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

PETITIONER'S REPLY TO RESPONDENTS' JOINT RESPONSE IN OPPOSITION TO METRO'S PETITION TO PERPETUATE TESTIMONY UNDER ORCP 37

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PETITIONER'S REPLY TO RESPONDENTS' JOINT RESPONSE IN OPPOSITION TO METRO'S PETITION TO PERPETUATE TESTIMONY UNDER ORCP 37

Petitioner Metropolitan Service District ("Metro") filed this Petition under ORCP 37 to perpetuate the testimony of Dr. Martin Hoffert, who worked as a consultant for Respondent Exxon/Mobil ("Exxon") from 1979-1987 and has critical information about the past and future impacts of fossil fuel products on global and local climate, when those effects were predictable and perceptible, the fossil fuel industry's knowledge of those effects and the science of climate adaptation. Petitioner filed this Petition on December 18, 2023, and Respondents removed the Petition to the District of Oregon, from which it was remanded on June 25, 2024. Dr. Hoffert has no objection to the time, place or scope of the deposition and remains willing and able to testify, thus, Metro requests that this Court grant its petition to perpetuate his testimony.

I. Background Facts

Dr. Martin Hoffert is an emeritus professor of physics at New York University with critical knowledge: from 1979-1987 he researched terrestrial climate change as a consultant for a corporate predecessor of ExxonMobil, one of the entities likely to be a defendant should Metro decide to bring a lawsuit. He was hired to model the foreseeable effects of burning fossil fuels on global warming. He has unique insider information about the state of the industry's knowledge regarding the impact of fossil fuels on climate, the industry's subsequent acts and omissions in the face of that knowledge, and the impact of those actions in regard to climate adaptation.

Unfortunately, Dr. Hoffert, who is now over 86 years old, is in poor health. Exhibit A, Declarations of Iris Hoffert dated November 30, 2023, and January 8, 2024. Because of Dr. Hoffert's age and the host of potentially deadly physical ailments with which he is afflicted—including atrial fibrillation, ventricular tachycardia, dilated cardiomyopathy, congestive heart failure, chronic obstructive pulmonary disease and a prior bout with cancer—Metro believes it is both prudent—and in its constituents' best interest—to try to preserve his knowledge in the event that Metro later decides it is obligated to file a suit. Accordingly, on December 18, 2023, over

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eight months ago, Metro filed its Rule 37A "before action" Petition to Perpetuate the Testimony of Dr. Martin Hoffert. This Petition does not seek monetary damages or equitable relief, it simply seeks to perpetuate the testimony of someone in ill-health.

On January 3, 2024, Exxon Mobil Corporation, with the eventual consent of all Respondents, removed the case to federal court. Metro responded by filing a motion to remand. After months of briefing, an oral hearing was held before Magistrate Judge Youlee Yim You. Afterward, Magistrate Judge You issued a detailed opinion recommending that Metro's Rule 37 Petition to Perpetuate the Testimony of Dr. Martin Hoffert be remanded to state court because it is not a "civil action" that is removeable under 28 U.S.C. §1441(a). *Metro v. Exxon Mobil Corp.*, Case No. 3:24-cv-00019-YY, 2024 WL 1991578 (D. Or. April 10, 2024). In the process Magistrate Judge You observed that "the overwhelming majority of federal courts" find that such pre-suit petitions are not removable civil actions because they do not seek monetary or equitable relief, and the three cases cited by Respondents in support of their position were inapplicable, inappropriately cited, or "devoid of any meaningful discussion of how to interpret or apply the removal statute." *Id*. at 7. Respondents objected to Magistrate Judge You's Recommendation, leading to more briefing and further delay. Ten weeks later, on June 25, 2024, District Judge Adrienne Nelson adopted Magistrate Judge You's Recommendation as her opinion, rejected Respondents' arguments and held that "Metro's petition, standing alone, will not expose respondents to monetary damages or equitable relief. Thus, under *Myers*, the petition does not constitute a civil action." *Metro v. Exxon Mobil Corp*., Case No. 3:24-cv-00019-YY, 2024 WL 3160475 at *4 (D. Or. June 25, 2024) (citing *State ex. rel. Myers v. Portland Gen. Elec. Co*., No. Civ. 04-CV-3002-HA, 2004 WL 1724296 (D. Or. July 30, 2004). Respondents chose not to appeal, and the file was returned to Multnomah County Circuit Court, whereupon Metro began again to try to obtain the deposition of Dr. Hoffert. Respondents advance three reasons why the Court should not grant Metro's Petition; none of them are valid.

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II. Metro is entitled to perpetuate Dr. Hoffert's testimony under Rule 37.

ORCP 37A provides for the perpetuation of testimony or evidence before the filing of an action. Respondents identify two portions of ORCP 37A they contend Metro has not satisfied. The first is found in ORCP 37A(1), which describes the components of the petition.

> The petition shall be entitled in the name of the petitioner and shall show: (a) that the petitioner, or the petitioner's personal representatives, heirs, beneficiaries, successors, or assigns are likely to be a party to an action cognizable in a court of this state and are presently unable to bring such an action or defend it, or that the petitioner has an interest in real property or some easement or franchise therein, about which a controversy may arise, which would be the subject of such action…. ORCP 37A(1)(a). Respondents focus on the first clause of part (a) and contend Metro cannot show it is presently unable to bring an action, and all but ignore the second.

The Respondents' second objection to Metro's Petition is based on the requirement of ORCP 37A(3). That section requires the granting of the petition to perpetuate testimony if the court "is satisfied that the perpetuation of the testimony or other discovery to perpetuate evidence may prevent a failure or delay of justice…." In such circumstances, a court "shall" make an order designating the deponent and the subject of the deposition. ORCP 37A(3). Respondents contend Metro cannot satisfy the requirement of ORCP 37A(3) and show the purpose of the Petition is to prevent a "failure or delay of justice".

Respondents are wrong on both counts.

A. Metro satisfies the "interest in property" prerequisite.

Respondents initially claim that Metro cannot satisfy the Rule 37 requirement that the petitioner be "presently unable to bring" a lawsuit. *See,* Respondents' Joint Response in Opposition to Metro's Petition to Perpetuate Testimony Under ORCP 37, 8-10 (hereinafter "Joint Response"). But that is not the basis for Metro's Petition. Instead, Metro contends it has an interest in real property about which a controversy may arise, and this interest satisfies the first part of the Rule 37A inquiry.

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Metro has various interests in more than 18,000 acres of real property in Multnomah, Clackamas and Washington Counties. Exhibit B, Declaration of Carrie MacLaren at 2. These include fee simple ownership (*e.g.,* Molalla Oaks, Prairies and Floodplains #1), fee ownership with maintenance and operation duties delegated to other agencies by Intergovernmental Agreements[1] (*e.g.,* Forest Park Central Property), tenancy in common based on contributions to purchase price (*e.g.,* Tryon Creek Linkages Target Area #3), conservation easements on private and government land (*e.g.,* Dairy and McKay Creeks Confluence; Stevens Meadow in Lake Oswego) and trail and access easements (*e.g.,* Clackamas River Bluffs and Greenway; Mason Hill Park). *Id.* Depending on the language of the agreements that cover these properties, Metro has varying authority and responsibility for operation, management and maintenance over them. *Id.* Metro's duty to provide adaptation to climate impacts, hence its standing to claim damages for the cost of such adaptations are thus likely to vary with the different provisions of the agreements that cover these lands. "Controversy may arise" about Metro's interest in these properties.

Metro has acquired ownership or managerial responsibilities over its interests at different points in time. The damages Metro would prove in an action against Respondents would depend on its authority and obligation to mitigate and abate the effects of extreme weather events caused by respondents' conduct. The "powers, rights and duties" of a local government entity under an Intergovernmental Agreement depend on the provisions in that agreement. ORS 190.030(1). Issues may arise in such an action as to whether Metro has the kind of interest that allows it to claim damages for maintaining, repairing or protecting against the effects caused by carbon pollution from respondents' products. Dr. Hoffert is expected to testify, among other things, when Exxon and other fossil fuel producing companies should have warned Metro (and the larger public) of the need to construct and implement measures for extreme heat resilience and why that type of climate adaptation would become imperative to save lives and property. Whether such

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[1] ORS 190.010 *et seq.*

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warnings would have empowered or obligated Metro to act depends on the nature of Metro's interests in affected properties when appropriate measures should have been taken—historical facts upon which Dr. Hoffert has first-hand experience and intimate knowledge. If a suit were filed against them, Respondents can be expected to raise every possible defense against Metro's claims in this case, including the question of Metro's power, duty or other standing to assert claims for damage caused by respondents' acts or omissions, just as the Chevron Respondents have done in the *City and County of Honolulu* case. Exhibit C, Excerpt from Answer of Defendants Chevron Corporation and Chevron U.S.A. These inquiries satisfy the plain language of the text, which requires that Metro have an "interest in property" as to which "controversy may arise."

