufficient to allow ExxonMobil to conduct a sufficient document review in order to meaningfully examine the witnesses. The Attorney General does not mention whether it has received non-public documents or testimony from these witnesses or others during the course of its investigation that it plans to use at the trial depositions. Moreover, additional contemporaneous documents may be critical to confronting the witnesses and refreshing their recollection.

documents. Any "competent cross-examiner would want to see and use relevant documents in the course of [] a deposition." *Quinn* v. *ConAgra Foods Packaged Foods LLC*, 2010 WL 3603780, at *1 (S.D. Ohio Sept. 10, 2010). Parties rely on produced documents to "test the credibility" of a witness's deposition testimony through confrontation—without documents, there is no way to explore the truth of what the witness says. *Phillips* v. *Berlex Lab'ys, Inc.*, 2006 WL 8447820, at *3 (D. Conn. May 5, 2006).[14]

The more "sensible" and fair approach to discovery is to exchange documents before deposing witnesses so that the parties have "the relevant documents in hand" at the time depositions take place. *Smith* v. *OSF HealthCare Sys.*, 933 F.3d 859, 861, 868 (7th Cir. 2019); *see also* P. M. Lauriat, et al., 49 Mass. Prac., Discovery § 2:5. The decision in *Weiss* v. *First Unum Life Ins.*, 2010 WL 1027610 (D.N.J. Mar. 16, 2010), is instructive. There, the court considered a request to perpetuate testimony of a witness who was "in declining health" when the parties had not yet engaged in written discovery or document production. *Id.* at *1. The court denied the request, explaining in part that it would be "extremely prejudicial" for defendants to be forced to cross-examine the witness without the benefit of fact discovery. *Id.* at *3.

[14] The decision in *19th Street Baptist Church* v. *St. Peters Episcopal Church* is not to the contrary. 190 F.R.D. 345 (E.D. Pa. 2000). There, the court permitted the plaintiffs to take trial depositions of some plaintiffs prior to document discovery on the condition that the plaintiffs met certain "safeguards" to prevent "surprise" to the defendant. *Id.* at 350. The court found that with these safeguards in place, the defendant could effectively cross-examine the plaintiffs at their depositions because the complaint in that case was "rich in factual detail" and defendants had demonstrated that they understood the nature of the allegations against them in the action. *Id.* Here, by contrast, the complaint makes no allegations regarding the witnesses that are tied to the Attorney General's causes of action. Rather, to the extent the Complaint discusses the time period or witnesses in question, it frames these allegations as historical "context." Am. Compl. at 17. There has been no showing that the testimony will be materially relevant to the Attorney General's trial counts at this stage of the litigation. Moreover, unlike the defendant in *19th Street Baptist Church*, ExxonMobil has raised numerous concerns regarding fairness and justice, including the unequal footing of discovery and the inability to confront the witnesses with documents.

As in *Weiss*, this action is "still in its infancy" because the parties have not yet exchanged documents, and ExxonMobil has not had the opportunity to conduct written discovery or to take discovery depositions. 2010 WL 1027610, at *1. What makes the Attorney General's request here all the more problematic is that the Attorney General has conducted its own discovery through a multi-year pre-suit investigation during which the Attorney General had the opportunity to depose, and may well have deposed, these and other witnesses. Yet all information obtained during the investigation has been completely hidden from ExxonMobil by design in order to prevent it from preparing a meaningful defense. Similarly, the Attorney General has had the opportunity to conduct discovery through post-complaint Rule 45 subpoenas, but it has refused to share any documents with ExxonMobil in violation of the spirit of Rule 45. It would be "extremely prejudicial" to force ExxonMobil to participate in trial depositions on such drastically unequal footing with the Attorney General. *Id.* at *3.

Even if the Attorney General's existing discovery truly is "wholly unrelated" to the requested depositions, *see* Ex. 2, ExxonMobil does not yet know how the witnesses' testimony will relate to the Attorney General's claims. To the extent the Amended Complaint discusses the time period when these witnesses were associated with ExxonMobil, it does so only to provide historical "context." *See* Am. Compl. at 17. If the Attorney General really has not collected any materials related to these witnesses to date, this implies that until recently even the Attorney General has not considered the witnesses to be significant to its claims. Of greater concern, the belatedness of the Attorney General's interest in these witnesses implies that the Attorney General is now considering new theories for trial that are unrelated to the pending complaint. Because ExxonMobil does not yet have notice of these new theories, it cannot adequately defend against them at trial depositions. Accordingly, the Attorney General cannot

excuse the information imbalance in this case by claiming its discovery to date has been unrelated to the requested depositions.

