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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

METRO,

Petitioner,

vs.

**EXXON MOBIL CORP., SHELL PLC,
F.K.A. ROYAL DUTCH SHELL PLC,
SHELL U.S.A., INC., EQUILON
ENTERPRISES LLC DBA SHELL OIL
PRODUCTS US, BP PLC, BP AMERICA,
INC., BP PRODUCTS NORTH
AMERICA, INC., CHEVRON CORP.,
CHEVRON U.S.A., INC.,
CONOCOPHILLIPS, MOTIVA
ENTERPRISES, LLC, OCCIDENTAL
PETROLEUM F.K.A. ANADARKO
PETROLEUM CORP., SPACE AGE
FUEL, INC., VALERO ENERGY CORP.,
TOTALENERGIES, S.E. F.K.A. TOTAL
S.A., TOTALENERGIES MARKETING
USA F.K.A. TOTAL SPECIALTIES USA,
INC., MARATHON OIL COMPANY,
MARATHON OIL CORP., MARATHON
PETROLEUM CORP., PEABODY
ENERGY CORP., KOCH INDUSTRIES,
INC., AMERICAN PETROLEUM
INSTITUTE, WESTERN STATES
PETROLEUM ASSOCIATION,
MCKINSEY & COMPANY, INC.,
MCKINSEY HOLDINGS, INC., and
OREGON INSTITUTE OF SCIENCE
AND MEDICINE,**

Respondents.

Case No. 23CV51762

**PETITION TO PERPETUATE
TESTIMONY UNDER ORCP 37**

Oral Argument Requested (30 minutes)

Petitioner moves the Court for an order under ORCP 37 that the deposition of Martin Hoffert, Ph.D be taken by oral examination on the subject of Dr. Hoffert’s experience and observations while working for what is now known as ExxonMobil Corporation and

1 ExxonMobil’s misrepresentations concerning the effects of the extraction and combustion of
2 fossil fuels on the Earth environment. ORCP 37 requires that the Court “shall make an order”
3 providing for perpetuation of testimony if “the court is satisfied that the perpetuation of the
4 testimony or other discovery to perpetuate evidence *may prevent a failure or delay of justice.*”
5 ORCP 37A(3) (emphasis added). This petition meets that standard because Dr. Hoffert is 85
6 years of age, in fragile health, and the Respondents’ tactics in climate change litigation routinely
7 delay ordinary discovery for years.

8 **The Petitioner**

9 Petitioner, Metro, is a metropolitan service district with the powers delineated in its home
10 rule charter last amended by the voters in January of 2015 in accordance with the Oregon
11 Constitution and ORS chapter 268. Metro’s jurisdiction covers 24 cities and certain land within
12 the boundaries of Multnomah, Clackamas and Washington Counties. Petitioner’s charter
13 mandate is “to preserve and enhance the quality of life and the environment” for present and
14 future generations. Metro Charter Preamble at 1. Metro has jurisdiction over matters of
15 metropolitan concern. Metro Charter Chapter II, Section 4. Metro owns, maintains and operates
16 a system of parks, natural areas and recreational facilities, owns and runs two transfer stations
17 and is responsible for the planning of regions solid waste system. Metro also owns and operates
18 the Oregon Zoo, the Oregon Convention Center and the Portland Expo Center. Metro’s core
19 functions include regional land use and transportation planning in portions of Multnomah,
20 Clackamas and Washington Counties in Oregon. Metro Charter, Chapter II. Metro has assumed
21 additional functions related to transit-oriented development, affordable housing, and supportive
22 housing services.

23 Metro focuses on “reducing climate change and investing in preparedness” through a
24 racial and economic equity lens, noting that, as of 2020, Portland, Oregon had the greatest
25 temperature discrepancy between rich and poor urban neighborhoods of 108 US cities. Metro
26 News, April 14, 2020. Metro works to “build climate resilience into all of its programs.” *Id.*

1 Metro has the power to levy ad valorem tax on taxable property within its boundaries,
2 income tax on income derived from sources within the district, excise taxes on persons using its
3 facilities, and to issue general obligation and revenue bonds. Metro Charter, Chapter III, Section
4 10; *see also* ORS 268.500, 268.505, 268.507.

