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7  
8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA

10  
11 THE UNITED STATES OF AMERICA,  
12 Plaintiff,

13 v.

14 THE STATE OF CALIFORNIA; GAVIN  
15 C. NEWSOM, in his official capacity as  
Governor of the State of California; THE  
16 CALIFORNIA AIR RESOURCES  
BOARD; MARY D. NICHOLS, in her  
17 official capacity as Chair of the California  
Air Resources Board and as Vice Chair and  
18 a board member of the Western Climate  
Initiative, Inc.; WESTERN CLIMATE  
INITIATIVE, INC.; JARED  
19 BLUMENFELD, in his official capacity as  
Secretary for Environmental Protection and  
20 as a board member of the Western Climate  
Initiative, Inc.; KIP LIPPER, in his official  
21 capacity as a board member of the Western  
Climate Initiative, Inc.; and RICHARD  
22 BLOOM, in his official capacity as a board  
member of the Western Climate Initiative,  
23 Inc.,

24 Defendants.  
25

CASE NO. 2:19-cv-02142-WBS-EFB

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF THE  
WCI, INC. DEFENDANTS’ OPPOSITION  
TO PLAINTIFF’S SECOND MOTION FOR  
SUMMARY JUDGMENT, JOINDER IN  
THE STATE DEFENDANTS’  
OPPOSITION TO PLAINTIFF’S SECOND  
MOTION FOR SUMMARY JUDGMENT  
AND CROSS-MOTIONS FOR SUMMARY  
JUDGMENT**

Complaint Filed: October 23, 2019  
Trial Date: Not Yet Scheduled

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**Date:** June 29, 2020  
**Time:** 1:30 PM  
**Courtroom:** 5  
**Judge:** William B. Shubb

26 <sup>1</sup> The WCI, Inc. Defendants are: Western Climate Initiative, Inc. (“WCI, Inc.”); Mary D. Nichols,  
27 in her official capacity as Vice Chair and a board member of WCI, Inc.; and Jared Blumenfeld, in  
28 his official capacity as a board member of WCI, Inc. Defendants Kip Lipper and Richard Bloom,  
in their official capacities as board members of WCI, Inc., were dismissed by order of the Court on  
February 26, 2020.

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**I. INTRODUCTION**

Plaintiff United States of America (“Plaintiff”) moves for summary judgment as to its third claim against all defendants, asking this Court to hold that California’s Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions of 2017 with the Canadian province of Quebec (“2017 Agreement”), together with its preparatory and implementing activities and related legal acts, starting with the Global Warming Solutions Act of 2006 (“AB 32”),<sup>2</sup> are preempted by the foreign affairs doctrine. However, Plaintiff makes no attempt to show how the Western Climate Initiative, Inc. (“WCI, Inc.”) Defendants’ conduct, including that of the two individuals sued in their capacities as an officer and board members of WCI, Inc., is subject to the foreign affairs doctrine, much less how it could be preempted by such doctrine. Plaintiff proffers no facts or legal authority to adjudicate this claim against the WCI, Inc. Defendants. Indeed, the Motion is based entirely on California’s Agreement with Quebec—to which the WCI, Inc. Defendants are not parties—and California’s supporting laws and regulations that the WCI, Inc. Defendants do not implement or enforce.

Plaintiff makes no attempt to show how the administrative and technical services provided by WCI, Inc. to its participating jurisdictions, or any other conduct by the WCI, Inc. Defendants, could violate the foreign affairs doctrine as a matter of law.<sup>3</sup> Nor is it apparent how an order for equitable relief directed at the WCI, Inc. Defendants—non-parties to the “Agreement and Arrangements”—could redress the injury-in-fact allegedly suffered by Plaintiff (i.e., the constitutional violations at issue). Contrary to Plaintiff’s representations, the WCI, Inc. Defendants do not have the ability to undo the linkage agreement between California and Quebec’s cap-and-trade programs. Plaintiff also fails to establish that the U.S. Constitution imposes liability for violations of the foreign affairs doctrine on private parties, even assuming *arguendo* such private

<sup>2</sup> Plaintiff refers to the 2017 Agreement and these activities collectively as the “Agreement and Arrangements.” *See, e.g.*, ECF No. 102, Plf’s Second MSJ at 2:16-28.

