UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ALLCO RENEWABLE ENERGY LIMITED, ALLCO FINANCE LIMITED AND THOMAS MELONE,

Plaintiffs,

v.

DEB HAALAND, in her official capacity of Secretary of the Interior, GARY FRAZER, in his official capacity of Assistant Director for Endangered Species, U.S. Fish and Wildlife Service, JANET COIT, in her official capacity of Assistant Administrator for Fisheries, NOAA Fisheries Directorate, MARTHA WILLIAMS in her official capacity of Principal Deputy Director, U.S. Fish and Wildlife Service, COLONEL JOHN A. ATILANO II in his official capacity of Commander and District Engineer, Colonel, U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Army Corps of Engineers, Bureau of Ocean Energy Management, and the U.S. Department of the Interior,

Defendants.

Case No. 1:21-cv-11171

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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Plaintiffs, Allco Renewable Energy Limited, Allco Finance Limited and Thomas Melone submit this memorandum in opposition to the Defendants' motion to dismiss (ECF No. 64) the Plaintiffs' First Amended Complaint ("FAC") (ECF No. 58). The Plaintiffs adopt the glossary of terms, section A through C of the Background section, and the Legal Standards section of the Defendants' memorandum in support (ECF No. 65) of their motion to dismiss.

INTRODUCTION

The Defendants have already concluded that in order to properly fulfill their obligations under NEPA the Vineyard Wind ("VW") project, the South Fork Wind ("SFW") project and other foreseeable projects (the "Foreseeable Actions") must be analyzed together.[1] Plaintiffs' claims are based upon the individual *and cumulative* impacts of the VW and SFW projects and the Foreseeable Actions.[2]

I. Plaintiffs Satisfy The Requirements For Standing.

A. Standing Based Upon Economic Injury And Increased Risk Of Economic Injury.

Courts have repeatedly found that market participants in regional energy regional markets possess standing to challenge government action affecting those markets. *See, e.g.*, *PPL EnergyPlus LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014) ("*Nazarian*") *aff'd sub. nom. Hughes*

[1] In the VW FEIS the Defendants concluded that the Foreseeable Actions include the "South Fork Wind, Bay State Wind, Skipjack Wind, Ocean Wind, Coastal Virginia Offshore Wind, Vineyard Wind 2 (also referred to as Park City Wind), Sunrise Wind, Revolution Wind, US Wind, and Empire Wind" projects and others. VW FEIS at 1-6, attached as Exhibit 1.

[2] NEPA requires that an environmental impact statement or EIS, must, among other things, rigorously explore and objectively evaluate all reasonable alternatives, analyze all direct, indirect, and cumulative environmental impacts, and include a discussion of the means to mitigate adverse environmental impacts. 40 C.F.R. §§1502.14, 1502.16. The scope of the analysis must include "[c]umulative actions," or actions that "when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement," and "[s]imilar actions," or actions that "when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together." 40 C.F.R. §§1508.25(a)(2), (3). Cumulative effects are "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. §1508.7. "Effects" are synonymous with "impacts." 40 C.F.R. §1508.8. These effects include "ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative" effects. 40 C.F.R. §1508.8. The cumulative impact requirement ensures that agencies consider effects that result from individually minor but collectively significant actions

v. Talen Energy Marketing, LLC, 136 S. Ct. 1288 (2016) ("*Hughes*"), *PPL EnergyPlus LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014) ("*Solomon*") *cert. den.* 136 S. Ct. 1728 (2016), *La. Energy & Power Authority v. FERC*, 141 F.3d 364, 367 n.5 (D.C. Cir. 1998) (citing cases). Both *Nazarian* and *Solomon* involved approvals of a new electric generator into the PJM regional energy markets. The plaintiffs in those cases, as here, claimed the entry of the new electric generator would adversely affect their opportunities and prices for their generation facilities. The Third and Fourth Circuits, as well as the United States Supreme Court, provided those plaintiffs with standing, even in the absence of statutes (unlike here) that required an analysis of the effects the new generator might have on those market participants.

NEPA and the OCSLA both require the Defendants to analyze the effects—direct, indirect and cumulative—from their proposed actions. One of the set of effects that the Defendants are charged to analyze and determine under those statutes are economic effects of the proposed action and any foreseeable actions. Going beyond the obligations imposed by NEPA, the OCSLA requires more—it requires the Defendants to ensure protection of the environment. For that purpose, the environment includes the "human environment" which includes the physical, social, and economic components, conditions, and factors which interactively determine the state, condition, and quality of living conditions, employment, and health of those affected, directly or indirectly, by activities occurring on the OCS. Thus, NEPA and the OCSLA require the Defendants to, at a minimum, take a hard look at the economic impact of the proposed action on Plaintiffs and other market participants. Those requirements of NEPA and the OCSLA reflect Congress' judgment that the government must make a fully informed decision before it takes actions that will have an adverse impact on market participants. If a market participant that is affected by the government's proposed action does not have standing to challenge the validity of the government's review, then the NEPA and OCSLA requirements would be a nullity.

Allco's economic interests are part of the human environment affected by the

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taking place over a period of time. 40 C.F.R. §1508.7).

Defendants' actions. Plaintiffs have plausibly alleged that they have suffered and will continue to suffer economic injury as the result of the Defendants' actions. The Plaintiffs have plausibly alleged that basic economic substitution theory establishes a direct causal connection between economic harms to Plaintiffs as participants in the ISO-New England energy markets and the Defendants approval of the subsidized the VW project and other Foreseeable Actions, *see*, FAC ¶36, and that Plaintiffs' harms would be redressed by requiring the Defendants to properly fulfill their responsibilities.

