TIM WILLIAMS, OSB No. 034940
E-Mail: tim@rdwyer.com
Dwyer Williams Cherkoss Attorneys, P.C.
1558 SW Nancy Way, Suite 101
Bend, OR 97702
Phone: (541) 617-0555

JAMES S. COON, OSB No. 771450
E-Mail: jcoon@tcnf.legal James S.
Coon, Esq.
820 SW 2nd Avenue, Suite 200
Portland, OR 97204
Phone: (503) 228-5222

JEFFREY B. SIMON (*pro hac vice*)
E-Mail: jsimon@sgptrial.com Simon
Greenstone Panatier, P.C.
1201 Elm Street, Suite 3400
Dallas, Texas 75270
Phone: (214) 276-7680

ROGER G. WORTHINGTON OSB No. 241117
E-Mail: rworthington@rgwpc.com Worthington
& Caron, P.C.
273 W. 7th Street
San Pedro, CA 90731
Phone: (310) 221-8090

RICHARD SCHECHTER (*pro hac vice*)
E-Mail: richard@rs-law.com Richard
Schechter, P.C.
1 Greenway Plaza, Suite 100
Houston, Texas 77046-0102
Phone: (713) 623-8919

Attorneys for Petitioner

METRO'S REPLY TO RESPONDENTS' OBJECTIONS TO MAGISTRATE YOU'S FINDINGS AND RECOMMENDATIONS DATED APRIL 10, 2024

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 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.,

Case No. 3:24-cv-00019

METRO'S REPLY TO RESPONDENTS' OBJECTIONS TO MAGISTRATE JUDGE YOU'S FINDINGS AND RECOMMENDATIONS DATED APRIL 10, 2024

No Oral Argument is Needed

EMERGENCY RESOLUTION OF THIS MATTER REQUESTED GIVEN THE DETERIORATING HEALTH OF THE WITNESS

DWYER WILLIAMS CHERKOSS
ACCIDENT INJURY ATTORNEYS
1558 SW Nancy Way, Suite 101, Bend, OR 97702 Phone: (541) 617-0555 Fax: (541) 617-0984 tim@rdwyer.com

MCKINSEY HOLDINGS, INC., and
OREGON INSTITUTE OF SCIENCE
AND MEDICINE,

Respondents.

METRO'S REPLY TO RESPONDENTS' OBJECTIONS TO MAGISTRATE YOU'S FINDINGS AND RECOMMENDATIONS DATED APRIL 10, 2024

Table of Contents

DWYER WILLIAMS CHERKOSS
ACCIDENT INJURY ATTORNEYS
tim@rdwyer.com

DWYER WILLIAMS CHERKOSS
ACCIDENT INJURY ATTORNEYS
1558 SW Nancy Way, Suite 101, Bend, OR 97702 Phone: (541) 617-0555 Fax: (541) 617-0984 tim@rdwyer.com

Table of Authorities

Cases **Page(s)**

DWYER WILLIAMS CHERKOSS
ACCIDENT INJURY ATTORNEYS
tim@rdwyer.com

1558 SW Nancy Way, Suite 101, Bend, OR 97702
Phone: (541) 617-0555 Fax: (541) 617-0984
DWYER WILLIAMS CHERKOSS
ACCIDENT INJURY ATTORNEYS
tim@rdwyer.com

Statutes

Other Authorities

INTRODUCTION

Dr. Martin Hoffert's health is rapidly deteriorating. Now over 85 years old (he will turn 86 in July), Dr. Hoffert has fought cancer, survived a heart attack, and endured multiple cardioversions. His mobility is severely limited, and no one knows how much longer he will live. Dr. Hoffert has critical insider information and potentially explosive testimony about the state of knowledge of ExxonMobil and other possible defendants regarding the environmental impact of the burning of fossil fuels.[1]

Petitioner Metro is a local metropolitan service district with, among other duties, the responsibility for stewardship of more than 18,000 acres of parks, natural areas and recreational facilities that have been impacted by climate change. Metro is considering bringing a claim for damages caused by fossil-fuel driven global warming, which manifested itself in the summer of 2021 as a mass casualty heat dome, among other ongoing heat-related disasters. Although Metro has made no final decision, it desires to preserve critical evidence, such as that which Dr. Hoffert has to offer, should it opt to proceed forward with litigation. To fulfill its fiduciary obligation to its residents and taxpayers, Metro filed a petition in Multnomah County district court pursuant to ORCP 37A to perpetuate Dr. Hoffert's testimony so that a jury would have all the facts should Metro file a lawsuit and 85-year-old Dr. Hoffert not survive to trial. Respondents clearly are alarmed by the prospect of his testimony and do not want a jury to hear Dr. Hoffert's evidence.

Accordingly, to delay the deposition—with the obvious hope that it never takes place—Respondents removed Metro's petition to perpetuate Dr. Hoffert's testimony to federal court.

[1] In the 1980s Dr. Hoffert, then a professor of physics at N.Y.U., worked as a consultant to ExxonMobil's predecessor, modeling the foreseeable effects of burning fossil fuels on global warming.

1

Metro timely filed its Motion to Remand, contending its ORCP 37A petition is not a "civil action" that can be removed under 28 U.S.C. § 1441(a). Supporting Metro's position are:

- the Constitution of the United States and the presumptions arising from the Constitution about removal jurisdiction;
- the plain text of the removal statutes, especially 28 U.S.C. §§1441,1442 and 1446;
- the 2011 amendments to 28 U.S.C. § 1442;
- the holdings of federal appellate courts;
- the rulings of dozens of federal district courts, including one from the District of Oregon; and
- federal courts' treatment of F.R.C.P. 27 motions to perpetuate testimony.

Supporting Respondents' position that Metro's petition to perpetuate testimony is a removable "civil action" is:

- *dicta* in one case, whose holding has not been followed by any other court.

After extensive briefing and an almost 90-minute hearing, Magistrate Judge You recommended this Court grant Petitioner's Motion to Remand. Findings and Recommendations at 13 (hereinafter F&Rs), ECF 129. Respondents subsequently filed objections that do nothing but repeat arguments rejected by Magistrate Judge You. Petitioner Metro now files this Opposition to Respondents' objections.

STANDARD OF REVIEW

Magistrate Judge You made a non-dispositive recommendation that Metro's petition to perpetuate the testimony of Dr. Hoffert be remanded to state court for resolution on the merits. While the Court must conduct a *de novo* review of properly preserved objections to a nondispositive recommendation, 28 U.S.C. § 636(b)(1)(A) and Fed. R. Civ. P. 72(a) expressly provide that "a district judge may 'reconsider' that ruling only if it is '**clearly erroneous or contrary to law**.'" *CPC Patent Technologies Pty Ltd. v. Apple, Inc.*, 34 F.4th 801, 803 (9th Cir. 2022) (emphasis

added). Judge Simon recently summarized the "high burden" an objector must meet in order to persuade a district court to reconsider a magistrate judge's recommendations:

> "**[R]eview under the clearly erroneous standard is significantly deferential, requiring a definite and firm conviction that a mistake has been committed**." *Sec. Farms v. Int'l Bhd. of Teamsters, Chauffers, Warehousemen & Helpers*, 124 F.3d 999, 1014 (9th Cir. 1997). "The reviewing court may not simply substitute its judgment for that of the deciding court." *Grimes v. City & Cnty. of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991). "**An order is contrary to the law when it fails**

1558 SW Nancy Way, Suite 101, Bend, OR 97702
Phone: (541) 617-0555 Fax: (541) 617-0984
DWYER WILLIAMS CHERKOSS
ACCIDENT INJURY ATTORNEYS
tim@rdwyer.com

> **to apply or misapplies relevant statutes, case law, or rules of procedure**." *Bisig*, 940 F.3d at 219 (simplified); *Perez v. City of Fresno*, 519 F. Supp. 3d 718, 722 (E.D. Cal. 2021); *Calderon v. Experian Info. Sols., Inc.*, 290 F.R.D. 508, 511 (D. Idaho 2013).

adidas America, Inc. v. Fashion Nova, Inc., 341 F.R.D. 263, 265-66 (D. Or. 2022) (emphasis added).

