UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT, Plaintiff, v. EXXON MOBIL CORPORATION, Defendant.	Case No. 3:20-CV-01555 (JCH) December 2, 2020

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
MOTION FOR REMAND TO SUPERIOR COURT AND FOR COSTS AND FEES

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I. INTRODUCTION

The grounds for removal asserted by Defendant Exxon Mobil Corporation in its Notice of Removal ("Notice") are wholly inapplicable to Plaintiff State of Connecticut's ("State") Complaint. Defendant mischaracterizes the allegations in the Complaint to the point of unrecognizability so that it can shoehorn hackneyed arguments into a retread Notice that fails to assert any objectively reasonable ground for federal jurisdiction. Moreover, because these arguments do not come close to relevance for the cause of action at issue in this case—enforcement of Connecticut's state consumer protection statute—Defendant simply hurls spurious accusations of impropriety and formulates arguments based on fictitious goals and motivations it attributes to the State. Five district courts and four appellate courts have rejected Defendant's attempts to remove similar cases on substantially similar grounds,[1] and its arguments are even less applicable here. This Court should therefore remand this case to its proper venue—Connecticut Superior Court—and award costs and attorneys' fees pursuant to 28 U.S.C. § 1447 (c) to the State for being forced to litigate Defendant's frivolous removal.

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[1] *See Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019) ("*Baltimore I*") (granting motion to remand), *as amended* (June 20, 2019), *aff'd in part, appeal dismissed in part*, 952 F.3d 452 (4th Cir. 2020) ("*Baltimore II*"), *cert. granted*, No. 19-1189 (Oct. 2, 2020) (on limited issue of whether 42 U.S.C. § 1442 restricts appellate review to federal officer removal statute); *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) ("*San Mateo I"*) (granting motion to remand), *aff'd in part, appeal dismissed in part*, 960 F.3d 586 (9th Cir. 2020) ("*San Mateo II*"), *reh'g en banc denied* (Aug. 4, 2020); *California v. BP PLC*, Nos. C 17-06011 WHA, C 17-06012 WHA, 2018 U.S. Dist. LEXIS 32990 (N.D. Cal. Feb. 27, 2018) ("*Oakland I*") (denying motion to remand), *vacated and remanded sub nom., City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020) ("*Oakland II*"), *amended and superseded on denial of reh'g sub. nom.*, 969 F.3d 895 (9th Cir. 2020); *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019) ("*Boulder I*") (granting motion to remand), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020) ("*Boulder II*"); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019) ("*Rhode Island I*") (granting motion to remand), *aff'd in part, appeal dismissed in part*, 979 F.3d 50, 2020 U.S. App. LEXIS 34194 (1st Cir. Oct. 29, 2020) ("*Rhode Island II*"); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020).

II. STATEMENT OF FACTS

On September 14, 2020, the State filed an eight count Complaint against Defendant. *See* Complaint ("Compl.") (Ex. 1). Counts one, three, five, and seven allege violations of the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110a *et. seq.*, and counts two, four, six, and eight allege that such conduct was willful. *Id*. at 36 – 43. Thus, the State's Complaint alleges only one theory of liability: violations of CUTPA. *Id.*

The State's Complaint alleges that Defendant—one of the largest and most profitable corporations in the world—is an "oil and gas company that locates, extracts, refines, transports, markets and sells fossil-fuel-based products." *Id.* at ¶¶ 53, 57. Going back as far as the 1950s, Defendant was aware that its products may have negative climatic effects. *Id.* at ¶¶ 3, 64, 65. In the 1970s and 1980s, Defendant "conducted research confirming that atmospheric carbon dioxide released in fossil fuel exploration, refinement, and combustion contributed to climate change." *Id.* at ¶¶ 4, 68 – 90. Moreover, Defendant knew that its research aligned with the general scientific consensus about climate change. *Id.* at ¶¶ 91 – 95. Armed with this knowledge, Defendant launched a campaign of deception in the late 1980s with the goal of misleading and deceiving the public about the reality of climate change. *Id.* at ¶¶ 96 – 99. One aspect of this campaign of deception focused on proffering disinformation both directly and through third party groups. *Id.* at ¶¶ 109 – 135. Another aspect focuses on targeting consumers with deceptive advertisements, which originally consisted primarily of print advertorials asserting misleading statements about climate change and now primarily consists of "greenwashed" advertising to untruthfully cast Defendant's business practices as environmentally beneficial. *Id.* at ¶¶ 136 – 167.

The State's allegations concern only Defendant's campaign of deception. Count One of the Complaint alleges that the disinformation and untruthful advertorials in Defendant's campaign of

deception constitute deceptive acts and practices in violation of CUTPA. *Id.* at Count One ¶¶ 181 – 188. Count Three alleges that those acts and practices constitute an unfair trade practice in violation of CUTPA. *Id.* at Count Three ¶¶ 188 – 194. Count Five alleges that Defendant's greenwashing advertisements constitute deceptive acts and practices in violation of CUTPA. *Id.* at Count Five ¶¶ 181 – 188. Count Seven alleges that Defendant's greenwashing acts and practices constitute an unfair trade practice in violation of CUTPA. *Id.* at Count Seven ¶¶ 188 – 194. Counts Two, Four, Six, and Eight allege that those acts and practices were done willfully. *Id.* at Count Two ¶¶ 188 -189; Count Four ¶¶ 194 – 195; Count Six ¶¶ 188 – 189; Count Eight ¶¶ 194 – 195. Nowhere does the State seek to hold the Defendant liable for greenhouse gas emissions or causing climate change.

The Complaint explains the negative consequences of climate change in Connecticut, *id.* at ¶¶ 168 – 181, because climate change is the subject of Defendant's campaign of deception at issue in the State's claims. *See id*. at Counts One – Eight. Moreover, the negative consequences of climate change in Connecticut are, in part, a byproduct of Defendant's campaign of deception, *see, e.g., id.* at ¶ 180, and therefore they are appropriate for a court to consider when granting relief. *See id.* at Prayer for Relief. However, the effects of climate change in Connecticut are not necessary to prove the State's claims that Defendant is liable for violations of CUTPA; the "injury" is the deception, and the negative climatic effects are simply harms stemming from the "injury" alleged in the Complaint. *See id.* at Counts One – Eight. Though Defendant is an enormous corporation and the topic of its campaign of deception is complex, at bottom this case is simply the State using the power granted in Conn. Gen. Stat. § 42-110m to seek redress for violations of its consumer protection statute.

III. LEGAL STANDARD

As a court of limited jurisdiction, a federal court must presume that a case lies outside of its jurisdiction unless and until jurisdiction has been shown to be proper. *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). Federal courts possess "only that power authorized by Constitution and statute." *Id*. Though a defendant can seek removal of a case "brought in a State court of which the district courts of the United States have original jurisdiction," 28 U.S.C § 1441 (a), "federal courts construe the removal statute narrowly, resolving any doubts against removability." *Somlyo v. J. Lu-Rob Enterprises, Inc.*, 932 F.2d 1043, 1045 – 46 (2d Cir. 1991). The presumption against removal is even higher in actions brought by a State exercising its sovereign authority to enforce its own laws. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 n. 22 (1983) ("considerations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it."). Thus, the party seeking removal "bears the burden of demonstrating the propriety of removal." *Grimo v. Blue Cross/Blue Shield*, 34 F.3d 148, 151 (2d Cir. 1994).

IV. ARGUMENT

It is clear on the face of the Complaint that this lawsuit, brought by the Attorney General in his sovereign enforcement capacity on behalf of the State, seeks appropriate redress for the deceptive and unfair practices by which Defendant has misled Connecticut consumers in violation of CUTPA. However, in order to argue various theories of removal, Defendant demonstrates for the Court its propensity to ignore facts in favor of efforts to deceive and mislead—this time by completely mischaracterizing the claims in the State's complaint.[2] *See, e.g.*, Defendant's Notice

[2] Defendant's Notice is littered with irrelevant accusations about some sort of vague conspiracy against it. *See, e.g.*, ¶¶ 4 – 14. Not only are these assertions unsupported innuendo, but they are yet another example of the Defendant recycling arguments that failed in other jurisdictions. *See Exxon*

of Removal [Doc. No. 1] ("Not.") at 1 (State's CUTPA action "is not about consumer protection"); *id.* at ¶ 3 ("Attorney General brought this action to limit and ultimately end [Defendant's] production of fossil fuels"); *id.* at ¶ 46 (case requires "decid[ing] how to strike the balance among competing national policy imperatives"); *id.* at ¶ 52 ("lawsuit fundamentally seeks to curtail global fossil fuel activities and emissions of greenhouse gases"); *id.* at ¶ 56 ("Attorney General's goal [is] that a state court substitute its judgment for that of Congress and the EPA on [regulation of greenhouse gases]"). Based wholly on Defendant's mischaracterization of the State's claims, it asserts as grounds for removal: (1) federal question jurisdiction, (2) diversity jurisdiction, and (3) other less common statutory and constitutional grants of original jurisdiction. These arguments have been thoroughly rejected in cases in which emissions actually ***are*** at issue, and they are meritless in a case that is not about limiting pollution but rather about Defendant's decades of deception in violation of CUTPA. *See* Compl.

A. No Federal Question Is Raised In The State's CUTPA Action.

Defendant seeks to invoke federal question jurisdiction as grounds for removal. *See* Not. ¶¶ 25; 50. Federal question jurisdiction arises from 28 U.S.C. § 1331, which grants federal district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treatises of the United States." Whether a civil action arises under federal law for purposes of Section 1331 is determined by the "well-pleaded complaint rule," which states that "federal question jurisdiction exists only when a federal question is presented ***on the face*** of the plaintiff's properly pleaded

Mobil Corp. v. Schneiderman, 316 F. Supp. 3d 679, 686 – 87 (S.D.N.Y. 2018) (dismissing as "implausible" Defendant's claims that the Attorneys General of Massachusetts and New York initiated "bad faith investigations in order to violate [Defendant's] constitutional rights" based on same conspiracy theory alleged in Defendant's Notice). Moreover, these spurious allegations are wholly irrelevant to the issue of removal because they are clearly outside of the four corners of the Complaint. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987).

complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (emphasis added). This rule enables a plaintiff, as the State did here, to be the "master of the claim" and "avoid federal jurisdiction by exclusive reliance on state law." *Id.* Since the State has founded all its claims exclusively on state law—CUTPA—the well-pleaded complaint rule demands concluding that there is no federal question presented on the face of the State's complaint. *See, e.g., Loussides v. Am. Online, Inc.*, 175 F. Supp. 2d. 211, 213 n.2 (D. Conn. 2001) (remanding case to state court after concluding that "[t]he standards for determining CUTPA liability do not depend on federal law."). Defendant does not argue otherwise.

Instead, Defendant attempts to justify federal jurisdiction by invoking exceptions to the well-pleaded complaint rule, of which there are two. The first, which is commonly called *Grable* jurisdiction, refers to a "special and small category" of cases in which federal law "is a necessary element of the . . . claim for relief." *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 699 (2006). The second, which is sometimes referred to as the artful pleading doctrine, "allows removal where federal law completely preempts a plaintiff's state-law claim." *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1998). Neither of these exceptions exist in this case. Defendant also argues for federal question jurisdiction based on an argument that the State's claims arise out of federal common law, however that argument is simply an unconvincing hodgepodge of the law surrounding the well-pleaded complaint rule and its two exceptions.

1. The standard for *Grable* Jurisdiction is not met.

The first exception to the well-pleaded complaint rule invoked in Defendant's Notice is so-called *Grable* jurisdiction, which provides that "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress."

Gunn, 568 U.S. at 258 (citing *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005)). *Grable* jurisdiction only reaches a "slim category" of cases because "it takes more than a federal element to open the 'arising under' door [of Section 1331]." *Empire Healthchoice*, 547 U.S. at 701; *see also Oakland II*, 969 F.3d at 904 (listing cases exemplifying difference between federal law as necessary element of claim versus federal law simply related to claim).

This case does not fit into the slim category of cases in which *Grable* jurisdiction is triggered. Indeed, Defendant has asserted *Grable* jurisdiction in similarly situated cases, and "[e]very court to consider the question has rejected [Defendant's] arguments for *Grable* jurisdiction." *Massachusetts*, 462 F. Supp. 3d at 45 (citing *Oakland II*, 969 F.3d 904 – 905; *Boulder I*, 405 F. Supp. 3d at 965 – 68; *Rhode Island I*, 393 F. Supp. 3d at 150 – 51; *Baltimore I*, 388 F. Supp. 3d at 558 – 61; *San Mateo I*, 294 F. Supp. 3d at 938). The *Massachusetts* court also noted:

> [t]hat unanimity is all the more telling since those cases involved nuisance claims in which the states and local governments sought damages from oil companies to offset the disastrous effects of climate change. Such sweeping theories of liability and relief arguably implicate national and international climate policies, yet those courts still deemed *Grable* inapplicable. Here, in contrast, Massachusetts relies exclusively on mundane theories of fraud against consumers and investors, without seeking to hold [Defendant] liable for any actual impacts of global warming. There is no federal issue embedded in this complaint.

Massachusetts, 462 F. Supp. 3d at 45. Similar to Massachusetts, the State does not assert sweeping theories of liability, but rather only a single state statutory basis. An analysis of *Grable*'s four criteria—specifically the first and third prongs—demonstrates that the doctrine is inapplicable to the State's claims.

Defendants cannot meet the first prong of *Grable*, which requires determining that a federal issue is "necessarily raised." A federal issue is "necessarily raised" for purposes of determining subject-matter jurisdiction only if it is "a necessary element of one of the well-pleaded state

claims." *Franchise Tax Bd.*, 463 U.S. at 13. Here, the State alleges that Defendant violated CUTPA through both deceptive and unfair acts and practices. To properly allege a deception claim under CUTPA, the State need only allege three things: (1) a representation, omission, or other practice likely to mislead consumers; (2) that consumers interpreted the message reasonably under the circumstances; and (3) that the misleading representation, omission or practice was material. *See Caldor, Inc. v. Heslin*, 215 Conn. 590, 597 (1990). To properly allege an unfairness claim under CUTPA, the State must allege that the challenged practice: (1) "without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness"; (2) "is immoral, unethical, oppressive, or unscrupulous"; or (3) "causes substantial injury to consumers, [competitors or other businessmen]." *Cheshire Mortg. Serv., Inc. v. Montes*, 223 Conn. 80, 105 – 106 (1992). The State's CUTPA claims are grounded entirely in the standards of Connecticut's own unfair and deceptive acts and practices statute and are not linked in any way to federal law. Because the State's claims do not necessarily raise a federal issue, Defendant has failed to establish the first *Grable* factor, and the Court's inquiry should end in favor of remand. *See, e.g., Baltimore I*, 388 F. Supp. 3d at 561 (declining to analyze other *Grable* prongs after concluding defendants failed to satisfy first prong).

Even if the State's CUTPA claims somehow raised issues regarding federal climate policy—which clearly they do not—Defendant could not demonstrate that they were sufficiently "substantial" as to meet the third prong of *Grable*. A federal issue is substantial if it is "nearly a pure issue of law" that is "both dispositive of the case and would be controlling in numerous other cases." *Empire Healthchoice*, 547 U.S. at 700. For example, in *Grable*, "the meaning of the federal

statute [regarding the Internal Revenue Service's ("IRS") notice requirements when executing seizures] . . . appear[ed] to be the only legal or factual issue contested in the case." *Grable*, 545 U.S. at 315 (holding there was federal jurisdiction to address action challenging IRS's ability to seize and dispose of property to satisfy tax delinquencies). This occurs in extremely limited circumstances and requires more than the mere invocation of federal law. *Compare Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 – 201 (1921) (federal jurisdiction exists when challenging federal statute's constitutionality) *with Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 805 – 807 (1986) (no federal jurisdiction over state-law claims despite being premised on violations of federal law).

Here, Defendant's convoluted argument in support of *Grable* jurisdiction asserts that "the issue of whether a state-law claim for worldwide greenhouse gas emissions and the global effects of climate change exists at all is a substantial federal question that must be decided by a federal court."[3] Not. ¶ 57. Perhaps it is, although every court to address that assertion has disagreed. *See supra* at 7. However, that question is irrelevant to this case because the State has not asserted claims for worldwide greenhouse gas emissions and the global effects of climate change. The State has asserted claims for violations of CUTPA. To the extent the remedies for the State's CUTPA claim consider the effects of global climate change, that is irrelevant to the determination of federal jurisdiction. *See Oakland II*, 969 F.3d at 905 ("a federal issue is not substantial if it is fact-bound and situation-specific . . . or raises only a hypothetical question unlikely to affect interpretations

[3] The State has attempted to address each of Defendant's arguments in support of removal in a coherent manner despite significant overlap between them. For example, Defendant alludes to the Clean Air Act as a basis for *Grable* jurisdiction, not. ¶ 54, however to the extent the Clean Air Act is at all relevant—which it is not—it would only be so with regard to preemption. Likewise, Defendant rehashes several arguments to support finding federal jurisdiction under both its federal common law and *Grable* arguments. *See, e.g.*, Not. ¶¶ 57, 63. These are addressed where appropriate.

of federal law in the future.") (citing *Empire Healthchoice*, 547 U.S. at 701; *Gunn*, 568 U.S. at 261).

2. There is no "Complete Preemption" of the State's Claims.

The second exception—or perhaps corollary[4]—to the well-pleaded complaint rule occurs "when a federal statute wholly displaces the state-law cause of action through complete pre-emption." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). Defendant does not specifically name complete preemption as grounds for removal, although many of its arguments assert that some aspect of federal law bars the State's state law claims. *See, e.g.*, Not. ¶ 54 (opining that this action necessitates a judge or jury to do the regulatory work delegated to the Environmental Protection Agency by the Clean Air Act); *id.* ¶¶ 57 – 58 (asserting that State's claims "impede the foreign affairs power . . . [and] conflict[] with the national position of the United States on foreign affairs"); *id.* ¶ 63 (asserting that federal law alone governs transboundary pollution, navigable waters, and foreign relations). Complete preemption, however, occurs only when "Congress intended for federal law to provide the 'exclusive cause of action' for the claim asserted." *Baltimore I*, 388 F. Supp. 3d. at 553 (quoting *Beneficial*, 539 U.S. at 9). Moreover, the Supreme Court has only recognized a statutory basis for finding complete preemption,[5] and it has only done so with regard to three statutes. *See Boulder I*, 405 F. Supp. 3d. at 969 (citing cases). Here,

[4] While many courts refer to two exceptions of the well-pleaded complaint rule, others have noted that complete preemption is more of a corollary rule than an exception. *See, e.g.*, *Rivet*, 522 U.S. at 475.

