

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

_____)	
COMMONWEALTH OF MASSACHUSETTS,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Service by e-mail
)	
EXXON MOBIL CORPORATION,)	
)	
<i>Defendant.</i>)	
_____)	

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

INTRODUCTION

The Commonwealth's motion is a modest, targeted request to preserve relevant trial testimony pending resolution of ExxonMobil's interlocutory appeal of a motion in this two-year-old action. In its opposition, ExxonMobil mischaracterizes the Commonwealth's motion, misstates the law, and makes baseless claims of prejudice. The Commonwealth has satisfied Rule 27(b)'s requirements for an order authorizing the two requested depositions pending the appeal. As such, allowing this motion constitutes a proper exercise of this Court's sound discretion regarding the "conduct . . . of discovery." *Solimene v. B. Grauel & Co., K.G.*, 399 Mass. 790, 799 (1987).

ARGUMENT

I. The Commonwealth's Motion Fully Satisfies the Requirements of Rule 27(b).

The age and health of witnesses, as ExxonMobil concedes, Opp'n 2, are important factors in deciding a Rule 27(b) motion, MA Mem. 10-11. They are dispositive here: Professor Hoffert is 83 years old with a harrowing medical history, and Dr. Werthamer is 86 years old. MA Mem. 6, 8; *see In re Town of Amenia, N.Y.*, 200 F.R.D. 200, 202 (S.D.N.Y. 2001) ("significant risk that ... testimony w[ould] be lost if not perpetuated" where witness was "seventy-seven years old and reportedly in ill health"). The Court need not and should 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. *See Texaco, Inc. v. Borda*, 383 F.2d 607, 609-10 (3d Cir. 1967).¹ Indeed, a contrary conclusion would "ignor[e] the facts of life." *19th St. Baptist Church v. St. Peters Episcopal Church*, 190 F.R.D. 345, 350 (E.D. Pa. 2000) (citation omitted). In response,

¹ The elderly and the ill now face additional heightened risks from COVID-19. *See, e.g., COVID-19 Risks and Vaccine Information for Older Adults*, CDC, Aug. 2, 2021, <https://tinyurl.com/yjm876xr>; *People with Medical Conditions*, CDC, Dec. 14, 2021, <https://tinyurl.com/2p8pjujn>.

ExxonMobil cites no case where a court denied a Rule 27(b) motion where the witnesses were, like those here, over 80 years old.^{2, 3} Because denying the Commonwealth's motion may very well result in a loss of evidence, it plainly satisfies Rule 27(b).

Professor Hoffert and Dr. Werthamer's testimony is also relevant to the Commonwealth's claims, as Rule 27(b) requires, and the Commonwealth has laid out the substance and articulated the relevance of the testimony. MA Mem. 1-2, 4-8, 12-13. ExxonMobil's "trial by ambush" epithet is, therefore, spurious. As ExxonMobil knows, Professor Hoffert and Dr. Werthamer's testimony is unique evidence of ExxonMobil's climate change knowledge and related activities during a key period described in the Amended Complaint. *Id.* Such historic evidence is "probative of Exxon[Mobil]'s present knowledge on the issue of climate change, and whether Exxon[Mobil] disclosed that knowledge to the public." *Exxon Mobil Corp. v. Att'y Gen.*, 479 Mass. 312, 326 (2018). The testimonies' relevance and their known substance make these Rule 27(b) depositions especially appropriate and fair here.

Finally, ExxonMobil argues incorrectly that there is no "judgment" here to trigger Rule 27(b). Opp'n 19-20. Rule 27(b) applies because "[a]n order" appealable under the present

² See, e.g., *In re Ricci & Kruse Lumber Co.*, 2018 WL 732498, at *2 (N.D. Cal. Feb. 6, 2018) (denial of pre-suit motion to depose witness "over 70 years old."); *In re Certain Inv.*, 2013 WL 3811807, at *5 (denial of pre-suit motion to depose witness with no showing of advanced age, or ill health, who was not "the most appropriate" witness); *In re Provident Life & Acc. Ins. Co. to Perpetuate Testimony*, 2013 WL 3946517, at *3 (C.D. Cal. July 26, 2013) (denial of pre-suit motion to depose 67-year-old witness with no health concerns); *Weiss v. First Unum Life Ins.*, 2010 WL 1027610, at *3 (D.N.J. Mar. 16, 2010) (evidence insufficient to show loss of testimony of 60-year-old man was likely); cf. *Barrows v. Am. Airlines, Inc.*, 164 F. Supp. 2d 179, 182 n.8 (D. Mass. 2001) (declined to rule on pre-suit motion).