When, however, as in this case, the objections simply repeat arguments made to and rejected by the Magistrate Judge, courts hold this constitutes a failure to properly object, as required by Fed. R. Civ. P. 72, and the district court's review is even narrower. As Judge Simon wrote on March 26th of this year, when considering objections made to Magistrate Judge You's findings and recommendations in a different case:

> **Objections that merely restate previously presented arguments, however, are improper**. *See, e.g.*, *El Papel LLC v. Inslee*, 2021 WL 71678, at *2 (W.D. Wash. Jan. 8, 2021) ("Because the Court finds that nearly all objections are merely a rehash of arguments already raised and decided upon by the Magistrate Judge, the Court will not address each objection here."); *Eagleman v. Shinn*, 2019 WL 7019414, at *4 (D. Ariz. Dec. 20, 2019) **("[O]bjections that merely repeat or rehash claims asserted in the Petition, which the magistrate judge has already addressed in the [Report and Recommendation], are not sufficient under Fed. R. Civ. P. 72**."); *Shiplet v. Veneman*, 620 F. Supp. 2d 1203, 1206 n.2 (D. Mont. 2009), *aff'd*, 383 F. App'x 667 (9th Cir. 2010) (explaining that objections that merely rehash arguments presented to the magistrate judge are improper); *see also* Fed. R. Civ. P. 72(b)(3) (directing the court to "determine de novo any part of the magistrate judge's disposition that has been *properly* objected to" (emphasis added)).

Hollis v. R&R Restaurants, Inc., 3:21-cv-965-YY; 2024 WL 1270896 (D. Or. March 26, 2024) (emphasis added). In these circumstances, the scope of the trial court's review is limited to

determining whether the Magistrate Judge committed clear error. *Id.*[2] Because Respondents' objections do nothing more than repeat arguments already made, this Court should only conduct a *de novo* review of the record to determine whether Magistrate Judge You committed clear error.

Regardless of the standard the Court applies, what the full record—including the pleadings, briefing (both before this Court and below), the transcript of the argument, the Findings and Recommendations, Respondents objections, and this Response—shows is that Magistrate Judge You got it right: Metro's pre-action petition filed in state court pursuant to Oregon Rule of Civil Procedure 37A to perpetuate the testimony of a dying witness is not a "civil action" that may be removed under 28 U.S.C. § 1441(a).

ARGUMENT AND AUTHORITIES

I. MAGISTRATE JUDGE YOU PROPERLY HELD SECTION 1441(a) SHOULD BE STRICTLY CONSTRUED AND THUS METRO'S RULE 37A PETITION TO PERPETUATE TESTIMONY IS NOT A REMOVABLE "CIVIL ACTION".

A. The Case Law Supports Magistrate Judge You's Finding that Section 1441(a) Is Strictly Construed.

Respondents object to three broad categories of findings and recommendations. Respondents' Objections at i, ECF 131. The first is Magistrate Judge You's holding that "the removal statute is strictly construed." F&Rs at 3, ECF 129. Recognizing they cannot prevail if Section 1441(a) is strictly construed, Respondents object and contend that the phrase "civil action"

[2] The reason for this narrow scope of review is because the goal of the Federal Magistrates Act is to increase the overall efficiency of the federal judiciary, not add another layer to its workload. *McCarthy v. Manson,* 554 F.Supp. 1275, 1286 (D.Conn.1982), *aff'd,* 714 F.2d 234 (2d Cir.1983). The opportunity to make objections to Findings and Recommendations is not meant to provide another chance to relitigate every argument presented to the Magistrate Judge, as this only adds extra work and delays resolution. *Camardo v. General Motors Hourly-Rate Employees Pension Plan*, 806 F.Supp. 380, 382 (W.D.N.Y. 1992). *See, Betancourt v. Ace Ins. Co. of Puerto Rico*, 313 F.Supp.2d 32, 34 (D.P.R. 2004) (noting a party may not file objections to a Magistrate Judge's findings and recommendations that duplicate arguments made to the Magistrate Judge and "expect the Court to treat the filing seriously").

in Section 1441(a) should be broadly construed.[3] Respondents' Objections at 8, ECF 131. Magistrate Judge You's analysis is correct.

Courts have long held Section 1441(a), which is part of the general removal statute,[4] must be strictly construed. *Healy v. Ratta*, 292 U.S. 263, 269 (1934); *Shamrock Oil and Gas Corp. v. Sheets*, 313 U.S. 100 (1941); *Takeda v. Northwestern Nat'l Life Ins. Co.,* 765 F.2d 815, 818 (9th Cir.1985). The Supreme Court recently reaffirmed this principle in *Home Depot U.S.A., Inc. v. Jackson*, 587 U.S. --, 139 S. Ct. 1743, 1745 (2019). There the Court held a third-party defendant is not a "defendant", as that term is defined by the plain language of Section 1441(a), and thus is not entitled to remove a case. *See also, Sharma v. HIS Asset Loan Obligation Trust 2007-1*, 23 F.4th 1167, 1170 (9th Cir. 2022) (holding Section 1441(a) must be strictly construed and that a non-party trustee is not a "defendant" eligible to remove a case under Section 1441, even though the nonparty is the real party in interest).[5]

1558 SW Nancy Way, Suite 101, Bend, OR 97702
Phone: (541) 617-0555 Fax: (541) 617-0984
DWYER WILLIAMS CHERKOSS
ACCIDENT INJURY ATTORNEYS
tim@rdwyer.com

The purpose of strictly construing the general removal statute is to protect the jurisdiction of state courts, *County of San Mateo v. Chevron Corp.*, 32 F.4th 733, 764 (9th Cir. 2022), *cert denied*, --U.S.--, 143 S.Ct. 1797 (2023), and the power reserved to the States "to provide for the determination of controversies in their courts…." *Healy*, 292 U.S. at 269. The "'strong presumption' against removal jurisdiction," *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992), the "due regard for the rightful independence of state governments", *Shamrock Oil and Gas Corp*,

[3] Respondents made the exact same argument to Magistrate Judge You. Response to Petitioner's Motion to Remand at 7-9, ECF 94.

[4] 28 U.S.C. §1441 is often referred to as "the general removal statute", as it governs removal in the vast majority of cases removed to federal court, those involving diversity or federal question jurisdiction. *See, Hansen v. Group Health Cooperative,* 902 F.3d 1051, 1056 (9th Cir. 2018).

