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7
8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

10
11 THE UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

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

24 Defendants.

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

**WCI, INC. DEFENDANTS' REPLY TO
PLAINTIFF'S OPPOSITION TO
DEFENDANTS' CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

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

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

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1 **I. INTRODUCTION**

2 Plaintiff’s nearly fifty-page reply and opposition brief fails to address any of the arguments
3 asserted by the WCI, Inc. Defendants. Indeed, Plaintiff’s brief does not present any factual or legal
4 authority to support the expansion of the foreign affairs doctrine to a private non-profit corporation,
5 such as Western Climate Initiative, Inc. (“WCI, Inc.”), or its board members. Aside from the
6 occasional tangential reference to “WCI” generally, which more often than not conflates the
7 Western Climate Initiative (“WCI”) with WCI, Inc. in an effort to distract and mislead the Court,
8 Plaintiff’s brief is based almost entirely on California’s Agreement with Quebec to which the WCI,
9 Inc. Defendants are not parties. Plaintiff otherwise relies on California’s cap-and-trade regulations,
10 which the WCI, Inc. Defendants neither implement nor enforce. Plaintiff fails to connect the
11 services offered by WCI, Inc., much less the conduct of the WCI, Inc. Defendants, to a foreign
12 affairs doctrine violation for which the WCI, Inc. Defendants may be held responsible as a matter
13 of law. Plaintiff’s claims fail because only states themselves are subject to the restrictions imposed
14 by the foreign affairs doctrine. And, even if the doctrine somehow applied to state actors or
15 instrumentalities of the state, which they do not as Plaintiff concedes by omission, the WCI, Inc.
16 Defendants do not qualify as such.

17 **II. PLAINTIFF’S FACTUAL MISCHARACTERIZATIONS**

18 **A. Western Climate Initiative Is Separate and Distinct from WCI, Inc.**

19 Plaintiff has consistently throughout this litigation misrepresented the relationship between
20 WCI, Inc. and WCI. Both historically and as it exists today, WCI, Inc. is a separate and distinct
21 legal entity from the informal partnership of various jurisdictions known as WCI.² Indeed, WCI
22 partners in a majority of cases are not, nor are they required to be, participating jurisdictions in
23 WCI, Inc. (DMFs 1-2; ECF No. 102-2, Ex. 14 at 3-8, n.1 (evidencing WCI, Inc.’s participating
24 jurisdictions versus the WCI state and territory partners)). Again, there is no evidence to allow the
25 statements or actions of WCI to be attributed to WCI, Inc. in any manner that has legal significance.

26 _____
27 ² For example, in making the statement that “WCI represents to the world that it constitutes ‘the
28 largest carbon market in North America, and the only one developed and managed by governments
from two different countries’”, this statement refers only to the WCI partnership – as opposed to
WCI, Inc. (ECF No. 107-2 at 39:20-26; ECF No. 108-3 at 39:20-26.)

1 WCI, Inc. is a private, non-profit corporation organized under the laws of Delaware to
2 provide administrative support and technical services to participating jurisdictions. (See ECF No.
3 125-1 at 180-81, WCI Fact Nos. 1-2, 7-8.) WCI, Inc. utilizes a software platform specifically
4 designed to track emissions and offsets in accordance with a participating jurisdiction's cap-and-
5 trade program requirements. (See ECF No. 125-1 at 180-82, WCI Fact Nos. 1-2, 7-8; ECF No. 50-
6 4, Ex. 12 at 132-139.) WCI, Inc. supports both individual jurisdiction and cross-jurisdictional
7 allowance auctions, as applicable. (See ECF No. 125-1 at 181-82, WCI Fact Nos. 7-8; ECF No. 50-
8 4, Ex. 12 at 132-139.) WCI, Inc.'s services may be utilized by any jurisdiction that seeks to
9 participate. (See ECF No. 125-1 at 180-82, WCI Fact Nos. 1-2, 7-8; ECF No. 50-4, Ex. 12 at 132-
10 139.) As evidenced by Nova Scotia's participation in WCI, Inc., linkage with California is not
11 required to participate in WCI, Inc. or to utilize the support and technical services it offers. (ECF
12 No. 50-4, Ex. 12 at 136; *see also* ECF No. 125-1 at 182-83, WCI Fact Nos. 9, 16; ECF No. 78-3,
13 Ex. 41 at 2; ECF No. 46-2 at 17, Art. III.)

14 WCI, on the other hand, is a somewhat informal "collaboration of independent jurisdictions
15 working together to identify, evaluate, and implement emissions trading policies to tackle climate
16 change at a regional level" that began in 2007. (See ECF No. 46-1 at 7, fn.3.) However, WCI itself
17 is not, and has never been, a legal entity with the power to take any valid action. (*Id.*)

18 **B. WCI, Inc. Is a Contractual Service Provider.**

19 WCI, Inc. has served multiple jurisdictions since its inception including Ontario, British
20 Columbia, Quebec, Nova Scotia and California. (See ECF No. 125-1 at 181, WCI Fact No. 3; *see*
21 *also* Sahota Decl. ¶¶ 62-64; ECF No. 50-4, Ex. 9 (establishing Ontario as a participating member);
22 ECF No. 46-2, Ex. B at 5 (establishing British Columbia as a participating member).) Each
23 jurisdiction contracts separately with WCI, Inc. for a variety of services depending on its individual
24 needs. (See ECF No. 125-1 at 182, WCI Fact Nos. 8-9; ECF No. 50-4, Ex. 12 at 132-139.) The
25 WCI, Inc. Defendants are indisputably not parties to agreements between participating or other
26 jurisdictions regarding inter-jurisdictional emissions trading programs, including that established
27 in the 2017 Agreement between California and Quebec. (See ECF No. 125-1 at 181, WCI Fact No.
28 7; ECF No. 125-1 at 183, WCI Fact Nos. 13-14.)

