

MAYOR AND CITY COUNCIL  
OF BALTIMORE

Plaintiff,

v.

BP P.L.C., *et al.*

Defendants.

\* IN THE  
\* CIRCUIT COURT  
\* FOR BALTIMORE CITY  
\* Case No. 24-C-18-004219

RECEIVED  
CIRCUIT COURT FOR  
BALTIMORE CITY  
2020 FEB -7 P 3:14  
CIVIL DIVISION

\* \* \* \* \*

**DEFENDANTS' MOTION TO DISMISS  
FOR FAILURE TO STATE A CLAIM UPON WHICH  
RELIEF CAN BE GRANTED AND REQUEST FOR HEARING**

Defendants Chevron Corporation (#7), Chevron U.S.A. Inc. (#8), BP Products North America Inc. (#3), BP America, Inc. (#2), BP p.l.c. (#1), Exxon Mobil Corporation (#9), ExxonMobil Oil Corporation (#10), Shell Oil Company (#12), Royal Dutch Shell, plc (#11), CITGO Petroleum Corporation (#13), ConocoPhillips (#14), ConocoPhillips Company (#15), Phillips 66 (#17), Phillips 66 Company (#18), Marathon Petroleum Corp. (#21), Speedway LLC (#22), Hess Corp. (#23), Marathon Oil Corporation (#20), Marathon Oil Company (#19), Crown Central LLC (#5), Crown Central New Holdings LLC (#6), CNX Resources Corporation (#24), CONSOL Energy Inc. (#25), and CONSOL Marine Terminals LLC (#26), by their undersigned attorneys and pursuant to Maryland Rule 2-322(b)(2), collectively move this Court to dismiss Plaintiff's Complaint with prejudice for failure to state a claim upon which relief can be granted.<sup>1</sup> The grounds and authorities in support of this Motion are set forth more fully in the accompanying Memorandum of Law. A proposed Order is attached.

<sup>1</sup> Several Defendants are contemporaneously filing motions to dismiss on the grounds that they are not subject to personal jurisdiction in Maryland. Defendants submit this motion subject to, and without waiver of, any jurisdictional objections.

## **REQUEST FOR HEARING**

Pursuant to Maryland Rule 2-311(f), the moving Defendants respectfully request a hearing on all issues raised in this Motion and the accompanying Memorandum of Law.

Dated: February 7, 2020

Respectfully submitted,

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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS  
FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED<sup>1</sup>**

Defendants, by their undersigned attorneys and pursuant to Maryland Rule 2-322(b)(2), file this Memorandum of Law in Support of their Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted. For the reasons set forth below, this Court should dismiss all claims against Defendants with prejudice.

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<sup>1</sup> Several Defendants are contemporaneously filing motions to dismiss on the grounds that they are not subject to personal jurisdiction in Maryland. Defendants submit this motion subject to, and without waiver of, any jurisdictional objections.

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## I. INTRODUCTION

The Mayor and City Council of Baltimore (“Plaintiff” or “the City”) seek to hold approximately two dozen energy companies liable for the claimed effects of climate change in Baltimore that have allegedly resulted from the worldwide accumulation of greenhouse gas emissions in the atmosphere for over a century. Plaintiff’s claims fail under both state and federal law.

Defendants have lawfully produced and sold fossil fuels for decades.<sup>2</sup> Those fossil fuels have enabled the industrialization of the world, driven the global economy, raised and sustained standards of living, and are vital to national security. They keep the lights on, power transportation, heat and cool countless homes and buildings, and support innumerable products that surround us in our everyday lives. Maryland law recognizes that the production, distribution, and sale of fossil fuels “vitally affect the economy of the State, and its public interest, welfare, and transportation,” Md. Code Ann., Com. Law § 11-302, and are “important to the economic well-being of the State and the nation.” Md. Code Ann., Envir. § 14-101; *see also* Md. Code Ann., Envir. § 14-122. Despite the importance of fossil fuels to global economic health and welfare, and despite significant consumption and combustion of fossil fuels worldwide, including by the City of Baltimore, Plaintiff asks this Court to regulate *global* production and distribution of fossil fuels by holding this select group of Defendants liable under *Maryland law*.

If successful, Plaintiff’s claims would fundamentally alter U.S. energy and environmental policy, foreign affairs, and national security. The federal government has been engaged in efforts to address climate change on both national and international levels for decades. Energy

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<sup>2</sup> This joint motion addresses the range of allegations made against the signatory Defendants. Individual Defendants may have defenses in addition to those argued here; joinder in this motion does not waive any such defense.

independence has been a tenet of national security policy for even longer. For these and other reasons, courts have repeatedly rejected similar attempts to create a climate change tort, including two federal district courts that dismissed virtually identical suits brought by New York City, San Francisco, and Oakland. Plaintiff's suit is similarly defective and should be dismissed under both Maryland and federal law.

As a preliminary matter, Plaintiff's sweeping claims fail under basic principles of Maryland tort law.

**Plaintiff cannot state a claim for nuisance.** Nuisance liability cannot be predicated on Defendants' alleged "control[] [of] every step of the fossil fuel product supply chain," Compl. ¶ 221(a), because these commercial activities are lawful, and indeed are promoted and encouraged by multiple federal and state statutes. *See* Restatement (Second) of Torts § 821B, cmt. f ("[C]onduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability."). Nor can Plaintiff state a nuisance claim by alleging that Defendants engaged in deceptive marketing and promotion of fossil fuels by attempting to "cast doubt" on climate change science. Defendants dispute these allegations, but even if accepted as true for purposes of this motion, they do not support a nuisance claim. Nor has Plaintiff alleged how that "deception" affected global demand for fossil fuels or the volume of global greenhouse gas emissions. Plaintiff's continued use of fossil fuels belies its own theory of causation, as Plaintiff acknowledges that the risks of climate change have been well-recognized at the highest levels of the U.S. Government and internationally since at least as early as 1965, and yet demand for fossil fuels has increased since that time. Compl. ¶ 103. Plaintiff's unprecedented climate change-based nuisance claims have been rejected by every court that has addressed their merits, and this Court should do likewise. *See* III.A.1 below.

**Plaintiff cannot state claims for products liability or trespass.** Plaintiff alleges both negligent and strict liability failure to warn and design defect claims. All of these claims fail because Plaintiff cannot allege basic requirements of products liability claims.

First, Plaintiff fails to allege that its injuries were caused by its own use of Defendants' products—or any particular instance of use by anyone else. Instead, Plaintiff complains that combustion of fossil fuels around the world more than a century caused its injuries. Plaintiff's claims are thus far beyond the scope of products liability law in Maryland. *See* III.A.2.a below.

Second, Plaintiff's failure to warn claim fails because Maryland law is clear that a duty to warn arises only where the product has a *hidden* danger, and here, Plaintiff's own allegations show that the risk of climate change was well publicized for more than half a century. *See* III.A.2.b below.

Third, Plaintiff fails to identify any defect in the design of Defendants' products because the emission of greenhouse gases is inherent to the combustion of fossil fuels and is not a "defect." *See* III.A.2.c below. And Plaintiff does not, and cannot, allege that it or its citizens would have halted consumption of fossil fuels had there been additional warnings about climate change. Even today, decades after the City alleges that governments, scientists, and the media loudly broadcast a relationship between fossil fuel emissions and climate change, the City, and indeed the world, continues to consume fossil fuels at historic levels. Defendants also cannot be liable for trespass because Plaintiff fails to show that Defendants have interfered with its property, that Defendants exercise control over the oceans, clouds, and precipitation allegedly affecting the property, or that Plaintiff did not consent to the consequences of using Defendants' products. Compl. ¶ 284. *See* III.A.3 below.

**Plaintiff cannot state a claim for violation of the Maryland Consumer Protection Act (“MCPA”).** Plaintiff’s MCPA claim should be dismissed because Plaintiff does not qualify as a consumer under the Act, and has not alleged that it relied on any alleged misrepresentations made by any Defendant, or that it was injured as a result of such reliance. To state a claim under the MCPA, Plaintiff must identify what misrepresentation each Defendant has allegedly made, which it has not done. *See* III.A.4 below.

**Plaintiff cannot establish causation for any of its tort claims.** Finally, Plaintiff has not alleged facts sufficient to establish two necessary elements of *any* tort claim—that Defendants are the cause in fact and legal cause of Plaintiff’s purported injuries. *Pittway Corp. v. Collins*, 409 Md. 218, 243 (2009). Plaintiff does not adequately allege that any (or all of) Defendant’s fossil fuel production or promotion was a “substantial factor” in causing Plaintiff’s asserted injuries. And Plaintiff cannot allege legal causation because Defendants’ lawful fossil fuel production and sales activities are remote from Plaintiff’s alleged injuries, separated by the decisions and actions of the billions of consumers of fossil fuels who created (and are creating) the emissions about which Plaintiff complains. *See* III.A.5 below.

**Federal law bars Plaintiff’s claims.** Plaintiff’s claims are also barred on numerous grounds under federal law. First, Plaintiff’s claims are based on injuries caused by global greenhouse gas emissions Plaintiff alleges were caused, in part, by consumption of Defendants’ fossil fuel products. Plaintiff’s transboundary pollution claims must be governed by federal law. But the Supreme Court held in *American Electric Power Co. v. Connecticut* (“AEP”), that Congress made the Environmental Protection Agency (“EPA”) the “primary regulator of greenhouse gas emissions” with the Clean Air Act (“CAA”), thus precluding courts from “setting emissions standards by judicial decree under federal tort law.” 564 U.S. 410, 427–28 (2011). As

the Court explained, the “appropriate amount” of greenhouse gas production is a “question of . . . international policy,” where “informed assessment of competing interests is required,” including “the environmental benefit potentially achievable, our Nation’s energy needs and the possibility of economic disruption.” *Id.* at 427. The limited exception to this rule allows states to regulate only sources of pollution within their borders. Plaintiff’s claims, which seek relief that would reach well beyond Maryland, cannot proceed under this exception. *See* III.B.1.a below.

But even if Plaintiff were correct that its transboundary pollution claims could be pleaded under state law, they would still conflict with, and be preempted by, the CAA. *See* III.B.1.b below. Allowing the City to pursue these claims would topple the regulatory scheme for transboundary pollution established by Congress under the CAA. *See Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 495–96 (1987). This is another in a series of climate change-related nuisance claims which “seek[] to impose liability and damages on a scale unlike any prior environmental pollution case.” *Native Village of Kivalina v. ExxonMobil Corp.* (“*Kivalina I*”), 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009). The relief sought here unfairly targets a small segment of the fossil fuel industry. In deciding Plaintiff’s claims, this Court would have to assess the overall social utility of Defendants’ conduct, and become a regulator, via tort claims, of the global fossil fuel industry. Both courts that have reached the merits of claims identical to those asserted here have thus held such claims are barred by federal law.

Plaintiff’s claims encompass not just interstate, but global activities and seek to impose retroactive liability on Defendants’ legal, worldwide commercial activities. Thus, Plaintiff’s claims are not only displaced by federal energy law, which regulates domestic fossil fuel production and development, *see* III.B.2 below, but are also barred by the foreign affairs doctrine, as adjudicating these claims would interfere—now and in the future—with the U.S. Government’s

ability to conduct foreign policy on energy and the environment, including through ongoing global discussions regarding climate change. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413–20 (2003). *See* III.B.3 below. Similarly, the Commerce and Due Process Clauses of the United States Constitution bar Plaintiff's claims because the relief sought would control extraterritorial conduct and impose enormous retroactive penalties on Defendants' lawful conduct. U.S. Const. art. I, § 8, cl. 3; U.S. Const. amend. V.; *see Healy v. Beer Inst.*, 491 U.S. 324, 336–37 (1989); *E. Enters. v. Apfel*, 524 U.S. 498 (1998). *See* III.B.5 below. Additionally, Plaintiff's claims warrant dismissal because they seek to punish Defendants for protected speech. *See* III.B.6 below.

The Complaint's deficiencies are inherent in Plaintiff's theory of the case and cannot be remedied by amendment. This Court should thus dismiss Plaintiff's claims with prejudice.

## II. BACKGROUND

The City asserts eight state law causes of action against approximately two dozen investor-owned energy companies:

- public and private nuisance, Compl. ¶¶ 218–36;
- products liability based on strict liability and negligent failure to warn, *id.* ¶¶ 237–48, 270–81;
- products liability based on strict liability and negligent design defect, *id.* ¶¶ 249–69;
- trespass, *id.* ¶¶ 282–90; and
- a “private right of action” under the MCPA, *id.* ¶¶ 291–98.

The premise of all of Plaintiff's claims is that Defendants' production and sale of coal, oil, and natural gas (which the Complaint refers to as “fossil fuel products,” *id.* ¶ 1), and Defendants' allegedly deceptive public promotion of fossil fuel products, renders them liable for Plaintiff's alleged climate change-related harms. Plaintiff seeks compensatory damages, equitable relief to abate the alleged nuisance, disgorgement of profits, punitive damages, civil penalties under the

MCPA, attorneys' fees and costs. *Id.* at 130 (Prayer for Relief).<sup>3</sup>

While Plaintiff purports to base its claims on “Defendants’ production, promotion, marketing of fossil fuels products, simultaneous concealment of the known hazards of those products, and their championing of anti-science campaigns,” Compl. ¶ 10, these activities did not cause Plaintiff’s alleged injuries—which consist of the alleged effects of climate change (e.g. rising temperatures and sea levels, increased risk of severe storms and flooding). Plaintiff’s alleged injuries instead are premised entirely on fossil fuel *emissions* resulting from billions of individual choices about what types of fuels to use, how efficiently to use them, and whether to employ measures to offset those emissions—choices that, for more than a century, have been made by governments, companies, and individuals worldwide on a daily basis. The Complaint itself acknowledges that emissions are the mechanism of the alleged nuisance: “atmospheric CO<sub>2</sub> and other greenhouse gases [are] the main driver of the gravely dangerous changes occurring to the global climate.” Compl. ¶ 2. Plaintiff uses variations of the word “emission” or “emit” more than 135 times in its Complaint. As one court explained in dismissing similar claims: “[Plaintiff] is seeking damages for global-warming related injuries resulting from greenhouse gas *emissions*, and not only the production of Defendants’ fossil fuels.” *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466, 471–72 (S.D.N.Y. 2018) (emphasis added); *see also City of Oakland*, 325 F. Supp. 3d at 1024.