[5] *Jackson* and *Sharma* establish Respondents had no right to remove Metro's petition to perpetuate Dr. Hoffert's testimony because they are not "defendants", as required by Section 1441(a).

313 U.S. at 108, and the federal structure of our government imbedded in our Constitution, direct "federal courts… to construe removal statutes strictly." *Univ. of S. Ala. v. Am Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999). "This is especially so in diversity cases, since concerns of comity mandate that state courts be allowed to decide state cases unless the removal action falls squarely within the bounds Congress has created." *Zurich American Ins. Co. v. CentiMark Corp.*, Case No. 3:21-cv-647 YY, 2021 WL 3563099 at *1 (D. Or. June 28, 2021). Well-settled jurisprudence unanimously supports Magistrate Judge You's finding.

B. The Case Law and 1948 Legislative History Support Magistrate Judge You's Finding that Federal Courts Overwhelmingly Hold Pre-Suit Petitions to Perpetuate Testimony are Not Removable Civil Actions.

Respondents contend the term "civil action" in Section 1441(a) should be construed broadly, and in support of their claim advance two faulty arguments that Magistrate Judge You rejected. The first is that courts interpret the term "civil action" broadly and that this broad interpretation is supported by the legislative history of the 1948 amendments of the removal provisions, as evidenced by the Historical and Revision Notes to Section 1441.[6] Respondents' Objections at 8-10, ECF 131. This claim is contrary to the facts and law, and Magistrate Judge You properly rejected it.[7]

[6] Respondents made the same argument to Magistrate Judge You. Respondents' Response to Petitioner's Motion to Remand at 7-9, ECF 94.

[7] Respondents also continue to make the bizarre claim, asserted in Supplemental Briefing, that District of Oregon Local Rule of Civil Procedure 3-4(c), which requires a JS-44 Cover Sheet "to be filed with every civil complaint, petition or other paper that initiates a civil action," means that Oregon federal judges have already determined that a petition to perpetuate testimony is a "civil action" for the purposes of Section 1441(a). ECF 131, Respondents' Objections, p.10-11. This claim is ludicrous and was properly rejected by Magistrate Judge You. First, Respondents do not cite any case law to support this proposition because there is no case ever holding a Local Rule requiring the filing of a Civil Cover Sheets when one files a petition to perpetuate testimony represents a statutory interpretation that presuit petitions to perpetuate testimony filed in state court are removable civil actions. This is especially so given the purpose of the Civil Cover Sheet, by its own terms, is solely administrative—it is "required

The case law does not support Respondents' position. The overwhelming majority of courts to address this issue have concluded that pre-action requests for discovery made under state law or

state rules of procedure and filed in state courts are not civil actions as required by Section1441(a) and thus are not removable. The leading case 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 held a state law pre-suit petition for discovery is not a removable civil action because 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 so holding, the Second Circuit relied not only on the plain language of Section 1441(a) to support its interpretation of the statute, but also on three underlying policies. First, any other ruling would put district courts in the untenable position of resolving subject matter jurisdiction before a lawsuit was filed, defendants identified, or a cause of action stated. *Id.* at 267. This is an

---

by the Clerk of the Court for the purpose of initiating the civil docket sheet." Second, the Practice Tips that accompany the Local Rules establish that the Civil Cover Sheets do not play a substantive role. For example, Practice Tip 2 under Local Rule 3-4 expressly states that checking the box "Jury Demand" on the JS-44 "does not constitute a valid jury demand." https://ord.uscourts.gov/index.php/printablecivil-procedure?tmpl=component&print=1. Finally, over thirty years ago the Ninth Circuit held that a pre-suit petition to perpetuate testimony is "more akin to a motion that to an 'action' commenced under Fed. R. Civ. P. Rules [sic] 1 and 2," *State of Nevada v. O'Leary*, 63 F.3d 932, 934 (9th Cir. 1995). Respondents argue, in essence, that the Oregon federal district judges reversed the Ninth Circuit *sua sponte* when they adopted a benign local rule designed to

promote administrative efficiency, in contravention of the long-standing doctrine that a panel opinion of the Ninth Circuit may only be overruled by that Court sitting *en banc* or by the Supreme Court. *Hart v. Massanari*, 265 F.3d 1155, 1171 (9th Cir. 2001). This argument is frivolous.

especially troublesome risk with potentially 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 undermines a state's policy choice to define the circumstances in which a potential litigant may obtain or preserve information prior to filing a lawsuit.[8] *Teamsters,* 906 F.3d at 267. Finally, federal courts are courts of limited jurisdiction, removal statutes are strictly construed, and allowing removal of a pre-suit petition for discovery when no defendants are named or claims delineated is contrary to the rule that all doubts must be resolved against removability. *Id*.[9]

These concerns identified in *Teamsters* 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

[8] Oregon, for example, 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 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."

[9] Since *Teamsters*, Metro is unaware of any court in the United States that has held a pre-suit petition to perpetuate testimony is a removable "civil action" under Section 1441(a).

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"). A sampling of other cases from various federal districts from across the years that have held that pre-suit petitions to perpetuate testimony are not removable includes *Oshkosh Truck Corp. v. International Union, etc.*, 67 F.R.D. 122 (E.D. Wisc. 1975); *Manhasset Office Group v. Banque Worms*, No, 87-CV3336, 1988 WL 102046 (E.D.N.Y. September 20, 1988); *In re Hinote*, 179 F.R.D. 335, 336 (S.D. Ala.

1998); *Barrows v. American Airlines, Inc.*, 164 F.Supp.2d 179 (D. Mass. 2001); *Davidson v. S. Farm*

1558 SW Nancy Way, Suite 101, Bend, OR 97702
Phone: (541) 617-0555 Fax: (541) 617-0984
DWYER WILLIAMS CHERKOSS
ACCIDENT INJURY ATTORNEYS
tim@rdwyer.com

Bureau Cas. Ins. Co., Civ. A. No. H-05-03607, 2006 WL 1716075 (S.D. Tex. June 19, 2006); *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); and *Leos v. Bexar County*, No. SA-22-CV-0574-JKP, 2022 WL 5236839 (W.D. Tex. October 4, 2022).[10]

This Court's jurisprudence echoes that found in *Teamsters* and the legion of cases from district courts around the country. *State ex. rel. Myers v. Portland Gen. Elec. Co.*, No. Civ. 04-CV3002-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 remanding, 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

[10] ExxonMobil also identified numerous other cases holding state pre-suit discovery petitions are not removable civil actions under Section 1441(a), *see*, Exxon Mobil Corporation's Notice of Removal at15 n.10 and n.11, ECF 1, in essence admitting that the majority of federal courts that have considered the issue before the Court have rejected their position.

equitable relief unless the Attorney General files a civil action." *Id.* at *2. 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. *Myers* has since been followed by other courts. *See, Mississippi ex. rel. Hood v. Gulf Coast Claims Facility*, No. 3:11–CV–00509–CWR–LRA, 2011 WL 5551773 at *2-3 (S.D. Miss. November 15, 2011).[11]