<sup>3</sup> Plaintiff’s own arguments focus solely on the Agreement and Arrangements – not the services offered by WCI, Inc. Indeed, Plaintiff concludes that “California’s Agreement and Arrangements with Quebec” are preempted under the foreign affairs doctrine. (Emphasis added.) Thus, Plaintiff concedes by omission that it is the 2017 Agreement and related California laws and regulations, not the services of WCI, Inc., that constitute the alleged constitutional violations and, as a result, cause its injury.

1 parties are state actors or engaged in state action. Thus, Plaintiff’s Motion for Summary Judgment  
2 as to the WCI, Inc. Defendants is fatally flawed for this additional reason and must be denied.

3 Plaintiff’s wholly unsupported attempt to apply the foreign affairs doctrine to the WCI, Inc.  
4 Defendants should be rejected, its summary judgment motion should be denied, and summary  
5 judgment should be entered for the WCI, Inc. Defendants on Plaintiff’s third cause of action under  
6 the foreign affairs doctrine.

7 Finally, the WCI, Inc. Defendants do not oppose Plaintiff’s Motion to Dismiss its fourth  
8 claim based on the Foreign Commerce Clause.<sup>4</sup>

9 **II. STATEMENT OF FACTS**

10 Plaintiff again mischaracterizes the evidence attributable to the WCI, Inc. Defendants.<sup>5</sup>  
11 WCI, Inc. and the WCI, Inc. officers and board members sued in such capacity—namely, Mary  
12 Nichols<sup>6</sup> and Jared Blumenfeld—do not implement or enforce California’s cap-and-trade  
13 regulations, are not parties to the challenged 2017 Agreement between California and Quebec, and  
14 lack the ability to influence or otherwise change California’s “Agreement and Arrangements” with  
15 the province of Quebec. (WCI, Inc. Defendants’ Disputed and/or Material Facts (“DMF”) 1-9, 11-  
16 13; ECF No. 102-1, at 10, Plaintiff’s Statement of Undisputed Facts (“Plf.’s SUF”) 48.)

17  
18  
19 <sup>4</sup> See Defendants’ Response in Support of Plaintiff’s Withdrawal of Fourth Cause of Action, filed  
May 18, 2020.

20 <sup>5</sup> To the extent the United States does, and is permitted to, incorporate by reference its Statement  
21 of Undisputed Facts in support of its first motion for summary judgment, ECF No. 12-1, as well as  
22 its Concordance of the Statements of Undisputed Fact in support of that same motion, ECF No. 78-  
23 1, and supplement such facts with its Second Statement of Undisputed Facts filed as ECF No. 102-  
24 1, the WCI, Inc. Defendants likewise hereby incorporate by reference the WCI, Inc. Defendants’  
25 Response to Plaintiff’s Separate Statement of Undisputed Facts in Support of Opposition to  
26 Plaintiff’s Motion for Summary Judgment, Joinder in the State Defendants’ Opposition to  
Plaintiff’s Motion for Summary Judgment and Cross-Motions for Summary Judgment, the WCI,  
Inc. Defendants’ Separate Statement of Material Facts in Support of Opposition to Plaintiff’s  
Motion for Summary Judgment, Joinder in the State Defendants’ Opposition to Plaintiff’s Motion  
for Summary Judgment and Cross-Motions for Summary Judgment, and the WCI, Inc. Defendants’  
Reply to Plaintiff’s Response to the Separate Statement of Material Facts in Support of Their Cross-  
Motion for Summary Judgment, ECF Nos. 45-3, 46-4, 45-2, 46-3, 85-1.

27 <sup>6</sup> While Ms. Nichols is referred to herein as a WCI, Inc. board member, she is sued in her capacity  
28 as Vice Chair of WCI, Inc., an officer position under WCI, Inc.’s Bylaws, as well as in her capacity  
as a board member. (DMF 6.) As such, for purposes of this Motion, all references to the WCI, Inc.  
board members include Ms. Nichols in her capacity as Vice Chair and an officer of WCI, Inc.

1 **A. Western Climate Initiative, Inc. Is a Private, Non-Profit Corporation.**

2 WCI, Inc. is a private, non-profit corporation organized under the laws of Delaware to  
 3 provide administrative support and technical services to participating jurisdictions with cap-and-  
 4 trade programs. (*See* DMFs 1-2, 7-8.) WCI, Inc. utilizes a software platform specifically designed  
 5 to track emissions and offsets in accordance with a participating jurisdiction’s cap-and-trade  
 6 program requirements. (DMF Nos. 1-2, 7-8; ECF No. 102-2, Ex. 14 at 3-8.<sup>7</sup>) Specifically, it tracks  
 7 compliance instruments and organizes and conducts allowance auctions. (*Id.*) WCI, Inc. supports  
 8 both individual jurisdiction and cross-jurisdictional allowance auctions, as applicable. (DMFs 7-8;  
 9 ECF No. 102-2, Ex. 14 at 3-8.)