Further, Metro's various interests in real property have developed over its 45-year history[2], during which public awareness of the effects of burning fossil fuels for energy has changed. Just as the Chevron Respondents have already done in the *City and County of Honolulu* case, Exhibit C, the other Respondents can be expected to join with Chevron and argue, should there be litigation with Metro on claims for negligence, that Metro was contributorily negligent because the harms and risks to its properties were "generally known and recognized and were open and obvious" Exhibit C, Thirty-Sixth Separate Defense, and that "Plaintiffs developed, built, or otherwise improved the areas at issue with knowledge of the risk of harm that climate events posed to those areas." Exhibit C, Thirty-Seventh Separate Defense. The questions of what Metro should have known and what it should have done to its property in light of that knowledge constitute controversies that may arise over interests in property held by Metro. Further, Dr. Hoffert's testimony will address both of these issues.

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[2] MacLaren Declaration at 2.

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The same holds true for allegations of fraud that Metro might make in a future suit. Respondents, if sued, may well contend Metro cannot prove the "reasonable reliance" element of fraud with respect to Metro's decisions to obtain varying interests in property and to develop those properties. One of the defenses will likely be, as the Chevron Respondents has already pled in the *City and County of Honolulu* case, Metro "developed, built, or otherwise improved the areas at issue with knowledge of the risk of harm that climate events posed to those areas." The nature of Metro's knowledge, what it relied on, and its interests in the properties at issue and activities on those properties during the times in question, would therefore be very much in controversy. This issue is further evidence of controversy that may arise regarding Metro's interests in property and Dr. Hoffert's testimony will address many aspects of these issues.

The "real property" prerequisite found in Rule 37 does not appear verbatim anywhere in American jurisprudence other than in ORCP 37.[3] Rule 37 has been mentioned only three times in reported Oregon judicial decisions, and none of those addresses the present question. In interpreting the meaning of ORCP 37, Oregon rules of statutory construction apply. *Wells Fargo Bank, N.A. v. Clark*, 294 Ore. App. 197, 201 (2018). We therefore apply the "text/context/legislative history" model of *State v. Gaines,* 346 Or 160, 171-72 (2009). The text and context of the rule are considered together as the primary indications of legislative intent, then legislative history may be considered "for what it is worth" in the court's view. *Id.*

1. Text: "Controversy may arise" about Metro's property interests

Rule 37 applies where the Petitioner can show that a "controversy may arise" about its interest in real property. The ordinary meaning of "controversy may arise" is that a controversy does not presently exist, and that it is possible that one will arise, but that it need not be certain

[3] Kentucky has Ky. R. Civ. P. 27.01, which provides for pre-litigation perpetuation deposition at the request of "A person who *** being a nonresident of this state, has an interest in real property herein, concerning which he expects to be a party to an action." The Kentucky rule does not include the more general "controversy may arise" provision found in ORCP 37.

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or even probable. Webster's most relevant definition of "may" is "to be in some degree likely to." *Webster's Third New Int'l Dictionary* (unabridged ed 1981) 1396 ("may" def. 2b). The event in question need not be probable but only likely "in some degree," which includes possibility. Webster defines "arise," as relevant here, as "to come into being." *Id.* at 117 ("arise" def. 4b). The qualifying controversy does not presently exist but may come into being, in this case, should one or more respondents raise an issue concerning the nature and timing of Metro's property interests and whether those interests entitle it to claim compensation for damage caused by respondents' products or for remedial measures that damage requires it to undertake.

The Oregon Supreme Court uses "may arise" to describe events that "may come into existence" but need not be probable. *See Howell v. Willamette Urology, P.C.,* 344 Or. 124, 129 (2008) (claim for wrongful death "may come into existence (*i.e*., may 'arise')" either before or after death); *State v. Amaya*, 336 Or. 616, 629 (2004) (recognizing "the problems that may arise if the preservation onion is sliced too thinly"). Metro has met the plain language of Rule 37 and shown a "controversy" that "may arise" concerning its interests in real property.

2. Context: Prior construction of ORCP 37

Prior judicial constructions of a statute or rule are part of an Oregon court's consideration of "context." *E.g., Blacknall v. Bd. of Parole,* 348 Or. 131, 141-42 (2010), *citing Wal-Mart Stores, Inc. v. City of Cent.* Point, 341 Or. 393, 392 (2006). ORCP 37 has not been construed on appeal except for the unremarkable proposition that the grant or denial of a request for discovery under Rule 37 is a matter of trial court discretion.[4] *Willamette Landing Apts. - 89, LLC v. Burnett*, 280 Or. App. 703, 719 (2016) (affirming denial of discovery on appeal under Rule 37B where discovery not ordinarily available in the kind of proceedings at issue). At the trial level, however,

[4] To be more precise, the question whether a trial court "is satisfied that the perpetuation of the testimony or other discovery to perpetuate evidence may prevent a failure or delay of justice" (Rule 37A(3)) is answered in the court's discretion. If answered in the affirmative, the court "shall" order perpetuation, which is mandatory.

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in *Safeco v. Malyugin,* 2016 Ore. Cir. LEXIS 6468 (Or. Cir. Ct. 2016), Judge Waller construed the rule broadly to allow Safeco's request for pre-filing discovery to further its investigation of the claims of its insured.

Safeco insured the Malyugins, who made a claim on their auto policy for theft and destruction of their car. Suspicious of the claim, Safeco moved under Rule 37 for an order requiring non-party T-Mobile USA to produce the Malyugins' phone records for the relevant time to establish the "location and sequence of events related to Malyugins' theft / loss." Judge Waller granted Safeco's motion, reasoning that:

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

Id. at *1. Although the filing of litigation was "not necessarily anticipate[d]," and no showing was required that perpetuation of evidence was necessary to avoid a "failure or delay of justice," Judge Waller construed Rule 37 liberally and ordered the production of extensive phone records under Rule 37.

The present facts come far closer to the language and intent of Rule 37 than did the facts in *Malyugin.* Litigation is anticipated in which controversy over Metro's interests in real property "may arise." Dr. Hoffert's first-hand whistleblower testimony about Exxon's long-standing, sophisticated understanding of the Earth's carbon cycle, how carbon pollution from fossil fuels influences climate, and the importance of regional preparation for extreme weather changes (the science of climate adaptation), as well as his knowledge of and contributions to climate science over the last 45 years, are indisputably relevant and at risk of loss because of his age and medical

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condition. To lose Dr. Hoffert's testimony because, at 86 and in declining health, he cannot wait much longer, would be just the kind of "failure or delay of justice" Rule 37 is intended to avoid.[5]

3. Legislative History

Petitioner is aware of no legislative history behind the "interest in property" provision of ORCP 37, which was originally codified as ORS 45.420(1) and adopted in 1978 by the Council on Court Procedures without further comment. Council on Court Procedures, *Oregon Rules of Civil Procedure* (with commentary) (December 2, 1978) at 109 ("The last clause of paragraph (l)(a), relating to a petitioner with an interest in real property, comes from ORS 45.420(1)").

Metro does not allege that it is presently unable to file suit against respondents but relies on the Rule 37A(1) ground that it has real property interests as to which "controversy may arise" in such a lawsuit. Respondents devote their argument to the Rule's "presently unable" ground and cite the Council on Court Procedures Biennial History statement for 1977-79 that perpetuation deposition "can only be used to perpetuate testimony and preserve evidence in a situation where a party cannot bring an action or force the action to be brought." Joint Response 8:5-6. Statements in legislative history cannot, of course, overrule the plain language of a legislative enactment. *Halperin v. Pitts*, 352 Or. 482, 494 (2012) ("Legislative history may be used to identify or resolve ambiguity in legislation, not to rewrite it."). Only the enacted statute or rule expresses in formally binding terms the intent of the entire legislative body. *State v. Gaines,* 346 Or. at 171.[6]

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[5] It is worth noting that, in litigation filed last year against Exxon and other fossil fuel companies by Multnomah County, the defendants removed the complaint to federal court and did the same with the present petition for perpetuation deposition, causing months of delay. In that Multnomah County case, defendants have announced to the Court that they all intend to file anti-SLAPP motions to strike, which will have the effect of staying "all discovery" in the case, ORS 31.152(2), thus further delaying discovery. There is every reason to believe respondents would engage in the same course of conduct should Metro file against them, further delaying the deposition of Dr. Hoffert.

[6] The federal cases decided under FRCP 27 on which Respondents rely in their Response carry no weight, as the federal rule does not include the "property interest" provision found in ORCP 37. Joint Response 8 n.7, 10:15-16.

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Respondents briefly mention the provision of Rule 37 that provides for a pre-litigation perpetuation deposition where petitioner has an "interest in real property … about which a controversy may arise." They argue, without citation to any authority, that the provision is meant only to address the validity or construction of wills and deeds. Joint Response 10:5-7. They also contend, again without authority, that Rule 37 is "best read" to require both a possible controversy concerning an interest in real property *and* present inability to bring suit, as if the "or" in the rule really means "and," a misconstruction that would have the strange effect of limiting Rule 37 to only disputes in which controversy about real property interests may arise. *Id.* at 10 n.11. This re-writing of Rule 37A(1) would be contrary to the holding of the Oregon Supreme Court in *Gaines*, in which the Court noted that "there is no more persuasive evidence of the intent of the legislature than 'the words by which the legislature undertook to give expression to its wishes.'" *Gaines,* 346 Or at 171.