³ ExxonMobil argues that *19th Street Baptist Church v. St. Peters Episcopal Church*, 190 F.R.D. 345 (E.D. Pa. 2000), is not analogous because the court there found that Rule 26 (not Rule 27) applied. Opp'n 15 n.15. But the *19th Street Baptist Church* court left no room to question this analogy, as it affirmed, "[w]hether Rule 26 or Rule 27 applies, . . . the common purpose informing both rules militates in favor of allowing perpetuation of testimony of a person when it is uncertain that that person will be available at trial." 190 F.R.D. at 349.

execution doctrine “is treated as a final judgment,” Howard J. Alperin, Summary of Basic Law, 14 Mass. Practice § 4:14 (5th ed. 2014 & Supp. 2021), and the denial of an anti-SLAPP motion is appealable under that doctrine, *Fabre v. Walton*, 436 Mass. 517, 520-22 (2002); see *Franchini v. Investor’s Bus. Daily, Inc.*, 981 F.3d 1, 6-8 (1st Cir. 2020) (denial of anti-SLAPP motion appealable under collateral order doctrine); *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1015-16 (9th Cir. 2013) (same).⁴ ExxonMobil’s appeal of this Court’s denial of its special motion to dismiss under the anti-SLAPP statute thus constitutes a “judgment” under Rule 27(b). The cases ExxonMobil cites for the contrary proposition are inapposite.⁵ Indeed, at least one court has allowed a Rule 27(b) motion pending the appeal of a denial of an anti-SLAPP motion to dismiss. *Piping Rock Partners v. David Lerner Assocs.*, 2013 WL 3458215, at *2 (N.D. Cal. July 9, 2013).

II. ExxonMobil’s Unfairness Complaints Lack Merit.

The “methods of discovery may be used in any sequence.” Mass. R. Civ. P. 26(d). ExxonMobil asks this Court to rewrite that rule to prohibit one party—the Commonwealth—from deposing witnesses—two former *ExxonMobil* workers—if the parties have not yet engaged in written discovery. That is not the law. It is settled that “all parties are allowed to use discovery

⁴ Massachusetts’ “present execution [doctrine] is similar to the Federal ‘collateral order doctrine.’” *Patel v. Martin*, 481 Mass. 29, 32-33 (2018); see *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 414 n.5 (2015) (certain interlocutory orders “deemed ‘final’” under collateral order doctrine).

⁵ In *Louisiana Real Est. Appraisers Bd. v. United States Fed. Trade Comm’n*, 2020 WL 1817297, at *2 (M.D. La. Apr. 9, 2020), the court ruled that a stay of administrative proceedings was not a judgment under Rule 27(b). The other cases ExxonMobil cites are even less relevant: the Rule 27(b) prerequisite—a pending appeal—was absent in each. See *Shore v. Acands, Inc.*, 644 F.2d 386, 389 (5th Cir. 1981) (“no judgment” or appeal); *Mwani v. Al Qaeda*, 2021 WL 5800737, at *10 (D.D.C. Dec. 7, 2021) (“no judgment entered” where a “judgment” is “any order from which an appeal lies”); *Brown v. Snyder*, 2020 WL 6342669, at *1 (E.D. Mich. Oct. 29, 2020) (no “appealable judgment”); *In re Liquor Salesmen’s Union Loc. 2D Pension Fund*, 2012 WL 2952391, at *2-3 (E.D.N.Y. July 19, 2012) (analyzing pre-complaint discovery under Rule 27(a)); *Marcello v. Desano*, 2006 WL 1582404, at *14 (D.R.I. Mar. 23, 2006) (no pending appeal).