[5] Courts disagree whether federal common law can be a basis for complete preemption, or whether complete preemption must have a federal statutory basis. *See Massachusetts*, 462 F. Supp. 3d at 41 n.8 (discussing in dicta).

Defendant cannot show that Congress intended the Clean Air Act or any of Defendant's other vague assertions about federal common law to preempt the State's consumer protection claims.[6]

3. Federal Common Law does not confer Jurisdiction over the State's Claims.

Defendant's argument that federal common law is a basis for removal of this state-law action to federal court, *see* not. ¶¶ 25 – 49, must be analyzed under the well-pleaded complaint rule and its two exceptions. *See, e.g.*, *Oakland II*, 969 F. 3d at 906 – 907 ("Under the well-pleaded complaint rule, the district court lacked federal question jurisdiction unless one of the two exceptions to the well-pleaded complaint rule applie[d]" despite "suggest[ion] that [plaintiffs'] state-law claim implicates a variety of 'federal interests,' including energy policy, national security, and foreign policy."). Unsurprisingly, doing so yields the same conclusion: the laws relied upon by Defendant are irrelevant to the State's action, and even if they were somehow related, they would not justify removal.

It is unclear the basis for Defendant's suggestion that the supposed "uniquely federal interests" purportedly implicated in the State's complaint, not. ¶25, should confer federal jurisdiction.[7] Defendant makes no argument that the State's well-pleaded complaint relies on

[6] Defendant does not assert that the Federal Trade Commission Act ("FTC Act") preempts CUTPA. The State notes that argument would also fail because the FTC Act has a savings clause. *See* 15 U.S.C. § 57b (e) ("Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law.").

[7] The cases cited by Defendant do not clarify its argument. For example, the line of cases it relies on to support its 'transboundary pollution' argument—*see* not. ¶¶ 27 – 37 (citing *City of Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Am. Elec. Power Co. v. Connecticut*, 664 U.S. 410 (2011) ("*AEP*"); and *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F. 3d 849 (9th Cir. 2012)—do not stand for the proposition that federal common law provides an independent ground for removal; removal was not an issue in those cases. Moreover, *AEP* and *Kivalina* are widely recognized as heralding the death of environmental common law in light of the Clean Air Act and Clean Water Act. Of course, this argument is also misguided because the State's case is not about transboundary pollution; it is about deceptive advertisements.

federal law. *See Caterpillar*, 482 U.S. at 392 ("The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law."). Moreover, Defendant has a separate section of its Notice devoted to *Grable* jurisdiction, and some of the same arguments are rehashed there, so presumably Defendant views federal common law as a distinct ground for removal. By process of elimination, therefore, the State believes that Defendant must be asserting that federal common law preempts the state law claims in the State's complaint. The State's deduction is aided by previous courts' interpretation of Defendant's federal common law argument. *See Baltimore I*, 388 F. Supp. 3d at 555 – 58 (rejecting Defendant's federal common law argument under preemption analysis); *Massachusetts*, 462 F. Supp. 3d at 41 – 44 (same); *Boulder I*, 405 F. Supp. 3d at 962 – 64 (same); *Rhode Island I*, 393 F. Supp. 3d at 148 – 50 (same)*;but see Oakland II*, 969 F.3d at 906 – 907 (rejecting Defendant's federal common law argument under *Grable*). Likewise, analyzing Defendant's federal common law argument within the framework of complete preemption comports with the law of this circuit. *See Marcus v. AT&T Corp.*, 138 F.3d 46, 53 – 54 (2d Cir. 1998) (rejecting removal of state law claims where federal common law did not completely preempt state law).

The *Baltimore I* court's analysis is particularly instructive in revealing why federal common law cannot provide a basis for removal. In short, absent ***complete*** preemption by federal law—which clearly does not exist in this case, *see supra* at 10 – 11—federal common law cannot provide some other ambiguous preemptive grounds for removal. *See Baltimore I*, 388 F. Supp. 3d at 554 – 558. At best, federal common law could provide ***ordinary*** preemption. *Id.* at 554. But ordinary preemption is merely a defense to a state law claim, *id.* at 554 (citing *Wurtz v. Rawlings Co., LLC*, 761 F.3d 232, 238 (2d Cir. 2014)), and possible defenses are not grounds for removal under the well-pleaded complaint rule. *Caterpillar*, 482 U.S. at 393 ("a case may ***not*** be removed

to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.") (emphasis in original).

In addition to not providing this Court with a proper legal vehicle to act upon its assertions of federal common law jurisdiction, Defendant's argument again demonstrates the fundamental flaw that occurs throughout its Notice—the alleged federal interests cited by Defendant are irrelevant to ***this*** case. Each of Defendant's federal question arguments demands a complete rewriting of the State's Complaint to make its argument even superficially relevant. In order to conclude, as Defendant asserts, that the State's "causes of action can arise—if at all—only under federal common law," *id.* ¶ 25, this Court would have to conclude that the State's allegations of deceptive and unfair business practices governed by state statute were preempted by federal common law concerning transboundary pollution, navigable waters, and international affairs and commerce. This argument with regard to federal common law fails in the same way Defendant's rewriting of the Complaint to shoehorn its *Grable* jurisdiction arguments fails. *See* supra at 6 – 10. These arguments were perhaps relevant—even if unsuccessful—to courts considering removal in actions seeking to hold Defendant liable for greenhouse gas emissions; reusing them in the context of an action seeking remedies for violations of a state consumer protection statute, however, constitutes a frivolous claim. *See Massachusetts*, 462 F. Supp. 3d at 44 (defendant "has not provided any reason why protecting Massachusetts consumers and investors from fraud implicates 'uniquely federal interests.' It does not.").

B. Diversity Jurisdiction Fails Because The State Is The Real Party In Interest.

Defendant claims that this Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332 (a). *See* Not. ¶¶ 122 – 134. Diversity jurisdiction provides a "neutral forum" for "cases in which

the amount in controversy exceeds $75,000 and there is diversity of citizenship among the parties." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1746 (2019). "There is no question that a State is not a 'citizen' for purposes of . . . diversity jurisdiction." *Moor v. Alameda Cty.*, 411 U.S. 693, 717 (1973). Nevertheless, Defendant argues that the State is not the real party in interest and therefore this court should consider the citizens of Connecticut the true plaintiffs in this action for purposes of diversity jurisdiction. *See* Not. ¶ 130. "The Supreme Court has established that the "'citizens' upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy." *Airlines Reporting Corp. v. S & N Travel*, 58 F.3d 857, 861 (2d Cir. 1995) (quoting *Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 460 (1980)). It is well-established, however, that a State is a real and substantial party to the controversy when acting "as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way." *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981). Thus, Defendant's argument that the State is not the true party in interest here is incorrect.

District courts have taken two approaches when determining whether a party is a real party in interest for purposes of diversity jurisdiction. *See Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 219 (2d Cir. 2013) ("[w]e have not yet passed on whether the real-party-in-interest inquiry should be made on the basis of the whole complaint or claim by claim, and district courts within this Circuit . . . appear to be split."). Courts following the claim-by-claim approach focus their analysis on who will receive the relief sought. *See, e.g., Connecticut v. Levi Strauss & Co.*, 471 F. Supp. 363, 372 (D. Conn. 1979). Courts following the whole-complaint approach focus on the overarching purpose of the litigation. *See, e.g., Connecticut v. Moody's Corp.*, No. 3:10-cv-546, 2011 U.S. Dist. LEXIS 780 (D. Conn. Jan. 5, 2011).[8] A majority of jurisdictions have adopted the

[8] Cases unreported as of this writing are appended at Exhibit 2.

whole complaint approach, *see Purdue Pharma*, 704 F.3d at 219, and courts in this circuit are inclined to follow the dicta in *Purdue Pharma* favoring the whole complaint approach. *See, e.g.*, *In re Std. & Poor's Rating Agency Litig.*, 23 F. Supp. 3d 378, 402 (S.D.N.Y. 2014) ("although the Second Circuit did not formally reach the question in *Purdue Pharma*, it is difficult to view that decision as anything but a thumb firmly on the whole-complaint side of the scale."). Regardless of which analysis is applied here, it is clear that the State is the real party in interest for purposes of diversity jurisdiction.

Levi Strauss is instructive in demonstrating why the claim-by-claim approach reveals that the State is the real party in interest. There, the district court examined the various types of relief requested by the State and determined that one form of relief—"refunds to be distributed to identifiable purchasers"—indicated that the State was not acting in its sovereign capacity because it "present[ed] claims of individuals." *Levi Strauss*, 471 F. Supp. at 371. Meanwhile, the court held that the other categories of relief sought—compensation for overcharges to be kept by the State, attorneys' fees, and civil penalties—were done so in the State's sovereign enforcement capacity and therefore did not qualify for diversity jurisdiction. *Id.* at 371 – 72.[9] Here, an analysis of the relief requested reveals that it is clearly in the latter category.

[9] The court ultimately remanded the case to state court despite its conclusion that the State was not acting in its sovereign capacity with regard to one of its claims. *Levi Strauss*, 471 F. Supp. at 372. It did so because that claim did not meet the monetary threshold required for diversity jurisdiction even though others did. *Id.* In other words, when conducting a claim-by-claim approach, diversity jurisdiction is only triggered if both elements are met within the same claim. The State does not conduct this analysis because Defendant's vague assertions do not allow it to determine exactly which form of relief it suggests is allegedly sought for identifiable individuals. However, the State notes that under the claim-by-claim approach, Defendant cannot rely upon, for example, the amount it will have to pay in civil penalties to get over the $75,000 threshold unless it is also arguing that the civil penalties are a form of relief in which the State is not acting in its sovereign capacity. *See* Not. ¶ 131.

The State has requested relief authorized by statute. *See* Conn. Gen. Stat. § 42-110m (permitting Attorney General to seek injunction, restitution, reasonable attorneys' fees, civil penalties, and such other relief as may be granted in equity). In addition to a finding that Defendant engaged in unfair and deceptive acts and practices in violation of CUTPA, the State's complaint requests injunctive relief. *See* Compl., Prayer for Relief ¶¶ 1, 2. It also seeks restitution to the State for monies expended by the State (*id.* ¶ 5), reasonable costs and attorneys' fees to the State (*id.* ¶¶ 9, 10), civil penalties to the State (*id.* ¶ 4), and various forms of equitable relief to the State (*id.* ¶¶ 3, 6, 7, 8). None of this relief is sought on behalf of only a select group of individuals, such as those who would be directly paid refunds in *Levi Strauss*, nor is the State requesting "actual damages." *Compare* Conn. Gen. Stat. § 42-110g (permitting "[a]ny person . . . to recover actual damages") *with id.* § 42-110m (not including actual damages in permissible recovery in suit by Attorney General). Moreover, Defendant's misguided attempt to classify certain aspects of the State's requested equitable relief as "relief on behalf of [Connecticut's] consumers" fails because "Connecticut's consumers" is not a narrow enough group of specific individuals such that they would become identifiable for purposes of diversity jurisdiction. *See Moody's*, 2011 U.S. Dist. LEXIS 780, at *10 (distinguishing "state actions to secure damages or restitution explicitly on behalf of specific individuals . . . ."). With regard to diversity jurisdiction, the claim-by-claim approach leaves no doubt that the State is a real party in interest.

A whole complaint analysis likewise yields the conclusion that the State is the true party in interest in this action. Instructive is *Moody's*, which recognized the State's "quasi-sovereign interest" to protect its citizens from CUTPA violations. *Moody's*, 2011 U.S. Dist. LEXIS 780, at *12 (holding State "is a real party in interest for purposes of determining jurisdiction because of its interests under Conn. Gen. Stat. § 42-110m."). The Court rejected the argument that the State

was not a real party in interest because only some Connecticut residents had relied upon the Moody's ratings and purchased securities. *Id.* at *10 – 12. The court determined that even if some specific individuals would benefit from the State's action, the State itself had a substantial interest in enforcing CUTPA. *Id.* (citing *New York v. General Motors Corp.*, 547 F. Supp 703, 705 – 706 (S.D.N.Y. 1982) (holding that primary purpose of obtaining wide-ranging injunctive relief outweighed recovery of damages for aggrieved consumers); *New York v. Charles Schwab & Co., Inc.*, No. 09-cv-7709, 2010 U.S. Dist. LEXIS 5830 (S.D.N.Y. Jan. 19, 2010) (State was real party in interest when simultaneously preventing recurrence of harm and remedying past damage)).

In using this "holistic approach" to "consider the complaint in its entirety to determine what interest, if any, the State possesses in the lawsuit as a whole," courts have looked at several factors. *See Std. & Poor's*, 23 F. Supp. 3d at 401. First, courts consider the authority by which the suit is brought. *Id.* at 404 (concluding that suit brought by state attorney general under his exclusive authority indicates State's quasi-sovereign interest); *Moody's*, 2011 U.S. Dist. LEXIS 780, at *12 (relying largely on attorney general's statutory authority to hold State was real party in interest). Here, just as in *Moody's*, the Attorney General has the exclusive authority to bring this action on behalf of the State pursuant to Conn. Gen. Stat. § 42-110m. *See* Compl. ¶ 45. Moreover, some of the claims the State alleges can only be brought by the Attorney General because CUTPA's statute of limitations does not apply to State enforcement actions. Second, courts consider whether the State has an interest in bringing the suit distinct from the interest of private parties. *See Std. & Poor's*, 23 F. Supp. 3d at 404 (interest may be "in the health and well-being—both physical and economic—of its residents in general. The State may show such an interest by alleging injury to a sufficiently substantial segment of its population."). Here, the State alleges that Connecticut consumers were deceived for decades by Defendant's ongoing campaign of deception. *See*, Compl.

¶¶ 96 – 167. Moreover, the harm to the climate flowing from that injury will affect the health and well-being of every person in Connecticut. *Id.* ¶¶ 168 – 181. Third, courts consider whether the State seeks relief unavailable to consumers. *See Std. & Poor's*, 23 F. Supp. 3d at 405 ("seek[ing] civil penalties and a statewide injunction against unfair and deceptive acts and practices—remedies unavailable to consumers—leaves no doubt that the State has concrete interests in the litigation; put simply, the benefits of those remedies flow to the State as a whole."). Here, not only does the State seek relief unavailable to consumers (e.g., civil penalties, injunctive relief, restitution for monies expended by the State), but every remedy requested would flow to the State as a whole rather than any specific individuals. Thus, when applying the whole-complaint approach, it is clear that the State is a real party in interest for purposes of diversity jurisdiction.

The cases Defendant relies upon are inapposite. In *Phillip Morris, Inc. v. Blumenthal*, 123 F.3d 103 (2d Cir. 1997), the Second Circuit was evaluating a district court decision to dismiss Phillip Morris's case based on *Younger* abstention. *See Younger v. Harris*, 401 U.S. 37 (1971) (holding that federal courts must abstain from hearing cases involving federal issues already being litigated in state court). The Second Circuit reversed after determining that the Attorney General's CUTPA action did not meet the 'important state interest' required for *Younger* abstention to apply. *Phillip Morris*, 123 F.3d at 107. However, the posture and facts of *Phillip Morris* demonstrate that, to the extent it is at all applicable, it benefits the State's argument in favor of remand. First, the burden the Attorney General had to meet in demonstrating a sovereign interest to invoke *Younger* is extremely high—*see Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 73 (2013) (*Younger* applies only in "exceptional" circumstances)—especially when compared to the fact that justifying removal is the defendant's burden. *Grimo*, 34 F.3d at 151. Second, in *Phillip Morris*, the Court determined that the relief sought would have been available through a private CUTPA action,

which is not true of the relief the State seeks in this case. *See supra* at 6. Finally, and most devastatingly to Defendant's reliance on this case, is the fact that the Attorney General's underlying CUTPA action in *Phillip Morris* was remanded to state court.[10] Likewise, none of the other cases cited in Defendant's Notice support finding diversity jurisdiction under either a claim-by-claim or a whole-complaint approach.

C. No Other Grant Of Original Jurisdiction Is Relevant To The State's Claims.

Defendant raises three other grounds for original federal jurisdiction that are irrelevant to the State's complaint. The State has explicitly sued Defendant for violations of CUTPA stemming from its decades-long campaign of deception. *See* Compl. Counts One – Eight. Yet Defendant argues that the State is really attempting to end its fossil fuel production, thereby impacting activities that arise on federal enclaves, were done at the direction of a federal officer, and are governed by the Outer Continental Shelf Lands Act ("OCSLA"). Not. ¶¶ 71 -121. In similarly situated cases, every court to consider these arguments for federal jurisdiction has rejected them. *See, infra* at 20 – 21 (federal officer removal), 25 – 26 (OCSLA), 27 (federal enclaves). They are even less persuasive here, where the conduct at issue is entirely distinct from Defendant's asserted exploration and production activities.

1. Federal Officer Removal is Improper.

Defendant's attempt to remove this case based on the federal officer removal statute, 42 U.S.C. § 1442 (a) (1), is misguided. This case is about violations of CUTPA, not petroleum

[10] The procedural history, as set forth in the opinion, is as follows: The Attorney General ("AG") publicized his intent to file suit against the defendant tobacco companies in state court. Before he could do so, the tobacco companies filed an action in federal court seeking to enjoin the AG from filing the state court action. The AG then filed a complaint in state court alleging violations of CUTPA and common law, and the tobacco companies removed the case to federal court. That case was remanded to state court for lack of subject matter jurisdiction. *See Phillip Morris*, 123 F.3d at 104 – 105. The appeal cited by Defendant arises out of the tobacco companies' federal court action.

production. Therefore, even if Defendant's claims about its relationships with federal officers with regard to its petroleum production are true, they are irrelevant to its decades-long campaign of deception at issue here. *See Massachusetts*, 462 F. Supp. 3d at 47 ("[Defendant's] marketing and sale tactics were not plausibly 'related to' the drilling and production activities supposedly done under the direction of the federal government.").

