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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

METRO, Petitioner, v. EXXON MOBIL CORP., SHELL PLC, F.K.A. ROYAL DUTCH SHELL PLC, SHELL U.S.A., INC., EQUILON ENTERPRISES LLC DBA SHELL OIL	Case No. 3:24-cv-00019 **METRO'S MOTION FOR REMAND**

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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.

In compliance with Local Rule 7-1, the parties made a good faith effort through telephone conferences to resolve the dispute and have been unable to do so.

A State pre-action discovery petition "does not institute a 'civil action' under §1441", and "cannot be removed to federal court."

Teamsters Local 404 Health Services & Ins. Plan v. King Pharmacy, Inc., 906 F.3d 260, 267 (2d Cir. 2018).

A pre-action petition to take a deposition "is a request for discovery, nothing more," and, therefore, is not subject to removal under 28 U.S.C. § 1441.

In re Hinote, 179 F.R.D. 335, 336 (S.D.Ala.1998).

"Justice delayed is justice denied."

William Gladstone, 1868

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Invoking Oregon Rule of Civil Procedure 37A, which governs "Before action" proceedings,[1] Metro, a metropolitan service district with a broad purview, filed a Petition to Perpetuate the testimony of Dr. Martin Hoffert, an emeritus professor of physics now over 85 years old and in very poor health. Dr. Hoffert has critical knowledge: in the 1980s he was hired as a consultant by the corporation now known as ExxonMobil to model the foreseeable effects of burning fossil fuels on global warming. He has unique insider information about the state of ExxonMobil's knowledge and its acts and omissions given that knowledge. ExxonMobil, in an effort to prevent Dr. Hoffert's deposition, removed Metro's Petition. This removal was improper.

The overwhelming majority of federal courts, including one in Oregon, have held that state "before action" discovery requests filed pursuant to state statutes and rules of civil procedure like Oregon Rule of Civil Procedure 37 **are not removable** to federal court. Courts have concluded that a pre-action petition for discovery is simply a motion for discovery, not a "civil action" as required for removal by 28 U.S.C. §1441(a). In so holding, federal courts focus on three critical factors in addition to the plain language of §1441 and statutes and rules like ORCP 37A.

First, "Before action" discovery petitions, like the one filed by Metro, assert no claim or cause of action upon which relief can be granted and do not seek monetary damages or equitable relief. The absence of these components deprives federal district courts—courts of limited jurisdiction—of the ability to accurately assess whether subject matter jurisdiction exists. Without these elements in a pleading, a court is left to guess: (1) whether the plaintiff will file a lawsuit, much less one alleging a cause of action raising a federal question; (2) against whom relief will ultimately be sought and whether there will be complete diversity of the parties; and (3) whether the amount in controversy will satisfy statutory requirements. Most federal courts do not want to

[1] ORCP 37A.

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guess about jurisdictional matters because an appellate determination of lack of subject matter jurisdiction nullifies a final judgment, resulting in a waste of time and resources.[2]

Second, removal raises federalism issues. Removal of a pre-action request for discovery takes a petition filed in state court invoking state policies enacted by state legislatures and/or courts regarding the extent of allowable pre-action discovery, and transports the petition to federal court, where a federal judge may apply completely different federal pre-action discovery policies enacted by Congress. Such a change of venue disrupts the very essence of our federal system of government structured by our country's Constitution, and, if not merited, fails to show the respect federal courts are to accord their state counterparts, which is why courts are admonished to construe the removal statute against allowing removal.[3]

Finally, allowing removal of pre-action discovery petitions undermines Article III of the United States Constitution, the long-standing doctrine that federal courts are courts of limited jurisdiction, and that doctrine's well-established corollary noted above, that the removal statutes are to be narrowly construed, with all doubts resolved against removal.[4]

Given the plain language of both 28 U.S.C. §1441(a) and Oregon Rule of Civil Procedure 37, the case law, and the policies underlying the courts' decisions, this matter should be remanded to Multnomah County Circuit Court for resolution on the merits.[5]

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[2] *Arbaugh v. Y&H* Corp., 546 U.S. 500, 513-14 (2006).

[3] "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy v. Ratta*, 292 U.S. 263, 270 (1934).

[4] *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

[5] Even if Metro's petition is removable, the Court lacks subject matter jurisdiction to address the merits. However, respecting the Order issued by the Court on January 22, 2024, Doc. 54, Metro focuses briefing in this Motion to Remand exclusively on the removability of a Rule 37 petition to perpetuate testimony and preserves all claims that the Court lacks subject matter jurisdiction for briefing and resolution for a later date. Further, because the sole issue at this time before the Court is whether its Petition to Perpetuate the

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FACTS

Metro is a metropolitan service district with authority under its home rule charter, ORS 268 and the Oregon Constitution. It serves more than 1.7 million people in Clackamas, Multnomah, and Washington counties. The agency's boundaries encompass 24 cities ranging from the Columbia River in the north to the bend of the Willamette River near Wilsonville, and from the foothills of the Coast Range near Forest Grove to the banks of the Sandy River at Troutdale. *See,* Where is Metro, Metro, (January 23, 2024), https://www.oregonmetro.gov/regional-leadership/what-metro. Metro exercises jurisdiction over a range of governmental functions. Its core functions involve regional land use and transportation planning and natural area stewardship, including more than 18,000 acres of parks, natural areas and recreational facilities; two transfer stations and the responsibility for the planning of the region's solid waste systems; ownership of properties such as the Oregon Zoo, the Portland Expo Center and the Oregon Convention Center; coordinating and planning investments in the transportation system in the three-county area; and managing the investment of housing bonds to help ensure the development and construction of affordable housing within its boundaries.

