UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DAVID B. TRACEY, *et al*., *Plaintiffs*, v. MASSACHUSETTS INSTITUTE OF TECHNOLOGY, *et al*., *Defendants*.	No. 16-cv-11620-NMG

MEMORANDUM IN OPPOSITION TO NON-PARTIES ABIGAIL P. JOHNSON AND FIDELITY'S MOTION FOR A PROTECTIVE ORDER [DOC. 244]

The Court should deny Abigail P. Johnson ("Johnson") and FMR LLC's ("Fidelity") (collectively "Johnson") premature motion for a protective order. First, Johnson's motion is illogically and incorrectly premised on unsupported allegations that Plaintiffs' *preliminary* witness list *shared only with Defendant*s was "a transparent attempt to harass [] Johnson and to attract media attention." Doc. 245 at 1. Plaintiffs have yet to issue a trial subpoena, so their intent could not have been to "harass" Johnson. Second, Plaintiffs never provided the preliminary witness list to anyone other than Defendants, so it could not be an attempt "to attract media attention." Third, Johnson admits her motion is premature and is not ripe for a decision because Plaintiffs have not served a subpoena. Fourth, Johnson offers no evidence to meet her burden of demonstrating that she lacks unique knowledge, so the apex witness doctrine is inapplicable. Fifth, and in addition to above, Plaintiffs have offered to accept stipulated written testimony from Johnson in lieu of calling her as a live witness demonstrating that Johnson's claims are without merit.

I. Johnson Presents No Evidence that Plaintiffs Intend to Harass Johnson

Plaintiffs did not include Ms. Johnson on their preliminary witness list to "harass" Johnson or gain publicity. In fact, Plaintiff *only served counsel for Defendants* with the

preliminary witness list. Lea Dec. ¶¶2–3. Plaintiffs never provided the witness list to Johnson, Fidelity or any third party. *Id.* ¶¶3–4. Plaintiffs have yet to issue a trial subpoena. *Id.* ¶5. Johnson makes an illogical argument that Plaintiffs included her on a preliminary witness list only shared with Defendants for harassment or media attention. Doc. 245 at 8–10. Presumably, *it was counsel for Defendants* who shared Plaintiffs' witness list with Johnson. In addition, Johnson shared it with the public by filing the instant motion, even though Plaintiffs informed her that the witness list was not yet final.

During a meet and confer with Johnson's counsel, Plaintiffs told Johnson's counsel that the witness list was not final, they had not issued any trial subpoenas and would take into consideration their objections to calling Johnson in determining their final witness list, but they were still preparing for trial and not in a place to make a final determination. *Id.* ¶6. Johnson, as she admits in her filings, prematurely filed this motion prior to even receiving a subpoena rather than allowing Plaintiffs time to consider her objections and determine whether she would be included in their final witness list. *See* Doc. 245 at 1 n.1.

II. Johnson Presents No Evidence that She was Included For Media Attention

Contrary to Johnson's suggestions otherwise, there is no evidence that the witness list has been shared with anyone other than Defendants, and the press and public would have no knowledge of the parties' internal discussions regarding the preliminary witness list if Johnson had not prematurely filed the instant motion.

The press release related to summary judgment that Johnson relies upon is in no way "reckless" or "false." Johnson claims it was "false" to describe Michael Howard as a "Fidelity executive," because he worked at MIT and was just expressing his "opinion" that Fidelity only cared about recordkeeping and assets in actively managed funds. Doc. 245 at 9 n.4. Johnson conveniently ignores that, prior to working at MIT, Howard was not only a Fidelity Executive,

but the Vice President for Finance in the Institutional Retirement Division of Fidelity from 2001 to 2005 and Chief Financial Officer of Fidelity subsidiary Pyramis Global Advisors from 2005 to 2009. Howard Dep. (Doc. 225-1) 24:6–25:20. Howard was indisputably a Fidelity executive with intimate knowledge of its cost structure and finances related to 401(k) plans prior to joining MIT; the statement was neither false nor reckless. Second, Johnson complains about the description of a donation in 2016 as "soon" after a statement in mid-2015 from a member of MIT's senior leadership that MIT should expect something "big and good from the Johnson family" if Fidelity remained the recordkeeper. Notably, Johnson does not deny a member of MIT's senior leadership made the statement to the chair of the fiduciary committee or that Fidelity's foundation made the $5 million donation. Doc. 245 at 9 n.4.[1] In short, she identifies nothing "false" or "reckless" about the statement.

