XAVIER BECERRA
Attorney General of California
MICHAEL P. CAYABAN
Supervising Deputy Attorney General
MICHAEL S. DORSI, SBN 281865
RYAN R. HOFFMAN, SBN 283297
PHILLIP M. HOOS, SBN 288019
M. ELAINE MECKENSTOCK, SBN 268861
Deputy Attorneys General
1515 Clay Street, 20th Floor
Oakland, CA 94612-1492
Telephone: (510) 879-0299
Fax: (510) 622-2270
E-mail: Elaine.Meckenstock@doj.ca.gov
Attorneys for State Defendants[1]

DELFINO, MADDEN, O'MALLEY, COYLE & KOEWLER LLP
MONICA HANS FOLSOM, SBN 227379
KRISTIN IVANCO, SBN. 294993
500 Capitol Mall, Suite 1550
Sacramento, CA 95814
Telephone: (916) 661-5700
Fax: (916) 661-5701
E-mail: mfolsom@delfinomadden.com
kivanco@delfinomadden.com
Attorneys for WCI, Inc. Defendants[2]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

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

Defendants.

2:19-cv-02142-WBS-EFB

REPLY ON THEIR MOTION TO DISMISS BY WCI, INC. DEFENDANTS AND DEFENDANT BLUMENFELD IN HIS OFFICIAL CAPACITY AS SECRETARY FOR ENVIRONMENTAL PROTECTION

[Fed. Rules of Civ. Proc. 12(b)(1), (b)(6)]

Date:	February 10, 2020
Time:	1:30 PM
Courtroom:	5
Judge:	Honorable William Shubb
Trial Date:	Not Set
Action Filed:	10/23/2019

[1] The State Defendants are State of California; Gavin C. Newsom, in his official capacity as Governor of the State of California; the California Air Resources Board; Mary D. Nichols, in her official capacity as Chair of the California Air Resources Board; and Jared Blumenfeld, in his official capacity as Secretary for Environmental Protection.

[2] The WCI, Inc. Defendants are the Western Climate Initiative, Inc. ("WCI, Inc."), Mary D. Nichols, in her official capacity as Vice Chair and a board member of WCI, Inc., and Jared Blumenfeld, Kip Lipper, and Richard Bloom, in their official capacities as board members of WCI, Inc.

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INTRODUCTION

Plaintiff makes no attempt to show how the administrative and technical services provided by the Western Climate Initiative, Inc. (WCI, Inc.), or any other conduct by the WCI, Inc. Defendants,[3] caused any injury to Plaintiff. Nor does Plaintiff attempt to show how an order directed against the WCI, Inc. Defendants could redress any injury allegedly suffered from the 2017 agreement between California and Quebec or the linkage between their cap-and-trade programs. As a consequence, Plaintiff has failed to satisfy its burden to show either the causation or redressability required to establish standing to sue the WCI, Inc. Defendants. Plaintiff's discussion of its constitutional claims against the WCI, Inc. Defendants, which spans only a page and does not even address the elements of such claims, likewise fails to show that any valid claims can be brought against the WCI, Inc. Defendants.

Rather than concentrating on standing or its constitutional claims, Plaintiff devotes most of its brief to a more peripheral issue: arguing that the WCI, Inc. Defendants should be considered state actors. Plaintiff's state actor arguments are unfounded. But, even assuming, *arguendo*, that Plaintiff's state actor arguments had merit, Plaintiff does not—and cannot—explain how those arguments can satisfy Plaintiff's separate *and threshold* burden to establish the requirements for Article III standing. Plaintiff's state actor arguments also fail to cure the deficiency of its claims against the WCI, Inc. Defendants under the Treaty and Compact Clauses, the foreign affairs preemption doctrine, or the dormant Foreign Commerce Clause.

Plaintiff similarly fails to show it has standing to sue or can state valid claims against the individual WCI, Inc. board members named as Defendants or against Secretary Jared Blumenfeld in his official capacity as Secretary for Environmental Protection.

Plaintiff does not even try to suggest that it can cure any of these defects. Accordingly, all of the WCI, Inc. Defendants and Secretary Blumenfeld in his official capacity as Secretary for Environmental Protection should be dismissed without leave to amend.

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[3] As noted, the WCI, Inc. Defendants are the Western Climate Initiative, Inc. ("WCI, Inc."), Mary D. Nichols, in her official capacity as Vice Chair and a board member of WCI, Inc., and Jared Blumenfeld, Kip Lipper, and Richard Bloom, in their official capacities as board members of WCI, Inc.

ARGUMENT

I. PLAINTIFF LACKS STANDING TO SUE THE WCI, INC. DEFENDANTS

The opening brief showed that Plaintiff lacks standing to sue the WCI, Inc. Defendants because it has not made, and cannot make, the required demonstrations of causation or redressability. Memorandum of Points and Authorities in Support of Motion to Dismiss (Mot.) at 8:8-10:21 (ECF Doc. 25). Plaintiff is unable to rebut either showing.