III. LEGAL ARGUMENTS

A. Plaintiff's Foreign Affairs Doctrine Claim Fails as a Matter of Law Because No Legal Authority Exists to Support Plaintiff's Foreign Affairs Doctrine Claim Against the WCI, Inc. Defendants.

Plaintiff has failed to meet its burden on summary judgment as to the WCI, Inc. Defendants. Plaintiff does not cite any legal authority to support the proposition that a private corporation, let alone a non-profit one, can violate the foreign affairs doctrine.³ Historically, the foreign affairs doctrine has only been invoked to strike down challenged laws and legislation of the states (and in rare cases municipalities). *See, e.g., Am. Ins. Assn. v. Garamendi*, 539 U.S. 396, 419-20 (2003); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000); *Gingery v. City of Glendale*, 831 F.3d 1222, 1231 (9th Cir. 2016); *Hines v. Davidowitz*, 312 U.S. 52, 65-67 (1941); *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1076-77 (9th Cir. 2012); *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 966-68 (9th Cir. 2010); *Zschernig v. Miller*, 389 U.S. 429, 437-38 (1968). Indeed, it is the state legislature who has the power to make, alter and repeal laws. Cal. Const. art. IV, § 1; *Walsh v. Bd. of Admin.*, 4 Cal.App.4th 682, 697 (1992). To expand the foreign affairs doctrine to private parties, including the WCI, Inc. Defendants who lack policymaking, regulatory or enforcement authority, would eviscerate its intended purpose and the long-standing legal authority limiting its application to state legislation and laws. (ECF No. 107 at 7:15-9:2, n.13; ECF No. 108-1 at 7:15-9:2, n.13.) Indeed, Plaintiff does not even attempt to justify such action in its discussion of the issues. The WCI, Inc. Defendants urge the Court not to extend this doctrine beyond its intended purpose based on Plaintiff's mere suggestion that it do so.

As there is no legal support for a foreign affairs doctrine claim against the WCI, Inc. Defendants, much less any evidence that such doctrine was violated by them, the WCI, Inc. Defendants' Cross-Motion for Summary Judgment should be granted.⁴

³ As set forth in their prior briefing, the WCI, Inc. Defendants incorporate by reference and join in the State Defendants' briefing on the Motion and Cross-Motions for Summary Judgment should the Court decide not to rule in favor of the WCI, Inc. Defendants on the grounds that, as private parties, they cannot be held liable for violations of the foreign affairs doctrine as a matter of law.

⁴ Even if the Court should find California has violated the foreign affairs doctrine, which it has not, any relief can, and should, be accomplished by an order against California only. *See Fed. R. Civ. P. 65(d)(2)(C)* (injunction binds persons in active concert or participation with the parties); *Fed. R. Civ. P. 21* (providing the court discretion, on just terms, to dismiss a party).

1 **B. The WCI, Inc. Board Members, in Their Capacities as Such, Are Entitled to Summary**
2 **Judgment.**

3 Nichols and Blumenfeld, sued in their capacity as WCI, Inc. board members, are entitled to
4 summary judgment as to the foreign affairs doctrine claim because no specific actions taken by
5 either of them are identified and directors of a non-profit corporation cannot be held personally
6 liable for conduct of the corporation merely because they hold official positions.⁵ *See In re*
7 *Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106, 118, 131 (Del. 2009). There is no
8 evidence that either of these individuals participated in any of the challenged activities in his or her
9 capacity as a board member or even had the ability to do so. Plaintiff has proffered no evidence or
10 legal authority to support maintenance of a foreign affairs doctrine claim against the WCI, Inc.
11 board members.

12 **IV. CONCLUSION**

13 Plaintiff's Motion for Summary Judgment should be denied, and judgment should be
14 entered for Defendants on Plaintiff's Foreign Affairs Doctrine claim—Plaintiff's third cause of
15 action.

16
17 DATED: June 22, 2020

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KOEHLER LLP

18
19 By: /s/ Monica Hans Folsom

20 MONICA HANS FOLSOM

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26 ⁵ WCI, Inc.'s board members, in their capacities as such, owe fiduciary duties to the corporation
27 separate and apart from their roles as state officials. Plaintiff cannot merely impute liability on the
28 WCI, Inc. board members because they are employed by the state as such employment does not
negate their duties to the corporation. Del. Code tit. 8, § 141; *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d
1170 (Del. 2000) (a board member's duties and obligations are owed separate and apart from any
outside employment or political interests.)