5 **Petitioner’s Interests and Subject Matter of Expected Action and Facts**

6 **(ORCP 37 A(1)(a), (b), (c))**

7 Petitioner has interests as owner, developer and operator of various real property in its
8 jurisdiction, which properties have been and/or will be subject to extreme weather events
9 including extreme heat, flooding, drought and wildfire because of the fraudulent misconduct of
10 fossil fuel producers and sellers who have misled government and the public as to the impacts of
11 the extraction and use of their products and the urgency of transition to noncarbon alternatives.
12 Controversy may arise as to the necessary and appropriate measures petitioner must take to protect
13 its interests in its real property from these impacts, which controversy would be the subject of
14 legal action cognizable in Multnomah County Circuit Court.

15 The subject matter of such legal action is likely to include the potential defendants’
16 fraudulent conduct, their knowledge of the catastrophic risks of burning fossil fuels, their internal
17 predictions of the timing and severity of the manifestations of fossil fuel-induced global warming,
18 the necessary abatement measures to be taken by Petitioner and the cost of those measures.

19 **Proposed Testimony and Reasons to Perpetuate**

20 **(ORCP 37 A(1)(c))**

21 Petitioner wishes to perpetuate the testimony of Martin Hoffert, Ph.D by deposition. Dr.
22 Hoffert, an emeritus professor of physics at New York University, researched terrestrial climate
23 change from 1979 to 1987 as a consultant for ExxonMobil, one of the leading likely defendants
24 in the above-referenced legal action. His expected testimony is uniquely important to showing
25 ExxonMobil’s prior knowledge about climate change and explaining its actions and omissions
26 based on that knowledge.

1 It is necessary to perpetuate Dr. Hoffert's testimony because Dr. Hoffert is 85 years old
2 with multiple life-threatening medical conditions, and the strategy of the defendants in climate
3 change litigation has been uniformly to delay and limit factual discovery with removal to federal
4 court and legal and procedural motions such that Discovery in actions similar to the one Petitioner
5 may file has moved very slowly, if at all.

6 Dr. Hoffert suffered his first heart attack in 1991 and underwent quadruple bypass surgery
7 in 1992. Exhibit 1 (Declaration of Iris Hoffert) at 1. An Implantable Cardioverter Defibrillator
8 to regulate the rhythm of his heartbeat was first inserted in 2001 and has been replaced three times
9 since. *Id.* He suffered a second heart attack in 2003. *Id.* He underwent surgery for lung cancer
10 in 2008 and for diverticulitis in 2016. He has had heart rhythm regulators replaced and updated
11 in 2015 and most recently in 2021. *Id.* He suffered internal bleeding in his lower gastrointestinal
12 tract for which he was hospitalized in 2021. *Id.* at 1-2. He takes multiple medications daily for
13 heart disease, blood clots, blood pressure, asthma and stroke. *Id.* at 1.

14 Given Dr. Hoffert's age and fragile medical condition and the expected glacial pace of
15 discovery in the prospective litigation, it is necessary and prudent to perpetuate his deposition so
16 that his evidence will not be lost. There is a substantial risk that Dr. Hoffert will become
17 unavailable to testify due to death or illness while the pre-discovery process grinds on. Because
18 of the unique testimonial evidence he can provide, an order providing for his perpetuation
19 deposition forthwith may prevent a failure, delay or miscarriage of justice.

20 **Adverse Parties**

21 **(ORCP 37 A(1)(d))**

22 The names of persons or entities Petitioner expects will be adverse parties, with their
23 addresses so far as known, are set forth in Exhibit 2.

24 **POINTS AND AUTHORITIES**

25 This Petition should be allowed because Petitioner, as the owner of thousands of acres of
26 land and multiple major public facilities in Multnomah, Clackamas and Washington Counties, is

1 charged with maintaining and protecting those properties and the citizens who use and live near
2 them. A potential legal action to satisfy Petitioners’ obligations is likely to depend substantially
3 on the testimony of Mr. Hoffert, whose age and medical condition make it necessary to perpetuate
4 his testimony without waiting for the ordinary course of this kind of litigation to unfold.