A. Plaintiff Has Not Established Causation

The WCI, Inc. Defendants established that Plaintiff does not and cannot allege that they "commit any of the alleged constitutional violations that purportedly injure Plaintiff." Mot. at 8:17-19. Plaintiff attributes its alleged injuries to the 2017 agreement between Quebec and California, but the WCI, Inc. Defendants are neither parties nor signatories to the agreement. *Id.* at 8:19-9:3. Similarly, the WCI, Inc. Defendants did not cause any injuries Plaintiff allegedly suffered from the California Air Resources Board's (CARB) amendment of its cap-and-trade regulations to permit the use of Quebec-issued compliance instruments. *Id.* at 9:4-24. Nor did the WCI, Inc. Defendants cause any injuries Plaintiff allegedly suffers from CARB's acceptance of Quebec-issued instruments. *Id.* The WCI, Inc. Defendants only supply administrative and technical support services to CARB, and there is no allegation that these services caused any of Plaintiff's alleged injuries. *Id*. at 9:15-20.

Plaintiff has no credible response. Far from denying that it alleges injuries from California's 2017 agreement with Quebec and the linkage of California's cap-and-trade program with Quebec's, Plaintiff confirms that the primary focus of its claims is the 2017 agreement to which WCI, Inc. is not a party. *E.g.*., MTD Opp. at 2:1-2, 2:11-13, 11:10-12. But Plaintiff does not and cannot assert that the WCI, Inc. Defendants caused California to enter into the 2017 agreement or caused CARB to amend its regulation to accept Quebec-issued instruments.[4] Nor

[4] Plaintiff notes that Defendant Mary Nichols, who is a WCI, Inc. board member, signed the 2017 agreement. MTD Opp. at 5:18-22. The agreement, however, clearly shows that Ms. Nichols did so in her official capacity as Chair of CARB: directly underneath her signature, the agreement describes her as "Chair of the California Air Resources Board." ECF 7-2, at 15. Noting that California law requires CARB's chair to serve on WCI, Inc.'s Board, Plaintiff also asserts that "Ms. Nichols' purported two hats to be a single one that she can turn around," MTD Opp. 6:1-5, 12-13, but it fails to explain this colorful assertion or show its legal significance.

does Plaintiff attempt to explain how the administrative and technical support services provided by WCI, Inc. has caused Plaintiff any injury. Plaintiff alleges that WCI, Inc. "provid[es] administrative and technical services to" jurisdictions such as California and Quebec that contract with WCI, Inc. "to support and facilitate the implementation of their cap-and-trade programs," Am. Compl., ¶ 136, and has been doing so since February 2012, *id.* ¶ 142. Plaintiff, however, does not describe these services in any more detail, much less identify any particular actions taken by WCI, Inc. or its board members that has caused Plaintiff injury.

Plaintiff does assert that "WCI" is the "*source* of its injury," MTD Opp. at 15: 9-11, but, here again, it neither identifies the injury nor explains how the WCI, Inc. Defendants caused that injury. Plaintiff also asserts that "WCI [Inc.] proclaims that it represents the largest carbon market in North America, and the only one developed and managed by governments from two different countries." MTD Opp. at 15:6-8 (internal quotation marks omitted). But Plaintiff fails to explain how a market *managed by governments* could establish that *the WCI, Inc. Defendants* have injured Plaintiff. Plaintiff likewise fails to explain how the existence of a carbon market of any size caused it any injury. As the opening brief showed, cap-and-trade is a market-based emissions-reduction program that allows regulated entities to reduce their compliance costs by buying and selling allowances in carbon market(s). Mot. at 2:17-3:6. Notably absent from Plaintiff's brief (and Amended Complaint) is any suggestion that Plaintiff is harmed by either a decrease in emissions or a reduction in compliance costs.

In addition, contrary to Plaintiff's assertion, WCI, Inc. has *not* proclaimed that it represents the largest carbon market in North America. That assertion is based on WCI, Inc.'s 2018 annual report. MTD Opp. at 15: 6-8. That report, however, states "[t]he *Western Climate Initiative (WCI) partnership* [fn omitted] represents the largest carbon market in North America." Attachment 1 (emphasis added).[5] The report clearly distinguishes the partnership known as

[5] The relevant page is provided as an attachment to this brief for the Court's convenience. The full document is Exhibit E to Defendants' Request for Judicial Notice (ECF 26-1 at 113-126). Despite Plaintiff's apparent objections, MTD Opp. at 14 n.19, the Court may "consider … documents incorporated by reference in the complaint, or matters of judicial notice" on this motion. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). This document is incorporated by reference in Plaintiff's complaint because it is quoted there and because Plaintiff

Western Climate Initiative (Initiative) from WCI, Inc., even using different acronyms for them: WCI and WCI, Inc., respectively. *Id.* In a footnote to the passage partially quoted by Plaintiff, the report explains that the Initiative is a "collaboration among Western U.S. States and Canadian provinces," *id*. at 1 n.1, and in the next paragraph the report identifies "Western Climate Initiative, Inc. (WCI, Inc.)" not as a partnership or collaboration, but as a "non-profit corporation." *Id*. The report could not have more plainly attributed the carbon market to the Initiative or more plainly distinguished that Initiative from WCI, Inc., the non-profit corporate entity that is a Defendant here. Thus, Plaintiff not only fails to explain how it is injured by this carbon market; it also erroneously attributes this market to WCI, Inc.