Application of the text and context of ORCP 37A(1) and the Rule's history shows Metro has satisfied the requirement that it has "interest[s] in property" as to which "controversy may arise". Respondents' contention that Metro has not met the requirements of ORCP 37A(1) should be rejected.

B. Dr. Hoffert's perpetuation "may prevent a failure or delay of justice."

Rule 37A(3) requires that the Court "shall" order the deposition to perpetuate testimony if it is "satisfied that the perpetuation of the testimony…may prevent a failure or delay of justice…" The question is therefore whether the Court is satisfied that the perpetuation of Dr. Hoffert's testimony "may prevent a failure or delay of justice." If so, "shall," is mandatory, *Friends of Columbia Gorge v. Columbia River*, 346 Or 415, 426, (2009), and requires the Court to order the deposition take place.

As above, "may" means "to be in some degree likely to." *Webster's Third New Int'l Dictionary* (unabridged ed 1981) 1396 ("may" def. 2b.) It does not require probability or any particular degree of likelihood, only "some degree" of likelihood. The preservation of Dr.

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Hoffert's testimony by perpetuation deposition "may" indeed prevent a "failure or delay of justice" because, as respondents do not contest, Dr. Hoffert's age and infirmity pose a substantial risk that he will not be able to testify should their efforts to block his testimony succeed.

To be clear about what Metro seeks here, it is the perpetuation deposition of one fact witness, Dr. Hoffert. Metro does not seek any equitable relief or monetary damage. Metro's Petition is not, as respondents characterize it, an effort to begin general discovery, nor is it a situation in which all Metro needs to do is file a civil action so that general discovery can begin, as evidenced by the delay caused by Respondents' course of conduct with respect to both this Petition and the Multnomah County litigation.

Respondents finally argue that a deposition of Dr. Hoffert taken in Massachusetts in 2022 suffices to preserve his testimony so that the deposition at issue here is unnecessary. Joint Response10-14. This is not correct. The 2022 deposition of Dr. Hoffert was taken in a case brought by the Massachusetts Attorney General in which the Attorney General only alleged two statutory theories of recovery, neither of which are unavailable to Metro.[7] The Massachusetts's deposition focused on Exxon and ExxonMobil's failure to convert its business activities from the exploitation and sale of fossil fuel products as energy sources to cleaner, alternative sources of energy. The theme was that Exxon knew in the 1970s and 1980s, when Dr. Hoffert consulted for them, that carbon pollution from the combustion of fossil fuels would cause harmful climate change, but Exxon chose to focus then and in subsequent years on selling fossil fuels instead of developing clean energy sources. That is an accurate narrative but not at all the focus of Metro's petition to perpetuate Dr. Hoffert's testimony. Dr. Hoffert is an expert on *climate adaptation*, which was not discussed in his 2022 deposition. As set forth in the Petition, Metro works to "build climate resilience into all of its programs." Petition 2. Its proposed legal action would

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[7] If Metro does bring a claim, it would allege common-law causes of action. The dissimilarity between the potential claims means that the topics of Dr. Hoffert's deposition will not be co-terminus with those Metro would cover in its perpetuation deposition.

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address "the necessary abatement measures to be taken by Petitioner and the cost of those measures." *Id.* at 3. Metro wants to understand from Dr. Hoffert, under oath and subject to cross-examination:

- What is the science of climate adaptation? Why, how and when should measures be taken to prepare for harmful climate change and to blunt its effects rather than simply trying to remediate after harm is done? Dr. Hoffert has not been questioned under oath about climate adaptation in the Massachusetts case or in any forum.
- How does misinformation to the public about climate change hinder the objectives of climate adaptation? How has it done so in the decades since Dr. Hoffert's work in the 1980s? What should Exxon and its competitors have done to warn and explain about the need for climate adaptation?
- What information did Exxon have about climate change when Dr. Hoffert consulted for them in the 1970s and 1980s, in comparison to what Exxon and ExxonMobil represented to the public about the threat of climate change in subsequent years in ads they placed in major news outlets like the *New York Times*? In the Massachusetts deposition, there was some reference to climate misinformation that Exxon disseminated in the *Times*, but not one of those *Times* ads was read from specifically nor attached as an exhibit to the deposition. Counsel in this case would do both.
- Dr. Hoffert will testify in his perpetuation deposition about Respondents' (in addition to Exxon's) knowledge and research. As part of his work, he was aware of the consensus of climate scientists about the need for both preventative and ameliorative climate adaptation. Exxon was the only defendant in the Massachusetts Attorney General's case, and Dr. Hoffert's 2022 deposition did not include a thorough account of the consensus among other climate scientists and other companies.
- In 1985, Dr. Hoffert, along with two Exxon climate scientists, published a paper that predicted the effects of continued reliance on the burning of fossil fuels for energy production. In 2023, the year after the Massachusetts deposition of Dr. Hoffert, a peer-reviewed paper published in *Science*, determined that the Exxon climate models produced in the 1980s by Dr. Hoffert and his colleagues were the most accurate in the world in determining how climate change would unfold in the 21st Century – accurate to a 99% certainty. Of course, that 2023 paper was not part of Dr. Hoffert's 2022 deposition and would be in Metro's perpetuation deposition.

Respondents' listing of subjects covered in the 2002 Massachusetts deposition does not include any of the above. Joint Response 6:10-20. Nor have these subjects been covered in any other preserved testimony from Dr. Hoffert. The information is central to Metro's potential claims against all Respondents, uniquely available from Dr. Hoffert, and will likely be lost if

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respondents are able to further delay or prevent his deposition. Dr. Hoffert's perpetuation deposition certainly "may prevent a failure or delay of justice." ORCP 37A(3).[8]

Metro has met the standards established by Rule 37A to allow for the perpetuation of Dr. Hoffert's testimony to prevent a failure or delay of justice. Therefore, Metro respectfully requests that the Court issue an order authorizing the deposition of Dr. Martin Hoffert.

III. Personal Jurisdiction Is Not Required.[9]

Some of the Respondents[10] (hereinafter "Non-Resident Respondents") argue that because the Court allegedly lacks personal jurisdiction over them, Metro's Rule 37 Motion to Perpetuate must be denied. Almost half of the Joint Response is devoted to arguing why the Court lacks personal jurisdiction over these Respondents. There is at least one fatal flaw with their argument: it is irrelevant. The case law is clear: the Court is not required to have personal jurisdiction over the Non-Resident Respondents to grant Metro's Rule 37 Motion. As established 150 years ago in *Pennoyer v. Neff,* **personal jurisdiction is required only when a party seeks a judgment against another party**. The federal courts to which Respondents removed this Petition have already held Metro does not seek either monetary damages or equitable relief against anyone, a ruling from which Respondents have not appealed. Metro's petition, more akin to a motion, is thus not the type of proceeding for which personal jurisdiction is required. The argument advanced by the Non-Resident Respondents is wrong as a matter of constitutional and statutory law.

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[8] Nor do Respondents address the concern that if Metro files suit against Respondents, the deposition of Dr. Hoffert in the Massachusetts' case will not be admissible under ORS 45.250(1) or (2) because none of the Respondents, save for Exxon, were parties who were present or represented at the deposition, nor did they have notice of the deposition.

[9] This Section is Metro's Reply to the Joint Response filed by all Respondents as well as the responses filed by individual Respondents challenging the Court's personal jurisdiction over them with respect to the petition to perpetuate the testimony of Dr. Hoffert.

[10] Those Respondents who challenge the Court's personal jurisdiction over them are identified as the "Non-Resident Respondents" in Respondents' Joint Opposition. Joint Response 4 n.2.

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A. Metro's Petition does not seek a judgment against anyone.

To understand why there is no requirement that the Court have personal jurisdiction over Respondents, it is useful to understand the history and nature of the type petition contemplated by ORCP 37A. Pre-suit petitions to perpetuate testimony date back to Roman law and English chancery courts and were incorporated into our federal and state judicial systems from the beginning of the Republic. *Mossler v. United States*, 158 F.2d 380, 381 (2d Cir. 1946). *See, e.g.*, 1 Stat. 90 (1789), which later became 28 U.S.C.A. § 644 and is now Fed. R. Civ. Pro. 27; *Suffolk v. Chapman*, 202 N.E.2d 535, 537 (Ill. 1964) (noting that an Illinois statute allowing the taking of pre-suit depositions has existed since 1819).