Metro is governed by an elected seven-member Council and operated on a day-to-day basis through its Chief Operating Officer. Metro's Councilors and staff treat their positions as a public trust, *See* Metro Code Chapter 2.17.010(b)(3), sharing the goal of working in the best interests of the community to preserve the property entrusted to them and secure that property's beneficial use, all while recognizing that Metro's funding comes from their constituents' hard-earned tax dollars.

As trustees for their constituents, Metro's Councilors and staff are aware that the protection of public property and the securing of that property's use for future generations sometimes requires

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Testimony of Dr. Hoffert was properly removed, Metro expressly defers and preserves all arguments in support of the merits of its Petition.

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a government entity to commence litigation against those who would tarnish that property forever. *See, State of Oregon v. Monsanto Company*, Case No. 18CV00540, In the Circuit Court for the State of Oregon, Multnomah County (suit brought against Monsanto Company and others for PCB contamination of Oregon's land and waters).

Metro, in its capacity as owner, developer and operator of property throughout the three-county region, and its elected Councilors and professional staff all endured the 2021 Pacific Northwest extreme heat event. They are now aware of both the scientific attribution about the cause of that event and, through the news, the litigation filed by Multnomah County to recover damages. As good stewards of public property and monies, they have begun to evaluate the nature of the harm caused by the 2021 extreme heat event and climate change, the extent of their impacts on the assets Metro holds and operates for the beneficial use of its constituents, and the viability of bringing a claim so that Metro may calculate for itself whether it should institute litigation. This analysis is not yet complete, and no decision has been made about whether to file a lawsuit, much less who Metro would sue, what claims it would assert or what relief it would seek. Nonetheless, as diligent guardians of both public lands and public funds, Metro does not want to lose critical evidence in the event it chooses to proceed forward with litigation.

One witness with critical insider knowledge is Dr. Martin Hoffert, an emeritus professor of physics at New York University who researched terrestrial climate change from 1979-1987 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. Metro learned of Dr. Hoffert's precarious medical condition, which is thoroughly documented in the Declarations of his wife, Iris Hoffert, Exhibits 1 and 2 to the Declaration of Tim Williams filed in support of this motion, and in the latest medical report from his treating cardiologist, Dr. Joseph Alonso, Exhibit 3 to the Declaration of Tim

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Williams filed in support of this motion.[6] Given his age and host of potentially deadly physical ailments—including atrial fibrillation, ventricular tachycardia, dilated cardiomyopathy, congestive heart failure, chronic obstructive pulmonary disease and a prior bout with cancer—Metro concluded it was both prudent and in its constituents' best interests to try to preserve his knowledge in the event that Metro later decides it is obligated to file a suit.[7] Accordingly, on December 18, 2023, Metro filed its Rule 37 "Before action" Petition to Perpetuate the Testimony of Dr. Martin Hoffert. Doc 2-1, ExxonMobil Corporation's Notice of Removal, Exhibit 1. On January 3, 2024, ExxonMobil, with the consent of some, but not all, of the other entities identified as potential adverse parties that had been served, filed a Notice of Removal. Subsequently, this Court entered