Plaintiff concedes that greenhouse gas molecules “quickly diffuse and comingle [sic] in the atmosphere” and cannot be “trace[d] to their source.” Compl. ¶ 235. Plaintiff alleges that

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<sup>3</sup> Defendants removed this case to federal court. *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 18-cv-02357, ECF No. 1 (D. Md.). The district court granted Plaintiff’s motion to remand. *See Mayor and City Council of Baltimore v. BP p.l.c.*, 388 F. Supp. 3d 538 (D. Md. 2019). Defendants have appealed the district court’s remand order. *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 19-1644 (4th Cir.). The district court mailed the remand order to this Court on November 12, 2019. *See Mayor and City Council of Baltimore*, No. 18-cv-2357, ECF No. 205 (D. Md.).

Defendants' fossil fuel products account for "approximately 15 percent" of global fossil fuel product-related CO<sub>2</sub> emissions between 1965 and 2015. *Id.* ¶ 94. According to Plaintiff's theories, Defendants' products are *not* the source of the other 85% of greenhouse gas emissions purportedly resulting from fossil fuel combustion, and that almost 100% of such emissions are created by the conduct of literally billions of third parties and Plaintiff, itself. *Id.* at 130 (Prayer for Relief). Despite that, Plaintiff seeks to hold Defendants liable for all of the alleged harms caused to Plaintiff by climate change.

According to Plaintiff's own allegations, the scientific community and government recognized the risk of climate change more than a half-century ago:

By 1965, concern about the risks of anthropogenic greenhouse gas emissions reached the highest level of the United States' scientific community. In that year, President Lyndon B. Johnson's Science Advisory Committee Panel on Environmental Pollution reported that by the year 2000, anthropogenic CO<sub>2</sub> emissions would "modify the heat balance of the atmosphere to such an extent that marked changes in climate . . . could occur."

Compl. ¶ 103 (alteration in original). The Complaint further notes that "President Johnson announced in a special message to Congress that '[t]his generation has altered the composition of the atmosphere on a global scale through . . . a steady increase in carbon dioxide from the burning of fossil fuels.'" *Id.* (alteration in original).

Despite alleging public knowledge at least as early as 1965, and the persistent focus on climate change since then by the media, governments, and the international community, Plaintiff asserts that Defendants somehow "concealed the dangers" of climate change and "sought to undermine the public support for greenhouse gas regulation, and engaged in massive campaigns to promote the ever-increasing use of their products at ever greater volumes." *Id.* ¶ 6. Even with this widespread knowledge of climate change risks, the Complaint acknowledges that use of fossil fuels and the resulting greenhouse gas emissions, have "exploded" over the past several decades—

long after the scientific community and governments sounded alarms. *Id.* ¶ 4. Plaintiff's Complaint makes clear that governments have promoted and authorized fossil fuel production, and society has continued to use these fuels, with eyes wide open, accepting the benefits and risks that accompany such use. *Id.* ¶ 43–45, 103–08.

### **III. ARGUMENT**

On a motion to dismiss for failure to state a claim, the Court “must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them.” *Wireless One, Inc. v. Mayor & City Council of Baltimore*, 465 Md. 588, 604 (2019) (citations omitted). “The well-pleaded facts setting forth the cause of action must be pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice.” *Id.* (citations omitted). Nor will the Court consider “[m]ere conclusory charges that are not factual allegations[.]” *Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 121 (2007) (citations omitted). The Court should grant the motion if the well-pleaded “allegations and permissible inferences, [even] if true . . . do not state a cause of action for which relief may be granted.” *Wireless One*, 465 Md. at 604 (citations omitted).

#### **A. Maryland Law Requires Dismissal of Plaintiff's Claims.**

Dismissal is required under Maryland law because Plaintiff fails to plead the necessary elements of any of its state law causes of action.

##### **1. Plaintiff Fails to Allege a Plausible Claim for Public or Private Nuisance.**

Under Maryland law, “[a] private nuisance is a nontrespassory invasion of another’s interest in the private use and enjoyment of land” and a “public nuisance is an unreasonable

interference with a right common to the general public.” *See Tadjer v. Montgomery Cty.*, 300 Md. 539, 551–52 (1984) (quoting Restatement (Second) of Torts §§ 821B, 821D).

Plaintiff has failed to state a claim for private or public nuisance. The Complaint rests the alleged public nuisance on two types of activity: i) Defendants’ extraction, sale, and promotion of fossil fuel products, Compl. ¶ 221(a); and ii) Defendants’ allegedly deceptive or incomplete statements to promote the sale and use of fossil fuels. *Id.* ¶¶ 221(b)–(e). The alleged private nuisance, which pleads interference with land due to rising sea levels, is attributed to the same conduct of Defendants. *Id.* ¶ 231.

The pleaded activity is insufficient as a matter of law to support either a public or a private nuisance claim. Fundamentally, the Complaint fails to allege (except in conclusory fashion) that any Defendant’s manufacture or sale of fossil fuel products interferes with Plaintiff’s “private use and enjoyment of land,” or with any public right. The Complaint’s allegations fail to show how this conduct, which is not only lawful but is actively encouraged and directed by the government, could or should be penalized or prohibited through the operation of tort law. Plaintiff’s attempt to base nuisance on various Defendants’ alleged statements is unsupportable and would stretch the law of nuisance—which arose from disputes relating to land use and remains centered on conduct that invades or limits use of real property—far beyond its established scope. Finally, Plaintiff cannot assert a claim for damages arising from any alleged public nuisance claim, as it has not pleaded that it suffered any particularized harm arising from Defendants’ conduct.

First, “whatever is authorized by statute, within the scope of legislative powers, is lawful, and therefore cannot be a nuisance.” *E. Coast Freight Lines v. Consol. Gas, Elec. Light & Power Co. of Baltimore*, 187 Md. 385, 398 (1946) (citation omitted); *see also Garrett v. Lake Roland El. Ry. Co.*, 79 Md. 277, 286 (1894) (same); *Cityco Realty Co. v. City of Annapolis*, 159 Md. 148, 160

(1930) (so long as defendant did not create nuisance through negligence or wanton disregard of public or private rights, “the acts complained of do not constitute a nuisance, if done under the authority of the state”); Restatement (Second) of Torts § 821B, cmt. f (“[C]onduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability.”).<sup>4</sup> Even if certain activity “would be a nuisance at common law, conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability.” *Agbebaku v. Sigma Aldrich, Inc.*, No. 24-C-02-004175, 2003 WL 24258219, at \*13 (Md. Cir. Ct. June 24, 2003) (rejecting nuisance claim based on emissions from state-regulated coal-burning power plant); *see also N. Carolina ex rel. Cooper v. Tenn. Val. Auth.*, 615 F.3d 291, 309 (4th Cir. 2010) (“Courts traditionally have been reluctant to enjoin as a public nuisance activities which have been considered and specifically authorized by the government.”) (quoting *New England Legal Found. v. Costle*, 666 F.2d 30, 33 (2d Cir. 1981)).

Numerous state and federal statutes, including those passed within the last decade, authorize and encourage the production and sale of fossil fuels. The Maryland legislature has declared that “the production and development of oil and gas resources is important to the

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<sup>4</sup> Some Maryland courts have found that specific conduct, lawfully performed on private property may be a nuisance. *See, e.g., Washington Suburban Sanitary Comm’n v. CAE-Link Corp.*, 330 Md. 115, 129 (1993) (alleged nuisance created by a sewage sludge composting facility). Such cases consider the activity and how, specifically, it interferes with the use of identified real property adjoining or nearby the nuisance-creating conduct. That is a far cry from Plaintiff’s allegations, which describe Defendants’ worldwide commercial activities generally, none of which is alleged to have affected Plaintiff’s land in a unique way, as the basis for the nuisance. Moreover, the activities Plaintiff challenges are authorized and encouraged by laws and regulations that govern the production and sale of fossil fuels, and those alleged to have suffered a private nuisance are themselves consumers of fossil fuels.

economic well-being of the State and the nation.” Md. Code Ann., Envir. § 14-101.<sup>5</sup> Maryland maintains an “Oil and Gas Fund” to “administer and implement programs to oversee the drilling, development, production, and storage of oil and gas wells, and other requirements related to the drilling of oil and gas wells” throughout the state. Md. Code Ann., Envir. §§ 14-122, 14-123. Plaintiff attempts to allege “sale” of fossil fuels as a nuisance, but Maryland regulations allow and encourage that commercial activity by establishing specifications for the sale of gasoline in the state. Md. Code Regs. 03.03.05.01-1; Md. Code Ann., Com. Law § 11-304 (regulating marketing agreements between gasoline dealers and distributors). These statutes and regulations leave no doubt that Maryland law and policy authorize and encourage fossil fuel production, promotion, and sale. And even though Maryland has enacted legislation to reduce greenhouse emissions and to combat climate change, any State plan to reduce emissions must not “decrease the likelihood of reliable and affordable electrical service and statewide fuel supplies.” See The Greenhouse Gas Emissions Reduction Act of 2009, Md. Code Ann., Envir. § 2-1206(5).<sup>6</sup>

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<sup>5</sup> See also Md. Code Ann., Com. Law § 11-302 (“The General Assembly finds and declares that [ ] the distribution and sale . . . of petroleum products in the State vitally affect the economy of the State, and its public interest, welfare, and transportation”). The Baltimore Energy Office notes that its “responsibilities include purchasing . . . heating oil, natural gas, [and] diesel gasoline . . . for City buildings, vehicles and equipment.” Press Release, Baltimore City Department of Public Works, *Baltimore’s Energy Office Joins Department of Public Works*, Nov. 20, 2014, <https://publicworks.baltimorecity.gov/news/press-releases/2014-11-20-baltimores-energy-office-joins-department-public-works> (last visited January 31, 2020). The 2018 report of the Maryland Commission on Climate Change admits that the state is “fossil fuel dependen[t].” Md. Comm’n on Climate Change, *2018 Annual Report* 63 (2018), [https://mdc.maryland.gov/programs/Air/ClimateChange/MCCC/Publications/MCCC\\_2018\\_final.pdf](https://mdc.maryland.gov/programs/Air/ClimateChange/MCCC/Publications/MCCC_2018_final.pdf). Defendants request that this Court take judicial notice, pursuant to Md. Rule 5-201(b), of these public records. See *Kona Properties, LLC v. W.D.B. Corp., Inc.*, 224 Md. App. 517, 534 n.14 (2015) (judicial notice of matters of public record appropriate); Md. Rule 5-201(b) (court may take judicial notice of public documents which are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned”).

<sup>6</sup> The Greenhouse Gas Emissions Reduction Act of 2009 recognizes the State’s competing objectives of regulating greenhouse gas emissions and maintaining “reliable and affordable electrical service and statewide fuel supplies,” and aims to balance the State’s economic and environmental interests. Md. Code Ann., Envir. §§ 2-1206(5)–(9). The legislature has set State policy regarding greenhouse gases; the Court should decline Plaintiff’s invitation to second-guess the legislative judgments in this tort action.

Dozens of federal statutes encourage and promote the same fossil fuel production activities.<sup>7</sup> As the federal government recently emphasized in an amicus brief in the *City of Oakland* case, “the United States has strong economic and national security interests in promoting the development of fossil fuels,” the very conduct that Plaintiff seeks to label a public nuisance. Br. for the United States as Amicus Curiae at 1, *City of Oakland v. BP p.l.c.*, No. 17-cv-6011, ECF No. 245 (N.D. Cal. May 10, 2018). The government cautioned that recognition of state common law claims premised on global climate change has “the potential to disrupt and interfere with the proper roles, responsibilities, and ongoing work of the Executive Branch and Congress in this area.” *Id.* at 2.

Plaintiff here does not allege that any Defendant violated state or federal laws regulating the production and sale of fossil fuel products or that such a violation caused its alleged harms. Plaintiff also does not allege that the particular way in which Defendants produced fossil fuel products caused a nuisance—quite the opposite. Instead, Plaintiff premises liability on Defendants’ alleged control of “every step of the fossil fuel product supply chain.” Compl. ¶ 221(a). As set forth above, however, because these activities are authorized and promoted by statute, they cannot be deemed a nuisance.<sup>8</sup> See III.A.1 above.