In the face of this virtually unanimous jurisprudence, Respondents repeat a claim they made to Magistrate Judge You:[12] cases like *Chicago, R.I. & P.R. Co.* v. *Stude*, 346 U.S. 574, 578– 80 (1954); *Nationwide Invs.* v. *Miller*, 793 F.2d 1044, 1045 (9th Cir. 1986); and *Johnson* v. *England*, 356 F.2d 44, 47 (9th Cir. 1966) support their position that the term "civil action" should be broadly construed. Respondents' Objections at 9-10, ECF 131. But none of Respondents' cited cases involve the removal of pre-suit petitions to perpetuate testimony. Indeed, none even address the question posed by Metro's Motion to Remand. The issue in *Stude* was whether the Railroad was a "defendant" entitled to remove a case under Section 1441(a); in *Miller* the question was

[11] Bizarrely, Respondents argue *Myers* supports their position. They say that Metro, in its Rule 37A petition, identified the details of an "anticipated lawsuit" and the "adverse parties" against whom it would proceed. Respondents' Objections at 18-19, ECF 131. This, Respondents claim, converts Metro's pre-suit discovery petition into a civil action. But this argument ignores Magistrate Judge You's unobjected to finding that Metro is only "considering" bringing a lawsuit, F&Rs at 2, ECF 129, and the uncontroverted fact that, at present, there is no lawsuit, there are no named defendants, no claims have been made, and no monetary damages or equitable relief have been sought. In short, none of the *sine qua nons* identified in *Myers* (and *Mayfield-George v. Texas Rehab. Comm'n*, among other cases) have been satisfied. Respondents' argument that *Myers* supports their position distorts its true holding: that until a claim for money damages or equitable relief is made, there is no removable civil action.

[12] Respondents' Response to Petitioner's Motion to Remand at 9, ECF 94.

whether a defendant was a federal officer who could remove a garnishment action under Section 1442, a completely different statute governed by completely different law; and in *Johnson* the question was whether the Labor Management Relations Act created a federal question that allowed for removal of a suit. Further, each of the cases cited by Respondents meets the test set out in *Myers* for a "civil action": there are identified causes of action asserted against identified parties and there is a demand for monetary damages or equitable relief.

Respondents do not object to Magistrate Judge You's finding that "a sizeable majority of federal courts to have considered the issue have determined that a petition for pre-suit discovery brought in state court under state rules of civil procedure is not removable as a civil action under 28 U.S.C. §1441(a)." F&Rs at 4, ECF 129. Given this unobjected-to finding and the overwhelming case law, it can hardly be said that Magistrate Judge You acted contrary to the law by refusing to stray from settled jurisprudence based on the irrelevant cases cited by Respondents.

With the case law overwhelmingly against them, Respondents object to Magistrate Judge You's conclusion because, they argue, the legislative history behind the 1948 amendments to Section 1441 and the "Historical and Revision Notes" to Section 1441 support their claim that the term "civil action" should be broadly construed. Respondents' Objections at 10, ECF 131.[13] Yet

there is nothing in the legislative history of the 1948 amendments to the removal statutes that addresses the removability of pre-suit petitions to perpetuate testimony, which is why Respondents do not cite one word from any part of that history. Further, the "Historical and Revision Notes" to Section 1441 that Respondents exalt, actually prove the accuracy of Magistrate Judge You's recommendation. Those Notes provide:

---

13 Respondents made this same argument to Magistrate Judge You, citing the same passage. Respondents' Response to Petitioner's Motion to Remand at 8, ECF 94.

> Phrases such as "in suits of a civil nature at law or in equity," the words "case," "cause," "suit," and the like have been omitted and the words "civil action" substituted in harmony with Rules 2 and 81(c) of the Federal Rules of Civil Procedure.

This language is clear, Section 1441(a) was designed to address the merger of the systems of law and equity and the term "civil action" is focused on lawsuits, cases in which one party sues another, with clearly defined claims, causes of action and requests for monetary damages or equitable relief. *See, e.g., Mayfield-George*, 197 F.R.D. at 283; *Myers*, 2004 WL 1724296 at *2. There is no mention in the Notes or legislative history of the terms "pre-suit deposition" or "pre-suit discovery," which are not lawsuits, but rather motions. *State of Nevada v. O'Leary*, 63 F.3d 932, 934 (9th Cir. 1995); *Ash v. Cort*, 512 F.2d 909 (3rd Cir. 1979); *In re Hinote,* 179 F.R.D. 335, 336

(S.D.Ala.1998) (a pre-suit petition to take a deposition "is a request for discovery, nothing more").

Contrary to Respondents' objections, a review of the case law and the legislative history of the 1948 amendments to the removal statute prove Magistrate Judge You did not commit clear error or rule contrary to the law.

C. The Plain Language of the Removal Statutes Supports Magistrate Judge You's Recommendation.

With the case law and legislative history against them, Respondents turn to the question of statutory construction. Their second argument in support of the objection to Magistrate Judge You's Finding that the term "civil action" in Section 1441(a) should be narrowly construed, is that the definition of "civil action" found in Section 1442, the federal officer removal statute, should supply the definition for the term "civil action" in Section 1441(a), the general removal statute. Respondents' Objections at 11-12, ECF 131. Magistrate Judge You expressly rejected this argument, holding "[i]t would be wrong to import into section 1441 the broader definition of 'civil

action' from section 1442." F&Rs at 8, ECF 129. A review of well-settled canons of statutory construction establishes that Magistrate Judge You is right.

"Statutory construction 'is a holistic endeavor,' and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." *U.S. Nat. Bank*

of Oregon v. Independent Ins. Agents of America, Inc., 508 U.S. 439, 455 (1993) (citation omitted). Courts do not "construe statutory phrases in isolation" but rather "read statutes as a whole." *U.S. v. Morton*, 467 U.S. 822, 828 (1984). What Magistrate Judge You found in looking at the removal statutes as a whole is that Congress used different language in different sections to identify what constitutes a "civil action", and the language in Section 1441(a), unlike in other sections, does not include pre-suit discovery in the definition of "civil action".

Section 1441 is part of a chapter devoted to removal jurisdiction, 28 U.S.C. Chapter 89. Its next-door neighbor, 28 U.S.C. §1442, is part of the same statutory regimen; it governs what is referred to as "federal officer removal". *Watson v. Phillip Morris Companies, Inc.*, 551 U.S. 142, 146 (2007). After the 1948 recodification and consolidation of the removal statutes into Chapter 89, the term "civil action" was used to describe the type of civil matter that could be removed under both Sections 1441(a) and 1442(a). The term, at that time, was statutorily undefined.

The two statutes, however, are interpreted differently. While 28 U.S.C. §1441 is narrowly construed, 28 U.S.C. §1442 is liberally construed in favor of removal. *Watson*, 551 U.S. at 147. The reason is that interpretation of Section 1441 must respect Article III and our system of federalism, while Section 1442 is designed to protect the federal government and its employees from state court interference with its operations and is thus broadly construed. *Id.* at 150. Before 2010, the vast majority of courts held the term "civil action," as found in Section 1441(a), did not include pre-suit petitions to take depositions. Interestingly, even though it was to be construed

broadly, some courts reached the same conclusion when interpreting the term "civil action" found in Section 1442; they also held it did not allow for the removal of petitions seeking pre-suit discovery from federal officers. H. R. Rep. No. 112-17(I), p.4 (2011), 2011 WL 692207 at *4.

