MAYOR AND CITY COUNCIL OF BALTIMORE	*	IN THE
	*	CIRCUIT COURT
Plaintiff, v.	*	FOR BALTIMORE CITY
BP P.L.C., *et al*.	*	Case No. 24-C-18-004219
Defendants.	*	Specially Assigned to the Hon. Videtta A. Brown

* * * * * * * * * * * * *

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED[1]

[1] Several Defendants have filed motions to dismiss on the grounds that they are not subject to personal jurisdiction in Maryland. Defendants submit this reply brief subject to, and without waiver of, any jurisdictional objections.

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I. INTRODUCTION

Plaintiff's Opposition claims to apply "established state law principles and traditional tort remedies," Opp. at 1, but this cannot withstand scrutiny. There is nothing "established" or "traditional" about Plaintiff's attempt to hold a select group of out-of-state energy producers liable for damages that Plaintiff claims it has suffered or will suffer from future weather events. If adopted by this Court, Plaintiff's unprecedented theories would launch a limitless expansion of tort liability contrary to settled state precedent, federal law, and the United States Constitution. The Court should reject this.

Plaintiff's production theory would impermissibly hold Defendants liable merely for producing lawful fossil fuels. Plaintiff does *not* seek to hold Defendants liable for the specific *manner* in which they produced their lawful fossil fuel products. Unlike in a traditional tort, Plaintiff does not claim, for example, that Defendants are liable because they extracted fossil fuels from the ground in ways that unreasonably polluted the waters or, as relevant here, emitted greenhouse gases. Plaintiff specifically *disclaims* holding Defendants liable for their own emissions. *See* Compl. at 130 (Prayer for Relief); *id.* ¶ 41. And Plaintiff does *not* allege that Defendants defectively designed fossil fuels in ways that increased CO_2 emissions, or contend that such a thing would have even been possible. Rather, Plaintiff seeks to hold Defendants liable for the fact that they are energy companies that produce fossil fuel products or the raw materials that go into them, which by their very nature emit CO_2 when combusted by end users.

Plaintiff ignores that both the production and use of fossil fuel products are fully authorized by law in each and every one of the jurisdictions across the country and around the world in which they occur. Plaintiff also ignores that production and use of fossil fuel products drive our economy and are essential to our national defense. Indeed, Maryland law expressly recognizes that the

production, distribution, and sale of fossil fuel products "vitally affect the economy of the State, and its public interest, welfare, and transportation." Md. Code Ann., Com. Law § 11-302. As a consequence, producing fossil fuel products is not a tort.

Tacitly conceding that Defendants cannot be held liable for merely producing and distributing fossil fuel products, Plaintiff now attempts to pivot to a deceptive "overpromotion" theory of liability. In its Opposition, Plaintiff now purports to hold Defendants liable not simply for producing fossil fuels, but rather for supposedly promoting their sale in some illicit manner. Plaintiff summarizes its present theory as seeking to base liability on "Defendants' tortious *over*production, *over*promotion, and *profligate* sale of fossil fuel products, combined with their concerted operation to misinform the public and conceal the fact that their products cause devastating changes to the climate." Opp. at 9 (emphases added). But this theory of "overpromotion" only exacerbates the fatal defects inherent in Plaintiff's claims. Plaintiff's Opposition repeatedly attacks the alleged "levels" or "amounts" of Defendants' sales of fossil fuels, contending they are "excessive," "harmful," "expanded," "unrestrained," "increased," "excess," or "ever-increasing." *See, e.g.*, Opp. at 2, 9, 14, 21, 23, 33–34, 38–39. Yet, Plaintiff gives no hint of a legal standard for determining the "proper" or "non-excessive" amount of Defendants' lawful products. Plaintiff's claims boil down to a policy dispute, not a viable tort claim.

Plaintiff's overpromotion theory would improperly require this Court to regulate Defendants' sales activities far beyond Maryland's borders, indeed throughout the nation and across the globe. There is no dispute that the vast majority of sales and use of Defendants' products occurred outside of Maryland. Plaintiff has not alleged and cannot allege that the in-state actions of any or all of the Defendants have somehow caused global climate change. Rather, Plaintiff admits that the climate impacts about which it complains are the result of cumulative

worldwide emissions over decades, if not centuries. *See* Compl. ¶¶ 9, 39, 41, 48, 108. To assess liability for this global phenomenon would require this Court to pass judgment on and effectively regulate the conduct of these Defendants, other energy companies not named, and billions of end users across the world over several decades.

No state may constitutionally impose its laws and regulate lawful conduct outside its borders, especially retrospectively. *See Healy v. The Beer Institute*, 491 U.S. 324, 336 (1989). But Plaintiff's claims seek to do exactly that, by basing liability on the allegedly excessive "levels" of Defendants' worldwide conduct. As one federal court has already found in dismissing substantively identical climate change claims, Plaintiff's "breathtaking[ly]" broad claims "would reach the sale of fossil fuels anywhere in the world." *City of Oakland v. BP p.l.c.*, 325 F. Supp. 3d 1017, 1022 (N.D. Cal. 2018). Such a sweeping inquiry runs afoul of various constitutional provisions, including the Commerce Clause, the Foreign Commerce Clause, the Due Process Clause, and the Foreign Affairs Clause, and is displaced and preempted by the Clean Air Act.

Plaintiff's overpromotion theory also fails because Plaintiff concedes that the consequences of using fossil fuels have been well known for decades, and that consumers and governments continue to use and promote the use of fossil fuels despite these known risks. The Complaint's citations to numerous studies and reports by governmental agencies dating back to the 1960s, *see, e.g.*, Compl. ¶¶ 103, 105, demonstrate that the government and general public had plenty of information readily available to them to suggest that emissions from fossil fuel combustion could have climatic effects. Not only did consumers continue to demand fossil fuels, but governments—including in Maryland—also continued to promote fossil fuel production and use. After all of the "revelations" about CO_2 emissions and climate change that Plaintiff claims were somehow hidden but now concedes are widely known, Maryland statutes continue to identify fossil

fuels, and specifically oil and gas, as vital to the public welfare, and Maryland consumers—including Plaintiff—continue to use fossil fuel products. There is no legal duty to warn of such obvious and known conditions. And, as Defendants have demonstrated, the Complaint fails to plead any "misrepresentations" or "misleading" promotions with specificity. *See* Mot. at 13–14, 28–30, 51–52. In fact, the only identified statements were concededly designed to influence public policy, and claims based on such activities are barred by the First Amendment under the *Noerr-Pennington* doctrine.

Plaintiff fails to plead causation for its overpromotion theory. Even if the Complaint did adequately allege any misrepresentations, Plaintiff fails to plead facts that, if taken as true, would show that "but for" alleged misrepresentations by Defendants Baltimore's current situation would be materially different, or the injury and risks at all altered. Plaintiff concedes that the vast majority of the world's supply of fossil fuels came from third parties not before this Court. This is in distinct contrast with the federal district court decisions in *State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420 (D. Md. 2019) ("*Exxon*") and *Mayor and City Council of Baltimore v. Monsanto Co.*, No. RDB-19-0483, 2020 WL 1529014 (D. Md. March 31, 2020) ("*Monsanto*"), upon which Plaintiff heavily relies. In both cases, the defendants' *products themselves* allegedly entered the state's groundwater, and in both cases the named defendants were allegedly responsible for the production or distribution of all (or nearly all) of the relevant chemicals. Neither of those cases recognized a tort action based on localized environmental injuries allegedly caused by complex geophysical phenomena arising from the actions of countless third parties around the world.

Precisely because climate change is an important policy issue within the province of local, national, and international legislators, suits seeking to assert global climate change torts like this one have been rejected as a matter of law. Those courts, including two federal district courts that

considered suits brought by New York City, San Francisco, and Oakland that are virtually identical to this one, recognized that climate change is a question of global policy, and not state tort law. For good reason, the complex balancing between the need for safe, affordable, and reliable energy and the goal of reducing greenhouse gas emissions due to combustion of fossil fuels is committed to the political branches. A state law tort lawsuit is not a permissible mechanism to make these policy decisions. In any event, each claim fails as a matter of Maryland law.

Accordingly, pursuant to settled Maryland and federal law, and the United States Constitution, this Court should dismiss Plaintiff's Complaint in its entirety and with prejudice.

II. ARGUMENT

A. The Complaint Does Not Adequately Plead the Required Elements of Its Maryland State Law Claims.

Plaintiff's claims should be dismissed because Plaintiff has not pleaded the required elements of any of its disparate state-law theories—nuisance, trespass, products liability, and the Maryland Consumer Protection Act ("MCPA")—which it seeks to improperly expand to target *lawful conduct* involving useful products whose inherent properties have been publicly known for decades.

1. Plaintiff Fails to State a Claim for Public or Private Nuisance.

Plaintiff has not identified, nor are Defendants aware of, any Maryland state court case that allows a nuisance claim directed at conduct that is (and always has been) fully authorized by law. For that reason, such lawful conduct—in this case, the production, promotion and sale of fossil fuels—cannot be unreasonable and therefore cannot be a nuisance. As a result, Plaintiff tries to recast Defendants' nuisance-related conduct as unreasonable by describing it as a "campaign of deception[,]" Opp. at 68, tied to Defendants' supposed "overproduction, overpromotion, and profligate sale of fossil fuel products[.]" Opp. at 9. This deception theory attempts to slap a nuisance

label on what is really an allegation of fraud—which would require proof of reliance and injury—while evading the rigorous pleading and proof requirements applicable to fraud claims. There is good reason that no Maryland case endorses such an approach, and this Court should reject Plaintiff's efforts to avoid dismissal of its woefully inadequate nuisance claim.

a. Defendants' Conduct Is Not Unreasonable Because It Is Authorized and Encouraged by Law.

To constitute a nuisance under Maryland law, the conduct at issue must be "unreasonable." *See, e.g.*, *Tadjer v. Montgomery Cty.*, 300 Md. 539, 551–52 (1984). Plaintiff's public and private nuisance claims must fail because state and federal statutes and policies authorize—indeed, encourage—production and sale of fossil fuels. *See* Mot. at 10–13; *see also, e.g.*, Md. Code Ann., Envir. § 14-101 ("[T]he production and development of oil and gas resources is important to the economic well-being of the State and the nation."); *id.* §§ 14-122, 14-123 (maintaining an "Oil and Gas Fund"). In fact, consistent with this encouragement of fossil fuel production and sale, during the COVID-19 pandemic, Maryland has categorized oil and gas companies as "critical infrastructure" and permitted "[c]ompanies engaged in the production, refining, . . . distribution, and sale of oil, gas, and propane products" to remain open.[2] Thus, as a matter of law, the production and sale of Defendants' products cannot be "unreasonable." *See Agbebaku v. Sigma Aldrich, Inc.*, No. 24-C-02-004175, 2003 WL 24258219, at *13 (Md. Cir. Ct. June 24, 2003) (Berger, J.) (rejecting nuisance claim based on emissions from state-regulated coal-burning power plant because "Maryland has authorized [d]efendants to produce electricity by power plants that emit mercury").

[2] *See* Office of Legal Counsel of Governor of State of Maryland, "Interpretive Guidance Regarding Order of Governor" (Mar. 23, 2020), https://governor.maryland.gov/wp-content/uploads/2020/03/OLC-Interpretive-Guidance-COVID19-04.pdf. Defendants request that this Court take judicial notice, pursuant to Md. Rule 5-201(b), of this public record. *See Kona Props., 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").

Plaintiff attempts to bypass this fatal flaw by recharacterizing Defendants' purported tortious conduct as "*over*production" and "*over*promotion[,]" *see, e.g.*, Opp. at 9 (emphases added), but these labels are meaningless because Plaintiff does not—and cannot—dispute that Defendants' promotion and production was fully authorized and encouraged by state and federal law. *See* Mot. at 10–12. And Plaintiff does not identify any federal or state limit on production that Defendants have violated or exceeded. Further, oil and gas production is a heavily regulated industry and where "'a comprehensive set of legislative acts or administrative regulations govern[s] the details of a particular kind of conduct, the courts are slow to declare an activity to be a public nuisance if it complies with the regulations.'" *Agbebaku*, 2003 WL 24258219, at *13 (quoting Restatement (Second) of Torts § 821(B) cmt. f).[3]

Plaintiff attempts to distinguish the many cases that clearly convey this restriction on nuisance law by suggesting that the "authoriz[ed] conduct" in those cases "was specifically and narrowly addressed by statute or regulation." Opp. at 16 n.7. But Defendants' conduct here—production of fossil fuels approved by state and federal statutes and authorized by detailed permitting regulations—is no less authorized by law than the activities of the power plant in *Agbebaku*, 2003 WL 24258219, the elevated structure in *Garrett v. Lake Roland El. Ry. Co.*, 79 Md. 277 (1894), or the sewer system in *Cityco Realty Co. v. City of Annapolis*, 159 Md. 148 (1930).