Because pre-action petitions to perpetuate testimony do not seek a judgment against a party, but rather only to preserve testimony, these petitions are described as "more akin to a motion" than an "action". *State of Nevada v. O'Leary*, 63 F.3d 932, 934 (9th Cir. 1995). Courts around the country describe them as an "ancillary" or "auxiliary" proceeding. *See, e.g.*, *Mossler*, 158 F.2d at 382; *Office Employees International Union Local 277 v. Southwestern Drug Corp.*, 391 S.W. 2d 404, 406 (Tex. 1965); *Wolfe v. Massachusetts Port Authority*, 366 Mass. 417, 419, 319 N.E.2d 423, 424 (1974); *Shore v. Acands, Inc.*, 644 F.2d 386, 389 (5th Cir. 1981); *Application of Deiulemar Compagnia Di Navigazione, S.p.A. v. M/V Allegra*, 198 F.3d 473, 484 (4th Cir. 1999). They are distinct from those cases on a court's docket in which parties seek judgment against other parties. Like all pre-action petitions to perpetuate testimony, Metro's Rule 37A Petition does not seek a judgment against anyone.[11]

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[11] The Non-Resident Respondents describe Metro's Petition as initiating an "adversary proceeding" against them. Joint Response14:14-15. The Non-Resident Respondents do not cite any case in support of their claim that a pre-suit petition to perpetuate testimony is an "adversary proceeding"—a term which appears to be extracted from bankruptcy law—nor has counsel for Metro been able to find such a reference in any case involving a pre-suit petition to perpetuate testimony in the history of American jurisprudence. Indeed, the case law is to the contrary—pre-suit petitions to perpetuate testimony are not an "adversary proceeding". *See, e.g. Orr v. City of Stockton*, 150 Cal. App.4th 622, 630, 58 Cal. Rptr.3d 662, 666 (Cal. Ct. App. 2007) ("a petition to preserve evidence under Code of

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B. There is no Federal Constitutional requirement that the Court have personal jurisdiction over Respondents to order that Dr. Hoffert appear for deposition.

Respondents contend the requirement of personal jurisdiction places a limit on the Court's power to order a pre-action deposition to perpetuate testimony. This is not correct. Since 1878 the United States Supreme Court has continuously held that the Due Process Clause of the Fourteenth Amendment, which is the source of the requirement of personal jurisdiction, places limits only on a state court's ability to exercise *adjudicatory jurisdiction* over a person. In *Pennoyer v. Neff*, 95 U.S. 714 (1878), the first case holding that the Fourteenth Amendment limited the ability of state courts to adjudicate cases, the Supreme Court held that a state court must have personal jurisdiction over a party before it may render a valid personal judgment.

> Since the adoption of the Fourteenth Amendment to the Federal Constitution the validity of such judgments [rendered in state court against a party with no connection to the state] may be directly questioned, and their enforcement in the state resisted, on the ground that proceedings in a court of justice *to determine the personal rights and obligations* of parties over whom the court has no jurisdiction does not constitute due process of law.

Id. at 733 (emphasis added). Metro's Petition does not seek to determine the personal rights or obligations of anyone—it just seeks to preserve testimony. Thus, under *Pennoyer*, personal jurisdiction is not required for the Court to grant Metro's petition to perpetuate testimony.

The Supreme Court has repeated this mantra on multiple occasions. *See, e.g., Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189, 194-95 (1915) (holding it is a violation of the Due Process Clause to render *a judgment* against a corporation not doing business in a state) (emphasis added); *Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement*, 326 U.S. 310, 319, (1945) (the Due Process Clause does not allow a state to "make binding a *judgment in personam* against an individual or corporate defendant with which the state has no

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Civil Procedure section 2035.010 et seq. does not constitute a 'suit' because it is not an adversarial proceeding to enforce a right or redress an injury."). Federal Rule of Bankruptcy Procedure 7027 adopts Federal Rule of Civil Procedure 27 and describes pre-action petitions to perpetuate testimony as "Depositions Before Adversary Proceedings or Pending Appeal."

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contacts, ties, or relations") (emphasis added); *Hanson v. Denkla*, 357 U.S. 235, 250 (1958) (with the adoption of the Fourteenth Amendment, "any *judgment purporting to bind the person* of a defendant over whom the court had not acquired in personam jurisdiction was void within the State as well as without") (emphasis added); *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291 (1980) ("the Due Process Clause of the Fourteenth Amendment limits the power of a state court *to render a valid personal judgment* against a non-resident defendant") (emphasis added); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (the Due Process Clause is applicable *only if the state court is seeking adjudicative authority*) (emphasis added); *Walden v. Fiore*, 571 U.S. 277, 283, 284 (2014) ("The Due Process Clause of the Fourteenth Amendment constrains a State's authority *to bind a nonresident defendant to a judgment* of its courts") (emphasis added); *Bristol-Myers Squibb Co. v. Superior Cour*t, 582 U.S. 255, 261-62 (2017) (same). The Supreme Court's holdings make it clear that the Due Process requirement of personal jurisdiction applies only to proceedings that could result in a binding judgment.

Oregon courts have reached the same conclusion. "Jurisdiction refers to the forum's *authority to adjudicate claims* against a defendant." *Figueroa v. BNSF Railway Co*., 361 Or. 142, 146 (2017) *citing Pennoyer v. Neff,* 95 U.S. at 722-23 (emphasis added). *See also*, *Shriners Hosps. for Children v. Cox,* 364 Or. 394, 402 (2019)("[jurisdiction] refers to a court's authority to require a defendant *to appear and to respond to charges*." (emphasis added); *Cox v. HP Inc*., 317 Or. App. 27, 31 (2022) ("The Due Process Clause limits the power of a state court *to render a personal judgment* against an out-of-state defendant") (emphasis added). See, *Miller v. Willamet Dental*, Case No. 3:23-cv-00217-AR, 2023 WL 3045413 at *3 (D. Or. April 5, 2023) (holding "personal jurisdiction refers to the court's power to render a judgment that will be enforceable against a defendant").

United States Supreme Court and Oregon Supreme Court and appellate court jurisprudence establish that the Court does not need to have personal jurisdiction over the Non-Resident Respondents to order the testimony of Dr. Hoffert be perpetuated prior to the filing of

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an action because Metro's petition does not seek to adjudicate a claim against them. In addition to the extensive jurisprudence defining when personal jurisdiction is required, a few cases have directly addressed the issue raised by the Non-Resident Respondents. All have concluded that personal jurisdiction over respondents is not required for a trial court to issue an order granting a pre-suit petition to perpetuate testimony.

C. Courts universally hold that personal jurisdiction is not required for a court to grant a pre-action petition to perpetuate testimony.

It is not surprising that, given the rarity of pre-action petitions to perpetuate testimony, no Oregon case has addressed the question of whether a court must have personal jurisdiction over all potential parties before the court can issue an order allowing the perpetuation of the testimony of a witness under Rule 37. Nationally, however, a small number of cases have addressed this issue. All have concluded personal jurisdiction over respondents is not constitutionally required for a court to order a pre-suit deposition to perpetuate testimony.

The first case to address the issue appears to have been *De Wagenknecht v. Stinnes*, 250 F.2d 414 (D.C. Cir. 1957). In *Stinnes*, the court held that personal jurisdiction over all parties was not required for a court to order the taking of a pre-suit deposition to preserve testimony under Federal Rule of Civil Procedure 27. The Court of Appeals wrote:

> While there are apparently no reported cases on the point, it would appear that if all expected adverse parties are nonresident aliens, the proceedings for perpetuation should not fail for lack of a proper district, provided there are proper safeguards as to notice and service of process, or other method of bringing the proceeding to the attention of the nonresident aliens. In such case, and under the above conditions, the filing of the proceeding may be accomplished in any Federal District Court. See 4 Moore, Federal Practice P27.04 (2d ed.). Here, certainly, there was adequate notice and service; and *it is hard to see how, under the circumstances of this case, appellants have been harmed*. To hold otherwise might result in a denial of justice.

De Wagenknecht v. Stinnes, 250 F.2d 414, 418 (D.C. Cir. 1957) (emphasis added).

In *Suffolk v. Chapman,* 202 N.E.2d 535 (Ill. 1964), the Illinois Supreme Court held personal jurisdiction over respondents is not required before a pre-suit deposition may be ordered. In *Suffolk*, the respondents conceded they had ample notice of the deposition and full opportunity

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to participate. *Id.* at 537. The respondents instead made the same argument that Respondents make in this case: "in the absence of jurisdiction either in personam or in rem, notice itself is not enough to support the order of the court, that it is beyond the power of the State to authorize proceedings against nonresidents upon such service." *Id.* In response, the Illinois Supreme Court wrote:

> The manifest object of taking these depositions is to prevent failures and delays of justice, and it is an express condition to the granting of an order that the court be satisfied that perpetuation of the particular testimony may do so. However the proceeding may be classified with regard to actions in rem and those in personam, we think the general power of Illinois to provide an effective administration of justice in its courts, and its evident interest in doing so, establishes beyond doubt the specific power to order depositions for the present purpose *even though expected parties may be nonresidents*, provided that full *opportunity is accorded them to appear and cross-examine.*

Id. (emphasis added). In other words, notice of and the opportunity to participate in the deposition is all that due process requires.

In *Allen v. Allen,* the Maryland Court of Special Appeals reached the same conclusion: personal jurisdiction over a respondent is not required for a trial court to grant a pre-action petition to perpetuate testimony. *Allen v. Allen*, 659 A.2d 411, 414-15 (1995). The personal jurisdiction focus, the court noted, is not on the respondents, but rather on the deponent, for that is the party that is subject to the court's exercise of power.