Plaintiff also asserts that California, Quebec, and WCI, Inc. have "interlocking directorates" and a "closely shared history," MTD Opp. at 15:3-6, and it asserts that "an outsider" would be unable to tell "exactly who is doing what" in the "WCI carbon market." *Id.* at 16:3-7. But Plaintiff fails to explain how any of this demonstrates that the WCI, Inc. Defendants have caused Plaintiff any injury. Indeed, Plaintiff does not even allege that *it* is unable to understand what WCI, Inc. as opposed to California and Quebec does. Nor could Plaintiff do so, given that the responsibilities and powers of California officials and agencies are provided by California statutes, while the responsibilities of and powers of the WCI, Inc. Defendants are established by that entity's By-Laws and other corporate documents. Plaintiff cannot credibly claim to be confused by the difference.[6]

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relies heavily on that allegation in its arguments. *Id.* (materials "may be incorporated by reference into a complaint if … the document forms the basis of the plaintiff's claim"). This annual report is also judicially noticeable. ECF No. 26-1 at 3. Finally, where, as here, "the challenger disputes the truth of the allegations" for standing, that is a factual attack, and "the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment" and "need not presume the truthfulness of the plaintiff's allegations." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

[6] Nor is there anything remarkable about the individual Defendants wearing multiple "hats," as Plaintiff describes it. For example, when Congress created the National Park Foundation in 1967, it provided that "[t]he Secretary of the Interior shall be the Chairman of the Board and the Director of the National Park Service shall be the Secretary of the Board." Pub. L. 90-209, § 2, 81 Stat. 656 (1967) (Attachment 2); 54 U.S.C. § 101112(a) (repealing prior statute but preserving roles of Secretary and the Director of the Interior). Thus, much like the individual Defendants here, both the Secretary of the Interior and the Director of the National Park Service wear two "hats"—as federal officials and as board members of "a charitable and nonprofit corporation" created by the government. 54 U.S.C. § 101111.

B. *United States Steel* Does Not Support Plaintiff

Unable to point to any allegations it has made, or could make, that the WCI, Inc. Defendants caused Plaintiff's alleged injuries, Plaintiff invokes the Supreme Court's decision in *United States Steel Corporation v. Multistate Tax Commission*, 434 U.S. 452 (1978) in an effort to support standing. MTD Opp. at 15:12-16:10. Plaintiff's reliance on this decision is surprising because the *United States Steel* Court rejected a Compact Clause claim much like the one Plaintiff advances here. The Court did so because the agreement in that case "did not purport to authorize the member States to exercise any powers they could not exercise in its absence," and because the agreement provided the right "to withdraw at any time." *U.S. Steel*, 434 U.S. at 473. Both of these factors are present here.

Moreover, there was no question of standing addressed or even raised in *United States Steel*, so the case does nothing to support Plaintiff's standing. As Plaintiff points out, the Multistate Tax Commission, an organization formed by the agreement between States, was a defendant in *United States Steel*. However, in sharp contrast to WCI, Inc., the Multistate Tax Commission did not merely provide technical and administrative services. To the contrary, in addition to formulating and proposing regulations, the Commission was authorized by member States to audit taxpayers on the States' behalf. *Id.* at 457. The plaintiffs in *United States Steel* alleged that they were "threatened with audits by the Commission." *Id.* at 458. Thus, the Commission's own conduct caused the plaintiffs' alleged injuries. In contrast, here, the complaint barely describes the services WCI, Inc. provides, describes *no* conduct by WCI, Inc. directors or board members, and, thus, fails to tie any purported injury to any conduct by these WCI, Inc. Defendants. Consequently, far from showing that Plaintiff has standing, *United States Steel* underscores Plaintiff's failure to allege causation here.

C. Plaintiff Has Not Established Redressability

In addition to demonstrating that Plaintiff failed to establish causation, the opening brief demonstrated that Plaintiff has failed to establish redressability. As the opening brief explained,

the WCI, Inc. Defendants do not exercise control over CARB,[7] and the services provided by WCI, Inc. are not unique and could be supplied by another vendor (or by CARB itself). Thus, an order directed at these WCI, Inc. Defendants could not force CARB to withdraw from its agreement with Quebec, prevent CARB from accepting Quebec-issued compliance instruments, or otherwise redress any injury alleged by Plaintiff. Mot. at 9:25-10:5. Again, Plaintiff has no response. Plaintiff makes no attempt to explain how an order directed at the WCI, Inc. Defendants could redress any of its alleged injuries. Instead, without identifying what the injury is, much less how it would be redressed, Plaintiff simply asserts that the WCI, Inc. Defendants are "a link in the chain that causes its injury" and relief against them would redress that injury. MTD Opp. at 16:8-10. Such conclusory assertions cannot satisfy Plaintiff's burden of proving redressability. *See, e.g.*, *Perez v. Nidek Co., Ltd.*, 711 F.3d 1109, 1113 (9th Cir. 2013).

Thus, the WCI, Inc. Defendants should be dismissed for lack of standing under Federal Rule of Civil Procedure 12(b)(1).