Defendants counter that, despite cases like *Nazarian, Solomon* and *Hughes*, Plaintiffs lack economic standing under *Dantzler, Inc. v. Empresas Berríos Inventory & Operations, Inc.*, 958 F.3d 38 (1st Cir. 2020). But *Dantzler* shows exactly why Allco's economic allegations provide it with standing. First of all, the First Circuit held in *Danzler* that the plaintiff's economic injury *did* constitute an injury-in-fact. *Danzler* at 48. In *Dantzler*, the plaintiff alleged that the government unlawfully assessed fees against ocean carriers, and the ocean carriers in turn passed those fees on to importers in Puerto Rico, such as plaintiff. The First Circuit held that the plaintiff failed to allege that the assessment and collection of fees "from third parties not before the court -- i.e., the ocean freight carriers -- directly caused its injury." *Id*. at 48. Here, the Defendants concede that the VW and SFW projects are ready to go. That is one of the reasons the Defendants have pushed for an accelerated timetable in this case. The Defendants approvals are what make the promise of offshore wind a reality, and solidifies the market disruption and adverse impact from VW and Foreseeable Actions. If the reality does not come to be, then the Plaintiffs injuries are lessened. The Plaintiffs injuries in the past would not be eliminated entirely but both the past, present and future injuries would be lessened because a government-subsidized electric generator would not be entering the ISO-New England market, re-opening the market to more opportunities for Plaintiffs.

That causal connection is neither indirect nor remote but rather, as alleged in the FAC, based upon fundamental economic substitution principles that have been endorsed by the federal courts. The VW FEIS is based on an irrational assumption about VW's and the Foreseeable

Actions impact on supply and demand in the ISO-New England energy markets. The Defendants' assumptions contradict fundamental economic principles, are disproven by actual market conditions, and are inconsistent with other agencies' practices for conducting economic and environmental analyses, including the Defendants. Because of these flawed assumptions, the Defendants' presentation of the consequences of the VW project, versus taking no action, is inaccurate and misleading, in violation of NEPA and the OCSLA.[3]

Unlike *Dantzler*, the Plaintiffs have plausibly alleged a direct impact based upon sound economic substitution theory. In addition, in *Dantzler* there was no law that required the governmental agency to take a hard look at the effect, direct and indirect, of the imposition of the fees. Here, both NEPA and the OCSLA require the Defendants to take a hard look at the direct, indirect and cumulative effects of the proposed action and Foreseeable Actions, which includes economic effects. It is that requirement of NEPA and the OCSLA that also squarely place Allco's interests in the zone of interests intended to be protected by the statutes in the sense that those interests must be considered.[4] In a case challenging Interior's 2012-2017 offshore oil and gas leasing program, the D.C. Circuit favorably reviewed Interior's modeling of how "forgoing additional leasing on the OCS would cause an increase in the use of substitute fuels . . . and a reduction in overall domestic energy consumption from greater efforts to conserve in the face of higher prices." *Ctr. for Sustainable Economy v. Jewell*, 779 F.3d 588, 609 (D.C. Cir. 2015). Importantly, nothing in BOEM's modeling is unique to the offshore oil and gas context.

[3] Agencies must "consider and disclose the actual environmental effects" of proposed actions in a way that "brings those effects to bear on [their] decisions." *Balt. Gas & Elec. Co. v. NRDC,* 462 U.S. 87, 97 (1983). Analysis of alternatives is the "heart of the environmental impact statement." 40 C.F.R. §1502.14. NEPA requires agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives," including the "no action" alternative. *Id*. Agencies must "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." *Id*. Agencies must also analyze the "[e]nergy requirements and conservation potential of various alternatives." 40 C.F.R. §1502.16(e).

[4] Whether an injury-in-fact has too indirect of a causation is governed by the Supreme Court's policy considerations in *Holmes v. Sec. Investor Prot. Corp*., 503 U.S. 258 (1992). Importantly, there must always be at least a class of plaintiffs that can challenge the action that has caused the alleged harm. The third *Holmes* factor espouses the policy that if there are market participants that would be affected by the entry of a massive increase in supply, then it is those participants that should have the ability to challenge complained of conduct.

"MarketSim's economics-based model representation of U.S. energy markets . . . simulates end-use domestic consumption of oil, natural gas, coal and electricity in four sectors (residential, commercial, industrial and transportation); primary energy production; and the transformation of primary energy into electricity." BOEM, *The Revised Market Simulation Model (MarketSim): Model Description* 2 (2012). BOEM's *MarketSim* demonstrates that the Defendants can easily model economic effects based upon substitution principles and that they are required to do so to comply with their obligations under NEPA, the OCSLA and the CWA.

Although a plaintiff "need not demonstrate that its entire injury will be redressed by a favorable judgment, it must show that the court can fashion a remedy that will at least lessen its injury." *Dantzler* at 49. Here, if the Defendants' approvals are vacated and the Defendants are required to fulfill their responsibilities, it is less likely that the VW project and the Foreseeable Actions will be built, which will open more opportunities for the Plaintiffs in both the near and long term.[5]

B. Plaintiff Melone's Environmental And Aesthetic Interests Provide Standing.

1. Melone Has Pled Sufficient Interests In The NARW And The Migratory Birds That Habitat On His Property For Standing.

Plaintiff Melone has specifically pled sufficient interests in the North Atlantic right whale ("NARW") and the migratory birds that habitat on Little Beach. The Defendants have not challenged Plaintiff Melone's environmental and aesthetic interest in those migratory birds. Instead, they seek to challenge the merits of the risks to those migratory birds, which is discussed