> The constitutional standards that govern a court's exercise of personal jurisdiction over a non-resident ordinarily must be met only in order to compel a person to submit to the authority of a court, such as by subjecting that person to a judgment *in personam*. In the case *sub judice,* appellee notified appellant, in accordance with the requirements of Rule 2–404(a), of his intent to depose a representative of Dean Witter with authority over appellant's stock accounts. There is no dispute that the court could exercise personal jurisdiction over the Dean Witter representative. Personal jurisdiction over Ms. Allen was not required where her stockbroker, not she herself, was the deponent from whom testimony and documentary evidence was sought. Moreover, no suit had been filed, and she was exposed neither to the subpoena power of the court nor to the imposition of a judgment against her. Accordingly, the circuit court did not err in declining to dismiss appellee's notice of deposition for lack of personal jurisdiction over appellant.

Id. (internal citations omitted).

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Finally, most recently, in *In re Reed,* No. 4:16-MC-1964, 2016 WL 5660421 (S.D. Tex. September 29, 2016), the court held that personal jurisdiction is not required to order the taking of a pre-suit deposition to perpetuate testimony.

> As the Court in which the Rule 27(a) petition for pre-suit deposition is filed, the Court is aware of the black letter law that a court cannot enter a binding judgment against a party over which it lacks personal jurisdiction. See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957) ("Since *Pennoyer v. Neff*, [95 U.S. 714, 726 (1877), overruled in part on other grounds by *Shaffer v. Heitner*, 433 U.S. 186 (1977),] this Court has held that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries). That rule is inapplicable here: *since no pretrial discovery is permitted under the federal rule, but only the perpetuation of testimony, there is nothing from this proceeding permitting a pre-suit deposition that would serve as a binding judgment for the later lawsuit*. The deposition is to preserve testimony that might be lost before a suit can be filed. Indeed, given the Rule's obvious purpose of protecting the petitioner from losing such evidence, imposing a requirement of personal jurisdiction on potential adverse parties would undermine or severely limit that purpose.

Id at *5 (footnote omitted) (emphasis added).

The Non-Resident Respondents allege that two cases stand for the proposition that the Court must have personal jurisdiction over them before it may grant a pre-suit motion to perpetuate testimony: *Matter of Marriage of Albar and Najjar*, 292 Or. App. 146, 151 (2018) and *Lightfoot v. Cendant Mortgage Corp.*, 580 U. S. 82 (2017). Joint Response, 14:18-15:4. A look at these two cases reveals neither addresses the issue before this Court and, in fact, the language in both supports Metro's position—that personal jurisdiction is only required in cases in which a judgment impacting a party is sought.

Matter of Marriage of Albar and Najjar involved a petition for dissolution of marriage and a claim for child custody and child support. *Najjar*, 292 Or. App. at 148. Mr. Najjar, who had left Oregon and returned to his home in Saudi Arabia, challenged the trial court's right to impose child support obligations on him without first establishing personal jurisdiction. *Id.* at 149. In short, *Najjar* involves the classic question of whether a court must have personal jurisdiction before it may enter judgment against a party. It has nothing to do with pre-suit

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petitions to perpetuate testimony and whether personal jurisdiction is required over respondents to grant such a petition.

Lightfoot has even less a connection to the issues before the Court. The issue in *Lightfoot* was whether Fannie Mae's "sue and be sued clause" grants federal district courts *subject matter* jurisdiction over cases involving Fannie Mae. *Lightfoot*, 580 U. S. at 84. No pre-suit petition to perpetuate testimony was involved, nor was there an issue of personal jurisdiction. The only mention of personal jurisdiction was when the Court recited the well-settled *dicta* that a court must have personal jurisdiction "before it can resolve a case." *Id.* at 95. Metro's petition to perpetuate Dr. Hoffert's testimony does not present a case to resolve, nor does it seek any type of monetary or equitable relief, as the two federal judges who have already heard this matter have concluded. *Najjar* and *Lightfoot* are irrelevant, and the Non-Resident Respondents have provided the Court no authority to support their contention that the Court must have personal jurisdiction over the Respondents before it may order the testimony of Dr. Hoffert be perpetuated.

The courts that have addressed the issue have unanimously concluded that personal jurisdiction is not required when a trial court is asked to grant a pre-action petition to perpetuate testimony. Metro has provided the Respondents ample notice of its petition and Respondents will have the opportunity to be heard regarding whether it is granted. If the Court does grant the petition, Respondents will have notice of the deposition's time and place and the opportunity to attend, participate in the deposition of Dr. Hoffert, and cross-examine him should they wish to do so. Dr. Hoffert is not objecting to the court exercising jurisdiction over him.

Since no judgment is being sought, Respondents have notice and the opportunity to participate, and Dr. Hoffert is willing to submit to the Court's jurisdiction, the Fourteenth Amendment Due Process Clause does not apply, and the personal jurisdiction requirement of the United States Constitution is not an issue in this Petition. As the court of appeals observed in *Stinnes*, it is hard to see how the Respondents will be harmed if Petitioners are allowed to preserve the testimony of an ailing non-party fact witness.

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D. The Oregon Constitution does not require personal jurisdiction for a pre-action perpetuation deposition.

The fact that the United States Constitution does not require personal jurisdiction does not resolve the constitutional issue; we need to look at the Oregon Constitution to see if it requires personal jurisdiction before the Court may act. The Constitution of the State of Oregon does not impose a personal jurisdiction requirement because there is no Due Process Clause in the Oregon constitution. *State ex. rel. Circus Circus Reno, Inc. v. Pope*, 317 Or. 151, 156 (Or. 1993).

> Because we do not have a due process clause in our state constitution, we must examine the federal constitution to ascertain the limitations on exercising jurisdiction over non-residents.

State v. Crookham, 296 Or. 735, 740 (Or. 1984). Since the Federal Constitution does not impose personal jurisdiction requirements on Rule 37A petitions to perpetuate testimony, neither does the Oregon Constitution.

E. Rule 37 does not require personal jurisdiction.

The only other potential source of a requirement of personal jurisdiction over Respondents would be Rule 37 itself. To determine the meaning of an Oregon Rule of Civil Procedure, courts look at its text, context and, to the extent deemed appropriate, the legislative history. *Larsen v. Selmet, Inc.*, 371 Or. 457, 464 (2023). The text of Rule 37, while containing venue and notice requirements, contains no requirement of personal jurisdiction. Nowhere in the text is there any language that explicitly states, or even implies, that a court must have personal jurisdiction over a respondent before it may consider a petition to perpetuate testimony.

This fits the context of the Rule, which is to allow the preservation of testimony without adjudicating the merits of the case. Indeed, nowhere in the history of the development of the Rule is there mention of the requirement of personal jurisdiction. In drafting Rule 37, the Oregon Council on Court Procedures specifically wrote:

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COMMENT

This rule governs use of depositions, requests for production and inspection, and medical examinations before a case is filed and pending appeal. It replaces the original Oregon deposition statute, ORS 45.410 through 45.470, which remained in ORS and applied to both depositions before and after a case was filed. The federal deposition procedure was adopted in Oregon and is generally used after a case was filed, but the original statute was used before filing. There was no ORS section dealing with depositions pending appeal. The language used in this rule is a combination of the version of Federal Rule 27 appearing in the Vermont Rules of Civil Procedure, the Uniform Perpetuation of Testimony Act, and a small portion of the existing ORS sections. The rule is not a discovery provision. It cannot be used to "fish" for information but only to perpetuate evidence.

Subsection A.(1) comes from the Uniform Perpetuation of Testimony Act. It is generally based upon Federal Rule 27(a) but contains additional language in paragraphs (a) and (b) that permits a petitioner who has executed a written instrument, including a will, to anticipate an action after assignment or death and to perpetuate evidence to show the circumstances of execution and mental capacity. The requirement of attaching a copy of an instrument in paragraph (l)(b) is necessary to allow parties given notice of a deposition a meaningful opportunity for cross examination. The last clause of paragraph (l)(a), relating to a petitioner with an interest in real property, comes from ORS 45.420(1).

Under subsection A.(2), the general scheme for service of summons in ORCP 7 is followed for service of notice and petition. The rule follows the federal rule in providing that, if actual notice cannot be given to prospective parties, the petitioner may proceed with an attorney appointed by the court to protect the interests of persons not served. Since the Council does not promulgate rules of evidence, perpetuation without notice under this rule involves no guarantee that evidence so perpetuated will be admissible in evidence. The next to the last sentence of this subsection was added to make this clear.

Oregon Rules of Civil Procedure, Promulgated by Council on Court Procedures, December 2, 1978.

The Council on Court Procedures not only doesn't mention that personal jurisdiction is required before a trial court may consider a petition to perpetuate testimony, but the Council does not even mention ORCP 4, the Oregon "long-arm statute". This is especially telling since the Council describes that service must be made in accordance with ORCP 7, the Oregon Rule describing how to serve process. The mention of ORCP 7 plus the absence of any reference to ORCP 4 makes it clear that the Council intended a petition to perpetuate testimony to require only proper service, not personal jurisdiction. This point is emphasized by the Council's

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reference to Federal Rule of Civil Procedure 27 as providing the basic guidelines for ORCP 37. As discussed above, there is no mention in Fed. R. Civ Pro. 27 of personal jurisdiction and the federal courts have uniformly held that Rule 27 does not require personal jurisdiction. *See, In re Reed*, 2016 WL 5660421 at *4.