10 WCI, Inc.’s services may be utilized by any jurisdiction with a cap-and-trade program.  
 11 (DMFs 1-2, 7-8; ECF No. 102-2, Ex. 14 at 3-8.) As evidenced by Nova Scotia’s participation in  
 12 WCI, Inc., linkage with California is not required to participate in WCI, Inc. or to utilize the support  
 13 and technical services it offers. (DMFs 7-11, 13; ECF No. 102-2, Ex. 14 at 4 (“During 2018, work  
 14 was completed to enable Nova Scotia to be able to utilize CITSS and the services of the market  
 15 monitor”).) Additional jurisdictions may contract to utilize WCI, Inc.’s services and become a  
 16 participating jurisdiction under its Bylaws without linking to California as Quebec has done. (DMFs  
 17 2, 7, 9, 11-13.) WCI, Inc. was not created to facilitate linkages between Quebec and California  
 18 under the 2017 Agreement, which is evidenced by CARB’s use of WCI, Inc.’s services in 2012,  
 19 *before* it linked its program to Quebec’s. (DMFs 9-10; ECF No. 102-1, at 10, Plf.’s SUF 48.)

20 **B. California Does Not Control WCI, Inc.**

21 No participating jurisdiction, including California, controls WCI, Inc.’s Board of Directors  
 22 (“Board”) or exercises more control over the Board than any other participating jurisdiction. (DMF  
 23 3.) Each of the three participating jurisdictions—currently, California, Quebec and Nova Scotia—  
 24 appoints two individuals to the Board. (*Id.*) As such, California representatives account for *only*  
 25 *two of the six members* on the Board. (*Id.*)

26 <sup>7</sup> All page references related to ECF document citations are to the ECF page numbers as opposed  
 27 to the document page numbers, if any, except with respect to the Exhibits to the Third Declaration  
 28 of Rachel E. Iacangelo in Support of United States’ Second Motion for Summary Judgment (“Plf’s  
 Exs.”) submitted on a flash drive (ECF No. 102-2). As to Plf’s Exs., the page number references  
 are to the page(s) following the exhibit slip sheet with the first such page identified as 1.

1 **C. WCI, Inc. Has No Power to Implement, Change or Enforce California Laws.**

2 WCI, Inc. has no policymaking, regulatory, or enforcement authority and plays no role in  
3 deciding whether California or Quebec will accept each other's compliance instruments. (DMFs  
4 11-12; *see* ECF No. 7-3 at 1, 3, 5 (describing services WCI, Inc. provides to CARB); *see also* Cal.  
5 Code Regs. tit. 17, §§ 95940, 95943(a). Simply put, WCI, Inc. does not control whether California  
6 and Quebec's cap-and-trade programs are linked.<sup>8</sup> (DMFs 11-12.)

7 **D. WCI, Inc. Is a Service Provider Subject to Individual Contracts With Each**  
8 **Jurisdiction Electing to Use Its Services for Remuneration.**

9 WCI, Inc.'s participants are not limited to California and Quebec or to jurisdictions with  
10 linkage agreements to California. (DMFs 2, 7, 9, 11-13.) Indeed, WCI, Inc. has served multiple  
11 jurisdictions since its inception including Ontario, British Columbia, Quebec, Nova Scotia and  
12 California. (DMFs 3, 15.) Each jurisdiction contracts with WCI, Inc. for a variety of services  
13 depending on its individual needs. (DMFs 8-9; ECF No. 102-2, Ex. 14 at 3-8.) For example, Nova  
14 Scotia currently utilizes WCI, Inc.'s services for tracking its emissions allowances, implementing  
15 an auction system, and providing associated administrative services in order to maintain  
16 compliance with its own cap-and-trade program. (DMF 16.) Its program only includes Nova Scotia  
17 greenhouse gas emission allowances and is not linked with other jurisdictions. (DMF 16; ECF No.  
18 102-2, Ex. 14 at 4-5.) Similarly, WCI, Inc. has separate contracts with California and Quebec,  
19 respectively, to provide services for tracking each jurisdiction's emissions and offsets in order to  
20 maintain compliance with its specific cap-and-trade program. (DMFs 9-10.) In addition to these  
21 services, WCI, Inc. supports California and Quebec's inter-jurisdictional emissions trading  
22 program as established in the 2017 Agreement. (DMFs 7-13.) However, the WCI, Inc. Defendants  
23 are indisputably not parties to the Agreement. (DMFs 13-14.) That Agreement is exclusively  
24 between California and Quebec, and it is their decision alone whether to continue or discontinue  
25 the linkage set forth in the Agreement. (DMFs 11-13.)

