

DWYER WILLIAMS CHERKOSS

ACCIDENT INJURY ATTORNEYS

ROY DWYER (1933-2022)
TIM WILLIAMS
ARNE CHERKOSS

1558 SW Nancy Way, Suite 101 • Bend, OR 97702
Phone: 541-617-0555 • www.roydwyer.com

ALEX WYLIE
SCOTT MAHADY
JEFFREY CARTER

SENT VIA E-MAIL: NELSON_CRD@ORD.USCOURTS.GOV

January 8, 2024

Hon. Adrienne Nelson
Mark O. Hatfield United States Courthouse
Room 1407
1000 Southwest Third Avenue
Portland, OR 97204

Re: *Metro v. Exxon Mobil Corp., et al.*
US District Court Case No. 3:24-cv-00019
Urgent Request for Rule 16 Conference

Dear Judge Nelson:

We represent Metro, which is considering a civil action against fossil fuel companies and others under various tort theories including negligence, public nuisance, fraud and trespass in their deceptive promotion of fossil fuel products and concealment and denial of the effects of the use of those products. An important “whistleblower” witness to the relevant events is Dr. Martin Hoffert, now 85 years of age and in failing health, who worked as a scientist for one of the major companies, now called ExxonMobil, in the 1980s.¹

We filed a petition in Multnomah County under ORCP 37 to perpetuate Dr. Hoffert’s testimony so as not to lose him to death or illness while litigation grinds on and discovery is delayed, as it has been in every similar case now pending in the United States. The fossil fuels companies’ first move in all of these cases is to remove to federal court. Remand to state court has been granted in the overwhelming majority of such cases, but it takes many months, even years. Although we have not filed a “civil action” on behalf of Metro, the fossil fuel defendants have “removed” our deposition perpetuation petition, and that putative removal is now before Your Honor.

An ORCP 37 motion to perpetuate testimony is not a “civil action” within the meaning of the removal statute, 28 USC 1441 (“any civil action... may be removed”) and so may not be removed. Indeed, ORCP Rule 37 provides separately for an “action” to perpetuate testimony, strongly

¹ The Superior Court of Massachusetts ordered a perpetuation deposition of Dr. Hoffert in 2022 because of his age and infirmity in a case by the Commonwealth against ExxonMobil. *Commonwealth v. Exxon Mobil Corp.*, 2022 Mass. Super. LEXIS 206 at *5 (“A person who is 83 or 87 years old cannot take the future for granted. Neither can a reasonably diligent litigant who wishes to have that person's testimony available for trial.”) While that deposition may be admissible against ExxonMobil, other potential defendants who were not represented there will likely object.

Toll Free: 1-800-285-8678

Offices Located in: Bend, Eugene, Grants Pass, Medford, Portland and Roseburg

implying that the perpetuation deposition it provides for is not an “action.”² There is conflicting authority among the federal courts on this question,³ and, as fossil fuel companies concede in their removal memorandum, the Ninth Circuit has not ruled on the question.⁴

Our perpetuation petition is not a “civil action.” It is simply an effort to preserve the unique testimony of one fragile individual, who because of his poor health has agreed to testify in this way as soon as possible. What we hope to avoid is a months-long briefing and counter-briefing process that would defeat the identical purpose of both ORCP 37 and the corresponding federal rule, FRCP 27 – “to prevent a failure or delay of justice.”

We are asking the Court, pursuant to FRCP 16 and LR-16 2(c), for an immediate conference to determine the path forward. We would ask that the purpose of the pre-lawsuit conference is to set an expedited briefing and argument schedule to resolve solely the question whether an ORCP 37 perpetuation petition may be removed to federal court.

We have advised the removing parties in writing and verbally of our intent to bring this matter to your attention on an emergency basis under FRCP 16. See letter of January 5, 2024, attached hereto. They have not consented to our request to either abandon the removal on this pre-lawsuit petition or, while the case is removed, agree to an expedited perpetuation deposition. We are also attaching a declaration from Iris Hoffert, Dr. Hoffert’s wife of 58 years, who states that her husband’s health has declined in the past month since her original declaration and urges that steps be taken to begin his deposition in a humane way as soon as possible. See Declaration of Iris Hoffert, dated January 8, 2024.

Thank you for your consideration.

Respectfully submitted,



Tim Williams, Attorney
Dwyer Williams Cherkoss Attorneys, P.C.
tim@rdwyer.com

² ORCP 37C (“Perpetuation by Action.”) Further, ORCP 37A by its own language refers to the petitions as something filed “Before Action.” The perpetuation petition is not, itself, an “action.” It is certainly not a civil complaint.

