IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, Attorney General of the State of Delaware,

Plaintiff,

v.

BP AMERICA INC., BP P.L.C., CHEVRON CORPORATION, CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, XTO ENERGY INC., HESS CORPORATION, MARATHON OIL CORPORATION, MARATHON OIL COMPANY, MARATHON PETROLEUM CORPORATION, MARATHON PETROLEUM COMPANY LP, SPEEDWAY LLC, MURPHY OIL CORPORATION, MURPHY USA INC., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, CITGO PETROLEUM CORPORATION, TOTAL S.A., TOTAL SPECIALTIES USA INC., OCCIDENTAL PETROLEUM CORPORATION, DEVON ENERGY CORPORATION, APACHE CORPORATION, CNX RESOURCES CORPORATION, CONSOL ENERGY INC., OVINTIV, INC., and AMERICAN PETROLEUM INSTITUTE,

Defendants.

Civil Action No. 20-cv-01429-LPS

DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants respectfully submit as supplemental authority *County Board of Arlington County, Virginia v. Express Scripts Pharmacy, Inc.*, __ F.3d __, 2021 WL 1726106 (4th Cir. May 3, 2021), which confirms that this case was properly removed under the federal officer removal statute.[1]

In *Arlington*, a municipality sued pharmacies in state court, asserting that they "caused an opioid epidemic" because "they were 'keenly aware of the oversupply of prescription opioids'" but "failed to 'tak[e] any meaningful action to stem the flow of opioids into the communities.'" *Id.* at *2. Defendants removed to federal court on the ground that they "operate the [TRICARE Mail Order Pharmacy ('TMOP')] as subcontractors," serving as part of a "federal health insurance program administered by DOD to 'provide[] medical care to current and retired service members and their families.'" *Id.* Relying on "guideposts" established in *Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007), the Fourth Circuit applied the liberal policy favoring federal officer removal to conclude that the defendants "acted under" a federal officer "in operating the TMOP in accordance with the DOD contract." *Arlington*, 2021 WL 1726106, at *2.

This action presents as strong a case—if not stronger—for federal-officer removal. As an initial matter, *Arlington* confirms that Plaintiff's claims are "related to" Defendants' production and sale of oil and gas products under the direction and control of federal officers. The Fourth Circuit reiterated that Congress has abandoned "the old 'causal nexus' test," such that a removing defendant need show only "a *connection or association* between the act in question and the federal office." *Id.* at *8 (emphasis added). Although the plaintiff in that case argued that "this requirement is not met" because the "Complaint did not even mention the distribution of opioids

[1] Several Defendants contend that they are not subject to personal jurisdiction in Delaware and submit this supplemental authority subject to, and without waiver of, these personal jurisdiction objections.

to veterans, the DOD contract or the operation of the TPOM," the Fourth Circuit held that this "position would elevate form over substance" insofar as "Arlington's claims seek monetary damages due to harm arising from 'every opioid prescription' filled by pharmacies" such as the defendants. 2021 WL 1726106, at *9. So, too, here. Although Plaintiff tries to characterize its Complaint as involving alleged misrepresentations about oil and gas rather than the production and sale of those products (including to the federal government), this disregards the substance of its Complaint, which ties its alleged injuries to the aggregate, global production and sale of fossil fuels—and their resultant emissions. *See, e.g.*, Compl. ¶ 4 ("Th[e] dramatic increase in atmospheric CO_2 and other greenhouse gases is the main driver of the gravely dangerous changes occurring to the global climate."); *id.* ¶ 5 ("Anthropogenic greenhouse gas pollution, primarily in the form of CO_2, is far and away the dominant cause of global warming."); *see also* Dkt. 96 at 12–15. As the Second Circuit recently explained in a similar climate-change action, "emissions [are] the singular source of the City's harm," and "the City's focus on [an] 'earlier moment' in the global warming lifecycle is merely artful pleading and does not change the substance of its claims." *City of New York v. Chevron Corp.*, 993 F.3d 81, 91, 97 (2d Cir. 2021).[2]

Arlington also confirms that Defendants "acted under" federal officers in conducting this oil and gas production. *First*, the record here establishes that Defendants produced and supplied the DOD with ***billions of dollars*** of highly specialized jet fuel under detailed contracts overseen

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[2] Delaware also argues that Defendants "fail to show that their production" at the direction of federal officers "constituted a 'significant[] portion' of their overall production." Plaintiff's Reply, Dkt. 101 at 25 (citing *Baker v. Atlantic Richfield Co.*, 962 F.3d 937, 945 (7th Cir. 2020)). But, in *Arlington*, the Fourth Circuit found that the "related to" prong was satisfied even though—as Arlington argued in its Motion to Remand—of the "tens of billions" of units of opioids sold, the portion sold pursuant to the DOD contracts was "de minimis." Motion to Remand at 10 n.5, *Cnty. Bd. of Arlington Cnty., Va. v. Mallincrockdt PLC, et al.*, No. 19-1446 ECF No. 18 (E.D.Va.) (filed Nov. 21, 2019). Defendants' significant activities at the direction of federal officers are likewise sufficient here.