II. PLAINTIFF HAS FAILED TO STATE A CLAIM AGAINST THE WCI, INC. DEFENDANTS

The single page that Plaintiff devotes to arguing it has stated valid claims against the WCI, Inc. Defendants is even more cursory and inadequate. MTD Opp. at 16:11-17:15. The WCI, Inc. Defendants showed in their opening brief that Plaintiff has not stated a cause of action against them under either the Treaty Clause or the Compact Clause because 1) Plaintiff's claims under those Clauses are based on the 2017 agreement between California and Quebec, 2) none of the WCI, Inc. Defendants either signed the agreement or caused California to enter into it, and 3) the technical and administrative support services provided by WCI, Inc. are no basis for finding liability under either Clause. Mot. at 11:2-12:16. The opening brief also showed that Plaintiff had failed to allege how the WCI, Inc. Defendants' actions interfered with United States foreign policy or discriminated against foreign commerce such that it could be subject to foreign affairs preemption or violate the dormant Foreign Commerce Clause. *Id*. at 13:3-14:22. In response,

[7] Although Mary Nichols is both the Chair of CARB and a board member and Vice Chair of WCI, Inc., this does not allow WCI, Inc. to control CARB. As discussed in the opening brief, CARB's authority, the composition of its governing Board, and the charge to those Board members are established by the California Legislature. Mot. at 21:18-22:13.

Plaintiff makes no attempt to argue to the contrary—no attempt to explain how WCI, Inc. Defendants' actions violated the Constitution. While it asserts that the WCI, Inc. Defendants "served as a tool to violate the Constitution," Plaintiff does not explain how they do this. MTD Opp. at 16:16-17:1.[8] Plaintiff fails to allege any facts that show how providing technical and administrative support services violates the Treaty Clause, the Compact Clause, the foreign affairs preemption doctrine, or the dormant Foreign Commerce Clause. Plaintiff plainly has not pleaded any allegations giving the WCI, Inc. Defendants "fair notice of what the [claim against them] is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks omitted).

Thus, if the WCI, Inc. Defendants are not dismissed for lack of standing under Federal Rule of Civil Procedure 12(b)(1), the claims against them should be dismissed under Federal Rule of Civil Procedure 12(b)(6).

III. PLAINTIFF'S STATE ACTOR ARGUMENTS DO NOT SAVE ITS CLAIMS

Unable to explain how the WCI, Inc. Defendants' conduct either injured Plaintiff or violated the Constitution, Plaintiff focuses on its claim that the WCI, Inc. Defendants are state actors and repeatedly asserts that Defendants' arguments "rely on the unsustainable assumption that WCI is not a state actor." MTD Opp. at 4:3-4; *see also id*. at 14: 7-10 (asserting that Defendants' standing arguments "depend[] entire on the misplaced notion that they are something other than actors for the state's execution of an unconstitutional agreement."); *id*. at 16:12-14 (the 12(b)(6) motion "depends entirely on the misplaced assumption that Movants are not state actors").[9] But the standing and state-actor inquiries are distinct, and the Article III standing

[8] Indeed, Plaintiff only mentions the foreign affairs preemption doctrine and the dormant Foreign Commerce Clause in passing, and the only thing that Plaintiff says about the Treaty and Compact Clauses is that they "are not such trivial components of the Constitution as to be evaded by clever artifices." MTD Opp. at 17:3-15. That is an odd statement, given Plaintiff's acknowledgment that, with the exception of Secretary Blumenfeld, the State Defendants have not moved to dismiss themselves and are hardly "evad[ing]" anything. MTD Opp. at 4:8-11.

[9] Plaintiff asserts in the introduction to its brief that "the *State's* lawyers are also *WCI's* lawyers in this case—having put their names to the instant motion to dismiss." MTD Opp. at 1:11-12. That is false. Defendants have moved to dismiss both the WCI, Inc. Defendants and Defendant Blumenfeld in his official capacity as Secretary for Environmental Protection, and both the cover of the motion and the signature page make clear that the law firm of Delfino, Madden, O'Malley, Coyle & Koewler LLP represents the WCI, Inc. Defendants while the

inquiry, which is jurisdictional, necessarily *precedes* the state-actor inquiry. *See, e.g, Ezra v. Leifer*, No. CV 18-871-MWF (KS), 2018 WL 4191420, at *3 (C.D. Cal. Aug. 30, 2018) (analyzing standing before state actor inquiry); *see also Bruce v. United States*, 759 F.2d 755, 757 (9th Cir. 1985) ("Standing is a threshold jurisdictional question in every federal case."). Thus, Plaintiff must establish standing before state action even becomes relevant, which, as discussed above, Plaintiff has failed to do.

Further, contrary to Plaintiff's suggestion, the WCI, Inc. Defendants did not rely on any assumption about state actor status in arguing that Plaintiff failed to state any valid constitutional claim against them. Quite the opposite: Defendants expressly argued that Plaintiff's state-actor assertions "*cannot save* Plaintiffs' claims against the WCI, Inc. Defendants." Mot. at 15:4-6 (emphasis added).

In addition to failing to show that WCI, Inc.'s state actor status can overcome Plaintiff's failure to establish standing and to state a claim, Plaintiff fails to show that WCI, Inc. is, in fact, a state actor. Defendants argued that Plaintiff has no cognizable theory under which they could be state actors with respect to conduct in which they did not participate, *id*. at 15:5-7, that it is unclear how a private party can be a state actor with the respect to the Treaty and Compact Clauses, foreign affairs preemption, or the dormant Foreign Commerce Clause, *id*. at 15:9-13, and that it is unclear how the state actor inquiry applies where, as here, a complaint alleges that actual state officials and agencies engaged in the offending conduct, *id*. at 15 n.12. Far from addressing these issues, Plaintiff simply ignores them.