Second, Plaintiff purports to base liability on Defendants’ alleged “deceptions” in its advertisement and marketing of fossil fuels, because, Plaintiff alleges, consumption of fossil fuels

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<sup>7</sup> See, e.g., Energy Policy Act of 1992, 42 U.S.C. §§ 13401, 13411(a), 13412, 13415(b)–(c); Energy Policy Act of 2005, 42 U.S.C. §§ 15903, 15904, 15909(a), 15910(a)(2)(B), 15927; Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a; Coastal Zone Management Act of 1972, 16 U.S.C. § 1451(f); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701(a)(12); Deep Water Royalty Relief Act of 1995, 43 USC § 1337(a); Mineral Leasing Act of 1920, 30 U.S.C. § 226; Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 352; Naval Petroleum Reserves Production Act of 1976, 42 U.S.C. §§ 6501–6507.

<sup>8</sup> Plaintiff’s claim that Defendants’ conduct constitutes a nuisance per se because it independently violates the MCPA fails along with Plaintiff’s claims under that statute. See III.A.4 below.

would have been lower in the absence of this alleged deception. *See, e.g.*, Compl. ¶¶ 100, 102. There is no support in Maryland law for the proposition that this type of conduct can be a nuisance, public or private. Maryland law requires plaintiff to plead that the defendant has caused “an unreasonable interference with a right common to the general public.” *Tadger*, 300 Md. at 552 (quoting Restatement (Second) of Torts § 821B). But what the Complaint effectively pleads for the nuisance is the right not to be defrauded, but that is an “individual right,” not a public right that could trigger a nuisance claim. Restatement (Second) of Torts § 821B, cmt. g. And, in considering whether a private nuisance claim exists, courts have consistently focused on whether the defendant is using its *property* in a way that interferes with “another’s interest in the private use and enjoyment of land.” *Exxon Corp. v. Yarema*, 69 Md. App. 124, 147 (1986) (quoting Restatement (Second) of Torts § 821D). Thus, Plaintiff’s allegations regarding purportedly deceptive marketing have no basis in nuisance law’s established purpose—protecting against unreasonable interference with the use and enjoyment of real property.<sup>9</sup> Nor could this purported deception have caused Plaintiff’s alleged injuries, *i.e.*, sea level rise and increased risk of flooding, which Plaintiff alleges result from worldwide fossil fuel consumption over decades. Plaintiff’s own continued consumption of fossil fuels despite its full knowledge of the risks is patently inconsistent with its theory of “deception.”

Maryland courts have hesitated to expand the law of nuisance. *See Little v. Union Trust Co.*, 45 Md. App. 178, 185 (1980) (finding efforts to expand nuisance law to cover negligence claims “have been repulsed by the Court of Appeals”) (citing *State v. Feldstein*, 207 Md. 20

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<sup>9</sup> The D.C. Circuit rejected one plaintiff’s attempt to premise a public nuisance claim on misleading statements as “radical” noting that it could “brook much mischief, including a multitude of inconsistent state prohibitions and requirements.” *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 1002 (D.C. Cir. 1973).

(1955)). And courts have repeatedly rejected attempts to create a climate change nuisance tort, which would stretch the boundaries of nuisance law beyond recognition. *See Native Village of Kivalina v. ExxonMobil Corp.* (“*Kivalina II*”), 696 F.3d 849, 855–58 (9th Cir. 2012) (holding plaintiff’s federal common law public nuisance claims were displaced by the CAA and EPA in actions it authorizes); *City of New York*, 325 F. Supp. 3d at 471–72; *City of Oakland*, 325 F. Supp. 3d at 1023. This Court, too, should decline to upend hundreds of years of established nuisance law and “create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of [ ] nuisance.” *In re Lead Paint Litig.*, 924 A.2d 484, 494 (N.J. 2007); *see also State v. Lead Indus.*, 951 A.2d 428, 456 (R.I. 2008) (rejecting public nuisance claim against lead paint manufacturers because the “law of public nuisance” was an improper vehicle for the plaintiff’s claims, having “never before [ ] been applied to products, however harmful”).

Lastly, Plaintiff has not pleaded that it has suffered special damages as necessary to succeed on a claim for damages arising from a public nuisance. Plaintiff must “show that by the wrong committed [it] suffer[ed] some special damage, or [has] a special interest in the subject-matter distinct from that of the general public.” *Bauernschmidt v. Standard Oil Co.*, 153 Md. 647, 652 (1927) (quoting *Mayor and City Council of Baltimore v. Keyser*, 72 Md. 108, 109 (1890)); *see also State Ctr., LLC v. Lexington Charles Ltd. P’ship*, 438 Md. 451, 521 (2014) (plaintiff “[can]not maintain an action for a public nuisance unless he suffered some special damage from the public nuisance”) (quoting *Ray v. Mayor of Baltimore*, 430 Md. 74, 82 (2013)). Plaintiff has not alleged that element. While Plaintiff makes a conclusory allegation of “special injury to the City,” Compl. ¶ 223, the nature of the harms that Plaintiff pleads are not distinct from effects on the general public in Baltimore or, as Plaintiff alleges, anywhere else in the world. The Complaint alleges

*global* injuries, including warming air temperatures, *id.* ¶¶ 61–68; disruptions in the hydrologic cycle, *id.* ¶¶ 69–74; increased precipitation, *id.* ¶¶ 75–83; drought, *id.* ¶¶ 84–85; sea level rise, *id.* ¶ 8; and public health impacts, *id.* ¶¶ 86–90, all generalized symptoms of a *global* problem. To the extent Plaintiff seeks damages arising from a public nuisance, the claim must be dismissed.

Maryland courts have “resisted the establishment of duties of care to indeterminate classes of people” with regard to products liability because doing so would foster “boundless” liability and “make tort law unmanageable.” *Gourdine v. Crews*, 405 Md. 722, 749 (2008). The same logic applies here: nuisance law should not be expanded to allow Plaintiff to pursue a claim based on the production and promotion of a lawful and socially useful product.

## **2. Plaintiff Fails to Allege a Plausible Products Liability Claim.**

Plaintiff asserts four products liability causes of action: failure to warn and design defect, sounding alternatively in negligence and strict liability. Compl. ¶¶ 237–81. To recover on a products liability claim sounding in strict liability, a plaintiff must show: “(1) the product was in a defective condition at the time that it left the possession or control of the seller; (2) that it was unreasonably dangerous to the user or consumer; (3) that the defect was a cause of the injuries, and (4) that the product was expected to and did reach the consumer without substantial change in its condition.” *Lloyd*, 397 Md. at 134 (internal citation omitted). For a products liability claim sounding in negligence, a plaintiff must allege: “(1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant’s breach of the duty.” *Gourdine*, 405 Md. at 738.

Each of Plaintiff’s products liability claims fails because Defendants’ products—whose risks Plaintiff admits it was aware of—functioned exactly as anticipated and within the bounds of the law. Defendants had neither a duty to warn Plaintiff of the well-known fact that fossil fuel

consumption creates emissions, *Mazda Motor of Am., Inc. v. Rogowski*, 105 Md. App. 318, 330–31 (1995), nor a duty to pull their products from the market when they operated as intended, *Kelley v. R.G. Indus., Inc.*, 304 Md. 124, 138 (1985), *abrogated on other grounds by* Md. Code Ann., Pub. Safety § 5-402(b). A manufacturer has a duty to warn only when “the item produced has an inherent and *hidden* danger that the producer knows or should know could be a substantial factor in causing injury,” *Virgil v. Kash N’ Karry Serv. Corp.*, 61 Md. App. 23, 33 (1984) (emphasis added) (citation omitted), but Plaintiff acknowledges that the risks of climate change attributable to greenhouse gas emissions were well known for decades. Compl. ¶ 103. Plaintiff’s products liability claims fail.

**a. Plaintiff’s Strict Liability Claims Fail Because It Does Not Allege Injury From Its Own Use or Consumption of Defendants’ Products.**

To recover on a products liability claim in strict liability, a plaintiff must plead, among other things, that it was “the user or consumer” of the defendant’s product, *Heckman v. Ryder Truck Rental, Inc.*, 962 F. Supp. 2d 792, 802 (D. Md. 2013); *see also Phipps v. Gen. Motors Corp.*, 278 Md. 337, 344 (1976) (defining strict liability), *and* that the plaintiff was either harmed by the use of the defendant’s product, or that the product gave rise to a clear danger of death or injury.

*Lloyd*, 397 Md. at 158.<sup>10</sup> But Plaintiff does not allege that its injury arises from its own use and consumption of certain of Defendants' products.<sup>11</sup> On the contrary, Plaintiff purports to base its claims on cumulative greenhouse gas emissions caused by the worldwide use of all fossil fuel products over decades. The facts alleged carry this case far outside the domain of products liability.

**b. Defendants Owed No Duty to Warn Plaintiff about the Risks of Climate Change.**

"Duty . . . is an essential element of both negligence and strict liability causes of action for failure to warn." *Gourdine*, 405 Md. at 743. Plaintiff does not even attempt to allege that a warning by Defendants to Plaintiff could have prevented its injuries. Rather, Plaintiff alleges that Defendants "breached their duty of care by failing to adequately warn *any consumers or any other party* of the climate effects that inevitably flow from the intended use of their fossil fuel products." Compl. ¶ 241 (emphasis added). Effectively, Plaintiff seeks to use Maryland products liability law to impose a duty on Defendants to warn the world. Maryland courts have declined to impose such duties, which would result in unlimited liability. *See Gourdine*, 405 Md. at 744–54. And Plaintiff cannot plausibly allege that any warning would have changed its own conduct, also rendering

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<sup>10</sup> The vast majority of products liability cases involve plaintiffs who used allegedly defective products themselves. *See, e.g., Estate of Schatz v. John Crane, Inc.*, 239 Md. App. 211 (2018) (exposure to asbestos dust caused mesothelioma); *May v. Air & Liquid Sys. Corp.*, 446 Md. 1 (2015) (exposure to asbestos caused cancer); *Gourdine*, 405 Md. at 744 (prescription drugs caused injury); *Pittway*, 409 Md. 218 (smoke detector failed to alert plaintiff of fire); *Ford Motor Co. v. Gen. Acc. Ins. Co.*, 365 Md. 321 (2001) (automobile caught fire); *Ellsworth v. Sherne Lingerie, Inc.*, 303 Md. 581 (1985) (clothing caught on fire); *Mazda Motor*, 105 Md. App. 318 (seat belt did not prevent injury to motorist whose vehicle struck tree); *Heckman*, 962 F. Supp. 2d 792 (truck's door strap broke when tugged on); *Watson v. Sunbeam Corp.*, 816 F. Supp. 384 (D. Md. 1993) (electric blanket caught fire). Even cases suggesting that bystanders may in certain circumstances be able to recover upon a sufficient showing of proximate causation where the nearby use of a product caused exposure are far afield from the situation here where the claims relate to climatic effects that developed over time with innumerable causes. *ACandS, Inc. v. Godwin*, 340 Md. 334, 349 (1995).

<sup>11</sup> Defendants manufacture several different fossil fuel products and do not waive any individual defenses based on their specific products.

Plaintiff's claim insufficient. *Georgia Pac., LLC v. Farrar*, 432 Md. 523, 540 (2013). Moreover, Defendants have no special relationship with Plaintiff that would give rise to a duty to warn. *Ashburn v. Anne Arundel Cty.*, 306 Md. 617, 628 (1986).

First, Plaintiff has not pleaded that any warning Defendants could have provided would have been sufficient to abate the alleged harms Plaintiff has suffered. Rather, Plaintiff claims that the burning of fossil fuels by *third parties around the world* over decades is ultimately to blame for climate change. *See* Compl. ¶ 41. Not only does Plaintiff impermissibly seek to apply Maryland tort law failure to warn duties to global conduct, but Plaintiff offers no plausible explanation for how warnings by any of these Defendants would have curbed the behavior of consumers around the globe who depend on fossil fuels for basic needs such as heating, cooling, and transportation. Plaintiff does not argue that any warning would have caused it to cease its own consumption of fossil fuels, much less that such warning or cessation would have prevented its alleged injuries. Consumption trends over the last half-century make implausible any contention that such warnings would have been effective, as consumers continue to burn fossil fuels today with knowledge of the effects from greenhouse gases. *See* Compl. ¶¶ 103, 105, 143–44 (public use of fossil fuels “continued unabated” in the 1990s even though “many specific consequences of rising levels of greenhouse gas pollution” were referenced in reports dating back to the 1960s). Even Plaintiff, fully cognizant of the role of fossil fuels in climate change, remains a large consumer of fossil fuels in Maryland. *See* Baltimore City Department of Public Works, *City Energy Use*, <https://publicworks.baltimorecity.gov/pw-bureaus/sustainable-energy/use> (last

visited January 31, 2020).<sup>12</sup> There is thus “no practical way that any warning . . . could have avoided th[e] danger,” and the Court should therefore decline to impose a duty of care on Defendants that “would have no practical effect[.]” *Georgia Pac.*, 432 Md. at 540, 541; *see also Estate of Schatz*, 239 Md. App. at 226 (no duty is imposed absent proof that “any [] warning would have been effective”).