[5] The Defendants' memo fn. 9 simply ignores the facts and law of those cases. In *Allco Finance Ltd. v. Klee*, 805 F.3d 89 (2d Cir. 2015), the Second Circuit based its affirmance not on the district court's opinion regarding lack of standing, but on the failure of the plaintiff to first file a petition for enforcement with the FERC under 16 U.S.C. §824a-3(h). The district court's standing holding in *Allco Finance Ltd. v. Klee*, 2016 WL 4414774 (D. Conn. Aug. 18, 2016) was overruled by the Second Circuit in *Allco Finance Ltd. v. Klee*, 861 F.3d 82 (2d Cir. 2017). The case *In re Green Mountain Power Corp*., 198 A.3d 36 (Vt. 2018) has no bearing here because it simply involved the discretion of an administrative agency to admit as an intervenor a person based upon economic interests. Of course, in this case, VW has been admitted as an intervenor based upon its alleged economic interests, reinforcing the irrelevance of that Vermont decision to this case. Defendants' footnote 10 similarly misses the mark. Electrons are electrons. It matters not whether those electrons are produced by a wind farm, a natural gas plant or a solar plant. VW and other Foreseeable Actions compete with QFs such Allco's because they lower the demand for energy from other QFs.

below. With respect to the NARW, the Defendants make the meritless claim that Melone must allege that he has seen or attempted to see NARWs in the vicinity of his property or the challenged projects. The Defendants have already concluded that both projects will result in the "take" of the NARW. The Foreseeable Actions will result in exponential addition "take." The Plaintiff has alleged in FAC ¶25 how the Defendants' actions and failures will impact Melone and his interests in the NARW. Melone specified his whale-watching activities, that he went whale-watching when the NARW was expected in its southern breeding area, witnessed a NARW and her calf personally, and he has given specifics of future trips. *Compare*, *Strahan v. Sec'y, Mass. Exec. Office of Energy & Envtl. Affairs*, No. 19-cv-10639, slip op. at 8 (D. Mass. Nov. 30, 2021) (Talwani, J.) [6] In contrast to the plaintiff in *Strahan*, Melone "has taken [] steps to specifically view [the NARW]," *id*., Melone has seen a NARW, Melone has specific regular future trips scheduled to see the same NARWs that habitat off the coast of Massachusetts when and where the NARW is likely to be found there. The Defendants mischaracterize *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) as applied to this case. The Supreme Court expressly approved the animal nexus theory as it applies to the facts of this case when it stated that it is plausible "to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist." *Id.* at 566. That is the case here. The NARW pregnant females that habitat off the coast of Massachusetts, make an annual trip to the waters off the northern coast of Florida. To claim that the federal decisions in this case would have no plausible effect on Melone's ability to view the NARW during those annual visits to Fernandina Beach, Florida, simply denies science, contradicts the Defendants' own (albeit deficient) analyses and shows the lack of a hard look that

[6] *Compare, Strahan v. Sec'y, Mass. Exec. Office of Energy & Envtl. Affairs*, No. 19-cv-10639, slip op. at 8 (D. Mass. Nov. 30, 2021) (Talwani, J.) (Plaintiff "asserted that he 'looked in Boston Harbor right now today for right whales,' and that he would be looking for right whales the next day in Boston Harbor (with no suggestion that Boston Harbor is a likely habitat for them), and that he was 'going whale watching next week,' with no details as to the supposed trip. At the same time, when asked if he had ever seen a North Atlantic right whale, he responded: 'Well, you can't really see a right whale.'")

pervades the Defendants' reviews of offshore wind.[7]

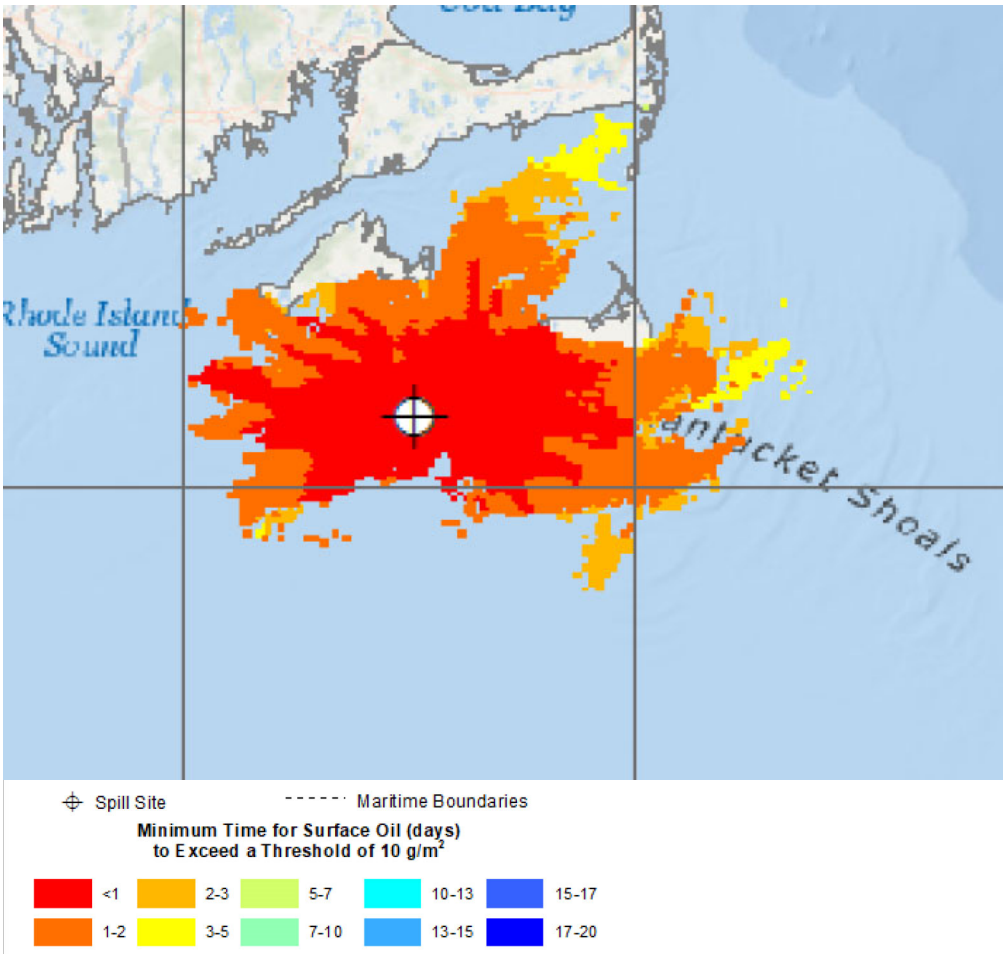
2. Credible Threat Standing Related To Hurricanes.

