PAU Appellate Case: 19-1330 HARQCUMEnt: 01 0119360820p

2001 K STREET, NW TELEPHONE (202) 223-7300

WASHINGTON, DC 20006-1047

June 12, 2020

Date Filed: 06/12/2020 Page: 1
NEW YORK, NY 10019-6064

NEW YORK, NY 10019-6064 TELEPHONE (212) 373-3000

UNIT 5201, FORTUNE FINANCIAL CENTER 5 DONGSANHUAN ZHONGLU CHAOYANG DISTRICT, BEIJING 100020, CHINA TELEPHONE (86-10) 5828-6300

HONG KONG CLUB BUILDING, 12TH FLOOR 3A CHATER ROAD, CENTRAL HONG KONG TELEPHONE (852) 2846-0300

ALDER CASTLE
10 NOBLE STREET
LONDON EC2V 7JU, UNITED KINGDOM
TELEPHONE (44 20) 7367 1600

FUKOKU SEIMEI BUILDING 2-2 UCHISAIWAICHO 2-CHOME CHIYODA-KU, TOKYO 100-0011, JAPAN TELEPHONE (81-3) 3597-8101

TORONTO-DOMINION CENTRE 77 KING STREET WEST, SUITE 3100 P.O. BOX 226 TORONTO, ONTARIO M5K 1J3 TELEPHONE (416) 504-0520

500 DELAWARE AVENUE, SUITE 200 POST OFFICE BOX 32 WILMINGTON, DE 19899-0032 TELEPHONE (302) 655-4410

WRITER'S DIRECT DIAL NUMBER

202-223-7325

WRITER'S DIRECT FACSIMILE

202-204-7397

WRITER'S DIRECT E-MAIL ADDRESS

kshanmugam@paulweiss.com

## VIA ELECTRONIC FILING

Christopher Wolpert Clerk of Court U.S. Court of Appeals for the Tenth Circuit Byron White United States Courthouse 1823 Stout Street Denver, CO 80257

> Re: Board of County Commissioners of Boulder County, et al. v. Suncor Energy (U.S.A.) Inc., et al., No. 19-1330

Dear Mr. Wolpert:

Pursuant to Federal Rule of Appellate Procedure 28(j), defendants-appellants write in response to plaintiffs-appellees' letter regarding County of San Mateo v. Chevron Corp., 2020 WL 2703701 (9th Cir. May 26, 2020), and City of Oakland v. BP p.l.c., 2020 WL 2702680 (9th Cir. May 26, 2020).

In San Mateo, the Ninth Circuit affirmed the district court's remand order, with the panel holding that it was bound by prior precedent to review only the federal-officer ground for removal and that removal was not permissible on that ground. 2020 WL 2703701, at \*5, \*9. In this circuit, however, the scope of appellate review of remand orders is an open question. Indeed, the Ninth Circuit indicated that, if it were "writing on a clean slate, [it] might conclude" that defendants' interpretation of 28 U.S.C. § 1447(d) is the "more persuasive" one. 2020 WL 2703701, at \*5. With respect to the merits of federal-officer removal, the panel's holding was incorrect: as defendants have explained, ExxonMobil clearly acted under the federal government's "close direction," *id.* at \*6, when extracting fossil fuels pursuant to federal lease agreements. See Reply Br. 20-22.

In *Oakland*, the Ninth Circuit held that the district court erred in concluding that it had federal-question jurisdiction and remanded for further proceedings. 2020

Appellate Case: 19-1330 Document: 010110360820 Date Filed: 06/12/2020 Page: 2

WL 2702680, at \*9. But contrary to plaintiffs' suggestion, the Ninth Circuit did not expressly address defendants' argument that a case is removable when the facts pleaded on the face of the complaint demonstrate that federal common law must supply the substantive rule of decision. While the defendants in *Oakland* made that same argument, the Ninth Circuit's opinion addressed only removal under *Grable* and the doctrine of complete preemption. *See id.* at \*5-\*7. Defendants' submission here is that federal common law provides an *independent* basis for removal—an argument the Ninth Circuit did not discuss. For reasons defendants have explained, the Ninth Circuit erred in rejecting removal on the grounds that it did in fact address. *See* Reply Br. 13-19.

We would appreciate it if you would circulate this letter to the panel at your earliest convenience.

Very truly yours,

/s/ Kannon K. Shanmugam Kannon K. Shanmugam

Counsel of record (via electronic filing)

cc:

## CERTIFICATE OF DIGITAL SUBMISSION, ANTIVIRUS SCAN, AND PRIVACY REDACTIONS

I hereby certify, pursuant to the Tenth Circuit CM/ECF User's Manual, that the foregoing letter, as submitted in digital form via the Court's electronic-filing system, has been scanned for viruses using Malwarebytes Anti-Malware (version 2020.05.31.03, updated May 31, 2020) and, according to that program, is free of viruses. I also certify that any hard copies submitted are exact copies of the document submitted electronically, and that all required privacy redactions have been made.

/s/ Kannon K. Shanmugam Kannon K. Shanmugam

June 12, 2020