[6] In her initial Declaration, dated November 30, 2023, Iris Hoffert, Dr. Hoffert's wife of over 59 years, details the heart attacks, cardioversions and cancer treatment Dr. Hoffert has undergone and how today Dr. Hoffert is extremely limited in his mobility and energy. She describes his condition as so problematic that if he failed to take all his daily medications, his "demise would be imminent". Exhibit 1, ¶4. In her supplemental Declaration, prepared less than 45 days later, Ms. Hoffert reports that since her first Declaration her husband's "health has declined badly." Exhibit 2, ¶2. She implores the court to "set the deposition of my husband as soon as possible." Exhibit 2, ¶4. Finally, Ms. Hoffert notes that while her husband's body is failing, his "brain remains sharp" and "[h]e wants to testify…". Exhibit 2, ¶3. Dr. Hoffert's medical history and condition as of August 2023 is thoroughly detailed in Dr. Joseph Alonso's progress notes, attached as Exhibit 3. Dr. Hoffert's age and medical condition are the two key factors that led the Suffolk County Superior Court in early 2022 to grant the Commonwealth of Massachusetts's Motion to Permit the Deposition of Dr. Hoffert pending appeal, as allowed by the Massachusetts' version of FRCP 27. *Commonwealth v. Exxon Mobil Corporation*, Civ. No. 19-3333-BLS1, 2022 WL 10393900 (Suffolk County Superior Court February 8, 2022). As the Court noted, "[a] person who is 83 or 87 years old cannot take the future for granted. **Neither can a reasonably diligent litigant who wishes to have that person's testimony available for trial**." *Id.* at *2 (footnote omitted) (emphasis added). The ruling by the Massachusetts' trial court reflects the fundamental policy underlying the Federal Rule, as expressed in Fed. R. Civ. P. 27(a)(3), of preventing "a failure or delay of justice", especially one caused by the death of a witness. *See, e.g., Texaco, Inc. v. Borda*, 383 F.2d 607, 609 (3d Cir. 1967) (granting a mandamus requiring the district court to allow Texaco to perpetuate the testimony of 71-year-old Charles Borda, holding "*[i]*t would be ignoring the facts of life to say that a 71-year old witness will be available, to give his deposition or testimony, at an undeterminable future date"). This fundamental principle reflects the adage of William Gladstone, Former Prime Minister of the United Kingdom, that "justice delayed is justice denied."

[7] Oregon law expressly allows parties to preserve evidence under ORCP 37 even when a petitioner "does not necessarily anticipate" suit will ever be filed. *Safeco Ins. Co. v. Malyugin*, Case No. 16CV14497, 2016 Or. Cir. LEXIS 6468 at *1 (Circuit Court of Oregon, Multnomah County June 1, 2016) (Waller, J).

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an Order requesting that the parties address one legal issue: "whether an ORCP 37 perpetuation petition may be removed to federal court." Doc. 54, Order issued by Court dated January 22, 2024.[8]

METRO'S RULE 37 PETITION IS NOT REMOVABLE

28 U.S.C. §1441(a) states a party may only remove a "civil action" over which a federal court has original jurisdiction. The issue before the Court is whether a "Before action" petition to perpetuate testimony filed under Oregon Rule of Civil Procedure 37 is a "civil action".[9] The

[8] In accordance with the Court's request, the sole focus of the briefing in Metro's Motion to Remand is whether Metro's ORCP 37 petition constitutes a removable "civil action". In compliance with this request, Metro will defer addressing the following issues: whether Metro has satisfied the elements of ORCP 37; whether, contrary to ExxonMobil's false allegations of a grand conspiracy, Metro's interest in perpetuating Dr. Hoffert's testimony meets the requirements set out in ORCP 37A(1); whether Dr. Hoffert's earlier deposition in another lawsuit is admissible against potential defendants other than ExxonMobil; the proper scope of Dr. Hoffert's testimony in the event Metro's ORCP 37 petition to perpetuate his testimony is granted or who that testimony might impact; or whether, as ORCP 37 instructs, allowing Dr. Hoffert's deposition "may prevent a failure or delay of justice." Metro reserves its arguments on those issues for the proper forum, at which time it will provide detailed briefing and/or additional evidence. Moreover, as noted in footnote 5, Metro will not address the Court's lack of subject matter jurisdiction and the various jurisdictional arguments offered by the removing parties in this Motion at this time, but reserves the right to do so, should this Court rule that Metro's ORCP 37 petition to perpetuate the deposition of Dr. Hoffert meets the definition of "civil action" found in 28 U.S.C. 1441(a). *Henderson ex rel. Henderson v. Shinseki*, 526 U.S. 428, 434-35 (2011) (lack of subject matter jurisdiction may be raised at any time).

[9] An Oregon court, applying Oregon law, would not consider a Rule 37 petition to perpetuate testimony to be a "civil action". Civil actions in Oregon are commenced by "filing a **complaint** with the clerk of the court." ORCP 3. A "complaint" contains a written statement setting out a party's claims or defenses. ORCP 13. ORCP 18 enumerates the items that must be included in a complaint if one is "asserting a claim for relief". ORCP 37A(1), on the other hand, which is found in the section of the Oregon Rules governing discovery, states that if a person desires to file a "Before action" request to perpetuate testimony, one files a "**petition**", a document that is completely different from a complaint. Rule 37A(1) dictates what must be contained in a "Before action" "petition", setting out requirements that are completely different than those required to be contained in a complaint initiating a "civil action". The Oregon Supreme Court is quite clear regarding statutory interpretation: "Use of a term [such as "complaint"] in one section and not in another section of the same statute indicates a purposeful omission." *King Estate Winery, Inc. v. Department of Revenue*, 329 Or. 414, 422, 988 P.2d 369 (1999), *citing PGE v. BOLI*, 317 Or. 606, 611, 859 P.2d 1143 (1993). A Rule 37 petition to perpetuate testimony falls, not within the scope of the Rules describing a "civil action", which require a party to set out its claims and the relief sought from the opponent, but rather within the bailiwick of the Rules that govern both "Motions", which are defined simply as "an application for an order," ORCP 14A, and discovery. *See,* ORCP 36-46. Indeed, as noted in footnote 7, Oregon courts grant ORCP 37 motions even when it is not anticipated that suit will ever be filed. Boiled down, Metro, which owns lands and easements impacted by global warming, is simply seeking a discovery Order pursuant to