Likelihood of inaccurate and incomplete testimony. The Attorney General's requested depositions would unjustly require the witnesses to testify without the opportunity to refresh their memories or to be confronted by relevant documents. It is well settled that "faulty memories" are an "effect[] of the passage of time." *Fuller* v. *Marx*, 724 F.2d 717, 721 (8th Cir. 1984). A witness's testimony "may be truthful yet inaccurate if memory fails and nothing has been done to refresh or stimulate that memory." *State of Utah* v. *Crestani*, 771 P.2d 1085, 1092 (Utah Ct. App. 1989). Both "the psychological . . . [and] legal communit[ies]" acknowledge that "the fading daguerreotype" of a witness's memory may need to be "unlock[ed]" using contemporaneous documents. *Baker* v. *State of Maryland*, 35 Md. App. 593, 594, 599 (1977). Therefore, it is essential for a "fair" and "meaningful" deposition that attorneys are able to "refresh witnesses' memories" with documents. *Rambus Inc.* v. *Samsung Elecs. Co.*, 2008 U.S. Dist. LEXIS 54196, at *14 (N.D. Cal. July 16, 2008); *accord Walker* v. *City of North Las Vegas*, 2017 WL 4467538, at *2 (D. Nev. Oct. 5, 2017).

Here, ExxonMobil would be unjustly prejudiced if the witnesses are deposed without the benefit of documents to refresh their recollection. It has been approximately 40 years since the events about which the witnesses are expected to testify. There is a high risk that the witnesses' testimony will be inaccurate if nothing is done "to refresh or stimulate" their memories. *Crestani*, 771 P.2d at 1092; *Fuller*, 724 F.2d at 721. To ensure accurate and complete testimony, the parties must have the opportunity to refresh the witnesses' memories with contemporaneous documents. *Rambus*, 2008 U.S. Dist. LEXIS 54196, at *14. Justice thus weighs against permitting the Attorney General to depose the witnesses now.

B. The Trial Depositions Would Impose an Unjust Burden on the Court, the Witnesses, and the Parties

The Attorney General's requested trial depositions would be unjustly burdensome on the Court, the witnesses, and the parties. The depositions would be a waste of time and resources because they would not yield admissible testimony and would need to be re-opened following document discovery.

Inadmissible Testimony. The failure to allow a fair opportunity to cross-examine a witness during a trial deposition could make such deposition testimony inadmissible as evidence at trial in the event the witness is unavailable. *See Anselmo* v. *Reback*, 400 Mass. 865, 869 (1987) (excluding testimony obtained pursuant to a Rule 27 deposition from the trial record where non-noticing party lacked the opportunity to cross-examine the witness); *accord Kirby* v. *Morales*, 50 Mass. App. Ct. 786, 790-91 (2001). Without an opportunity for ExxonMobil to review the Attorney General's extensive discovery, any testimony that is presented to the factfinder will be ineffectively challenged by defense counsel and thus potentially inadmissible. *See Kirby*, 50 Mass. App. Ct. at 790-91. As the whole point of the perpetuation of testimony is for its use at trial, it would be counter to the interests of justice to allow depositions in these circumstances. It would be unnecessarily burdensome for the parties and the witnesses to submit to trial depositions now when the deposition testimony is unlikely to be useful at trial. It would also impose an unnecessary burden on the Court and the parties to litigate over the admissibility of this testimony when the parties could simply wait until after document discovery is substantially complete before taking these depositions.

Likelihood of follow-up depositions. When parties are unable to fully develop and sharpen the issues through the documentary record prior to depositions, they often need to re-depose the witnesses after relevant documents have surfaced. *See, e.g.*, *Waste Corp. of Am.*

v. *Genesis Ins. Co.*, 2004 WL 7331295, at *2 (S.D. Fla. Dec. 21, 2004) (plaintiffs needed to take second depositions of witnesses to address issues that became "the subject of a sharpened focus as a result of Defendant's discovery"). Here, follow-up depositions will likely be needed for these witnesses after document discovery is substantially complete. Given the current lack of document discovery, the depositions are likely to be unfocused and incomplete. Only after the relevant issues have come under "sharpened focus as a result of Defendant's discovery" could the parties obtain all the information they need from these witnesses through a second deposition. *Id.* at *2. It would be costly, inefficient, and burdensome for the witnesses and ExxonMobil to undergo two depositions per witness, when one deposition would likely suffice. Therefore, it would not serve the interests of justice to permit trial depositions at this time.