26 \_\_\_\_\_  
27 <sup>8</sup> The state legislative process does not involve private corporations. *See* Cal. Const. art. IV, § 1  
28 (state legislative power is vested in the legislature, which consists of the Senate and the Assembly).  
It is the state legislature who has the power to make, alter and repeal laws. *Walsh v. Bd. of Admin.*,  
4 Cal. App. 4th 682, 697 (3d Dist. 1992).



1 **E. Western Climate Initiative (“WCI”) Cannot Speak for WCI, Inc. – a Distinct Legal**  
 2 **Entity.**

3 Plaintiff proffers no evidence to establish that Western Climate Initiative (“WCI”) has ever  
 4 been a legal entity with the ability to act to form WCI, Inc. or that it is the “parent” of WCI, Inc. in  
 5 any manner that has legal significance. WCI, unlike WCI, Inc.—a separate and distinct legal entity  
 6 —is a somewhat informal “collaboration of independent jurisdictions working together to identify,  
 7 evaluate, and implement emissions trading policies to tackle climate change at a regional level”  
 8 that began in 2007.<sup>9</sup> (DMFs 1-2.) It was designed to create a dialogue regarding implementation of  
 9 cap-and-trade programs in the respective jurisdictions of its partner participants. (ECF No. 102-2,  
 10 Ex. 14 at 3, n.1.) However, WCI itself is not, and has never been, a legal entity with the power to  
 11 take any valid action. (*Id.*) Additionally, WCI partners are not necessarily, nor are they required to  
 12 be, participating jurisdictions in WCI, Inc. (DMFs 1-2; ECF No. 102-2, Ex. 14 at 3-8, n.1  
 13 (evidencing WCI, Inc.’s participating jurisdictions versus the WCI state and territory partners)).

14 **III. PROCEDURAL HISTORY**

15 Plaintiff filed its Complaint against Defendants on October 29, 2019 and its Amended  
 16 Complaint on November 19, 2019. (ECF Nos. 1, 7.) The Amended Complaint asserts four causes  
 17 of action and seeks declaratory and injunctive relief. (ECF No. 7.) On November 19, 2019, the  
 18 parties filed, and the Court subsequently granted for good cause, a joint stipulation extending the  
 19 deadline for all Defendants to file responsive pleadings to January 6, 2020. (ECF No. 11.) On  
 20 January 6, 2020, the WCI, Inc. Defendants and Defendant Jared Blumenfeld, in his official capacity  
 21 as Secretary for Environmental Protection, moved for dismissal of the Amended Complaint as to  
 22 them. (ECF No. 25.) That same day, the State Defendants, with the exception of Mr. Blumenfeld,  
 23 answered the Amended Complaint. (ECF No. 24.) On February 26, 2020, the Court granted  
 24 Defendants’ Motion to Dismiss as to Defendants Kip Lipper and Richard Bloom only. (ECF No.

25 \_\_\_\_\_  
 26 <sup>9</sup> Plaintiff has consistently throughout this litigation misrepresented the relationship between WCI,  
 27 Inc. and the Western Climate Initiative (“WCI”). For example, in making the statement that “WCI  
 28 represents to the world that it constitutes ‘the largest carbon market in North America, and the only  
 one developed and managed by governments from two different countries’” (ECF No. 102-1, at 26,  
 Plf’s SUF 140), this statement refers only to the WCI partnership – as opposed to WCI, Inc. (ECF  
 No. 102-2, Ex. 14 at 3.)

1 79.) On March 11, 2020, the remaining WCI, Inc. Defendants and Mr. Blumenfeld filed their  
2 respective Answers to the Amended Complaint. (ECF Nos. 89-90.)