Johnson ignores copious evidence that Defendants failed to engage in an impartial investigation of the relevant factors related to the Plan's recordkeeping and investments in an attempt to protect their relationship with her, while she served on the MIT Corporation, and Fidelity. *See* Doc. 224 ¶¶121–172. Johnson wholly ignores that MIT executive's response to being told participants paid more than three times the market rates for recordkeeping and administrative fees was to state "*MIT must be sensitive to . . . [the fact that] . . . Johnson is a member of both the MIT Corporation and MITIMCo's Board of Trustees. She is Chair of the Board that oversees Fidelity's 161 fixed income and asset allocation funds which handle about $650 billion of the more than $1.2 trillion managed by Fidelity.*" Doc. 225-11 at 17 (emphasis

[1] Johnson also described this statement as a "joke." *Id.* First, there is nothing in the document suggesting it was a "joke," and Johnson presents no evidence supporting this characterization. *See* Doc. 225-77 ("if we are not switching to Vanguard or TIAA-CREF, I am going to expect something big and good coming to MIT from the Johnson family.") Second, the content is consistent with a myriad of facts and documents demonstrating a desire to please Fidelity and Johnson. *See* Doc. 224 ¶¶121–172.

added). As discussed below, there is substantial documentary evidence linking actions or inactions regarding the Plan to MIT's relationship with Johnson. In short, Johnson presents no evidence that Plaintiffs are considering calling her as a witness to "harass" her or to "garner media attention."

III. Johnson's Motion is Not Ripe

As Johnson admits in her motion (Doc. 245 at 1 n.1), she has not been served with a subpoena, has not been asked if she would testify without a subpoena, and no final witness list has been filed. Johnson asks for an unprecedented protective order preventing a party from even issuing a subpoena. Johnson's Proposed Order. (Doc. 244-1) ("Plaintiffs are prohibited from issuing a subpoena to Abigail Johnson to testify at trial in this action."). Until and unless Plaintiffs serve Johnson with a subpoena, her motion is not ripe and the Court should not consider it. Johnson has cited no authority supporting her unprecedented request for a protective order prohibiting a party from serving a subpoena. Nor does Johnson present any authority how she, as a non-party, has standing to challenge a preliminary witness list only exchanged between the parties.

IV. Johnson Presents No Evidence to Support Her Contention That the Apex Witness Doctrine Applies

Johnson has not satisfied her burden of demonstrating that she is an apex witness without unique knowledge. Johnson seeks a protective order for good cause under Rule 26(c).[2] "The burden of demonstrating good cause rests on the proponent of the protective order." *Jagex Ltd. v. Impulse Software*, 273 F.R.D. 357, 358 (D. Mass. 2011)(citing *Pub. Citizen v. Liggett Grp., Inc.*,

[2] It is not clear that Rule 26, which only applies to discovery, is even applicable to non-party Johnson's unprecedented request for a protective order preventing a party from issuing a trial subpoena.

858 F.2d 775, 789 (1st Cir. 1988)). Johnson bears the burden of demonstrating that she is an apex witness and lacks any unique knowledge.

The apex witness doctrine only applies when the proponent demonstrates that the executive has no unique knowledge and there is no good cause for the deposition. *See Travelers Rental Co. v. Ford Motor Co.*, 116 F.R.D. 140, 142 (D. Mass. 1987); *Koninklijke Philips Elecs. N.V. v. ZOLL Med. Corp.*, No. 10-11041-NMG, 2013 WL 1833010, at *1 (D. Mass. Apr. 30, 2013)("Courts, however, have acknowledged that precluding depositions of such executives may be appropriate where they lack specific and unique knowledge related to the suit."). An executive has unique knowledge if reports were specifically prepared for them regarding relevant decisions, if they were the ultimate decision maker on relevant issues, or if they were involved in "the administration or implementation" of relevant policies. *Travelers*, 116 F.R.D at 142–143. Courts routinely deny motions under the apex witness doctrine when the apex witness fails to meet its burden by submitting a declaration stating that the executive does not have unique personal knowledge. *See, e.g., Angiodynamics, Inc. v. Biolitec, Inc*., No. 08 005, 2010 WL 11541925, at *2–3 (N.D.N.Y. Sept. 17, 2010)(finding a second-hand affidavit from corporate counsel was insufficient to show the senior executive had no relevant and unique knowledge); *Burnett v. Wahlburgers Franchising LLC*, No. 16 CV 4602 (WFK), 2018 WL 8367463, at *3 (E.D.N.Y. July 10, 2018)(similar); *Vellali v. Yale Univ.*, No. 16-1345, Doc. 172 at *4 (D. Conn. Apr. 19, 2019)(Ex. 1)(same).[3] Filing testimony from other individuals claiming that the executive has no unique knowledge is not sufficient. *Angiodynamics, Inc.*, 2010 WL 11541925, at *2–3; *Burnett*, 2018 WL 8367463, at *3; *Vellali*, No. 16-1345, Doc. 172 at *4.