II. The Age and Health of These Witnesses Do Not Justify the Extraordinary Relief Afforded by Rule 27(b)

The Attorney General invokes the age and health of the witnesses to justify its Rule 27(b) motion, Mot. 10-11, but the Attorney General has not shown "special circumstances that reflect an *immediate* and *urgent* need to take [a witness's] deposition." *In re Certain Inv.*, 2013 WL 3811807, at *5 (emphasis in original). To show that a witness's circumstances justify the extraordinary relief that Rule 27 affords, the moving party must provide "evidence that the witness's age . . . . or some other condition (e.g., poor health) would prevent the witness from being available to testify at trial." *In re Provident Life & Acc. Ins. Co. to Perpetuate Testimony*, 2013 WL 3946517, at *3 (C.D. Cal. July 26, 2013); *accord Ash*, 512 F.2d at 909. A witness's age, "in and of itself, does not demonstrate an immediate need for the perpetuation of his testimony." *Matter of Ricci & Kruse Lumber Co.*, 2018 WL 732498, at *2 (N.D. Cal. Feb. 6, 2018). This is particularly true when a witness is in good health. *See, e.g.*, *id.* Under these

principles, the Attorney General has not offered sufficient evidence to justify depositions under Rule 27(b).

Dr. Werthamer. The Attorney General fails to offer any "evidence" indicating that Dr. Werthamer will not be "available to testify at trial." *In re Provident Life & Acc. Ins. Co.*, 2013 WL 3946517, at *3. The Attorney General merely points out that Dr. Werthamer is 86 years old. Mot. 10. But Dr. Werthamer's age by itself "does not demonstrate an immediate need for the perpetuation of his testimony."[15] *Matter of Ricci & Kruse Lumber Co.*, 2018 WL 732498, at *2. Dr. Werthamer allegedly "reports that he is in good health," and there is no indication he has a life-threatening illness that will prevent him from surviving the duration of the pending anti-SLAPP appeal. Mot. 8. Thus, the Attorney General has failed to show an "*immediate* and *urgent* need" to take Dr. Werthamer's deposition. *In re Certain Inv.,* 2013 WL 3811807, at *5.

Dr. Hoffert. Similarly, the Attorney General has failed to substantiate its claim that Dr. Hoffert needs to be immediately deposed. The Attorney General's only evidence is an affidavit from an investigator on the Attorney General's staff who does not profess to have any medical training. *Compare* Greer Aff. ¶¶ 1, 6 *with Weiss*, 2010 WL 1027610, at *2 (considering a medical affidavit in support of a motion to perpetuate testimony). And even if the affidavit

[15] The Attorney General contends that the witnesses' ages are "alone sufficient reason" for the Court to permit their depositions. Mot. 10. But the Attorney General misreads precedent to support its claim. In two of the cases the Attorney General cites, the court did *not* find that the witness's age provided "sufficient reason" to depose them. *Id.*; *see Penn Mut. Life Ins. Co.* v. *United States*, 68 F.3d 1371, 1375 (D.C. Cir. 1995) (noting that a witness's age carried "significant risk" he would be unable to testify, but remanding the case for "further inquiry" into whether the witness possessed "unique knowledge . . . that is legally relevant"); *Ash*, 512 F.2d at 913 (affirming the denial of a Rule 27(b) motion despite noting that "age may be a relevant factor in showing that testimony must be perpetuated"). The other cases the Attorney General cites are not analogous to this case. *See Texaco, Inc.* v. *Borda*, 383 F.2d 607, 610 (3d Cir. 1967) (affirming the lower court's decision to stay proceedings while granting the petitioner's request to take a deposition while the proceedings were stayed); *19th St. Baptist Church*, 190 F.R.D. at 348 (finding Rule 26, rather than Rule 27, was the "applicable rule" in the case).