The laws in those cases did not specifically identify and protect a power plant's emissions of mercury (*Agbebaku*), or an elevated railroad's blockage of light and air (*Garrett*), or a sewer discharge (*Cityco*). Rather, in each case, the lawfulness of the challenged "nuisance" was presumed to be encompassed within the general statutory authorization for the subject structure. *See,*

[3] Plaintiff acknowledges the importance of fossil fuel production in the relief it seeks in this case. Rather than seek equitable relief that would curtail Defendants from producing or selling fossil fuels, Plaintiff expressly alleges that "it does not seek to . . . restrain Defendants from engaging in their business operations." Compl. ¶ 12.

e.g., *Cityco Realty Co.*, 159 Md. at 148 (from the express authorization to construct the sewer "it may be reasonably presumed" that the challenged discharge was authorized, and therefore not a nuisance).

The Maryland Court of Appeals' decision in *Bishop Processing Co. v. Davis*, 213 Md. 465 (1957), which Plaintiff cites, demonstrates precisely why no nuisance claim can survive here. In *Bishop*, the plaintiffs, a group of neighbors, brought a nuisance claim seeking to abate odors emanating from a processing plant. *Id.* at 468–69. In affirming the trial court's nuisance injunction, the Court of Appeals emphasized that the defendant would likely be able to abate the alleged nuisance *without ceasing its authorized operations*. *Id*. at 471. Because the alleged nuisance—harmful emission of odors—was not inherent to the processing plant's continued authorized operation, the alleged nuisance was *not necessarily authorized* by the Board of Health. Here, however, the authorization to produce fossil fuels necessarily encompasses the alleged nuisance—*i.e.*, the production and sale of products that emit greenhouse gases when combusted—because greenhouse gas emissions *are inherent* to the combustion of fossil fuel products. Plaintiff does not suggest (nor could it) that Defendants could somehow continue operations while simultaneously abating the alleged nuisance.[4]

Under well-settled law, Defendants' lawful conduct in producing, promoting, and selling fossil fuel products is not "unreasonable" and therefore cannot form the basis for a nuisance claim. *See Agbebaku*, 2003 WL 24258219, at *13.

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[4] Furthermore, in *Bishop*, the plants and products were not endorsed as useful or "vital" by the State itself, as is the case here. *Id.* at 473–74. And there was no mention of any law or statute authorizing or endorsing the conduct at issue, only a reference by the court that the plant complied with business laws generally. *Id.* Moreover, *Bishop's* holding is limited to situations in which a business's lawful operations are a nuisance to its neighbor. *Id*. at 474 ("The law is clear that where a trade or business as carried on interferes with the reasonable and comfortable enjoyment by another of his property, a wrong is done to a neighboring owner for which an action lies at law or equity. In such cases it makes no difference that the business was lawful and one useful to the public and conducted in the most approved method.") (emphasis added).

b. Maryland Law Does Not Recognize a Nuisance Tort Based on an Alleged Campaign of Deception.

Presumably recognizing that Defendants' lawful production and promotion of fossil fuels cannot constitute a nuisance, Plaintiff attempts to recast its nuisance claims as based on a "campaign of deception." Opp. at 68. But no Maryland court has ever found that an alleged campaign of deception, or *any* promotion or other speech, can itself constitute a nuisance. Mot. at 14.

(i) There is no public nuisance because speech directed at third parties, even where misleading, invades at most a private right.

Public nuisance law addresses interferences with *public* rights. By contrast, harm caused by fraudulent or deceptive promotion of a product cannot interfere with any public right. As the Restatement (Second) of Torts explains, "[a] public right is collective in nature not like *the individual right* that everyone has *not to be . . . defrauded*." Restatement (Second) of Torts § 821(B) cmt. g (emphasis added). While Plaintiff alleges that the effects of global climate change have infringed on public rights, the alleged "campaign of deception" could at most affect the private rights of the individuals purportedly deceived. This alone precludes Plaintiff's deception theory as a basis for public nuisance.

(ii) Maryland law has never recognized a public or private nuisance premised solely on promotion or other speech.

Plaintiff has not identified a single Maryland case that has based nuisance liability solely on product "promotion" or other speech, and Defendants are not aware of one. Instead, Plaintiff relies on cases in which the defendant's own action or product allegedly directly caused or constituted the nuisance affecting the plaintiff's property interest, regardless of whether that conduct was accompanied by product "promotion." But here, Plaintiff does not allege that Defendants' fossil fuel products *themselves* are a nuisance, or even that those products *themselves* create a nuisance due to the way they are produced or disseminated. Rather, the alleged "nuisance" is rising sea

levels that purportedly result from the worldwide accumulation of greenhouse gases over decades due to the combustion of fossil fuels by billions of public and private actors around the world.

Plaintiff claims that it need show only that Defendants "engage[d] in 'some active participation in the continuance of [the nuisance]' or 'some positive act evidencing its adoption.'" Opp. at 17 (quoting *Gorman v. Sabo*, 210 Md. 155, 161 (1956)). But in all of the cases Plaintiff cites, it was the defendant's own conduct or product—not the defendant's alleged speech *about* its product—that was alleged or found to have directly caused or constituted the nuisance. *See Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 256–57 (D. Md. 2000) (finding that defendant builders' "finished product" itself "constitute[d] a public nuisance"); *E. Coast Freight Lines v. Consol. Gas, Elec. Light & Power Co. of Baltimore*, 187 Md. 385, 393 (1946) (noting that a contractor may be liable where the finished product it made *was* a nuisance); *Gorman*, 210 Md. at 161 ("[T]he radio that produced the noise belonged to [defendant] and was played in the home he owned and lived in. He was fully aware of the design in playing it, did not stop it when asked to, and on at least one occasion, himself turned it up.").[5]

Plaintiff cites *no* controlling Maryland authority for its novel nuisance theory and instead relies heavily on *Monsanto* and *Exxon*. But in both of those cases, the defendants' products themselves allegedly caused the injury.

Plaintiff asserts that in *Exxon*, a case complaining of methyl tert-butyl ether ("MTBE") in Maryland groundwater, "Judge Hollander concluded that 'no case law forecloses [a] theory of public nuisance liability' based on the deceptive marketing of a dangerous product." Opp. at 17

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[5] Plaintiff's reliance on *Gorman* also fails because the defendant's conduct there involved an "intentional, malicious, and willful course of action" meant to "annoy, harass and injure" the plaintiffs by causing loud and offensive sounds to emanate from their property. 210 Md. at 159. The neighborhood quarrel in *Gorman* is dissimilar in every way from the emission of greenhouse gases that results from people and businesses worldwide using lawfully produced and sold fossil fuels.

(Plaintiff's alteration). But this is not accurate, and Plaintiff's bracketed alteration of the quotation is consequential. Judge Hollander concluded only that "no case law forecloses *this* theory of public nuisance liability"—*i.e.*, the theory alleged in that case, *Exxon*, 406 F. Supp. 3d at 469 (emphasis added)—which claimed far more than just alleged "deceptive marketing of a dangerous product." Opp. at 17. In *Exxon*, the court found it essential, at the motion to dismiss stage, that the defendants there were alleged to have "controlled all or substantially all of the market for MTBE and MTBE gasoline *in Maryland*," and "manufactured and distributed MTBE gasoline *in Maryland*" through a system that, according to the plaintiff, defendants "knew or reasonably should have known" contained leaks that allowed gasoline containing MTBE to be released into *Maryland* groundwater. 406 F. Supp. 3d at 469 (emphasis added). Similarly, in *Monsanto*, the court found it is essential that Plaintiff alleged that the defendant was "the sole manufacturer of PCBs in the United States" during the relevant period, *Monsanto*, 2020 WL 1529014, at *10, that PCB were contaminants "disseminated *in the City's waters*," and "that Defendants manufactured and distributed PCBs which have *contaminated the City's water*, creating a public nuisance." *Id.* (emphases added). Plaintiff makes no comparable allegations here. Neither Judge Hollander in *Exxon* nor Judge Bennett in *Monsanto* suggested that claims would have been sustained had they been based solely on allegations of deceptive product promotion without any allegations that the defendants' product had otherwise been detected in Maryland groundwater.

What is most notable about *Exxon* and *Monsanto* is their similarity to garden-variety tort cases, and their dissimilarity to the claims here. *Exxon* and *Monsanto* involved a product produced, promoted, transported, and stored by defendants that migrated into groundwater. The courts in *Exxon* and *Monsanto* declined to dismiss the public nuisance claim because defendants were alleged to have substantially contributed to *chemical releases* into the state's groundwater, a garden

variety tort case. *See Exxon*, 406 F. Supp. 3d at 468; *Monsanto*, 2020 WL 1529014, at *10. Here Plaintiff does not complain that Defendants' products have contaminated groundwater or land. Rather the complaint is that the worldwide sum of emissions from combustion of fossil fuel products and various other human activities have accumulated in the global atmosphere, which has caused changes to global temperatures and weather patterns, which have resulted in weather events and other atmospheric developments that threaten, or have resulted in, harm to Plaintiff's properties and infrastructure, again not by the presence of Defendants' products on Plaintiff's property or groundwater, but by the presence of water, wind and other weather phenomena produced by complex atmospheric processes.

Relying on the *Exxon* and *Monsanto* decisions to sustain Plaintiff's nuisance claims would thus extend Maryland public nuisance law beyond conventional pollution cases to include lawful commercial speech like marketing and advertising. Other state and federal courts have refused to do this, even where the product was alleged to have caused serious injury or even death. *See, e.g.*, *Lead Industries*, 951 A.2d 428, 456 (R.I. 2008) (dismissing nuisance claim based on the sale and distribution of, and alleged misrepresentations about, lead pigment for use in lead paint because "[t]he law of public nuisance never before has been applied to products, however harmful"); *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 196 (N.Y. App. Div. 2003) (rejecting nuisance claims based on marketing and distribution of firearms because that would "open the courthouse doors to a flood of limitless, similar theories of public nuisance"); *Camden Cty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d. Cir. 2001) (dismissing nuisance claim based on marketing and distribution of firearms because "no New Jersey court has ever allowed a public nuisance claim against manufacturers for lawful products that are lawfully place[d] in the stream of commerce"); *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882, 909–10

(E.D. Pa. 2000) (explaining that "[t]he refusal of many courts to expand public nuisance law to the manufacturing, marketing, and distribution of products conforms with the elements of public nuisance law" and holding that "products which function properly do not constitute a public nuisance"); *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F. 2d 915, 920 (8th Cir. 1993) (dismissing asbestos nuisance claim and noting that no "North Dakota case [has] extend[ed] the application of the nuisance statute to situations where one party has sold the other a product that later is alleged to *constitute* a nuisance"); *City of Manchester v. Nat'l Gypsum Co*., 637 F. Supp. 646, 656 (D.R.I. 1986) (rejecting nuisance claim based on the sale, distribution and marketing of asbestos). This Court should likewise decline to extend nuisance law here.

(iii) The Complaint fails to satisfy the heightened pleading requirements applicable to Plaintiff's claim.

Even if Maryland did recognize a promotion-based nuisance theory, Plaintiff's Complaint would fail because such claims would be subject to heightened pleading requirements and the City has not alleged each fraudulent statement with particularity—including who made it, when it was made, and why it was false.[6] *See, e.g.*, *McCormick v. Medtronic, Inc*., 219 Md. App. 485, 492–93 (2014). Maryland law is clear that a plaintiff cannot merely assert conclusory allegations of fraud against multiple defendants without specifying each defendant's participation in the alleged fraud. *Adams*, 193 F.R.D. 243, 253–54 (D. Md. 2000) (dismissing fraud-based claims under federal

[6] At bottom, Plaintiff's overpromotion claims amount to a "fraud on the market" theory, which Maryland expressly does not recognize. *Agbebaku*, 2003 WL 24258219, at *10 (rejecting "fraud on the marketplace" theory as "a cause of action inconsistent with venerable Maryland case law regarding fraud"); *Cofield v. Lead Industries Ass'n*, No. CIV.A. MJG-99-3277, 2000 WL 34292681, at *10 (D. Md. Aug. 17, 2000) (noting that "fraud on the market theory" is "expressly contrary" to Maryland precedent on fraud) (citing cases). Moreover, such fraud claims are unavailable to Plaintiff, because it is not complaining about untrue statements that defendants made to the City and the City relied upon, among other things. Attenuated third-party fraud is not actionable in Maryland. See *Exxon Mobil Corp. v. Albright*, 483 Md. 303, 336 (2013) ("[W]e have not permitted recovery without a demonstration that the plaintiff relied, either directly or indirectly, on the relevant misrepresentation."), reconsideration granted in part on other grounds, 433 Md. 502 (2013).

heightened pleading standard); *McCormick*, 219 Md. App. at 528 (2014) (defining "[t]he requirement of particularity" as "analogous [to the] federal rule"); *see also Wells v. State*, 100 Md. App. 693, 703 (1994) (rejecting conclusory guilt-by-association group pleading because "defendants are not fungible" and "[the court] must examine what each is charged with doing or failing to do"). This heightened pleading requirement—and Plaintiff's inability to meet it—is undoubtedly why Plaintiff has tried to cloak its claim under the guise of nuisance.