In 2010 this issue became important to Congress as the result of the decision in *Price v. Johnson*, No. 3:09-cv-476-M, 2009 WL 10704853 (N.D. Tex. April 10, 2009). John Wiley Price, a County Commissioner in Dallas County, Texas, filed a pre-suit petition under Texas Rule of Civil Procedure 202 to depose Congresswoman Eddie Bernice Johnson.[14] Congresswoman Johnson removed the case to federal court pursuant to 28 U.S.C. §1442, contending she was a federal officer. The district court remanded the case, holding that a petition to take a deposition prior to a lawsuit was not a "civil action" under either Sections 1441(a) or 1442, citing cases holding that a pre-suit petition "is not a 'civil action' because it asserts no claim or cause of action upon which relief can be granted." *Id.* at *1.

Congress immediately sprang into action. Even though it knew courts were holding a petition for pre-suit discovery was not a "civil action" under both Sections 1441(a) and 1442, **Congress chose to amend only Section 1442**. That amendment involved inserting a definition section. New Section 28 U.S.C. §1442(d)(1), added in 2011, now provides:

> The terms "civil action" and "criminal prosecution" **include any proceeding** (whether or not ancillary to another proceeding) **to the extent that in such proceeding a judicial order**, **including a subpoena for testimony** or documents, is sought or issued.

(emphasis added). The text of Section 1442(d)(1) is clear: for the purposes of federal officer removal, a "civil action" includes a proceeding seeking a judicial order to obtain testimony. And the legislative history is clear, this provision was expressly added to address the limited question

14 The purpose of Price's suit was to investigate the potential of a defamation action against Congresswoman Johnson. *Price v. Johnson*, 600 F.3d 460, 461 (5th Cir. 2010).

of whether a motion to engage in pre-suit discovery was removable under Section 1442, the federal officer removal statute. H. R. Rep. No. 112-17(I), p.4 (2011), 2011 WL 692207 at *4. No change was made, however, to Section 1441, no effort was made to change Section 1441, and there is no mention in the legislative history of anyone expressing any concern about any court's interpretation of "civil action" under Section 1441. When Congress includes language in one section of a statute but omits it in another, it is presumed Congress acted intentionally and purposefully in the disparate inclusion or exclusion. *Gallardo by and through Vassallo v. Marstiller*, 569 U.S. 420, 430-431 (2022). *See, Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (holding Congress's inclusion of a phrase in two sections of a statute but not a third indicates the phrase should not be read into the third).

There is now a significant textual difference between Sections 1441(a) and 1442, where once there was none. Section 1442, the federal officer removal statute, now contains a provision

expanding the definition of a "civil action" to include pre-suit petitions to take depositions. *Hammer v. U. S. Dept. of Health and Human Services*, 905 F.3d 517, 527 (7th Cir. 2018) (the term "include" in 28 U.S.C. §1442(d)(1) broadens the type of civil actions that are removable). *See, Samantar v. Yousef*, 560 U.S. 305, 314 and n.10 (2010) (citing 2A N. Singer & J. Singer, Sutherland on Statutory Construction § 47.7, p. 305 (7th ed.2007) ("[T]he word 'includes' is usually a term of enlargement, and not of limitation" (some internal quotation marks omitted)). Section 1441(a), on the other hand, does not contain language broadening the definition of "civil action" to include pre-suit discovery.

When Congress amends a statute, courts presume Congress was knowledgeable about judicial decisions interpreting the prior legislation. *Porter v. Board of Trustees of Manhattan Beach Unified School District*, 307 F.3d 1064, 1072 (9th Cir. 2002). Congress chose to expand the definition of "civil action" in Section 1442(d)(1) to cover pre-suit petitions to take depositions but

chose not to make the same change to the definition of "civil action" in Section 1441(a). The law is clear: courts must presume Congress was satisfied with the narrow judicial interpretation of "civil action" in Section 1441(a), the statutory provision at issue in this case. *Sosa*, 542 U.S. at 711 n.9. Congress has inserted language in Section 1442 that it chose not to include in Section 1441. It is presumed that Congress acted intentionally and purposefully in this exclusion. *Cheneau v.*

Garland, 997 F.3d 916, 920 (9th Cir. 2021) (*en banc*). This can mean only one thing: the term "civil action" in Section 1441(a) does not include pre-suit depositions to preserve testimony.

But there is more. As Magistrate Judge You properly found, the language in Section 1446 of the removal statute also supports her finding that the definition of "civil action" in Section 1442 should not be imported into Section 1441(a). F&Rs at 5-8, ECF 129. 28 U.S.C. §1446 sets out the procedure to be followed when a party removes a matter from state to federal court. Section 1446(b)(1) defines the time frame in which the notice of removal of "a civil action **or proceeding**" must be given. This statutory language makes it clear there are two distinct types of civil matters that are potentially removable: "civil actions" and civil "proceedings."[15] Section 1441(a) limits removal to only one of those subsets: civil actions.

Section 1446(g) affirms this important distinction. It sets out the deadline for filing a notice of removal "[w]here the civil action or criminal prosecution that is removable under section 1442(a) is a proceeding in which a judicial order for testimony or documents is sought or issued or sought to be enforced." Again, Congress makes it clear, "proceedings" are removable under Section 1442(a), but not under Section 1441(a).

---

[15] There would be no need to identify "proceedings" as a separate category of potentially removable civil matters if they were encompassed in the phrase "civil action". To so hold would violate the canon against surplusage. *Nielsen v. Preap*, —— U.S. ——, 139 S. Ct. 954, 969 (2019) (citation omitted) (holding every word and every provision in a statute is to be given effect; no provision should be interpreted to either duplicate another or to have no consequence).

Congress' expansion of the definition of "civil action" in Section 1442(d)(1) to include presuit matters, Congress' use of the phrase "civil action or proceeding" in Section 1446(b)(1), and Congress' establishment of a deadline in Section 1446(g) to file a notice of removal of a proceeding removed pursuant to Section 1442(a) make it clear that the term "civil action" in Section 1441(a) only allows for a removal of a narrow set of civil matters. Magistrate Judge You, following the well-established rules of statutory construction, found that the differences in the statutory language meant Congress intended to narrowly construe the term "civil action" in Section 1441(a).

In short, Magistrate Judge You correctly found that the term "civil action" in Section 1441(a) is narrowly construed and does not include pre-suit petitions to take depositions. That is the holding in the overwhelming majority of cases and is in accord with the plain language of the statute. Respondents' objections should be rejected, and Magistrate Judge You's Findings and Recommendations accepted and adopted.

II. MAGISTRATE JUDGE YOU CORRECTLY REFUSED RESPONDENTS' REQUEST THAT SHE JUDICIALLY LEGISLATE AND AMEND THE STATUTE

The second broad set of Respondents' objections are grouped under the heading "The F&Rs Err in Concluding that all ORCP 37 Petitions Are Non-Removable." Respondents' Objections at12-17, ECF 131. The core of Respondents' objections is a claim that Magistrate Judge You erred in not rewriting the removal statute to create a distinction between a pre-suit petition to take a deposition that is to be used to *investigate* a potential claim and a pre-suit petition to take a

deposition to *preserve testimony*, and to allow for removal of the latter. *Id.* at 16. Respondents contend the dozens of cases involving pre-suit petitions to perpetuate testimony that have been remanded involve "pre-suit discovery to *investigate* potential claims", and are different from Metro's Petition, which seeks to perpetuate testimony. A pre-suit deposition to preserve testimony,

Respondents argue, goes to the merits of a case, and thus should be considered a "civil action" that is removable under Section 1441(a).[16] Magistrate Judge You considered this argument and properly rejected it. F&Rs at 9-10, ECF 129. There are several good reasons supporting her finding.

