SHER EDLING LLP
PROTECTING PEOPLE AND THE PLANET

December 19, 2019

Via ECF

Maria R. Hamilton
Clerk of Court
U.S. Court of Appeals for the First Circuit
John Joseph Moakley U.S. Courthouse
1 Courthouse Way, Suite 2500
Boston, MA 02210

Re: *State of Rhode Island v. Shell Oil Prods. Co., et al.*, No. 19-1818
Plaintiff-Appellee's Response to Defendants-Appellants' Rule 28(j) Letter

Dear Ms. Hamilton,

Appellants' December 17, 2019 letter inappropriately attempts to raise new arguments not timely submitted in their opening brief. It is firmly established that "a letter submitted pursuant to Rule 28(j) *cannot* raise a new issue." *United States v. Nason*, 9 F.3d 155, 163 (1st Cir. 1993); *United States v. Morgan*, 384 F.3d 1, 8 (1st Cir. 2004). The Court should disregard the letter.

Regardless, *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30 (1st Cir. 1999) is inapposite. There, the United States "brought suit in the United States District Court … against several foreign banking concerns to recover assets" and subject to a criminal forfeiture order. *Id.* at 34. The government argued personal jurisdiction existed over the defendant banks under Fed. R. Civ. P. 4(k)(2), because its conversion claims against them were governed by federal common law. 191 F.3d at 38–39. The court narrowly held that "when the United States sues to assert its rights against an alleged converter to recoup assets … forfeited to it, the rights that it has acquired find their roots in, and must be adjudicated in accordance with, a federal source." *Id.* at 44–45. The court's analysis has no bearing on whether state law tort claims brought by a sovereign state against corporations arise under federal law for removal jurisdiction purposes.

To the extent the court's "arising under" analysis had any relevance to removal, it has been supplanted by the Supreme Court's on-point instructions in *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308 (2005). The Supreme Court's purpose in *Grable* was to "bring some order to th[e] unruly doctrine" of which state law claims arise under federal law for removal purposes, precisely to remedy "general confusion" on the issue. *See Gunn v. Minton*, 568 U.S. 251, 258 (2013); *see also id.* ("In outlining the contours of this slim category, we do not paint on a blank canvas. Unfortunately, the canvas looks like one that Jackson Pollock got to first."). *Swiss Am. Bank* does not provide a separate, free-standing test for removal jurisdiction that survives *Grable*.

Respectfully submitted,

/s/ Victor M. Sher
Victor M. Sher
Sher Edling LLP

Counsel for Plaintiff-Appellee

cc: All Counsel of Record (via ECF)