Plaintiff purports to identify alleged misrepresentations in its Complaint. Compl. ¶¶ 148–157, 161–162, 164–165, but only seven of these 14 alleged misrepresentations are attributed to any Defendant. *Id*. ¶¶ 148–149, 153, 155–157. And even cursory scrutiny shows that those statements are not misrepresentations. *See First Union Nat. Bank v. Steele Software Sys. Corp.*, 154 Md. App. 97, 161–62 (2003) (holding that to be actionable a statement "must have been in respect of ascertainable facts, as distinguished from mere matters of opinion or speculation," which are "not actionable" (quoting *Robertson v. Parks*, 76 Md. 118, 132 (1892)); Compl. ¶¶ 148 ("[e]mphasize the uncertainty" and "resist the overstatement and sensationalization"); *id*. ¶ 149 (recognizing "scientific uncertainty"). Quite simply, Plaintiff's pleaded nuisance claims fail, and its newly minted overpromotion theory cannot save it from dismissal. Counts One and Two of the Complaint should thus be dismissed with prejudice.

2. Plaintiff's Product Liability Claims Should Be Dismissed.

Plaintiff's product liability theory, if accepted, would expand and distort Maryland product liability law beyond all recognized bounds by permitting a locality to recover alleged damages for global climate change arising from, among other causes, the use by countless third parties of fossil fuels that Plaintiff itself alleges are produced and sold in large part—85% according to Plaintiff—by *non*-defendants. Compl. ¶ 7. Plaintiff urges this expansion even though the Complaint alleges public awareness of climate change risks related to the use of fossil fuels since as early as 1965,

id. ¶ 103; that greenhouse gases are released during the "normal and intended" use of fossil fuels, *id.* ¶ 18; that climate change is a global problem, neither the cause nor the effects of which are localized to Baltimore, *e.g.*, *id*. ¶¶ 18, 36–68; and that, at most, only 15% of greenhouse gas emissions between 1965 and 2015 are allegedly linked, even indirectly, to Defendants' products. *Id.* ¶ 7. Furthermore, despite its allegations that Defendants' products were "defective and dangerous when used as intended," *id.* ¶¶ 259, 268, Plaintiff continues to use fossil fuels, and encourage fossil fuel use, to this day. Plaintiff cannot save its claims by asking the Court to ignore these acknowledged facts. This Court should dismiss Plaintiff's product liability claims.

a. Plaintiff Cannot Assert Claims as a Bystander.

In its Opposition, Plaintiff attempts to recast its "products liability" claim as a "bystander" claim on the theory that it was injured by global climate change resulting from other parties' use of Defendants' products. Opp. at 20–21. But Plaintiff is not a "bystander" in any sense because it does not allege that its injuries were caused by its "exposure" to Defendants' products—namely, fossil fuels. *Eagle-Picher Indus., Inc. v. Balbos*, 326 Md. 179, 210 (1992); *see also Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162–63 (4th Cir. 1986) ("[T]here must be evidence of exposure to a specific product[.]").

Far from helping Plaintiff, the cases it cites demonstrate that bystander liability requires a direct nexus between the alleged injury—generally, harms resulting from the plaintiff bystander's direct exposure to the product itself—and a third-party's use of the product. The alleged injury in *Exxon*—groundwater contamination—was allegedly tied directly to the storage and delivery within Maryland of gasoline containing MTBE, for which the named defendants were allegedly "responsible for all or substantially all of th[e] market." 406 F. Supp. 3d at 462. The same is true for the other cases cited by Plaintiff, which all feature a close nexus between the products and the injuries suffered by the alleged bystander exposed to them. *See, e.g.*, *Monsanto*, 2020 WL

1529014, at *10 (allowing bystander design defect claim to proceed where manufacturer of PCB, known to be toxic and hard to contain, allegedly contaminated plaintiff's groundwater directly); *Georgia-Pacific Corp. v. Pransky*, 369 Md. 360, 366 (2002) (allowing design defect bystander claims to proceed where plaintiff's alleged injury resulted from direct exposure to an asbestos-containing product in her home); *Valk Mfg. Co. v. Rangaswamy*, 74 Md. App. 304, 318 (1988), *rev'd sub nom. on other grounds Montgomery Cty. v. Valk Mfg. Co.*, 317 Md. 185 (1989) (motorist harmed by collision with vehicle that had defendant's snow plow attachment mounted on it could recover as bystander); *ACandS, Inc. v. Godwin*, 340 Md. 334, 404 (1995) (allowing bystander liability where plaintiffs were directly and frequently exposed to asbestos, even though plaintiffs themselves did not use the products). Here, Plaintiff cannot demonstrate a similar nexus because its alleged injuries result not from direct exposure to Defendants' products, but from the alleged climatic effects of the accumulation of a byproduct (greenhouse gas emissions) of worldwide combustion of fossil fuels and other industrial processes over many decades.

Plaintiff's continued use of fossil fuels also undermines its bystander argument. There is no dispute that Plaintiff used fossil fuels extensively during the relevant period and continues to do so. But Plaintiff cannot have it both ways. It cannot take the position that Defendants' products are suitable for its *own* use, but somehow give rise to bystander liability when used in the same way by *others*.

b. Defendants' Products Do Not Have a Design Defect.

The Complaint does not plausibly allege any design defect. Plaintiff has not pleaded, as it must, that Defendants' fossil fuel products were in a "defective condition" or were "unreasonably dangerous" when placed on the market. *Phipps v. Gen. Motors Corp.*, 278 Md. 337, 344 (1976). Fossil fuels function in a manner consistent with consumer expectations—they are combusted to produce energy—and are thus not defective within any meaning of the word. *Kelley v. R.G. Indus.,*

Inc., 304 Md. 124, 138 (1985), *abrogated on other grounds by* Md. Code Ann., Pub. Safety § 5-402(b). Plaintiff admits that the "*normal and intended use* of [fossil fuels] has led to the emission of a substantial percentage of the total volume of greenhouse gases released into the atmosphere since 1965." Compl. ¶ 18 (emphasis added). Notably, Plaintiff does not and cannot contend any product defect when it used fossil fuels for myriad purposes, such as to power its fleet of vehicles, to light city streets or to warm public buildings, for example. In addition, "a product cannot be defective because of a characteristic that is inherent in the product itself." *See Cofield v. Lead Indus. Ass'n*, No. CIV.A. MJG-99-3277, 2000 WL 34292681, at *2 (D. Md. Aug. 17, 2000) (elemental lead's presence in lead pigment does not render the pigment defectively designed). Plaintiff acknowledges that the emission of greenhouse gases is an inherent characteristic of the use and combustion of Defendants' products. As a result, such emissions cannot constitute a defect.

Plaintiff's design defect claim fails for the additional reason that Plaintiff itself, and other governments and municipalities worldwide, including the State of Maryland, not only permit the sale of these fossil fuels, but also actively promote their production and use. *See* Mot. at 11–12.

c. Defendants Had No Duty to Warn.

Plaintiff's failure to warn claims similarly should be dismissed because there is no duty to warn where, as here, a warning would not abate the alleged harms or where harms are generally known. *See* Mot. at 18–21. Plaintiff's attempts to revive its claim fail.

Plaintiff is incorrect that a duty to warn arises from the alleged foreseeability of its vulnerability to climate change as a coastal area. Opp. at 27. Foreseeability alone "does not itself impose a duty . . . unless a special relationship exists," Mot. at 21 (citing *Dehn v. Edgecombe*, 384 Md. 606, 625 (2005)). Plaintiff alleges nothing giving rise to any special relationship here, and indeed the duty Plaintiff seeks to impose would improperly and impermissibly extend to the entire world at large. In fact, Plaintiff expressly pleads that the effects of climate change are not limited to

coastal cities like itself but rather are global. Compl. ¶¶ 36–68.[7] That is the antithesis of a "special relationship."

Plaintiff's reliance on *Monsanto* and *Exxon* to support its failure to warn claims is also misplaced. Both of those courts recognized that "there is no duty to 'warn the world,'" and any duty extends only "to third persons whom the supplier should expect to be endangered by [the product's] *use*." *Monsanto*, 2020 WL 1529014, at *11 (citing *Exxon*, 406 F. Supp. 3d at 463) (emphasis added). Here, by seeking to impose a limitless duty on Defendants to warn "the public" about purported risks associated with a complex global phenomenon resulting from the worldwide actions of billions of individuals, corporations, and governments over many decades, Plaintiff's failure to warn claim violates both of these principles. For the reasons discussed further above, Section II.A.1.b.(ii), *Monsanto* and *Exxon* are plainly distinguishable. In *Monsanto*, plaintiff alleged that defendant, "as the *sole manufacturer of PCBs*, knew and expected that PCBs would cause widespread water contamination." *Monsanto*, 2020 WL 1529014 at *11. And in *Exxon*, plaintiffs alleged that "defendants were responsible for all or substantially all of this market," and that defendants "created and controlled a market for products in the State that posed *unique, substantial harms to its resources*." 406 F. Supp. 3d at 463. Defendants' products are not alleged to have contaminated Maryland or directly harmed Plaintiff in any way, and Plaintiff's Complaint alleges that Defendants are indirectly responsible for no more than 15% of greenhouse gas emissions from industrial sources. Plaintiff cannot identify whose fossil fuels, or whose usage, caused its alleged harms, or even allege it has suffered harms unique to Baltimore. *See* Mot. at 38 n.22 (collecting cases).

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[7] Plaintiff contends this is not a question of expansive duty, but instead of expansive breach, but the case it cites for this proposition is inapposite. *See* Opp. at 27 (citing *Moran v. Faberge, Inc.*, 332 A.2d 11, 15–16 (Md. 1975)). *Moran* holds that a product manufacturer can be liable for *unintended* use. Here, Defendants' products are alleged to have been used as intended, so the question is the scope of Defendants' duty to warn.

Nor is there any duty to warn where, as here, a warning would be futile. Mot. at 19–20 (citing *Georgia Pac., LLC v. Farrar*, 432 Md. 523, 540–41 (2013)). In response to Defendants' argument that Plaintiff has failed to plead that any warning would have abated the alleged harms, Plaintiff argues that it is sufficient to allege that its injuries would not have occurred to the same magnitude. Opp. at 24 (citing Compl. ¶ 216). As discussed in Defendants' Motion, the conclusory allegation that Plaintiff would have "suffered no or far less serious injuries" absent Defendants' unspecified conduct falls far short of the required pleading standard, and is belied by allegations in the Complaint that Plaintiff, and the world at large, continues to use fossil fuels at "unabated" levels despite public knowledge regarding the alleged climate change risks associated with such use. *See* Mot. at 9.

Plaintiff also contends that this Court should assume that any warning that combusting fossil fuels results in climate change would have been heeded, Opp. at 24, but this presumption "does not . . . relieve a plaintiff of the requirement [to] adequately allege causation in the first place." *Grinage v. Mylan Pharm., Inc.*, 840 F. Supp. 2d 862, 868 (D. Md. 2011) (citation omitted). Plaintiff therefore must allege facts indicating that the warning it seeks would have impacted the decisions of consumers. Here, Plaintiff does not even allege *any* behavioral changes it would have made in light of a warning, nor could it plausibly do so since it continues to use fossil fuels extensively notwithstanding its acknowledged recognition of the risks of doing so, and indeed after the filing of its Complaint.

Finally, there is no duty to warn of clear and obvious dangers and generally known risks. Mot. at 20. Plaintiff incorrectly argues that whether the dangers were known is a factual issue that cannot be decided until trial. Opp. at 25–26. But the case cited by Plaintiff, *Nicholson v. Yamaha Motor Co.*, 80 Md. App. 695, 721 (1989), *affirmed dismissal* of a failure to warn claim *at the*

pleading stage where "the danger not warned about was clear and obvious." Dismissal unquestionably is warranted here because the Complaint itself makes clear that the alleged risks have been well known for decades. *See* Compl. ¶ 103 (noting concern about climate change risks that resulted in a report by Lyndon B. Johnson's Science Advisory Committee in 1965); *id.* ¶ 105 (asserting references in the 1966 World Book Encyclopedia and presidential panel reports describing consequences of rising greenhouse gas emissions); *id.* ¶ 143 (discussing multiple government reports and actions from 1988 to 1992 confirming the role of greenhouse gas emissions in climate change). There can be no dispute that the reasonable consumer, including Plaintiff, has been aware of the alleged impacts of fossil fuel consumption for several decades.

3. Plaintiff Fails to State a Trespass Claim.

Plaintiff's Opposition confirms that its trespass claim fails because: (1) the alleged instrumentality of the tort—Defendants' supposed campaign of misinformation—is incapable of trespassing onto Plaintiff's property; (2) the alleged objects of the trespass (rain and sea water) are not within Defendants' control; and (3) Plaintiff's continuous use of fossil fuels amounts to consent. *See* Mot. at 25–28. Plaintiff cites no authority in which a court has found a trespass to land under similar facts. *See* Opp. at 31–35.

a. No Trespass Has Been Alleged.

The Restatement (Second) of Torts, which Plaintiff cites as purported support for its theory that Defendants caused a trespass, Opp. at 34, actually punctures its claim. The Restatement explains when a defendant may be liable for causing a trespass: "[t]he actor, without himself entering the land, may invade another's interest in its exclusive possession by throwing, propelling, or placing a thing either on or beneath the surface of the land or in the air space above it." Restatement (Second) of Torts § 158 cmt. i. Here, none of the Defendants entered Plaintiff's land, or invaded

Plaintiff's "exclusive possession" of any land by "throwing, propelling, or placing" anything (particularly fossil fuels) on, over, or beneath it. And under Plaintiff's promotion theory, the alleged wrongful conduct is Defendants' supposed campaign of misinformation—not bare production of fossil fuel products. But speech plainly is not an invasion of property, and under no interpretation of trespass law can Defendants be found to have trespassed on Plaintiff's property by promoting their products.