In short, the text of ORCP 37A does not require personal jurisdiction to exist prior to issuing an order granting a pre-suit petition to perpetuate testimony, the Rule's context does not require personal jurisdiction, and the history of the Rule does not mention a requirement of personal jurisdiction. There is no statutory basis for concluding that Rule 37 requires a court to ensure personal jurisdiction exists prior to ordering a pre-suit deposition.

F. Participating in the Deposition Does Not Waive Personal Jurisdiction.

The Non-Resident Respondents' final claim is that if they participate in the deposition, they *risk* "waiver of their personal jurisdiction defenses as to Metro's anticipated claims." Joint Response 15:4-9. In support of this allegation, they cite two cases, *Lazar v. Kroncke* and *Seiko Epson Corp. v. Glory S. Software Mfg., Inc.* Neither case is applicable, and the Non-Resident Respondents' concern is without merit.

"Waiver" is the voluntary relinquishment of a known right. *Alderman v. Davidson*, 326 Or. 508, 513 (1998). In *Waterway Terminals Co. v. P.S. Lord Mechanical Contractors,* 242 Or. 1 (1965), the court described the rigorous requisites to establish waiver of a legal right:

> In the absence of an express agreement a waiver will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to. To make out a case of waiver of a legal right there must be a *clear, unequivocal, and decisive* act of the party showing such a purpose or acts amounting to an estoppel on his part.

Id. at 26 (emphasis added) (citations omitted). There is no risk that the Non-Resident Respondents, by participating in the deposition of Dr. Hoffert, will waive any personal jurisdiction challenge they might have should Metro ever file suit.

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First, waiver requires the relinquishment of a known right. *Alderman*, 326 Or. at 513. The Non-Resident Respondents have no right to assert a personal jurisdiction claim in this Petition. Without a right, there cannot be a waiver. Second, even if the Non-Resident Respondents had a right, any relinquishment must be voluntary. The Non-Resident Respondents have not voluntarily relinquished anything. They have filed objections to the Court's exercise of personal jurisdiction as required by ORCP 21G(1). This preserves any objection they might have, even when subsequent discovery takes place. *See*, *Amundson v. Jackson*, 122 Or. App. 85, 87-88 (1993) (a defendant does not waive an objection to personal jurisdiction by defending on the merits); ORCP 21A(2)(b) (allowing a trial court to defer deciding a motion to dismiss for lack of personal jurisdiction "until further discovery or until trial on the merits."). Third, any conduct by the Non-Resident Respondents' after the Court denies their personal jurisdiction challenge, including participating in the deposition, does not waive their rights to re-urge that challenge at a later date or on appeal. *See*, *Amundson v. Jackson*, *supra.*; ORCP 21G(1). Indeed, in *In re Reed*, the court expressly addressed this concern and implicitly rejected the notion that participating in the perpetuation deposition waives a respondent's ability to challenge personal jurisdiction in a subsequently filed case. The court distinguished between the deposition to perpetuate testimony and the subsequent lawsuit and held that the requirement of personal jurisdiction "may make it necessary for petitioner to file her expected lawsuit in a number of courts that have jurisdiction over the various potential defendants, but the issue of perpetuation of Reed's testimony may be resolved here…." *In re Reed,* 2016 WL 5660421 at *4. *In re Reed* establishes the Non-Resident Respondents' participation in Dr. Hoffert's deposition to perpetuate his testimony has no bearing on their ability to raise personal jurisdiction defenses should Metro later file suit. Finally, and perhaps most importantly, to assuage any concerns that the Respondents might have about waiving their future right to challenge personal jurisdiction, Metro offered to stipulate it would not use Respondents' participation in the perpetuation deposition of Dr. Hoffert as a basis for

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asserting personal jurisdiction against any Respondent. The Non-Resident Respondents declined Metro's offer. Metro stands by this offer and is still willing to agree to such a stipulation.

The Non-Resident Respondents cite two cases to support their position that participation in Dr. Hoffert's perpetuation deposition might cause waiver. Neither is relevant. The first, *Lazar v. Kroncke*, 862 F.3d 1186 (9th Cir. 2017), applies the Federal Rules of Civil Procedure, which are not applicable here, and holds that the defendant in that case did not waive its jurisdictional challenge because it "complied with its obligation under Federal Rule of Civil Procedure 12(h)(1) to raise a personal jurisdiction defense at the earliest stage possible." *Id.* at 1201. Similarly, the Non-Resident Respondents have raised their personal jurisdiction defenses at an early stage in the resolution of this Petition. The second case, *Seiko Epson Corp. v. Glory S. Software Mfg., Inc.*, No. 06–CV–236–BR, 2010 WL 4366370 (D. Or. Oct. 28, 2010), also applies the Federal Rules and involves a defendant that never raised a jurisdictional challenge prior to the motion to enter judgment. *Id.* at *3. That hardly represents what has transpired in this matter.

The Non-Resident Respondents have not voluntarily relinquished a known right. Indeed, they have no right to personal jurisdiction in this matter. Even if the Non-Resident Respondents have a right, they are not voluntarily releasing it, but rather challenging personal jurisdiction prior to any ruling on the merits. Finally, participation in the deposition will not constitute waiver under Oregon law or the court's holding in *In re Reed*. The Non-Resident Respondents have no concern about waiver.

IV. Conclusion: Metro is Entitled to Take a Pre-Action Deposition to Perpetuate the Testimony of Dr. Martin Hoffert.

Metro has established in its ORCP 37 petition to depose Dr. Martin Hoffert should be granted. Metro has an interest in real property about which a controversy may arise and perpetuating Dr. Hoffert's testimony may prevent a failure or delay of justice. The Non-Resident Respondents' claim that the Court lacks personal jurisdiction over them is misplaced. There is neither a constitutional nor a statutory requirement of personal jurisdiction. Having met the test

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set out in ORCP 37A, Metro respectfully requests that the Court grant its petition to perpetuate the testimony of Dr. Martin Hoffert and enter an order authorizing the deposition take place in the next 30 days.

Dated: August 21, 2024.

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	by **sending via the court's electronic filing system, to the extent one exists, and counsel is registered**
X	by **email**
	by **mail**
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DATED: August 21, 2024

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Exhibit A

DECLARATION OF IRIS HOFFERT

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

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

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

DECLARATION OF IRIS HOFFERT

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

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

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

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

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

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

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

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

Date: Nov 30, 2023

Iris Hoffert

DECLARATION OF IRIS HOFFERT

1. My name is Iris Hoffert. I live at 8961 SW 86th Loop in Ocala, Florida with my husband, Dr. Martin (Marty) Hoffert, PhD. Marty and I have been married for 58 years. On November 30, 2023, I provided a declaration regarding my husband's health status. The below will supplement my earlier statement. I am of sound mind and competent to make this affidavit and the facts stated herein are all true and correct to the best of my ability.

2. Since late November of 2023, Marty's health has declined badly. He is in bed about 14 hours a day on average. He sleeps a fraction of that time. He is getting weaker. He tires more easily, although he tries to walk daily. His breathing is more labored when he walks. His eyesight seems to have gotten worse.

3. Despite the decline in Marty's health condition since my last statement, Marty's brain remains sharp. He wants to testify about the events surrounding his work for Exxon regarding the cause, risks, escalation and impacts of global warming. He was hoping to start the deposition in late January, 2024.

4. I understand there may be a delay. I am very, very concerned about delaying Marty's deposition beyond the original target date. When he gave his deposition in 2022, I believe that there was only one defendant, Exxon. That deposition tired him out. For this next deposition, I understand there may be over a dozen defense lawyers. I'm worried about the time the new deposition will take, as Marty tires out easily. I would ask the Court to set the deposition of my husband as soon as possible. I also urge the Court to protect him from the stress and anxiety of a prolonged deposition. Marty wants to testify, and I want him to as well, but we need to protect his heart and health.

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

Date: Jan 8, 2024

Iris E. Hoffert

Iris Hoffert

Exhibit B

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

DECLARATION OF CARRIE MACLAREN IN SUPPORT OF METRO'S REPLY TO RESPONDENTS' JOINT RESPONSE IN OPPOSITION TO METRO'S PETITION TO PERPETUATE TESTIMONY UNDER ORCP 37

DECLARATION OF CARRIE MACLAREN

1. My name is Carrie MacLaren. I am the Metro Attorney for Metro, a municipal corporation in the Portland metropolitan area, comprising portions of Multnomah, Clackamas and Washington counties.