came from a medical professional, it would not justify a Rule 27(b) deposition. The medical events described in the affidavit either happened long ago or are described in vague terms (e.g., "cardiac events"), *see* Greer Aff. ¶ 6, hardly indicating that Dr. Hoffert is at imminent risk of death today.[16]

The Attorney General's allegations about Dr. Hoffert are further undercut by his recent conduct. On July 2, 2021, over a month after the most recent health incident described in the affidavit, Dr. Hoffert was featured in an article in *The Guardian* for which he was interviewed and photographed.[17] In the photographs, Dr. Hoffert posed in a pedal-driven vehicle and inside his at-home model airplane workshop.[18] Two months later, an article in *Stabroek News* noted that Dr. Hoffert "still zooms around" in "a three-wheeled solar and pedal vehicle that is a striking hybrid between a bicycle and a car." Deolall, *supra* n.12. These activities do not paint a picture of immediate and urgent need for testimony from an individual whose health poses a significant "danger that his testimony will be lost." *Weiss*, 2010 WL 1027610, at *3. Accordingly, the Attorney General's medical evidence does not satisfy its burden for a Rule 27(b) motion.

III. Rule 27(b) Depositions Are Not Justified Here Because the Witnesses' Testimony Will Not Be Material to This Litigation, Distinctly Useful, or Competent Evidence

The Attorney General's motion should independently be denied because it improperly seeks to use Rule 27 as "a substitute for broad discovery" rather than a means to perpetuate

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[16] *See Weiss*, 2010 WL 1027610, at *2. In *Weiss*, an ill plaintiff sought to perpetuate his testimony using a deposition to preserve testimony for trial. *Id.* at *1. He submitted letters from both his doctor and attorney detailing medical conditions from which he suffered, including a myocardial infarction, a heart transplant, and skin tumors. *Id.* The court rejected the request for the deposition. Despite noting the "significance" of plaintiff's alleged medical conditions, the court nonetheless found this evidence "deficient," "conclusory in nature," and "not supported by sufficient facts" to justify the deposition. *Id.* at *2-3. Noting that the evidence provided "no indication" that "Plaintiff is or has recently suffered" from certain ailments described, the court concluded that plaintiff's evidence failed to show "a danger that his testimony [would] be lost." *Id.* at *3.

[17] *See* Pattee, *supra* n.11.

[18] *Id.*

testimony. *Deiulemar*, 198 F.3d at 485. As the Attorney General concedes, "the purpose of the proposed depositions must be to preserve testimony for trial *and not for any other reason*." Mot. 10 (emphasis added). But here, the Attorney General has failed to meet its burden to show that the proposed testimony would be material, distinctly useful, or competent as evidence.

First, the Attorney General has not shown that the witnesses' testimony would be material to its claims. *See Arizona* v. *California*, 292 U.S. 341, 348 (1934). Testimony is material if it is both "relevant *and* goes to the substantial matters in dispute or has a legitimate or effective bearing on the decision." *Canal Barge Co.* v. *Gulfstream Trading, Ltd.*, 1999 WL 1277539, at *2 (E.D. La. Dec. 22, 1999) (emphasis added); *accord* 6 Moore's Federal Practice Civil § 27.16 (3d ed. 2011).[19] Here, the Attorney General speculates that the witnesses are valuable because they can testify about ExxonMobil's climate science research in the 1970s and the 1980s, as well as related decisions of management at the time. *See* Mot. 5-7, 12-13. But that research and those decisions from 40 years ago are not material to any of the Attorney General's claims, which are time-bound by the applicable four-year limitations period.[20] *See* Am. Comp. ¶¶ 742-44, 755-57, 766-68 (alleging Chapter 93A claims for misstatements and omissions "since at least 2012"); Mass Gen. Laws ch. 260 § 5A (setting a four-year limitations

[19] "This requirement is more stringent than the standard for discovery under Rule 26(b)." *Canal Barge Co.*, 1999 WL 1277539, at *2. Unlike the standard for discovery, which looks for relevance to "the subject matter of the pending action," Mass. R. Civ. P. 26(b), and even the standard at trial, which looks to a "tendency to make a fact more or less probable" and whether "the fact is of consequence" to the action, Mass. Guide to Evid. § 401, the materiality standard analyzes whether the fact goes to a "substantial matter" in addition to whether it is relevant. *See Canal Barge Co.*, 1999 WL 1277539, at *2; *accord* 6 Moore's Federal Practice Civil § 27.16 (3d ed. 2011).