Relying on *Rockland Beach & Dye Works Co. v. H.J. Williams Corp.*, 219 A.2d 48 (Md. 1966), Plaintiff argues that a trespass claim can succeed when property "is invaded by an inanimate or intangible object," so long as the defendant has "some connection with or some control over [the] object." Opp. at 33. However, the tort Plaintiff alleges here is not the production of fossil fuels, but the supposedly nefarious promotion of them, which is not an invasion of property. And, in any event, Defendants have no control over the rain and floodwaters that allegedly created the trespass on its unidentified lands. Neither *Rockland* nor any other case suggests that liability can be imposed in the absence of such control.

Plaintiff nonetheless argues that Defendants "[c]ontrol[] every step of the fossil fuel product supply chain" and thus have "'some connection' to the climatic harms that now injure Baltimore." Opp. at 33–34. But Plaintiff does not point to any Maryland case law even suggesting that control of the supply chain constitutes control of seawater invading property because a *byproduct* created by the *use* of a defendant's product affects the weather. Plaintiff therefore cannot plausibly allege that Defendants control, or have a legally sufficient "connection with," global weather and the oceans which would be required even under Plaintiff's overbroad interpretation of *Rockland*. The cases cited by Plaintiff involve trespass by objects controlled by defendants that invaded property from nearby. *See Rockland*, 242 Md. at 378 (finding defendant caused mud and debris from

excavation to pile up on adjacent property when carried over property line by seasonal rain); *Exxon*, 406 F. Supp. 3d at 471 (defendants' gasoline allegedly leaked from storage tanks); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 457 F. Supp. 2d 298, 315 (S.D.N.Y. 2006) (same); *Litz v. Md. Dep't of Env't*, 434 Md. 623, 650 (2013) (defendant-approved septic system carried polluted groundwater to plaintiff's property).[8] *But see JBG Twinbrook Metro. Ltd. P'Ship v. Wheeler*, 346 Md. 601, 626 (1997) (gasoline leaked from underground storage tanks found to be insufficient to support trespass claim as a matter of law). Plaintiff alleges no such facts here.

For the same reasons set forth below in Section II.A.5, the chain of causation underlying Plaintiff's theories of tort liability is much more attenuated than any found in the *Rockland*/*Wheeler* line of cases and cannot reasonably extend to control over rain and seawater. Plaintiff's theory of rising sea levels and changed weather does not even remotely fit within any recognized theory of trespass.

b. Plaintiff's Continued, Voluntary Combustion of Fossil Fuels Constitutes Consent to Defendants' Conduct.

Even if—contrary to law—Defendants' production and promotion of fossil fuels, and subsequent combustion by end users, could constitute a "trespass," then Plaintiff's continuous use of fossil fuels would amount to consent, which would defeat any claim of trespass. Plaintiff argues in its Opposition that "even if the City had impliedly consented in some manner to some use of fossil fuel products, it did not consent to the excess." Opp. at 34. Plaintiff fails to explain how any such limit to its consent was communicated to Defendants or constituted a reasonable interpretation of its consent under the circumstances. Yet Plaintiff does not explain how a factfinder

[8] In any event, in *Litz*, the court did not make any conclusions regarding whether the conduct constituted a trespass—the case instead discussed whether the alleged trespass was continuing for purposes of considering a statute of limitations bar. 434 Md. at 650.

could possibly distinguish between the amount of production consented to and the supposed "excess" amount (a defect endemic to Plaintiff's overpromotion theory of liability in general). In short, Plaintiff's continued consumption of Defendants' products defeats its argument. *See Brazerol v. Hudson*, 262 Md. 269, 274 (1971) (allowing dump truck to pass through property was a general, unconditional and unlimited consent to enter that negated any claim of trespass even when its consent led to the plaintiff's detriment); *see also, e.g.*, *IMAPizza, LLC v. At Pizza Ltd.*, 334 F. Supp. 3d 95, 127 (D.D.C. 2018) (rejecting "no consent to the excess" argument because plaintiff had not informed defendant of the extent of its consent, nor was there a reasonable interpretation of the consent available so as to put defendant on notice of the extent of consent) (quoting Restatement (Second) of Torts § 892(A) cmt. g).

Plaintiff also argues that its consent was not effective because it was "induced by the [Defendants'] misrepresentation(s)." Opp. at 34 (citing Restatement (Second) of Torts § 892(B)). Again, however, Plaintiff's continued use of fossil fuels and the admissions in its Complaint that the risks of climate change were well known as early as the 1960s defeat this argument. As Plaintiff has failed to allege a required element of trespass (lack of consent), this count should be dismissed.

c. The Court Should Dismiss Plaintiff's Trespass Claim for Failure to Plead Specific City-Owned Properties Allegedly Affected.

Defendants additionally moved to dismiss because Plaintiff failed to identify any City-owned property allegedly affected by the claimed trespass, and improperly alleged speculative future harms. *See* Mot. at 26. While implicitly conceding that future harms are not actionable in trespass, *see* Opp. at 32, Plaintiff argues it is not required to identify specific properties under Maryland Rule 2-305. Plaintiff is wrong.

Plaintiff's sole authority is *Exxon* in which the court applied the pleading standard of Rule 8 of the Federal Rules of Civil Procedure, which Plaintiff analogizes to Maryland Rule 2-305. *See* Opp. at 32. But Plaintiff cannot avoid the additional hurdle of Maryland Rule 2-304, which provides that "[t]ime *and place* shall be averred in a pleading when material to the cause of action or ground of defense" (emphasis added).[9] The "place" of a trespass is without question material to Plaintiff's claim, and the claim should be dismissed for failing to meet the applicable pleading requirement. *See Gusdorff v. Duncan*, 94 Md. 160, 166 (1901) (finding error in overruling a demurrer because "[a]n inspection of the record discloses a material error in the declaration in that it fails entirely to state the location of the premises upon which the trespass is alleged to have been made").

4. Plaintiff's MCPA Claim Fails.

Defendants moved to dismiss Plaintiff's claim under the MCPA because Plaintiff failed to allege sufficient facts to state a claim, including that it was harmed as a consumer. Plaintiff's Opposition further exposes the deficiencies of this claim. Plaintiff advances two flawed theories: it (1) is a consumer because it is a "legal entity acting in its own consumptive capacity and for the public welfare"; and (2) may bring a claim in a representative capacity "on behalf of its consumer residents." Opp. at 36. Neither theory holds.

a. Plaintiff Cannot Bring Claims as a Consumer.

First, Plaintiff lacks standing to bring its claims under the MCPA because it is not a "consumer" as that term is defined in the statute. Section 13-408(a) of the MCPA provides that "any

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[9] The closest analogue to Maryland Rule 2-304(c) under the federal rules is Rule 9(f), which provides that "[a]n allegation of time and place is material when testing the sufficiency of a pleading," but does not *require* a plaintiff to plead time and place. *See* Wright & Miller, Fed. Prac. & Proc. § 1309 ("It should be understood the Federal Rule of Civil Procedure 9(f) does not require the pleader to set out specific allegations of time and place; it merely states the significance of these allegations when a pleader actually interposes them in a complaint and answer."). This further distinguishes *Exxon*.

person may bring an action to recover for injury or loss sustained by him as the result of a practice prohibited by this title." Com. Law § 13-408(a).[10] The specified relevant "practice[s]" referred to in § 13-408(a) relate to the sale or offer for sale of "consumer goods," defined as goods "which are primarily for personal, household, family, or agricultural purposes" or those that are purchased "by a fraternal, religious, civic, patriotic, educational, or charitable organization for the benefit of the members of the organization." *Id.* §§ 13-303(1)–(2), 13-101(d)(1)–(2); *see also id.* § 13-101(c)(1) (defining "Consumer" in relation to "*consumer goods*, consumer services, consumer realty, or consumer credit" (emphasis added)). Therefore, a person who did not purchase "consumer goods" from the defendant cannot claim to have been injured by "any unfair or deceptive trade practice" with respect to the sale of such goods. *Id.* § 13-303(1). And as Defendants' Motion shows, even a natural person is not a "consumer" under the statute where he purchases the goods for business use. *See Boatel Indus., Inc. v. Hester*, 77 Md. App. 284, 302 (1988) (holding that the plaintiff could not recover under the MCPA where boat was not purchased primarily for household use but was instead purchased for commercial use).

Plaintiff relies on the "any person" phrase under Section 13-408(a) to claim entitlement to sue under the MCPA, but numerous courts have rejected this argument. For example, the U.S. District Court for the District of Maryland held that a manufacturer of aquarium water filters did not have standing to sue a competitor for allegedly unfair and deceptive trade practices in marketing its own products because it was not a consumer within the meaning of the statute. *See Penn-Plax, Inc. v. L. Schultz, Inc.*, 988 F. Supp. 906, 911 (D. Md. 1997). The aquarium manufacturer

[10] While "person" may be defined as an "individual, corporation, business trust, statutory trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity" as Plaintiff cites, *see* Opp. at 36, a municipality or local government that purchases goods for a consumptive (commercial) purpose is not contemplated by the statute and there is no Maryland case permitting such a claim. Com. Law § 13-301(h).

pointed to the same "any person" language in Section 13-408(a), but the district court rejected this argument, citing Maryland courts' longstanding limitation of MCPA standing to "consumers" in light of, among other things, the MCPA's stated goal of protecting consumers from certain business practices. *See id.* at 909 (citing *CitaraManis v. Hallowell*, 328 Md. 142, 150–52 (1992)); *Boatel Indus.*, 77 Md. App. at 303; *Rogers Refrigeration v. Pulliam's Garage*, 66 Md. App. 675, 681 (1986)).[11]

While the Maryland Legislature expanded the definition of "consumer" in 2013 to include fraternal, religious, civic, patriotic, educational, and charitable organizations that purchase goods for their members, *see* 2013 Md. Laws ch. 350, Plaintiff has not alleged that it fits within that definition. Nor does the notion of "liberal construction" of a remedial statute, which Plaintiff briefly invokes in its Opposition, Opp. at 35, change this result. The MCPA is to be "construed and applied liberally to promote its purpose," Com. Law § 13-105, which is "to set certain minimum statewide standards for the protection of consumers . . . ." *Id.* § 13-102(b). Plaintiff is not a "consumer," and no amount of "liberal construction" can alter that fact. Plaintiff offers no reason to overturn decades of law limiting application of the MCPA to "consumers" and expand it to include municipalities. Its claim under the MCPA should therefore be dismissed.

b. Plaintiff Cannot Bring an MCPA Claim in a Representative Capacity.

Second, Plaintiff also lacks standing to bring its MCPA claim "on behalf of its consumer residents." Opp. at 36. Section 13-408(a) of the MCPA generally provides that "any person may

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[11] *See also Living Legends Awards for Service to Humanity, Inc. v. Human Symphony Found., Inc.*, No. CV PX 16-3094, 2017 WL 3868586, at *5 (D. Md. Sept. 5, 2017) ("Plaintiff Living Legends, a corporate not-for-profit entity, is not a 'consumer' under the [MCPA] . . . . Therefore, the [M]CPA affords it no protection and no remedy."); *JFJ Toys, Inc. v. Sears Holdings Corp.*, 237 F. Supp. 3d 311, 342 (D. Md. 2017) ("Plaintiff JFJ Toys, Inc., a corporate commercial entity, and Plaintiff Ramirez, the sole owner of JFJ, neither have alleged facts nor proffered any evidence that they are 'consumers' under the MCPA. Therefore, the MCPA affords them no protection and no remedy."); *Fare Deals Ltd. v. World Choice Travel.Com, Inc.*, 180 F. Supp. 2d 678, 692 (D. Md. 2001) ("Fare Deals, a corporate commercial entity, is not a 'consumer' under the Maryland Consumer Protection Act. Therefore, the CPA affords it no protection and no remedy.").

bring an action to recover for injury or loss *sustained by him* as the result of a practice prohibited by this title[.]" Com. Law § 13-408(a) (emphasis added). The italicized phrase excludes representative capacity suits. Nothing in the statute authorizes the City to seek redress for the injuries of others. When the Mayor and City Council brings suit, ostensibly on behalf of residents alleged to have been injured, it is not seeking redress for "an injury or loss sustained by [the Mayor and City Council]." *Id.* Plaintiff's claim is therefore outside the scope of the private right of action available under the MCPA.

And there is no authority under municipal law for Plaintiff to sue on behalf of residents, either. Plaintiff operates under the Charter of Baltimore City. Article I, Section 1 of the Charter establishes Plaintiff as a corporate entity and provides that it "may sue and be sued" but provides no authority for Plaintiff to sue or be sued in a representative capacity on behalf of its residents. To the extent that Plaintiff proceeds on this theory, therefore, not only does it lack standing, its MCPA claims are also beyond its legal authority.