Finally, while Plaintiff correctly acknowledges that there are several recognized state-actor tests, it fails to identify any such test that it can satisfy. Instead, Plaintiff argues that WCI, Inc. should be considered a state actor because there is a "close nexus between the State and the *challenged action* such that seemingly private behavior may be fairly treated as that of the State itself." MTD Opp. at 10:15-16 (emphasis in original; quotation omitted). Plaintiff, however, never identifies what action or "seemingly private behavior" of the WCI, Inc. Defendants it is

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California Attorney General represents the State Defendants, including Secretary Blumenfeld. Mot. at 1:1-8, 23:1-3.

challenging, much less shows a nexus between that action and the State. To the contrary, in fact, Plaintiff alleges that CARB and the Governor of California have taken the actions Plaintiff challenges—signing an agreement with Quebec and deciding to accept Quebec-issued compliance instruments. Amend. Compl., ¶¶ 12, 57, 85. Those allegations may establish a nexus to the State, but they do not connect the WCI, Inc. Defendants to the challenged actions.

Plaintiff also repeats the Supreme Court's observation that "examples may be the best teachers" when it comes to state actor inquiries. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001); MTD Opp. at 12:14-15. But Plaintiff's examples do not support it. In both *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), and *Brentwood Academy*, the corporations held to be state actors were controlled, in effect, by a single sovereign. In *Lebron*, the federal government "retain[ed] for itself permanent authority to appoint a majority of the directors." 513 U.S. at 400. And in *Brentwood Academy*, the Court found state action because the organization in question was comprised of member schools "within a single State." 531 U.S. at 298. In contrast here, no single sovereign controls the board of WCI, Inc. because each participating jurisdiction appoints an equal number of members. Mot. at 16:5-17. Moreover, the other facts of this case bear no resemblance to *Brentwood Academy* in which the alleged state actor "produce[d] rules and regulate[d] competition," among other traditional public functions, 531 U.S. at 299, or to *Lebron*, where the state actor (Amtrak) was governed by extremely specific requirements from Congress, including direction to "[e]liminat[e] … the deficit associated with food and beverage services by September 30, 1982," and to implement "schedules which provide a systemwide average speed of at least 60 miles per hour," 513 U.S. at 384 (internal quotation marks omitted).

Despite relying on cases where a single sovereign controlled the state actor, Plaintiff asserts that "the relevant question is not whether California *alone* controls WCI [Inc.], but instead whether the *parties to the agreement* control WCI [Inc.]." MTD Opp. at 11:5-7. Plaintiff provides no authority for what appears to be a kind of multi-jurisdictional conspiracy theory of state action. Plaintiff also fails to point to any factual allegations that could support such a theory beyond its conclusory assertion that California, Quebec, and WCI, Inc. have "interlocking

directorates." *Id*. at 10:20; *see also id*. at 5:17-7:18. But Plaintiff never explains what state or provincial board of directors interlocks with WCI, Inc.'s board, much less how that concept, which appears to be drawn from corporate law, is significant to state actor analysis. Nor does Plaintiff attempt to reconcile its implicit state actor conspiracy theory with the facts or holdings of its own cases or with the facts and holding of *National Colleges Athletic Association v. Tarkanian*, in which the Supreme Court rejected a state actor claim regarding an organization comprised largely of members appointed because of their positions as government officials. 488 U.S. 179, 193-199 (1988). Indeed, Plaintiff's only response to the opening brief's discussion of *Tarkanian* is that *Tarkanian* involved a different constitutional claim than Plaintiff brings here. MTD Opp. at 11:21-23. Notably, the same is true of the state action cases on which Plaintiff relies, and Plaintiff neither explains nor provides support for the proposition that the nature of the underlying claim is an important distinction in state actor cases. Continuing its quest for supportive precedent, Plaintiff once again points to *United States Steel*. But there is no mention at all of the state actor doctrine in the Supreme Court's decision in that case. This is no doubt at least in part due to the fact that in the lower court the defendants argued that the Commission was *an actual state agency* in an attempt to establish Eleventh Amendment immunity. *U. S. Steel Corp. v. Multistate Tax Comm'n*, 367 F. Supp. 107, 112 (S.D.N.Y. 1973).

Finally, Plaintiff asserts that WCI, Inc. is a state actor because it performs a traditional and exclusive governmental function "of regulating private conduct." MTD Opp. at 12:1-6. But Plaintiff can point to no allegations supporting this assertion because, again, Plaintiff alleges only that WCI, Inc. provides technical and administrative support services. As demonstrated in the opening brief, these services—developing and maintaining a computer system that tracks instrument holdings and conducting auctions—are not traditional and exclusive governmental functions. Mot. at 17:1-10. Plaintiff does not dispute this point and, indeed, never mentions those services in its brief.

Thus, while dedicating the bulk of its opposition to arguing that the WCI, Inc. Defendants are state actors, Plaintiff fails to show that this issue is material given the other defects in its

claims and fails to identify either a legal theory or allegations in its Amended Complaint supporting its state actor argument.