[20] The Attorney General incorrectly suggests the Supreme Judicial Court has already ruled that evidence from 40 years ago is material to this litigation. Mot. 13 (citing *Exxon Mobil Corp.* v. *Att'y Gen.*, 479 Mass. 312, 326 (2018). In that case, the Court was assessing the Attorney General's discovery requests within the context of a broad CID rather than the Massachusetts Rules of Civil Procedure. *See Tomasella* v. *Nestle USA, Inc.*, 962 F.3d 60, 76 (1st Cir. 2020) (recognizing that *Exxon Mobil* addresses the "issue of the scope of the Massachusetts Attorney General's investigative power under Chapter 93A"). The relevant standard for the Supreme Judicial Court was whether the evidence was "plainly irrelevant," *Exxon Mobil Corp.*, 479 Mass. at 326 (quotations omitted), not whether the evidence was material. Accordingly, the Attorney General now faces a higher bar to show the materiality of the witnesses' expected testimony—a bar which it has not cleared.

period for consumer protection actions). In reality, the only purpose these depositions could serve would be to enable an improper fishing expedition for new information and new claims.

Second, the Attorney General has failed to show that the witnesses' testimony is "distinctly useful," Mot. 12, and "cannot easily be accommodated by other potential witnesses." *Deiulemar*, 198 F.3d at 486. Nor could it: the parties have not exchanged documents, and the Attorney General claims that the evidence it received through compulsory process is "wholly unrelated to the two depositions." Ex. 2. If the Attorney General actually has no discovery about the witnesses, then it is improperly using Rule 27(b) to secure a general deposition for purposes of discovery about subject matter that was so unimportant the Attorney General did not pursue it in the last six years. The only other conclusion, as noted above, is that the Attorney General is tactically withholding such documents, making these trial-bound depositions inequitable. *See supra* Section I.A.

The affidavit offered by the Attorney General is not to the contrary. For example, the affidavit alleges that the witnesses were members of "research groups," Mot. 4, implicitly suggesting that there were many other researchers who "were there." Mot. 12. These other researchers may be younger than Dr. Hoffert and Dr. Werthamer—who were in their 40s while associated with Exxon Research—and may be able to testify about the same events. The Attorney General offers nothing to rebut these common-sense possibilities or establish that justice would be delayed if the testimony of their preferred witnesses are not preserved now.

Finally, in the case of Dr. Werthamer, the Attorney General has failed to establish that a deposition would yield admissible testimony. *See Arizona*, 292 U.S. at 348; *accord Canal Barge Co.*, 1999 WL 1277539, at *2. The Attorney General specifically draws attention to Dr. Werthamer's supervision of Henry Shaw, and notes that it is his "conversations with

Dr. Shaw at the time" that make Dr. Werthamer an important witness. Mot. 10. This is hearsay. Mass. Guide to Evid. § 801(c). Even though Dr. Shaw may be deceased, the Attorney General has pointed to no exception to the hearsay rule that would allow any of Dr. Shaw's statements to be admissible at trial through Dr. Werthamer's testimony. *See id.* § 804. Given that Dr. Werthamer's deposition testimony would not be "competent (*i.e.*, admissible)" at trial, *Canal Barge Co.*, 1999 WL 1277539, at *3, the Attorney General has failed to establish that his testimony would fit within the narrow confines permitted by a Rule 27(b) motion.

IV. Rule 27(b) Does Not Authorize Depositions Here Because the Court Has Not Issued a Final Judgment in This Case

The Attorney General cannot take Rule 27(b) depositions during the pendency of an interlocutory appeal. Rule 27(b) only applies "[i]f an appeal has been taken from a ***judgment***," Mass. R. Civ. P. 27(b) (emphasis added), which is defined under the Massachusetts Rules of Civil Procedure as "the act of the trial court finally adjudicating the rights of the parties." Mass. R. Civ. P. 54(a). Here, the Attorney General cannot seek relief under Rule 27(b) because the trial court has not finally adjudicated the parties' rights. The pending appeal in this action concerns an interlocutory order that did not dispose of the Attorney General's claims. Because no judgment has been entered in this case, the Attorney General cannot obtain permission to perpetuate testimony under Rule 27(b).