Further, there would be no basis for this Court to imply a right of action in a representative-capacity suit under the statute. In determining whether to read an implied right of action into a statute, the Maryland Court of Appeals has considered certain factors that are not present here:

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted[?] Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

Fangman v. Genuine Title, LLC, 447 Md. 681, 694 (2016) (alteration in original) (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)). Here, the legislative intent is apparent from the face of the statute, which vests the right to bring representative capacity suits or engage in public enforcement proceedings only in: (1) the Consumer Protection Division of the Office of the Attorney General, *see*

Com. Law §§ 13-403 and 13-408(a); and (2) to the extent that they are "consumers," certain fraternal, religious, civic, patriotic, educational, or charitable organizations that "purchase[]" goods "for the benefit of the members of the organization[.]" *See id.* § 13-101(c)–(d). Plaintiff does not fall within these limited categories.

Plaintiff's citation to *Anne Arundel Cty. v. Purdue Pharma L.P.*, No. CV GLR-18-519, 2018 WL 1963789 (D. Md. Apr. 25, 2018) does not advance this argument. Plaintiff claims *Purdue Pharma* stated that "[M]CPA claims against opioid manufacturers [were] alleged to have caused widespread opioid use and extraction of a high monetary cost from the county." Opp. at 36. But that is not correct. Plaintiff has recited the subject matter of Anne Arundel County's *Complaint* in that case. *See Anne Arundel Cty.*, 2018 WL 1963789 at *2. The merits of the MCPA claim were not before the court in the *Purdue Pharma* opinion, which was limited to consideration of removal jurisdiction and joinder. *See generally id.* (granting the County's motion to remand).

c. Plaintiff Does Not Plead Its MCPA Claim with the Requisite Particularity.

Even if Plaintiff had standing as a consumer (which it does not), Plaintiff fails to plead its MCPA claim with particularity. Mot. at 28. Plaintiff argues that "[t]he City is not required to plead each of its allegations with particularity, because they arise under [MCPA] Sections 13-301(1) & (3)" and that "[o]nly claims under Section 13-301(9) must be alleged with particularity." Opp. at 36 n.15. Plaintiff has confused the issues—and in one case, misstated the statute on which its own pleadings are based.

The MCPA claim *as pleaded* is limited to Sections 13-301(1) and 13-301(9) of the MCPA, and does not mention Section 13-301(3), *see* Compl. ¶ 292, contrary to what Plaintiff claims in its Opposition. *See* Opp. at 36 n.15. And Plaintiff concedes that Section 13-301(9) of the MCPA is

subject to a heightened pleading standard, but claims it has met that standard, pointing to Paragraphs 149, 153–157, 161, 167, and 184–187 of the Complaint. *Id.* at 37–38. These allegations, however, are not sufficiently pleaded to show "the intention to persuade others to rely on the false statement" (with "others" being Baltimore City), because they fail to "identify who made what false statement, when, and in what manner (*i.e.*, orally, in writing, etc.); why the statement is false; and why a finder of fact would have reason to conclude that the defendant acted with scienter (*i.e.*, that the defendant either knew that the statement was false or acted with reckless disregard for its truth) and with the intention to persuade others to rely on the false statement." *McCormick*, 219 Md. App. at 528.

Indeed, Plaintiff attributes the statements in many of these paragraphs to Defendants, with no specific Defendant named, even though its Complaint names twenty-six different Defendants. Plaintiff alleges neither that the purported unfair or deceptive statements were made in the context of any advertisement for sale or linked to any sale, nor that Plaintiff or *any* consumer relied on any of the statements in deciding whether to purchase fossil fuels. *Cf. Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 143 (2007) (to state a claim under the MCPA, "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"); *Bey v. Shapiro Brown & Alt, LLP*, 997 F. Supp. 2d 310, 319 (D. Md. 2014) (dismissing MCPA claim under Fed. R. Civ. P. 12(b)(6) based on the plaintiff's failure to allege facts to establish reliance). Indeed, nowhere in the Complaint does Plaintiff allege facts showing that it or any consumer was even *aware* of the statements, let alone considered them in making decisions to purchase fossil fuels. Therefore, Plaintiff has not pleaded its MCPA claim under Section 13-301(9) with the required particularity.

Plaintiff also fails to state a claim under Section 13-301(1) even under an ordinary pleading standard. Section 13-301(1) of the MCPA prohibits a "[f]alse, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers." Whether brought under Section 13-301(1) or Section 13-301(9), a private action under the MCPA requires a plaintiff to plead facts to establish reliance and causation. *See above*. In fact, in moving to dismiss an MCPA claim brought against it in the District of Maryland, the City argued there that the plaintiff must plead that a consumer was "induced" by a representation made about the product. *See* Mem. of the Mayor & City Council of Baltimore City, *et al*. in Supp. of Mot. to Dismiss Defs.' Am. Countercls. in *Mayor and City Council of Baltimore v. Allen*, No. 16-03486-ELH, 2017 WL 3976916 (D. Md. Jan. 11, 2017). Plaintiff has pleaded no such facts supporting reliance and causation here and, therefore, has failed to state a claim.

5. Plaintiff Fails to Allege Legally Sufficient Causation.

Plaintiff cannot allege that Defendants' conduct—whether production or the alleged overpromotion of fossil fuels—is either a cause-in-fact or the legal cause of Plaintiff's alleged localized harm. Despite retreating from its production-based theory of liability elsewhere, Plaintiff often reverts to its production-based allegations in arguing causation. But Plaintiff cannot have it both ways, and this tactical shift reveals the fundamental flaws in its "overpromotion" theory, which requires an even more attenuated and implausible causal chain.[12]

[12] This Court should reject Plaintiff's attempt to have it both ways. Plaintiff hopes that its "overpromotion" theory will defeat a motion to dismiss, but it seeks to preserve its ability to abandon that theory later to focus on the full extent of Defendants' production, rather than limit itself to the hypothetical "excess" allegedly resulting from Defendants' "overpromotion" and thus claim larger damages.

Instead of pleading the necessary causal relationship, Plaintiff relies on conclusory assertions about the purported marginal behavior of unidentified actors at unidentified times who, Plaintiff's Opposition speculates, would "have bought fewer or no fossil fuels" were it not for Defendants' alleged promotion. Opp. at 38 (citing Compl. ¶¶ 216, 295–96). Here, Plaintiff provides no specific factual basis for causation, nor for its bald assertion that but for Defendants' alleged promotion the demand for and consumption of fossil fuels would have declined. Finally, Plaintiff's resort to a novel "commingled product" theory developed specifically for the MTBE litigation and inapplicable to the facts alleged here cannot salvage its claims.

a. Plaintiff Fails to Allege Causation in Fact.

"The causation-in-fact inquiry asks whether defendant's conduct actually produced an injury." *Exxon*, 406 F. Supp. 3d at 453 (quoting *Peterson v. Underwood*, 258 Md. 9, 16–17 (1970)). Accordingly, the acts for which Plaintiff seeks to hold Defendants liable must be the same acts that cause Plaintiff's alleged harms. A plaintiff cannot claim for example that a defendant is liable for creating a nuisance for all the days she played music too loudly but then rely on the number of days she played music at all to establish causation. *Cf. Gorman*, 210 Md. at 161. Nor can a plaintiff claim that a defendant is liable for the contamination of all groundwater in an expansive location if its product is found to have caused groundwater contamination only in a single spot. *Cf. Monsanto*, 2020 WL 1529014; *Exxon*, 406 F. Supp. 3d 420. Yet, that is essentially what Plaintiff attempts to do here.

Plaintiff argues that the alleged "source of tort liability" is not Defendants' alleged responsibility for 15% of CO_2 emissions but rather Defendants' alleged "concealment and misrepresentation of [fossil fuel] products' known dangers—and simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change." *Mayor & City Council of Baltimore v. BP p.l.c*, 952 F.3d 452, 467 (4th Cir. 2020); *see*

also Tr. of Oral Arg. at 17, 18, *Mayor & City Council of Baltimore v. BP p.l.c.*, 952 F.3d 452 (4th Cir. 2020) (No. 19-1644); Opp. at 39–40 (arguing Defendants are "responsible for the release of billions of tons of greenhouse gases into the atmosphere *through* their relentless, deceptive promotion and concealment . . . [that] encouraged the public to combust in ever-increasing amounts"). But Plaintiff *does not allege* that Defendants' so-called overpromotion led to additional emissions that were a substantial cause of its injuries. Instead, Plaintiff improperly tries to return to its production theory, arguing that combustion of Defendants' products led ultimately (and through the intervention of billions of individuals and businesses) to approximately 15% of global greenhouse gas emissions, and therefore Defendants were a substantial cause of Plaintiff's injuries. *See* Opp. at 43. But even if true, this would be irrelevant, as under Plaintiff's overpromotion theory it must plead facts establishing that Defendants' alleged "*concealment and misrepresentation*" and "*promotion of unrestrained use*" of their products—as distinct from the mere production and sale of those products—led to *additional* emissions that were in and of themselves a substantial factor in causing Plaintiff's injuries. *BP p.l.c.*., 952 F.3d at 467. It fails to do so.

Plaintiff attempts to meet its substantial factor burden with the conclusory allegation that "overpromotion" caused "far more emissions[,]" a quantity Plaintiff fails to define, "which would not have [otherwise] occurred." Opp. at 43. This speculative and conclusory contention does not suffice. To adequately plead that Defendants' conduct was a substantial factor in causing its alleged harm, Plaintiff must allege how, *i.e.*, by what mechanism, the allegedly wrongful conduct resulted in the alleged harm and that the conduct was sufficient to cause the harm. *See Exxon*, 406 F. Supp. 3d at 455 ("[T]he State does not allege that any single defendant's conduct was sufficient to cause its injury. Accordingly, it fails to plausibly allege causation under the substantial factor

test.").[13] Plaintiff does not (in fact never even attempts to) connect these dots. At most, Plaintiff alleges that Defendants collectively were responsible for the "*release* of billions of tons of greenhouse gases," but does not plausibly plead any facts suggesting that these releases standing alone were sufficient to cause climate change. Opp. at 39, 43 (emphasis added). Moreover, these alleged "releases" are not due to combustion by any defendant. Rather, they were caused by millions of people and entities worldwide over decades, including Plaintiff itself, consuming and combusting fossil fuels for myriad uses, such as generation of electricity to power lights or air conditioning, and transportation by car or plane. And Plaintiff fails to plausibly allege that any marginal change in energy demand stemming from Defendants' supposed promotion of fossil fuels would have been sufficient to cause Plaintiff's harms. It does not identify, for example, a single natural gas power plant whose construction can be traced to Defendants' alleged "overpromotion," or similarly, how many more cars were driven or how many more lights were turned on as a result of the alleged "overpromotion." Absent such allegations, the Court cannot determine, as it must under the substantial factor test, "the number of other factors which contribute to producing the harm and the extent of the effect which they have in producing it" or whether the Defendants "created a

[13] Plaintiff's argument that Defendants' *production* activities constitute a cause-in-fact of its climate change injuries succeeds only in mischaracterizing Defendants' position and misstating Maryland case law. Plaintiff is wrong to assert that "Defendants contend that where multiple actors contribute to a harm, none of those actors can itself be the cause-in-fact, so all contributing tortfeasors should be entirely immune from liability." Opp. at 41. Defendants say no such thing. Indeed, the purpose of Maryland's substantial factor inquiry is to provide the test for liability in multiple contributor cases. In such cases, each Defendants' conduct must be an *independently sufficient* cause of Plaintiff's harm. *See State* v. *Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 455 (D. Md. 2019) ("[A] cause must be sufficient before it can be substantial.") Neither of Plaintiff's cited cases disputes this requirement. *Balbos* supports the requirement of independent sufficiency. *Aldridge v. Goodyear Tire & Rubber Co.*, 34 F. Supp. 2d 1010, 1020 (D. Md. 1999), *vacated and remanded sub nom. Aldridge v. Goodyear Tire & Rubber Co.*, 223 F.3d 263 (4th Cir. 2000) ("[S]ince asbestos in itself is sufficient to cause harm, the substantial factor test has been properly applied in *Balbos* and other Maryland asbestos cases to determine whether there has been adequate proof of causation."). And *Yonce* is inapt as it is not a multiple contributor case. *See Yonce* v. *SmithKline Beecham Clinical Labs., Inc.*, 111 Md. App. 124, 141 (1996) (finding that a doctor's negligent administration of a medical procedure was a but-for cause of *and* a substantial factor in the resulting injury).

situation harmless unless acted upon by other forces of which the actor is not responsible." *Exxon*, 406 F. Supp. 3d at 453 (quoting *Pittway Corp. v. Collins*, 409 Md. 218, 245 (2009)).

Indeed, Plaintiff does not allege who Defendants' customers were, let alone how, if at all, their behavior is connected to the issuance of the statements by Defendants that Plaintiff claims were misleading. Without alleging that it was a customer of any or all of the Defendants, or that it even was aware of Defendants' alleged statements, Plaintiff merely repeats its conclusory assertion that, "[h]ad Defendants not engaged in a deceptive campaign of misinformation about their products and their relation to climate change, the City and its residents would have bought fewer or no fossil fuels." Opp. at 38. Although Plaintiff should be expected to plead its own knowledge of the alleged misstatements, there is no factual basis pleaded for this conclusory allegation, which in all events is belied by the City's continuing consumption of Defendants' products today. *See, e.g.*, Compl. ¶¶ 43 at Fig. 2, 44 at Fig. 3. It is striking that in a Complaint Plaintiff filed years after it adopted its own climate plan, Plaintiff fails to identify any changes in its or anyone else's behavior that can be tied to Defendants' alleged overpromotion.

b. Plaintiff Fails to Allege Legal Causation.

