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January 18, 2022

Via ECF

Molly C. Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *City and County of Honolulu, et al. v. Sunoco LP, et al.*, No. 21-15313;
County of Maui v. Sunoco LP, et al., No. 21-15318;
Plaintiffs-Appellees' Citation of Supplemental Authorities

Dear Ms. Dwyer,

Pursuant to Federal Rule of Appellate Procedure 28(j), Plaintiffs-Appellees City and County of Honolulu and County of Maui submit *West Virginia State University Board of Governors v. The Dow Chemical Co.*, No. 20-1712, __F.4th__, 2022 WL 90242 (4th Cir. Jan. 10, 2022) (**Ex. A**) (“WVSU”), as supplemental authority. The decision undermines Defendants-Appellants’ theory of federal-officer removal.

In WVSU, the court affirmed an order remanding a university’s lawsuit bringing state-law claims against chemical companies that had owned and operated a facility regulated under the Resources Conservation and Recovery Act (“RCRA”). WVSU at 3–4, 11. Although the U.S. Environmental Protection Agency (“EPA”) had issued RCRA permits requiring cleanup actions at the facility, the defendants’ activities had nevertheless contaminated an adjacent university property. *Id.* at 4–11.

Defendants in WVSU invoked federal-officer removal because they had “work[ed] hand-in-hand with EPA for decades, at EPA’s direction, to assist the federal agency in remediating” the facility. WVSU at 11. The court rejected this argument: “Although there is no doubt that Defendants are in a highly regulated sector,” their arguments were “unpersuasive because they would impermissibly expand the federal removal statute by blurring the line Watson carefully delineated where ‘a private firm’s compliance (or noncompliance) with federal laws, rules, and regulations *does not by itself* fall within the scope of the statutory phrase ‘acting under’ a federal ‘official.’” *Id.* at 26 (quoting *Watson v. Philip Morris Cos.*, 551 U.S. 142, 153 (2007)). In a similar vein, Defendants-Appellants here conflate regulatory compliance with a true acting-under relationship. *E.g.*, AOB 46–48.

Respectfully submitted,

/s/ Victor M. Sher

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Counsel for Plaintiffs-Appellees
in Nos. 21-15313, 21-15318

cc: All Counsel of Record (via ECF)