5 **Oregon has construed ORCP 37 liberally.**

6 ORCP 37 has not been construed in detail by any Oregon appellate court. It has been
7 applied in this Court by Judge Waller in *Safeco Ins. Co. v. Malyugin*, Case No. 16CV14497, 2016
8 Or Cir. LEXIS 6468, in which Safeco insured the Malyugins, who made a claim on their auto
9 policy for theft and destruction of their car. Safeco moved under Rule 37 for an order requiring
10 T-Mobile USA to produce the Malyugins’ phone records for the relevant time to establish the
11 “location and sequence of events related to Malyugins' theft / loss.” Judge Waller granted
12 Safeco’s motion, reasoning that:

13 While Petitioner does not necessarily anticipate that the Malyugins will file suit
14 regarding the above referenced theft and loss, in order for Petitioner to complete its
15 investigation of the Malyugins' claims (which could classify them as prospective
16 plaintiffs and therefore adverse to Petitioner) Petitioner finds it necessary to file
17 this motion in order to fully and adequately investigate these claims.

18 *Id.* at *1. The grant or denial of a request for discovery under rule 37 is a matter of trial court
19 discretion. *Willamette Landing Apts. - 89, LLC v. Burnett*, 280 Or App 703, 719 (2016) (affirming
20 denial of discovery on appeal under Rule 37B where discovery not ordinarily available in the
21 proceedings at issue). In *Safeco v. Malyugin*, Judge Waller construed the rule broadly to allow
22 Safeco’s request for pre-filing discovery to further its investigation of the claims of its insured,
23 although the filing of litigation was “not necessarily anticipate[d].”

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Dr. Hoffert has been perpetuated before.

Dr. Hoffert’s likely testimony is well known to Exxon Mobil and other Respondents from prior public statements he has made. Exhibit 3 at 4.¹ Dr. Hoffert’s perpetuation deposition was ordered under FRCP 27(b)² by the Superior Court for the Commonwealth of Massachusetts in February 2022, pending an appeal³ in a case brought against ExxonMobil by the Commonwealth, Civ. No. 03333-BLS1. *Id.* at 3. The Massachusetts court found no state court cases construing the rule and relied on cases decided under FRCP 27. *Id.* at 3. The court cited *Texaco, Inc. v. Borda*, 383 F.2d 607 (1967), quoting its reasoning:

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

Exhibit 3 at 4, *quoting* 383 F2d at 609. That reasoning applies in spades to Dr. Hoffert, who is now 85 years old and suffers from several serious medical conditions. Granting Massachusetts’ petition to perpetuate, the court observed that Mr. Hoffert has

Information about what Exxon knew as much as 40 years ago about climate change, this information is relevant to plaintiff’s allegations, and this information may not otherwise be discoverable by alternative means or through other witnesses.

Ex. 3, at 4. The same, of course, is true in this case. As the Massachusetts court concluded,

A person who is 83 ... years old cannot take the future for granted. Neither can a reasonably diligent litigant who wishes to have the person’s testimony available for trial.

Id. at 5. A year and a half after the Massachusetts Court’s decision, the case for Dr. Hoffert’s perpetuation deposition is stronger yet.

¹ Martin Hoffert, *Written Testimony*, at <https://docs.house.gov/meetings/GO/GO02/20191023/110126/HHRG-116-GO02-Wstate-HoffertM-20191023.pdf>, last accessed December 1, 2023.

² The federal rule does not include a provision for pre-filing perpetuation where the petitioner “has an interest in real property or some easement or franchise therein, about which a controversy may arise.” ORCP 37A does.

³ Mass. R.Civ.P. 27, like ORCP 37, provides for perpetuation depositions pending appeal as well as pre-filing.