Plaintiff also fails to plead that Defendants' alleged overpromotion was a legally cognizable cause of Baltimore's alleged injuries. Legal causation requires "the act and the injury [to] be reasonably related." *Pittway*, 409 Md. at 246. This analysis hinges on "whether the injuries were a foreseeable result of the [] conduct" as well as "the remoteness of the injury . . . [and] the extent to which the injury is out of proportion with the negligent party's culpability." *Id.* (citation omitted). Plaintiff argues that its injuries were a foreseeable result of Defendants' challenged conduct because Defendants knew that consumers' use of their products would "inevitabl[y]" cause climate change, which would, in turn, harm the City. Opp. at 44; *see also* Compl. ¶ 46. But Plaintiff's conclusory allegation that the inevitability of climate change was foreseeable by Defendants does

nothing to allege the required link between Defendants' promotional activities and Plaintiff's alleged harms. *See Dehn*, 384 Md. at 626 (2005) ("[L]egal causation 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.").

Plaintiff never alleges how much consumption of fossil fuels supposedly increased due to Defendants' overpromotion. And it likewise fails to allege that it was foreseeable that Defendants' promotional activities would induce an increase to such an extent as to cause injuries in Baltimore that otherwise would not have occurred. Plaintiff thus cannot now argue that sea level rise in Baltimore was in the "general field of danger" allegedly created by of Defendants' overpromotional activities. Opp. at 46 (citing *Exxon*, 406 F. Supp. 3d at 453). Because these harms are not within the general field of danger for the alleged tortious conduct on which Plaintiff focuses—overpromotion—it is not a legally cognizable cause and the claims should be dismissed.

c. Plaintiff's Attempt to Substitute a "Commingling" Theory for Adequate Allegations of Causation Fails.

Finally, Plaintiff's Opposition attempts to salvage its deficient pleading by asserting an alternative theory of "commingled product causation" that it concedes would be an "adaptation" of causation principles. *See* Opp. at 47. No Maryland state court has adopted or endorsed this theory of causation, and it is highly unlikely that the Maryland Court of Appeals would do so in light of its express holding that market-share liability "is not recognized under Maryland law." *Reiter v. Pneumo Abex, LLC*, 417 Md. 57, 65 (2010). The only case Plaintiff cites in support of its commingled product theory is *Exxon*. In *Exxon*, the court held that a "commingled product" theory, *as applied in MTBE cases*, was "closer to traditional causation than market share liability" (which Maryland courts had rejected). *Exxon*, 406 F. Supp. 3d at 458 (quoting *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 591 F. Supp. 2d 259, 268 (S.D.N.Y. 2008)). But

what Plaintiff attempts to pass off as "commingled product causation" here is substantially broader than "market share liability" and bears no relationship to "traditional causation."

Moreover, the court in *Exxon* relied on the State's allegation that "defendants together controlled substantially all of the market for MTBE gasoline in Maryland. *Id.* at 458. Therefore, the allegation that *Exxon* defendants controlled the entire relevant market was a necessary prerequisite to adopting the commingled product theory. That is *not* the case here. While attempting to import a brand new causation theory into this action, Plaintiff makes no allegation that the Court has before it as defendants all or substantially all of the global actors whose actions have caused the emission of greenhouse gases, or even all the actors who produce products that emit greenhouse gases when used by others. Quite the contrary, the Complaint alleges that the defendants collectively account indirectly for at most 15% of global CO_2 emissions from fossil fuels—and they of course would account for an even smaller percentage of producers of all products whose use emits greenhouse gases. Compl. ¶ 7. To apply a commingled product theory where producers allegedly responsible for at least 85% of global CO_2 emissions (let alone greenhouse gas emitters) are *not* before the Court would be an unprecedented and improper extension of *any* existing causation theory. In addition, and unlike in *Exxon*, fossil fuels are *not* the comingled product that Plaintiff alleges caused its injuries—rather, Plaintiff alleges that global climate change is caused by greenhouse gas emissions, which are the *byproduct* of fossil fuels when combusted by consumers. Compl. ¶ 39.

And, in all events, Plaintiff's overpromotion theory renders the commingled product theory entirely inappropriate and inapplicable. In *Exxon*, the plaintiffs alleged that the product itself (*i.e.*, gasoline containing MTBE) was the cause of the harm. *See* 406 F. Supp. 3d at 443; *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 591 F. Supp. 2d at 262. Here, by contrast,

Plaintiff alleges that it is not the *products* (*i.e.*, fossil fuels) that caused Plaintiff's alleged injuries, but Defendants' false and deceptive *statements* about those products. Plaintiff claims these statements led to excessive sales and use of fossil fuels, which ultimately contributed in some unspecified way to global climate change and Plaintiff's supposed injuries. *See, e.g.*, Compl. ¶ 2. This theory therefore necessarily depends on specific statements and misrepresentations, which Plaintiff must identify and attribute to specific Defendants. It cannot simply use the word "commingled" as a convenient way to escape its burden of adequately pleading causation. Plaintiff's attenuated version of commingled causation theory therefore is inapplicable, and in any event, has no basis in Maryland law.

B. Federal Law Necessarily Governs the Conduct at Issue, and It Displaces, Preempts, or Otherwise Precludes Plaintiff's Claims.

Finally, Plaintiff's Complaint does not and cannot plead around Defendant's dispositive federal statutory, common law, and constitutional defenses and challenges to the state law claims that Plaintiff has purported to assert.

1. Plaintiff's Claims Are Governed by Federal Common Law and Displaced by the Clean Air Act.

As two federal courts facing nearly-identical climate tort lawsuits have already held, because Plaintiff's claims "are ultimately based on the transboundary emission of greenhouse gases," the claims "arise under federal common law and require a uniform standard of decision." *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466, 471 (S.D.N.Y. 2018); *California v. B.P., p.l.c.*, Nos. C 17-06011 WHW, C 17-06012 WHA, 2018 WL 1064293, at *2 (N.D. Cal. Feb. 27, 2018). Plaintiff's interstate pollution claims "raise[] exactly the sort of federal interests that necessitate a uniform solution," and must be governed by federal common law. *Id.*, 2018 WL 1064293, at *2; *City of New York*, 325 F. Supp. 3d at 471. As the Supreme Court has repeatedly held, "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Illinois*

v. City of Milwaukee, 406 U.S. 91, 103 (1972). Furthermore, the Supreme Court held in *Am. Elec. Power Co. v. Connecticut* ("*AEP*") that the Clean Air Act ("CAA") displaces federal common law claims seeking to regulate interstate greenhouse gas emissions. 564 U.S. 410, 428 (2011) ("Congress designated [the EPA] as best suited to serve as primary regulator of greenhouse gases.").

Plaintiff fails to directly address how Maryland law could govern its interstate—and indeed, global—pollution claims. Plaintiff asserts that the Supreme Court expressly preserved state-law claims in *AEP,* Opp. at 48, and argues that the federal district court decision in this suit remanding the action to this state court "already held" that "[b]ecause the City pleads its claims entirely under Maryland law, displacement of those claims by the CAA is impossible." *Id*. Plaintiff is wrong on both counts.

First, contrary to Plaintiff's assertion, the Supreme Court did not hold in *AEP* that climate change tort claims "arise under state law." Opp. at 48. Rather, the Supreme Court dismissed plaintiffs' federal common law claims *on the merits*—because they had been displaced by federal statute. The Court then expressly declined to address the viability of the state law claims plaintiffs had also pleaded (under source state law), noting that the parties had not "briefed preemption or otherwise addressed the availability of a claim under state nuisance law." *Id*. The Supreme Court simply noted that "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal [CAA]." 564 U.S. at 429 (citing *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987)). Therefore, Plaintiff's assertion that *AEP* "clearly reached that holding" is plainly wrong. Opp. at 48.

For decades, the Supreme Court has reinforced that a claim may be brought under state law only with respect to *in-state* pollution sources. *Ouellette*, 479 U.S. 481, 499. The *AEP* state law claims that the Supreme Court left for remand were asserted under "the law of each State where

the defendants operate[d] powerplants," 564 U.S. at 429, *i.e.*, the law of the *source* state of the greenhouse gas emissions. But Plaintiff's claims here do not challenge emissions from Maryland sources. Rather, Plaintiff is seeking to project one state's law—Maryland's—onto activity across the entire nation (and the world). In any case, the viability of the purported state law claims in *AEP* was never adjudicated because plaintiffs declined to pursue those claims on remand. *See* Notice of Voluntary Dismissal, *Connecticut v. Am. Elec. Power Co., Inc.*, No. 04-CV-05669 (S.D.N.Y. Dec. 6, 2011), ECF No. 94.

Second, the Maryland federal court's remand decision does not hold that Plaintiff's state law claims can proceed without regard to the CAA. Rather, the district court declined to determine the appropriate source of law for Plaintiff's claims, deferring it as a merits question.[14] *See Mayor and City Council of Baltimore v. B.P. p.l.c.*, 388 F. Supp. 3d 538, 558 (D. Md. 2019). In remanding the case, the Fourth Circuit was not directing this Court how to rule on the state law claims, nor could it have done so in light of its conclusion that the federal courts lacked jurisdiction.

2. Federal Law Preempts Any State Law Claims.

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

Even if Plaintiff were correct that Maryland law could govern its interstate pollution claims, the CAA would preempt those claims because they seek to apply Maryland common law

[14] Defendants believe the district court erred in concluding that the appropriate source of law for Plaintiff's claims addressing global activity was a merits question instead of an issue it had to resolve in determining whether it had federal question jurisdiction. As the First Circuit held in *United States v. Swiss Am. Bank, Ltd.*, determining whether a claim arises under federal law requires a "two-part approach [that] involves what may be characterized as the source question and the substance question. The former asks: should the source of controlling law be federal or state? The latter (which comes into play only if the source question is answered in favor of a federal solution) asks" how the Court should "defin[e] the substance of the rule[.]" 191 F.3d 30, 43 (1st Cir. 1999) (citing *United States v. Standard Oil Co.*, 332 U.S. 301 (1947)). The source of the law is thus a separate question from whether a plaintiff can state a claim under that law, and the fact that Plaintiff's interstate pollution torts are preempted by the CAA, as set forth in Section II.B.2.a below, is irrelevant to whether they must be governed by federal common law. Whether a claim "arises under" federal law "turns on the resolution of the source question"—which is not a merits determination—and thus should have been determined by the district court. *Id.* at 44.

to greenhouse gas emissions originating in other states and around the world. *See Ouellette*, 479 U.S. at 499 (holding that the Clean Water Act preempts all state law tort claims except those based on the law of the *source* state); Mot. at 41–42. Plaintiff makes several arguments to avoid the straightfoward application of the CAA and Supreme Court precedent, each of which fails.

First, Plaintiff points to its theory of overpromotion and argues that *Ouellette* is inapplicable because Plaintiff "is not challenging the legality of any point-source emissions but is instead pleading violations of state statutory and common law duties stemming from the sale of a dangerous product through misleading means." Opp. at 56. But to the extent it seeks liability for "overpromotion" Plaintiff's Complaint alleges injuries from greenhouse gas emissions due to excessive "levels" of sales that Plaintiff must tie to combustion of fossil fuels by third-parties worldwide, Compl. ¶¶ 2, 7, 248, including those from stationary sources. Notwithstanding Plaintiff's attempt to divert the Court's attention to other aspects of its allegations, worldwide emissions are clearly at the very heart of Plaintiff's claims. Thus, *Ouellette* applies and precludes the claims.

To be sure, *Ouellette* and its progeny under both the Clean Water Act and CAA hold that states may impose "higher common-law" and "higher statutory restrictions" than those imposed by the EPA "on *their own* point sources," but when it comes to "[a]pplication of an affected State's law to an out-of-state source," state law is preempted. *Bell v. Cheswick Generating Station*, 734 F.3d 188, 194 (3d Cir. 2013) (emphasis added) (quoting *Ouellette*, 479 U.S. at 497); *see also North Carolina, ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291, 304 (4th Cir. 2010); *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015); *accord AEP*, 564 U.S. at 429 (noting plaintiffs sought relief under "state law, in particular, the law of each State where the defendants operate powerplants" and have emissions, *i.e.*, source-state law). *Ouellette* compels the conclusion that the CAA itself preempts Plaintiff's claims, which purport to apply Maryland law

to sources not merely in a neighboring state, but in all fifty states and around the world. Further, insofar as Plaintiff's claims are premised on third-party greenhouse gas emissions from mobile sources, a comprehensive preemption scheme under Title II of the CAA limits state regulation of mobile sources and fuels, providing comprehensive procedures for states to undertake any such regulation and otherwise expressly preempting state regulation in these areas. *See* 42 U.S.C. §§ 7416(a), 7543, 7545(c)(4).