3 In the meantime, on December 11, 2019, Plaintiff filed its first Motion for Summary  
4 Judgment as to two of its four claims—under the Treaty and Compact Clauses. (ECF No. 12.) In  
5 response, Defendants opposed the Motion for Summary Judgment and filed Cross-Motions for  
6 Summary Judgment. (ECF Nos. 46, 50.) On March 12, 2020, following a hearing on the motions,  
7 the Court issued an order denying Plaintiff’s Motion for Summary Judgment and granting  
8 Defendants’ Cross-Motions for Summary Judgment. (ECF No. 91.)

9 On April 20, 2020, Plaintiff filed the instant Motion for Summary Judgment as to its Third  
10 Cause of Action under the Foreign Affairs Doctrine and corresponding Motion to Dismiss the  
11 Fourth Cause of Action under the Foreign Commerce Clause. (ECF No. 102.)

12 The Initial Scheduling Conference is set to occur on September 14, 2020. (ECF No. 104.)

13 **IV. SUMMARY JUDGMENT STANDARD**

14 To prevail on summary judgment, the moving party must show “that there is no genuine  
15 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.  
16 Civ. P. 56(a); *Mut. Fund Inv’rs v. Putnam Mgmt. Co.*, 553 F.2d 620, 624 (9th Cir. 1977); *Doff v.*  
17 *Brunswick Corp.*, 372 F.2d 801, 805 (9th Cir. 1966). Material facts are those that might affect the  
18 outcome of the case, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), as “determined by  
19 the substantive law governing the claim or defense.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*  
20 *Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

21 Where a plaintiff seeks summary judgment, the burden is to demonstrate affirmatively that  
22 there is no genuine dispute of material fact as to each element of the claims for relief, entitling  
23 plaintiff to judgment as a matter of law, and to demonstrate the lack of any dispute of material fact  
24 as to the affirmative defenses asserted by the defendant. *Fontenot v. Upjohn Co.*, 780 F.2d 1190,  
25 1195 (5th Cir. 1986); *Zands v. Nelson*, 797 F. Supp. 805, 808 (S.D. Cal. 1992); *Grimmway Enters.,*  
26 *Inc. v. PIC Fresh Glob., Inc.*, 548 F. Supp. 2d 840, 845 (E.D. Cal. 2008). If the moving party meets  
27 its initial burden, the burden shifts to the nonmoving party to show that there is a genuine issue for  
28 trial. *See Anderson*, 477 U.S. at 250; *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th

1 Cir. 2007). The court must “view[ ] the evidence in the light most favorable to the nonmoving  
 2 party.” *Fontana v. Haskin*, 262 F.3d 871, 876 (9th Cir. 2001). “Conclusory, speculative testimony  
 3 in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary  
 4 judgment.” *Soremekun*, 509 F.3d at 984.

5 Where, as here, the “parties submit cross-motions for summary judgment, each motion must  
 6 be considered on its own merits.” *Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two*, 249  
 7 F.3d 1132, 1136 (9th Cir. 2001) (internal quotation marks omitted). Thus, “[t]he court must rule on  
 8 each party’s motion on an individual and separate basis, determining, for each side, whether a  
 9 judgment may be entered in accordance with the Rule 56 standard.” *Id.* “[W]hen simultaneous  
 10 cross-motions for summary judgment on the same claim are before the court, the court must  
 11 consider the appropriate evidentiary material identified and submitted in support of both motions,  
 12 and in opposition to both motions, before ruling on each of them.” *Tulalip Tribes v. Wash.*, 783  
 13 F.3d 1151, 1156 (9th Cir. 2015).

## 14 V. LEGAL ARGUMENTS

### 15 A. Summary Judgment Must Be Denied Because Plaintiff’s Third Cause of Action Fails 16 as a Matter of Law as to the WCI, Inc. Defendants.

17 Application of the foreign affairs doctrine is limited to *state laws*, either on their face or as  
 18 applied by the states, that interfere with United States foreign policy. The Constitution allocates  
 19 particular powers related to foreign affairs to the President<sup>10</sup> and Congress<sup>11</sup> and expressly prohibits  
 20 *the states* from exercising such powers. *Deutsch v. Turner Corp.*, 324 F.3d 692, 708-09 (2003).

22 <sup>10</sup> The Constitution “appoints the President as ‘Commander in Chief of the Army and Navy of the  
 23 United States,’ U.S. Const., art. II, § 2, cl. 1, and authorizes him to ‘make Treaties, provided two  
 24 thirds of the Senators present concur,’ to ‘appoint Ambassadors’ with the ‘Advice and Consent of  
 the Senate,’ *id.* cl. 2, and to ‘receive Ambassadors and other public Ministers,’ *id.* § 3.” *Deutsch v.*  
*Turner Corp.*, 324 F.3d 692, 708-09 (2003).