Plaintiffs allege claims of harm to the NARW, the migratory birds on Little Beach, Plaintiff Melone's environmental and aesthetic interests in those species and Plaintiff Melone's interest in his home and environment on Martha's Vineyard. Part of the alleged harms to those interests relate to Atlantic hurricanes and the credible threat (a basis for standing recognized by the First Circuit) to those interests posed by placing millions of gallons of oil only 14 miles away from Martha's Vineyard.

Why are Atlantic Hurricanes such a concern to Plaintiffs as they relate to the projects and the Foreseeable Actions? The VW FEIS concludes that the WTGs can structurally "endure sustained wind speeds of up to 112 mph (182.2 kph) and gusts of 157 mph (252.7 kph). *See*, VW FEIS 2-26." Those wind speeds equate to a storm at the very low end of a Category 3 storm. Using outdated data, and ignoring climate change, the VW FEIS concludes that the occurrence of a hurricane above those wind speeds is unlikely. More recent data undermines Defendants' conclusions. A report prepared for the Nuclear Regulatory Commission ("NRC") in 2020 (and part of the administrative record), *see* Exhibit 2, concludes the climatic conditions have gotten so much worse in just the past ten years that if Hurricane Sandy were to arrive now, it would arrive as a Category 4 or 5 storm and be a direct hit on the VW energy area and the other offshore wind areas. Such a storm would produce sustained winds over 130 to 180 miles per hour likely destroying the wind turbine generators ("WTGs") and the electrical service platforms ("ESPs") releasing millions of gallons of oil into the water. Shown below is an excerpt from VW Oil Spill

[7] The Defendants argue that Plaintiff Melone's interest in the NARW did not exist when he filed suit and therefore standing cannot exist based upon Melone's interests in the NARW. While that may be true in some Circuits, it is not in the First Circuit. *see U.S. ex rel. Gadbois v. PharMerica Corp*., 809 F.3d 1, 5-6 (1st Cir. 2015) (holding that later amendments to complaints can cure standing defects at the time the original complaint was filed in order to avoid the "pointless formality" of refiling a complaint.) The Second, Fourth, Ninth, Federal and the D.C. Circuit agree with the First Circuit. *Northstar Fin. Advisors Inc. v. Schwab Invs*., 779 F.3d 1036 (9th Cir. 2015); *Daniels v. Arcade, L.P.*, 477 F. App'x 125 (4th Cir. 2012); *Prasco, LLC v. Medicis Pharm. Corp*., 537 F.3d 1329 (Fed. Cir. 2008); *Travelers Ins. Co. v. 633 Third Assocs*., 973 F.2d 82 (2d Cir. 1992) ("If the complaint *as amended* alleges sufficient facts to support the requisite injury . . . plaintiff will have established standing to sue . . . .") (emphasis added); *Scahill v.*

Response modeling, which is part of the VW COP and the administrative record. It shows how many days it would take for an oil spill of just 2,954 barrels (124,097 gallons) of oil to spread, which is the oil contained in just one ESP. The modeling ***did not*** account for the oil in the WTGs, which is another half-million gallons for the VW project alone. The oil contained in the WTGs for the VW and SFW projects and the Foreseeable Actions far exceeds 10,000,000 gallons, more than the oil disaster caused by the Exxon Valdez. The modeling shows that it would take about 1 day for a spill of less than 1% of the oil that will be permanently stationed at sea as a result of the VW and SFW projects and the Foreseeable Actions to wreak unimaginable destruction on Martha's Vineyard, Plaintiff Melone's property, Little Beach, the waters where the NARW habitat, the NARW and migratory birds.



To Plaintiffs' knowledge, neither the Defendants nor any project proponents have

District of Columbia, 909 F.3d 909 F.3d 1177 (D.C. Cir. 2018).

modeled what an oil spill from a Category 4 or 5 storm's destruction of the WTGs would look like.

The risk from hurricanes is a credible threat and the risk of enhanced and potentially catastrophic damage from those storms is a credible threat because of the presence of millions of gallons of oil in the wind energy area in the WTGs and platforms. Such a credible threat is sufficient for standing in cases involving threatened environmental harm. *See, e.g.*, *Nat'l Family Farm Coal. v. U.S. Envtl. Prot. Agency*, 966 F.3d 893, 909 (9th Cir. 2020) (finding that "a credible threat of harm is sufficient to constitute actual injury for standing purposes") (citing *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 645 n.49 (9th Cir. 2014) ("[A] credible threat of harm is sufficient to constitute actual injury for standing purposes, whether or not a statutory violation has occurred.").

The First Circuit recognized enhanced risk as a basis for standing in *Kerin v. Titeflex Corp*., 770 F.3d 978, 983 (1st Cir. 2014) stating that "a small probability of a great harm may be sufficient, *see Vill. of Elk Grove Vill. v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993) (recognizing that 'even a small probability . . . is sufficient . . . [provided] the relief sought would, if granted, reduce the probability')." In *Kerin*, the district court dismissed the suit reasoning that "lightning strikes present a textbook example of speculative risk and remote possibilities which are simply insufficient for injury in fact." *Kerin* at 980. The First Circuit disagreed. While the First Circuit affirmed the dismissal in that case, the court did so because it found that the plaintiff failed "to allege risk sufficient to find injury." *Kerin* at 981. The First Circuit made it clear, however, that "[w]e do not hold that increased risk of harm from product vulnerability to lightning strikes can never give rise to standing." *Kerin* at 979.