IV. THE INDIVIDUAL WCI, INC. BOARD MEMBERS SHOULD BE DISMISSED

Even if Plaintiff somehow could establish standing to sue WCI, Inc., the entity, and could also state a claim against that entity, Plaintiff could not establish standing to sue, or state a valid claim against, the individual WCI, Inc. board members because there is not a single allegation in the complaint describing what these WCI, Inc. board members do or any actions they have taken, *see* Mot. at 18:10-24, and there is no basis for imposing personal liability on such board members for a corporation's conduct merely because they hold such offices, *id*. at 19:8-18. Other than noting that several of the individual officers wear multiple "hats," MTD Opp. at 6:10-6:24, a circumstance that is neither unusual nor conflates the distinctions between roles, *see, supra,* at 4 n. 6, Plaintiff offers no response to these arguments. Plaintiff, thus, fails to establish that it has standing to sue or can state a valid claim against any of the individual WCI, Inc. Defendants.

The WCI, Inc. board members should be dismissed because the Amended Complaint fails to connect these board members in their WCI, Inc. capacities as such to any allegedly wrongful acts, or, indeed, offer any clue why it names non-voting board members as defendants. As to the voting board members, Plaintiff ignores fundamental principles of corporate law. Plaintiff sues the WCI, Inc. board members in their official capacities as board members and, in the case of Ms. Nichols, an officer of WCI, Inc. (Amend. Compl., ¶¶ 13, 16-18)—a capacity separate and distinct from the political offices each of them hold in relation to the State of California. The voting board members are also only two of six directors—an insufficient number to control WCI, Inc..[10] That Ms. Nichols signed the 2017 agreement between California and Quebec as Chair of CARB

[10] Plaintiff improperly asserts that the WCI, Inc. Defendants cannot rely on its bylaws to support these propositions and the Motion to Dismiss (*see, e.g.*, MTD Opp. at 14 fn. 19), ignoring entirely that the Amended Complaint references them (Amend. Compl., §15) and they are judicially noticeable. Further, while the Court must generally "accept the plaintiffs' allegations as true and construe them in the light most favorable to plaintiffs," the Court need not "accept as true allegations that contradict matters properly subject to judicial notice" or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Sciences Securities Litigation*, 536 F.3d. 1049, 1055 (9th Cir. 2008) (internal quotations omitted).

is a red herring and further undermines Plaintiff's position as to the WCI, Inc. board members when Delaware law, under which law WCI, Inc. was organized, is applied.

The business and affairs of every corporation organized under the laws of Delaware shall be managed by or under the direction of a board of directors in accordance with its bylaws. Del. Code tit. 8, § 141 (2020).[11] Directors of Delaware corporations are fiduciaries of the corporation on which they serve. *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1172 (Del. 2000). As fiduciaries, the directors of a corporation owe duties of due care, good faith and loyalty to the corporation. *Id*. Public policy demands of corporate directors an undivided loyalty to the corporation to the end that there shall be no conflict between duty and self-interest. *Italo-Petroleum Corp. of America v. Hannigan*, 40 Del. 534, 549-550 (1940); *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939).

These principles are deeply rooted in corporations law and the duties owed regardless of how the director comes to serve in his or her position:

> Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. 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 human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interest of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers.

Guth, 5 A.2d at 510. Indeed, directors are not permitted to vote on matters in which they are interested. Del. Code tit. 8, § 144. Under Delaware law, "[i]ndependence means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences." *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984) (overruled on other grounds by *Brehm v. Eisner*, 746 A.2d 244, 256 (2000)). Specifically, a director must refrain from voting to approve a contract or transaction between a corporation and one or more of its directors or officers, or between a corporation and any other corporation, partnership,

[11] The Delaware General Corporation Code applies to non-profits incorporated under Delaware law, with limited exceptions not applicable here. Del. Code tit. 8, § 114 (2020).

association, or other organization in which one or more of its directors or officers, are directors or officers, or have a financial interest. Del. Code tit. 8, § 144.

Thus, in this case, based on the allegations of the Amended Complaint and Delaware law, the WCI, Inc. board members could not take actions to approve or terminate any of the agreements at issue in this litigation even if they controlled WCI, Inc. as Plaintiff asserts. As such, they are not proper or necessary parties to this litigation.

Finally, Plaintiff's allegations of the WCI, Inc. board members' involvement in the alleged constitutional violations in their official capacities as such are too conclusory to state a claim. See, e.g., *Twombly*, 550 U.S. at 564-65; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

All of the individual WCI, Inc. board members should be dismissed without leave to amend under either Rule 12(b)(1), for lack of standing, or 12(b)(6), for failure to state a claim.

V. JARED BLUMENFELD SHOULD BE DISMISSED IN HIS OFFICIAL CAPACITY AS SECRETARY FOR ENVIRONMENTAL PROTECTION

Plaintiff also has failed to establish that it has standing to sue or can state a valid claim against Jared Blumenfeld in his official capacity as Secretary for Environmental Protection. The opening brief showed that Plaintiff has not alleged that Secretary Blumenfeld is a party to any agreement challenged by Plaintiff or that he adopted, implements, or enforces any California law to which Plaintiff objects. Mot. at 20:11-16. Indeed, the Amended Complaint mentions the Secretary only twice and "contains no factual allegations establishing Plaintiff's standing to bring claims" against him. Mot. at 20:9-11, 16-17. Unable to deny this, Plaintiff simply notes several statutory provisions under which Secretary Blumenfeld oversees CARB and is responsible to the Governor for the operations of the departments, offices, and units within his agency. MTD Opp. at 17:16-18:5. However, as already explained, Mot. at 22:18-22:5, these provisions offer no grounds for suing the Secretary because they only allow him to hold department, office, or other unit heads "responsible for management control over . . . program performance of [their] department[s], office[s] or other unit[s]," Cal. Gov. Code § 12800(b), and California law expressly delegates to CARB, not the Secretary, authority to adopt and implement the cap-and-trade program. Mot. at 21:6-17 (citing Cal. Health & Safety Code §§ 38505(l), 38560,