Similarly, under Maryland law there is no duty to warn of “clear and obvious” dangers and “generally known” risks. *Mazda Motor*, 105 Md. App. at 330–31; *see also Waterhouse v. R.J. Reynolds Tobacco Co.*, 368 F. Supp. 2d 432, 435 (D. Md. 2005), *aff’d*, 162 F. App’x 231 (4th Cir. 2006). Plaintiff alleges that in 1965, a presidential committee reported that CO<sub>2</sub> emissions driven by fossil fuel use “modify the heat balance of the atmosphere to such an extent that marked changes in climate . . . could occur.” Compl. ¶ 103. A manufacturer has no duty to warn of such an “open and obvious” alleged danger, regardless of “whether or not [the danger is] actually known to the user.” *Mazda Motor*, 105 Md. App. at 327 (quoting 1 Am. L. Prod. Liab. 3d § 1:70 (1987)). The standard is not “whether the plaintiff actually recognized the risk, but whether a reasonable person in the plaintiff’s position would have done so.” *Id.* at 328 (citation omitted); *see also Estate of White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 435 (D. Md. 2000) (cigarette manufacturers did not have a duty to warn “because the dangers of smoking cigarettes were commonly known”). Here, the Complaint leaves no doubt that a reasonable consumer would have fully appreciated the alleged risks of using fossil fuels—that it could contribute to climate change. Indeed, as noted above, Plaintiff concedes that by 1965—over 50 years ago—“concern about the

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<sup>12</sup> Defendants request that this Court take judicial notice, pursuant to Md. Rule 5-201(b), of these public records. *See Kona Properties*, 224 Md. App. at 534 n.14 (judicial notice of matters of public record appropriate); Md. Rule 5-201(b) (court may take judicial notice of public documents which are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned”).

risks of anthropogenic greenhouse gas emissions” had already “reached the highest level of the United States’ scientific community.” Compl. ¶ 103.

Second, duty also “requires a close or direct effect of the tortfeasor’s conduct on the injured party.” *Gourdine*, 405 Md. at 746. Maryland courts have “resisted the establishment of duties of care to indeterminate classes of people,” because doing so would foster “boundless” liability and “make tort law unmanageable.” *Id.* at 749 (quoting *Doe v. Pharmacia & Upjohn Co., Inc.*, 388 Md. 407, 420–21 (2005)). For example, in *Gourdine*, the Court of Appeals held that a drug company owed no duty to warn a motorist killed by a woman taking the company’s medication, because “duty should be defined . . . [with] regard to the size of the group to which the duty would be owed,” and imposing a duty to warn in such circumstances would create “a duty to the world.” *Id.* at 752, 750. Here, Plaintiff invokes products liability law to impose a duty on Defendants to “warn the world” about the dangers of climate change, even though Plaintiff makes no plausible allegation that such a warning by Defendants would have reduced fossil fuel consumption by Plaintiff or countless third parties around the globe. As in *Gourdine*, this Court should reject Plaintiff’s attempt to impose such a boundless duty.

Third, Plaintiff does not plead any special relationship that could give rise to a duty to warn. “There is no duty to control a third person’s conduct so as to prevent personal harm to another, unless a ‘special relationship’ exists either between the actor and the third person or between the actor and the person injured.” *Ashburn*, 306 Md. at 628; *see also Warr v. JMGM Grp., LLC*, 433 Md. 170, 184 (2013); *Dehn v. Edgcombe*, 384 Md. 606, 625 (2005) (“[F]oreseeab[ility] does not itself impose a duty . . . unless a special relationship exists.”) (quoting *Ashburn*, 306 Md. at 628); *Estate of Schatz*, 239 Md. App at 225 (“[T]he relationship (or lack thereof) of the parties is a relevant factor in determining the existence of a duty to warn.”). Plaintiff

does not allege that any Defendants had a special relationship with Plaintiff or with any of the literally billions of consumers of fossil fuels whose conduct has led to Plaintiff's alleged injuries. Compl. ¶ 245. Defendants therefore owed no legal duty to warn Plaintiff or other consumers of the purported risks of climate change resulting from the combustion of fossil fuels by Plaintiff and unrelated third parties around the world.

**c. Plaintiff's Allegations Confirm that Defendants' Products Were Not Defective or Unreasonably Dangerous.**

Plaintiff's design defect claims also fail. For a seller to be liable for a design defect "the product must be both in a 'defective condition' and 'unreasonably dangerous' at the time that it is placed on the market by the seller." *Phipps*, 278 Md. at 344 (citing Restatement (Second) of Torts § 402A); *accord* *Ellsworth*, 303 Md. at 591 (plaintiff must show "the product is in a defective condition, that is in a condition not contemplated by the ultimate consumer, and unreasonably dangerous, that is dangerous to an extent beyond that which would be contemplated by the ordinary consumer . . .") (citing Restatement (Second) of Torts § 402A) (internal quotation marks omitted). Plaintiff cannot claim that fossil fuels are defectively designed because it is the *use* of those products that causes greenhouse gas emissions, which in turn allegedly "cause numerous global and local changes to Earth's climate." Compl. ¶ 253; *see id.* ¶ 18 (conceding that emission of greenhouse gases is inherent to combustion of fossil fuels because fossil fuels cannot be made without carbon). The emission of greenhouse gases upon use or combustion of fossil fuels is not a product design defect; it is an inherent characteristic of the products themselves.

A product "which functions as intended and as expected is not 'defective,'" even if use of the product creates negative externalities. *Kelley*, 304 Md. at 138. Similarly, "a product cannot be defective because of a characteristic that is inherent in the product itself." *Cofield v. Lead Indus. Ans'n, Inc.*, No. CIV.A. MJG-99-3277, 2000 WL 34292681, at \*2 (D. Md. Aug. 17, 2000); *see*

also *Dudley v. Baltimore Gas & Elec. Co.*, 98 Md. App. 182, 202 (1993) (rejecting claims that natural gas was defective because it was “flammable and highly explosive” as these characteristics are “intrinsic to the nature of natural gas”). For example, in *Halliday v. Sturm, Ruger & Co.*, the Court of Appeals found that a firearm that contributed to a child’s death was not defective because “it worked exactly as it was designed and intended to work.” 368 Md. 186, 208 (2002). Similarly, in *Ziegler v. Kawasaki Heavy Industries, Ltd.*, the Court of Special Appeals found that a motorcycle was not defective despite lacking a safety feature because it “operated exactly as intended.” 74 Md. App. 613, 623 (1988); see also *Town of Lexington v. Pharmacia Corp.*, 133 F. Supp. 3d 258, 270 (D. Mass. 2015) (holding no design defect where Plaintiff was unable to identify a defective aspect of the design of polychlorinated biphenyls (“PCBs”) beyond the “mere presence of PCBs,” as “PCBs cannot be PCBs without the presence of PCBs themselves, along with their inherent characteristics”); *Godoy ex rel. Gramling v. E.I. du Pont de Nemours & Co.*, 768 N.W.2d 674, 678 (Wis. 2009) (rejecting design defect claim involving lead pigment “where the presence of lead is the alleged defect in design, and its very presence is a characteristic of the product itself. Without lead, there can be no white lead carbonate pigment”).

Here, Plaintiff pleads that its alleged injuries are the result of “the normal and intended use” of Defendants’ fossil fuel products. Compl. ¶ 18. Plaintiff has not alleged that any user of fossil fuels intended or expected those fuels to work differently than alleged. Nor has Plaintiff identified an alternative means of “designing” fossil fuels that retains their benefits while reducing the alleged negative externalities. The Complaint does not explain how Defendants could have produced fossil fuels that lessened the risk of climate change. Beyond their inherent properties, Plaintiff offers no explanation as to why Defendants’ products are defective at all, let alone in a

way not contemplated by the ultimate consumer. See *Ellsworth*, 303 Md. at 591 (citing Restatement (Second) of Torts § 402A).

Further, the Court of Appeals has defined a defective condition as one “not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.” *Halliday*, 368 Md. at 193 (emphases added) (citation omitted); *Ellsworth*, 303 Md. at 591. But Plaintiff does not allege it was harmed through its own use of fossil fuels. Instead, fossil fuels are alleged to be dangerous only due to their combustion by billions of users globally over decades. Accordingly, Plaintiff fails to sufficiently allege a design defect cause of action, as Defendants’ lawful products did not malfunction, worked exactly as designed and intended, and did so in a manner as any ordinary consumer would have expected.<sup>13</sup> *Halliday*, 368 Md. at 208

In addition to not demonstrating a “defective condition,” Plaintiff also fails to allege facts showing that Defendants’ fossil fuel products are “unreasonably dangerous,” as is needed to support its design defect claim. Compl. ¶¶ 250, 253. To evaluate design defect claims, Maryland courts employ the “consumer expectation” test, *Simpson v. Standard Container Co.*, 72 Md. App. 199, 203 (1987), which considers whether a product “is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it with the ordinary knowledge common to the community as to the product’s characteristics,” *Halliday*, 368 Md. at 194 (adopting Restatement (Second) of Torts § 402A). In *Halliday*, the Court of Appeals concluded that a firearm that contributed to a child’s death was not unreasonably dangerous because its dangers would have been understood by the ordinary consumer. *Id.* at 208; see also *Kelley*, 304 Md. at

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<sup>13</sup> To the extent Plaintiff seeks a ruling declaring fossil fuels defective, or requiring the abatement of Defendants’ production of fossil fuels, Plaintiff seeks to ban them worldwide, not just in Maryland. Indeed, an action for strict liability focuses “not on the conduct of the manufacturers but rather the product itself.” *Phipps*, 278 Md. at 344; *Collins v. Li*, 176 Md. App. 502, 578 (2007) (same), *aff’d sub nom. Pittway*, 409 Md. 218. The consequences of a wholesale ban on fossil fuels would be a catastrophic disruption to the U.S. and international economies and reinforce the federal nature of Plaintiff’s claims.

136 (finding a handgun not unreasonably dangerous, though “capable of being used . . . to inflict harm,” because an ordinary consumer would “expect a handgun to be dangerous”).

Here, Plaintiff alleges widespread, longstanding knowledge of the characteristics of the fossil fuels that Plaintiff claims are unreasonably dangerous. Plaintiff affirmatively alleges that the relationship between greenhouse gas emissions and climate change has been publicly known since at least the 1960s, and that knowledge only grew in magnitude, specificity, and urgency in the years that followed. Compl. ¶¶ 103–05. Indeed, Plaintiff alleges that in 1965, President Lyndon B. Johnson and his science advisory committee publicly acknowledged and forewarned of anthropogenic climate change. *Id.* ¶ 103. Those allegations belie Plaintiff’s claim that fossil fuel products “have not performed as safely as an ordinary consumer would expect them to” with respect to emissions of greenhouse gases. *Id.* ¶ 253. Despite the known risks associated with fossil fuels, billions of ordinary consumers (including Plaintiff) have continued to use them as they are intended for their myriad benefits demonstrating that fossil fuels are not defective or unreasonably dangerous.<sup>14</sup>

### 3. Plaintiff Fails to Allege a Plausible Claim for Trespass.

Plaintiff asserts that Defendants are liable for trespass because climate change has allegedly caused sea-water, floodwaters, and “other materials to enter its property.” Compl. ¶ 285. “[T]respass is a tort involving ‘an intentional or negligent intrusion upon or to the possessory

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<sup>14</sup> Although Maryland courts generally apply the consumer expectation test to evaluate design defect claims, they apply the risk-utility test in some instances, particularly when the product “malfunctions in some way.” *Halliday*, 368 Md. at 200; *see also Kelley*, 304 Md. at 138. The risk-utility test considers whether “the danger presented by the product outweighs its utility.” *Halliday*, 368 Md. at 194. Here, however, Plaintiff cannot plausibly allege that Defendants’ fossil fuels “malfunctioned” in any way, or that the alleged dangers of fossil fuels outweigh the significant benefits they provide. As one court explained: “[O]ur industrial revolution and the development of our modern world has literally been fueled by oil and coal. Without those fuels, virtually all of our monumental progress would have been impossible. All of us have benefitted.” *City of Oakland*, 325 F. Supp. 3d at 1023; *see also City of New York*, 325 F. Supp. 3d. at 475 (recognizing the “global benefits of fossil fuel use.”).

interest in property of another.” *Royal Investment Grp., LLC v. Wang*, 183 Md. App. 406, 444–45 (2008) (quoting *Ford v. Baltimore City*, 149 Md. App. 107, 129 (2002)). In order to prevail on a cause of action for trespass, the plaintiff must establish: “(1) an interference with a possessory interest in his property; (2) through the defendant’s physical act or force against that property; (3) which was executed without his consent.” *United Food & Commercial Workers Int’l Union v. Wal-Mart Stores, Inc.*, 228 Md. App. 203, 234 (2016) (quoting *Royal Investment Grp.*, 183 Md. App. at 444–45 (internal quotation marks omitted)), *aff’d*, 453 Md. 482 (2017). Plaintiff’s factual allegations fail to plausibly establish *any* of these elements.

First, Plaintiff fails to show that Defendants interfered with its property. To start, Plaintiff does not identify any specific parcel of City-owned land that has been “inundated by sea water,” Compl. ¶ 215, “submerge[ed],” *id.* ¶ 286, or rendered “unusable,” *id.* Plaintiff vaguely alleges that floodwaters have “enter[ed] its real property,” *id.* ¶ 286, but Defendants and the Court are left to speculate as to which property or how Plaintiff’s possessory interest in that property has suffered an interference. Plaintiff also speculates about *future* invasions that may result from Defendants’ conduct. *See, e.g., id.* ¶ 8 (“[A]s a direct and proximate consequence of Defendants’ wrongful conduct . . . average sea level *will* rise substantially along Maryland’s coast” (emphasis added)); *id.* ¶ 16 (Baltimore “*will continue to be impacted* by increased temperatures and disruptions to the hydrologic cycle” (emphasis added)). But Plaintiff cannot state a trespass claim based on such forecasts because “trespass requires that the defendant . . . *entered* or *caused* something harmful or noxious to enter onto the plaintiff’s land.” *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 408 (2013) (emphases added), *reconsideration granted in part on other grounds*, 433 Md. 502 (2013). Future invasions that have not yet occurred—and may never occur—are not actionable. *See id.*

(“General contamination of an aquifer that may or may not reach a given [plaintiff’s] property at an undetermined point in the future is not sufficient to prove invasion of property.”).