1 Prompt preservation of Dr. Hoffert’s testimony is necessary not only because of his
2 advanced age and fragile medical condition but also because the expected defendants’ consistent
3 approach to litigation of climate change cases has been to delay discovery as long as possible.
4 The defendants in these cases have removed to federal court every case filed in state court,
5 offering up at least eight grounds for federal court jurisdiction: (1) federal common law, (2)
6 federal question jurisdiction under Grable, (3) Clean Air Act preemption, (4) Outer Continental
7 Shelf Lands Act, (5) federal officer removal statute, (6) “federal enclaves,” (7) bankruptcy law,
8 and (8) original admiralty jurisdiction. *See, e.g., Mayor & City Council of Baltimore v. BP P.L.C.*,
9 388 F. Supp. 3d 538 (D. Md. 2019). Each of these jurisdictional bases has been rejected by courts
10 across the country, including the First, Third, Fourth, Eighth, Ninth and Tenth Circuit Courts⁴,
11 most recently once again by the Ninth Circuit in *City of Oakland v. BP PLC*, No. 22-16810,
12 (Memorandum Opinion Nov. 27, 2023). The United States Supreme Court has denied the
13 defendants’ multiple petitions for writ of certiorari.⁵ Although the “second wave” of climate
14 change tort litigation began in 2017,⁶ because of delays caused by defendants’ legal maneuvers,
15 full discovery on liability and damages has yet to begin in any such case.

16 /////
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18 ⁴ *Rhode Island v. Shell Oil Prods. Co., L.L.C.*, 35 F.4th 44 (1st Cir. 2022); *City of Hoboken v. Chevron Corp.* 45 F.4th
19 699 (3d Cir. 2022); *Mayor & City Council of Balt. v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022); *Minnesota v. API*, 63
20 F.4th 703 (8th Cir. 2023); *City & Cty. of Honolulu v. Sunoco LP*, 39 F.4th 1101 (9th Cir. 2022); *Cty. of San Mateo v.*
Chevron Corp., 32 F.4th 733, 757 (9th Cir. 2022); *City of Oakland v. BP Pub. Ltd. Co.*, 969 F.3d 895, 901 (9th Cir.
2020); *Bd. Of Cty. Comm’rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022).

21 ⁵ *See Shell Oil Prods. Co., L.L.C. v. Rhode Island*, 143 S. Ct. 1796 (2023); *Chevron Corp. v. City of Hoboken*, 143 S.
22 Ct. 2483 (2023); *BP PLC v. Mayor of Balt.*, 143 S. Ct. 1795 (2023); *Chevron Corp. v. City of Oakland*, 141 S. Ct.
23 2776 (2021); *Sunoco LP v. City & Cty. of Honolulu*, 143 S. Ct. 1795 (2023); *Chevron Corp. v. San Mateo Cty.*, 143
24 S. Ct. 1797 (2023); *Suncor Energy (U.S.A.) Inc. v. Bd. of Cty. Comm’rs of Boulder Cty.*, 143 S. Ct. 1795 (2023). The
Supreme Court granted certiorari on the defendants’ first petition in *Baltimore*, but it simply vacated the Fourth
Circuit’s opinion and remanded, holding that the appellate court had erred by reviewing only the federal officer basis
for jurisdiction and failing to consider the other rejected grounds for removal. *BP PLC v. Mayor of Balt.*, 141 S. Ct.
1532, 1533 (2021). Notably, the Court did not decide whether the court erred in rejecting federal officer removal
jurisdiction. *Id.*


25 ⁶ Sokol, “Seeking (Some) Climate Justice in State Tort Law,” 95 *Washington L. Rev.* 1383, 1386 (2020). The “first
26 wave” of climate litigation comprised largely federal court actions between 2004 and 2011, ending with the Supreme
Court’s holding in that the Clean Air Act displaced federal common law in those cases. *Am. Elec. Power Co. v.*
Connecticut, 564 U.S. 410, 423 (2011).