The federal officer removal statute allows for the removal of state-court actions against, *inter alia*, "any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office . . . ." 42 U.S.C. § 1442 (a) (1). "Its 'basic purpose' is to protect against the interference with federal operations that would ensue if a state were able to arrest federal officers and agents acting within the scope of their authority and bring them to trial in state court for an alleged state-law offense." *Baltimore II*, 952 F.3d at 461 (citing *Watson v. Phillip Morris Cos.*, 551 U.S. 142, 150 (2007)). Defendant attempts to avail itself of federal officer removal based on the assertion that it "acted under the direction and control of federal officers to carry out essential functions for the federal government and this conduct is related to and connected with the [State's] asserted claims and injuries." Not. ¶ 76. Four circuit courts and multiple district courts have rejected this identical argument in similarly situated cases. *See Baltimore II*, 952 F.3d at 471 (affirming district court holding federal officer removal statute inapplicable); *San Mateo II*, 960 F.3d at 603 (same); *Boulder II*, 965 F.3d at 827 (same); *Rhode Island II*, 2020 U.S. App. LEXIS 34194, at *21 (same); *Massachusetts*, 462 F. Supp. 3d at 47 (holding federal officer removal statute inapplicable).

In order to properly avail itself of federal officer removal, defendants must meet each prong of a three part test: "First, they must show that they are 'person[s]' within the meaning of the statute who 'act[ed] under [a federal] officer.' Second, they must show that they performed the

actions for which they are being sued 'under color of [federal] office.' Third, they must raise a colorable federal defense." *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 135 (2d Cir. 2008) (quoting 28 U.S.C. § 1442 (a) (1)) (citing *Jefferson Cty. v. Acker*, 527 U.S. 423, 431 (1991) (internal citations omitted). Defendant's argument fails on both the first and second prong, either of which is sufficient to conclude that federal officer removal is impermissible in this case.

In support of the first prong—that Defendant 'acted under' a federal officer—Defendant's argument is basically that the federal government has, at times, purchased and regulated the exploration and production of oil and gas. *See* Not. ¶¶ 73 - 86 (the government has purchased oil and gas, which has in the past been important to war efforts); *id.* ¶¶ 87 – 98 (Defendant produced oil and gas through federal government leases governed by the OCSLA); *id.* ¶¶ 99 -102 (Defendant produced oil and operating infrastructure for the Strategic Petroleum Reserve). However, "the key lesson from *Watson* [551 U.S. at 153 – 54] is that closely supervised government contractors are distinguishable from intensely regulated private firms because the former assist the government in carrying out basic government functions." *Baltimore II*, 952 F.3d at 463. Defendant, without pointing to any government contract or any specific instances of carrying out essential governmental functions, falls squarely in the latter category.

To determine whether the nature of the relationship at issue fits the 'acting under' criterion, courts will analyze whether the private actor is "acting on behalf of the officer in a manner akin to an agency relationship" or whether the actor is "subject to the officer's close direction, such as acting under the subjection, guidance, or control of the officer." *San Mateo II*, 960 F.3d at 599 – 600. A commonly-cited example of when the 'acting under' prong for federal officer removal was satisfied occurred when Dow Chemical, operating under threat of criminal sanctions, worked under direct and close governmental supervision to produce Agent Orange to precise specifications

for use in the Vietnam War. *See Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998); *see also Sawyer v. Foster Wheeler LLC*, 860 F.3d 249 (4th Cir. 2017) (Navy exerted "intense direction and control" regarding highly detailed boiler specification). That sort of intense oversight of a specific product produced on behalf of the government is a far cry from the generic federal relationship Defendant proffers. *See Baltimore II*, 952 F.3d at 462 – 71 (holding 'acting under' prong unsatisfied when defendant oil companies asserted specific contracts with Navy to produce gas and that they had leases governed by OCSLA); *San Mateo II*, 960 F.3d at 600 – 603 (same); *Boulder II*, 965 F.3d at 820 – 27 (holding 'acting under' prong unsatisfied when defendant oil companies asserted they had leases governed by OCSLA).

In stark contrast to the Notice's thirty paragraphs arguing that Defendant meets the 'acting under prong,' Defendant devotes only one conclusory paragraph in support of its assertion that it meets the second 'nexus' prong. *See* Not. ¶ 105. This prong has been "known as the causation requirement," *Isaacson*, 517 F.3d at 137, however many courts have interpreted a 2011 amendment to Code section 1442 (a) (1) as loosening that standard. *See Massachusetts*, 462 F. Supp. 3d at 47 ("Congress broadened federal officer removal to actions, not just ***causally*** connected, but alternatively ***connected*** or ***associated***, with acts under color of federal office.") (citing *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 292 (5th Cir. 2020) (emphasis in original)); *see also* 42 U.S.C. § 1442 (a) (1) ("for or ***relating to*** any act under color of such office . . . .") (emphasis added). However, even under this loosened standard, Defendant is unable to demonstrate that any acts supporting federal officer removal—of which there are none—were related to the conduct at issue in this case. *See Massachusetts*, 462 F. Supp. 3d at 47 ("even under this more expansive standard" marketing and sales tactics are not related to exploration and production activities allegedly done at direction of federal officer.).

In order to make the 'related to' leap even plausible, Defendant must again ask this Court not to look at the complaint as it is on its face, but rather to adopt its fictional narrative that this action concerns the production of oil and gas with the purpose of the suit being to "curtail global fossil fuel activities and emissions of greenhouse gases." *See, e.g.*, Not. ¶ 52. However, that is not what this case is about. Even in cases concerning greenhouse gas emissions, Defendant has failed to convince any court that its acts allegedly done at direction of a federal officer had a sufficient nexus with the allegations in the complaint as to justify federal officer removal. *See Baltimore II*, 952 F.3d at 467 ("Baltimore does not merely allege that Defendants contributed to climate change and its attendant harms by producing and selling fossil fuel products; it is the concealment and misrepresentation of the products' known dangers—and simultaneous promotion of unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change."); *Rhode Island II*, 2020 U.S. App. LEXIS 34194, at *21 ("There is simply no nexus between anything for which Rhode Island seeks damages and anything the oil companies allegedly did at the behest of a federal officer."). Likewise, here, the State's allegations of deceptive and unfair business practices are not sufficiently 'related to' any purported federal officer direction, and therefore Defendant is unable to avail itself of federal officer jurisdiction.

2. The Outer Continental Shelf Lands Act is Irrelevant.

Defendant next improperly attempts to justify removal of this case pursuant to the grant of original federal jurisdiction provided by the OCSLA. *See* 43 U.S.C. § 1349 (b) ("the district courts of the United States shall have jurisdiction of cases and controversies ***arising out of, or in connection with*** . . . any ***operation*** conducted on the outer Continental Shelf ["OCS"] which involves exploration, development, or production of the minerals, of the subsoil and seabed of the [OCS], or which involves rights to such minerals . . . .") (emphasis added). "Courts typically assess

jurisdiction under this provision in terms of whether (1) the activities that caused the injury constituted an 'operation' 'conducted on the [OCS]' that involved the exploration and production of minerals, and (2) the case 'arises out of, or in connection with the operation.'" *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014). The second prong has been interpreted as a but-for causation requirement. *Id.* Defendant cannot meet either criterion.

Defendant cannot meet the first criterion because "the term 'operation' contemplate[s] the doing of some physical act on the OCS." *EP Operating Ltd. P'ship v. Placid Oil Co.,* 26 F.3d 563, 567 (5th Cir. 2014). Moreover, that activity must relate to exploration, development, or production. *Id.* at 567 – 68 (reading 'operation' broadly "to encompass the full range of oil and gas activity from locating mineral resources through the construction, operation, servicing and maintenance of facilities to produce those resources.").[11] Here, however, even considering the broad reading of 'operation,' it is indisputable that the marketing and selling of fossil fuel products is far too attenuated from the "operation . . . involv[ing] exploration, development, or production" on the OCS. The State's complaint does not allege anything about any of Defendant's purported activities on the OCS. There is no "operation" at issue.

Likewise, Defendant cannot meet the "arising out of" but-for causation requirement of the second criterion. Defendant's argument that CUTPA claims about misleading consumers in Connecticut arise out of the fraction of Defendant's business conducted on the OCS would render any claim against Defendant subject to OCSLA jurisdiction. *See Plains Gas Solutions, LLC v. Tenn. Gas Pipeline Co., LLC*, 46 F. Supp. 3d 701, 705 (S.D. Tex. 2014) ("Defendants' argument that the 'but for' test extends jurisdiction to any claim that would not exist but for offshore

[11] This "broad" reading of operation actually shows just how narrow 'operation' really is for OCSLA purposes. The dispute that led the *EP Operating* court to this "broad" reading concerned offshore drilling equipment that was anchored to the OCS but was currently not being used.

production lends itself to absurd results."). The facts and allegations here are not the result of Defendant's purported operations on the OCS, but rather of Defendant's decades-long deception about its business practices. A relationship to OCS operations—if one exits at all—is far too attenuated for OCSLA jurisdiction. *See Boulder I*, 405 F. Supp. 3d at 978 (holding no jurisdiction under OCSLA because "[t]he fact that some of [Defendant's] oil was apparently sourced from the OCS does not create the required direct connection."); *Rhode Island I*, 393 F. Supp. 3d at 151 – 52 (holding no jurisdiction under OCSLA because "Defendant's operations on the OCS may have contributed to the State's injuries; however, Defendants have not shown that these injuries would not have occurred but for those operations."); *Baltimore I*, 388 F. Supp. 3d at 566 – 67 (holding no jurisdiction under OCSLA because "defendants offer no basis to enable this Court to conclude that the City's claims for injuries stemming from climate change would not have occurred but for defendants' extraction activities on the OCS."); *San Mateo I*, 294 F. Supp. 3d at 938 – 39 (holding no jurisdiction under OCSLA because "defendants have not shown that plaintiffs' causes of action would not have accrued ***but for*** the defendants' activities on the shelf.") (emphasis in original).[12]

3. The State's Claims did not "Arise On" Federal Enclaves.

Defendant also attempts removal based on the federal enclave doctrine, which permits federal question jurisdiction if liability arises on a federal enclave. *See* U.S. Const. art. I § 8, cl. 17; *see also Surplus Trading Co. v. Cook*, 281 U.S. 647, 652 (1930) (jurisdiction over lands purchased by the United States with consent of the State legislature passes to the United States, "thereby making the jurisdiction of the latter the sole jurisdiction."). Federal enclave jurisdiction is not common, and when it is found, "[t]he general reasoning . . . is that any claim that ***arises on***

[12] Despite four district courts previously relying on the 'but-for' requirement to deny Defendant's argument for jurisdiction under OCSLA, Defendant failed to mention that dispositive criterion in four pages of briefing to this Court. *See* Not. ¶¶ 109 – 117.

a federal enclave is necessarily a creature of federal law because, quite simply, there is no other law." *Baltimore I*, 388 F. Supp. 3d at 564 (emphasis added). Indeed, the key determination in assessing federal enclave jurisdiction is whether most or all of the relevant events alleged in the complaint arise on a federal enclave. *Id.* at 565 ("courts have only found that claims arise on federal enclaves, and thus fall within federal question jurisdiction, when all or most of the pertinent events occurred there.").[13]

Defendant does not assert that any pertinent event alleged in the complaint arose on a federal enclave. Instead, it argues that the State's alleged "targeting of [Defendant's] oil and gas operations" necessarily include Defendant's activities on "military bases and other federal enclaves." Not. ¶ 120. This is the same recurring argument that the State's complaint (which alleges only violations of CUTPA) is actually something that it is not (part of a vast conspiracy to take down the entire oil and gas industry). Not only does this fanciful interpretation run afoul of the well-pleaded complaint rule, but it also fails to assert that any specific pertinent event alleged in the complaint occurred on a federal enclave. Likewise, Defendant's argument that "climate change injuries will be suffered in the federal enclaves within Connecticut," *id.* ¶ 53, fails to assert that any of the State's claims arose on federal enclaves—let alone that most or all do. The injury alleged in the State's complaint is that Connecticut consumers were deceived; that is the "injury"

[13] Defendant argues that "[f]ederal jurisdiction is available if ***some*** of the events or damages alleged in the complaint occurred on a federal enclave" based on its reading of *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006). Not. ¶ 119 (emphasis added). *Durham* does not stand for this proposition; indeed, its only reference to federal enclave jurisdiction was dicta about its viability as an unpursued ground for removal. Much more instructive with regard to the locus of the allegations to a federal enclave is a California district court case that rejected removal despite some pertinent events occurring on a federal enclave because it was not the exclusive locus. *See In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1125 – 26 (N.D. Cal. 2012).

component of a CUTPA claim, and that occurred throughout Connecticut. That further harm for which the State seeks relief flowed from that injury falls well short of the requirement that the claims arise on a federal enclave.[14] *See Baltimore I*, 388 F. Supp. 3d at 566 (holding claims did not arise on federal enclaves); *Boulder I*, 405 F. Supp. 3d at 974 – 75 (same); *Rhode Island I*, 393 F. Supp. 3d at 152 (same); *San Mateo I*, 294 F. Supp. 3d at 939 (same).

D. Defendant's Objectively Unreasonable Removal Justifies Awarding The State Attorneys' Fees.

The State respectfully requests this Court award costs and expenses incurred by the State in responding to all the contorted arguments in Defendant's objectively unreasonable and impermissibly long Notice of Removal.[15] *See* 28 U.S.C. § 1447 (c) ("An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."). Recognizing that unjustified removal "delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources," Congress promulgated Code section 1447 (c) to "deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005). In determining whether to award costs and fees, courts consider whether the removing party had an objectively reasonable basis for removal. *Id.* at 141 ("the standard for awarding fees should turn on the reasonableness of the removal. Absent unusual circumstances, courts may award attorney's fees under § 1447 (c) only where the removing party lacked an objectively reasonable

[14] The State has not specifically requested relief related to any federal enclave. *See* Compl., Prayer for Relief.

[15] Federal statute requires that Defendant's Notice of Removal set forth a "short and plain statement of the grounds for removal . . . ." 28 U.S.C. § 1446 (a). Instead, Defendant filed a fifty-eight page Notice (with 184 pages of superfluous exhibits) that exceeded the Local Rule page limit. *See* Local Rule 7 (a) 5 (limiting memoranda of law to forty pages).

basis for seeking removal."). District courts have discretion in determining whether to award attorneys' fees, *id.* at 139, and "a great deal of discretion and flexibility . . . in fashioning awards of costs and fees." *Morgan Guar. Trust Co. v. Republic of Palau*, 971 F.2d 917, 924 (2d Cir. 1992).

Defendant failed to inform this Court that every argument advanced in its Notice has been roundly rejected by district and circuit courts across the country. *See supra* at n. 1. In response to California municipalities' allegations of nuisance, trespass, products liability and negligence, Defendant filed notices of removal based on, *inter alia*, (1) federal common law; (2) *Grable* jurisdiction; (3) federal preemption; and (4) specially designated federal jurisdiction pursuant to the federal officer removal statute ("FORS"), OCSLA, and because the claim arose on federal enclaves. *See Oakland I*, No. 3:17-cv-06011, Doc. No. 1, at ¶¶ 5 – 10;[16] *San Mateo I*, No. 3:17-cv-04934, Doc. No. 1, at ¶¶ 5 – 10. Likewise, Defendant has advanced the same arguments in response to other state and municipal actions alleging nuisance, trespass, products liability, unfair and deceptive acts and practices, unjust enrichment, civil conspiracy, impairment of public trust resources, and violations of a state environmental statute. *See Baltimore I*, No.1-18-cv-02357, Doc. No. 1, at ¶¶ 5 – 10 (asserting *Grable*, federal common law, preemption, FORS, and federal enclaves); *Boulder I*, No. 1:18-cv-01672, Doc. No. 1, at ¶¶ 2, 4 (asserting *Grable*, federal common law, preemption, FORS, federal enclaves, and OCSLA); *Rhode Island I*, No. 1:18-cv-00395, Doc. No. 1, at ¶¶ 5 – 10 (same). *Massachusetts*, No. 1:19-cv-12430, Doc. No. 1, at 7, 12, 14 (asserting *Grable*, federal common law, and FORS). Each of these cases was remanded back to state court.[17]

[16] In lieu of attaching each repetitive Notice discussed herein—totaling hundreds of pages—the State has provided the Court with the case and docket numbers where they can be found.

[17] *Oakland I* denied remand, but that decision was vacated by the Ninth Circuit. *Oakland II*, 969 F.3d at 911 – 12.

Defendant's retread Notice[18] is objectively unreasonable for three reasons. First, Defendant has advanced these arguments in jurisdictions across the country without success. It has received decision after decision from district and circuit courts stating that these theories for removal are baseless, yet it continues to advance them without regard to prior judicial decisions. *See Robinson v. Pfizer, Inc.*, No. 4:16-CV-439 (CEJ), 2016 U.S. Dist. LEXIS 57174, at *12 (E.D. Mo. Apr. 29, 2016) (awarding attorneys' fees because defendant had no objectively reasonable basis for removal after multiple courts had remanded cases removed on same basis). Second, Defendant continues to assert the same arguments regardless of the specific allegations pleaded. Here, when its arguments did not fit the State's complaint, it simply rewrote the complaint in a long-winded series of obvious mischaracterizations. *See Savino v. Savino*, 590 Fed. Appx. 80, 81 (2d Cir. 2015) (affirming award of attorneys' fees when removal did not follow well-pleaded complaint rule). Third, Defendant's arguments failed to even make out colorable claims on their face. *See Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 411 (7th Cir. 2000) (affirming award of attorneys' fees when removal "appears designed to increase its adversary's expenses (and thus discourage litigation) without regard to the merits of plaintiffs' position.").