Second, the City does not allege that *Defendants or their products* intruded upon any City-owned property. Rather, Plaintiff alleges that “flood waters, extreme precipitation, saltwater, and other materials” have “enter[ed] the City’s real property.” Compl. ¶ 284. But Defendants do not exercise control over the oceans, clouds, or precipitation. See *Rockland Bleach & Dye Works Co. v. H. J. Williams Corp.*, 242 Md. 375, 387 (1966) (in case of alleged trespass by an object, “the defendant must have some connection with or some control over that object in order for an action in trespass to be successful against him”).<sup>15</sup> Plaintiff contends that Defendants should be held liable for trespass because they introduced “fossil fuel products into the stream of commerce.” Compl. ¶ 287. The link between this activity and the harms of which Plaintiff complains is far too attenuated to constitute the control necessary to establish liability for trespass. See *JBG/Twinbrook Metro Ltd. P’ship v. Wheeler*, 346 Md. 601, 625–26 (1997) (finding that a gas company contracting with station owner to sell company’s gas was not liable in trespass for subsurface percolation of gas onto an adjacent property because company had “insufficient control, as a matter of law” over the gasoline).

Third, the City fails to plead lack of consent. Although Plaintiff asserts that it “did not give permission for Defendants . . . to cause floodwaters, extreme precipitation, saltwater, and other

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<sup>15</sup> Other courts similarly have dismissed environmental harm-based trespass claims where there is little connection to the defendant’s products. See, e.g., *In re Paulsboro Derailment Cases*, Nos. 13-784, 12-7586, 13-410, 13-721, 13-761, 2013 WL 5530046, at \*8 (D.N.J. Oct. 4, 2013) (“[M]odern courts do not favor trespass claims for environmental pollution” or endorse efforts “to torture old remedies to fit factual patterns not contemplated when those remedies were fashioned.” (internal quotation marks omitted)); see also *In re Nassau Cty. Consol. MTBE (Methyl Tertiary Butyl Ether) Prod. Liab. Litig.*, 918 N.Y.S.2d 399, at \*18 (Sup. Ct., Nassau Co. 2010) (unpublished table decision) (dismissing trespass claim where plaintiff “only alleged that [defendants] committed a trespass by their participation in the chain of distribution”).

materials to enter its property as a result of the use of Defendants' fossil fuel products," Compl. ¶ 285, Plaintiff itself uses these products. *See* Baltimore City Department of Public Works, *City Energy Use*, <https://publicworks.baltimorecity.gov/pw-bureaus/sustainable-energy/use> (last visited January 31, 2020).<sup>16</sup> By using the very products that allegedly caused the trespass, Plaintiff consented to the consequences, including the purported invasion of its property.

#### 4. Plaintiff Fails to Allege a Plausible Claim under the MCPA.

Plaintiff asserts claims under the Maryland Consumer Protection Act ("MCPA") based on injuries it allegedly suffered as a result of Defendants' "unfair or deceptive trade practice[s]." Compl. ¶¶ 292–93 (quoting Md. Code Ann., Com. Law § 13-408(a); citing *id.* §§ 13-301(1), 13-301(9)). Plaintiff's MCPA claims fail because Plaintiff has not pleaded them with sufficient particularity and has failed to adequately allege reliance. In addition, Plaintiff does not allege that it was harmed in its capacity as a consumer, as required to state a claim under the MCPA. Plaintiff's MCPA claims therefore must be dismissed.

A consumer bringing a private action under the MCPA must show: (1) an unfair or deceptive practice or misrepresentation, (2) upon which the consumer relied, (3) that caused the consumer actual injury. *See Lloyd*, 397 Md. at 140–43; *see also Bey v. Shapiro Brown & Alt, LLP*, 997 F. Supp. 2d 310, 319 (D. Md. 2014), *aff'd*, 584 F. App'x 135 (4th Cir. 2014); *see also Bank of Am., N.A. v. Jill P. Mitchell Living Tr.*, 822 F. Supp. 2d 505, 532 (D. Md. 2011) ("Consumers must prove that they relied on the misrepresentation in question to prevail on a damages action under the MCPA."). Moreover, MCPA claims involving allegations of fraud and deception must

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<sup>16</sup> *See* III.A.1 n.6 above. Defendants request that this Court take judicial notice, pursuant to Md. Rule 5-201(b), of these public records. *See Kona Properties*, 224 Md. App. at 534 n.14 (judicial notice of matters of public record appropriate); Md. Rule 5-201(b) (court may take judicial notice of public documents which are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

be pleaded with particularity, which requires Plaintiff to identify the false statements, who made them and when, why they are false, and, for claims under Section 13-301(9), “why a finder of fact would have reason to conclude that the defendant acted with scienter . . . and with the intention to persuade others to rely on the false statement.” *McCormick v. Medtronic, Inc.*, 219 Md. App. 485, 492–93 (2014); *see also Daniyan v. Viridian Energy, LLC*, No. GLR-14-2715, 2015 WL 4031752, at \*1–2 (D. Md. June 30, 2015); *Luskin’s, Inc. v. Consumer Prot. Div.*, 353 Md. 335, 366 (1999) (requiring a finding of scienter for claims under § 13-301(9) of the MCPA).

Plaintiff has not pleaded its claims with the requisite particularity. Although the Complaint discusses certain Defendants’ alleged public relations campaigns and lobbying activities over the past several decades, Compl. ¶¶ 141–70, Plaintiff does not identify what the alleged misstatements were or which defendants made them, nor does Plaintiff claim to have relied on any one of them. *See Lloyd*, 397 Md. at 143 (requiring MCPA plaintiff to show injury measured by its loss as a result of reliance on the sellers’ misrepresentation); *Bey*, 997 F. Supp. 2d at 319 (dismissing MCPA claim because plaintiff “did not rely on Defendants’ representations”); *Farwell v. Story*, No. DKC 10-1274, 2010 WL 4963008, at \*8–9 (D. Md. Dec. 1, 2010) (same). Indeed, Plaintiff does not even allege that it was *aware* of any alleged misrepresentation. Plaintiff’s MCPA claims should be dismissed on these grounds alone.

Plaintiff has also failed to allege that it relied on any of Defendants’ alleged public relations campaigns or that such reliance resulted in an injury cognizable under the MCPA. “[I]n order to articulate a cognizable injury under the Consumer Protection Act, . . . the consumer must have suffered an identifiable loss, measured by the amount the consumer spent or lost as a result of his or her reliance on the sellers’ misrepresentation.” *Lloyd*, 397 Md. at 143. The City pleads no such reliance or injury.

This underscores another basic problem with the City's MCPA claims—the City fails to plead, as required, any injury in its capacity as a consumer who was injured as a result of the use of Defendants' products. *See Boatel Indus., Inc. v. Hester*, 77 Md. App. 284, 303 (1988) (disqualifying plaintiff from recovering under the MCPA because “he does not qualify as a ‘consumer’”). The MCPA defines “consumers” as lessees and recipients of goods, including actual and prospective purchasers. Md. Code Ann., Com. Law § 13-101(c)(1). But the City's claims are not based on damages caused by its *own* consumption of Defendants' products—or on the amounts Plaintiff spent on those products—but on the consumption of billions of third parties outside Maryland, with respect to whom the City also fails to adequately allege reliance. Compl. ¶¶ 20(g), 21(e), 22(g), 34.<sup>17</sup> Because Plaintiff does not claim to be harmed in its capacity as a consumer, its MCPA claim fails. *See Boatel Indus., Inc.*, 77 Md. App. at 303.

#### **5. Plaintiff Fails to Allege Causation Adequately for Any Claim.**

Maryland courts have long recognized that “a causal relationship between the defendant's acts and the plaintiff's injury . . . is fundamental to tort law.” *Nissen Corp v. Miller*, 323 Md. 613, 627 (1991) (quoting *Polius v. Clark Equip. Co.*, 802 F.2d 75, 81–82 (3d Cir. 1986)); *see also Pittway*, 409 Md. at 252–53; *Chassels v. Krepps*, 235 Md. App. 1, 12 (2017). Plaintiff is required to plead “identifiable conduct” by Defendants that caused Plaintiff's “particular” injury. *McClelland v. Goodyear Tire & Rubber Co.*, 735 F. Supp. 172, 174–75 (D. Md. 1990). The first step in assessing causation is “an examination of causation-in-fact to determine who or what caused” the alleged injury, and the “second step is a legal analysis to determine who should pay”

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<sup>17</sup> Although the Consumer Protection Division of the Office of the Attorney General can enforce the MCPA on behalf of third-party consumers under certain circumstances, *see* Md. Code Ann., Com. Law § 13-204; *Boatel Indus., Inc.*, 77 Md. App. at 303, the City does not—and cannot—invoke any such regulatory authority here. On the contrary, Plaintiff asserts a “private right of action” under § 13-408(a) to remedy harm that the City itself claims to have incurred as a result of Defendants' alleged misconduct. Compl. ¶¶ 293, 298.

for the alleged injury—legal cause. *Pittway*, 409 Md. at 244. Plaintiff’s claims fail at both steps, requiring dismissal of Plaintiff’s Complaint.

**a. Taking the Factual Allegations of Plaintiff’s Complaint as True, Plaintiff Cannot Show that Defendants’ Conduct Was a Substantial Factor in Plaintiff’s Injuries.**

When “two or more independent” acts bring about a plaintiff’s alleged injuries, Maryland courts apply “the substantial factor” test to determine causation-in-fact. *Pittway*, 409 Md. at 244. Maryland has “adopted the substantial factor test set forth in the Restatement (Second) of Torts.” *Id.*; *see also Copsey v. Park*, 453 Md. 141, 164 (2017) (same). Under this approach, each defendant’s conduct must be an independently sufficient cause of the plaintiff’s harm in order to constitute a substantial factor. Mere sufficiency is not enough. Restatement (Second) of Torts § 432; *Aldridge v. Goodyear Tire & Rubber Co.*, 34 F. Supp. 2d 1010, 1013 (D. Md. 1999) (citation omitted), *vacated on other grounds*, 223 F.3d 263 (4th Cir. 2000), *aff’d on remand*, 198 F.R.D. 72 (D. Md. 2000), *aff’d*, 30 F. App’x 184 (4th Cir. 2002) (A “cause must be sufficient before it can be substantial.”).

Maryland courts consider three factors in the substantial factor analysis: “(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it; (b) whether the actor’s conduct has created a force . . . harmless unless acted upon by other forces of which the actor is not responsible; [and] (c) lapse of time.” *Pittway*, 409 Md. at 245 (quoting Restatement (Second) of Torts § 433). To be liable, each defendant’s independent conduct must satisfy the Restatement’s requirements. *John Crane v. Linkus*, 190 Md. App. 217, 234 (2010) (“The question is whether each contributing cause, *standing alone*, is a substantial factor.” (emphasis added)).

Here, Plaintiff does not allege that any Defendant’s conduct served as an “independently sufficient cause of [its] harm.” *Aldridge*, 34 F. Supp. 2d at 1020; *see also Asphalt & Concrete*

*Servs., Inc. v. Perry*, 221 Md. App. 235, 261 (2015) (“The ‘substantial factor’ test appears when ‘two independent causes concur to bring about an injury, and either cause, standing alone, would have wrought the identical harm.’”).<sup>18</sup> Instead, Plaintiff merely makes the conclusory allegation that Defendants’ conduct has “contributed substantially” to the buildup of CO<sub>2</sub> in the environment. Compl. ¶ 6.<sup>19</sup> In fact, Plaintiff cannot trace its injuries to any specific Defendant’s greenhouse gas emissions because, as Plaintiff admits, CO<sub>2</sub> emissions commingle in the atmosphere. *Id.* ¶ 235.

Even if Plaintiff could demonstrate any Defendant’s conduct was independently sufficient to cause its harm, which it cannot, all three substantial factor considerations weigh against finding causation here.

**i) Countless Factors Contribute to Plaintiff’s Alleged Injuries.**

First, climate change arises from the current and historical acts of countless third parties. Billions of individuals and entities contribute to climate change when they burn fossil fuels—each thereby contributing to climate change—while driving automobiles, heating, cooling, and powering their homes, operating machinery, traveling on airplanes, and engaging in myriad other energy-consuming activities. Entities contribute to climate change in similar ways and through energy generation and manufacturing products, such as automobiles, that themselves require fossil

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<sup>18</sup> Should Plaintiff attempt to avoid proving causation by arguing that Defendants are liable in proportion to their market share, the claims should be dismissed because market share liability is not recognized under Maryland law. *Wallace & Gale Asbestos Settlement Tr. v. Busch*, 464 Md. 474, 491 (2019).