This analysis is confirmed by the parallel Rule 27(b) of the Federal Rules of Civil Procedure, which is also limited to cases where a "judgment has been rendered." *See* Fed. R. Civ. P. 27(b)(1). Courts have uniformly and repeatedly held that the federal analogue to Rule 27(b) "only applies where a final judgment has been rendered." *Louisiana Real Est. Appraisers Bd.* v. *United States Fed. Trade Comm'n*, 2020 WL 1817297, at *2 (M.D. La. Apr. 9, 2020) (citing *Shore* v. *Acands, Inc.*, 644 F.2d 386, 389 (5th Cir. 1981) (denying motion to

perpetuate testimony during interlocutory appeal because no "final judgment has been rendered")); *accord Marcello* v. *Desano*, 2006 WL 1582404, at *14 (D.R.I. Mar. 23, 2006); *Brown* v. *Snyder*, 2020 WL 6342669, at *1 (E.D. Mich. Oct. 29, 2020); *Mwani*, 2021 WL 5800737, at *11. That comports with the purpose of the rule, which is solely to allow preservation of testimony "that would otherwise be destroyed." *In re Liquor Salesmen's Union Loc. 2D Pension Fund*, 2012 WL 2952391, at *3 (E.D.N.Y July 19, 2012). Because the requirements of Rule 27(b) are not met, the Court should deny the Attorney General's motion.

CONCLUSION

Six years after the Attorney General launched its investigation, the Attorney General invokes Rule 27(b) to lock in testimony before making any disclosures that might be useful for cross-examination. Allowing the depositions to proceed on this basis would permit an inherently inequitable and utterly inefficient trial by ambush. The Attorney General has refused to produce the documents it has received in response to third-party subpoenas or to otherwise disclose the documents on which it would depose the witnesses. There is also no immediate and urgent need to take the depositions—one of the witnesses is acknowledged to be in good health, and the other by all reports has been leading an active and productive professional and personal life in the months since his most recent alleged medical incidents. Nor would these depositions be appropriate given that the witnesses' testimony would not be material, distinctly useful, or admissible at trial. Finally, Rule 27(b) depositions are unavailable here because no final judgment has been entered. The Attorney General's motion should therefore be denied.

Dated: January 20, 2022

Respectfully submitted,

EXXON MOBIL CORPORATION

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Counsel for Exxon Mobil Corporation

CERTIFICATE OF SERVICE

I, Justin Anderson, counsel for Defendant Exxon Mobil Corporation, hereby certify that on January 20, 2022, I caused a copy of this Memorandum of Law of Exxon Mobil Corporation in Opposition to the Commonwealth's Motion to Permit the Depositions of Certain Witnesses Pending Appeal to be served on counsel of record by electronic service.

/s/ Justin Anderson

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.	SUPERIOR COURT CIVIL ACTION NO.: 1984-CV-03333-BLS1
COMMONWEALTH OF MASSACHUSETTS, Plaintiff, v. EXXON MOBIL CORPORATION, Defendant.	**Service Via Email**

AFFIDAVIT OF JUSTIN ANDERSON

I, Justin Anderson, hereby depose and state under oath:

1. I am a partner with the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP.

2. I submit this affidavit in support of Defendant Exxon Mobil Corporation's Memorandum of Law in Opposition to the Commonwealth's Motion to Permit the Depositions of Certain Witnesses Pending Appeal. My statements in this affidavit are based on personal knowledge, based on my experience or my consultation with others, or they are known to me in my capacity as counsel for Exxon Mobil Corporation ("ExxonMobil").

3. Between July 26, 2021 and the present, I received multiple emails from the Attorney General's office notifying me of Rule 45 subpoenas for documents that the Attorney General intended to serve on approximately 13 third parties. Some of the emails also indicated that the Attorney General had received partial productions on certain dates in response to subpoenas, but did not provide further detail about these productions.

4. Attached to this affidavit as Exhibit 1 is a true and correct copy of an email from me to Assistant Attorney General, Energy and Environment Bureau, David A. Wittenberg of the Office of the Massachusetts Attorney General, dated January 6, 2022.