Defendant did not remove this case based on an objectively reasonable belief that its perpetually failing arguments originally crafted to justify federal jurisdiction over common law nuisance claims would somehow be applicable to the CUTPA claims in this case. Rather, Defendant decided to file a recycled brief simply for the purposes of delay. Absent an award of

[18] Defendant's practice of simply copying previous notices of removal is evident in its failure to delete a reference to 28 U.S.C. § 1453 (b) as grounds for removal in the Notice's opening paragraph. *See* Not. at 1. That Code section pertains to removal of class actions—a grounds for removal in other jurisdictions that Defendant chose not to assert here. *See, e.g.*, *Massachusetts*, 462 F. Supp. 3d at 47 – 51.

attorneys' fees, it will continue to do so in other jurisdictions because it has no reason not to.[19] Other courts have begun assessing fees for this blatant waste of judicial resources. *See Rhode Island II*, 2020 U.S. App. LEXIS 34194, at *21 (awarding costs to Rhode Island while affirming remand). The State urges this Court to do the same.

V. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court remand the Complaint to Connecticut Superior Court and award attorney's fees to the State for time spent litigating Defendant's objectively unreasonable removal of this action.

[19] In addition to the districts that have decided remand, Defendant has asserted largely the same grounds for removal in the District of Columbia, Minnesota, Delaware, and New Jersey. *See District of Columbia v. Exxon Mobil Corp.*, No. 1:20-cv-01932, Doc. No. 1 (D.D.C 2020); *Minnesota v. Am. Petroleum Inst.*, No. 20-cv-1636, Doc. No. 1 (D. Minn. 2020); *Delaware v. BP America, Inc.*, No.1:20-cv-01429, Doc. No. 1 (D. Del. 2020); *City of Hoboken v. Exxon Mobil Corp.*, No. 2:20-cv-14243, Doc. No. 1 (D.N.J. 2020). As of December 1, 2020, upon information and belief, the issue of removal is still being litigated in these cases.

Respectfully submitted,

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EXHIBIT 1

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Docket Number:	**HHD-CV-20-6132568S**
Case Name:	**STATE OF CONNECTICUT v. EXXON MOBIL CORPORATION**
Type of Transaction:	**E-File New Case**
Fee Waived:	**$360.00**
Waiver Reason:	**State Official**
Date Filed:	**9/14/2020**
New Case By:	**440801 - BENJAMIN WHEELOCK CHENEY**
Documents Filed:	**SUMMONS** **COMPLAINT** **RETURN OF SERVICE**
Date and Time of Transaction:	**SEP-14-2020 13:34:44 PM**

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SUMMONS - CIVIL
JD-CV-1 Rev. 2-20
C.G.S. §§ 51-346, 51-347, 51-349, 51-350, 52-45a, 52-48, 52-259;
P.B. §§ 3-1 through 3-21, 8-1, 10-13

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STATE OF CONNECTICUT
SUPERIOR COURT
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Instructions are on page 2.

☐ Select if amount, legal interest, or property in demand, not including interest and costs, is LESS than $2,500.

☒ Select if amount, legal interest, or property in demand, not including interest and costs, is $2,500 or MORE.

☒ Select if claiming other relief in addition to, or in place of, money or damages.

TO: Any proper officer

By authority of the State of Connecticut, you are hereby commanded to make due and legal service of this summons and attached complaint.

Address of court clerk *(Number, street, town and zip code)*	Telephone number of clerk	**Return Date** *(Must be a Tuesday)*
95 Washington Street, Hartford 06106	**(860) 548 – 2700**	**10/13/2020**

☒ Judicial District ☐ Housing Session ☐ G.A. Number: ___	At *(City/Town)*	Case type code *(See list on page 2)*
	Hartford	Major: **M** Minor: **90**

For the plaintiff(s) enter the appearance of:

Name and address of attorney, law firm or plaintiff if self-represented *(Number, street, town and zip code)*	Juris number *(if attorney or law firm)*
William M. Tong, AG, Office of the Attorney General, 165 Capitol Avenue, Hartford, CT 06106	**440323**

Telephone number	Signature of plaintiff *(if self-represented)*
(860) 808 – 5280	

The attorney or law firm appearing for the plaintiff, or the plaintiff if self-represented, agrees to accept papers (service) electronically in this case under Section 10-13 of the Connecticut Practice Book. ☒ Yes ☐ No

E-mail address for delivery of papers under Section 10-13 of the Connecticut Practice Book *(if agreed)*: **Benjamin.Cheney@ct.gov**

Parties	Name *(Last, First, Middle Initial)* and address of each party *(Number; street; P.O. Box; town; state; zip; country, if not USA)*	
First plaintiff	**Name: State of Connecticut** **Address: Office of the Attorney General, 165 Capitol Avenue, Hartford, CT 06106**	**P-01**
Additional plaintiff	**Name:** **Address:**	**P-02**
First defendant	**Name: Exxon Mobil Corporation** **Address: Agent for Service: Corporation Service Company, 100 Pearl Street, 17th Floor, Hartford, CT 06103**	**D-01**
Additional defendant	**Name:** **Address:**	**D-02**
Additional defendant	**Name:** **Address:**	**D-03**
Additional defendant	**Name:** **Address:**	**D-04**

Total number of plaintiffs: 1	**Total number of defendants: 1**	☐ Form JD-CV-2 attached for additional parties

Notice to each defendant

1. **You are being sued.** This is a summons in a lawsuit. The complaint attached states the claims the plaintiff is making against you.
2. To receive further notices, you or your attorney must file an *Appearance* (form JD-CL-12) with the clerk at the address above. Generally, it must be filed on or before the second day after the Return Date. The Return Date is not a hearing date. You do not have to come to court on the Return Date unless you receive a separate notice telling you to appear.
3. If you or your attorney do not file an *Appearance* on time, a default judgment may be entered against you. You can get an *Appearance* form at the court address above, or on-line at https://jud.ct.gov/webforms/.
4. If you believe that you have insurance that may cover the claim being made against you in this lawsuit, you should immediately contact your insurance representative. Other actions you may take are described in the Connecticut Practice Book, which may be found in a superior court law library or on-line at https://www.jud.ct.gov/pb.htm.
5. If you have questions about the summons and complaint, you should talk to an attorney.

The court staff is not allowed to give advice on legal matters.

Date	Signed *(Sign and select proper box)*	Name of person signing
09/14/2020	☒ Commissioner of Superior Court ☐ _____ Clerk	**William M. Tong**

If this summons is signed by a Clerk:
a. The signing has been done so that the plaintiff(s) will not be denied access to the courts.
b. It is the responsibility of the plaintiff(s) to ensure that service is made in the manner provided by law.
c. The court staff is not permitted to give any legal advice in connection with any lawsuit.
d. The Clerk signing this summons at the request of the plaintiff(s) is not responsible in any way for any errors or omissions in the summons, any allegations contained in the complaint, or the service of the summons or complaint.

For Court Use Only
File Date

I certify I have read and understand the above:	Signed *(Self-represented plaintiff)*	Date	Docket Number

DOCKET NO:		RETURN DATE: October 13, 2020
STATE OF CONNECTICUT	:	SUPERIOR COURT
V.	:	J.D. OF HARTFORD AT HARTFORD
EXXON MOBIL CORPORATION	:	SEPTEMBER 14, 2020

COMPLAINT

I. INTRODUCTION

1. Climate change poses an existential threat to humanity.

2. For several decades the Exxon Mobil Corporation ("ExxonMobil" or "Defendant") has misled and deceived Connecticut consumers about the negative effects of its business practices on the climate.

3. As far back as the 1950s, ExxonMobil's corporate executives, scientists, and other representatives and agents knew that fossil fuel combustion contributed to global warming.

4. In the 1970s and 1980s, ExxonMobil conducted research confirming that atmospheric carbon dioxide released in fossil fuel exploration, refinement, and combustion contributed to climate change.

5. In the late 1980s, when climate change gained increased public attention, ExxonMobil had the opportunity to responsibly contribute to public understanding of climate change and its potentially catastrophic consequences.

6. ExxonMobil instead began a systematic campaign of deception to undermine public acceptance of the scientific facts and methods relied upon by climate scientists who knew that anthropogenic (human-caused) climate change was real and dangerous to humanity.

7. ExxonMobil executed this unfair and deceptive campaign in order to maximize profits by selling more oil and gasoline than consumers would have purchased had the reality of climate change been disclosed.

8. The campaign of deception ExxonMobil implemented was similar to the infamous disinformation campaign used by tobacco companies to conceal their products' deadly effects.

9. ExxonMobil's campaign of deception was wide-ranging, including targeting consumers to spread and reinforce doubt about established climate science.

10. Over the last several decades dozens of ExxonMobil advertorials (paid advertisements appearing similar to editorial content) published in newspapers, including but not limited to *The New York Times*, contained misleading and deceptive statements about the relationship between ExxonMobil's business practices and climate change.

11. ExxonMobil's strategy to create uncertainty about climate science successfully kept consumers purchasing ExxonMobil products by deceiving consumers about the serious harm caused by ExxonMobil's industry and business practices.

12. ExxonMobil continues its campaign of deception to this day in greenwashed advertising (advertising falsely claiming or implying that Exxon's corporate actions are beneficial to the environment).

13. ExxonMobil's greenwashed advertising deceives consumers by downplaying ExxonMobil's contributions to climate change and falsely portraying ExxonMobil as a corporation committed to seriously combatting climate change.

14. ExxonMobil, however, continues to be a major contributor to climate change.

15. ExxonMobil's decades-long campaign of deceiving Connecticut consumers includes numerous violations of the Connecticut Unfair Trade Practices Act.

16. ExxonMobil's campaign of deception has allowed it to continue to inflict decades of avoidable harm on Connecticut's natural environment, including but not limited to its lands, waters, coastlines, infrastructure, fish and wildlife, natural resources and critical ecosystems.

17. ExxonMobil's campaign of deception has contributed to myriad negative consequences in Connecticut, including but not limited to sea level rise, flooding, drought, increases in extreme temperatures and severe storms, decreases in air quality, contamination of drinking water, increases in the spread of diseases, and severe economic consequences.

18. Despite ExxonMobil finally admitting publicly that combustion of fossil fuels contributes to climate change, its decades-long campaign of deception has been so successful that many consumers still do not believe the scientific facts that climate change is real, is caused primarily by fossil fuel combustion, and is having and will have devastating consequences for Connecticut and all of humanity.

19. The success of ExxonMobil's campaign of deception has helped to ensure that the people of the State of Connecticut will continue to experience the catastrophic consequences of climate change for the foreseeable future.

20. ExxonMobil must be held accountable for its campaign of deception.

II. OVERVIEW

21. This lawsuit seeks appropriate redress for the unfair, deceptive, unethical, oppressive, immoral, and/or unscrupulous practices by ExxonMobil of systematically, knowingly, and routinely misrepresenting the extent of the harmful climatic effects of its fossil fuel products and its industry as a whole, research conducted about the relationship between climate change and fossil fuels, conclusions reached regarding the climatic effects of its fossil fuel products, and actions taken to address the negative climatic effects of its fossil fuel products.

22. Climate change is a change in global or regional climate patterns. As used herein, the term climate change refers to the shift in worldwide weather patterns associated with an increase in average global temperature. This phenomenon is also sometimes referred to as global warming.

23. The negative effects of climate change have already been felt by the residents of Connecticut, and climate change will continue to have increasingly serious, life-threatening, and financially burdensome impacts on the people of Connecticut and the lands, waters, coastline, species, natural resources, critical ecosystems, infrastructure and other assets owned by the State and its political subdivisions.

24. Human activity has contributed, and continues to contribute, to climate change.

25. The most significant way in which human activity has contributed to climate change is through the extraction, refinement, and combustion of fossil fuels.

26. ExxonMobil is a corporation whose primary trade and commercial interest is the extraction, refinement, and sale of fossil fuels, and it is one of the largest and most profitable corporations in the world as a result of its trade.

27. ExxonMobil has contributed to climate change by causing the sale of fossil fuel and petroleum products, in Connecticut and elsewhere, that emit large quantities of greenhouse gases responsible for trapping atmospheric heat that causes global warming.

28. ExxonMobil knew decades ago that the release of greenhouse gases, including carbon dioxide ("CO_2"), when fossil fuels are combusted, was a substantial factor in causing global warming.

29. ExxonMobil used and continues to use its knowledge about the reality and effects of climate change to make business decisions, including but not limited to exploration strategies.

30. ExxonMobil's stated position is that it will continue to explore for new fossil fuel reserves and that it does not anticipate a reduction in fossil fuel consumption for the next forty years.

31. In the 1950s and 1960s, ExxonMobil was aware of research—some of it by its own employees—correlating the combustion of fossil fuels and climate change. In the late 1970s, scientists in its employ drafted internal memoranda confirming the general scientific consensus that humans were impacting the climate by burning fossil fuels.

32. In the early 1980s, ExxonMobil scientists accurately predicted the concentration of carbon dioxide in the atmosphere and the corresponding temperature increase for the year 2020. The Defendant was able to accurately predict the severity of climate change because, beginning in the late 1970s, it had invested significant resources aimed at understanding the science of climate change.

33. Notwithstanding ExxonMobil's knowledge of the risks posed by continuing to find, extract, refine, and sell its fossil fuel products, the Defendant continuously advertised and sold those products at multiple locations in Connecticut to the consumers of Connecticut throughout the 1970s, 1980s, 1990s, 2000s, and up to and including the present day.

34. Rather than adjust its business practices to account for the knowledge it had about its industry contributing to climate change, ExxonMobil instead began to engage in a campaign of deception intended to mislead consumers.

35. Beginning in the late 1980s, ExxonMobil began a campaign to deceive the consumers of Connecticut about the harmful climatic effects of its fossil fuel products by misrepresenting and omitting material facts about how the use of its fossil fuel products

significantly increased CO_2 and other heat-trapping emissions that ExxonMobil knew contributed to climate change.

36. Each time Connecticut consumers purchased—and continue to purchase—ExxonMobil's fossil fuel products at service stations and elsewhere, ExxonMobil knowingly deceived and deceives the consumers of Connecticut by failing to disclose highly material information concerning the harmful climatic effects of its products. This deception has occurred in millions of transactions in Connecticut over the last four decades.

37. In advertisements, public speeches, articles, media statements and published writings during the last five decades, ExxonMobil has knowingly deceived consumers by systematically and routinely misrepresenting and/or omitting information about its products' effects on the climate, its knowledge about the effect of its products on the climate, and scientific consensus about the effects of ExxonMobil's products on the climate.

38. ExxonMobil also deceived consumers by funding and/or collaborating with third party groups, including but not limited to the American Petroleum Institute, the Global Climate Coalition, and others, to assist in spreading disinformation about the effects of its products on the climate.

39. ExxonMobil's strategy to profit from its business that it knew caused harmful climatic impacts was based on a comprehensive campaign of deception that used several tactics, including, as set forth in a 1988 memorandum authored by Exxon spokesperson Joseph M. Carlson, "emphasiz[ing] uncertainty in scientific conclusions regarding the potential enhanced greenhouse effect." The Defendant emphasized uncertainty through serial misrepresentations and omissions regarding facts that would have been important to reasonable purchasers making their purchasing decisions.

40. ExxonMobil has also engaged in a corporate promotion and branding campaign—referred to herein as "greenwashing"—that misrepresents its business' environmental impacts and deceives consumers.

41. ExxonMobil's campaign of deception was and is unfair, deceptive, unethical, oppressive, immoral, and/or unscrupulous. The Defendant's affirmative misrepresentations, omissions of material fact, and half-truths had and have a tendency to mislead Connecticut consumers regarding their purchase of ExxonMobil's fossil-fuel-based products.

42. ExxonMobil's campaign of deception has enabled it to substantially increase its profits by simultaneously deceiving Connecticut consumers about the causal link between climate change and every purchase of an ExxonMobil fossil-fuel-based product and by helping to slow—for decades—a transition to energy sources that do not cause an existential threat to humanity. Its campaign of deception has undermined and delayed the creation of alternative technologies, driven by informed consumer choice, which could have avoided the most devastating effects of climate change, and it has stifled an open marketplace for renewable energy, thereby leaving consumers unable to reasonably avoid the detrimental consequences of fossil fuel combustion.

43. ExxonMobil's campaign of deception has contributed and continues to contribute significantly to harmful climate change in Connecticut. The Defendant's unfair, deceptive, unethical, oppressive, immoral, and/or unscrupulous conduct has been a substantial factor in causing the avoidable release of billions of tons of greenhouse gases that now sit in the Earth's atmosphere and cause, *inter alia*, sea-level rise on Connecticut's shoreline, wildlife degradation on Connecticut's lands, and property devaluation and damage for Connecticut's residents.

44. By intentionally and knowingly misrepresenting and/or omitting material facts

about the extent of the harmful climatic effects of its fossil-fuel-based products, the research it conducted, the conclusions it reached regarding the climatic effects of its fossil fuel products, and the nature of its business's impacts on the environment and climate, ExxonMobil offered and continues to offer a materially deceptive representation of its business practices to consumers with the goal of maximizing profits.

45. ExxonMobil's conduct as described herein constitutes deceptive, unfair and illegal business practices in violation of the Connecticut Unfair Trade Practices Act ("CUTPA"). Pursuant to Conn. Gen. Stat. § 42-110m, the Connecticut Attorney General, in the name of the State of Connecticut, seeks restitution, disgorgement, and civil penalties, as well as other injunctive and equitable relief to remediate all past and future damage caused by these unfair, deceptive, and illegal business practices.

III. PARTIES

46. Plaintiff State of Connecticut, represented by William Tong, Attorney General of the State of Connecticut, brings this action in its sovereign enforcement capacity pursuant to Conn. Gen. Stat. § 42-110m and at the request of Michelle H. Seagull, Commissioner of the Department of Consumer Protection for the State of Connecticut.

47. Defendant Exxon Mobil Corporation is a multinational energy and chemicals company incorporated in the State of New Jersey and has its principal place of business at 5959 Las Colinas Boulevard, Irving, Texas. It is registered to do business in Connecticut as a foreign corporation and maintains a registered agent for service of process, Corporation Service Company, 100 Pearl Street, Hartford, Connecticut.