<sup>19</sup> Plaintiff has not alleged what any Defendant’s individual contribution is to its alleged harms. Thus, Plaintiff has not alleged that any Defendant’s contribution to said harms is more than *de minimis*. By definition, a *de minimis* contribution is not a substantial factor. See, e.g., *Stark v. Armstrong World Indus., Inc.*, 21 Fed. App’x 371, 375 (6th Cir. 2001) (applying the Restatement’s substantial factor test and concluding that “[a] defendant does not become liable based on a bare demonstration of ‘minimal exposure’ even when the plaintiff’s injuries arise from the relevant toxic substance”); *Aldridge*, 34 F. Supp. at 1018–19 (no causation because defendant Goodyear produced only 10% of the chemicals that allegedly caused plaintiffs’ injuries).

fuels. In addition to fossil fuel usage, numerous other factors have contributed to climate change.<sup>20</sup> It is thus both impossible and inequitable to attribute causation-in-fact to the select group of fossil fuel producers that Plaintiff chose to name in its Complaint. See *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118, 1135 (D.N.M. 2011) (“[C]limate change is dependent on an unknowable multitude of [greenhouse gas] sources and sinks, and it is impossible to say with any certainty that Plaintiff’s alleged injuries were the result of any particular action or actions by Defendants.”). As the district court explained in *Kivalina I*, the “undifferentiated nature of greenhouse gas emissions from all global sources and their worldwide accumulation over long periods of time . . . make[s] clear that there is no realistic possibility of tracing any particular alleged effect of global warming to any particular [action] by any specific person, entity, [or] group at any particular point in time.” 663 F. Supp. 2d at 880. Simply put, tort claims aimed at individual defendants are ill suited to addressing the effects of climate change, a problem created by humanity at large, and one for which the legislative and executive branches—not the courts—are best suited to develop a “uniform and comprehensive solution.” *California v. BP p.l.c.*, No. C 17-06011 WHA, 2018 WL 1064293, at \*3 (N.D. Cal. Feb. 27, 2018).

**ii) Defendants’ Products Do Not Cause Harm Unless and Until Acted Upon by Others.**

Second, it is *not* oil and gas production, the production of fuels from those products, or the marketing of them that causes climate change. Rather, as Plaintiff admits, it is the combustion of fossil fuels by billions of third parties (including Plaintiff) that creates greenhouse gas emissions, which accumulate in the atmosphere over time and purportedly cause the harms Plaintiff alleges.

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<sup>20</sup> Other sources of greenhouse gas emissions include decomposition, ocean release and respiration, cement production, agricultural practices, including livestock manure, and many others. See IPCC, Climate Change 2014: Synthesis Report, Summary for Policymakers, Figure SPM.1, [https://www.ipcc.ch/site/assets/uploads/2018/02/AR5\\_SYR\\_FINAL\\_SPM.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf) (cited in Compl. ¶ 3 n.3).

Compl. ¶¶ 41, 48. Defendants do not control the consumption of fossil fuels by these end users, which depends on innumerable factors—from the price of energy, to government policies about transportation and housing, to the individual decisions of billions of people around the globe—or the way in which these end users consume the fossil fuels, which affects the level of greenhouse gas emissions from such consumption. Emissions from fossil fuel consumption will continue until these third parties elect not to combust fossil fuels—whether that fuel is produced by Defendants, or other suppliers who are not parties to this litigation. Defendants are thus not a “substantial cause” of the harms Plaintiff alleges within the meaning of Maryland tort law. *See Aldridge*, 34 F. Supp. 2d at 1018 (finding no causation-in-fact where, among other things, chemicals Goodyear supplied were not toxic until they decomposed in “various hot processes in the . . . plant”).

**iii) Plaintiff’s Claims Depend on Conduct that Is Decades Old.**

Finally, the “lapse of time” factor also weighs against a finding of causation because Plaintiff admits that it seeks to hold Defendants liable for lawful conduct occurring since the “Second World War,” (Compl. ¶ 4), and its theory sweeps in conduct going back decades earlier to the beginning of the Industrial Age. Plaintiff’s claims are therefore “dependent on a series of events far removed both in space and time from the Defendants” alleged misconduct. *Kivalina I*, 663 F. Supp. 2d at 881.

The only attempt Plaintiff makes to allege a link between its allegations about Defendants’ promotion of fossil fuels and Plaintiff’s alleged injury is Plaintiff’s speculation that Defendants’ alleged lobbying efforts (either directly or through trade associations) are somehow responsible for delayed “action on climate change,” and that absent Defendants’ conduct, action would have been taken to “restore[] the earth’s energy balance and halt[] future global warming.” Compl. ¶ 180; *id.* ¶ 183. This “wholly speculative” alternative history is “not sufficient” to establish causation-in-fact. *See Lyon v. Campbell*, 120 Md. App. 412, 437 (1998) (“[C]ausation evidence

that is wholly speculative is not sufficient.”). Plaintiff does not allege what actions would have been taken or who would have taken them—governments, regulators, businesses, or individuals. The theory also cannot be reconciled with Plaintiff’s admission that climate change has been recognized at the highest levels of the U.S. government since at least 1965, when a presidential committee reported that CO<sub>2</sub> emissions driven by fossil fuel use “modify the heat balance of the atmosphere to such an extent that marked changes in climate . . . could occur.” Compl. ¶ 103.

**b. Plaintiff Fails to Plead Legal Causation.**

Putting aside causation-in-fact, the Court should dismiss Plaintiff’s tort claims because Defendants’ conduct does not “constitute a legally cognizable cause” of the alleged injuries. *Pittway*, 409 Md. at 245 (“Legal causation is a policy-oriented doctrine designed to be a method for limiting liability after cause-in-fact has been established.”). The doctrine of proximate cause was designed to prevent courts from creating “significant extensions of liability” in tort, even where a causal connection is “rationally arguable.” *Valentine v. On Target, Inc.*, 112 Md. App. 679, 693 (1996), *aff’d*, 353 Md. 544 (1999). The causal connection alleged here would significantly extend liability, and as such Defendants are not the legal cause of Baltimore’s alleged harms under Maryland law.

“[P]ublic policy considerations that may play a role in determining legal causation include ‘the remoteness of the injury’” from the defendant’s act and “the extent to which the injury is out of proportion” to the defendant’s culpability. *Pittway*, 409 Md. at 246 (citation omitted). As set forth above, Plaintiff alleges no relationship between itself and these Defendants, and does not claim that any Defendant engaged in a particular negligent or wrongful act directed at Plaintiff or even a wrongful act to which Plaintiff was exposed, causing its injuries. *See* III.A.2.b above. Indeed, Plaintiff admits that the cause of climate change is the accumulation of greenhouse gases in the atmosphere over decades due to the activities—including fossil fuel consumption—of

countless third parties, not Defendants' mere production of fossil fuels. Compl. ¶¶ 41, 48. Plaintiff also admits that CO<sub>2</sub> emissions cannot be traced to their source. *Id.* ¶ 235. Defendants' alleged wrongful acts are thus too "remote" from the alleged injury to provide a basis for legal causation.

The injury for which Plaintiff seeks to impose liability is "out of proportion" to Defendants' alleged culpability, which rests on conduct that is lawful and encouraged under both federal and Maryland law—not to mention worldwide. Indeed, this conduct has benefited and continues to benefit the City in countless ways as the City continues to consume fossil fuels in large quantities. *See Pittway*, 409 Md. at 246. Here, there can be no legal causation predicated on sequential, attenuated events where the allegedly injured party, the City, has no relationship with Defendants. *See, e.g., Dehn*, 384 Md. at 611–12 (rejecting liability where no duty was owed to wife when negligent act happened to husband, which later caused wife's injury); *Doe*, 388 Md. at 411–12 (same); *Gourdine*, 405 Md. at 726 (rejecting liability for alleged negligent failure to warn because any duty was owed to the product user, not the injured party).

Moreover, the significant "lapse of time" between the onset of the alleged conduct and the alleged injury is exponentially greater than that in many other cases in which Maryland courts have declined to find legal causation. *See, e.g., Wankel v. A & B Contractors, Inc.*, 127 Md. App. 128, 159, 170–71 (1999) (affirming trial court's finding that 13 months between conduct and harm was sufficiently "remote in time" to preclude a finding of legal causation).

For all of these reasons, Plaintiff does not allege the necessary close connection between Defendants' alleged conduct and Plaintiff's alleged harms to justify a finding of causation and imposition of liability. *See Dehn*, 384 Md. at 626 ("[L]egal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is

justified in imposing liability”) (quoting *Prosser & Keeton on the Law of Torts* § 41 at 264 (5th Ed. 1984)). All of Plaintiff’s state-law claims must be dismissed.

**B. Plaintiff’s Claims Are Also Barred by Federal Law.**

As demonstrated above, the Complaint can and should be dismissed on myriad state law grounds for failure to state a claim. In addition, there are independent bases for dismissal under federal law. Multiple federal courts have refused to create a climate change tort like the one Plaintiff asserts here, finding such claims barred by the Clean Air Act (“CAA”) and the foreign affairs doctrine.

Approximately 15 years ago, various plaintiffs filed the first tranche of climate change cases against utility companies and energy companies. The Supreme Court shut down those cases when it ruled in *AEP* that Congress, through the CAA, tasked the EPA—and not the courts—with regulating greenhouse gas emissions. *See AEP*, 564 U.S. at 427–28. *AEP* rested on earlier decisions confirming that federal (not state) common law governs “interstate pollution,” and that a state cannot apply its law to pollution emanating from sources in other states. *AEP*, 564 U.S. at 421; *Onellette*, 479 U.S. at 492; *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) (“When we deal with air and water in their ambient or interstate aspects, there is a federal common law.”); *Kivalina II*, 696 F.3d at 855–58 (holding that federal public nuisance claims brought by Alaskan village against oil and gas companies for climate change-related injuries such as rising sea levels were “transboundary pollution” claims to which federal common law applied).<sup>21</sup>

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<sup>21</sup> Plaintiffs in *Kivalina* and *AEP* had alternatively asserted state law claims, but those claims were not considered by the courts on appeal. *See Kivalina II*, 696 F.3d at 854–55; *AEP*, 564 U.S. at 429. Following dismissal of their federal claims, plaintiffs in both cases did not attempt to pursue any alternative state law claims on remand.

In *Kivalina II*, the Ninth Circuit affirmed dismissal of public nuisance claims brought by local governmental entities against a broad array of oil, gas, and coal producers (many of which are named as Defendants here) as well as dozens of electric power producers. 696 F.3d at 856–58. The Ninth Circuit held that such claims were displaced by the CAA because “Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources and has therefore displaced federal common law.” *Id.* at 856. In 2006, the State of California brought climate change public nuisance claims against six major automobile manufacturers. The Northern District of California dismissed the case on the basis that it presented a political question and noted the “authority to regulate carbon dioxide lies with the federal government, and more specifically with the EPA as set forth in the CAA.” *California v. Gen Motors Corp.*, No. C06–05755 MJJ, 2007 WL 2726871, at \*14 (N.D. Cal. Sept. 17, 2007).

The second, and current, round of climate cases began over two years ago when state and local governmental entities filed more than a dozen identical climate change suits against overlapping groups of oil, gas, and coal companies.<sup>22</sup> Seeking to avoid established law that ended the first round of climate change cases, these new cases pursue a theory of injury *even more attenuated* than the plaintiffs’ theories in the first round of cases. Instead of suing companies for producing emissions that contribute to climate change, Plaintiff here has sued companies that produce or sell fossil fuels that eventually are combusted by billions of end users around the world,

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<sup>22</sup> See *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018); *City of Imperial Beach v. Chevron Corp.*, No. 17-cv-4934 (N.D. Cal.); *Cty. of Marin v. Chevron Corp.*, No. 17-cv-4935 (N.D. Cal.); *Cty. of Santa Cruz v. Chevron Corp.*, No. 18-cv-450 (N.D. Cal.); *City of Santa Cruz v. Chevron Corp.*, No. 18-cv-458 (N.D. Cal.); *City of Richmond v. Chevron Corp.*, No. 18-cv-732 (N.D. Cal.); *City of Oakland v. BP p.l.c.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018); *City & Cty. of San Francisco v. BP p.l.c.*, No. 17-cv-6012 (N.D. Cal.); *Pac. Coast Fed. of Fishermen’s Ass’ns v. Chevron Corp.*, No. 3:18-cv-07477 (N.D. Cal.); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019); *Mayor & City Council of Baltimore v. BP p.l.c.*, 388 F. Supp. 3d 538 (D. Md. 2019); *King County v. BP p.l.c.*, No. 2:18-cv-00758-RSL (W.D. Wash.); *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018); *Bd. of Cty. Comm’rs v. Suncor Energy (U.S.A.) Inc.*, No. 18-cv-01672 (D. Colo.).

resulting in the emissions that allegedly contribute to climate change and caused Plaintiff's injury. So far, two courts have reached the merits of these new claims, and both have dismissed for failure to state a claim. *See City of New York*, 325 F. Supp. 3d at 468; *City of Oakland*, 325 F. Supp. 3d at 1019.

Those courts rejected plaintiffs' attempts to distinguish their claims from previously dismissed climate change cases. *City of New York*, 325 F. Supp. 3d at 471–73 (“Here, the City seeks damages for global warming-related injuries caused by greenhouse gas emissions resulting from the combustion of Defendants’ fossil fuels.”); *see also City of Oakland*, 325 F. Supp. 3d at 1024. The courts recognized that federal common law controlled and concluded that Supreme Court and Ninth Circuit precedent rejecting prior attempts to create a climate change tort foreclosed Plaintiff's claims. *City of Oakland*, 325 F. Supp. 3d at 1026–27; *City of New York*, 325 F. Supp. 3d at 475.