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overwhelming majority of the federal courts that have addressed this issue have concluded that pre-action requests for discovery made under state law or state rules of procedure are not civil actions as required by §1441(a) and thus are not removable. For a partial list of cases that have so held, *See,* Doc. 1, ExxonMobil Corporation's Notice of Removal, p.15, n.10, 11.[10] The appellate case that conclusively resolved this issue is *Teamsters Local 404 Health Services & Ins. Plan v. King Pharmacy, Inc.,* 906 F.3d 260, 267 (2d Cir. 2018).

Teamsters involved a pre-action petition filed in New York state court by Teamsters Local 404 seeking disclosure of a settlement agreement between a group of pharmaceutical companies and the generic manufacturer of EpiPen. *Id.* at 262. The respondents removed the pre-action petition to federal court, and the district court remanded the case back to state court. On appeal, the Second Circuit Court held §1441(a)'s clear requirement that only a "civil action" may be removed "governs what is eligible for removal," *Id.* at 266,[11] and affirmed the remand order, holding that a state law pre-suit petition for discovery is not a civil action. *Id.* at 267. The Court

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its Rule 37A(3) discovery motion allowing it to perpetuate the testimony of Dr. Hoffert in the event it later chooses to litigate.

[10] ExxonMobil identifies only a few of the many cases that have concluded state pre-suit discovery mechanisms are not removable civil actions under §1441(a). A sampling of other cases from various federal districts from across the years, in addition to those identified by ExxonMobil in its footnotes, includes *Manhasset Office Group v. Banque Worms*, No, 87-CV-3336, 1988 WL 102046 (E.D.N.Y. September 20, 1988); *In re Hinote*, 179 F.R.D. 335, 336 (S.D. Ala. 1998); *Mayfield-George v. Texas Rehab. Comm'n*, 197 F.R.D. 280, 282-84 (N.D. Tex. 2000); *McCrary v. Kansas City So. R.R.*, 121 F.Supp.2d 566, 569 (E.D. Tex. 2000); *Barrows v. American Airlines, Inc.*, 164 F.Supp.2d 179 (D. Mass. 2001); *Bradenberg v. Watson*, No. 3:10-CV-346, 2010 WL 11565481 (S.D. Ohio December 10, 2010); *Capps v. JPMorgan Chase Bank, N. A.*, No. 3:13–CV–572–CWR–LRA, 2014 WL 10475644 (S.D. Miss. September 29, 2014); *Leos v. Bexar County*, No. SA-22-CV-0574-JKP, 2022 WL 5236839 (W.D. Tex. October 4, 2022).

[11] *See also, Hoyt v. Lane Construction Corp.*, 927 F.3d 287, 295 (5th Cir. 2019);*Medlin v. Boeing Vertol Co.*, 620 F.2d 957, 964 (3d Cir. 1980). This is important because §1441 specifically states that only a "civil action" may be removed. The procedural section of the removal statute, 28 U.S.C. §1446, references the removal of a "civil action or proceeding". While §1446 explicitly recognizes that there are two types of civil matters, actions and proceedings, under §1441 only a "civil action" is removable. Civil proceedings, like petitions to perpetuate testimony, must remain in state court.

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ruled the New York statute which, like Oregon Rule 37, is limited to instances in which an action has not been commenced, "does not institute a civil action under §1441." *Id.* at 265, 267.

In reaching its conclusion, the Second Circuit looked beyond just the plain language of the statute and identified several policy reasons supporting its statutory interpretation. First, any other ruling would put district courts in the untenable position of resolving subject matter jurisdiction questions before a lawsuit was filed. "Were we to hold otherwise, we would force the district courts to decide if they have subject matter jurisdiction before a complaint has been filed or a cause of action stated…." *Id.* at 267. This is an especially troublesome risk with potential drastic consequences, since subject matter jurisdiction may be challenged on appeal—even by a party that previously acknowledged subject matter jurisdiction—or raised by an appellate court on its own accord. *Henderson ex rel. Henderson v. Shinseki*, 526 U.S. 428, 434-35 (2011). If it is determined on appeal there was no subject matter jurisdiction, the case must be dismissed, and "many months of work on the part of the attorneys and the court may be wasted". *Id.* at 435. Second, allowing removal of pre-action petitions for discovery implicates issues of federalism. Permitting removal would undermine a state's policy choice to define the circumstances in which it would grant potential litigants a means of preserving information prior to filing a lawsuit.[12] *Teamsters Local 404,* 906 F.3d at 267. Finally, it is axiomatic that federal courts are courts of limited jurisdiction. Removal statutes are strictly construed, and all doubts are resolved against removability. *Id*.