48. Exxon Mobil Corporation is the parent company of numerous wholly owned subsidiaries, including but not limited to ExxonMobil Oil Corporation, and is liable for the unlawful actions of those subsidiaries.

49. Exxon Mobil Corporation controls and has controlled companywide decisions related to all aspects of all allegations contained herein, including but not limited to decisions regarding advertising, public communications, and climate change research.

50. Exxon Mobil Corporation was formed on November 30, 1999, by the merger of Exxon Corporation ("Exxon") and Mobil Oil Corporation ("Mobil"). Exxon Mobil Corporation is liable for its own conduct as well as the conduct of any prior corporate entities that eventually became, or became owned by, Exxon Mobil Corporation (including but not limited to Exxon, Mobil, Exxon Research and Engineering Company, Standard Oil of New Jersey, Standard Oil of New York, Vacuum Oil, Socony-Vacuum Oil Company, and Humble Oil & Refining Company) as well as activities conducted while operating under any alternative trade names (including but not limited to Exxon, Mobil, ExxonMobil Research and Engineering Company, Enco and Esso).

51. As used in this Complaint, "ExxonMobil" refers collectively to Exxon Mobil Corporation and its predecessors, subsidiaries, affiliates, and divisions.

52. Whenever reference is made in this complaint to any act or practice of ExxonMobil, such allegation shall be deemed to mean that the principals, officers, directors, employees, agents, or representatives of ExxonMobil did, or authorized, such act or practice on behalf of ExxonMobil while actively engaged in the scope of their duties.

53. ExxonMobil is a vertically integrated oil and gas company that locates, extracts, refines, transports, markets and sells fossil-fuel-based products.

54. According to its public filings with the Securities and Exchange Commission, ExxonMobil's "principal business is energy, involving exploration for, and production of, crude oil and natural gas, manufacture of petroleum products and transportation and sale of crude oil, natural gas and petroleum products. ExxonMobil is a major manufacturer and marketer of commodity petrochemicals, including olefins, aromatics, polyethylene and polypropylene plastics and a wide variety of specialty products. Affiliates of ExxonMobil conduct extensive research programs in support of these businesses."

55. According to ExxonMobil's website, it is committed to being the world's premier petroleum and chemical manufacturing company.

56. ExxonMobil claims a commitment to enhancing the long-term value of the investment dollars entrusted to it by its shareholders. ExxonMobil is committed to running its business profitably and expects superior returns for its shareholders.

57. ExxonMobil is one of the largest and most profitable corporations in the world. The Forbes Global 200 list of the world's largest public companies ranked ExxonMobil 11th, with a market value of over $340 billion, in 2019. That year, ExxonMobil reported $14.3 billion in earnings. In 2018, ExxonMobil earned over $20 billion in profits from $290 billion in revenues. ExxonMobil has remained highly profitable for the last five decades concentrating its business on global oil and gas production, refining, distribution, and wholesale and retail sales.

58. A significant portion of ExxonMobil's profits over the past several decades was derived from its campaign of deception, which has deceived the public, kept consumers buying ExxonMobil fossil-fuel-based products, and prevented a transition to alternative sources of energy.

59. For decades, ExxonMobil has regularly transacted business in the State of Connecticut and derived substantial revenue from its business within the State of Connecticut. ExxonMobil's products have been sold within the State of Connecticut by company-owned gas stations and Branded Wholesalers, and ExxonMobil's deceptive advertisements at issue in this complaint have been repeatedly viewed and relied upon by Connecticut consumers.

60. ExxonMobil has extensive contacts with the State of Connecticut, including but not limited to the following. Upon information and belief, from 1973 until 2007, ExxonMobil maintained a chemical plant at 495 Lordship Boulevard, Stratford, Connecticut. ExxonMobil also maintains a branding agreement with Alliance Energy, LLC, to maintain the Mobil brand name for 88 petroleum-products retail stations located in Connecticut. Upon information and belief, ExxonMobil operated numerous additional petroleum-products retail stations located in Connecticut through 1999, when ExxonMobil divested of those stations as a result of a settlement with the Federal Trade Commission. Exxon continues to maintain branded franchises throughout the State of Connecticut.

61. ExxonMobil has engaged in national advertising campaigns that have deliberately targeted consumers throughout the United States, including Connecticut, in order to increase its sales and enhance its reputation. ExxonMobil has purposely availed itself of Connecticut's marketplace through nationwide advertising that it knew would reach the consumers of Connecticut.

IV. EXXONMOBIL KNEW ITS PRODUCTS CAUSED CLIMATE CHANGE

62. The scientific consensus that climate change is a real phenomenon, caused in part by human activity, has been growing for decades.

63. The following paragraphs are a partial compilation of events and/or documents that demonstrate the alignment of the Defendant's internal research and knowledge about climate change with the scientific consensus that climate change was and is a serious threat to humanity and our environment.

64. In 1957, H.R. Brannon of Humble Oil (now ExxonMobil) published research correlating increased fossil fuel combustion with increased atmospheric CO_2.

65. In 1959, renowned physicist Edward Teller delivered the earliest known warning of the dangers of global warming to the petroleum industry, speaking before the American Petroleum Institute ("API"). The following year he formally published his warnings about the dangers of global climate change.

66. In 1965, President Lyndon B. Johnson's Science Advisory Committee predicted that fossil fuel combustion could cause significant climatic changes by the end of the 20th Century.

67. In 1965, Frank Ikard, President of API, delivered a presentation at API's Annual Meeting, informing API's membership of the findings of the Presidential Science Advisory Committee. Representatives from ExxonMobil were in attendance at that meeting.

68. In the 1970s, ExxonMobil invested millions of dollars and hired scientists and other personnel to design projects specifically to further its understanding of climate science. ExxonMobil's 1970s-era research was later championed by then-CEO Lee Raymond, who stated in 2000 that "[f]or more than two decades, Exxon Mobil Corporation has carefully studied and worked to increase understanding of the issue of global climate change, often referred to as global warming."

69. In 1978, Exxon scientist Henry Shaw sent a letter to Exxon leadership describing two proposed scientific initiatives, including a project to monitor atmospheric and oceanic CO_2 levels ("the tanker project"), to address Exxon's "need to assess the possible impact of the greenhouse effect on Exxon's business" based on researchers attributing the increase in atmospheric CO_2 to fossil fuel burning. During this time ExxonMobil also invested significant resources in researching climate modeling.

70. In 1978, senior Exxon scientist James F. Black warned the Exxon Corporation Management Committee in writing of the "Greenhouse Effect" caused by CO_2 in the Earth's atmosphere. His memorandum stated that CO_2 concentration was increasing in the Earth's atmosphere, CO_2 emissions were attributable to fossil fuels, and CO_2 emissions would cause climate variations including a mean temperature increase. The memorandum stated: "Present thinking holds that man has a time window of five to ten years before the need for hard decisions regarding changes in energy strategies might become critical."

71. In 1979, scientists from Exxon gave a presentation to the National Oceanic and Atmospheric Association stating that Exxon's rationale for researching "the greenhouse effect" was "to assess the possible impact of the greenhouse effect on Exxon business" and assemble a "responsible team that can credibly carry bad news, if any, to the corporation."

72. In 1979, an internal Exxon memorandum stated that the most widely held theory about climate change was that the "increase [in CO_2 concentration] is due to fossil fuel combustion," "[i]ncreasing CO_2 concentration will cause a warming of the earth's surface," and the "present trend of fossil fuel consumption will cause dramatic environmental effects before the year 2050." With a doubling of CO_2 concentration (using 1860 as a baseline), the study

predicted that "ocean levels would rise four feet" and the "Arctic Ocean would be ice free for at least six months each year, causing major shifts in weather patterns in the northern hemisphere."

73. In 1979, Exxon scientist Henry Shaw advocated for research on the greenhouse effect in order to combat potential environmental controls that could negatively impact Exxon's business. He opined that this "aggressive defensive program" be initiated before the government made "the public aware of pollution problems."

74. In 1979, an internal Exxon memorandum recommended that a study on atmospheric CO_2 not receive priority as an emerging issue because society will be able to cope with "whatever problems ensue such as some increase in ocean level, due to polar ice cap melting, [and] the main concern that crop-growing regions would shift northward to Siberia and Canada, leaving central regions too warm for food production."

75. In a 1980 draft statement to the National Commission on Air Quality CO_2 Workshop, Exxon opined that the consequences of climate change would be "adverse to the stability of human and natural communities" and that action delayed until the increase in atmospheric CO_2 is discernible would likely occur "too late to be effective."

76. In 1980, an Exxon report stated that the observable growth in atmospheric CO_2 had been coincident with the start of the Industrial Revolution and that a doubling of CO_2 in the atmosphere could occur sometime between 2035 and 2065. The report predicted that the rise in temperature associated with the increase in atmospheric CO_2 would cause a "dramatic impact on soil moisture, and in turn, on agriculture." It also predicted that one effect of climate change—the melting of the Antarctic ice sheet—could raise sea level by 5 meters.

77. In 1980, a subsidiary of Exxon prepared an internal memorandum, which stated: "There is no doubt that increases in fossil fuel usage and decreases in forest cover are aggravating the potential problem of increased CO_2 in the atmosphere."

78. In 1980, Dr. John Laurman, a consultant and recognized expert in the field of CO_2 and climate, presented to the API Task Force on Climate Change on "The CO_2 Problem." He identified the "scientific consensus on the potential for large future climatic response to increased CO_2 levels" as a reason for concern, stated that there was "strong empirical evidence" that climate change was caused by fossil fuel combustion, and warned that the "likely impacts" of climate change were "major economic consequences" by 2038 and "globally catastrophic effects" by 2067. Henry Shaw, a member of the Task Force, represented Exxon at the meeting.

79. In 1981, Exxon scientist Henry Shaw wrote that a doubling of CO_2 would result in a 3°C increase in average global temperature and a 10°C increase at the poles, causing major shifts in rainfall and agriculture and melting of polar ice.

80. In 1981, Roger Cohen, director of Exxon's Theoretical and Mathematical Sciences Laboratory, critiqued a draft memorandum from a colleague that stated that the effects of climate change in 2030 would be "well short of catastrophic." This characterization, Cohen wrote, "may be too reassuring."

81. In 1981, an internal Exxon memorandum revealed that the Defendant considered implementation of a comprehensive high-impact program studying atmospheric CO_2. However, Exxon decided not to pursue that program after concluding that "energy conservation or shifting to renewable energy sources" were "the only options that make sense" to combat increases in atmospheric CO_2.

82. In 1982, Exxon began to scale back its research on CO_2 and climate change. It canceled the tanker project, and several years later it stopped researching climate modeling. Meanwhile, however, Exxon continued to learn about the potentially devastating consequences of its products.

83. In 1982, Roger Cohen summarized the findings of Exxon's research in climate modeling, stating that "over the past several years a clear scientific consensus has emerged regarding the expected climatic effects of increased atmospheric CO_2." Cohen acknowledged that Exxon shared the views of the mainstream scientific community, stating that there is "unanimous agreement in the scientific community that a temperature increase of this magnitude would bring about significant changes in the earth's climate," and that Exxon's findings were "consistent with the published predictions of more complex climate models" and "in accord with the scientific consensus on the effect of increased atmospheric CO_2 on climate."

84. In 1982, an API report, which was largely critical of the accuracy of climate modeling, conceded that "all climate model studies indicate that a doubling of CO_2 will produce a significant increase in the global and annual mean temperature of the Earth." The report noted that the warming predicted by the scientific consensus "can have serious consequences for man's comfort and survival since patterns of aridity and rainfall can change, the height of the sea level can increase considerably and the world food supply can be affected."

85. In 1982, a corporate primer given "wide circulation to Exxon management" concluded that "there is time for further study and monitoring before specific action need be taken," but it noted that "once the effects [of climate change] are measurable, they might not be reversible." The report stated that the effects are "potentially catastrophic" and included famine, migration, "stress on renewable resource production," and sea level rise that would cause

"flooding on much of the U.S. East Coast." The report predicted a doubling of CO_2 concentrations (above pre-industrial levels) by 2060 and increased temperatures of 2-4°C (above 1982 levels) by the end of the 21st century. According to the report, "[m]itigation of the 'greenhouse effect' would require major reductions in fossil fuel consumption."

86. In 1982 remarks, the President of Exxon's Research and Engineering Company acknowledged that "fossil fuels, and liquid chemical fuels, are really the heart of the energy and CO_2 problem" and emphasized the need to adopt conservation technologies to address the "profound issues posed by the CO_2 buildup" in the atmosphere.

87. At all times mentioned herein before the two companies merged, Mobil and Exxon had similar knowledge about climate change as it related to their products. In addition to having access to publicly available information and information shared between corporations in the petroleum industry—including, but not limited to, information shared though API—Mobil conducted its own research on climate change that aligned with scientific consensus.

88. For example, in 1983, a Mobil Status Report on Environmental and Toxicology Issues summarized the scientific consensus on the greenhouse effect and the possibility that a temperature rise of 3°F to 6 °F may occur and cause drought and fifteen to twenty feet of sea level rise, "inundating many of the world's coastal cities."

89. In 1984, Exxon scientist Henry Shaw gave a presentation that highlighted the disparities in some climate modeling, but nonetheless concluded that humankind "can either adapt our civilization to a warmer planet or avoid the problem by sharply curtailing the use of fossil fuels." He listed some of the effects of global warming as: sea-level rise, redistribution of rainfall, changes in agricultural productivity, accelerated growth of pests and weeds, detrimental health effects, and population migration.

90. By the mid-1980s, the Defendant knew that anthropogenic climate change was real, scientific consensus was that continued expulsion of CO_2 into the atmosphere would cause catastrophic consequences for humanity, and that the only meaningful way to curtail climate change was to curtail combustion of fossil fuels.

91. In 1988, National Aeronautics and Space Administration ("NASA") scientist Dr. James Hansen testified before Congress that global warming is ascribable to the greenhouse effect, and that global warming was—at that time—"begin[ning] to effect the probability of occurrence of extreme events such as summer heat waves."

92. Less than six weeks after Dr. Hansen's testimony, Exxon spokesperson Joseph M. Carlson circulated an internal draft memorandum acknowledging the scientific consensus that atmospheric CO_2 concentrations were increasing and could double in 100 years, that the combustion of fossil fuels was emitting five billion tons of CO_2 per year, and that the "principal greenhouse gases are by-products of fossil fuel combustion." He advised that the "[g]reenhouse effect may be one of the most significant environmental issues for the 1990s."

93. The 1988 Carlson memorandum stated that Exxon "has not modified its energy outlook or forecasts to account for possible changes in fossil fuel demand or utilization due to the Greenhouse effect."

94. In 1990, the First Assessment Report of the Intergovernmental Panel on Climate Change ("IPCC") was completed. It concluded that human activity caused the release of greenhouse gases—including CO_2 and methane—which enhanced the greenhouse effect and caused additional warming to the Earth's surface.

95. In 1995, the IPCC issued its Second Assessment Report, which concluded that "the balance of evidence, from changes in global mean surface air temperature and from changes

in geographical, seasonal and vertical patterns of atmospheric temperature, suggests a discernible human influence on global climate." Consistent with previous reports, scientific consensus was that climate change was occurring, the combustion of fossil fuels was a significant contributor to climate change, and climate change could have devastating impacts on humanity and the environment. The IPCC has since published three more assessment reports, in 2001, 2007, and 2014. These reports detail continued scientific consensus on the causes and effects of global climate change, and predict worsening damage compared to the conclusions in the Second Assessment Report.

V. EXXONMOBIL DECEIVED CONSUMERS

96. Despite public scientific consensus and years of internal scientific research concluding that climate change resulted from burning fossil fuels and would have devastating consequences, the Defendant engaged in a campaign to deceive the public about these conclusions.

97. Exxon's 1988 Carlson memorandum, which was drafted weeks after Dr. Hansen's Congressional testimony, stated that the Defendant's public position would be to "[e]mphasize the uncertainty in scientific conclusions regarding the potential enhanced Greenhouse effect" and "resist overstatement and sensationalization of potential Greenhouse effect which could lead to noneconomic development of nonfossil fuel resources."

98. Emphasizing claimed uncertainty about climate change has been a common tactic in Defendant's campaign of deception.

99. The Defendant executed the strategy of deceiving the public with the intent of increasing its product sales.

100. ExxonMobil's campaign of deception spread disinformation in several ways, including but not limited to investment brochures, research papers, books, speeches, presentations, and interviews.

101. In addition to spreading disinformation directly, the Defendant also provided funding to—and continues to provide funding to—many individuals and organizations for the purpose of disseminating disinformation to foster doubt about climate change. Some of the funding of this disinformation campaign came from the ExxonMobil Foundation, which was provided significant funding by, and operated under the control of, Exxon Mobil Corporation.

102. Much like ExxonMobil's disinformation, ExxonMobil's deceptive advertisements have evolved over time.

103. As described in more detail below, ExxonMobil's deceptive advertising took the form of advertorials containing false, misleading, and/or deceptive information for decades. More recently—and currently—ExxonMobil's deception in advertising is often in the form of "greenwashing."

104. Greenwashing is a practice in which a company uses imagery and language in advertising and promotional materials to suggest to consumers that the company is environmentally responsible and consumers should buy its products.

105. The Defendant's campaign of deception about the risks associated with burning fossil fuels and climate change has delayed the needed transition to clean energy in Connecticut, the United States, and around the world.

106. The Defendant's practices and a resultant delay in shifting to alternative sources of energy have had and will have a significant negative financial impact on the people of the State of Connecticut.

107. The Defendant engaged in a campaign of deception in order to facilitate its continuing sales of fossil fuels and to continue to profit from those sales.

108. Each manner in which the Defendant executed its campaign of deception was within its primary line of business and in furtherance of its objective to sell product in Connecticut's marketplace.

A. ExxonMobil Systematically and Routinely Used Disinformation as Part of its Campaign of Deception.

109. The Defendant disseminated disinformation both directly and through other organizations, including but not limited to the specific instances in the following paragraphs.

110. The Defendant was a longstanding and continuous Board Member of API, and API received funding and direction from the Defendant.