25 <sup>11</sup> The Constitution “grants to Congress the power to ‘lay and collect ... Duties, Imposts, and  
 26 Excises,’ to ‘provide for the common Defense,’ *id.* art. I, § 8, cl. 1, to ‘regulate Commerce with  
 27 foreign Nations,’ *id.* art. I, § 8, cl. 3, to ‘establish an uniform Rule of Naturalization,’ *id.* cl. 4, to  
 28 ‘define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law  
 of Nations,’ *id.* cl. 10, to ‘declare War, grant Letters of Marque and Reprisal, and make Rules  
 concerning Captures on Land and Water,’ *id.* cl. 11, to ‘raise and support Armies,’ *id.* cl. 12, to  
 ‘provide and maintain a Navy,’ *id.* cl. 13, and to regulate ‘the land and naval forces,’ *id.* cl. 14.”  
*Deutsch*, 324 F.3d at 708-09.

1 “The federal government’s foreign affairs power is not mentioned expressly in the text of the  
 2 Constitution but, rather, is derived from the structure of the Constitution and the nature of  
 3 federalism.” *Gerling Glob. Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 751 (9th Cir. 2001). It  
 4 has rarely been invoked by the courts. *See id.* at 752.

5 None of the cases relied upon by Plaintiff are applicable to the application of the foreign  
 6 affairs doctrine to the WCI, Inc. Defendants. Specifically, when the foreign affairs doctrine has  
 7 been invoked, it has been to strike down challenged laws and legislation of the states—not the acts  
 8 of private parties.<sup>12</sup> Here, WCI, Inc. is a non-profit corporation, and its board members in their  
 9 capacities as such owe fiduciary duties to the corporation separate and apart from their roles as state  
 10 officials.<sup>13</sup> Further, WCI, Inc. is not a party to the 2017 Agreement nor does it have the power to  
 11 create, implement, or enforce the state laws related to the 2017 Agreement (i.e., the  
 12 “Arrangements”). Plaintiff does not cite, nor could the WCI, Inc. Defendants find, even a scintilla  
 13 of authority applying the foreign affairs doctrine to private conduct – much less to that of a nonprofit  
 14 corporation and its board members. Moreover, there is no basis to expand the doctrine beyond its  
 15 limited application. Expanding the foreign affairs doctrine to apply to the WCI, Inc. Defendants  
 16 despite their inability to change or apply California law on behalf of the state, including the 2017

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 19 <sup>12</sup> *See, e.g., Am. Ins. Assn. v. Garamendi*, 539 U.S. 396, 419-20 (2003) (holding **California**  
 20 **legislation** preempted based on the “clear conflict” between the policies adopted by the federal  
 21 government and the state of California); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 388  
 22 (2000) (holding **Massachusetts law** preempted); *Deutsch*, 324 F.3d at 708, 716 (holding **California**  
 23 **statute** preempted by the foreign affairs doctrine in so much as it extends and expands the  
 24 reparations negotiated and evidenced in treaties entered into following the end of World War II);  
 25 *Gingery v. City of Glendale*, 831 F.3d 1222, 1231 (9th Cir. 2016) (holding monument installed in  
 26 public park by local government did not violate the foreign affairs doctrine); *Hines v. Davidowitz*,  
 312 U.S. 52, 65-67 (1941) (preempting **Pennsylvania’s Alien Registration Act** found to be in direct  
 27 conflict with the Congressional Alien Registration Act); *Movsesian v. Victoria Versicherung AG*,  
 670 F.3d 1067, 1076-77 (9th Cir. 2012) (holding **California statute** preempted as it provided a  
 28 private right of action related directly to war time reparations); *Von Saher v. Norton Simon Museum*  
 of Art, 592 F.3d 954, 966-68 (9th Cir. 2010) (holding **California statute** intruded on federal  
 governments power to make and resolve war); *Zschernig v. Miller*, 389 U.S. 429, 437-38 (1968)  
 (holding **Oregon law** preempted as it invited courts to conduct detailed inquiries into the political  
 systems and conduct of foreign nations and required judgments about the actions and policies of  
 foreign nations and the credibility of foreign representatives).