1 **CONCLUSION**

2 The petition to perpetuate Dr. Hoffert’s testimony by deposition should be granted
3 because, in light of Dr. Hoffert’s age, medical condition and the remoteness in time of his
4 involvement with ExxonMobil, his testimony is uniquely important, not duplicated by any other
5 source, and “the perpetuation of the testimony ... may prevent a failure or delay of justice.”
6 ORCP 37 A(3). Dr. Hoffert has consented to appear for his deposition in this matter on January
7 24, 2024, in a conference room in Ocala, Florida at a location to be determined at a later date.

8 Dated: December 15, 2023.

9 **DWYER WILLIAMS CHERKOSS**
10 **ATTORNEYS, P.C.**

11 
12 By: _____
13 Tim Williams, OSB No. 034940
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14 and

15 **JAMES S. COON, ESQ.**

16
17 By: /s/ James S. Coon
18 James S. Coon, OSB No. 771450
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19 and

20 **SIMON GREENSTONE PANATIER, P.C.**

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and

WORTHINGTON & CARON, P.C.

By: /s/ Roger G. Worthington

Roger G. Worthington (*pro hac vice* pending)

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Attorneys for Petitioner

1 **DECLARATION OF IRIS HOFFERT**

2 1. My name is Iris Hoffert. I live at 8961 SW 86th Loop in Ocala, Florida with my husband,
3 Dr. Martin (Marty) Hoffert, PhD. Marty and I have been married for 58 years. It will be 59 years at the end
4 of January. I am 82 years old. My birth date is August 7, 1941. My husband was born on July 1, 1938. He is
5 85 years old. Before my retirement, I was a public middle and high school social studies teacher for 34
6 years in the suburbs of New York City. I am of sound mind and competent to make this affidavit and the
7 facts stated herein are all true and correct to the best of my ability.

8
9 2. I am Marty's wife and caretaker. I shop for his groceries and prepare his meals. I help fill his
10 prescription medicines and over the counter supplements. I apportion his medications and organize his
11 twice daily intake regimen. He takes approximately 9 pills in the morning, including Carvedilol, a beta
12 blocker that prevents angina, heart disease and stroke, and Omeprazole to prevent upper GI bleeding. In the
13 evening, Marty takes 16 pills, including the beta blocker Carvedilol again, another beta blocker called
14 Sotalol that's used for treating atrial fibrillation, Xarelto to prevent blood clots and stroke, Singulair to
15 prevent asthma attacks, Duloxetine to treat chronic muscle pain, and Lisinopril to treat high blood pressure
16 and heart failure.

17
18 3. A summary of my husband's health history is as follows. Marty had his first heart attack in
19 1991. In 1992, he underwent a quadruple bypass. In 2001, doctors inserted his first Implantable
20 Cardioverter Defibrillator (ICD), which is designed to detect arrhythmia and sends an electrical shock to the
21 heart which is supposed to reset the normal rhythm. He's had three more since then. In 2003, Marty
22 suffered his second heart attack. In 2007, his ICD delivered two shocks to return his heart rate back to
23 normal. In 2008, after doctors at Memorial Sloan Kettering in NYC detected an adenocarcinoma nodule in
24 his right lung, he had surgery to remove the cancer. In 2010, doctors replaced the ICD in his chest. In 2015,
25 doctors installed a new defibrillator in Marty's chest called a "CRT-D (Cardiac Resynchronization
26 Therapy)," which is like a pacemaker that also delivers small electrical impulses that helps the heart
27 muscles pump on the same rhythm. In 2016, Marty underwent surgery for diverticulitis. In 2020, his CRT-
28 D shocked him again. In 2021, his cardiologist upgraded his CRT-D device in his chest and heart. In 2021,

1 Marty was rushed to the hospital for internal bleeding in his lower GI tract and had a blood and iron
2 infusion.

3
4 4. I am very concerned about Marty's declining health condition. We cannot travel. He is
5 spending more and more time in bed. We live in a retirement community. He cannot walk up a flight of
6 stairs without stopping to rest every few steps. He gets short of breath after walking about 30 feet. He
7 retires to the bedroom at about 6:30 pm every night and rises between 9am and 10am. He fatigues easily. I
8 worry about any activity that will exhaust him. I do the best I can to care for him, feed him, clean the house
9 and help him with his medications and appointments. I keep a very close eye on him because a stroke or
10 another heart attack can happen at any time. Our doctors tell us that if Marty did not take all of the
11 prescription and over the counter medicines daily Marty's demise would be imminent.