In granting Plaintiff's motion to remand, the district declined to decide whether federal common law must necessarily govern Plaintiff's claims. *See Mayor and City Council of Baltimore v. BP p.l.c.*, 388 F. Supp. 3d 538, 555, 557–58 (D. Md. 2019).<sup>23</sup> Regardless of whether federal or state common law governs Plaintiff's claims, however, the result is the same—Plaintiff's claims

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<sup>23</sup> Defendants removed this case to federal court on the basis that Plaintiff's interstate pollution claims necessarily “arose under” federal law, among other grounds. *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 18-cv-02357, ECF No. 1 (D. Md.). In granting Plaintiff's motion to remand, the district court declined to decide whether federal common law must necessarily govern Plaintiff's claims. *See Mayor and City Council of Baltimore v. BP p.l.c.*, 388 F. Supp. 3d 538, 555, 557–58 (D. Md. 2019). The district court erred in conflating the question of whether Plaintiff could state a claim (the “substance” of Plaintiff's claims) with the question of the law under which Plaintiff's claims necessarily arise (the “source” question). *See United States v. Standard Oil Co.*, 332 U.S. 301, 305–06 (1947); *see also United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 43 (1st Cir. 1999). Defendants' appeal of the district court's remand order is pending. *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 19-1644 (4th Cir.).

are barred.<sup>24</sup> If governed by federal common law, Plaintiff's claims are displaced by the CAA; if governed by state law, they are *preempted* by the CAA because states cannot regulate pollution sources in other states. In addition, because Plaintiff seeks to apply Maryland tort law extraterritorially and retroactively to curtail Defendants' lawful out-of-state energy production, its claims are also barred by the foreign affairs doctrine and the Commerce and Due Process Clauses of the U.S. Constitution.

**1. Plaintiff's Claims Are Barred by the Clean Air Act.**

**a. Plaintiff's Federal Common Law Claims Are Displaced under *AEP*.**

First, if Plaintiff's claims are governed by federal common law, as Defendants contend, they are displaced by the CAA. The Supreme Court held in *AEP* that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions" or damages due to climate change-related injuries caused by greenhouse gas emissions. *AEP*, 564 U.S. at 424; *see also Kivalina II*, 696 F.3d at 857. Two federal district courts applied *AEP* to dismiss claims brought in New York and California that were identical to Baltimore's claims. *See City of New York*, 325 F. Supp. 3d at 473 ("[U]nder *AEP* and *Kivalina*, the Clean Air Act displaces the City's claims seeking damages for past and future domestic greenhouse gas emissions brought under federal common law."); *City of Oakland*, 325 F. Supp. 3d at 1024 ("[T]he Clean Air Act and the EPA's authority thereunder to set emission standards have displaced federal common law nuisance claims to enjoin a defendant's emission of greenhouse gases."). Moreover, displacement of federal common law does not mean that state

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<sup>24</sup> This state court, like the federal courts that decided *City of New York* and *City of Oakland*, is bound by the Supremacy Clause to apply the applicable federal common law. *See* 19 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4514 (3d ed. 2019) nn. 9, 10, 11 and accompanying text ("[P]ost-Erie federal common law is truly federal law and therefore, by virtue of the Supremacy Clause, it is binding on state courts as well as on the federal courts.").

common law springs to life. “[I]f federal common law exists, it is because state law cannot be used.” *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313 (1981) n.7; *see also Nat’l Audubon Soc’y v. Dep’t of Water*, 869 F.2d 1196, 1204–05 (9th Cir. 1988) (“[T]rue interstate disputes require application of federal common law” to “the exclusion of state law.”) (citation omitted).

The result is no different for Plaintiff’s product liability, trespass, and MCPA claims, because like the nuisance claims, each of these claims is aimed at harms allegedly caused by the emission of greenhouse gases and their accumulation in the atmosphere.<sup>25</sup> Because Congress has displaced any remedy available to Plaintiff, Plaintiff cannot state a claim under federal common law. The Supreme Court made clear in *AEP* that Congress had delegated emissions-regulating authority to the EPA, and that this delegation “is what displaces federal common law.” 564 U.S. at 426. As there is “no room for a parallel track,” Plaintiff’s claims are displaced by the CAA. *Id.* at 425.

**b. Plaintiff’s State Common Law Claims Are Preempted under *Ouellette*.**

Second, even if Plaintiff were able to state claims under state law, such claims would be preempted by the CAA because the claims would effectively regulate interstate greenhouse gas

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<sup>25</sup> *See* Compl. ¶¶ 218–36 (nuisance claims based on theory that Defendants’ production of oil and gas and “campaign[] against the regulation of fossil fuel products” caused climate change as “the cost to society of each ton of greenhouse gas emitted into the atmosphere increases as total global emissions increase”); *id.* ¶¶ 237–48, 270–81 (failure to warn claims based on Defendants’ alleged breach of duty to warn of alleged climate change risks from fossil fuel products “because greenhouse gas emissions from their use cause numerous global and local changes to Earth’s climate”); *id.* ¶¶ 249–69 (design defect claims based on allegation that oil and gas are “unreasonably dangerous” for foreseeable uses and that such uses resulted in “the addition of CO<sub>2</sub> emissions to the global atmosphere”); *id.* ¶¶ 282–90 (trespass claim based on Defendants allegedly causing sea level rise and other alleged climate change harms); *id.* ¶¶ 291–98 (MCPA claims based on theory that Defendants made misleading statements and developed public relations materials that prevented consumers from recognizing “risk that fossil fuel products would cause grave climate changes”).

emissions. State law must yield to federal law if compliance with both federal and state regulations would be impossible and where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.” *Arizona v. United States*, 567 U.S. 387, 399–400 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). This is such a case. The Supreme Court held more than 30 years ago that the Clean Water Act (“CWA”) preempted state law claims for injury from water pollution where the pollutant was discharged into the environment from a point outside of the state where the injury occurred. See *Ouellette*, 479 U.S. at 499 (holding that property owners in Vermont could not apply Vermont law to New York for discharges into Lake Champlain, affecting property owners on the Vermont side). The Court held that the only state law claims “not pre-empted [by the CWA are] those alleging violations of the laws of the polluting, or ‘source,’ State.” *Id.* at 485. Because the structure of CAA parallels the structure of the CWA, down to an analogous savings clause,<sup>26</sup> courts have consistently applied *Ouellette* to find that the CAA preempts state law claims challenging air pollution originating out-of-state. See *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015) (“[C]laims based on the common law of a non-source state . . . are preempted by the [CAA]”); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 190–91 (3d Cir. 2013) (same); *Cooper*, 615 F.3d at 301 (4th Cir. 2010) (same). Plaintiff has not even attempted to plead its claims only under the laws of the state where the allegedly harm-causing emissions occurred—which would require pleading its claims under the laws of all 50 states for emissions occurring in those states. See *Ouellette*, 479 U.S. at 485.

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<sup>26</sup> While the “savings clause” in CAA Section 116 preserves states’ rights to “adopt” or “enforce” standards and limitations on emissions, with certain enumerated exceptions, 42 U.S.C. § 7416, that provision does not render state common law applicable to matters for which state common law never applied (*i.e.*, for air in its “ambient or interstate aspects” where “borrowing the law of a particular state would be inappropriate,” *AEP*, 564 U.S. at 421, 422). Section 116 merely preserves state authority to “regulate to minimize the in-state harm caused by products sold in-state.” *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 952 (9th Cir. 2019) (emphasis added). It does not authorize states to pursue nationwide or worldwide climate regulation.

Finally, Plaintiff cannot circumvent the CAA by seeking to hold Defendants liable for the emissions of others. The courts in *New York* and *Oakland* recognized that the CAA displaced federal common law nuisance claims against a party for its own emissions and that, as a result of that displacement, a third party could not be sued as a result of someone else's emissions. *City of New York*, 325 F. Supp. 3d at 474–75 (finding that claims alleging climate change-related injuries against fossil fuel producers were predicated on emissions and were displaced by federal law); *see also City of Oakland*, 325 F. Supp. 3d at 1024.

## **2. Plaintiff's Claims Are Barred by Federal Energy Law.**

Even framed as challenging Defendants' role in fossil fuel *production* rather than emissions, Plaintiff's claims are still displaced by federal law because Congress also has spoken directly to that issue through numerous statutes, including the Energy Policy Act of 2005, the Energy Policy Act of 1992, the Federal Land Policy and Management Act of 1976, the Coastal Zone Management Act of 1972, and the Mining and Minerals Policy Act of 1970, which address, and promote, fossil fuel production and development. *See* 16 U.S.C. § 1451(j); 30 U.S.C. § 21a; 42 U.S.C. §§ 13401, 15927; 43 U.S.C. § 1701(a)(12).

For example, the Energy Policy Act of 1992 provides that “[i]t is the goal of the United States in carrying out energy supply and energy conservation research and development . . . to strengthen national energy security by reducing dependence on imported oil.” 42 U.S.C. § 13401. The statute directs the Secretary of Energy “to increase the recoverability of domestic oil resources,” *id.* § 13411(a), and to investigate “oil shale extraction and conversion” in order “to produce domestic supplies of liquid fuels from oil shale,” *id.* § 13412. The 2005 Act declared it “the policy of the United States that . . . oil shale, tar sands, and other unconventional fuels are strategically important domestic resources that should be developed to reduce the growing dependence of the United States on politically and economically unstable sources of foreign oil

imports,” *id.* § 15927(b), and offered financial incentives to fossil fuel producers to increase domestic fossil fuel production. Even the tax code encourages the extraction and refining activities of fossil fuel companies in order to promote production. *See* I.R.C. §§ 263(c), 613A(c)(1), 617. The cited legislation directly addresses, and refutes, the proposition that Defendants’ fossil fuel production and related activities are “unreasonable” or tortious because of the potential threat of climate change. *See AEP*, 564 U.S. at 423–424. Plaintiff’s claims challenging these activities are therefore displaced.

### **3. Plaintiff’s Claims Are Barred by the Foreign Affairs Doctrine.**

Just as Plaintiff may not use Maryland tort law to regulate fossil fuel production and greenhouse gas emissions in other states, Plaintiff may not use Maryland law to regulate these activities worldwide. The foreign affairs doctrine preempts state law that would “impair the effective exercise of the Nation’s foreign policy.” *Garamendi*, 539 U.S. at 419 (quoting *Zschernig v. Miller*, 389 U.S. 429, 440 (1968)). This prohibition extends to state law causes of action. *See United States v. Pink*, 315 U.S. 203, 230–31 (1942) (“[S]tate law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement.”).

Plaintiff’s claims would interfere with the U.S. government’s conduct of foreign policy, now and prospectively, which includes efforts to address climate change and the allocation of costs through multilateral negotiations. *See In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 115, 119–20 (2d Cir. 2010). Efforts to address climate change, including in a variety of multilateral

fora, have been an important element of U.S. foreign policy and diplomacy for decades.<sup>27</sup> The U.S. is a party to the United Nations Framework Convention on Climate Change (“UNFCCC”), which aims to stabilize greenhouse gas concentrations while also enabling sustainable economic development. UNFCCC (1992), art. 2, <https://unfccc.int/resource/docs/convkp/conveng.pdf>. The United States also has acted at the national level to address climate change while balancing key economic and social interests. In 1978, Congress established a “national climate program” to improve the country’s understanding of climate change through enhanced research, information collection and dissemination, and international cooperation. See Nat’l Climate Program Act, 15 U.S.C. § 2901 *et seq.* In the Global Climate Protection Act of 1987, Congress recognized the uniquely international character of climate change and directed the Secretary of State to coordinate U.S. negotiations on this issue. See *id.* § 2901(5); see also *id.* § 2952(a). Other laws, like the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007, sought further reductions of greenhouse gas emissions. See *id.* § 13389(c)(1); *id.* § 17001 *et seq.*

Indeed, that claims like those brought by Plaintiff have the potential to interfere with the government’s conduct of foreign affairs is underscored by the United States’ amicus brief in the Second Circuit appeal of *City of New York*. The United States explained that “international negotiations related to climate change regularly consider whether and how to pay for the costs to adapt to climate change and whether and how to share costs among different countries and international stakeholders,” and argued that “[a]pplication of state nuisance law . . . would

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<sup>27</sup> See Nat’l Climate Program Act of 1978, 15 U.S.C. § 2901 *et seq.* (establishing “national climate program” to improve country’s understanding of climate change through research and international cooperation); Global Climate Protection Act, Title XI of Pub. L. 100-204, 101 Stat. 1407 (1987), note following 15 U.S.C. § 2901 (recognizing uniquely international character of climate change and directing Secretary of State to coordinate U.S. negotiations on the issue); 15 U.S.C. § 2952(a) (prompting President to “direct the Secretary of State . . . to initiate discussions with other nations leading toward international protocols and other agreements to coordinate global change research activities”).

substantially interfere with the ongoing foreign policy of the United States.” Br. for the United States as Amicus Curiae at 15–16, *City of New York v. BP p.l.c.*, No. 18-2188, ECF No. 210 (2d Cir. Mar. 7, 2019).

The need to balance greenhouse gas regulation with the benefits of fossil fuels continues to be a subject of debate in the U.S. Government and presumably will remain so, as different administrations come and go. *See, e.g.*, S. Res. 98, 105th Cong. (1997) (unanimous resolution of the U.S. Senate urging the President not to sign the Kyoto Protocol if it would cause serious harm to the U.S. economy or fail to sufficiently reduce other countries’ emissions). As the district court dismissing virtually identical claims brought by the City of New York explained, such claims “implicate countless foreign governments and their laws and policies . . . [and] is the subject of international agreements.” *City of New York*, 325 F. Supp. 3d at 475; *see also City of Oakland*, 325 F. Supp. 3d at 1026.