[12] Oregon has chosen to grant its citizens a broader right to perpetuate testimony than that allowed under the Federal Rules of Civil Procedure. Oregon Rule of Civil Procedure 37A(1) allows a person, before an action is filed, to seek to perpetuate testimony, obtain documents, enter property, have a physical or mental examination conducted or access medical records. This can be done if a person is "likely to be a party" but is "presently unable" to bring or defend "an action" **or** if the petitioner has an interest in real property "about which a controversy may arise". The scope of Federal Rule of Civil Procedure 27, on the other hand, is quite narrow. It allows for the perpetuation of testimony by deposition only when the "petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought."

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These concerns echo those identified by the numerous federal courts that, over the past decades, have refused to allow removal of state pre-action discovery petitions. *See, e.g., Mayfield-George v. Texas Rehab. Comm'n*, 197 F.R.D. 280, 283 (N.D. Tex. 2000) (a pre-action petition for discovery "asserts no claim or cause of action upon which relief can be granted", but rather is a petition for discovery which may or may not lead to a lawsuit that may or may not raise federal question jurisdiction); *Young v. Hyundai Motor Mfg. Alabama, LLC*, 575 F. Supp. 2d 1251, 1255 (M.D. Ala. 2008) ("removal constitutes an infringement on state sovereignty" and thus implicates issues of federalism); *McCrary v. Kansas City So. R.R.*, 121 F.Supp.2d 566, 569 (E.D. Tex. 2000) ("the removal statutes are to be strictly construed").

This Court's own jurisprudence is aligned with the Second Circuit's analysis in *Teamsters*. *State ex. rel. Myers v. Portland Gen. Elec. Co.*, No. Civ. 04-CV-3002-HA, 2004 WL 1724296 (D. Or. July 30, 2004), arose out of a pre-suit Civil Investigative Demand (CID) issued by the Attorney General of Oregon pursuant to the Oregon Unlawful Trade Practices Act, seeking documents from Portland General Electric (PGE) so that the Attorney General could determine whether a statutory violation had occurred. *Id.* at *1. PGE removed the case to federal court, asserting complete preemption by the Federal Power Act. *Id.* at *2. In reaching his decision to remand, Former Chief Judge Haggerty observed that no "civil action", as required by §1441(a), had yet been filed because "investigative proceedings cannot expose PGE to monetary damages or equitable relief unless the Attorney General files a civil action." *Id.* at *2. In remanding, the Court observed that if the Attorney General subsequently filed a complaint seeking damages or equitable relief, PGE was free to remove the case for the Court to determine whether a federal question exists. *Id.* at *3. In essence, this Court has held that one *sine qua non* of a "civil action" for the purposes of §1441(a) is a demand for monetary damages or equitable relief from another party.

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Metro has not filed a "complaint" seeking monetary damages or equitable relief, but rather simply a petition seeking to depose a witness in extremely poor health to preserve his testimony in the event it later chooses to file a civil action. The holding in *State ex. rel. Myers* dictates that Metro's Petition to Perpetuate Testimony is not a "civil action" as defined by §1441(a) and should be remanded to Multnomah County Circuit Court. If Metro ever chooses to file a complaint against ExxonMobil, at that time ExxonMobil may remove the case and ask the Court to determine whether the Court has subject matter jurisdiction.

ExxonMobil claims in its Notice of Removal that the District of Oregon has previously "*permitted* removal of a petition to perpetuate pre-suit testimony under ORCP 37," referring the Court to *Kelly v. Whitney*, No. 98-30-HU, 1998 WL 877625 (D. Or. October 27, 1998). Doc. 1, ExxonMobil Corporation's Notice of Removal, p.13 (emphasis added). With all due respect, no explicit "permission" was granted in *Kelly* because the issue of the propriety of removal was not raised.

The full style of *Kelly* as listed on the docket sheet is *Kelly, ex rel. Oregon 1843 AD the state of Oregon 1857 AD v. Art Whitney, et. al.* Exhibit 4 to the Declaration of Tim Williams filed in support of this motion, Civil Docket for Case #: 3-98-cv-00030-HU. Mr. Kelly, acting *pro se*, filed a pre-suit petition in state court to take the depositions of several IRS employees, who he alleged were participating in collecting his taxes. *Kelly*, 1998 WL 877625 at *1. The United States Attorney removed the case to federal court based on 28 U.S.C. §1442—the federal officer removal statute, a completely different statutory provision than §1441(a) with different underlying policies—and **the docket sheet reflects that no motion to remand was filed** by Kelly, the *pro se* petitioner. The fact that no motion to remand was filed is confirmed by the district court's opinion, which contains absolutely no discussion about whether the state court pre-suit petition to take

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depositions was removable. Instead, the district court jumps directly from a brief discussion of the facts into analyzing whether the *pro se* petitioner was entitled to take the depositions under Federal Rule of Civil Procedure 27.