38562)(c)(2)). Moreover, Plaintiff makes no attempt to explain how Secretary Blumenfeld may be sued for the conduct of a program entrusted to and under the control of a board under his general supervision. Plaintiff's silence on these issues is fatal. *Golden Gate Transactional Independent Service, Inc. v. California*, 2019 WL 4222452, at *7 (C.D. Cal. May 1, 2019) (dismissing claim against defendant to whom the complaint referred "only once to describe his occupation"). Plaintiff has likewise failed to state a valid claim for relief. *See Pryer v. Character Judy*, No. CIVS09-2895, 2010 WL 1660242, at *2 (E.D. Cal. Apr. 23, 2010) (dismissing defendants for failure to state a claim against them); *see also Iqbal*, 556 U.S. at 678 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). Because Plaintiff has shown no ability to rehabilitate the Amended Complaint, this Court should dismiss Secretary Blumenfeld without leave to amend. *Schmier v. U.S. Appeals for Ninth Circuit*, 279 F.3d 817, 824-825 (2002).

VI. PLAINTIFF'S CLAIMS SHOULD BE DISMISSED WITHOUT LEAVE TO AMEND

Because Plaintiff has not suggested that it can cure any of the fatal defects in either standing or the merits of their claims against the WCI, Inc. Defendants and Defendant Blumenfeld, in his official capacity as Secretary for Environmental Protection, these Defendants should be dismissed without leave to amend.

CONCLUSION

For the reasons discussed above and in the opening brief, the following Defendants respectfully request that this Court dismiss them without leave to amend: Western Climate Initiative, Inc., Kip Lipper, Richard Bloom, Jared Blumenfeld (in all capacities), and Mary D. Nichols, in her official capacity as Vice Chair and a board member of the Western Climate Initiative, Inc.

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Dated: February 3, 2020

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
MICHAEL P. CAYABAN
Supervising Deputy Attorney General

/s/ M. Elaine Meckenstock
M. ELAINE MECKENSTOCK
Deputy Attorney General
Attorneys for State Defendants

DELFINO, MADDEN, O'MALLEY, COYLE & KOEWLER LLP

/s/ Monica Hans Folsom (as authorized on February 3, 2020)
MONICA HANS FOLSOM
Attorneys for WCI, Inc. Defendants

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Attachment 1

(Excerpt from document filed as ECF 26-1)

2018 ACTIVITIES AND ACCOMPLISHMENTS

1. INTRODUCTION

The Western Climate Initiative (WCI) partnership[1] represents the largest carbon market in North America, and the only one developed and managed by governments from two different countries. At the end of 2018, the WCI carbon market was one of the world's largest existing carbon market. The WCI partnership covers a population of nearly 50 million people and about 3 trillion USD / 4 trillion CAD in gross domestic product (GDP).

Western Climate Initiative, Inc. (WCI, Inc.) is a non-profit corporation formed in 2011 to support the implementation of state and provincial greenhouse gas (GHG) emissions trading programs. At the end of 2018, California, Québec and Nova Scotia were participants in WCI, Inc., building on their common, continuous and collaborative efforts to tackle climate change and reduce GHG emissions from multiple sources in the most cost-effective way possible. The administrative support provided by WCI, Inc. can be expanded to support jurisdictions that join in the future. Each Participating Jurisdiction specifies its regulations and administrative requirements, and WCI, Inc. provides administrative support that meets these specifications in alignment with the various needs of the Partnership.

Most of the administrative support provided by WCI, Inc. is highly technical and has been developed through the use of specialized contractors:

- The development and administration of the Compliance Instrument Tracking System Service (CITSS), which serves as a single registry for all Participating Jurisdictions;
- The development and administration of the GHG allowance auction and reserve sale platform, used by jurisdictions to auction emission allowances under their Cap-and-Trade programs and to conduct reserve sales;
- Financial administrative services for auctions and reserve sales, which includes evaluation of bid guarantees and financial settlement of accounts (transferring the payments from the auction and reserve sale purchasers to the sellers); and
- The performance of analyses by an independent market monitor to support market oversight performed by each jurisdiction.

The activities and accomplishments of WCI, Inc. in 2018 are divided into three categories: Cap-and-Trade Services, Personnel and Direct Operations, and Governance.

[1] A collaboration among Western U.S. states and Canadian provinces to tackle climate change at a regional level. The partnership developed the 2008 Design Recommendations for the WCI Regional Cap and Trade Program and the 2010 Design for the WCI Regional Program. For more details, see the WCI website.

Attachment 2

(Provided pursuant to Local Rule 133(i)(3)(i))

Public Law 90-209

December 18, 1967
[S. 814]

AN ACT

To establish the National Park Foundation.