[3] The apex witness cases cited by Johnson similarly required testimonial evidence from the executive asserting that he or she lacked unique knowledge to demonstrate good cause. *Amazon.com, Inc. v. Comm'r*, 108 T.C.M. (CCH) 588, at 5 (T.C. 2014); *Treppel v. Biovail Corp.*, No. 03 CIV. 3002 PKL JCF, 2006 WL 468314, at *1 (S.D.N.Y. Feb. 28, 2006).

Tellingly, Johnson does not even submit a declaration denying that she has unique knowledge relevant to this case. Rather, Johnson argues Plaintiffs conceded that she had no unique knowledge. Doc. 245 at 6–7. Plaintiffs did no such thing. Plaintiffs merely argued in their motion for leave to file a third amended complaint that they were not required to demonstrate that Johnson attempted to "exert influence" on the Plan to assert a duty of loyalty claim because Defendants' intent to favor Johnson and Fidelity was demonstrated from their own statements and conduct.[4] Doc. 193-1 at 6–7. As discussed below, there is abundant documentation of Johnson's involvement in Fidelity's interactions with MIT regarding the Plan, Fidelity's updates to Johnson and Fidelity's insertion of Johnson to influence MIT's decision-making process. Second, Johnson relies upon statements from MIT's former director of benefits, a Fidelity employee, and a former MIT and Fidelity employee. Doc. 245 at 6. None of these individuals testified that Johnson had no unique knowledge as is required under the apex witness doctrine. Moreover, testimony from others that the executive does not have knowledge is not sufficient. *Angiodynamics, Inc.*, 2010 WL 11541925, at *2–3; *Burnett*, 2018 WL 8367463, at *3; *Vellali*, No. 16-1345, Doc. 172 at *4. Johnson also presents no authority that the apex witness doctrine applies here. Johnson has roles at both Fidelity and MIT. Johnson presents no authority that the apex witness doctrine applies when an executive working for a third party also has relevant knowledge to a case based on its role with a party in the case.

Setting aside Johnson's failure to offer the proper evidence to meet her burden of demonstrating good cause, plenty of evidence of Johnson's unique knowledge exists in this case. In May 2010, a Fidelity employee responsible for the MIT relationship, John Harrington, sent MIT an e-mail highlighting Abigail Johnson's role as head of Personal and Workplace Investing

[4] As discussed in Plaintiffs' Opposition to Defendants' Motion in Limine 1, evidence of MIT's desire to maintain Fidelity's revenue and please Johnson is relevant to the inquiry regarding whether Defendants acted prudently.

(PWI), the recordkeeping division of Fidelity, noting that Harrington reported to PWI and that "Abby continues to have major focus on the PWI business and has expanded her leadership scope to additional distribution channels." Doc. 225-36. In early 2011, MIT's Plan Oversight Committee's Chair and Executive Vice President and Treasurer, Theresa Stone, met with Fidelity's Kathy Murphy, who directly reported to Abigail Johnson, regarding the Plan. Doc. 225-41. In June 2010, the Executive Vice President of Fidelity's Tax-Exempt 403(b) Market wrote to Stone that "I did meet with Abby [Johnson] yesterday on an unrelated topic and I was able to let her know about our discussion [related to the MIT retirement Plan] – she was glad to hear you [Theresa Stone] and Rick were able to attend and bring the Celtics good luck." Doc. 225-85. In August 2011, Harrington told MIT that Johnson and others in "senior leadership" with Johnson at Fidelity were asking MIT to sign acknowledgments to changes in Fidelity's recordkeeping float practices and indicated that if MIT refused the refusal would be taken before Johnson. Ex. 2, (MIT-0150355). Harrington also indicated that any investment lineup changes would need to be discussed "strategically with leadership from Fidelity and MIT." Doc. 225-33. In 2014, Ruiz wrote that he would want to confer with Abigail Johnson prior to making Plan changes. Doc. 208-5. As a member of the MIT Corporation, Johnson was part of the "government of MIT" with a "fiduciary duty to govern MIT."[5] The MIT Corporation retained full authority and discretion over the recordkeeping arrangement with Fidelity until 2014, when it delegated those responsibilities to the Executive Vice President & Treasurer. Johnson, as a member of the MIT Corporation, also elected the Chair of the Corporation (John Reed), the President (Rafael Reif) and the Executive Vice President and Treasurer (Stone and Ruiz).[6]

[5] Doc. 250, n. 1. The MIT Corporation Bylaws as amended December 7, 2012, § 1.1. Available at https://corporation.mit.edu/sites/default/files/documents/bylaws.pdf.
[6] *Id*. at §1.1.1.

