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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 submit *Delaware v. BP America Inc.*, Case No. 20-cv-01429-LPS, Dkt. 120 (D. Del. Jan. 5, 2022) (**Ex. A**) ("Order"), as supplemental authority. The decision granted the State of Delaware's motion to remand in a state-law action that seeks to hold fossil-fuel companies liable for concealing and misrepresenting the harms caused by their products. The opinion is relevant for at least four reasons.

First, the court rejected analogous attempts to rewrite the complaint. In *Delaware*, as here, the defendants insisted that the lawsuit sought to "regulate global climate change" and "supplant decades of national energy, economic, and environmental policies." Order at 11, 13. But as the district court rightly recognized, "[t]hese statements [were] not consistent with a fair reading of [Delaware's] claims." *Id.* at 12. Instead, those claims narrowly targeted "Defendants' alleged disinformation campaign," just as Plaintiffs-Appellees' claims do here. *Id.* at 12.

Second, *Delaware* rejected nearly identical theories of federal-officer removal. *Id.* at 15-24. As the court explained, Delaware's complaint effectively disclaimed injuries arising from the defendants' "operation of petroleum reserves" and "sales of 'specialized petroleum products' to the U.S. military." *Id.* at 17-18. The defendants' wartime activities were "irrelevant" because they predated the "alleged disinformation campaign, which is what [Delaware's] case [was] actually about." *Id.* at 19. And the defendants' OCS leases failed the acting-under requirement because "OCS lessees" did not "perform[] a task that the federal government would otherwise be required to undertake itself." *Id.* at 23.

Third, OCSLA jurisdiction did not exist in *Delaware* because there was no but-for connection between the asserted claims and an OCS operation. *See id.* at 25-28. There, as here, the defendants "contended that the 'but for' requirement is 'contrary to the text of the statute.'" *Id.* at 26. The district court disagreed, explaining that this requirement represents a "reasonable" and "necessary" interpretation of the statutory text. *Id.* at 26-27.

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Finally, although Defendants-Appellants insist that federal-enclave jurisdiction exists here, many of those same defendants “abandoned” that same jurisdictional theory in *Delaware*. Order at 4.

Respectfully submitted,

/s/ Victor M. Sher

Victor M. Sher
Sher Edling LLP

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

cc: All Counsel of Record (via ECF)