111. In 1996, API published a book titled "Reinventing Energy: Making the Right Choices," which falsely stated that "there is no persuasive basis for forcing Americans to dramatically change their lifestyles to use less oil." The book falsely denied the human connection to climate change, stating that "no conclusive—or even strongly suggestive—scientific evidence exists that human activities are significantly affecting sea levels, rainfall, surface temperatures or the intensity and frequency of storms."

112. In or around 1996, the Defendant joined with API and other parties to create the Global Climate Science Communications Team ("GCSCT"), a small group of prominent representatives of fossil fuel companies, public relations firms, and industry front groups with the mission of undermining the global scientific consensus that climate change was real and human caused.

113. An agent of the Defendant was a member of the GCSCT. Through its membership, the Defendant directed and participated in the activities of the GCSCT. The

Defendant had the authority to control the activities of the GCSCT and knowledge of material representations made by the GCSCT.

114. In 1998, the GCSCT developed a plan to launch a multi-million-dollar, multi-year "national media relations program to inform the media about uncertainties in climate science; to generate national, regional and local media on the scientific uncertainties, and thereby educate and inform the public, stimulating them to raise questions with policymakers."

115. In 1998, the GCSCT prepared a memorandum outlining "strategies and tactics" to affect public opinion about climate change. The memorandum stated that "Victory will be achieved when average citizens 'understand' (recognize) uncertainties in climate science" and the "recognition of uncertainties becomes part of the 'conventional wisdom.'"

116. The 1998 GCSCT memorandum advocated implementing: (1) a "National Media Relations Program" to "inform the media about uncertainties in climate science;" (2) a "Global Climate Science Information Source" with the goal of "undercutting the 'prevailing scientific wisdom'"; and (3) a "National Direct Outreach and Education" effort "to inform and educate members of Congress, state officials, industry leadership, and school teachers/students about uncertainties in climate science."

117. In addition to planning and executing a disinformation campaign with API and other API members, the Defendant was a member of other organizations that disseminated disinformation as part of its campaign of deception.

118. For example, Exxon and Mobil were members of the Global Climate Coalition ("GCC"), which defined itself as "an organization of business trade associations and private companies . . . to coordinate business participation in the scientific and policy debate on the global climate change issue."

119. In 1995, Mobil drafted a paper for the GCC critiquing the IPCC's conclusion that human activity had impacted global climate. The paper acknowledged that "[t]he potential for a human impact on climate is based on well-established scientific fact and should not be denied" and that "contrarian theories raise interesting questions about our total understanding of climate process, but they do not offer convincing arguments against the conventional model of greenhouse gas emission-induced climate change." Nevertheless, the paper falsely concluded that "[c]laims that human activities have already impacted climate are currently unjustified." The paper also provided a list of talking-point counterarguments to the positions of scientific consensus.

120. Contrary to GCC's purported mission of "contribut[ing] to a balanced debate on global climate change," the organization took a hardline stance against scientific consensus, as evidenced by its 1996 statement that "the scientific community has not yet met the 'burden of proof' that greenhouse gas emissions are likely to cause serious climatic impacts."

121. In addition to working with and through other organizations, the Defendant disseminated disinformation directly to the public.

122. In 1996, Exxon's then-CEO, Lee Raymond, authored several articles stating that fossil fuels' effect on the Earth's climate was an "unproven theory" and that "scientific evidence remains inconclusive as to whether human activities affect global climate." An accompanying piece authored by Exxon went on to assert that "[t]here is still a tremendous amount of uncertainty about how the climate will change in the 21st century" and whether global warming was good or bad.

123. In 1996, Lee Raymond gave remarks to the Economic Club of Detroit and stated: "Currently, the scientific evidence is inconclusive as to whether human activities are having a

significant effect on the global climate." Similarly, he stated in remarks on a European trip later that year that "evidence remains inconclusive as to whether human activities, including the burning of fossil fuels, are affecting global climate." These remarks, as well as urging opposition to efforts to reduce fossil fuel use, were reiterated in a speech to API later in 1996.

124. The purpose of Lee Raymond's remarks at the Economic Club of Detroit was to improve the reputation of the petroleum industry and advertise industry products for the listeners. Comments included promotion of oil's non-energy related uses, a discussion about contemporaneous global supply levels, and a comparison between oil products and alternative sources of energy. Similarly, the European trip remarks were aimed at advertising and burnishing the Defendant's business and products. Comments included a discussion of the Defendant's finances, its global operations, and planned future activities, as well as its anticipated future revenue.

125. In 1997, Lee Raymond gave a speech at the World Petroleum Conference in which he criticized climate modelling as "notoriously inaccurate," questioned whether global warming was occurring, and stated that "[i]t is highly unlikely that the temperature in the middle of next century will be significantly affected whether policies are enacted now or 20 years from now." He also falsely stated that "the earth is cooler today than it was 20 years ago."

126. In 1997, Mobil published an "educational" booklet in which it falsely stated that "[s]cientists cannot tell us with certainty how much and where temperatures will increase—or if they will increase at all. Neither can they tell us what impact such increases would have or what positive impact the proposed remedies will have."

127. The booklet encouraged readers to discuss the statements contained within with their friends, family and lawmakers. The booklet was promulgated for the purpose of influencing

public opinion regarding Mobil and its impact on climate change, and it contained deceptive misrepresentations about the scientific consensus about climate change as well as statements and imagery designed to create the impression that Mobil was operating in an environmentally-friendly manner.

128. In 1998, the Defendant published a brochure for the public titled "Global Climate Change: everyone's debate" in which the Defendant falsely claimed that based on "our analysis . . . the current state of climate science is too uncertain to provide clear answers to many key questions about global climate change," including whether it is "a threat" and whether "the tiny portion of greenhouse gases caused by burning fossil fuels have a measurable effect on worldwide climate."

129. In 2000, ExxonMobil published a brochure titled "A Better Path Forward" stating: "We agree that the potential for climate change caused by increases in carbon dioxide and other greenhouse gases may pose a legitimate long-term risk. However, we do not now have a sufficient scientific understanding of climate change to make reasonable predictions and/or justify drastic measures."

130. These brochures, upon information and belief, promulgated for the purpose of influencing public opinion regarding ExxonMobil and its impact on climate change, contained deceptive misrepresentations about the scientific consensus about climate change as well as statements and imagery designed to create the impression that ExxonMobil was operating in an environmentally-friendly manner.

131. In a 2001 article in *Fortune* magazine, ExxonMobil's then-CEO, Lee Raymond, stated that "[ExxonMobil's] geologists show you how over the last 100,000 years, the temperatures had huge swings that didn't have anything to do with man-made burning of fossil

fuels, because no one was burning them . . . . So how do you distinguish that phenomenon, which we don't understand, from what's going on now?" He also dismissed the idea of renewable energy alternatives, stating that "[e]ven if there were significant changes in technology that none of us see now, by the time you get [alternative energy sources] developed on a commercial scale and get it implemented, it's ten, 15, 20 years." The *Fortune* article noted that other oil and gas companies, such as BP Amoco, "at least acknowledge that temperatures may in fact be rising in the long term."

132. ExxonMobil published a number of materials—both annually and on a one-time basis—as part of its campaign of deception, including but not limited to Corporate Citizen Reports, Sustainability Reports, and Outlooks for Energy. Many of these reports were misleading to the public given what the Defendant knew at the time.

133. In response to a 2005 Corporate Citizenship Brochure, the Royal Society—an independent scientific academy in the United Kingdom—wrote a letter to ExxonMobil to express "disappointment at the inaccurate and misleading view of the science of climate change" expressed in the widely distributed materials.

134. Each aforementioned example of disinformation was disseminated after the 1995 IPCC report concluded that climate change was real, human-caused and attributable to the combustion of fossil fuels and the Defendant's own aforementioned internal research revealed the same.

135. All of ExxonMobil's disinformation was tied to trade or commerce intimately associated with Connecticut, specifically ExxonMobil's business of selling oil and gas to Connecticut consumers. ExxonMobil's disinformation impacted and injured Connecticut consumers.

B. ExxonMobil Systematically and Routinely Used Deceptive Advertisements as Part of its Campaign of Deception.

136. The Defendant purchased advertising—in the form of "advertorials"—to influence consumers about climate change with the goal of selling more of its product.

137. The Defendant purchased advertorials in *The New York Times* starting in or about 1970 and continued to purchase advertorials until at least 2007. Between 1972 and 2001, the advertorials were published nearly every Thursday.

138. *The New York Times* is a national newspaper that has historically and continues to specifically target the tri-state (Connecticut, New York, New Jersey) area; notably, it has and continues to publish specific sections (e.g., Metro) tailored only to the tri-state area.

139. During the time when the advertorials were published in *The New York Times*, *The New York Times* had a circulation of tens of thousands of readers in Connecticut.

140. The Defendant published advertorials in other publications—including but not limited to *The Washington Post*, *National Journal*, *USA Today*, and *The Financial Times*—that were read by Connecticut consumers.

141. By placing advertisements in national publications, the Defendant knowingly availed itself of Connecticut's marketplace.

142. In speeches in the 1970s, Mobil's then-Chairperson Rawleigh Warner, Jr. called the advertorials "quarter-page advertisement[s]" and "advocacy advertising." A Mobil document detailing its public affairs programs during the 1970s and early 1980s referred to the advertorials as a "useful new ad format."

143. Paying money to newspapers to print advertorials was an act and practice in the conduct of the Defendant's primary line of business—selling oil, gas, and petroleum products.

144. Some of the advertorials, including but not limited to those described herein, deceptively discussed climate change as part of the Defendant's campaign of deception. The following advertorials are representative of a larger number of advertorials that were deceptive to consumers in many ways, including but not limited to unjustifiably emphasizing claimed uncertainty of climate science, omitting and/or misrepresenting known facts and/or scientific consensus on climate change, and reflecting only the doubt—as opposed to the confidence—of ExxonMobil's mixed internal dialogue on climate change:

a. In 1984, a Mobil advertorial in the *New York Times* titled "Lies they tell our children" stated that "a greenhouse effect" that could "melt the polar ice caps and devastate U.S. coastal cities" was a "lie" and a "myth of the 1960s and 1970s."

b. In 1993, a Mobil advertorial in the *New York Times* titled "Apocalypse no" asserted that the "dire predictions of global warming catastrophes" and "media hype proclaiming that the sky was falling did not properly portray the consensus of the scientific community." It cited the "lack of scientific data" as justification to delay action to address climate change.

c. In 1996, a Mobil advertorial in the *New York Times* titled "With climate change, what we don't know can hurt us" warned that acting quickly to curb emissions would "create an unwarranted sense of crisis" and urged instead a "gradual approach."

d. In 1996, a Mobil advertorial in the *New York Times* titled "Less heat, more light on climate change" stated that "a number of the scientists believe we have the time and resources to avert a crisis."

e. In 1997, a Mobil advertorial in the *New York Times* titled "Reset the alarm" stated: "Let's face it: The science of climate change is too uncertain to mandate a plan of action that could plunge economies into turmoil. . . . Scientists cannot predict with certainty if temperatures will increase, by how much and where changes will occur. We still don't know what role man-made greenhouse gases might play in warming the planet."

f. In 1997, a Mobil advertorial in the *New York Times* titled "Climate Change: a prudent approach" stated: "We don't know enough about the factors that affect global warming and the degree to which—if any—that man-made emissions (namely carbon dioxide) contribute to increases in the Earth's temperature." However, the advertorial then described the

"precautionary [and] voluntary" ways in which Mobil is "reducing emissions at the source and removing carbon dioxide from the atmosphere [by] supporting research and technology efforts, curtailing our own greenhouse gas emissions and helping customers scale back their emissions of carbon dioxide."

g. In 1997, a Mobil advertorial in the *New York Times* titled "Climate change: where we come out" stated that "after two decades of progress, climatologists are still uncertain how—or even if—the buildup of man-made greenhouse gases is linked to global warming. It could be at least a decade before climate models will be able to link greenhouse warming unambiguously to human actions."

h. In 1997, a Mobil advertorial in the *New York Times* titled "Stop, look and listen before we leap" cautioned consumers that the international efforts to combat climate change were borne out of "speculation," not in line with the "underlying science . . . [that] continue[s] to signal caution," and could "wreak havoc" on "U.S. prosperity."

i. In 2000, an ExxonMobil advertorial in the *New York Times* titled "Unsettled Science" displayed a chart with the Sargasso Sea temperature lowering over time, and it stated that "climate and greenhouse gas levels experience significant natural variability for reasons having nothing to do with human activity" and "little if any warming" had occurred in the last 20 years, characterized the impacts of climate change as "positive or negative," and warned that the position that "the science debate is settled [was] empty rhetoric." The scientist whose research formed the basis of the chart in the advertorial subsequently wrote a letter to ExxonMobil stating that "ExxonMobil has been misleading in its use of the Sargasso Sea data."

j. In 2002, an ExxonMobil advertorial in the *New York Times* titled "Do No Harm" warned of the damage to the United States' economy and way of life if policies were enacted to address climate change. The advertorial characterized the climate change "debate" as balanced, proposed that climate change may be "trivial" and the future impacts "beneficial," and juxtaposed climate science with unpredictable local weather.

k. In 2002, an ExxonMobil advertorial in the *New York Times* titled "A responsible path forward on climate" announced that ExxonMobil was funding the Global Climate and Energy Project at Stanford University to conduct "research on ways to address climate and energy issues." The advertorial championing this initiative also stated that "many of today's suggested alternative energy approaches are not as . . . environmentally beneficial . . . as competing fossil fuels."

l. In 2004, an ExxonMobil advertorial in the *New York Times* titled "Weather and climate" explained that unordinary weather events were unrelated to climate change and that "scientific uncertainties continue to limit our ability to make objective, qualitative determinations regarding the human role in recent climate change or the degree and consequences of future change."

145. Professor Martin Hoffert, a former New York University physicist who researched climate change as an Exxon consultant in the 1980s, stated the following in sworn testimony before Congress: "I was greatly distressed by the climate science denial program campaign that Exxon's front office launched around the time I stopped working as a consultant—but not collaborator—for Exxon. The advertisements that Exxon ran in major newspapers raising doubt about climate change were contradicted by the scientific work we had done and continue to do. Exxon was publicly promoting views that its own scientists knew were wrong, and we knew that because we were the major group working on this. This was immoral and has greatly set back efforts to address climate change."

146. The deception contained in the aforementioned advertorials—along with many others—was explained in a letter from a Senior Scientist at the Office of U.S. Global Change Research Program to ExxonMobil's then-CEO Lee Raymond, detailing several ways in which an August 10, 2000 ExxonMobil advertorial in the *Washington Post* titled "Political cart before a scientific horse" was deceptive. That letter criticized characterizing a draft report of the *U.S. National Assessment of the Potential Consequences of Climate Variability and Change* as a "political document" when the "report was prepared by a panel of experts having no political connections and had been very carefully reviewed by technical experts to ensure objectivity."

147. A common tactic in ExxonMobil's campaign of deception has been to falsely characterize scientific evidence as political.

148. The aforementioned letter criticizing the characterization of scientific evidence as political described several other tactics ExxonMobil commonly used when communicating publicly about climate change in the conduct of selling oil and gas, including but not limited to: (1) advocating for doing more research to understand the problem of climate change while also arguing that it would be too expensive to deal with the problem; (2) using recommendations for more research as a substitute for taking affirmative steps on climate change when the scientific consensus recommended pursuing both simultaneously; (3) mischaracterizing scientific conclusions by changing the scientific basis of the conclusion (e.g., arguing that climate models cannot accurately make *predictions* when climate models are intended to make *projections* not predictions); (4) portraying two sides of a debate as evenly balanced when one side has the great weight of authority; and (5) claiming that the science failed to meet a benchmark that it did not intend or need to meet in order to be credible. The letter indicated that there were also other ways in which ExxonMobil's advertorials and other forms of disinformation were deceptive.

149. ExxonMobil's advertising has also deceptively promoted ExxonMobil products and practices as environmentally beneficial.

150. Despite the overwhelming evidence that fossil fuels contribute to climate change, ExxonMobil has engaged in "greenwashing" by claiming that certain of its products reduce carbon dioxide emissions and are environmentally sound.

151. ExxonMobil has used greenwashing as a deceptive means of corporate promotion and advertising since the 1970s, but ExxonMobil increased its use of greenwashing after it discontinued its purchase of *New York Times* advertorials.

152. ExxonMobil has engaged in greenwashing while failing to disclose that the development, production, refining and use of its fossil fuel products contributes to climate change.

153. Upon information and belief, misleading advertising by ExxonMobil that portrays ExxonMobil products as environmentally sound has intentionally reached Connecticut consumers through print, television, radio and online platforms including social media.

154. ExxonMobil's greenwashing advertisements include, but are not limited to, the following marketing campaigns: "Protect Tomorrow. Today;" "Energy Solutions;" "Energy Lives Here;" "That's Unexpected Energy;" and "The Future of Energy."

155. An example of such a greenwashing advertisement—titled "Growing Fuel"—is a 30 second commercial that aired frequently on television and social media and can be easily found online. In it, a narrator claims that ExxonMobil is "farming" to grow "algae for biofuels that could one day power planes, propel ships, and fuel trucks and cut their greenhouse gas emissions in half." The narration is accompanied by images of crops growing in a field, green pools, green spheres representing young algae, and the Earth.

156. ExxonMobil has made similar claims and used similar language regarding the use of algae as an example of its innovation in the development of alternative fuels in other advertising—including but not limited to an advertorial in the electronic edition of *The New York Times* titled, "The Future of Energy? It May Come From Where You Least Expect: How scientists are tapping algae and plant waste to fuel a sustainable energy future" and a marketing video on YouTube titled, "School of ExxonMobil: Algae Biofuel."

157. As part of these greenwashed advertisements, ExxonMobil claims that it is "working to decrease our overall carbon footprint."

158. At the same time that ExxonMobil is attempting to convince consumers to purchase its products with greenwashed advertising, ExxonMobil is simultaneously devoting resources to expanding exploration of potential new oil and gas reserves, which if used, will do irreparable harm to the climate. ExxonMobil has announced expansion in fossil fuel production at sites off Guyana and in Argentina, and it has publicly indicated plans for new oil and gas projects in the United States. ExxonMobil has further, upon information and belief, indicated interest in opportunities for drilling in the Arctic National Wildlife Refuge.