Kerin identified two categories of enhanced risk scenarios. The first involves "a possible future injury that may or may not happen (i.e., the harm threatened); and (2) a present injury that is the cost or inconvenience created by the increased risk of the first, future injury (e.g., the cost of mitigation." *Kerin* at 981-2. The First Circuit observed that "standing is more frequently

found, [when] the present injury is linked to a statute or regulation or standard of conduct that allegedly has been or will soon be violated." *Kerin* at 982. The court explained that "[c]ases in this first category are easier, in part because the legislature and executive agencies -- the branches tasked with evaluating risks and developing safety standards -- have already identified the risk as injurious." The First Circuit cited *Baur v. Veneman*, 352 F.3d 625, 634-5 (2d Cir. 2003) "(noting the 'tight connection between the type of injury . . . allege[d] and the fundamental goals of the statutes . . . sue[d] under')" and *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 948 (9th Cir. 2002) "(explaining that to require actual evidence of environmental harm, rather than an increased risk based on a violation of the statute, misunderstands the nature of environmental harm'") (emphasis in original), both of which were credible threat cases.

The second category identified by the First Circuit is where "the present injury has not been identified and so is entirely dependent on the alleged risk of future injury… Cases falling in this second category require greater caution and scrutiny because the assessment of risk is both less certain, and whether the risk constitutes injury is likely to be more controversial." *Kerin* at 982.

Here, it is *plausible* that another Hurricane Sandy would occur during the 30-40 years-plus timeframe that the VW, SFW and the Foreseeable Actions would sit off the East Coast and destroy the WTGs that are designed to survive sustained wind speeds of no greater than 112 miles per hour. It is *plausible* that the millions of gallons of oil housed in those WTGs would be released into the ocean and land on the shores of Martha's Vineyard where Plaintiff Melone and thousands of migratory birds live. VW's own modeling vividly shows that to be true. It is plausible that such an oil spill and wrecked WTG parts floating in the ocean and landing onshore would constitute a "take" of the NARW[8] and the migratory birds that habitat on Melone's property and cause catastrophic damage to Melone's property and Martha's Vineyard and those species. Plaintiff's claimed credible threat of harm from hurricanes falls into both of the First

[8] VW FEIS 3-73: "Marine mammal exposure to aquatic contaminants and inhalation of fumes from oil spills can result in mortality or sublethal effects on the individual fitness, including adrenal effects, hematological effects, liver effects lung disease, poor body condition, skin

Circuit's categories. It fits into the first category because it is a possible future injury that may or may not happen and the Plaintiffs have alleged that the Defendants have violated the standards required under NEPA, the OCSLA, the MMPA, the CWA and the ESA. Plaintiff's claimed credible threat of harm from hurricanes fits into the second category because the enhanced risk of damage to coastal property owners, migratory birds and their habitat and the NARW and their habitat from more severe Atlantic hurricanes from climate change is well recognized.[9] While the government may disagree with the Plaintiffs' assessment of the likelihood of such a disaster based upon its use of outdated and incorrect data, the government agrees that there is a credible threat, otherwise it would not have reviewed it in the FEIS.[10]

Here, to establish standing the Plaintiffs need only "allege an increased risk of concrete injury that results from a series of credible occurrences." *Ctr. for Food Safety v. Perdue,* 517 F. Supp. 3d 1034, 1040 (N.D. Cal. 2021) (internal citation and quotation omitted). That is the case here. The increased risk is imminent because the construction of the VW and SFW projects is imminent. That increased risk arises from a series of credible occurrences once either the VW and/or the SFW project is constructed. Here, Plaintiffs allege that the VW and SFW projects will increase the likelihood of harm to their property, their business, and their aesthetic and environmental interests in specific species.

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lesions, and several other health effects attributed to oil exposure."

[9] Under the Defendants' logic no one (not even adjoining property owners such as Plaintiff Melone) could challenge the Defendants failure to take a hard look at authorizing metal sticks in coastal waters in the direct line of hurricanes that would house millions of gallons of oil. The logical extension of the Defendants' position is that the government could approve putting a billion-gallon oil storage tank on the OCS just three miles away from Martha's Vineyard that is only designed (like VW) to "endure sustained wind speeds of up to 112 mph (182.2 kph) and gusts of 157 mph (252.7 kph)" *see*, VW FEIS 2-26, and no Martha's Vineyard coastal landowner would have standing to challenge the government's decision. That is completely at odds with the suit provisions of the OCSLA and the ESA and the suit provisions of the MMPA and the APA and the First Circuit's recognition that "a small probability of a great harm may be sufficient" for standing. *Kerin* at 983.

[10] The credible threat basis for standing is not reserved for environmental cases. In food and drug safety cases, exposure to increased risk of harm establishes standing if the threat is credible. *Baur v. Veneman*, 352 F.3d 625 (2d. Cir. 2003). "Exposure to risk, not the actual onset of disease, must be imminent." *Id.* This is because "[l]ike threatened environmental harm, the potential harm from exposure to dangerous food products or drugs is by nature probabilistic, yet an unreasonable exposure to risk may itself cause cognizable injury." *Baur*, 352 F.3d at 634 (internal citation and quotations omitted).

Courts have recognized that "[t]he ability to challenge actions creating threatened environmental harms is particularly important because in contrast to many other types of harms, monetary compensation may well not adequately return plaintiffs to their original position," given that "[t]he extinction of a species, the destruction of a wilderness habitat, or the fouling of air and water are harms that are frequently difficult or impossible to remedy." *Cent. Delta Water Agency*, 306 F.3d at 950. And here there would not be any prospect of monetary compensation in any case. The entities that would own and operate the VW and SFW projects would be single-purpose entities with no guarantees from their parent companies resulting in the bankruptcy of those companies in such a scenario. [11]

3. The Threat To The Little Beach Migratory Birds.

Plaintiff Melone has sufficiently alleged the threat that the VW and SFW projects pose to the Piping Plover and the other migratory birds on Little Beach. The Defendants' administrative record documents the risk to those birds.[12] Collision rates of birds (i.e., death) results from the bird either hitting "the turbine superstructure, or being killed in the vortices encountered in the wake of the turbines." *See*, Exhibit 5 at 77.[13] The Defendants' (albeit deficient) analysis shows that on average every piping plover will fly right into the RSZ of the new experimental Haliade wind turbines. The Loring report, Exhibit 4, concludes that "Piping Plovers flew at estimated

[11] As VW's oil spill modeling shows, Plaintiff Melone owns land adjacent to the project sites. Any oil, WTG parts or other debris from the projects during construction and/or operation will flow toward to the Plaintiffs' home. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005) (Plaintiffs "who own land near the site of a proposed action have little difficulty establishing a concrete interest.").