<sup>13</sup> The individually named WCI, Inc. Defendants remaining in this case are sued both in their  
 official capacity as board members of WCI, Inc. and as California officials. It is only the latter role,  
 not the former, that could possibly give rise to the alleged foreign affairs claim.

1 Agreement between California and Quebec, would be a stark departure from its intended and  
2 historic application and is not supported by legal precedent.

3 Summary judgment should be granted against Plaintiff and in favor of the WCI, Inc.  
4 Defendants as there is no legal support for a foreign affairs claim against the WCI, Inc. Defendants.

5 **B. Nichols and Blumenfeld, in Their Official Capacities as WCI, Inc. Board Members,**  
6 **Have Not, and Cannot, Violate the Foreign Affairs Doctrine.**

7 Each board member owes WCI, Inc. duties and obligations separate and apart from any  
8 outside employment or political interests.<sup>14</sup> Del. Code tit. 8, § 141; *Skeen v. Jo-Ann Stores, Inc.*,  
9 750 A.2d 1170 (Del. 2000). Plaintiff has not proffered any facts that would subject the WCI, Inc.  
10 board members to personal liability for any corporate wrongdoing. Plaintiff provides *no facts* in  
11 the Second Motion for Summary Judgment that describe specific wrongful acts of the WCI, Inc.  
12 board members in their capacities as such. Indeed, the Motion is devoid of any facts regarding the  
13 role of WCI, Inc., much less the WCI, Inc. board members, in the linkage decision for the respective  
14 cap-and-trade programs of California and Quebec. There is no evidence that any of these  
15 individuals participated in any of the challenged activities or even had the ability to do so in their  
16 capacities as WCI, Inc. board members. Nor does Plaintiff offer any legal authority to establish the  
17 WCI, Inc. board members' liability for violations of the foreign affairs doctrine.

18 Public policy demands of corporate directors an undivided loyalty to the corporation to the  
19 end that there shall be no conflict between duty and self-interest. *Italo-Petroleum Corp. of Am. v.*  
20 *Hannigan*, 40 Del. 534 (1940); *Guth v. Loft, Inc.*, 5 A.2d 503 (Del. 1939). These principles are  
21 deeply rooted in corporate law and the duties owed regardless of how the director comes to serve  
22 in his or her position:

23 Corporate officers and directors are not permitted to use their  
24 position of trust and confidence to further their private interests.  
25 While technically not trustees, they stand in a fiduciary relation to  
the corporation and its stockholders. A public policy, existing  
through the years, and derived from a profound knowledge of

26 <sup>14</sup> The Delaware General Corporation Code applies to non-profits incorporated under Delaware  
27 law, with limited exceptions not applicable here. Del. Code tit. 8, § 114. A corporation's capacity  
28 to be sued is determined by the law under which it was organized, Fed. R. Civ. P. 17(b)(2), and  
under Delaware law, a corporation has the capacity to be sued in its corporate name. Del. Code tit.  
8, § 122(2).

1 human characteristics and motives, has established a rule that  
2 demands of a corporate officer or director, peremptorily and  
3 inexorably, the most scrupulous observance of his duty, not only  
4 affirmatively to protect the interest of the corporation committed to  
5 his charge, but also to refrain from doing anything that would work  
6 injury to the corporation, or to deprive it of profit or advantage  
7 which his skill and ability might properly bring to it, or to enable it  
8 to make in the reasonable and lawful exercise of its powers.

9 *Guth*, 5 A.2d at 510. Indeed, directors are not permitted to vote on matters in which they are  
10 interested. Del. Code tit. 8, § 144; *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984). The WCI, Inc.  
11 board members have separate and distinct obligations to WCI, Inc. under Delaware law that prohibit  
12 them from allowing extraneous pressures or incentives from affecting their decisions with respect  
13 to WCI, Inc. In their capacities as board members, each owe distinct fiduciary duties and obligations  
14 to WCI, Inc., and any decisions made in their capacity as WCI, Inc. board members must be made  
15 without regard to their affiliation with the State of California. Del. Code tit. 8, § 141; *Skeen*, 750  
16 A.2d at 1172; *Italo-Petroleum Corp. of Am.*, 40 Del. at 549-50; *Guth*, 5 A.2d at 510.