Plaintiff argues that this case is analogous to *Counts v. General Motors, LLC*, 237 F. Supp. 3d 572 (E.D. Mich. 2017), which found that the CAA did not preempt breach of contract, fraudulent concealment, and deceptive advertising claims arising from General Motors' installation of "defeat devices" in vehicles to make them appear more fuel efficient. 237 F. Supp. 3d at 572. *Counts* is inapposite because the plaintiffs there were not alleging injury from the emissions themselves but from deception that lowered the value of their supposedly "fuel efficient" vehicles. *Counts*, 237 F. Supp. 3d at 582 ("Plaintiffs [were] attempting to hold GM responsible for what [p]laintiffs allege[d] [were] false representations *about certain technology in the [vehicle]*." (emphasis added)). Unlike in *Counts*, the Plaintiff here alleges injuries caused by the emissions in question. To adjudicate Plaintiff's climate nuisance claim, the Court would need to "determine, in the first instance, what amount of carbon dioxide is 'unreasonable.'" *AEP*, 564 U.S. at 428. While Plaintiff does not identify a specific quantity of emissions that would have been reasonable, its Complaint alleges that a 15% annual reduction in global greenhouse gas emissions would be required to "restore the Earth's energy balance by the end of the century"—leaving this Court, rather than the EPA, to decide that issue and determine the appropriate remedy. Compl. ¶ 187.

As the Supreme Court observed in *AEP*, "[t]he appropriate amount . . . cannot be prescribed in a vacuum: as with other questions of national or international policy, informed assessment of

competing interests is required … the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance." *AEP*, 564 U.S. at 427. And while "[t]hese determinations would be made for the defendants [here]," "[s]imilar suits could be mounted … against 'thousands or hundreds or tens' of other defendants" *id.* at 428, or against these defendants in other state courts for the same nationwide and worldwide business operations. The result would be "individual … judges issuing ad hoc, case-by-case" determinations of what would constitute a reasonable level of emissions for each defendant. *Id.* Thus, it is of no relevance whatsoever that Plaintiff proclaims it seeks only money damages and does not seek to stop production and consumption of fossil fuels; each case would determine a standard of reasonable emissions. Adjudication of Plaintiff's claims would unleash the "chaotic patchwork of state standards" that the *Counts* court found gives rise to federal preemption. *Counts*, 237 F. Supp. 3d at 592 (internal quotation omitted). Plaintiff's claims thus implicate the very considerations that animate *Ouellette*. Opp. at 42. And they illustrate precisely why Congress delegated to EPA, via the CAA, the authority to regulate greenhouse gas emissions, as the Supreme Court held in *Massachusetts v. EPA*, 549 U.S. 497 (2007).

Second, Plaintiff argues that the CAA's "cooperative federalism structure" preserves its claims. Opp. at 52. Under the CAA states may implement (with EPA's approval) state-specific standards that are more stringent than federal standards for the emission of pollutants from *in-state* stationary sources. *See* Opp. at 52–53. The CAA does not, however, permit a state to regulate or bring claims based on emissions from *out-of-state* sources, and *Ouellette* forecloses such an interpretation. Plaintiff also contends that its claims fall within its "historic police powers to protect the health, safety and property rights of its citzens," Opp. at 54, but that was also true in *Ouellette*—property owners in Vermont sought local remedies (damages and remediation) for

local harm (pollution on the Vermont side of the lake). The Supreme Court nonetheless held the Vermont-law claim preempted because only source-state law could apply. *See Ouellette*, 479 U.S. at 494. The City does not have an "historic power" to regulate the *global* production, promotion, and consumption of fossil fuels, and none of the state police power cases Plaintiff cites says otherwise.

Third, Plaintiff incorrectly relies upon CAA savings clauses to support its argument that Congress intended to save from preemption common law remedies for emissions otherwise regulated under the Act. Opp. at 52–53. The purpose and scope of such savings provisions is squarely addressed in a recent decision finding that an ordinance passed by the Baltimore City Council known as the Baltimore Clean Air Act was held to be preempted under Maryland law "because it 'second guesses' the complex federal and state regulatory scheme for air emissions." *Wheelabrator Baltimore, L.P. v. Mayor & City Council of Baltimore*, No. CV GLR-19-1264, 2020 WL 1491409, at *6 (D. Md. Mar. 27, 2020). The court there explained that the ordinance was conflict preempted because it targeted pollutant emissions for which comprehensive standards had already been established under the CAA, which were memorialized in permits issued to facilities under federally-approved state law procedures implementing CAA Title V. As the court observed, "[e]missions standards for these pollutants are set by EPA after a lengthy public rulemaking process and enforced through intricate permitting systems administered by the states[,]" and "[a]llowing a locality to undermine this regulatory scheme by substituting its judgment in place of decisions by the federal and state government is not consistent with the goals of the CAA and its corresponding statutes." *Id*. The court also rejected the argument that the savings clause in the Maryland air pollution statute precluded a finding of preemption—an argument similar to the one Plaintiff advances here, *see* Opp. at 57–58—explaining that "a court may find a law is conflict

preempted even where it purports to fit within a statute's saving clause." *Wheelabrator*, 2020 WL 1491409, at *6. In doing so, the court cited the Supreme Court's decision in *United States v. Locke*, 589 U.S. 89, 106 (2000), in which the Court declined "to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Id.* This Court should do the same, as interpreting the savings provisions of the CAA in the manner urged by Plaintiff would upset the existing regulatory framework for addressing the emissions at issue in the Complaint.

b. Plaintiff's Claims Are Barred by Federal Energy Law.

Plaintiff's claims, if adjudicated under Maryland law, would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in various federal energy statutes promoting the production and sale of domestic oil, and are therefore barred. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). Plaintiff's only response is to conceal the breadth of its claims and hope the Court will not notice.

Plaintiff mischaracterizes its claims as merely "protect[ing] [the City's] resources and citizens from climate change-related harm," Opp. at 60, which it contends is not in conflict with the "federal interest in promoting domestic oil production" reflected in the statutes cited by Defendants, Opp. at 59. But, as already explained, Plaintiff's claims necessarily rest on the production, sale, and use of fossil fuels worldwide. *See, e.g.*, Compl. ¶¶ 2, 7, 248. And under Plaintiff's overpromotion theory, Plaintiff expressly seeks to impose liability against and levy payments from Defendants on the basis of purportedly excessive levels of sales, which is no more than regulation of production and emissions levels in disguise. Because Plaintiff's claims ultimately seek to limit, or discourage, production through large damage awards and equitable relief, they conflict with federal laws that promote domestic production, including, for example, the Energy Policy Act's

direction to "increase the recoverability of domestic oil resources." 42 U.S.C. § 13411(a); *see also* 42 U.S.C. § 15927(b) ("[O]il 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").

The allegations here differ significantly from *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 243 (1984), on which Plaintiff relies. Opp. at 53. In *Silkwood*, the company's failure to comply with federal guidelines caused a nuclear accident at a single location; state law claims for punitive damages were not preempted because they were not an attempt by the state to regulate *conduct* already regulated by the federal government. 464 U.S. at 244. In contrast, here there is no allegation that the dangers Plaintiff complains of result from any Defendant's failure to comply with applicable law. Rather, they are a result of the normal and lawful combustion of Defendants' products by independent third-party end users.

Plaintiff also relies on the Second Circuit's determination that state law nuisance claims aimed at pollution of groundwater by MTBE were not preempted by the CAA, even though it encouraged the use of gasoline additives, of which MTBE was one, to reduce emissions. Opp. at 60. But there, the tortious conduct was not the mere sale and use of MTBE, but faulty supply and storage practices that caused MTBE to leak into groundwater. *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d at 104. There is no similar allegation here. Again, even with respect to Plaintiff's allegation of deceptive promotion, it was not the promotion itself that caused the alleged harms, or even the increased production allegedly resulting from the promotion. Instead, it was the supposed increase in consumption of fossil fuels by consumers—an activity whose lawfulness Plaintiff does not dispute.

c. Plaintiff's Claims Are Barred by the Commerce Clause.

Under Plaintiff's overpromotion theory, all of Plaintiff's claims fail in the first instance

because they would require the Court to impose liability based on the "levels" of Defendants' sales of products that, as demonstrated above, were fully lawful in the jurisdictions in which they were sold—including to the extent they were sold in Maryland. Neither Maryland law, nor federal statute, nor the United States Constitution authorizes or permits imposing such a sweeping theory of liability.

By seeking to impose liability on these Defendants for the alleged "levels" or "amounts" of their sales of fossil fuel products that Plaintiff contends are "harmful," "expanded," "unrestrained," "increased," "excess," or "ever-increasing[,]" Opp. at 2, 9, 14, 21, 23, 33, 34, 38, 39, Plaintiff tries to appoint this Court as the regulator of the fossil fuel industry—throughout the nation and the world. But this it cannot do.

Plaintiff's claims concern conduct occurring almost exclusively outside Maryland's borders, and are hardly the "localized remedies for localized harm" with limited extraterritorial effect that Plaintiff asserts in arguing that its claims do not violate the Dormant Commerce Clause. *See* Opp. at 61. In fact, the expanse of Plaintiff's claims is "breathtaking." *City of Oakland*, 325 F. Supp. 3d at 1022. It "rests on the sweeping proposition that otherwise lawful and everyday sales of fossil fuels, combined with an awareness that greenhouse gas emissions lead to increased global temperatures, constitute a public nuisance," *id.*, with an "international reach of the alleged wrong," *id.* at 1028–29. This extraterritorial aspect is as true for Plaintiff's production theory as it is for its new overpromotion theory. For instance, Plaintiff's claims as framed would encompass oil and gas produced in Texas, refined in Louisiana, and then sold to a customer in Mississippi, who heard advertising from a Tennessee media market, and emits greenhouse gases while driving through Arkansas, which add to global concentrations. There is no Maryland-specific connection, and Maryland law cannot apply to that extraterritorial conduct.

Plaintiff asserts that it "does not seek any regulatory relief in this case" attempting to frame its claims as merely "abatement or damages remedies." Opp. at 61, 63. But imposing even compensatory liability based on a Defendant's individual or collective so-called excessive "levels" of sales is without question an act of regulation—indeed, it is "a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959). Imposition of tort liability on this select group of energy companies would undoubtedly affect their ability to conduct their businesses, and have far more than an "indirect effect on interstate commerce," particularly where, under Plaintiff's theory, the only way for Defendants to avoid liability would be to radically curtail or even cease their (lawful) national and global economic activity. Awarding relief on Plaintiff's claims would necessarily have "the practical effect of regulating commerce occurring wholly outside the State's borders." *Star Sci. Inc. v. Beales*, 278 F.3d 339, 355 (4th Cir. 2002).

Plaintiff's claims here are vastly different from the cases on which they rely. For example, the securities fraud claims at issue in *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679 (S.D.N.Y. 2018) *appeal docketed*, No. 18-1170 (2d Cir. 2018), focused on alleged statements to investors, and the securities laws at issue had already been found to "only regulate [] transactions occurring within the regulating States." And the claims at issue in *Pharmaceutical Research & Manufacturers of America v. Concannon*, 249 F.3d 66 (1st Cir. 2009), challenged a Maine *statute* regulating Medicaid rebates only on drugs sold to Maine residents. Neither case comes close to the global reach of Plaintiff's tort claims here.

As for Plaintiff's contention that its theory of liability would have only an "indirect effect[] on interstate commerce[,]" Opp. at 63, Plaintiff's cited cases are similarly inapposite. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978),

and *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), all involved challenges to state statutes that governed *in-state* conduct, not widespread tort liability for lawful conduct occurring throughout the world. And *Brown-Forman Distillers Corp. v. N.Y. Liquor Auth.*, 476 U.S. 573 (1986), *struck down* the state statute at issue under the Dormant Commerce Clause because it affected distillers' selling ability outside New York.

Plaintiff also fails to address the fact that its claims are barred by the Foreign Commerce Clause, even though "state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny." Mot. at 47 n.28; *see also Bd. of Trustee of Employees' Retirement System of City of Baltimore v. Mayor and City of Baltimore*, 317 Md. 72, 145 (1989) (state regulation affecting foreign commerce is "undoubtedly subject to more intensive Commerce Clause scrutiny"). Here, there can be no doubt that Plaintiff's claims will have a substantial impact on fossil fuel production, including distribution and sales outside of the United States. In fact, Plaintiff concedes that a significant portion of Defendants' conduct occurred outside of the United States and several Defendants are based and headquartered in foreign nations.[15] Indeed, in its amicus brief supporting Defendants' Motion, the United States Government agreed, explaining that "a monetary award to Baltimore based on Defendants' extraterritorial conduct 'would have Defendants change [their] methods of doing business and controlling pollution to avoid the threat of ongoing liability' . . . which would have the 'practical effect' of curbing fossil fuel production

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[15] *See, e.g.*, Compl. ¶ 18 (alleging that "between 1965 and 2015, the named Defendants extracted from the earth enough fossil fuels (*i.e.*, crude oil, coal and natural gas) to account for more than one in every six tons of CO_2 and methane emitted *worldwide*") (emphasis added); *id*. ¶ 20 (Defendant BP p.l.c. is "registered in England and Wales with its principal place of business in London, England"); *id*. at ¶ 24 (Defendant Royal Dutch Shell PLC is "incorporated in England and Wales, with its headquarters and principal place of business in the Hague, Netherlands"); *id.* ¶ 145 (alleging that "Defendants embarked on a decades-long campaign designed to maximize continued dependence on their productions and undermine national and *international* efforts to rein in greenhouse gas emissions" (emphasis added)); *id.* ¶¶ 173–76 (alleging exploration and production activities in the Artic and North Sea).

in foreign countries—an outcome inconsistent with the Foreign Commerce Clause[.]" *See* Br. for the United States as Amicus Curiae at 18–19 (Dkt. No. 75/0).