159. The publication of greenwashed advertisements deceives reasonable consumers into believing that purchasing ExxonMobil products is a responsible choice because ExxonMobil is addressing climate change by investing in alternative energy sources.

160. While ExxonMobil was airing "Growing Fuel" and similar greenwashed advertisements, the vast majority of ExxonMobil's research and development continued to be spent on finding, refining, and producing oil and gas that will eventually enter the market, be burned, and contribute to climate change. This practice continues today.

161. Online, ExxonMobil claims that its goal is to be able to produce 10,000 barrels of algae biofuel per day by 2025.

162. Even if ExxonMobil met its goal and produced 10,000 barrels a day of algae biofuel in 2025, that would be approximately 0.2 percent of its current refinery capacity.

163. ExxonMobil spends less than one percent of its annual revenue on alternative energy research. As a consequence, ExxonMobil provides no more than nominal resources to alternative energy research.

164. ExxonMobil's advertising that emphasizes its purported commitment to developing low carbon fuels does not mention that the low carbon fuels would—even in a best-

case scenario—only be a small fraction of ExxonMobil product, and many of the alternative fuels ExxonMobil is pursuing are many years away from being usable.

165. ExxonMobil also engages in greenwashing by advertising that certain of its fossil-fuel-based products can help consumers reduce greenhouse gas emissions and improve fuel economy.

166. Advertisements claiming that certain ExxonMobil products are environmentally sound have falsely given reasonable consumers the impression that purchasing ExxonMobil's products is an environmentally sound decision and that ExxonMobil is supportive of ambitious action to address climate change.

167. Through advertisements over the past four decades—and continuing today—ExxonMobil has deprived Connecticut consumers of accurate information about their purchasing decisions. Initially these tactics mostly focused on disinformation about climate science, whereas more recent advertising has sought to falsely induce purchases and brand affinity by portraying ExxonMobil as a company working on a solution to climate change through selling "green" products. These tactics have had a material effect on Connecticut consumers.

VI. THE REALITY OF CLIMATE CHANGE IN CONNECTICUT

168. The pre-industrial concentration of carbon dioxide in the atmosphere was approximately 280 parts per million ("ppm"). In 2020, the concentration exceeded 415 ppm.

169. Average global air temperature has risen approximately 1 degree Celsius above its pre-industrial level.

170. In 2018, the IPCC concluded that the Earth will experience 1.5 degrees Celsius warming between 2030 and 2052 if the current pace of greenhouse gas emissions continues.

171. The increase in temperature and CO_2 in the atmosphere is attributable to human activity, including the burning of fossil fuels.

172. Credible scientific evidence indicates—especially considering recent extreme weather events—that the catastrophic effects of climate change are occurring sooner than anticipated.

173. Climate change has negatively impacted, is negatively impacting, and will continue to negatively impact Connecticut's people, lands, waters, coastline, infrastructure, fish and wildlife, natural resources, critical ecosystems, and other assets owned by or held in the public trust by the state of Connecticut and/or its municipalities.

174. Climate change has caused, is causing, and will cause sea level rise, flooding, drought, an increase in extreme temperatures, a decrease in air quality, an increase in severe storms, contamination of drinking water, and an increase in certain disease-transmitting species.

175. As a result of the negative impacts on Connecticut's environment, climate change has caused, is causing, and will cause an increase in illness, infectious disease and death.

176. As a result of the negative impacts on Connecticut's environment, climate change has caused, is causing, and will cause serious damage to existing infrastructure, including but not limited to coastal and inland development, roadways, railways, dams, water and sewer systems, and other utilities.

177. As a result of the negative impacts on Connecticut's environment, climate change has caused, is causing, and will cause serious detrimental economic impacts on the State of Connecticut, its people, businesses and municipalities, including but not limited to heat-related productivity losses, increased energy cost and consumption, and agriculture, tourism, and recreation losses.

178. Even if the Earth continues at its current rate of warming, the State of Connecticut would have to expend at billions of dollars to adapt to the consequences of global warming.

179. ExxonMobil's stated plans to continue exploring for new fossil fuel reserves and not to plan for a reduction in fossil fuel consumption for the next forty years will result in more greenhouse gases being emitted into the atmosphere and will cause more severe health, economic and environmental consequences to the State of Connecticut.

180. ExxonMobil's business practices over at least the last thirty years have prevented or helped to slow the transition to cleaner alternative fuels through a campaign of deception and misleading consumers about the science of climate change, despite ExxonMobil's knowledge of the consequences associated with continuing to use its products.

181. The State of Connecticut, its people, and its municipalities will have to expend billions of dollars to adapt and implement resilience measures to partially combat the ongoing negative effects of climate change.

COUNT ONE

ExxonMobil's Campaign of Deception Violated Conn. Gen. Stat. § 42-110b.

1-181. Paragraphs 1 through 181 of the Complaint are hereby repeated and realleged as Paragraphs 1 through 181 of this First Count as if fully set forth herein.

182. At all times relevant to this Complaint, ExxonMobil was engaged in the conduct of trade or commerce by selling oil and gasoline through retailers and/or branded wholesalers located in Connecticut.

183. By engaging in the acts and practices alleged herein, ExxonMobil made or caused to be made to Connecticut consumers, directly or indirectly, explicitly or by implication,

representations which are material and false or likely to mislead consumers when reasonably interpreted, including, but not limited to, the following:

a. that ExxonMobil was uncertain that climate change was real, occurring or would occur in the future;

b. that ExxonMobil was uncertain that human activity, including the combustion of fossil fuels, contributed to climate change;

c. that there was time to wait before taking action;

d. that there was a balanced debate amongst scientists about whether climate change was occurring, its relationship to human activity, and whether its effects would be positive or negative;

e. that ExxonMobil's research supported the assertions in (a) – (d).

184. By engaging in acts and practices alleged herein, ExxonMobil made deceptive omissions and/or asserted deceptive half-truths about scientific facts and the scientific consensus regarding climate change in order to mislead Connecticut consumers about its knowledge regarding climate change and the industry, including, but not limited to, the following:

a. that scientists employed by ExxonMobil knew that human activity, including the combustion of fossil fuels, contributed to climate change;

b. that climate change has potentially catastrophic effects;

c. that use of ExxonMobil products contributes to climate change;

d. that ExxonMobil decided to emphasize the uncertainty as part of its disinformation campaign as a way to continue to profit off the sale of oil and gasoline;

e. that ExxonMobil knew that reduction of fossil fuel combustion was the primary realistic course of action to address climate change; and

f. that there was scientific consensus, including from ExxonMobil's own scientists, that the combustion of fossil fuels was contributing to climate change and that the effects could be devastating.

185. The advertorials and disinformation in the Defendant's campaign of deception constituted a sophisticated public relations campaign for the purpose of increasing its sales and profits.

186. The acts and practices alleged herein, when interpreted reasonably, were and are likely to affect Connecticut consumers' decisions or conduct.

187. Through the conduct alleged herein, ExxonMobil achieved revenues, profits, and gains which it otherwise would not have.

188. ExxonMobil violated Conn. Gen. Stat. § 42-110b by making false and/or misleading statements about its business practices and their environmental impact that were and are likely to deceive Connecticut consumers.

COUNT TWO

ExxonMobil's Conduct in Count One was Willful.

1-188. Paragraphs 1 through 188 of the First Count are hereby repeated and realleged as Paragraphs 1 through 188 of this Second Count as if fully set forth herein.

189. ExxonMobil engaged in the acts and practices alleged herein when it knew or should have known that its conduct was deceptive, in violation of Conn. Gen. Stat. § 42-110b (a), and, therefore, is liable for civil penalties of up to $5,000 per willful violation pursuant to Conn. Gen. Stat. § 42-110o (b).

COUNT THREE

ExxonMobil's Campaign of Deception Constitutes Unfair Trade Practices in Violation of Conn. Gen. Stat. § 42-110b.

1-188. Paragraphs 1 through 188 of the First Count are hereby repeated and realleged as Paragraphs 1 through 188 of this Third Count as if fully set forth herein.

189. ExxonMobil's unfair acts and practices were in contravention of Connecticut's public policy, including but not limited to the policy set forth in General Statutes § 22a-1, which states that "human activity must be guided by and in harmony with the system of relationships among the elements of nature. . . . [T]he policy of the state of Connecticut is to conserve, improve and protect its natural resources and environment and to control air, land, and water pollution in order to enhance the health, safety and welfare of the people of the state." The statute also provides that the state has a "responsibility as trustee of the environment for the present and future generations."

190. ExxonMobil's unfair acts and practices were in contravention of Connecticut's public policy promoting truth in advertising.

191. ExxonMobil's unfair acts and practices—including, but not limited to, the following—were immoral, unethical, oppressive and/or unscrupulous:

a. deceiving Connecticut consumers about the catastrophic health, safety, economic, and environmental effects of burning fossil fuels; and

b. undermining and delaying the creation of alternative technologies, driven by informed consumer choice, which could have avoided the most devastating effects of climate change.

192. ExxonMobil's unfair acts and practices have directly and proximately caused substantial injury to consumers within the State of Connecticut.

193. The substantial injury caused to consumers by ExxonMobil's unfair acts and practices is not outweighed by any countervailing benefits, but rather resulted in the stifling of an open marketplace for renewable energy, thereby leaving consumers unable to reasonably avoid the detrimental consequences of fossil fuel combustion.

194. ExxonMobil's false and/or misleading statements about its business practices and their environmental impact constitute an unfair trade practice in violation of Conn. Gen. Stat. § 42-110b.

COUNT FOUR

ExxonMobil's Conduct in Count Three was Willful.

1-194. Paragraphs 1 through 194 of the Third Count are hereby repeated and realleged as Paragraphs 1 through 194 of this Fourth Count as if fully set forth herein.

195. ExxonMobil engaged in the acts and practices alleged herein when it knew or should have known that its conduct was unfair, in violation of Conn. Gen. Stat. § 42-110b (a), and, therefore, is liable for civil penalties of up to $5,000 per willful violation pursuant to Conn. Gen. Stat. § 42-110o (b).

COUNT FIVE

ExxonMobil's Deceptive Greenwashing Campaigns Violated Conn. Gen. Stat. § 42-110b.

1-181. Paragraphs 1 through 181 of the Complaint are hereby repeated and realleged as Paragraphs 1 through 181 of this Fifth Count as if fully set forth herein.

182. At all times relevant to this Complaint, ExxonMobil was engaged in the conduct of trade or commerce by selling oil and gasoline through retailers and/or branded wholesalers located in Connecticut.

183. ExxonMobil has engaged in deceptive greenwashing campaigns to portray the company as environmentally conscious as part of the company's marketing strategy to sell oil and gasoline to Connecticut consumers.

184. As part of these "greenwashing" campaigns, ExxonMobil has engaged in deceptive conduct, including but not limited to, the following:

a. made false and/or misleading statements regarding ExxonMobil's activities and their effect on the climate and/or the environment;

b. failed to disclose that the continued use of fossil fuels will have a negative impact on the climate;

c. created an impression that the company is expending far more resources toward developing sustainable energy solutions than it actually is;

d. failed to disclose that the amount of resources ExxonMobil is devoting to research and development of "green" technologies, including but not limited to algae production, is far exceeded by the amount of resources it is expending on exploration, extraction and refinement of oil;

e. created a false impression that ExxonMobil is meaningfully addressing climate change through development of alternative energy resources;

f. used words and imagery to give the appearance that ExxonMobil products are not environmentally harmful; and

g. asserted half-truths about its products and practices and their environmental impact.

185. ExxonMobil's "greenwashing" advertisements were and are a sophisticated public relations campaign for the purpose of increasing its sales and profits.

186. The acts and practices alleged herein, when interpreted reasonably, were and are likely to affect Connecticut consumers' decisions or conduct.

187. Through the conduct alleged herein, ExxonMobil achieved revenues, profits, and gains which it otherwise would not have.

188. ExxonMobil violated Conn. Gen. Stat. § 42-110b by conducting false and misleading Greenwashing Campaigns likely to deceive Connecticut consumers.

COUNT SIX

ExxonMobil's Conduct in Count Five was Willful.

1-188. Paragraphs 1 through 188 of the Fifth Count are hereby repeated and realleged as Paragraphs 1 through 188 of this Sixth Count as if fully set forth herein.

189. ExxonMobil engaged in the acts and practices alleged herein when it knew or should have known that its conduct was deceptive, in violation of Conn. Gen. Stat. § 42-110b (a), and, therefore, is liable for civil penalties of up to $5,000 per willful violation pursuant to Conn. Gen. Stat. § 42-110o (b).

COUNT SEVEN

ExxonMobil's Deceptive Greenwashing Campaigns Constitute Unfair Trade Practices in Violation of Conn. Gen. Stat. § 42-110b.

1-188. Paragraphs 1 through 188 of the Fifth Count are hereby repeated and realleged as Paragraphs 1 through 188 of this Seventh Count as if fully set forth herein.

189. ExxonMobil's unfair acts and practices were in contravention of Connecticut's public policy, including but not limited to the policy set forth in General Statutes § 22a-1, which states that "human activity must be guided by and in harmony with the system of relationships among the elements of nature. . . . [T]he policy of the state of Connecticut is to conserve, improve and protect its natural resources and environment and to control air, land, and water pollution in order to enhance the health, safety and welfare of the people of the state." The statute also provides that the state has a "responsibility as trustee of the environment for the present and future generations."

190. ExxonMobil's unfair greenwashing acts and practices were in contravention of Connecticut's public policy promoting truth in advertising.

191. ExxonMobil's unfair greenwashing acts and practices—including, but not limited to, the following—were immoral, unethical, oppressive and/or unscrupulous:

a. deceiving Connecticut consumers about the catastrophic health, safety, economic, and environmental effects of burning fossil fuels; and

b. undermining and delaying the creation of alternative technologies, driven by informed consumer choice, which could have avoided the most devastating effects of climate change.

192. ExxonMobil's unfair acts and practices have directly and proximately caused substantial injury to consumers within the State of Connecticut.

193. The substantial injury caused to consumers by ExxonMobil's unfair acts and practices is not outweighed by any countervailing benefits, but rather resulted in the stifling of an open marketplace for renewable energy thereby leaving consumers unable to reasonably avoid the detrimental consequences of fossil fuel combustion.

194. ExxonMobil's false and misleading Greenwashing Campaigns constitute unfair trade practices in violation of Conn. Gen. Stat. § 42-110b.

COUNT EIGHT

ExxonMobil's Conduct in Count Seven was Willful.

1-194. Paragraphs 1 through 194 of the Seventh Count are hereby repeated and realleged as Paragraphs 1 through 194 of this Eighth Count as if fully set forth herein.

195. ExxonMobil engaged in the acts and practices alleged herein when it knew or should have known that its conduct was unfair, in violation of Conn. Gen. Stat. § 42-110b (a), and, therefore, is liable for civil penalties of up to $5,000 per willful violation pursuant to Conn. Gen. Stat. § 42-110o (b).

VII. PRAYER FOR RELIEF

WHEREFORE, the State of Connecticut requests the following relief:

1. A finding that by the acts alleged herein, ExxonMobil engaged in unfair and deceptive acts and practices in the course of engaging in trade or commerce within the State of Connecticut in violation of the Connecticut Unfair Trade Practices Act;

2. An injunction pursuant to Conn. Gen. Stat. § 42-110m enjoining ExxonMobil from engaging in any acts that violate the Connecticut Unfair Trade Practices Act, including, but not limited to, the deceptive acts and practices alleged herein;

3. Equitable relief pursuant to Conn. Gen. Stat. § 42-110m for past, present and future deceptive acts and practices that will require future climate change mitigation, adaptation, and resiliency;

4. An order pursuant to Conn. Gen. Stat. § 42-110m directing ExxonMobil to pay a civil penalty for $5,000 for each and every willful violation of the Connecticut Unfair Trade Practices Act;

5. An order pursuant to Conn. Gen. Stat. § 42-110m directing ExxonMobil to pay restitution to the State for all expenditures attributable to ExxonMobil that the State has made and will have to make to combat the effects of climate change;

6. An order pursuant to Conn. Gen. Stat. § 42-100m directing ExxonMobil to disgorge all revenues, profits, and gains achieved in whole or in part through the unfair acts or practices complained of herein;

7. An order that ExxonMobil disclose all research and studies in its possession, including such research and studies previously conducted directly or indirectly by it, its

respective agents, affiliates, servants, officers, directors, employees, and all persons acting in concert with them, that relates to the issue of climate change;

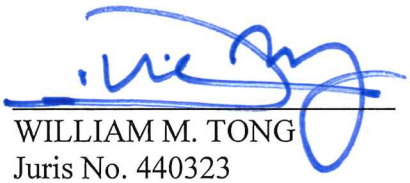
8. An order that ExxonMobil fund a corrective education campaign to remedy the harm inflicted by decades of disinformation, to be administered and controlled by the State or such other independent third party as the Court may deem appropriate;

9. An order pursuant to Conn. Gen. Stat. § 42-100m directing ExxonMobil to pay reasonable attorney's fees to the State of Connecticut;

10. Costs of suit; and

11. Such other relief as this Court deems just and equitable.

PLAINTIFF
STATE OF CONNECTICUT

By: 

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DOCKET NO:		RETURN DATE: October 13, 2020
STATE OF CONNECTICUT	:	SUPERIOR COURT
V.	:	J.D. OF HARTFORD
	:	AT HARTFORD
EXXON MOBIL CORPORATION	:	
	:	SEPTEMBER 14, 2020

STATEMENT OF AMOUNT IN DEMAND

The Plaintiff states that the amount in demand is greater than Fifteen Thousand Dollars ($15,000), exclusive of interest and costs.