First, it is a statute we are construing, and the role of courts in interpreting a statute is "to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). Indeed, the Ninth Circuit has been quite clear with respect to Section 1441(a): the plain language of the text governs and there is no room for judicially created exceptions. *Sharma*, 23 F.4th at 1169-71. There is nothing in the text of Section 1441(a) that supports Respondents' argument that a pre-action petition seeking to perpetuate testimony is a "civil action", but a pre-action petition seeking to investigate potential causes of action is not a "civil action." To achieve the granular result desired by Respondents, Magistrate Judge You would have had to add language to Section 1441(a), in violation of long-settled jurisprudence that courts should not add 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). As

the Ninth Circuit observed in *Sharma*, if Congress meant to allow removal in a certain setting, "it could have written the statute that way." *Sharma*, 23 F.4th at 1171. Respondents' request to amend Section 1441(a) is more properly addressed to Congress.

Second, no case in the history of American jurisprudence reaches the Respondents' proposed conclusion. No court, in interpreting Section 1441(a), has drawn a distinction between the removability of a pre-action petition to perpetuate testimony and a pre-action petition to

16 Respondents made this exact same argument to Magistrate Judge You, citing the same cases. Respondents' Response to Motion to Remand at 16-20, ECF 94.

investigate potential causes of action. Indeed, no court has ever mentioned such a distinction. Magistrate Judge You properly declined to enter those uncharted waters.

Third, as Magistrate Judge You observes, adopting Respondents' proposal is contrary to the "mandate to construe the general removal statute narrowly and resolve any doubt in favor of remand to the state court. *Gaus*, 980 F.2d at 566." F&Rs at 8, ECF 129. Respondents' proposed statutory amendment, as discussed below, would require the district court to speculate about who will be sued, what causes of action will be alleged, and what damages will be claimed. *Id.* This, as

Magistrate Judge You notes, citing *Teamsters*, 906 F.3d at 260 and *Young*, 575 F.Sup.2d at 1255, will make evaluating subject matter jurisdiction "a speculative enterprise." F&Rs at 8-9, ECF 129.

Respondents offer two arguments to Magistrate Judge You's refusal to judicially amend the general removal statute. First, they contend *In re Texas*, 110 F. Supp.2d 514 (E.D. Tex. 2000), a case later reversed by the Fifth Circuit and discredited by subsequent courts, supports their position and object to Magistrate Judge You "discounting" its "persuasive strength". Respondents' Objections at 13-15, ECF 131. A careful look at the case, its history, and prior Fifth Circuit jurisprudence reveals that Magistrate Judge You did not err in her interpretation of *In re Texas*.

In *In re Texas*, the trial court held a petition filed in Texas state court pursuant to Texas Rule of Civil Procedure 202 seeking pre-action discovery was a removable civil action. *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. *Texas v. Real Parties in Interest*, 259 F.3d 387 (5th Cir. 2001), *cert. denied sub. nom. Umphrey v. Texas*, 534 U.S. 1115 (2002). While declining to rule on the removability of

a pre-action petition to take depositions, the Fifth Circuit used language, quoted *verbatim* in Magistrate Judge You's opinion, F&Rs at 12, ECT 129, strongly suggesting that the trial court's holding that a Rule 202 petition is removable was wrong and concluding that federal courts could not interfere with pre-suit discovery petitions filed in state courts. *Texas v. Real Parties in Interest*, 259 F.3d at 394, 395. The Fifth Circuit's holding was so explicit that one member of the federal judiciary, after a thorough analysis of the cases and law, rejected the argument that *In re Texas* supports removal of pre-action discovery motions, describing such motions as being "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). For the past nineteen years, since the decision in *Texas v. Real Parties in Interest*, every court in the United States that has considered the district court's analysis in *In re Texas* has rejected it.[17]

And there is good reason that the Fifth Circuit, in *Texas v. Real Parties in Interest*, was so dismissive of the argument made that a pre-suit petition to perpetuate testimony is a removable civil action. Seven years earlier, in *Wilson v. Belin*, 20 F.3d 644 (5th Cir.), *cert. denied*, 513 U.S. 930 (1994), the court held an equitable bill of discovery seeking pre-suit discovery was not a pleading that set forth a claim for relief. *Wilson* involved a defamation case arising out comments

[17] *See, e.g. Mayfield-George*, 197 F.R.D. at 282-84; *McCrary*, 121 F.Supp.2d at 569; *Davidson v. S. Farm Bureau Cas. Ins. Co.,* Civ. A. No. H-05-03607, 2006 WL 1716075 (S.D. Tex. June 19, 2006); *Sawyer v. E.I. du Pont de Nemours & Co.*, No. Civ. A. 06-1420, 2006 WL 1804614 (S.D. Tex. June 28, 2006); *Young,* 575 F. Supp. 2d at 1255; *In re Enable Commerce*,

DWYER WILLIAMS CHERKOSS
ACCIDENT INJURY ATTORNEYS
Phone: (541) 617-0555 Fax: (541) 617-0984
tim@rdwyer.com

256 F.R.D 527, 530 (N.D. Tex. 2009); *Mississippi ex. rel. Hood*, 2011 WL 5551773 at *2-3; *Kingman Holdings, L.L.C. v. Everbank*, Civ. A. No. SA-14-CA-107-FB; 2014 WL 12877303 (W.D. Tex. March 31, 2014); *Capps v. JPMorgan Chase Bank, N. A.*, No. 3:13–CV–572–CWR–LRA, 2014 WL 10475644 (S.D. Miss. September 29, 2014); *In re Highland Capital Management, L.P.*, 2022 WL 38310 at *8. *See also, Rivera v. City of McAllen, Texas,* Civil Action No. 7:20-cv-00384, 2021 WL 37537 at *2 (S.D. Tex. January 5, 2021); *Leos v. Bexar County*, No. SA-22-CV-0574-JKP, 2022 WL 5236839 (W.D. Tex. October 4, 2022).

made concerning the theories advanced by Wilson about the assassination of President Kennedy. Prior to filing the case, Wilson filed a bill of discovery (the equitable predecessor of Texas Rule of Civil Procedure 202) and deposed a reporter to determine if the reporter had misquoted two persons in an article. Sixty days later, Wilson sued the two persons in Texas state court. After service, the defendants removed the case to federal court. *Id.* at 646. One of the issues on appeal was whether the notice of removal was timely filed. The answer turned on whether the bill of discovery, a presuit deposition, was a document that stated a claim, thus starting Section 1446(g)'s 30-day time for removal. *Id.* at 651 n.8. The Fifth Circuit held the bill of discovery did not start the removal clock running because it was not an initial pleading setting forth a claim for relief. *Id.* If a pre-suit petition for discovery did not start the removal clock running, then, by definition, it was not a removable "civil action". *Young*, 575 F.Supp.2d at 1254. Thus, not only does *In re Texas* not help Respondents, but it illustrates that the Fifth Circuit's jurisprudence aligns with that of the Second Circuit and pre-suit petitions to perpetuate discovery are not removable civil actions. *Id.*

Magistrate Judge You thoroughly examined Respondents' argument, properly concluded that the "continued vitality" of the district court's reasoning in *In re Texas* is "questionable at best," and correctly refused to rely on a reversed case whose fundamental holding has been so thoroughly rejected. F&Rs at 11-13, ECF 129.