As the Second Circuit observed in *Teamsters*, whether a matter is a "civil action" under §1441(a) is a "preliminary matter" to be resolved prior to turning to the question of subject matter jurisdiction. *Teamsters Local 404,* 906 F.3d at 264. 28 U.S.C. §1447(c) provides that "[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a)." Otherwise, the challenge is waived. *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 392 (1998). Thus, when the *pro se* petitioner in *Kelly* failed to file a motion to remand, he waived the right to challenge the removal on the ground that his pre-suit petition did not constitute a "civil action." *Cong v. ConocoPhillips Co.*, No. CV H-12-1976, 2016 WL 6603244 at *1 (S.D. Tex. November 8, 2016) (holding petitioners waived their right to challenge the removal of a petition to take pre-suit depositions by failing to timely file a motion to remand). The district judge in *Kelly* never "permitted" the removal of a Rule 37 petition because the issue of the removability of Kelly's petition was never raised.

ExxonMobil's representation to the Court that *Kelly* permitted "removal of a petition for pre-suit perpetuation testimony under ORCP [37]," Doc. 1, ExxonMobil Corporation's Notice of Removal, p.4, is simply erroneous. *Kelly* stands for nothing more than the long-settled proposition that if a plaintiff does not timely challenge a removal action, the right to remand is waived. *Kelly* has nothing to say about the propriety of removing a Rule 37 petition to perpetuate testimony and is thus completely irrelevant to the issue in this case: whether a petition to perpetuate testimony filed under ORCP 37 is a "civil action" as required by §1441(a).

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The approach taken in *Teamsters, State ex. rel. Myers,* and the countless district courts that have addressed the propriety of removal of state pre-suit petitions to perpetuate discovery mirrors federal courts' treatment of Fed. R. Civ. Pro. 27 requests to perpetuate testimony. Courts have described Rule 27 requests as "more akin to a motion than to an 'action' commenced under Fed.R.Civ.P. [*sic*] Rules 1 and 2 of the Federal Rules of Civil Procedure." *State of Nevada v. O'Leary*, 63 F.3d 932, 934 (9th Cir. 1995); *Thomas Workman v. United States Postal Service,* No. 23-mc-30 MIS/GBW, 2024 WL 139214 at *5 (D.N.M January 12, 2024). *See, In re Chester County Elec., Inc.*, 208 F.R.D. 545, 548 (E.D. Pa. 2002) (holding an individual or entity bringing a Rule 27(a) motion is not a "party", but rather a "prospective party."); *Pacific Indemnity Co.,* Civ. No. 13-375 MV/ACT, 2013 WL 12329778 at *3 (D.N.M. July 15, 2013) (citing *Application of Deiulemar Compagnia Di Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473, 484 (4th Cir. 1999) "a 'proceeding pursuant to Rule 27 to perpetuate testimony is not based on a pending action **nor is it a separate civil action in the usual sense**. Furthermore, its purpose 'is not the determination of substantive rights, but merely the providing of aid for the eventual adjudication of such rights **in a suit later to be begun**.'") (internal citations omitted) (emphasis added).

Facing clear case law aligned against it, ExxonMobil, in its Notice of Removal, asks the Court to reject the mainstream jurisprudence and instead look for guidance to the few outlier cases holding that state pre-action petitions for discovery are removable. ExxonMobil specifically identifies *In re Texas*, 110 F. Supp.2d 514 (E.D. Tex. 2000), as a case the Court should follow, describing it as "instructive." Doc. 1, ExxonMobil Corporation's Notice of Removal, p. 14. ExxonMobil neglects to inform the Court that *In re Texas* was reversed on appeal, *Texas v. Real Parties in Interest*, 259 F.3d 387 (5th Cir. 2001), *cert. denied sub. nom., Umphrey v. Texas*, 534

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U.S. 1115 (2002), and that language in the Fifth Circuit's opinion supports Metro's Motion to Remand.

In *In re Texas*, the trial court held that a petition filed in Texas state court pursuant to Texas Rule of Civil Procedure 202 seeking pre-action discovery was removable. *In re Texas*, 110 F. Supp.2d at 521. The trial court then identified the All Writs Act, 28 U.S.C. §1651(a), as the sole basis for its subject matter jurisdiction over the Rule 202 petition. *In re Texas*, 110 F. Supp.2d at 526-30. On appeal, the Fifth Circuit reversed the district court, holding that the All Writs Act did not apply and, since there was no other basis for subject matter jurisdiction, the case had to be remanded to state court. While declining to rule on the removability of a pre-action petition to take depositions, the Fifth Circuit used language strongly suggesting that the trial court's holding that a Rule 202 petition is removable was wrong, describing a Rule 202 petition as "only an investigatory tool" and concluding that federal courts could not interfere with the use of this tool in the state courts. *Texas v. Real Parties in Interest*, 259 F.3d at 394, 395. This holding has led one member of the federal judiciary, after a thorough analysis of the cases and law, to reject the argument that *In re Texas* supports removal of pre-action discovery motions. "Bottom line, while the Fifth Circuit reversed on the basis of improper utilization of the All Writs Act, it still seemed to echo the theme of most federal district courts that have held that a Rule 202 proceeding is 'only an investigatory tool' and is simply too inchoate to constitute a removable cause of action." *Dondero v. Alvarez & Marsal CRF Mgt., LLC (In re Highland Capital Management, L.P.)*, Case No. 19-34054-sgj11, 2022 WL 38310 at *8 (Bankr. N.D. Tex January 4, 2022). This Court should not rely on a reversed case whose fundamental holding has been so thoroughly rejected.

