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December 30, 2019

**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 of Oakland v. BP P.L.C.*, No. 18-16663
Plaintiffs-Appellants' Response to Defendants-Appellees' Rule 28(j) Letter

Dear Ms. Dwyer,

Defendants-Appellees' December 19, 2019 letter cites *United States v. Swiss American Bank, Ltd.*, 191 F.3d 30 (1st Cir. 1999), as newly discovered authority under Rule 28(j). That 20-year-old case is inapposite.

In *Swiss American Bank*, the United States sued four foreign banks in federal court to recover assets subject to a federal-court criminal forfeiture order. *Id.* at 35. The issue was whether the court could assert personal jurisdiction over the banks pursuant to the federal long-arm statute, Fed. R. Civ. P. 4(k)(2), which applies when a defendant is beyond the jurisdictional reach of state courts and the plaintiff's claim arises under federal law. *Id.* at 38.

Defendants contend that Oakland and San Francisco's claims "arise under" federal common law for purposes of removal jurisdiction for the same reason the United States' claim in *Swiss American Bank* arose under federal law for purposes of Rule 4(k)(2). But the controlling authority in the removal context is *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308 (2005), decided six years after *Swiss American Bank*, in which the Supreme Court sought to "bring some order to th[e] unruly doctrine" of when state law claims may be deemed to arise under federal law for removal purposes. *See Gunn v. Minton*, 568 U.S. 251, 258 (2013). The federal government brought its claims in *Swiss American Bank* in federal court to recoup funds pursuant to its "federal-law power to punish criminals, including its right to require forfeiture of racketeering proceeds," which the court narrowly held arises under federal law, and over which "state law has no direct bearing." *See* 191 F.3d at 45. The claims here were brought by municipal entities in state court under well-established California tort law.

As Plaintiffs have shown, *see* Plaintiffs-Appellants' Opening Brief at 20–23; Plaintiffs-Appellants' Reply Brief at 13–16, no "substantial" federal question is "necessarily raised" and "actually disputed" by the allegations of Plaintiffs' complaints, and forcing Oakland and San Francisco to litigate their state-law public nuisance claims in federal court would impermissibly disrupt the balance of federal-state responsibility. *Grable*, 545 U.S. at 314–15.

Respectfully submitted,

*/s/ Victor M. Sher*
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cc: All Counsel of Record (via ECF)