In sum, Plaintiff's claims would require this Court to pass judgment on lawful business activities in all 50 states and around the world, including fossil fuel sales and customers' emissions that do not even result from the alleged deception. And, of course, the allegedly excessive sales are really a proxy for the Defendants' production and their customers' emissions—which ultimately is the conduct Plaintiff seeks to regulate. As pleaded in the Complaint, Plaintiff's claims go far beyond allegations of a deceptive marketing campaign by Defendants. In fact, the harms alleged and the requested relief are inextricably tied to the production and sale of fossil fuels. The Complaint purports to allocate 15% of *global* greenhouse gas emissions to Defendants; it does not purport to quantify the value or volume of products purportedly sold through deception, much less sold in Maryland. Compl. ¶ 7. Plaintiff's claims thus have the "practical effect of regulating commerce occurring wholly outside [Maryland]." *Healy*, 491 U.S. at 332 (internal quotation marks omitted). But Maryland law cannot regulate conduct outside its borders or worldwide. *See, e.g.*, *Brown-Forman Distillers*, 476 U.S. at 585 (New York has "no authority to control sales in other States"); *Md. State Comptroller of the Treasury v. Wynne*, 431 Md. 147, 161 (2013) (noting that the Commerce Clause has a "negative aspect [that is] an applied limitation on the power of state and local governments to enact laws affecting foreign or interstate commerce.").

d. Plaintiff's Claims Are Barred by the Foreign Affairs Doctrine.

Plaintiff argues that its claims are not barred by the foreign affairs doctrine because they "do not seek to establish or change foreign policy, either implicitly or explicitly" and any impact is "incidental" and "insufficient[.]" Opp. at 64. But nothing in Plaintiff's claims are limited to or depend on Maryland injury, or effect.

Plaintiff acknowledges that "[c]limate change may be a global crisis," Opp. at 68, and concedes that global climate change has been the subject of international treaties and negotiations. *See*, *e.g.*, Compl. ¶ 143 (discussing the 1992 Earth Summit in Brazil and the creation of the United Nations Framework Convention on Climate Change). Plaintiff's claims will necessarily interfere with the U.S. Government's international efforts to address climate change (not to mention its domestic regulation of greenhouse gases, addressed in Sections II.B.2.a–b above). *See* Mot. at 40–44. As the Supreme Court has held, "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the concern for uniformity in this country's dealings with foreign nations that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003).

The regulatory effect of damage awards, as already noted, *see* pp. 47–48 above, applies in any extraterritorial situation. *Cf. California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at *14 (N.D. Cal. Sept. 17, 2007) (dismissing climate change nuisance action because "by seeking to impose damages . . . Plaintiff's nuisance claims sufficiently implicate the political branches' powers over . . . foreign policy"). Maryland's "traditional state responsibility" does not encompass the ability to regulate the global production, promotion, and consumption of fossil fuels on which Plaintiff's claims are based. *See City of New York*, 325 F. Supp. 3d at 475.

Plaintiff's approach to addressing climate change through tort actions directly conflicts with federal foreign policy. As the federal government noted in its amicus brief, "[e]fforts to address climate change, including in a variety of multilateral fora, have for decades been a focus of U.S. foreign policy" and the "[a]pplication of state law [in this area] would substantially interfere with the ongoing foreign policy of the United States." Br. for the United States as Amicus

Curiae at 20–21. In fact, the United States makes clear that not only would state law interfere, but "Baltimore's tort claims *conflict* with the United States foreign policy, including the balance of national interests struck by the UNFCCC [United Nations Framework Convention on Climate Change]." *Id.* at 21. Moreover, the "approach advanced by Baltimore would 'compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments.'" *Id.* at 23. "Because Baltimore's claims challenging production and consumption of fossil fuels outside the United States have the effect of regulating conduct beyond U.S. boundaries and impermissibly interfere with the conduct of foreign affairs, they are preempted by the Foreign Commerce Clause and the foreign affairs power." *Id.* at 24.

Plaintiff argues that similar amicus briefs filed by the United States in *City of New York* and *City of Oakland* "add[] no substance[.]" Opp. at 67 & n.31. But these briefs, and the brief filed here, demonstrate the gravity of interference in foreign policy that Plaintiff's claims present. The claims touch upon "the production and sale of fossil fuels in numerous states and foreign countries—products that are intermingled in complex, interdependent streams of international commerce." Br. for the United States as Amicus Curiae at 16, *City of Oakland v. BP Plc.*, No 17-cv-6011, ECF No. 245 at 7 (N.D. Cal. May 10, 2018). "Where, as here, Baltimore seeks to project state law into the jurisdiction of other nations, the potential is particularly great for . . . interference with United States foreign policy[.]" Br. for the United States as Amicus Curiae at 17–18. This is far more than an "incidental impact" on foreign policy. "There is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

Without addressing what Plaintiff calls the "laundry list of international accords" related to climate change identified in Defendants' Motion, Opp. at 68, Plaintiff instead makes a slippery

slope argument that, "[i]f the City's claims were preempted here by the foreign affairs doctrine, so too would virtually every tort claim seeking to redress local injuries caused, directly or indirectly, by any product or conduct that is the subject of international cooperation and negotiation." Opp. at 68. This speculation is absurd—the tort claims Plaintiff describes are cabined by well-established doctrine and elements of duty, breach and causation—and only sharpens Defendants' point that this Complaint, alleging injury from worldwide conduct and worldwide atmospheric phenomena, necessarily would require a dramatic expansion of tort law to survive.[16]

Nor are *City of Oakland* and *City of New York*, in which federal district courts found that virtually identical claims encroached on the primacy of the federal executive branch in foreign affairs, distinguishable on the basis that those courts held that Plaintiff's claims were governed by federal and not state common law. Opp. at 67–78. The separation of powers and extraterritoriality concerns underlying the *City of New York* and *Oakland* decisions apply with equal, if not greater, force to state law claims. "[T]he Supreme Court has endorsed repeatedly, including in *Garamendi*, the notion of executive primacy in the sphere of foreign affairs." *In re Assicurazioni Generali S.p.a.*, 340 F. Supp. 2d 494, 502 (2d Cir. 2004) (collecting cases relying on the unique responsibility of the executive branch over foreign affairs). A single state has even less power to usurp that *federal* executive primacy than other branches of the federal government.

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[16] *Green Mt. Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007), and *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007), do not support Plaintiff's argument that state regulations of greenhouse gases are not preempted. Both cases relate solely to vehicle emissions, for which specific exceptions to CAA preemption are provided. *See* 42 U.S.C. § 7543 (specifying the conditions that California motor vehicle emissions standards must satisfy for such standards not to be preempted and for other states to opt into such standards under 42 U.S.C. § 7507); *Cent. Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1165 ("*Green Mountain* [] is essentially the product of a conclusion of non-conflict"). Plaintiff's claims here are far broader, as they "seek[] to hold Defendants liable for the emissions that result from their worldwide production, marketing, and sale of fossil fuels." *City of New York*, 325 F. Supp. 3d at 475.

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

Plaintiff's claims should be dismissed because they violate Defendants' due process rights by seeking retroactive punishment for conduct that was—and still is—lawful. *See* Mot. at 50–51. Plaintiff argues that retroactive tort liability for lawful conduct is permissible and that, in any event, its claims are based on Defendants' alleged "decades-long campaign of deception to hide known serious harms caused by their products," which was not authorized by law. Opp. at 68. Both arguments fail.

A "State cannot," consistent with due process, "punish a defendant for conduct that may have been lawful where it occurred." *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 421 (2003); *see also BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 573 (1996). That *State Farm* pertained to punitive damages is not a meaningful distinction as Plaintiff seeks punitive damages for many of its claims. *See* Compl. ¶¶ 236, 249, 262, 283, 292, 304, 314 (seeking punitive damages). Plaintiff's reliance on *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991), is misplaced. That case pertained to the retroactive application of a court decision to other *nonparties* operating under similar facts. Here, Defendants are the first and only parties on which Plaintiff seeks to impose new, sweeping tort liability, for conduct never previously deemed illegal, and that is lawful around the country and the world. Plaintiff does not dispute that Defendants' production and sale of fossil fuels was and remains legal and encouraged by law, and Plaintiff's Complaint alleges no violation of any law with respect to these activities. Yet, Plaintiff's Complaint seeks to impose liability for this legal conduct: even to the extent Plaintiff focuses on Defendants' alleged "deception," it necessarily relies on the cumulative effects of global greenhouse gas emissions over time as the alleged cause of its purported injuries. Thus, Defendants' lawful production and sale of fossil fuels underlie all Plaintiff's claims.

Plaintiff also relies on *Polakoff v. Turner*, 385 Md. 467 (2005) and *Owens-Illionis v. Zenobia*, 325 Md. 420 (1992), but these, too, are inapposite. *Polakoff* involved court interpretation of a statute. 385 Md. at 488. Here, Plaintiff does not adequately allege any statutory violations by Defendants, and, in fact both state and federal law actively encourage Defendants' activities. *See* Section II.A.1.a above. And in *Owens-Illinois*, the court simply raised the standard of proof required to award damages to a tort plaintiff, from a preponderance of the evidence to clear and convincing evidence. 325 Md. at 469.[17]

f. Plaintiff's Claims Are Barred by the First Amendment.

To the extent Plaintiff's claims seek to punish Defendants for their speech and lobbying activities, they target speech protected by the First Amendment and should be dismissed. *See* Mot. at 51–52.

Plaintiff fails to allege any misrepresentations at all on the part of most Defendants. Instead, Plaintiff largely targets Defendants "by and through their trade association memberships. . ." Compl. ¶ 166; *see also id.* ¶¶ 115–16, 120–21 (alleging actions and statements by the American Petroleum Institute). But "[a] member of a trade group or other similar organization does not necessarily endorse everything done by that organization or its members." *Pfizer Inc. v. Giles (In re Asbestos Sch. Litig.)*, 46 F.3d 1284, 1290 (3d Cir. 1994). The few specific statements Plaintiff does identify plainly are not misrepresentations; rather, the statements acknowledge the existence of climate change, but advocate for further studies to understand its underlying causes and effects.

[17] *Owens-Illinois* cites *Julian v. Christopher*, 320 Md. 1 (1990) to support its retroactive adjustment to the evidentiary requirements of punitive damages in tort cases. There, the court held that "[c]ontracts should be interpreted based on the law as it existed when they were entered into." *Id.*, 320 Md. at 11. A large portion of Defendants' fossil fuel production is pursuant to contracts, many of which are with the United States and its agencies. According to *Julian* such activity should be exempt from the retroactive tort liability Plaintiff seeks here.

See, e.g., Compl. ¶ 148 ("emphazi[ng] the uncertainty in scientific conclusions regarding the potential enhanced Greenhouse Effect"); *id.* ¶ 149 ("emphasiz[ing] scientific uncertainty"); *id.* ¶ 155 (acknowledging the lack of "economic alternative[] [energy sources] on the horizon"). The Complaint thus targets protected commercial speech.

Moreover, although Plaintiff purports not to challenge Defendants' lobbying, nearly every statement attributed to Defendants in the Complaint comprises petitioning or lobbying activity. *See, e.g.*, Compl. ¶¶ 158–59 (describing the activities of various trade groups); *id.* ¶ 160 (alleging that "Defendants mounted a campaign against regulation of their business practices"). Lobbying activity is protected by the First Amendment. *See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 145 (1961); *United Mine Works of Am. v. Pennington*, 381 U.S. 657, 671 (1965). Plaintiff's passing argument that the sham exception "could" apply here is not supported by any allegations in the Complaint. Opp. at 72. That narrow exception applies only to activities that "are not genuinely aimed at procuring favorable governmental action at all[.]" *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991) (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4 (1988)). But Plaintiff alleges the opposite—that Defendants sought to influence government action in a manner favorable to Defendants and succeeded in doing so.[18] *See, e.g.*, Compl. ¶ 117 (Exxon scientists seek to "influence possible legislation"); *id.* ¶ 143 (alleging that Defendants mounted "a public campaign aimed at evading regulation of their fossil fuel products and/or emissions therefrom."); *id.* ¶ 166 (alleging that Defendants' activity "by and through their trade association memberships" has enabled them to "evade regulation of the emissions resulting from use of their fossil fuel products"). This alleged

[18] To the extent that Plaintiff alleges improper means of lobbying on the part of Defendants, such conduct is still protected by the First Amendment, as the sham exception is not for Defendants who "genuinely seek[] to achieve [their] governmental result, but do[] so through improper means." *City of Columbia*, 499 U.S. at 380 (quoting *Allied Tube & Conduit Corp.*, 486 U.S. at 508).

activity is the core of what *Noerr-Pennington* protects. Plaintiff's claims should thus be dismissed as barred by the First Amendment.

III. CONCLUSION

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

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Respectfully submitted,

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I HEREBY CERTIFY, that on this 21st day of May 2020, a copy of Defendants' Reply Memorandum in Support of Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted was sent via email to:

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