Recognizing that the majority rule requires remand, ExxonMobil seeks to distinguish the cases. First, it argues the cases in which remand was ordered involved petitions seeking to

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investigate whether a claim exists as opposed to the petition in the case at bar, which seeks to preserve testimony for a potential suit. Doc. 1, ExxonMobil Corporation's Notice of Removal, p. 15. Petitions to preserve testimony, as opposed to ones seeking to investigate, it argues, should be considered a "civil action". This argument, which has absolutely no case law to support it, is both factually incorrect and logically and legally untenable.

Factually, other courts have been presented with removed pre-action petitions that seek to perpetuate testimony as opposed to investigate whether an action exists. For example, *Barrows v. American Airlines, Inc.*, 164 F.Supp.2d 179 (D. Mass. 2001), involved a petition to perpetuate testimony brought under Massachusetts Rule of Civil Procedure 27. Mass. R. Civ. P. 27(a)(1) is virtually identical to Federal Rule of Civil Procedure 27 in that it does not allow for perpetuation of testimony for the purposes of investigating the existence of a claim. Mass. R. Civ. P. 27(a)(1). The district court in *Barrows* remanded the case, holding that a state pre-action petition to perpetuate testimony under Mass. R. Civ. P. 27 was not a removable "civil action" under §1441. *Barrows*, 164 F.Supp.2d at 182.

Legally and logically, ExxonMobil's effort to distinguish the mainstream jurisprudence is unsupportable. No distinction between pre-action petitions seeking to perpetuate testimony and pre-action petitions seeking to investigate potential causes of action can be found in the plain language of §1441, the statute's legislative history, or the case law. Further, it is a long-settled canon of statutory construction that courts should not add words to, or subtract words from, a statute. *62 Cases, More or Less, Each Containing Six Jars of Jam v. U.S.*, 340 U.S. 593, 596 (1951). To achieve the result ExxonMobil seeks, this Court would have to violate this canon and rewrite §1441 to define "civil action" to include pre-action petitions to take depositions to perpetuate testimony while at the same time excluding from that definition pre-action petitions to take

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depositions to investigate whether a party has a claim. In essence, this request asks the Court to engage in judicial legislation, in violation of the separation of powers doctrine that lies at the core of our Constitution. Congress is the governmental entity to address this issue. The Court should reject any suggestion to judicially amend the statutory language.

Even if the Court were to edit the statute to satisfy ExxonMobil, all the problems identified by the Second Circuit in *Teamsters* and by countless district courts in their decisions regarding the removability of pre-suit petitions would remain. Allowing removal of pre-action petitions that only seek to perpetuate testimony would still leave district courts speculating about the answer to questions that impact subject matter jurisdiction, still raise significant issues implicating federalism and our constitutional structure of government, and still run contrary to appellate commands that the provisions of the removal statute are to be strictly construed against removal jurisdiction. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). The idea of re-writing §1441 and its jurisprudence to draw a fine line distinguishing between the removability of state pre-action petitions to preserve testimony and those that seek to investigate to determine if there is liability has no support in statutory language, legislative history or reported decisions.

ExxonMobil's final effort to justify its removal of Metro's Rule 37 petition is to ask the Court to rely on the thin reed of *Cong v. ConocoPhillips Co.*, No. CV H-12-1976, 2016 WL 6603244 (S.D. Tex. November 8, 2016), which it also describes as "particularly instructive". Doc. 1, ExxonMobil Corporation's Notice of Removal, p. 16. But even a cursory look at *Cong* reveals it is completely irrelevant. The only similarity between the *Cong* and Metro petitions to perpetuate testimony is that both involve state-filed petitions seeking permission to take depositions. In *Cong*, the express purpose of the proposed discovery was to depose multiple executives employed by one of the potential defendants "to investigate [the existence of] a potential claim", *Cong*, 2016 WL

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6603244 at *1; in Metro's case, the purpose of the petition is to preserve the testimony of one third-party witness, an 85-year-old scientist in failing health. The parties in *Cong* who were petitioning for the right to conduct pre-action discovery had already filed suit, raising the question of why they needed pre-suit discovery. *Id.* As the district court noted, the plaintiffs were "not confused about the claims, parties, or damage." *Id.* Metro's Rule 37 petition, on the other hand, seeks to preserve the testimony of a witness in ill health.[13] Perhaps most importantly, in *Cong* the motion to remand the petition to conduct pre-action depositions was expressly denied **because it was filed too late**, *Id.* at 1, meaning all statements about the removability of a pre-action petition for discovery are *dicta*. This is reflected in the district court's two-sentence analysis of the removability of the petition for pre-action discovery.[14] It simply was not relevant to the court's holding. The rest of the district court's short opinion is devoted to its analysis of why the *Cong* plaintiffs' pre-action petition to conduct discovery should be denied on its merits, factors that are all irrelevant to Metro's petition before the Court.