[12] *See, e.g.,* Exh. 3 at 4 ("2-year-old and adult roseate terns may be present in low numbers flying through or foraging in the WDA, primarily in the spring, late summer, and fall. An unknown portion of adults and young-of-the-year likely will fly through the WDA during fall migration …there is great uncertainty associated with estimating the roseate tern population at risk of collision with the WTGs".) *Id.* at 5 ("We do not expect the entire population would fly through the WDA while traveling to foraging habitat or during migration. … more accurate data within the WDA is needed to better assess exposure of terns to the WDA and RSZ. Therefore, it is reasonable to assume that a small but unknown number may traverse the WDA at flight heights ranging from less than 12 m (39 ft) to well above the RSZ [the rotor swept zone].") *Id.* at 5 ("Coarse altitude estimates indicated plovers were flying generally at the upper range and above the RSZ (this study assumed the RSZ was less than 250 m [820.2 ft]), and found that 15.2 percent of plover flights occurred within the RSZ of the Massachusetts Wind Energy Area (including the WDA).")

[13] Exhibit 5 is a report cited by the Loring report (Exh. 4), which in turn was cited by the

mean speeds of 42 km hr−1 and at altitudes of 288 m." Two hundred and eighty-eight meters is 944 feet which subjects the birds to the risk of death from collision.[14] The height of the RSZ is at 1047 feet to 1171 feet. *See,* Exhibit 6, which is an excerpt from the VW COP. Exhibit 5 is an estimation collision methodology cited by the Loring report. $n_{collision} = n_4 \times r_4 \times (1-c)$. For the Piping Plover, the Loring report establishes that it can be expected that all Piping Plover flights will be in the RSZ of the new higher capacity turbines. As a result, the collision model will produce a positive result, making it practically certain that migratory birds will be killed. In any event, the VW, SFW and the Foreseeable Actions clearly constitute a credible threat to the migratory birds on Little Beach, and as such, Plaintiffs have standing.[15]

C. Plaintiffs Have Standing To Challenge The SFW Project.

The Plaintiffs have not made a specific allegation that the energy from the SFW project will compete with their projects in Connecticut and Massachusetts. The Plaintiffs do not need to make that specific allegation because the SFW project like the other Foreseeable Actions are all peas in the same pod, and the direct, indirect and cumulative effects of those projects and the Foreseeable Actions do compete and harm Plaintiffs' competitive and commercial interests. As for Plaintiff Melone's aesthetic and recreational interests, the SFW project will impact those to the same extent as the VW project. With respect to migratory birds, the Loring report establishes that. With respect to NARW, the Defendants' conclusions with respect to "take" establish that. The same risks from hurricanes applies to both projects and the Foreseeable Actions. With respect to oil spills, the credible threat is the same, but surprisingly, the Defendants has labeled

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Defendants in the Letter of Concurrence (Exh. 3).

[14] *See*, Loring at 2 ("The potential adverse effects of offshore wind energy developments on avian species include collision mortality, behavioral changes near turbines in response to visual stimuli, and impacts from physical alteration of habitat in response to construction of turbines and other infrastructure.") *Id*. ("Migratory shorebirds may be especially susceptible to the potential effects of wind energy development due to their use of coastal habitats and migratory routes that may occur offshore (O'Connell et al. 2011). One species of concern is the federally threatened Atlantic coast population of the Piping Plover.") *Id*. at 11 ("Migratory birds may also descend to lower altitudes during periods of limited visibility, low cloud ceiling, and/or inclement weather, increasing their risk of collision with offshore wind turbines.")

[15] The Defendants' reference at 11 of its Memorandum to the merits conclusion of the risks to the Piping Plover is a merits issue, not a standing issue. In any case, as discussed above, that conclusion is based upon the Concurrence letter (Exh. 3) which did not analyze the new much

the analyses that have been done related to the SFW project, "confidential" on their web site. ("D Oil Spill Response Plan (Confidential)"). *See,* https://www.boem.gov/renewable-energy/state-activities/volume-ii-appendices. Obviously, the Defendants are trying to hide the ball, which is another reason their objections should be rejected.

D. Plaintiffs' Alleged Procedural And Informational Harm Establishes Standing.

1. Plaintiffs Have Procedural Standing.

A "credible threat of harm is sufficient to constitute actual injury for standing purposes." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002). Thus, Plaintiffs need only show that the exercise of a procedural right "could protect [its] concrete interests." *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv*., 789 F.3d 1075, 1082 (9th Cir. 2015).