17 The Second Motion for Summary Judgment contains no evidence that could support  
18 Plaintiff's claims against the WCI, Inc. board members. *See Sacks v. Office of Foreign Assets*  
19 *Control*, 466 F.3d 764, 774 (9th Cir. 2006). Plaintiff does not, and cannot, connect the WCI, Inc.  
20 board members in their capacities as such to any allegedly wrongful acts. Indeed, as discussed  
21 above, corporate officers and directors are not permitted to use their position of trust and confidence  
22 to further their private interests. *Guth*, 5 A.2d at 510. In this regard, directors are not permitted to  
23 vote on matters in which they are interested. Del. Code tit. 8, § 144; *Aronson*, 473 A.2d at 816.  
24 Because Plaintiff does not proffer any evidence of misconduct on behalf of the WCI, Inc. board  
25 members, they are entitled summary judgment as a matter of law.

26 **C. WCI, Inc. Defendants Also Join the State Defendants' Opposition to Plaintiff's**  
27 **Summary Judgment Motion.**

28 The WCI, Inc. Defendants also join in the arguments made and opposition filed by the State  
Defendants to Plaintiff's Second Motion for Summary Judgment. Although the WCI, Inc.  
Defendants' analysis may differ in some respects, joinder in the arguments asserted and opposition  
filed by the State Defendants is appropriate to the extent the Court is not inclined to deny Plaintiff's

1 summary judgment motion as to the WCI, Inc. Defendants on the grounds set forth above. As such,  
2 the WCI, Inc. Defendants hereby adopt the State Defendants' arguments and evidence in support  
3 thereof by reference.

4 **D. The WCI, Inc. Defendants Are Also Entitled to Summary Judgment Because Plaintiff**  
5 **Cannot Maintain a Valid Claim Against Them Under the Foreign Affairs Doctrine.**

6 The WCI, Inc. Defendants—the entity WCI, Inc. and the two named WCI, Inc. board  
7 members—are entitled to summary judgment for the reasons set forth above in Parts V.A-C above.  
8 Specifically, Plaintiff cannot maintain a valid claim against the WCI, Inc. Defendants for violation  
9 of the foreign affairs doctrine as a matter of law. The foreign affairs doctrine has only been applied  
10 to strike down state laws—on their face or as applied. The WCI, Inc. Defendants do not make,  
11 enforce, or have the power to repeal state laws – that is solely within the state legislative powers  
12 granted by the California Constitution. Cal. Const. art. IV, §§ 1, 10; *Walsh v. Bd. of Admin.*, 4 Cal.  
13 App. 4th 682, 697 (3d Dist. 1992); *Zumbrun Law Firm v. California*, 165 Cal. App. 4th 1603, 1614  
14 (3d Dist. 2008). Additionally, the WCI, Inc. Defendants are not parties to the 2017 Agreement and  
15 have no control over whether or not California or Quebec will accept each other's compliance  
16 instruments. (DMF Nos. 1-2, 9-14; ECF No. 102-2, Ex. 14 at 3-8.) The only involvement WCI, Inc.  
17 has in this matter is offering ancillary services for remuneration under separate service agreements  
18 unique to each participating jurisdiction. (DMFs 9-10; ECF No. 102-1, at 10, Plf.'s SUF 48.)  
19 Further, as set forth above, each of the WCI, Inc. board members have distinct obligations to WCI,  
20 Inc. and each decision related to WCI, Inc. was made independently from their positions with the  
21 state consistent with Delaware law. As such, summary judgment in favor of the WCI, Inc.  
22 Defendants is appropriate.

23 **VI. CONCLUSION**

24 Plaintiff does not show how an order directed against the WCI, Inc. Defendants could  
25 redress any injury allegedly suffered by Plaintiff based on the 2017 Agreement between California  
26 and Quebec or the California laws and regulations allowing linkage between their cap-and-trade  
27 programs. Similarly, Plaintiff's discussion of its foreign affairs doctrine claim against the WCI, Inc.  
28 Defendants, which spans one paragraph and does not even address the elements of such claims

1 (ECF No. 102 at 22:11-21), likewise fails to show that any valid foreign affairs doctrine claim can  
2 be brought against the WCI, Inc. Defendants as private parties with no power to create or apply  
3 state laws. Plaintiff's omission of any substantive discussion of its claim as to the WCI, Inc.  
4 Defendants should be seen for what it is — a concession that no such claim can be maintained.

5 As detailed herein, Plaintiff has failed to meet its burden of proof on summary judgment.  
6 Accordingly, Plaintiff's Motion must be denied in its entirety. Defendants Cross-Motion for  
7 Summary Judgment should be granted on the third cause of action under the foreign affairs doctrine.

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DATED: May 18, 2020

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