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[13] Indeed, the district court in *Cong* emphasized that the pre-action discovery the *Cong* plaintiffs were seeking did not involve a witness who is dying, *Cong*, 2016 WL 6603244 at *2, very clearly implying that were that the case, the court might have reached a different conclusion.

[14] And the *Cong* analysis itself is not persuasive. For example, the court cites 14B Charles A. Wright et. al., Federal Practice and Procedure § 3721 (4th ed. 2009), as standing for the proposition that "a civil action is one person asking a court to do something about another person." *Cong*, 2016 WL 6603244 at *1. But no such language appears in the current edition, 14C Charles A. Wright, et. al., Federal Practice and Procedure § 3721 (4th ed. 2023), and a Westlaw search fails to reveal any other federal court that has utilized similar language to define the statutory phrase "civil action". Indeed, *Cong* is an outlier among federal courts in Texas. Other Texas federal district courts routinely reach the opposite conclusion. *See, e.g. Sawyer v. E.I. du Pont de Nemours & Co.*, No. Civ. A. 06-1420, 2006 WL 1804614 (S.D. Tex. June 28, 2006); *Rivera v. City of McAllen, Texas,* Civil Action No. 7:20-cv-00384, 2021 WL 37537 at *2 (S.D. Tex. January 5, 2021); *Davidson v. S. Farm Bureau Cas. Ins. Co.,* Civ. A. No. H-05-03607, 2006 WL 1716075 (S.D. Tex. June 19, 2006); *McCrary v. Kan. City So. R.R.,* 121 F.Supp.2d 566 (E.D.Tex.2000) ; *Mayfield–George v. Tex. Rehab. Comm'n,* 197 F.R.D. 280 (N.D.Tex.2000); *Kingman Holdings, L.L.C. v. Everbank*, Civ. A. No. SA-14-CA-107-FB; 2014 WL 12877303 (W.D. Tex. March 31, 2014). Even if a throw-away sentence of unknown provenance in *Cong* accurately sets out the test for a "civil action", it is clear Metro's petition does not involve a "civil action" and is thus not removable. Metro is not asking a court to do something about another person, it just wants to preserve the testimony of an 85-year-old witness in failing health.

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Even if *Cong* merits consideration, its application still raises—without addressing—all the same concerns identified by the Second Circuit in *Teamsters* and by countless other district courts in the opinions cited throughout this Motion. The trial court would still have to speculate about the answer to questions of subject matter jurisdiction, including whether there is complete diversity since the court would not know which parties, if any, the petitioner ultimately sues or the amount in controversy; there would still be major issues implicating federalism, especially since in Metro's case, it seeks to preserve the testimony of a witness before he dies; and the decision would still run contrary to the long-standing dictates that the provisions of the removal statute are to be strictly construed against removal jurisdiction.

CONCLUSION

The plain language of §1441(a) and ORCP 37, the Second Circuit's holding in *Teamsters*, this Court's holding in *State ex. rel. Myers,* the Fifth Circuit's language in *Texas v. Real Parties in Interest*, the rulings in dozens of cases by federal judges around the country, and the principles underlying all of these rulings point to but one answer to the question the Court posited in its Order of January 22, 2024: a "Before action" petition to perpetuate testimony filed in state court pursuant to Oregon Rule of Civil Procedure 37 is not removable under 28 U.S.C. §1441(a) because it is not a "civil action" as required by that statutory provision. The Court should remand Metro's Petition to Perpetuate the testimony of Dr. Martin Hoffert back to the Multnomah County Circuit Court for resolution by the Circuit Court on the merits and, in light of his declining health, do so swiftly, to prevent the delay or denial of justice.

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Dated: January 26, 2024.

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CERTIFICATE OF SERVICE

I do hereby certify that on January 26, 2024, a true and correct copy of the above and foregoing document was electronically served on all counsel of record, in accordance with the Federal Rules of Civil Procedure.

I further certify that the below listed entities for which counsel has not yet made an appearance are being served a true and correct copy of the above and foregoing document by U.S. Certified Mail, Return Receipt Requested:

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I further certify that Shell PLC, formerly known as Royal Dutch Shell PLC, and BP PLC are being served a true and correct copy of the above and foregoing document in accordance with the Federal Rules of Civil Procedure and the Hague Convention.

I also certify that all counsel of record for Multnomah County have been provided a courtesy copy of the above and foregoing document by email.

Respectfully,

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