2. I make this declaration in support of Metro's Reply to Respondents' Joint Response in Opposition to Metro's Petition to Perpetuate Testimony Under ORCP 37. I have personal knowledge from Metro's business records and am competent to testify to the following:

3. Metro has various interests in some 18,000 acres of real property in Multnomah, Clackamas and Washington counties, including the Oregon Zoo, Oregon Convention Center, Portland Expo Center, the Metro Central and South transfer stations, and a system of parks and natural areas. These interests, developed over the last 45 years, include (1) fee simple ownership (*e.g.* Molalla Oaks, Prairies and Floodplains #1), (2) fee simple ownership with maintenance and operation authority and responsibility delegated to other agencies in Intergovernmental Agreements under Chapter 190 of the Oregon Revised Statutes (*e.g.* Forest Park Central Property), (3) tenancy in common, with ownership interests generally allocated based on contributions to purchase price (*e.g.* Tryon Creek Linkages Target Area #3), (4) conservation easements on private and government land (*e.g.* Dairy and McKay Creeks Confluence; Stevens Meadow in Lake Oswego) and (5) trail and access easements (*e.g.,* Clackamas River Bluffs and Greenway; Mason Hill Park). Metro's authority and responsibility for the operation, management and maintenance of these properties varies depending on the terms of the relevant intergovernmental and other agreements that govern its interests in these lands.

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

August 21, 2024.

/s/ Carrie MacLaren
Carrie MacLaren, OSB No. 993034
Metro | oregonmetro.gov
600 NE Grand Ave.
Portland, OR 97232-2736
503-797-1511
carrie.maclaren@oregonmetro.gov

Exhibit C

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CITY AND COUNTY OF HONOLULU, AND HONOLULU BOARD OF WATER SUPPLY, Plaintiffs, vs. SUNOCO LP; ALOHA PETROLEUM, LTD.; ALOHA PETROLEUM LLC; EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; SHELL OIL PRODUCTS COMPANY LLC; CHEVRON CORP; CHEVRON USA INC.; BHP GROUP LIMITED; BHP GROUP PLC; BHP HAWAII INC.; BP PLC; BP AMERICA INC.; MARATHON PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; AND DOES 1 through 100, inclusive, Defendants.	CIVIL NO. 1CCV-20-0000380 (LWC) (Other Non-Vehicle Tort) **DEFENDANTS CHEVRON CORPORATION AND CHEVRON U.S.A. INC.'S ANSWER TO THE FIRST AMENDED COMPLAINT; CERTIFICATE OF SERVICE** Trial date: None Judge: Honorable Lisa W. Cataldo

DEFENDANTS CHEVRON CORPORATION AND
CHEVRON U.S.A. INC.'S ANSWER TO THE FIRST AMENDED COMPLAINT

Defendants Chevron Corporation and Chevron U.S.A., Inc. (together, the "Chevron Defendants"), through their undersigned attorneys, hereby answer (the "Answer") Plaintiffs' First Amended Complaint (the "Complaint"), Dkt. No. 45, by (A) providing a statement in support of their Separate Defenses, (B) providing their Separate Defenses, and (C) responding to the allegations contained in the numbered Paragraphs stated in the Complaint.

The Chevron Defendants deny all allegations in the Complaint not expressly admitted herein. Furthermore, the Chevron Defendants deny all allegations contained in the Complaint to

and other fossil fuels produced in Hawaii underscores the importance of aviation and aviation fuel to a thriving Hawaii."[449]

B. SEPARATE DEFENSES

Without assuming any burden of proof that they would not otherwise bear, the Chevron Defendants assert the following defenses. By listing a defense here, the Chevron Defendants in no way concede that they bear the burden of proving any fact, issue, or element of a cause of action (or any burden) where such burden properly belongs to Plaintiffs. The Chevron Defendants reserve the right to assert further defenses as the case proceeds. In light of the foregoing and for other reasons, and additional facts to be identified during discovery, the Chevron Defendants assert the following defenses:

FIRST SEPARATE DEFENSE

(Assumption of Risk)

1. Plaintiffs knowingly assumed the risks associated with the production, sale, distribution, and consumption of fossil fuels.

SECOND SEPARATE DEFENSE

(Authorization)

2. All of the Chevron Defendants' alleged conduct was authorized by applicable law. By pleading this affirmative defense, the Chevron Defendants do not assert any new matter on which the Chevron Defendants bear the burden with regard to such claims; this defense is alleged purely in an abundance of caution to ensure that no claim of waiver may be made by Plaintiffs.

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[449] Hawaii State Energy Office, Testimony of Scott J. Glenn before the House Committee on Finance, Feb. 5, 2021, https://www.capitol.hawaii.gov/session2021/testimony/HB683_HD1_TESTIMONY_FIN_02-26-21_.PDF.

THIRD SEPARATE DEFENSE

(Causation—Intervening or Superseding Causes)

3. Plaintiffs' claims are barred by the doctrines of superseding and intervening causation. Plaintiffs' injuries, if any, were caused by independent, and/or unforeseeable, and/or extraordinary actions and forces over which the Chevron Defendants had no control.

FOURTH SEPARATE DEFENSE

(Causation—Lack of Proximate Cause and Substantial Factor Cause)

4. The Chevron Defendants' alleged actions are not the proximate cause, or the substantial factor cause, of any injury to Plaintiffs.

FIFTH SEPARATE DEFENSE

(Choice of Law)

5. Plaintiffs' claims are barred, in whole or in part, by choice-of-law principles because Plaintiffs' claims violate or fail to state a viable claim under the applicable state or federal law.

SIXTH SEPARATE DEFENSE

(Constitutional Defense—Rights to Free Speech and Petition)

6. Plaintiffs' claims are barred to the extent they relate to the Chevron Defendants' alleged advertising, public statements, lobbying, or other activities protected by the First Amendment to the Constitution of the United States (including the *Noerr-Pennington* doctrine), by Section 4 of Article I of the Constitution of the State of Hawai‘i, and/or by the laws or Constitution of any other State whose free-speech protections may apply.

SEVENTH SEPARATE DEFENSE

(Constitutional Defense—Due Process and Ex post Facto Clause (Anti-Retroactivity and "Fair Notice" Doctrines))

7. Plaintiffs' claims are barred, in whole or in part, because they violate the Due Process and Ex Post Facto Clauses of the United States Constitution, Section 5 of the Constitution of the State of Hawai‘i, or the laws and the Constitution of any other State that may apply, to the

extent (a) Plaintiffs seeks to impose liability retroactively for conduct that was not actionable at the time it occurred and (b) Plaintiffs seek to impose liability for conduct as to which the Chevron Defendants had no fair notice of the Chevron Defendants' potential liability.

EIGHTH SEPARATE DEFENSE

(Constitutional Defense—Commerce Clause)

8. Plaintiffs' claims are barred, in whole or in part, because they violate the Commerce Clause of the United States Constitution.

NINTH SEPARATE DEFENSE

(Constitutional Defense—Due Process and Eighth Amendment Prohibitions on Excessive Punitive Damages and Other Civil Penalties)

9. Plaintiffs' claims for punitive or exemplary damages or other civil penalties are barred or reduced by applicable law or statute or, in the alternative, are unconstitutional insofar as they violate the Due Process protections afforded by the United States Constitution, the Excessive Fines Clause of the Eighth Amendment of the United States Constitution, the Full Faith and Credit Clause of the United States Constitution, the Supremacy Clause, principles of federalism, similar provisions of the Constitution of the State of Hawai'i (*e.g.*, Article I, § 12), or similar provisions of the U.S. Constitution, or the laws and the Constitution of any other State that may apply. Any law, statute, or other authority purporting to permit the recovery of punitive damages or civil penalties in this case is unconstitutional, facially and as applied, to the extent that, without limitation, it: (1) lacks constitutionally sufficient standards to guide and restrain the jury's discretion in determining whether to award punitive damages or civil penalties and/or the amount, if any; (2) is void for vagueness in that it fails to provide adequate advance notice as to what conduct will result in punitive damages or civil penalties; (3) unconstitutionally may permit recovery of punitive damages or civil penalties based on harms to third parties, out-of-state conduct, conduct that complied with applicable law, or conduct that was not directed, or did not proximately cause harm, to Plaintiffs; (4) unconstitutionally may permit recovery of punitive damages or civil penalties in an amount that is not both reasonable and proportionate to the amount

of harm, if any, to Plaintiffs and to the amount of compensatory damages, if any; (5) unconstitutionally may permit jury consideration of net worth or other financial information relating to Defendants; (6) lacks constitutionally sufficient standards to be applied by the trial court in post-verdict review of any award of punitive damages or civil penalties; (7) lacks constitutionally sufficient standards for appellate review of any award of punitive damages or civil penalties; (8) would unconstitutionally impose a penalty, criminal in nature, without according to Defendants the same procedural protections that are accorded to criminal defendants under the Constitutions of the United States, this State, and any other State whose laws may apply; and (9) otherwise fails to satisfy precedent of the Supreme Court of the United States, of the courts of this State, or of the Courts of any other State whose laws may apply. Plaintiffs bear the burden of proof on all issues regarding punitive damages and civil penalties; this defense does not assert any new matter on which Defendants bears the burden; this defense is alleged purely in an abundance of caution to ensure that no claim of waiver may be made by Plaintiffs.

TENTH SEPARATE DEFENSE

(Damages—Comparative Negligence)

10. Plaintiffs' alleged damages, if any, are barred, in whole or in part, because any such alleged damages were caused by Plaintiffs' own negligence.