When a party alleges injury to its procedural rights, "courts relax the normal standards of redressability and imminence." *Sierra Club v. FERC*, 827 F.3d 59, 65 (D.C. Cir. 2016). In such cases, "the primary focus of the standing inquiry is not the imminence or redressability of the injury to the plaintiff, but whether a plaintiff who has suffered a personal and particularized injury has sued a defendant who has caused that injury." *City of Dania Beach v. FAA*, 485 F.3d 1181, 1185 (D.C. Cir. 2007) (quoting *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) (en banc)). "To establish injury-in-fact in a 'procedural injury' case, petitioners must show that 'the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff.'" *Id.* at 1185 (quoting *Fla. Audubon Soc'y*, 94 F.3d at 663). In other words, "[a] violation of the procedural requirements of a statute is sufficient to grant a plaintiff standing to sue, so long as the procedural requirement was designed to protect some threatened concrete interest of the plaintiff." A plaintiff alleging a violation of some procedural right "never has to prove that if he had received the procedure the substantive result would have been altered," and need only show "that the procedural step was connected to the substantive result." *Sugar Cane Growers Cooperative v. Veneman*, 289 F.3d 89, 95, 351 U.S. App. D.C. 214 (D.C. Cir. 2002). Plaintiffs are entitled to bring their claims under a procedural

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larger Haliade WTGs.

standing theory because they have demonstrated a threat to a sufficiently concrete and particularized interest that the projects would affect and the alleged procedural deficiencies are connected to a substantive governmental decision—issuing the approvals and failure to satisfy the requirements of NEPA, the CWA, the MMPA, the ESA and the OCSLA—that is in turn connected to a risk of harm to Plaintiffs' identified interests. *See Dania Beach*, 485 F.3d at 1185 (describing need for distinct risk to particularized interest in procedural injury context); *Sierra Club*, 827 F.3d at 65 (discussing components of an adequate causal chain in procedural injury context).

2. Plaintiffs Have Informational Standing.

"[T]he denial of information to which the plaintiff claims to be entitled by law establishes a quintessential injury in fact." *Comm. on the Judiciary of the United States House of Representatives v. McGahn*, 968 F.3d 755, 766 (D.C. Cir. 2020). A plaintiff's reading of a statute for informational standing purposes must at least be plausible. *See Humane Soc'y of the U.S. v. Vilsack*, 797 F.3d 4, 8 (D.C. Cir. 2015). The existence and scope of an injury for informational standing purposes is defined by Congress: a plaintiff seeking to demonstrate that it has informational standing generally "need not allege any *additional* harm beyond the one Congress has identified." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (emphasis in original) (citing *FEC v. Akins*, 524 U.S. 11, 20-25, 118 S. Ct. 1777 (1998), and *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449, 109 S. Ct. 2558 (1989)). A plaintiff suffers sufficiently concrete and particularized informational injury where the plaintiff alleges that: (1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure. *See Akins*, 524 U.S. at 21-22. Here, Plaintiffs have been denied the information that NEPA, the OCSLA, the CWA and the MMPA require be produced and made available to Plaintiffs (*i.e.,* information from proper consultation as required by the ESA and the preparation of an EIS that complies with NEPA and a proper legal and factual analysis by the Defendants under the OCSLA, the CWA and the MMPA). *See*

42 U.S.C. § 4332(C). Defendants are required by NEPA and federal law to prepare such information and make it available to Plaintiffs. The cases cited by the Defendants are either inapposite or have been overruled by *Spokeo*.

E. Plaintiffs Have Standing To Challenge The Corps' Approvals.

The Defendants' claim of the narrowness of the Corps' review is expressly contradicted by the ROD.[16] The discharges that the Corps authorized include every discharge and disturbance related to the construction and operation of the projects. Those discharges affect the habitat of the NARW, and as the VW oil spill response modeling shows, any type of discharge from the projects will likely find their way to Martha's Vineyard and Melone's property (which includes wetland and eelgrass habitat and habitat for the Little Beach migratory birds.)

II. The OCSLA And ESA Claims Should Be Not Dismissed Based Upon Those Statutes' Notice Requirements.

No claims should be dismissed based upon the ESA and OCSLA notice provisions for the following reasons. *First,* Plaintiffs did provide notices of some claims prior to filing the FAC. Thus, with respect to those claims, the FAC cured any deficiency. *See U.S. ex rel. Gadbois v. PharMerica Corp*., 809 F.3d 1, 5-6 (1st Cir. 2015). *Second*, even if those notice provisions were jurisdictional, there is nothing in the statute preventing activation of a premature complaint. A virtually identical notice requirement can be found in 16 U.S.C. §824a-3(h) which requires that before an electric generator that is a qualifying facility can bring suit against a state regulatory authority under 16 U.S.C. §824a-3(h), it must first ask the Federal Energy Regulatory Commission ("FERC") to do so. If the FERC fails to act within 60 days of the request, then the generator may bring suit. Faced with a complaint that was filed before the 60-day period started,

[16] *See*, VW ROD at 30-31 ("The USACE scope of analysis under NEPA includes the areas within the 75,614 acre lease OCS-A 501 area that will be impacted by turbine and transmission cable installation, the 23.3 mile offshore transmission cable corridor (approximately 96 acres), the onshore transmission cable route, and the 6.4 acre substation site where generated electricity will be delivered. In addition, under NEPA reasonably foreseeable activities within the larger overall wind lease area were considered to account for potential cumulative effects. Determination of the "USACE action area" for section 7 of the ESA: The ESA action area includes all areas included in the NEPA scope of analysis. The USACE action area has been addressed within the larger ESA action area defined by BOEM.)

the Ninth Circuit held that "[t]he statute does not forbid 'activating' a premature complaint when there is a proper petition and no action within 60 days." Thus, the Ninth Circuit reversed the district court's dismissal on those grounds. *Solutions for Utils., Inc. v. Cal. PUC*, 596 Fed. Appx. 571, 572 (9th Cir. 2015). The First Circuit's reasoning in *Gadbois* is consistent with the Ninth Circuit's rationale in *Solutions*. It would be a "pointless formality" for the Plaintiffs to refile the complaint now that the 60 days has passed with respect to all notices given. *Third*, those notice provisions are not jurisdictional but are instead claims-processing requirements.[17] The Defendants have not met the high bar to establish either 60-day notice requirement is jurisdictional.