³ Cases pointing out that federal jurisdiction is not plenary but limited construe removal jurisdiction narrowly and not to include pre-action perpetuation depositions. *E.g. Barrows v. Am. Airlines*, 164 F. Supp. 2d 179, 181 (2001); *Mayfield-George v. Texas Rehabilitation Commission*, 197 F.R.D. 280, 283 (N.D. Tex., 2000). *C Young v. Hyundai Motor Mfg. Ala., LLC*, 575 F. Supp. 2d 1251, 1255 (MD Ala 2008), citing *Russell Corp. v. American Home Assur. Co.*, 264 F.3d 1040, 1050 (11th Cir. 2001), *York v. Horizon Fed. Sav. & Loan Ass'n*, 712 F. Supp. 85, 87 (E.D. La. 1989); *Adams v. Aero Servs. Int'l, Inc.*, 657 F. Supp. 519, 521 (E.D. Va. 1987).

⁴ The Defendants claim that a 1998 District of Oregon case supports removal of a perpetuation petition, but the case, brought by a *pro se* plaintiff, does not discuss, mention or stand for that proposition. *Kelly v. Whitney*, No. 98-30-HU, 1998 WL 877625, at *1 (D. Or. Oct. 27, 1998).

James S. Coon, OSB No. 771450
jcoon@tcnf.legal

/s/ Jeffrey B. Simon
Jeffrey B. Simon (*pro hac vice forthcoming*)
Simon Greenstone Panatier, PC
jsimon@sgptrial.com

/s/ Roger G. Worthington
Roger G. Worthington (*pro hac vice pending*)
Worthington & Caron, PC
rworthington@rgwpc.com

Enclosures

cc: Counsel for Respondents

JEFFREY B. SIMON (CA, NY, TX)
DAVID C. GREENSTONE (CA, NY, TX)
CHRISTOPHER J. PANATIER (CA, PA, TX)
STUART J. PURDY (CA)
LEAH C. KAGAN (CA, NJ, NY)
CHARLES E. SOECHTING, JR. (PA, TX)
BRENDAN J. TULLY (NY)
DEBBIE BRYANT (TX)
TIFFANY N. DICKENSON (LA, MS, PA, TX)
JACEY L. HORNECKER (TX)

SIMON GREENSTONE PANATIER

TRIAL LAWYERS

MATTHEW G. LA SORSA (NY)
CHRISTINA MANCUSO (TX)
ANISHA M. MATHW (TX)
JENNIFER MONTEMAYOR (TX)
JODEE NEIL (TX)
ALBERT OGANESYAN (CA)
SHREEDHAR R. PATEL (AZ, CA, NY, OR, TX)
HOLLY C. PETERSON (MD, NJ, NY, TX)
KATHRYN A. PRYOR (MO, NY, PA, TX)
MARY T. RAHMES (CA)
IYMAN STRAWDER (TX, CA)
FRANK J. WATHEN (TX)
SHAINA A. WEISSMAN (MA, NY)
MARC I. WILLICK (CA)

ASSOCIATES:
GREYSON ACKERMAN (TX)
JACKIE BREWER (CA)
MICHAEL DERUVE (NY)
ROBERT I. ELLIS (NJ, NY)
ERICA L. FALKNER (CA)
WHITNEY GAGE (TX)
CHRISTINA M. GUTIERREZ (NY)

ATTORNEYS & COUNSELORS AT LAW
A Professional Corporation
www.SGPTRIAL.com

OF COUNSEL:
LISA M. BARLEY (CA)
ROBERT A. GREEN (CA)

PLEASE RESPOND TO THE DALLAS OFFICE

January 5, 2024

James T. McDermott
Dwain M. Clifford
MCDERMOTT WEAVER CONNELLY
CLIFFORD LLP
1000 SW Broadway
Suite 960
Portland, OR 97205

via email jmcdermott@mwcc.law

via email delifford@mwcc.law

Theodore V. Wells, Jr.
Daniel J. Toal
Yahonnes Cleary
Caitlin Grusauskas
PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064

via email: twells@paulweiss.com

via email: dtoal@paulweiss.com

via email: yccleary@paulweiss.com

via email: cgrusauskas@paulweiss.com

Dear Counsel:

We are in receipt of Exxon Mobil Corporation's Notice of Removal of Metro's Petition To Perpetuate Testimony Under ORCP 37 for the Deposition of Dr. Martin Hoffert. First, we do not agree that the ORCP Petition is a removable "civil action" as defined by law, and under the facts underlying the petition. Second, we disagree with most, if not all, of the factual contentions and legal arguments made in your "snap removal." Third, nothing in this letter or proposal shall at any point waive any right or argument Metro has, including but not limited to, the lack of federal subject matter jurisdiction of the ORCP Petition, any subsequent petition, or if ever filed, a subsequent lawsuit.