devices when and how they choose.” 8A Richard L. Marcus, Fed. Practice & Procedure § 2047 (3d ed. 2010 & 2021 update). This Court has previously rejected the very argument ExxonMobil makes here, *i.e.*, that document discovery must precede a deposition. *Alnylam Pharm., Inc. v. Dicerna Pharm., Inc.*, 2016 WL 4063565, at *3-4 (Super. Ct. Apr. 6, 2016) (denying motion for order preventing deposition of company’s own employee prior to other party’s completion of document production). ExxonMobil’s relies on a magistrate’s contrary finding in *Weiss v. First Unum Life Ins.*, 2010 WL 1027610 at *3 (D.N.J. Mar. 16, 2010), *see* Opp’n 10-11, but this is inconsistent with *Alnylam*, decisions such as *19th Street Baptist Church*, and Rule 26(d) itself.⁶

Equity is not on ExxonMobil’s side either. While ExxonMobil asserts that allowing the depositions prior to written discovery would force it “to enter the depositions blind,” Opp’n 9, the two deponents both worked for ExxonMobil and their expected testimony concerns their work for the company, MA Mem. 1, 4-8. ExxonMobil surely knows more about that work and what they might say about it than the Commonwealth, which has not received a single document from ExxonMobil during either the underlying investigation or in this case. Moreover, the testimony the Commonwealth seeks to perpetuate is publicly reflected in the witnesses’ press interviews and sworn congressional testimony and is described in the amended complaint. *Id.* at 1-2, 4-8.

There is also no support for ExxonMobil’s repeated complaints that the Commonwealth has not shared its own materials relating to the two deponents. *E.g.*, Opp’n 1, 4-9, 11, 18, 20.

That is a self-inflicted problem, since ExxonMobil has been unwilling to engage in open party

⁶ ExxonMobil’s attempt to distinguish *19th Street Baptist Church*, which authorized a deposition of elderly plaintiffs to perpetuate their testimony prior to document discovery, is misleading. Opp’n 10 n14. There, as here, the defendants raised identical concerns to the fairness ones ExxonMobil raises here, *see* 190 F.R.D. at 350, but the court “disagree[d],” noting that, as here, the defendants’ motion to dismiss showed that they “underst[ood] the nature of the allegations against them,” *id.*

discovery pending its appeal. *See* Anderson Aff., Ex. 2. Nonetheless, the Commonwealth is prepared to provide ExxonMobil with any non-public materials that the Commonwealth has received from the deponents regarding the deponents and their work for ExxonMobil at a reasonable time prior to the depositions, provided that ExxonMobil is subject to a reciprocal obligation.⁷ If ExxonMobil deems it necessary to depose the witnesses again following the completion of document discovery, it may notice their depositions at that time, and the Court will determine whether that is necessary and appropriate based on the then-existing record. *Alnylam*, 2016 WL 4063565, at *4; *see Piping Rock*, 2013 WL 3458215, at *2 (allowing “follow-up questions at a later date” in absence of document discovery where Rule 27(b) motion allowed based on risk that “memory will fade”).

* * *

Given ExxonMobil’s pending appeal, Rule 27(b) is an appropriate device to preserve the testimony of these two important, elderly witnesses. Alternatively, since ExxonMobil—despite its opposition to this motion and full party discovery—now concedes that this is a “live” case in this Court pending its appeal, Opp’n 2-3, the Commonwealth would readily agree to an immediate Rule 16 conference to discuss an orderly process for initiating full discovery, including third-party depositions.

CONCLUSION

For the foregoing reasons, and the additional reasons stated in the Commonwealth’s opening memorandum, the Commonwealth respectfully requests the Court allow its motion.

⁷ The Commonwealth declines, however, to engage in one-sided productions of its confidential investigative demand responses, depositions, interviews, and all other materials collected during its investigation, as ExxonMobil wrongly believes it should be entitled to obtain outside the confines and reciprocal obligations of ordinary discovery. *Id.* at 4. The Commonwealth also has reasonably deferred exchange of Rule 45 subpoena responses until an electronically stored information protocol and protective confidentiality order, which the parties have been discussing for months, are in place. Anderson Aff. Ex. 2.

Respectfully Submitted,

COMMONWEALTH OF MASSACHUSETTS,

By its attorney,

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CERTIFICATE OF SERVICE

I, David A. Wittenberg, certify that on January 31, 2022, I served the foregoing document by sending a copy thereof by electronic service to:

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