by federal officers that, like the contracts in *Arlington*, established "how [they] must operate" and fixed "[p]ricing . . . , shipping, payment, and many other specifications." *Arlington*, 2021 WL 1726106, at *5; *see also* Dkt. 96 at 49–51. During the Cold War, Shell Oil Company developed and produced jet fuel to meet the ***unique performance requirements*** of the U-2 spy plane and, later, the OXCART and SR-71 Blackbird programs. *See* Dkt. 96 at 49–50; NOR, Ex. 41 at 1–5 (establishing specific testing, inspection, labeling, and security requirements for specialized fuel). To this day, Defendants continue to supply the DOD with highly specialized jet fuels, such as JP-5 and JP-8, to assist the DOD in filling its unique needs. Defendants' contracts with the DOD have expressly required "refined hydrocarbon distillate fuel oils" and the inclusion of "***military unique additives that are required by military weapon systems***." Dkt. 96 at 51 (emphasis added); *see also* NOR, Ex. 50 §§ 3.1, 6.1; *id.*, Ex. 60 (attaching representative contracts for specialized fuel in accordance with military formulations and terms similar to those in *Arlington*). These jet fuels were designed specifically to assist the military in fulfilling its unique and essential missions and not for general commercial use. *Arlington* confirmed that courts "have unhesitatingly treated the 'acting under' requirement as satisfied where a contractor seeks to remove a case involving injuries arising from equipment that it *manufactured for the government*." 2021 WL 1726106, at *4 (emphasis in original). Removal is even more appropriate here, where Defendants' jet fuel was more specialized and more uniquely tailored under the direction of a federal officer than the opioids in *Arlington*.

Similarly, Defendants' lease agreements with the federal government for production on the Outer Continental Shelf ("OCS") contained highly technical and specific requirements that went far beyond those in *Arlington*. For example, the leases required Defendants to "promptly drill and produce such other wells as the [federal] supervisor may reasonably require" and comply with "the

written orders of the supervisor." Dkt. 98 ¶ 19 [Priest Decl.]. These orders have specified "how wells, platforms, and other fixed structures should be marked," "dictated the minimum depth and methods for cementing well conduct casing in place," and "required the installation of subsurface safety devices . . . on all OCS wells." *Id.* ¶ 24. And as in *Arlington*, Defendants "are required to comply with all of these contractual requirements along with the statutes, regulations and policy manuals governing" their operations. 2021 WL 1726106, at *5.

Second, Defendants here, like those in *Arlington*, acted under a federal "contracting officer who is charged with managing" their work. *Id.* For example, Shell Oil Company acted under federal officers in supplying specialized fuel and facilities for the OXCART program. *See, e.g.*, NOR, Ex. 43 ("This work is under the technical direction of Colonel H. Wilson[.]"). DOD contract officers exerted significant oversight and control over Defendants' contracts for military jet fuels—including by retaining the ability to amend contract terms, adjust prices and delivery locations, and inspect and accept (or reject) the fuels. *See, e.g.*, *id.*, Ex. 60; *id.*, Ex. 42. This oversight extended to Defendants' work for the United States on the OCS, which continues to this day. As Defendants' expert Tyler Priest explained, Department of Interior officials, identified as "supervisors" under the Code of Federal Regulations, controlled the "rate of production from OCS wells," Dkt. 98 ¶ 26 [Priest Decl.], determined "methods of measuring production and computing royalties," *id.* ¶ 20, and "provided direction to lessees regarding when and where they drilled, and at what price," *id.* ¶ 28. In fact, ***these supervisors could suspend Defendants' operations*** on the OCS altogether in certain situations, *id.* ¶ 20—authority that goes beyond "perfunctory, run-of-the-mill permitting and inspection," *id.* ¶ 22, and far beyond the "guidance and instruction" and "audit" authority exercised by the contracting officer in *Arlington*, *see* 2021 WL 1726106, at *5.

Additionally, Chevron's predecessor, Standard Oil, operated under the supervision of the Secretary of the Navy in managing the Elk Hills Reserve. The Operating Agreement between the federal government and Standard Oil provided that "OPERATOR is in the employ of the Navy Department and is responsible to the Secretary thereof." NOR, Ex. 27 § III(a). The Secretary exercised its authority over Standard Oil in November 1974, when it directed Standard Oil to produce 400,000 barrels per day because it was "***in the employ of the Navy*** and ha[d] been tasked with performing a function which is within the exclusive control of the Secretary of the Navy." Dkt. 97-1, Ex. 12 at 3 (emphasis added).

Third, Defendants "assist[ed]" the federal government "in fulfilling 'basic governmental tasks' that 'the Government itself would have had to perform' if it had not contracted with a private firm." *Arlington*, 2021 WL 1726106, at *6. Just as the DOD had a duty in *Arlington* to provide prescriptions to veterans, which the defendants fulfilled under the direction and supervision of the DOD, the DOD had a similar duty here to provide fuel to the military branches, which Defendants fulfilled under the direction and supervision of the DOD. Absent Defendants' supply of these fuels under federal contracts, the government itself would have had to produce those fuels.

Additionally, in response to the 1973 oil embargo, Congress ordered "expedited exploration and development of the [OCS] in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments." Dkt. 98 ¶ 55 [Priest Decl.]. Although Congress considered fulfilling this mandate through "the creation of a national oil company," *id.* ¶ 52, it ultimately opted instead to deputize private companies (including Defendants) to carry out those duties of the federal government, subject to the federal government's guidance and control, *id.* ¶ 55.

Respectfully submitted,

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