Dr. Martin Hoffert is in poor health and *in extremis*, and we are not opposed to taking his deposition under the Federal Rules of Civil Procedure instead of the Oregon Rules of Civil Procedure on January 24, 2024. This compromise should eliminate the need for, in our opinion, an unnecessary expenditure of resources debating whether the deposition should be taken pursuant to the federal rules or the Oregon state rules. Instead, the parties can work collectively to preserve the testimony of a dying man as time is of the essence. By taking the deposition under the federal rules, Metro is not consenting to federal

DALLAS (Primary Office):

901 Main St., Suite 5900
Dallas, Texas 75202
214-276-7680 (T)
214-276-7699 (F)

HOUSTON:

440 Louisiana St., Suite 802
Houston, Texas 77002
713-405-1201 (T)
214-276-7699 (F)

LOS ANGELES:

3760 Kilroy Airport Way, Suite 680
Long Beach, California 90806
562-590-3400 (T)
562-590-3412 (F)

NEW YORK:

420 Lexington Avenue, Suite 2848
New York, New York 10170
212-634-1690 (T)
214-320-0526 (F)

January 5, 2024

subject matter jurisdiction and Metro expressly disclaims federal subject matter jurisdiction over the substance of the deposition and any resulting claims or lawsuits.

Moreover, by consenting to allow this deposition to proceed under the federal rules, Metro agrees that all defendants who were provided notice of the ORCP 37 Petition reserve all rights to challenge jurisdiction once and if Metro chooses to file a lawsuit against said Defendants. Metro similarly reserves all rights to name additional defendants or omit defendants served with notice of the ORCP 37 Petition in any filed lawsuit.

Finally, please note that, in view of Dr. Martin Hoffert's age and poor health, and in accordance with the purpose of both ORCP 37 and FRCP 27 to prevent the delay or denial of justice, if we cannot come to an agreement on how to proceed, Metro will be contacting the Court to schedule an emergency hearing on the removability of Metro's ORCP 37 Petition on grounds that it is not a properly removable civil action under 28 U.S.C. §§ 1331, 1332, or 1441.

Please let us know if you are amenable to this compromise no later than 5:00 PM PST, Wednesday January 10, 2024. If you wish to discuss this further, we can arrange for a meet and confer at a time prior to the deadline.

Sincerely,

A handwritten signature in black ink, appearing to read 'S.R. Patel', written in a cursive style.

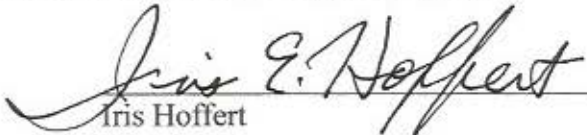
Shreedhar R. Patel
Attorney

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. On
4 November 30, 2023, I provided a declaration regarding my husband's health status. The
5 below will supplement my earlier statement. I am of sound mind and competent to make
6 this affidavit and the facts stated herein are all true and correct to the best of my ability.
- 7 2. Since late November of 2023, Marty's health has declined badly. He is in bed about 14
8 hours a day on average. He sleeps a fraction of that time. He is getting weaker. He tires
9 more easily, although he tries to walk daily. His breathing is more labored when he walks.
10 His eyesight seems to have gotten worse.
- 11 3. Despite the decline in Marty's health condition since my last statement, Marty's brain
12 remains sharp. He wants to testify about the events surrounding his work for Exxon
13 regarding the cause, risks, escalation and impacts of global warming. He was hoping to start
14 the deposition in late January, 2024.
- 15 4. I understand there may be a delay. I am very, very concerned about delaying Marty's
16 deposition beyond the original target date. When he gave his deposition in 2022, I believe
17 that there was only one defendant, Exxon. That deposition tired him out. For this next
18 deposition, I understand there may be over a dozen defense lawyers. I'm worried about the
19 time the new deposition will take, as Marty tires out easily. I would ask the Court to set the
20 deposition of my husband as soon as possible. I also urge the Court to protect him from the
21 stress and anxiety of a prolonged deposition. Marty wants to testify, and I want him to as
22 well, but we need to protect his heart and health.

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

25 Date: Jan 8, 2024

26 
Iris Hoffert