National Park Foundation. Establishment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to encourage private gifts of real and personal property or any income therefrom or other interest therein for the benefit of, or in connection with, the National Park Service, its activities, or its services, and thereby to further the conservation of natural, scenic, historic, scientific, educational, inspirational, or recreational resources for future generations of Americans, there is hereby established a charitable and nonprofit corporation to be known as the National Park Foundation to accept and administer such gifts.

Membership.

SEC. 2. The National Park Foundation shall consist of a Board having as members the Secretary of the Interior, the Director of the National Park Service, ex officio, and no less than six private citizens of the United States appointed by the Secretary of the Interior whose initial terms shall be staggered to assure continuity of administration. Thereafter, the term shall be six years, unless a successor is chosen to fill a vacancy occurring prior to the expiration of the term for which his predecessor was chosen, in which event the successor shall be chosen only for the remainder of that term. The Secretary of the Interior shall be the Chairman of the Board and the Director of the National Park Service shall be the Secretary of the Board. Membership on the Board shall not be deemed to be an office within the meaning of the statutes of the United States. A majority of the members of the Board serving at any one time shall constitute a quorum for the transaction of business, and the Foundation shall have an official seal, which shall be judicially noticed. The Board shall meet at the call of the Chairman and there shall be at least one meeting each year.

Travel expenses, reimbursement.

No compensation shall be paid to the members of the Board for their services as members, but they shall be reimbursed for actual and necessary traveling and subsistence expenses incurred by them in the performance of their duties as such members out of National Park Foundation funds available to the Board for such purposes. The Foundation shall succeed to all right, title, and interest of the National Park Trust Fund Board established in any property or funds, including the National Park Trust Fund, subject to the terms and conditions thereof. The National Park Trust Fund is hereby abolished, and the Act of July 10, 1935 (49 Stat. 477; 16 U.S.C. 19 et seq.), as amended, is hereby repealed.

Repeal.

Gifts, bequests, etc., acceptance.

SEC. 3. The Foundation is authorized to accept, receive, solicit, hold, administer, and use any gifts, devises, or bequests, either absolutely or in trust of real or personal property or any income therefrom or other interest therein for the benefit of or in connection with, the National Park Service, its activities, or its services: *Provided*, That the Foundation may not accept any such gift, devise, or bequest which entails any expenditure other than from the resources of the Foundation. An interest in the real property includes, among other things, easements or other rights for preservation, conservation, protection, or enhancement by and for the public of natural, scenic, historic, scientific, educational, inspirational, or recreational resources. A gift, devise, or bequest may be accepted by the Foundation even though it is encumbered, restricted, or subject to beneficial interests of private persons if any current or future interest therein is for the benefit of the National Park Service, its activities, or its services.

Restriction.

Property or income; sale, investment, etc.

SEC. 4. Except as otherwise required by the instrument of transfer, the Foundation may sell, lease, invest, reinvest, retain, or otherwise

dispose of or deal with any property or income thereof as the Board may from time to time determine. The Foundation shall not engage in any business, nor shall the Foundation make any investment that may not lawfully be made by a trust company in the District of Columbia, except that the Foundation may make any investment authorized by the instrument of transfer, and may retain any property accepted by the Foundation. The Foundation may utilize the services and facilities of the Department of the Interior and the Department of Justice, and such services and facilities may be made available on request to the extent practicable without reimbursement therefor.

SEC. 5. The Foundation shall have perpetual succession, with all the usual powers and obligations of a corporation acting as a trustee, including the power to sue and to be sued in its own name, but the members of the Board shall not be personally liable, except for malfeasance.

Contract authority.

SEC. 6. The Foundation shall have the power to enter into contracts, to execute instruments, and generally to do any and all lawful acts necessary or appropriate to its purposes.

SEC. 7. In carrying out the provisions of this Act, the Board may adopt bylaws, rules, and regulations necessary for the administration of its functions and contract for any necessary services.

Tax exemptions.

SEC. 8. The Foundation and any income or property received or owned by it, and all transactions relating to such income or property, shall be exempt from all Federal, State, and local taxation with respect thereto. The Foundation may, however, in the discretion of its directors, contribute toward the costs of local government in amounts not in excess of those which it would be obligated to pay such government if it were not exempt from taxation by virtue of the foregoing or by virtue of its being a charitable and nonprofit corporation and may agree so to contribute with respect to property transferred to it and the income derived therefrom if such agreement is a condition of the transfer. Contributions, gifts, and other transfers made to or for the use of the Foundation shall be regarded as contributions, gifts, or transfers to or for the use of the United States.

SEC. 9. The United States shall not be liable for any debts, defaults, acts, or omissions of the Foundation.

Report to Congress.

SEC. 10. The Foundation shall, as soon as practicable after the end of each fiscal year, transmit to Congress an annual report of its proceedings and activities, including a full and complete statement of its receipts, expenditures, and investments.

Approved December 18, 1967.

Public Law 90-210

AN ACT

To amend the Food and Agriculture Act of 1965.

December 18, 1967
[S. 2126]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 602(a) of the Food and Agriculture Act of 1965 is amended by adding at the end thereof the following new sentence: "The foregoing provision shall not prevent a producer from placing a farm in the program if the farm was acquired by the producer to replace an eligible farm from which he was displaced because of its acquisition by any Federal, State, or other agency having the right of eminent domain."

Food and Agriculture Act of 1965, amendment.
79 Stat. 1206.
7 USC 1838.

Approved December 18, 1967.