Johnson also received reports from time to time from Stone and Ruiz.[7] The MIT Corporation Bylaws also provide that "[n]o one under engagement to provide personal services to MIT with or without compensation … shall be elected a member of the Corporation."[8] Contrary to Johnson's unsworn assertions, she has extensive and unique knowledge regarding this case, both in her position at Fidelity and on the MIT Corporation.

V. Plaintiffs Have Offered to Stipulate to Written Testimony From Johnson to Obviate the Need to Call Her as a Live Witness.

Additionally, Plaintiffs have offered to remove Johnson if she will stipulate to giving testimony by declaration to nine sentences of which she has unique knowledge. Ex. 3, Aug. 22, 2019 email from H. Lea to J. Carroll. The full text is as follows:

> 1. Ms. Johnson was a member of the MIT Corporation and sat on the following Committees and Visiting Committees of the Corporation (noting Chair when applicable): [INSERT LIST]
>
> 2. Fidelity Investments is a privately held corporation owned by the Johnson family, including Abagail Johnson.
>
> 3. Ms. Johnson served as the Head of Retail, Workplace, and Institutional Business for Fidelity Investments from 2005 to 2014. In 2014, Ms. Johnson became the CEO of Fidelity Investments.
>
> 4. The MIT Corporation constitutes the governing body of MIT, including a responsibility to govern MIT and ensure that MIT adheres to the purposes for which it was established. The MIT Corporation elects and oversees, among others, the President and the Executive Vice President and Treasurer.
>
> 5. Ms. Johnson is aware of the various policies in place by MIT including the policy to avoid conflicts of interest and to refuse all gifts from vendors or service providers.
>
> 6. The MIT Corporation, including Ms. Johnson, failed to oversee the terms of Fidelity's contract with MIT.
>
> 7. Prior to 2014, the MIT Corporation, including Ms. Johnson, never voted to delegate or authorize a delegation in writing of MIT's fiduciary responsibility or

[7] *Id*. at §§ 1.1.4, 1.2.
[8] *Id*. at § 2.5

authority pursuant to Plan Section 10.2(h) over the Plan's administration, including Section 10.2(e).

8. Ms. Johnson serves on the Board of the Fidelity Foundation, along with members of her family and officers of Fidelity Investments. Ms. Johnson's immediate family, including her husband and siblings and other Fidelity Investment executives are Directors of the Fidelity Non-Profit Management Foundation. The assets of both Foundations were funded from contributions by Fidelity and the Johnson family, including Ms. Johnson.

9. Collectively the Fidelity Foundation and the Fidelity Non-Profit Management Foundation donated over $23 million to MIT since 2000. The publicly available Form 990s for both foundations show donations consistent with the chart below:

2001	**$200,000**
2002	**$0**
2003	**$1,376,254**
2004	**$3,162,799**
2005	**$952,724**
2006	**$1,401,723**
2007	**$352,805**
2008	**$1,782,927**
2009	**$3,195,149**
2010	**$865,617**
2011	**$791,650**
2012	**$325,983**
2013	**$2,964,892**
2014	**$650,000**
2015	**0**
2016	**$5,000,000**
TOTAL	**$23,022,523**

CONCLUSION

For these reasons, the Court should deny Johnson's unprecedented and premature motion for a protective order.

August 26, 2019

/s/ Jerome J. Schlichter
SCHLICHTER BOGARD & DENTON LLP
Jerome J. Schlichter (admitted *pro hac vice*)
Heather Lea (admitted *pro hac vice*)
Joel D. Rohlf (admitted *pro hac vice*)
Scott T. Apking (admitted *pro hac vice*)
100 South Fourth Street, Suite 1200
St. Louis, MO, 63102
(314) 621-6115
(314) 621-5934 (fax)
jschlichter@uselaws.com
hlea@uselaws.com
jrohlf@uselaws.com
sapking@uselaws.com
Lead Counsel for Plaintiffs

Michael M. Mulder (admitted *pro hac vice*)
Elena N. Liveris (admitted *pro hac vice*)
LAW OFFICES OF MICHAEL M. MULDER
1603 Orrington Avenue, Suite 600
Evanston, Illinois 60201
(312) 263-0272
(847) 563-2301 (fax)
mmmulder@mmulderlaw.com
eliveris@mmulderlaw.com
Counsel for Plaintiffs

Stephen Churchill, BBO#564158
FAIR WORK, P.C.
192 South Street, Suite 450
Boston, MA 02111
(617) 607-3260
(617) 488-2261 (fax)
steve@fairworklaw.com
Local Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on August 26, 2019.

/s/ Jerome J. Schlichter