12
13 5. I worry also because at 82 years of age I have my own health issues. I have to use a walker to
14 move around. I have osteoarthritis in my neck and back. In 2006, I was diagnosed with Super Ventricular
15 Tachycardia (SVT), which can make my heart feel like it's exploding out of my chest. I have two other
16 heart conditions. The first is called Premature Atrial Contractions and the second is called Premature
17 Ventricular Contractions. I take daily medication for these.

18
19 6. My husband was a professor of physics and former chair of the department of applied
20 science at New York University. He is a climate scientist who has published articles on a number of topics
21 related to climate change and renewable energy resources. He consulted with Exxon from approximately
22 1979 to 1987. Exxon hired him to study climate change and the carbon cycle, among other things. He
23 developed models that helped predict when the greenhouse gases resulting from the burning of fossil fuels
24 would impact our world. He alerted Exxon about the effect the combustion of fossil fuels would have on
25 global temperature and the related consequences. In 2019, Marty was invited to testify before the U.S.
26 Congress concerning the topic: "What Big Oil Knew About Climate Change from Fossil Fuels and When."

1 7. My husband's body may be failing but his memory on what Exxon knew and when is very
2 sharp. I know that he wants to testify. He has unique information about what Exxon knew and when that
3 few scientists alive today, if any, can testify about. I only worry that a prolonged deposition may exhaust
4 him. As his wife and caretaker, I would ask the Court to limit the deposition to no more than 3-4 hours a
5 day, and schedule it near where we live, from the hours between 1pm and 5pm. He will need a driver to
6 pick him up and return him.

7 8. My husband is under the care of Dr. Joseph Alonso, a cardiologist. Dr. Alonso practices at
8 the Central Florida Heart Center, located at 3310 SW 34th St, in Ocala, Florida. My husband was last
9 examined by Dr. Alonso on August 21, 2023. I am attaching to my statement a true and correct copy of the
10 "Progress Notes" prepared by and electronically signed by Dr. Alonso on October 25, 2023.
11

12 I hereby declare that the above statement is true to the best of my knowledge and belief, and that I
13 understand that it is made for use as evidence in court and is subject to penalty for perjury.
14

15 Date:

Nov 30, 2023


Iris Hoffert

COMPANY NAME	REGISTERED AGENT IN OREGON	ALT SERVICE ADDRESS AT PPB OR INC STATE	STATE OF INC.
EXXON MOBIL CORP.	Corporation Service Company 1127 Broadway Street NE, Suite 310 Salem, OR 97301	N/A	NJ
SHELL U.S.A., INC.	CT Corporation System 780 Commercial Street SE, Suite 100 Salem, OR 97301	N/A	DE
EQUILON ENTERPRISES, LLC (d/b/a Shell Oil Products US)	CT Corporation System 780 Commercial Street SE, Suite 100 Salem, OR 97301	N/A	DE
BP AMERICA, INC.	CT Corporation System 780 Commercial Street SE, Suite 100 Salem, OR 97301	N/A	DE
BP PRODUCTS NORTH AMERICA, INC.	CT Corporation System 780 Commercial Street SE, Suite 100 Salem, OR 97301	N/A	MD
CHEVRON CORP.	Not Available	DE: The Prentice-Hall Corporation System, Inc. 251 Little Falls Drive Wilmington, DE 19808	DE
CHEVRON U.S.A., INC.	The Prentice-Hall Corporation System, Inc. 1127 Broadway Street NE, Suite 310 Salem, OR 97301	N/A	PA
CONOCOPHILLIPS	United States Corporation Company 1127 Broadway Street NE, Suite 310 Salem, OR 97301	N/A	DE
MOTIVA ENTERPRISES, LLC	CT Corporation System 780 Commercial Street SE, Suite 100 Salem, OR 97301	N/A	DE
OCCIDENTAL PETROLEUM (f/k/a Anadarko Petroleum Corp.)	Not Available	DE: The Corporation Trust Company Corporation Trust Center 1209 Orange Street Wilmington, DE 19801	DE
SPACE AGE FUEL, INC.	Scott L. Jensen 1 SW Columbia Street, Suite 900 Portland, OR 97204	N/A	OR
VALERO ENEGRY CORP.	Not Available	DE: The Corporation Trust Company Corporation Trust Center 1209 Orange Street Wilmington, DE 19801	DE
TOTALENERGIES MARKETING USA, INC. (f/k/a Total Specialties USA, Inc.)	Corporation Service Company 1127 Broadway Street NE, Suite 310 Salem, OR 97301	N/A	FL
MARATHON OIL COMPANY	CT Corporation System 780 Commercial Street SE, Suite 100 Salem, OR 97301	N/A	OH
MARATHON OIL CORP.	Not Available	DE: The Corporation Trust Company Corporation Trust Center 1209 Orange Street Wilmington, DE 19801	DE
MARATHON PETROLEUM CORP.	Not Available	DE: The Corporation Trust Company Corporation Trust Center 1209 Orange Street Wilmington, DE 19801	DE