Plaintiff suggests that a global cap of “a 15 percent annual reduction” in CO<sub>2</sub> emissions would be required to abate the nuisance attributed to global emissions. Compl. ¶ 180. But neither the Plaintiff nor the courts can determine or enforce what they believe to be “reasonable” global emissions levels because the Constitution and our laws vest foreign relations authority in the executive branch. *See AEP*, 564 U.S. at 427–29 (dismissing claim that would have required “setting emissions standards by judicial decree” and explaining the “appropriate amount” of greenhouse gas emissions is a “question of . . . international policy”); *City of New York*, 325 F. Supp. 3d at 475 (“[T]o litigate such an action . . . would severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches”); *see also Juliana v. United States*, \_\_\_ F.3d \_\_\_, 2020 WL 254149, at \*8 & n.8 (9th Cir. Jan. 17, 2020) (dismissing climate change-related claims because, *inter alia*, climate change solutions require a “host of complex

policy decisions entrusted . . . to the wisdom and discretion” of the federal political branches and recognizing the “[m]any resolutions and plans [that] have been introduced in Congress” to “tackl[e] this global problem,” all of which entail “the exercise of discretion, trade-offs, international cooperation, private-sector partnerships, and other value judgments”). Because Plaintiff’s claims would “undermine[] the President’s capacity . . . for effective diplomacy” by “[c]ompromis[ing] the very capacity of the President to speak for the Nation,” the foreign affairs doctrine preempts them. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 381 (2000).

#### 4. Plaintiff’s Claims Are Barred by the Commerce Clause.

Because the relief Plaintiff seeks would have “the practical effect” of “control[ling] conduct beyond the boundaries of [Maryland],” its claims also are barred by the Commerce Clause, which “protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.” *Healy*, 491 U.S. at 336–37.<sup>28</sup>

The Complaint alleges that Defendants wrongfully “manufactured, promoted, marketed, and sold . . . fossil fuel products” around the world, and that this worldwide conduct has injured Plaintiff. Compl. ¶ 191; *see, e.g., id.* ¶ 20(b) (noting BP production in Trinidad, India, and the Gulf of Mexico); *id.* ¶ 28(b) (noting Hess production in Denmark, Equatorial Guinea, Malaysia, Thailand, and Norway); *id.* ¶ 29(f) (CONSOL production in Appalachia). Plaintiff’s “breathtaking[ly]” broad theory of liability “would reach the sale of fossil fuels anywhere in the world.” *City of Oakland*, 325 F. Supp. 3d at 1022. The damages and equitable relief Plaintiff

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<sup>28</sup> Plaintiff’s claims are also barred because the requested relief would burden foreign as well as interstate commerce. *See Japan Line, Ltd. v. Los Angeles Cty.*, 441 U.S. 434, 449 (1979) (“The need for federal uniformity is . . . paramount in ascertaining the negative implications of Congress’ power to regulate Commerce with foreign Nations under the Commerce Clause.” (internal quotation marks omitted)); *S. Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (“It is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny.”).

seeks would necessarily regulate fossil fuel extraction and production far beyond Maryland's boundaries.

Indeed, if this Court awarded “abatement of the public nuisance Defendants have created,” Compl. ¶ 228, it would necessarily regulate Defendants’ lawful business activities in other states, which presumably have their own different interests in regulating conduct within their borders. No state may use its tort law to “impos[e] its regulatory policies on the entire nation,” because “one State’s power to impose burdens on the interstate market” is “constrained by the need to respect the interests of other States.” *BMW of N. Am. v. Gore* (“*BMW*”), 517 U.S. 559, 571, 585 (1996).

Plaintiff’s request for monetary damages does not allow it to circumvent the regulatory effect and limitations of an abatement remedy, because a money damages award would have the same practical effect as abatement. “The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.” *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959). If Defendants’ lawful business models were found to be a nuisance—or if their products are deemed defective—every day of continued, lawful production would give rise to new claims, and therefore perpetual liability, until the business model is terminated. *See Goldstein v. Potomac Elec. Power Co.*, 285 Md. 673, 690 n.4 (1979) (stating that “successive actions may be brought for damages for each invasion of the plaintiff’s land until the period of prescription has elapsed”); *Ouellette*, 479 U.S. at 495 (recognizing that damages addressing common law environmental tort claims often force defendants to “change [their] methods of doing business and controlling pollution to avoid the threat of ongoing liability”).

In short, whether this Court were to impose an injunction or award the damages Plaintiff seeks, the relief requested would “directly control” commerce occurring wholly outside Maryland, in violation of the Commerce Clause. *Healy*, 491 U.S. at 336; *see also W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) (“Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce.”). The “practical effect” of state action “must be evaluated” by considering “what effect would arise if not one, but many or every, State adopted” similar policies. *Id.* at 336. This is more than a theoretical concern—there are a dozen nearly identical cases pending in California, New York, Rhode Island, Washington, and Colorado.

Courts must also consider how one state’s regulations “may interact with the legitimate regulatory regimes of other States,” many of which depend heavily on the production of fossil fuel resources for their economic prosperity and security. *Id.* Although Maryland is free to impose stricter limitations on the production and use of fossil fuels within its *own* borders, Plaintiff may not use the hammer of state tort law to “impose its own policy choice on neighboring states,” let alone every state in the country. *BMW*, 517 U.S. at 571. Indeed, even where a law “regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental,” it will not be upheld if “the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

A judgment in Plaintiff’s favor would have far more than incidental effects on interstate commerce. The nation’s economy depends on fossil fuels for heat, energy, transportation, agriculture, defense, and many other necessities. The local interests of any one state cannot outweigh the massive burdens that would be imposed upon the rest of the country with respect to

the economy, national security, transportation, and even the ability to heat one's home and cook food, if Plaintiff succeeds in unfairly penalizing a subset of the fossil fuel industry. Therefore, Plaintiff's requested judgment would impose the type of excessive burdens on interstate commerce that the Constitution forbids.

#### 5. Plaintiff's Claims Are Barred by the Due Process Clause.

Plaintiff does not allege that Defendants have violated *any* of the numerous federal and state laws regulating the extraction, production, promotion, or sale of fossil fuels. Yet it seeks massive damages based on emissions resulting from the use of products Defendants lawfully produced and sold across the country and around the world for decades. *See* Compl. ¶¶ 6, 7, 102, 140(H), 143, at 130 (Prayer for Relief). Imposing such extraordinary extraterritorial and retroactive liability on lawful, government-encouraged conduct would constitute “a due process violation of the most basic sort.” *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).<sup>29</sup>

Due process forbids States from “punish[ing] a defendant for conduct that may have been lawful where it occurred”—and there is no dispute that Plaintiff's suit seeks to impose liability based on conduct that was (and still is) legal where it occurred, in other states and around the globe. *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003) (collecting cases). Due process similarly prohibits a state from “impos[ing] economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.” *BMW*, 517 U.S. at 572; *see also id.* at 573 (state could not “punish BMW for conduct that was lawful where it occurred” or “impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions”). This

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<sup>29</sup> The due process clauses of both the U.S. Constitution and the Maryland Constitution (Article 24 of the Maryland Declaration of Rights) prohibits such a remedy. *See Pitsenberger v. Pitsenberger*, 287 Md. 20, 27 (1980) (“Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment of the United States Constitution have the same meaning, and that Supreme Court interpretations of the Fourteenth Amendment function as authority for interpretation of Article 24.” (citations omitted)).

is effectively what Baltimore seeks to do here by seeking damages and abatement predicated on violations of Maryland tort law based on Defendants' conduct in other states.

Due process also strongly disfavors the imposition of retroactive liability for lawful conduct because it deprives citizens of proper notice and upsets reasonable expectations. Plaintiff seeks to impose such retroactive liability here for production, promotion, and emissions going back decades. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (striking down a retroactive rule) (collecting cases); *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (noting that retroactive legislation presents “problems of unfairness that are more serious than . . . prospective legislation”); *E. Enters.*, 524 U.S. at 538 (striking down statute making coal companies retroactively liable for the medical costs of former coal miners because it “improperly place[d] a severe, disproportionate, and extremely retroactive burden on Eastern”). Because the City seeks to impose massive extraterritorial and retroactive liability based on Defendants' lawful conduct over many decades, its claims should be dismissed.

#### **6. Plaintiff's Claims Are Barred by the First Amendment.**

Finally, Plaintiff's claims also should be dismissed because they seek to punish Defendants for protected speech. According to Plaintiff, Defendants have “[d]isseminat[ed] and fund[ed] the dissemination of information intended to mislead . . . regulators,” Compl. ¶¶ 221(d), (e), and “engag[ed] in a campaign of disinformation regarding global warming,” which “prevented . . . regulators . . . from taking steps to mitigate the inevitable consequences of fossil fuel consumption.”<sup>30</sup> *Id.* ¶ 264(d). Far from strengthening its claims, Plaintiff's reliance on

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<sup>30</sup> Plaintiff also generally alleges with regard to all its claims that Defendants “wrongfully [] promoted” and “campaign[ed] against regulation of” fossil fuels even though they supposedly knew about the risks of greenhouse gas emissions. Compl. ¶ 190; *see id.* ¶¶ 1, 6, 10, 18, 94, 95, 100, 190, 193, 251, 252, 264(b), 284, 294, 295.

Defendants' alleged attempts to influence regulation dooms its claims, because the alleged "wrongful" conduct is protected speech under the First Amendment. U.S. Const. amend. I.

Specifically, as the Supreme Court has held, lobbying activity is protected from civil liability. See *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 145 (1961) (holding that lobbying activity is protected from civil liability); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 671 (1965) (same); see also *Baltimore Scrap Corp. v. David J. Joseph Co.*, 81 F. Supp. 2d 602, 620 (D. Md. 2000), *aff'd*, 237 F.3d 394 (4th Cir. 2001) ("*Noerr-Pennington* immunity . . . applies to □ state common law claims."). This is true even if "the campaign employs unethical and deceptive methods."<sup>31</sup> *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499–500 (1988); see also *New W., L.P. v. City of Joliet*, 491 F.3d 717, 722 (7th Cir. 2007) ("[T]he holding of *Noerr* is that lobbying is protected whether or not the lobbyist used deceit."). Here, Plaintiff repeatedly targets speech squarely protected by *Noerr-Pennington*. For example, throughout the Complaint, Plaintiff alleges that Defendants or industry lobbying organizations engaged in a "public campaign aimed at evading regulation of their fossil fuel products." Compl. ¶ 143; see also *id.* ¶¶ 30–31.

Plaintiff also targets quintessential lobbying activity when it alleges that Defendants produced reports that "warned of the potentially dramatic economic effects of ill-advised policy measures" related to climate change. *Id.* ¶ 149. Communications seeking to influence regulation concerning the role of fossil fuels in national energy policy—which are plainly directed towards lawmakers and regulators—are immunized by *Noerr-Pennington* and thus cannot form the basis of liability. Accordingly, Plaintiff's claims based on these communications must be dismissed.

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<sup>31</sup> Defendants dispute that any of their public relations campaigns have been unethical or deceptive.

**C. Dismissal Should Be With Prejudice.**

As discussed above, the Court should dismiss Plaintiff's Complaint in its entirety. Because it is clear that Plaintiff is unable to file an amended complaint that would cure the defects that require dismissal, the dismissal should be with prejudice.

When the Court grants a motion to dismiss pursuant to Md. Rule 2-322(a), "an amended complaint may be filed only if the court expressly grants leave to amend." It is within the Court's discretion to grant or deny a plaintiff leave to amend his or her complaint to attempt to remedy the defects that led to dismissal. *See Gaskins v. Marshall Craft Assoc., Inc.*, 110 Md. App. 705, 716 (1996) (explaining that "[t]he circuit court's decision not to grant leave to amend will not be overturned on appeal unless it is an abuse of discretion").

Here, it is clear that allowing Plaintiff to amend the Complaint would be futile, as the gravamen of Plaintiff's case is governed by federal common law and preempted by the CAA. Further, no amendment can overcome the legal obstacles to granting Plaintiff any relief under Maryland state tort law.

**CONCLUSION**

For these reasons, Defendants respectfully request that the Court dismiss Plaintiff's Complaint in its entirety with prejudice.

Dated: February 7, 2020

Respectfully submitted,

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MAYOR AND CITY COUNCIL  
OF BALTIMORE

Plaintiff,

v.

BP P.L.C., *et al.*

Defendants.

\* IN THE  
\* CIRCUIT COURT  
\* FOR BALTIMORE CITY  
\* Case No. 24-C-18-004219

\*

\* \* \* \* \*

**PROPOSED ORDER**

Upon review and consideration of Defendants' Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted and Request for Hearing, Plaintiff's Opposition thereto, and any further Reply(ies), it is this \_\_\_\_ day of \_\_\_\_\_, 2020, by the Circuit Court for Baltimore City, hereby

ORDERED, that Defendants' Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted is GRANTED; and it is further

ORDERED, that Plaintiff's Complaint filed July 20, 2018 is DISMISSED WITH PREJUDICE against all Defendants.

\_\_\_\_\_  
JUDGE VIDETTA A. BROWN

cc: All counsel

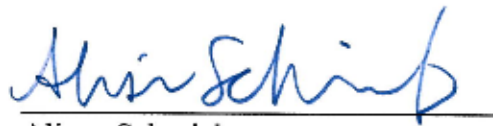
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 7th day of February, 2020, a copy of the foregoing Defendants' Motion to Dismiss for Failure to State a Claim upon which Relief Can Be Granted and Request for Hearing, Memorandum of Law in support thereof, and proposed Order were served via email and first-class mail, postage-prepaid on the following:

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