Respondents' second objection to Magistrate Judge You's refusal to amend Section 1441(a) to allow for the removal of pre-suit petitions to perpetuate testimony is that, even if the re-writing of the statute will make ascertaining whether a court has subject matter jurisdiction a speculative enterprise, that is no basis for "a categorical rule that pre-suit discovery petitions can *never* be subject to removal." Respondents' Objections at 16, ECF 131. In support of their position, Respondents reference Federal Rule of Civil Procedure 27, which allows for pre-suit discovery,

and argue that federal courts currently have to determine jurisdiction before suit is filed when confronted with Rule 27 petitions. This objection totally misses the point.

First, Magistrate Judge You did not recommend the Court find pre-suit discovery petitions can never be removed, only that Metro's petition be remanded. F&Rs at 13, ECF 129. Second, the cases Respondents cite, Respondents' Objections at 16-17, ECF 131, support Metro's request for remand. The cases simply hold that a party seeking the pre-suit discovery under Fed. R. Civ. P. 27 must establish that the anticipated lawsuit will be within the jurisdiction of the federal courts. This

reflects long-standing case law that federal courts are courts of limited jurisdiction and a party seeking to bring an action in federal court must allege facts that support the granting of federal jurisdiction. *See, e.g.*, *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). But holding a party that voluntarily files a Rule 27 motion in federal court must prove jurisdiction is a completely different animal from holding that a federal judge must determine whether there is subject matter jurisdiction over a case that has not yet been, and may never be, filed, where the potential plaintiff has not decided whom to sue, what claims to make or what damages to allege, and where the potential plaintiff has shown no interest in bringing the case in federal court.

Take, for example, the application of Respondents' proposed new rule to federal question jurisdiction. Whether federal question jurisdiction exists is determined from the face of the complaint. *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392 (1987). Under the well-pleaded complaint rule, the plaintiff is the master of his or her own complaint and can choose what claims, if any, to assert, including choosing not to plead independent federal claims. *Karambelas v. Hughes Aircraft, Inc.*, 992 F.2d 971 (9th Cir. 1993). If a defendant removes a pre-suit petition to perpetuate testimony, how would a court determine what causes of action the potential plaintiff plans to allege? Would a federal judge take over the role of master of the plaintiff's complaint or attempt

DWYER WILLIAMS CHERKOSS
ACCIDENT INJURY ATTORNEYS
tim@rdwyer.com

to divine what the plaintiff will or will not plead? And how would a court make that determination when there are no identified plaintiffs or defendants and no well-pleaded complaint to review, given the "formal complaint is the critical source of facts" for the court's determination "of subject matter jurisdiction arising under federal law"? *Oshkosh Truck Corp.*, 67 F.R.D. at 124. And how would that determination be made in a case like the one before the Court, when the unobjected-to Finding is that Petitioner Metro has not even decided whether to sue? The same concerns hold true with respect to diversity jurisdiction. Since the existence of diversity jurisdiction is determined from the face of the complaint, *Fifty Associates v. Prudential Ins. Co. of America*, 446 F.2d 1187, 1190 (9th Cir. 1970), how will a court decide whether the parties are diverse or the amount-incontroversy exceeds the statutory threshold if there are neither parties nor claims for damages? And, again, how will that determination be made in this case, where Metro has not even decided whether to sue or who to name as a defendant? *Cf., Wong v. Rosenblatt*, No. 3:13–CV–02209–ST, 2014 WL 1419080 (D. Or. April 11, 2014) (holding that the existence of unknown John Doe defendants destroys diversity jurisdiction). As the district judge wrote in *Young*, "The court finds this kind of judicial fortune-telling inconsistent with the court's duty to remand where jurisdiction is not absolutely clear." *Young*, 575 F. Supp. 2d at 1255. Magistrate Judge You properly declined to create a judicial exception that would require federal courts to engage in a "speculative exercise" to determine whether jurisdiction exists. F&Rs at p.8-9, ECF 129. *See, Sharma,* 23 F.4th at 117273

(holding that even if courts could judicially create an exception to Section 1441(a), the exception proposed must not create unnecessary uncertainty and confusion).

Respondents' proposed interpretation of Section 1441(a) is unsupported legally and unworkable factually. Magistrate Judge You did not err when she rejected these arguments and held that Metro's petition to perpetuate Dr. Hoffert's testimony should be remanded to state court.

23

III. MAGISTRATE JUDGE YOU CORRECTLY FOUND KELLY v. WHITNEY TO BE INAPPLICABLE and CONG v. CONOCOPHILLIPS TO BE OF NO USE

As a last gasp, Respondents cite three cases they claim offer the "most applicable case law" and object that Magistrate Judge You failed to follow them. Respondents' Objections at 17-20, ECF 131. But a look at these cases shows either they are of no help to Respondents, or they support Petitioner Metro.

The three cases cited by Respondents as being "most applicable" are *Myers, Kelly v. Whitney* and *Cong v. ConocoPhillips*. *Myers*, as has already been discussed, *see supra* pp.9-10 and note 11, not only does not help Respondents, but directly supports Metro's contention that no removable civil action has yet been filed.

Kelly v. Whitney, No. 98-30-HU, 1998 WL 877625 (D. Or. October 27, 1998), on the other hand, is completely irrelevant. *Kelly* involved a *pro se* litigant's effort to take the pre-suit depositions of several IRS employees who were involved 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)**. Kelly did not file either a motion to remand or a motion challenging the court's jurisdiction, and the court proceeded to the merits without ever discussing whether a presuit petition to perpetuate testimony was removable under 28 U.S.C. §1442. From this silence, Respondents argue there is precedent binding on this Court. This argument is a gross overreach.

Magistrate Judge You observed that, because there is nothing written, we have no idea, twenty-five years later, whether the trial judge failed to address the removability of the pre-suit petition to depose the IRS agents, or simply concluded the court had jurisdiction, but failed to

describe that basis in the opinion.[18] It would not be appropriate, she concluded, to "speculate some 25 years after the fact as to why that issue was not raised or whether the district judge made an unspoken decision about the court's subject matter jurisdiction over that case." F&Rs at 11, ECF 129. But what we do know is this: whatever the court did or did not do, it is irrelevant to this litigation because *Kelly* involved the federal officer removal statute, Section 1442, not the general removal statute involved in this case, Section 1441, and the standards for interpreting these two

statutes are diametrically opposed. *Durham v. Lockheed Martin Co.*, 445 F.3d 1247, 1252 (9th Cir. 2006).

In the end, the only support for Respondents' position is the only case in the past almost 20 years that has held pre-suit petitions for discovery filed in state court are removable under Section 1441(a): *Cong v. ConocoPhillips Co.*, No. CV H-12-1976, 2016 WL 6603244 (S.D. Tex. November 8, 2016). Respondents object because Magistrate Judge You did not follow this lone case. Respondents' Objections at 19-20, ECF 131. What Magistrate Judge You found, and what Respondents fail to advise the Court, is that there are multiple major problems with the holding in *Cong* that made it inappropriate to follow. F&Rs at 13, ECF 129.