PEABODY ENERGY CORP.	Not Available	DE: Corporation Service Company 251 Little Falls Drive Wilmington, DE 19808	DE
KOCH INDUSTRIES, INC.	Not Available	KS: United Agent Group, Inc. 4601 E. Douglas Avenue, Suite 700 Wichita, KS 67218	KS
AMERICAN PETROLEUM INSTITUTE	Not Available	DC: Cogency Global, Inc. 1025 Connecticut Ave. NW, Suite 712 Washington, DC 20036	DC
WESTERN STATES PETROLEUM ASSOC.	Incorp. Services, Inc. 2355 State Street, Suite 101B Salem, OR 97301	N/A	CA
MCKINSEY & CO., INC.	Corporation Service Company 1127 Broadway Street NE, Suite 310 Salem, OR 97301	N/A	NY
MCKINSEY HOLDINGS, INC.	Not Available	DE: Corporation Service Company 251 Little Falls Drive Wilmington, DE 19808	DE
OREGON INSTITUTE OF SCIENCE AND MEDICINE	Currently Administratively Dissolved Registered Agent and last known office of the corporation as shown by the records on file in the office of the Oregon Secretary of State: Arthur B. Robinson 2251 Dick George Road Cave Junction, OR 97523	ORS 60.121 service to be made on: Oregon Secretary of State Public Service Building 255 Capitol St. NE, Suite 151 Salem, OR 97310 and Arthur B. Robinson 2251 Dick George Road Cave Junction, OR 97523	OR

COMPANY NAME	REGISTERED AGENT IN OREGON	ALT SERVICE ADDRESS AT PPB OR INC STATE	CORPORATE HEADQUARTERS	COUNTRY OF INC.
SHELL, PLC (f/k/a Royal Dutch Shell, PLC)	N/A	N/A	Shell Centre London, England, SE17NA	UK
BP, PLC	N/A	N/A	1 St. James's Square London, England, SW1Y4PD	UK
TOTALENERGIES, S.E. (f/k/a Total S.A.)	N/A	N/A	2 Place Jean Millier La Defense 6 Paris, Ile-De-France 92400	FR

NOTIFY

04/08v

67

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
Civil No. 19-3333-BLS1

COMMONWEALTH OF MASSACHUSETTS
Plaintiff

vs.

EXXON MOBIL CORPORATION
Defendant

Notice Sent (6)
02.10.22

MD

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

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

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

DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

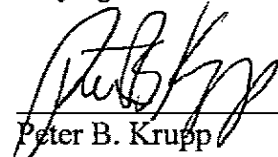
Exxon's arguments against authorizing these depositions to proceed are far from compelling. There is nothing in our discovery rules that requires discovery to proceed in any particular sequence. Nor does the Commonwealth enjoy any particular advantage in preserving testimony from these two witnesses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

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

ORDER

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

Dated: February 8, 2022



Peter B. Krupp
Justice of the Superior Court

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