5. Attached to this affidavit as Exhibit 2 is a true and correct copy of an email from Chief Legal Counsel Richard A. Johnston of the Office of the Massachusetts Attorney General to me, dated January 10, 2022.

Signed under the penalties of perjury, this 20th day of January, 2022.

/s/ Justin Anderson

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CERTIFICATE OF SERVICE

I, Justin Anderson, counsel for Defendant Exxon Mobil Corporation, hereby certify that on January 20, 2022, I caused a copy of the Affidavit of Justin Anderson and the accompanying exhibits to be served on counsel of record by electronic service.

/s/ Justin Anderson

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Exhibit 1

From: Anderson, Justin <janderson@paulweiss.com>
Sent: Thursday, January 6, 2022 10:48 PM
To: Wittenberg, David (AGO) <david.wittenberg@state.ma.us>
Subject: RE: Commonwealth v. ExxonMobil

Hi David. Thank you for your call. As we indicated a few months ago, we believe taking depositions at this point is premature and inappropriate. Your office filed a 200-page complaint against ExxonMobil, proceeding on a number of theories, and we have not yet exchanged document discovery on those theories or otherwise narrowed the case. Your request is also premature in light of the pending appeal before the Supreme Judicial Court. Oral argument is only two months away, and the outcome of that appeal could result in the dismissal of the action in its entirety.

There is also significant unfairness in proceeding with depositions at this time. Your office conducted a four year-investigation during which you issued numerous CIDs and otherwise amassed a substantial volume of relevant documents, possibly including deposition testimony and affidavits. Your office refused to provide us with any of the materials obtained during your pre-suit investigation. Your office has also issued numerous Rule 45 subpoenas subsequent to filing your complaint. Despite our requests—and we believe in violation of the spirit, if not the letter, of Rule 45—your office has been unwilling to share any of those subpoenaed documents with us, taking the position that your only Rule 45 obligation is to provide notice that you received discovery from third parties. It would thus be highly unfair to conduct depositions, which you might later seek to use at trial, when the trial counts and theories are unknown to us and where only your office has access to relevant, discoverable documents. As we have previously indicated, this would be trial by ambush, and it would violate our due process rights.

We therefore ask again for your office to produce all documents obtained from Rule 45 subpoenas and pre-suit CIDs, together with documents your office has exchanged with the potential deponents and the documents your office might use during the depositions. Your response to these requests will inform the position we take on your motion to proceed with depositions.

We look forward to hearing from you.

Justin Anderson | Partner
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Pronouns: He/Him/His

Exhibit 2

From: Johnston, Richard (AGO) <richard.johnston@state.ma.us>
Sent: Monday, January 10, 2022 8:53 AM
To: Anderson, Justin <janderson@paulweiss.com>
Subject: FW: Commonwealth v. ExxonMobil

Justin:

We have reviewed your email to David Wittenberg in response to our inquiry as to whether ExxonMobil will assent to the Commonwealth's Rule 27(b) motion to depose two witnesses, both of whom are in their 80s, during the pendency of the company's appeal of the denial of its anti-SLAPP motion to dismiss. We understand your email to indicate that ExxonMobil will not assent to the depositions or that motion as things stand. I am writing only to clarify the Commonwealth's position on several issues raised in your response.

The response indicates that ExxonMobil will not consider assenting to the depositions unless and until the Commonwealth agrees to produce documents to ExxonMobil that include all of the Commonwealth's Chapter 93A investigatory materials and all responses to the Rule 45 subpoenas that the Commonwealth has served in this action.

As to the Chapter 93A investigatory materials, as we have previously discussed with you, the Commonwealth is not prepared at this stage to engage in such broad, unilateral discovery productions without reciprocal obligations on the part of ExxonMobil to engage in full document discovery.

As to responses to the Rule 45 subpoenas (which we believe to be wholly unrelated to the two depositions), your statement of the Commonwealth's position is not accurate. While the Rule does not require us to produce such documents, we remain prepared to engage in a reciprocal production of Rule 45 documents received by the parties -- shortly after the entry of appropriate stipulations or court orders with respect to confidentiality and electronically-stored information governing the production of documents in this case, which as you know, we are attempting to negotiate with your team. We think stipulations and/or orders are an important and logical predicate to document transfers, and ExxonMobil has identified no pressing need for the documents before such orders are in place.

Rich