First, **the court's holding in *Cong* with respect to the definition of "civil action" in Section 1441(a) is two sentences long** and fails to discuss or even consider the long-standing constitutionally driven presumptions against broadly construing the language in Section 1441 or the jurisdictional challenges created by its holding.

---

18 It seems reasonable to conclude the *Kelly* trial judge decided the court had jurisdiction but simply omitted describing the jurisdictional basis in the opinion, as it was well-established by then that state court suits against IRS agents for their efforts to collect taxes were removable to federal court under the federal officer removal statute. *See, e.g.*, *Dean v. Gray*, 923 F.2d 861 (9th Cir. 1991).

DWYER WILLIAMS CHERKOSS
ACCIDENT INJURY ATTORNEYS
Phone: (541) 617-0555 Fax: (541) 617-0984
tim@rdwyer.com

Second, the *Cong* court failed to consider the dozens of federal courts that have reached the opposite conclusion, including the Fifth Circuit holdings in *Texas v. Real Parties in Interest* and *Wilson v. Belin.*

Third, the *Cong* court failed to consider the plain text of the removal statutes, including the differences between Section 1441 and Sections 1442 and 1446 (and the legislative history illuminating the reason for those differences), or make any effort to harmonize those differences. This failure alone means *Cong* is not a binding precedent . *See, Perea v. Humana Pharmacy, Inc.*, SACV 12-1881-JST (ANx), 2013 WL 12129618 at *4 n.2 (C.D. Calif. January 23, 2013).

Fourth, the district court's comment in *Cong* that a pre-suit petition to investigate a potential claim is a "civil action," is *dicta.* The court's initial and primary holding was that plaintiffs' motion to remand was filed too late. *Cong*, 2016 WL 6603244 at *1. That ruling resolved the remand issue. The subsequent discussion about the removability of the pre-suit petition, as the district court itself admitted, was secondary. *Id.* A secondary holding in an unpublished opinion is *dicta* and without precedential value. *Export Group v. Reef Industries, Inc.*, 54 F.3d 1466, 1471-72 (9th Cir. 1995).

Fifth, not only is the holding in *Cong* contrary to the Fifth Circuit's holdings in *Texas v. Real Parties in Interest* and *Wilson v. Belin*, it is also not followed by any other federal court in the United States or Texas, much less courts in the same district. *See, e.g., Rivera v. City of McAllen, Texas,* Civil Action No. 7:20-cv-00384, 2021 WL 37537 at *2 (S.D. Tex. January 5, 2021); *In re Highland Capital Management, L.P.*, Case No. 19-34054-sgj11, 2022 WL 38310 at *8 (Bankr.

N.D. Tex January 4, 2022); *Leos v. Bexar County*, Case No. SA-22-CV-0574-JKP, 2022 WL 5236839 (W.D. Tex. October 4, 2022).

Sixth, the legal analysis in *Cong* is little more than *ipse dixit.* The district court devotes but two sentences to its analysis (probably because it considered this part of the opinion to be *dicta*) and does not cite any case to support its conclusion that "a civil action is one person asking a court to do something about another person." *Cong*, 2016 WL 6603244 at *1.

Seventh, the legal support the district court cites in support of its holding that "a civil action is one person asking a court to do something about another person," Wright and Miller, Federal Practice and Procedure, **does not** contain this, or similar, language, s*ee*, 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 in the history of American jurisprudence that has utilized similar language to define the statutory phrase "civil action" found in Section 1441(a).

Magistrate Judge You thoughtfully observed that "the district court's decision in *Cong* is devoid of any meaningful discussion of how to interpret or apply the removal statute, the presumption that cases lie outside of a federal court's removal jurisdiction, or any other principles set out above that have caused the overwhelming majority of federal courts to find that such

petitions are not removable." F&Rs at 13, ECF 129. Magistrate Judge You did not rule contrary to the law when she chose not to follow *Cong*, but rather to travel the "well-worn path" created by the dozens of federal court cases before this one.

CONCLUSION AND REQUEST FOR QUICK RESOLUTION

Dr. Martin Hoffert is in ill-health and deteriorating rapidly. Rapidly approaching his 86th birthday, it is unclear how much longer he will live. *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 a 71-year-old, holding "[i]t would be ignoring the facts of life to say that a 71year-old witness will be available to give his deposition or testimony at an undeterminable future

date"). A review of the record reveals that Magistrate Judge You committed no errors: the Constitution of the United States; the plain language of Sections 1441(a), 1442(d)(1) and 1446(b)(1) and (g) of the removal statutes; the presumption that Section 1441(a) is to be narrowly construed; the legislative history underlying the 2011 amendments; the Second Circuit's holding in *Teamsters* and the unanimity of courts after that holding; the rulings in dozens of cases by federal judges around the country; the holding in *State ex. rel. Myers*; the Fifth Circuit's holdings in *Texas v. Real Parties in Interest* and *Wilson v. Belin*; and the principles underlying these rulings all point to but one conclusion: Metro's "Before action" petition to perpetuate testimony of Dr. Hoffert 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.

Petitioner Metro and its counsel are cognizant of the Court's busy docket and the fact that their case is no more important than any other. But given the age and health of the witness and the delay occasioned by this meritless removal, exacerbated by objections that repeat arguments previously made, Metro humbly asks this Honorable Court to consider Respondents' Objections as soon as possible, in the interests of justice, and respectfully prays that the Court accept and adopt the Recommendation made by Magistrate Judge You and 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.

Dated: May 3, 2024.

By: 
Tim Williams, OSB No. 034940

and

JAMES S. COON, ESQ.

By: */s/ James S. Coon*
James S. Coon, OSB No. 771450

and

SIMON GREENSTONE PANATIER, P.C.

By: */s/ Jeffrey B. Simon*
Jeffrey B. Simon (*pro hac vice*)

and

WORTHINGTON & CARON, P.C.

By: */s/ Roger G. Worthington*
Roger G. Worthington OSB No. 241117

and

RICHARD SCHECHTER, P.C.

By: */s/ Richard Schechter*
Richard Schechter (*pro hac vice*)

Attorneys for Petitioner

1558 SW Nancy Way, Suite 101, Bend, OR 97702
Phone: (541) 617-0555 Fax: (541) 617-0984
DWYER WILLIAMS CHERKOSS
ACCIDENT INJURY ATTORNEYS
tim@rdwyer.com

29

CERTIFICATE OF SERVICE

I do hereby certify that on May 3, 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:

Motiva Enterprises, LLC CT Corporation System 780 Commercial Street SE, Suite 100 Salem OR 97301	Space Age Fuel, Inc. Scott L. Jensen 1 SW Columbia Street, Suite 100 Portland OR 97204
Total Energies Marketing USA, Inc. Corporation Service Company 1127 Broadway Street NE, Suite 310 Salem OR 97301	Peabody Energy Corp. Corporation Service Company 251 Little Falls Drive Wilmington DE 19808
Oregon Institute of Science and Medicine Attn: Arthur B. Robinson 2251 Dick George Road Cave Junction OR 97523	

I further certify that Shell PLC, formerly known as Royal Dutch Shell PLC, is 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,

/s/ Richard Schechter Richard Schechter

30