III. No Claims Should Be Dismissed Based Upon the Administrative Waiver Doctrine.

The Defendants argue that Plaintiffs' claims are barred by the administrative waiver doctrine, commonly referred to as issue exhaustion, which "provides that it is inappropriate for courts reviewing agency decisions to consider arguments not raised before the administrative agency involved." *See, Coal. for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 461-62 (6th Cir. 2004) (citing *United States v. L.A. Tucker Truck Lines, Inc*., 344 U.S. 33, 37 (1952)). The rule is "an analogy to the rule that appellate courts will not consider arguments not raised before trial courts." *Sims v. Apfel*, 530 U.S. 103, 108-109 (2000) ("*Sims*"). The Defendants are incorrect for several reasons. *First*, as the Supreme Court stated in *Sims* the requirements of administrative issue exhaustion "are largely creatures of statute," and no statute or regulation required it there. Here, the only administrative exhaustion requirements under the statutes are the 60-day notices required under the ESA and the OCSLA, which Plaintiffs provided. *See*, FAC ¶54. *Second*, as illustrated by Defendants' lack of action in response to the notices given by Plaintiffs, the serving of the notices was futile. *NRDC v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987) (*en banc*), explaining that courts have waived exhaustion where the agency "has had an opportunity to consider the identical issues [presented to the court] . . . but

[17] Unless Congress has "clearly stated" that the statutory limitation is jurisdictional, "courts should treat the restriction as nonjurisdictional in character." *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (internal quotations and citation omitted).

which were raised by other parties," or if the agency's decision indicates that it "had the opportunity to consider the very argument pressed by the petitioner on judicial review." (Internal citations and quotations omitted).

Third, Plaintiffs did submit comments during the review process. The Defendants' attempt to exclude the process that resulted in the FEIS from each agency's approval process (and on which each agency's approvals were based) should be rejected out-of-hand. Each agency was either a lead agency, participating agency or cooperating agency in the EIS process, and each agency received notice of Plaintiffs' comments as well as the comments of many others. Surely the Defendants are not suggesting that no agency other than BOEM based its decision on the FEIS and the process that led to the FEIS.

Fourth, with respect to NEPA, the Supreme Court has held that "the agency bears the primary responsibility to ensure that it complies with NEPA, and an EA's or an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action." *DOT v. Public Citizen*, 541 U.S. 752, 765 (2004). A flaw is "so obvious" that it does not result in waiver "where the agency had independent knowledge of the issues that concerned Plaintiffs." *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006) (citing *Friends of Clearwater v. Dombeck*, 222 F.3d 552, 558-59 (9th Cir. 2000)) (holding plaintiffs did not waive objection by failing to raise it to agency where "the record [was] replete with evidence that the Army recognized the specific shortfall of the []EIS raised by Plaintiffs"). "This is true even if the issue was considered sua sponte by the agency or was raised by someone other than the petitioning party." *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 (9th Cir. 2007) (citing *Portland Gen. Elec. Co. v. Johnson*, 754 F.2d 1475, 1481 (9th Cir. 1985), abrogated on other grounds as recognized by *Clatskanie Peoples Utility Dist. v. Bonneville Power Admin.*, 330 Fed. App'x 637, 638 (9th Cir. 2009)) (holding agency was "fully appraised" of plaintiffs' objections arising under the Northwest Power Act because other parties raised same objections during comment period and thus objections were not waived). That is the case here. The Defendants have relied on

outdated data, have based their specious conclusions on different, smaller turbines, and otherwise deficient analyses that ignore science and economics and received notice of all Plaintiffs' objections. Defendants neither claim nor identify any objection raised by Plaintiffs that they were unaware of through Plaintiffs' comments or another party's comments, which the Defendants must do. The Defendants' motion should be rejected.

IV. No Claims Should Be Dismissed Based Upon Alleged Failure To Identify A Final Agency Action.

Federal Rule of Civil Procedure 8(a)(2) requires that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement "needs only enough detail to provide a defendant with 'fair notice of what the . . . claim is and the grounds upon which it rests.'" *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 12 (1st Cir. 2011) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)) (internal quotation marks omitted). The FAC challenges all of the Defendants' approvals related to the VW and SFW projects, including the approvals given by the FWS Defendants which formed the basis for approvals by other Defendants. The FWS Defendants' approvals include the letter of concurrence dated October 16, 2020, regarding the federally endangered roseate tern and the federally threatened piping plover, two species that habitat on Plaintiff Melone's property, and the biological assessments related to species under the jurisdiction of the FWS Defendants. The FAC also charges the FWS Defendants with the failure to take a hard look at the effects and increased risks to species under the jurisdiction of the FWS Defendants. The FAC also charges the FWS Defendants (Count XVI) with violation of their continuing obligations under section 9 of the ESA. The FWS Defendants have received fair notice of the claims against them. In the case of the Corps related to the SFW project, the Corps has similarly had fair notice that its approvals are challenged by the FAC. The FAC also then details the deficiencies in the Corps' approvals of the SFW project, *see* Counts VI, VII, VIII, IX, X, XI, XII, and XIV which are the same deficiencies the Plaintiffs submitted to the Defendants during the EIS process and are a part of the administrative record.

V. Count IV.

Plaintiffs concede that as written Count IV (which relates to notice provisions of the MMPA) fails to state a claim. Plaintiffs will seek leave to amend Count IV to address the correct notice provisions of 16 U.S.C. §1371(a)(5)(D), which notice provisions were not complied with. Here, Defendants failed to publish a proposed authorization not later than 45 days after receiving an application and failed to request public comment through newspapers of general circulation, and appropriate electronic media and to all locally affected communities for a period of 30 days after publication, which affected communities include the entire range of the NARW.

CONCLUSION

For the reasons stated above, no claim should be dismissed. To the extent the Court dismisses any claim, the Plaintiffs request leave to amend the complaint.

Respectfully submitted,

Dated: March 23, 2022

/s/ Thomas Melone

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Certificate of Service

I HEREBY CERTIFY that on this 23rd day of March 2022, a true and complete copy of the foregoing has been filed with the Clerk of the Court pursuant to the Court's electronic filing procedures, and served on counsel of record via the Court's electronic filing system.

/s/Thomas Melone