ELEVENTH SEPARATE DEFENSE

(Damages—Failure to Mitigate)

11. Plaintiffs' alleged damages are barred, in whole or in part, because Plaintiffs failed to mitigate any such alleged damages.

TWELFTH SEPARATE DEFENSE

(Discharge in Bankruptcy)

12. Plaintiffs' claims are barred to the extent the claims were discharged in bankruptcy. Plaintiffs' claims arising from acts or omissions of Texaco, Inc., and that company's affiliates, are barred by order of the Bankruptcy Court of the Southern District of New York.

THIRTEENTH SEPARATE DEFENSE

(No Equitable Relief)

13. Plaintiffs' request for equitable relief is barred to the extent that Plaintiffs have an adequate remedy at law.

FOURTEENTH SEPARATE DEFENSE

(Estoppel)

14. Plaintiffs are estopped, by their own conduct and statements, from asserting any of the purported claims in the Complaint against the Chevron Defendants.

FIFTEENTH SEPARATE DEFENSE

(No Joint or Collective Liability)

15. Plaintiffs' claims are barred to the extent that they seek to hold the Chevron Defendants jointly and severally liable for the conduct of any other actor.

SIXTEENTH SEPARATE DEFENSE

(Failure to State a Claim)

16. The Complaint fails to state a claim for which relief can be granted.

SEVENTEENTH SEPARATE DEFENSE

(Federal Defense—Displacement by Clean Air Act)

17. Plaintiffs' claims are barred because they are governed by federal common law, which has been displaced by the Clean Air Act.

EIGHTEENTH SEPARATE DEFENSE

(Federal Defense—Government Contractor Defense)

18. Plaintiffs' claims are barred, in whole or in part, by the government contractor defense, because the Chevron Defendants' actions were directed, supervised, approved, or ratified by the federal government or its agents.

NINETEENTH SEPARATE DEFENSE

(Federal Defense—Political Question, Foreign Affairs, and Separation of Powers Doctrines)

19. Plaintiffs' claims and damages are barred or limited by the federal and state doctrines of political question, foreign affairs, and separation of powers.

TWENTIETH SEPARATE DEFENSE

(Federal Defense—Preemption by Federal Authorities)

20. Plaintiffs' claims are preempted by federal law, including (without limitation) federal common law, the Clean Air Act, and statutes authorizing and encouraging the production, distribution, and use of fossil fuels, under the doctrines of express preemption, implied preemption, conflict preemption, and field preemption.

TWENTY-FIRST SEPARATE DEFENSE

(Federal Defense—Preemption Because the EPA Has Exclusive Authority to Weigh the Costs and Benefits of Fossil Fuel Emissions)

21. Plaintiffs' claims are barred to the extent Plaintiffs' claims (or the Chevron Defendants' available defenses to the claims under state law) would require the court or the jury to reexamine the cost-benefit analysis delegated to federal agencies, including (without limitation) the EPA, under the Clean Air Act.

TWENTY-SECOND SEPARATE DEFENSE

(Impossibility of Ascertaining and Calculating Damages)

22. Plaintiffs are barred from recovery because of the impossibility of ascertaining and calculating alleged damages.

TWENTY-THIRD SEPARATE DEFENSE

(Improper Venue)

23. Plaintiffs' claims are barred because of improper venue and/or pursuant to the doctrine of *forum non conveniens*.

TWENTY-FOURTH SEPARATE DEFENSE

(*In Pari Delicto*)

24. Plaintiffs' claims are barred by the doctrine of *in pari delicto* because of Plaintiffs' own statements and conduct.

TWENTY-FIFTH SEPARATE DEFENSE

(Laches)

25. Plaintiffs' claims are barred, in whole or in part, by the doctrine of laches.

TWENTY-SIXTH SEPARATE DEFENSE

(Lack of Capacity to Sue)

26. Plaintiffs' claims are barred to the extent Plaintiffs bring these claims on behalf of, or seek damages allegedly suffered by, any person other than themselves because Plaintiffs lack *parens patriae* capacity to do so.

TWENTY-SEVENTH SEPARATE DEFENSE

(Lack of Personal Jurisdiction)

27. Plaintiffs' claims are barred by lack of personal jurisdiction.

TWENTY-EIGHTH SEPARATE DEFENSE

(Lack of Subject Matter Jurisdiction)

28. Plaintiffs' claims are barred by lack of subject matter jurisdiction.

TWENTY-NINTH SEPARATE DEFENSE

(License and Consent)

29. Plaintiffs' claims are barred, in whole or in part, by the doctrines of invitation, license, and consent.

THIRTIETH SEPARATE DEFENSE

(Municipal Cost Recovery Rule)

30. Plaintiffs' claims are barred, in whole or in part, by the municipal cost recovery rule or free public services doctrine.

THIRTY-FIRST SEPARATE DEFENSE

(Preemption by State and Local Authorities)

31. Plaintiffs' claims are barred, in whole or in part, because authorities and agencies of the State of Hawai'i, and of municipalities within the State, have mandated, directed, approved, encouraged, and/or ratified the alleged actions of the Chevron Defendants.

THIRTY-SECOND SEPARATE DEFENSE

(Preemption by Authorities of Other States)

32. Plaintiffs' claims are barred, in whole or in part, because authorities and agencies of other States have mandated, directed, approved, and/or ratified the alleged actions of the Chevron Defendants.

THIRTY-THIRD SEPARATE DEFENSE

(Privilege and Justification)

33. Plaintiffs' claims are barred, in whole or in part, because the Chevron Defendants' conduct was privileged and justified. The Chevron Defendants' acts of producing, refining, and selling fossil fuels were important and necessary to securing the benefits of plentiful, reliable, and affordable energy that powers the modern economy of the United States and the world, including Hawai'i and Honolulu.

THIRTY-FOURTH SEPARATE DEFENSE

(No Punitive Damages)

34. Plaintiffs are not entitled to recover punitive damages under any legal theory, and Plaintiffs' prayer for punitive damages is barred because no act or omission of the Chevron Defendants was malicious, willful, wanton, oppressive, or grossly negligent.

THIRTY-FIFTH SEPARATE DEFENSE

(Indispensable Parties – Failure to Join)

35. Plaintiffs' claims cannot proceed to trial, and Plaintiffs cannot be awarded any relief from the Chevron Defendants, because Plaintiffs have failed to join all indispensable parties

needed for just adjudication including all other producers of fossil fuels and all consumers of fossil fuels.

THIRTY-SIXTH SEPARATE DEFENSE

(Risks – The Risks Were Generally Known and Recognized)

36. Plaintiffs' claims are barred, in whole or in part, because the harms and risks Plaintiffs allege were generally known and recognized and were open and obvious.

THIRTY-SEVENTH SEPARATE DEFENSE

(Risks – Plaintiffs Came to the Nuisance)

37. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs developed, built, or otherwise improved the areas at issue with knowledge of the risk of harm that climate events posed to those areas.

THIRTY-EIGHTH SEPARATE DEFENSE

(Risks – No Duty to Warn)

38. Plaintiffs' claims are barred, in whole or in part, because the Chevron Defendants did not owe Plaintiffs a duty to warn of alleged dangers associated with their products or the products of other manufacturers.

THIRTY-NINTH SEPARATE DEFENSE

(Risks—the Benefits of Fossil Fuels Outweighed the Risks)

39. Plaintiffs' claims are barred, in whole or in part, because the benefits of fossil fuels outweighed the risks of all damages asserted by Plaintiffs.

FORTIETH SEPARATE DEFENSE

(Standing and Ripeness)

40. Plaintiffs lack standing to bring all or some of their claims, and some or all of Plaintiffs' claims are not yet ripe because many of Plaintiffs' alleged injuries have not yet occurred and may never occur.

FORTY-FIRST SEPARATE DEFENSE

(Statute of Limitations)

41. Plaintiffs' claims are barred, in whole or in part, by the applicable statutes of limitations and repose.

FORTY-SECOND SEPARATE DEFENSE

(*Ultra Vires*)

42. Plaintiffs' claims should be dismissed, in whole or in part, as *ultra vires*, because the claims and/or relief sought exceed the scope of power granted to Plaintiffs by law.

FORTY-THIRD SEPARATE DEFENSE

(Unclean Hands)

43. Plaintiffs' claims are barred, in whole or in part, by the doctrine of unclean hands.

FORTY-FOURTH SEPARATE DEFENSE

(Waiver)

44. Plaintiffs' claims are barred, in whole or in part, because by conduct, representations, and omissions, Plaintiffs have knowingly waived, relinquished, and/or abandoned, and/or are equitably estopped to assert, any claim for relief against the Chevron Defendants respecting the matters that are the subject of the complaint.

FORTY-FIFTH SEPARATE DEFENSE

(No Attorneys' Fees)

45. Plaintiffs are not entitled to recover attorneys' fees under any legal theory alleged in the Complaint.

FORTY-SIXTH SEPARATE DEFENSE

(Incorporation)

46. To the extent applicable, the Chevron Defendants hereby adopt and incorporate by reference any other applicable defenses asserted or to be asserted by any other defendant in this action and any other statutory defenses available to them. The Chevron Defendants reserve the