PLAINTIFF
STATE OF CONNECTICUT

By: _____

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STATE OF CONNECTICUT}
} SS: HARTFORD, SEPTEMBER 14, 2020
COUNTY OF HARTFORD }

Then and by virtue hereof, on the 14th day of September, 2020, I made due and legal service on the within named Defendant, **EXXON MOBIL CORPORATION,** I left a verified true and attested copy of the within original **Writ, Summons, Complaint, and Statement of Amount in Demand,** with and in the hands of Deneen L. Seifel, duly authorized to accept for Corporation Service Company, Agent For Service for said Defendant, at Updike, Kelly & Spellacy, P.C., 100 Pearl Street, in the City of Hartford.

The within is the original**, Writ, Summons, Complaint, and Statement of Amount in Demand,** with my doings hereon endorsed.

FEES:

Pages	$ 47.00
Endorsements	1.60
Service	40.00
Travel	1.15
Total	$ 89.75

ATTEST:

ALEX J. RODRIGUEZ
STATE MARSHAL
HARTFORD COUNTY

EXHIBIT 2

Questioned
As of: December 1, 2020 2:17 PM Z

California v. BP P.L.C.

United States District Court for the Northern District of California

February 27, 2018, Decided; February 27, 2018, Filed

No. C 17-06011 WHA; No. C 17-06012 WHA

Reporter
2018 U.S. Dist. LEXIS 32990 *; 48 ELR 20036; 2018 WL 1064293

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. BP P.L.C., et al., Defendants.

Subsequent History: Motion granted by *City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 2018 U.S. Dist. LEXIS 106895 (N.D. Cal., June 25, 2018)*

Dismissed by, Judgment entered by *City of Oakland v. BP p.l.c., 2018 U.S. Dist. LEXIS 126258 (N.D. Cal., July 27, 2018)*

Related proceeding at *City of San Francisco v. Exxon Mobil Corp., 2020 Tex. App. LEXIS 5226 (Tex. App. Fort Worth, June 18, 2020)*

Core Terms

federal common law, plaintiffs', Air, global, fuels, displaced, emissions, fossil, nuisance claim, pollution, warming, state law, complaints, interstate, domestic, court of appeals, courts, public nuisance, nuisance, sea

Counsel: **[*1]** For The People of the State of California, acting by and through the Oakland City Attorney, (3:17-cv-06011-WHA, 3:17-cv-06012-WHA) Plaintiff: Erin Brianna Bernstein, LEAD ATTORNEY, Office of the City Attorney of San Francisco, San Francisco, CA; Maria Bee, LEAD ATTORNEY, Oakland City Attorney's Office, Oakland, CA; Shana E. Scarlett, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Benjamin A. Crass, Benjamin Krass, Matthew F. Pawa, Wesley Kelman, Hagens Berman Sobol Shapiro LLP, Newton, MA; Emerson Hilton, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Steve W. Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA.

For BP P.L.C., a public limited company of England and Wales, (3:17-cv-06011-WHA, 3:17-cv-06012-WHA) Defendant: Jonathan W. Hughes, LEAD ATTORNEY, Arnold & Porter LLP, San Francisco, CA; John David Lombardo, Arnold & Porter LLP, Los Angeles, CA; Matthew T. Heartney, Arnold & Porter, Los Angeles, CA; Nancy G. Milburn, Philip H. Curtis, Arnold Porter Kaye Scholer LLP, New York, NY; Rachael S Shen, Arnold Porter Kaye Scholer LLP, San Francisco, CA.

For Chevron Corporation, a Delaware corporation, (3:17-cv-06011-WHA, 3:17-cv-06012-WHA) Defendant, 3rd party **[*2]** plaintiff: Theodore J. Boutrous, Jr., LEAD ATTORNEY, Andrea Ellen Neuman, Gibson Dunn & Crutcher LLP, Los Angeles, CA; Anne Marie Champion, Gibson Dunn & Crutcher LLP, New York, NY; Erica Worth Harris, Susan Godfrey LLP, Houston, TX; Ethan D. Dettmer, Gibson Dunn & Crutcher LLP, San Francisco, CA; Herbert J Stern, Stern Kilcullen LLC, Florham Park, NJ United Sta; Joel M. Silverstein, Stern & Kilcullen, LLC, Florham Park, NJ; Johnny William Carter, Susman Godfrey LLP, Houston, TX; Kalpana Srinivasan, Michael Brent Adamson, William Edward Thomson, Susman Godfrey L.L.P., Los Angeles, CA; Kemper Diehl, PRO HAC VICE, Susman Godfrey L.L.P., Seattle, WA; Neal Stuart Manne, Susman Godfrey LLP, Houston, TX; Steven M. Shepard, Susman Godfrey LLP, New York, NY.

For ConocoPhillips Company, a Delaware corporation, (3:17-cv-06011-WHA, 3:17-cv-06012-WHA) Defendant: Megan R Nishikawa, LEAD ATTORNEY, King & Spalding LLP, San Francisco, CA; Carol Margaret Wood, Tracie Jo Renfroe, King & Spalding LLP,

Houston, TX; Justin Torres, King & Spalding LLP, Washington, DC; Nicholas Allen Miller-Stratton, King and Spalding LLP, San Francisco, CA.

For Exxon Mobil Corporation, a New Jersey corporation, (3:17-cv-06011-WHA, **[*3]** 3:17-cv-06012-WHA) Defendant: Mark Randall Oppenheimer, LEAD ATTORNEY, Dawn Sestito, O'Melveny & Myers LLP, Los Angeles, CA; Daniel John Toal, Jaren Janghorbani, Theodore V. Wells, Jr., Paul Weiss Rifkind Wharton & Garrison LLP, New York, NY.

For Royal Dutch Shell PLC, a public limited company of England and Wales, (3:17-cv-06011-WHA, 3:17-cv-06012-WHA) Defendant: Elizabeth Ann Kim, LEAD ATTORNEY, Jerome Cary Roth, Munger Tolles & Olson LLP, San Francisco, CA; Daniel Paul Collins, Munger Tolles & Olson LLP, Los Angeles, CA.

Judges: WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

Opinion by: WILLIAM ALSUP

Opinion

ORDER DENYING MOTIONS TO REMAND

INTRODUCTION

In these "global warming" actions asserting claims for public nuisance under state law, plaintiff municipalities move to remand. For the following reasons, the motions are **DENIED**.

STATEMENT

Oakland and San Francisco brought these related actions in California Superior Court against defendants BP p.l.c, Chevron Corporation, ConocoPhillips Company, Exxon Mobil Corporation, and Royal Dutch Shell plc. Defendants are the first (Chevron), second (Exxon), fourth (BP), sixth (Shell) and ninth (ConocoPhillips) largest cumulative producers of fossil fuels worldwide (Compls. ¶ 10). **[*4]**

Burning fossil fuels adds carbon dioxide to that already naturally present in our atmosphere. Plaintiffs allege that the combustion (by others) of fossil fuels produced by defendants has increased atmospheric levels of carbon dioxide and, as a result, raised global temperatures and melted glaciers to cause a rise in sea levels, and thus caused flooding in Oakland and San Francisco (Oakl. Compl. ¶¶ 38, 48, 50; SF Compl. ¶¶ 38, 49, 51).

The complaints do not seek to impose liability for direct emissions of carbon dioxide, which emissions flow from combustion in worldwide machinery that use such fuels, like automobiles, jets, ships, train engines, powerplants, heating systems, factories, and so on. Rather, plaintiffs' state law nuisance claims are premised on the theory that — despite long-knowing that their products posed severe risks to the global climate — defendants produced fossil fuels while simultaneously engaging in large scale advertising and public relations campaigns to discredit scientific research on global warming, to downplay the risks of global warming, and to portray fossil fuels as environmentally responsible and essential to human well-being (Oakl. Compl. ¶¶ 11, 62-83; **[*5]** SF Compl. ¶¶ 11, 63-84).

The complaints further allege that accelerated sea level rise has and will continue to inundate public and private property in Oakland and San Francisco. Although plaintiffs (and the federal government through the Army Corps of Engineers) have already taken action to abate the harm of sea level rise, the magnitude of such actions will continue to increase. The complaints stress that a severe storm surge, coupled with higher sea levels, could result in loss of life and extensive damage to public and private property (Oakl. Compl. ¶¶ 84-92; SF Compl. ¶¶ 85-93).

Based on these allegations, each complaint asserts a single cause of action under California public nuisance law. As relief, such complaints seek an abatement fund to pay for seawalls and other infrastructure needed to address rising sea levels (Oakl. Compl. ¶¶ 93-98; SF Compl. ¶¶ 94-99, Relief Requested ¶ 2).

Defendants removed these actions. Plaintiffs now move to remand to state court. This order follows full briefing

and oral argument.[1]

ANALYSIS

Plaintiffs' nuisance claims — which address the national and international geophysical phenomenon of global warming — are necessarily governed by federal common **[*6]** law. District courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States," including claims brought under federal common law. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 850, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985)* (citing *28 U.S.C. § 1331*). Federal jurisdiction over these actions is therefore proper.

Federal courts, unlike state courts, do not possess a general power to develop and apply their own rules of decision. *City of Milwaukee v. Illinois, 451 U.S. 304, 312, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981)* ("*Milwaukee II*"). Federal common law is appropriately fashioned, however, where a federal rule of decision is "necessary to protect uniquely federal interests." *Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981)*. While not all federal interests fall into this category, uniquely federal interests exist in "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations." *Id. at 641*. In such disputes, the "nature of the controversy makes it inappropriate for state law to control." *Ibid.*

In *Illinois v. City of Milwaukee, 406 U.S. 91, 107 n.9, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (1972)* ("*Milwaukee I*"), for example, the Supreme Court applied federal common law to an interstate nuisance claim, explaining that:

> Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights **[*7]** of a State against improper impairment by sources outside its domain. The more would this seem to be imperative in the present era of growing concern on the part of a State about its ecological conditions and impairments of them. In the outside sources of such impairment, more conflicting disputes, increasing assertions and proliferating contentions would seem to be inevitable. Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights.

The Supreme Court has continued to affirm that, post—*Erie*, federal common law includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution. *Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 421, 131 S. Ct. 2527, 180 L. Ed. 2d 435 (2011)* ("*AEP*"). Both our court of appeals and the Supreme Court have addressed the viability of the federal common law of nuisance to address global warming. The parties sharply contest the import of these decisions.

The plaintiffs in *AEP* brought suit against five domestic emitters of carbon dioxide, alleging that by contributing to global warming, those defendants had violated the federal common **[*8]** law of interstate nuisance, or, in the alternative, state tort law. *564 U.S. at 418*. The Supreme Court recognized that environmental protection "is undoubtedly an area within national legislative power, one in which federal courts may fill in statutory interstices, and, if necessary, even fashion federal law." *Id. at 421* (internal quotes and citations omitted). It held, however, that because the *Clean Air Act* "[spoke] directly" to the issue of carbon-dioxide emissions from domestic power-plants, the Act displaced any federal common law right to seek an abatement of defendants' emissions. *Id. at 424-25*. *AEP* did not reach the plaintiffs' state law claims. Instead, Justice Ginsburg explained that "the availability *vel non* of a state lawsuit depend[ed], *inter alia*, on the preemptive effect of the federal Act," and left the matter open for consideration on remand. *Id. at 429*.

Our court of appeals addressed similar claims in *Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012)* ("*Kivalina*"). Citing to *AEP*, the appellate court held that the Clean Air Act also displaced federal common law nuisance claims for *damages* caused by global warming. *Id. at 856*. *Kivalina* underscored that "federal common law can apply to transboundary pollution suits," and that most often such suits are — as here — founded on **[*9]** a theory of public nuisance. *Id.*

[1] Six similar actions, filed by the County of San Mateo, City of Imperial Beach, County of Marin, County of Santa Cruz, City of Santa Cruz and City of Richmond, respectively, are pending in this district before Judge Vince Chhabria (Case Nos. 17-cv-4929, 17-cv-4934, 17-cv-4935, 18-cv-0450, 18-cv-0458, 18-cv-0732). In comparison to the instant cases, these actions assert additional claims (including product liability, negligence, and trespass) against additional defendants.

at 855. But *Kivalina* also failed to reach the plaintiffs' state law claims, which the district court had dismissed without prejudice to their refiling in state court. *Id. at 858*; *Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 882-83 (N.D. Cal. 2009)* (Judge Saundra Brown Armstrong).

Here, as in *Milwaukee I*, *AEP*, and *Kivalina*, a uniform standard of decision is necessary to deal with the issues raised in plaintiffs' complaints. If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints, a problem centuries in the making (and studying) with causes ranging from volcanoes, to wildfires, to deforestation to stimulation of other greenhouse gases — and, most pertinent here, to the combustion of fossil fuels. The range of consequences is likewise universal — warmer weather in some places that may benefit agriculture but worse weather in others, *e.g.*, worse hurricanes, more drought, more crop failures and — as here specifically alleged — the melting of the ice caps, the rising of the oceans, and the inevitable flooding of coastal lands. Taking the complaints at face value, the scope of the worldwide predicament demands the most comprehensive view available, which in our American court **[*10]** system means our federal courts and our federal common law. A patchwork of fifty different answers to the same fundamental global issue would be unworkable. This is not to say that the ultimate answer under our federal common law will favor judicial relief. But it is to say that the extent of any judicial relief should be uniform across our nation.

Plaintiffs raise three primary arguments in seeking to avoid federal common law. None are persuasive.

First, plaintiffs argue that — in contrast to earlier transboundary pollution suits such as *AEP* and *Kivalina* — plaintiffs' nuisance claims are brought against *sellers* of a product rather than direct *dischargers* of interstate pollutants. Extending federal common law to the current dispute, plaintiffs caution, would extend the scope of federal nuisance law well beyond its original justification. To be sure, plaintiffs raise novel theories of liability. And it is also true, of course, that the development of federal common law is necessary only in a "few and restricted instances." *Milwaukee II, 451 U.S. at 313*. As explained above, however, the transboundary problem of global warming raises exactly the sort of federal interests that necessitate a uniform solution. This is **[*11]** no less true because plaintiffs assert a novel theory of liability, nor is it less true because plaintiffs' theory mirrors the sort of state-law claims that are traditionally applied to products made in other states and sold nationally.[2]

Plaintiffs' reliance on *National Audubon Society v. Department of Water, 869 F.2d 1196 (9th Cir. 1988)*, is also misplaced. There, our court of appeals held that federal nuisance law did not extend to claims concerning a California agency's diversion of water from a lake wholly within the state. Although the water diversion may have led to air pollution in both California and Nevada, our court of appeals found that it was "essentially a domestic dispute" in which application of state law would not be inappropriate. *Id. at 1204-05*. The court underscored, however, that the Supreme Court does consider the application of state law inappropriate (and the application of federal law appropriate) in "those interstate controversies which involve a state suing sources outside of its own territory." *Id. at 1205*.

Second, plaintiffs contend that — even if their claims are tantamount to the interstate pollution claims raised in *AEP* and *Kivalina* — the Clean Air Act displaces such federal common law claims. Moreover, they argue, *International Paper Company v. Ouellette, 479 U.S. 481, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987)*, held that once federal common **[*12]** law is displaced, state law once again governs.

This order presumes that when congressional action displaces federal common law, state law becomes available to the extent it is not preempted by statute. *AEP, 564 U.S. at 429*. But while *AEP* and *Kivalina* left open the question of whether nuisance claims against *domestic emitters* of greenhouse gases could be brought under state law, they did not recognize the displacement of the federal common law claims raised here. Emissions from domestic sources are certainly regulated by the Clean Air Act, but plaintiffs here have fixated on an earlier moment

[2] Notably, in support of their theory of liability plaintiffs cite decisions where the alleged nuisance was caused by a product's use *in California*. In *People v. ConAgra Grocery Products Company, 17 Cal. App. 5th 51, 227 Cal. Rptr. 3d 499 (2017)*, the plaintiffs sued producers and manufacturers of lead paint, arguing that the defendants deceptively minimized its dangers and promoted its use. The plaintiffs there, however, sought abatement only with respect to products used in California buildings. Similarly, the claims in *Ileto v. Glock Inc., 349 F.3d 1191 (9th Cir. 2003)*, concerned the manufacture and marketing of firearms but stemmed from the shooting of six individuals in Los Angeles. Plaintiffs' claims here, by contrast, are not localized to California and instead concern fossil fuel consumption worldwide.

in the train of industry, the earlier moment of production and sale of fossil fuels, not their combustion.

Through the Clean Air Act, Congress established a comprehensive state and federal scheme to control air pollution in the United States. 42 U.S.C. § 7401 et seq. The central elements of this comprehensive scheme are (1) the Act's provisions for uniform national standards of performance for new stationary sources of air pollution, § 7411, (2) the Act's provisions for uniform national emission standards for certain air pollutants, § 7412, (3) the Act's promulgation of primary and secondary national ambient air quality standards, §§ 7408-09, and (4) the development of **[*13]** national ambient air quality standards for motor vehicle emissions, § 7521. The Clean Air Act displaced the nuisance claims asserted in *Kivalina* and *AEP* because the Act "spoke directly" to the issues presented — *domestic* emissions of greenhouse gases. The same cannot be said here.

Plaintiffs' nuisance claims center on an alleged scheme to produce and sell fossil fuels while deceiving the public regarding the dangers of global warming and the benefits of fossil fuels. Plaintiffs do not bring claims against emitters, but rather bring claims against defendants for having put fossil fuels into the flow of international commerce. Importantly, unlike *AEP* and *Kivalina*, which sought only to reach domestic conduct, plaintiffs' claims here attack behavior worldwide. While some of the fuel produced by defendants is certainly consumed in the United States (emissions from which are regulated by the Clean Air Act), greenhouse gases emanating from overseas sources are equally guilty (perhaps more so) of causing plaintiffs' harm. Yet these foreign emissions are out of the EPA and Clean Air Act's reach.

For displacement to occur, "[t]he existence of laws generally applicable to the question is not sufficient; **[*14]** the applicability of displacement is an issue-specific inquiry." *Kivalina, 696 F.3d at 856*. In *Milwaukee I*, the Supreme Court considered multiple statutes potentially affecting the federal question but ultimately concluded that no statute directly addressed the question and accordingly held that the federal common law public nuisance claim had not been displaced. *406 U.S. at 101-03*. Here, the Clean Air Act does not provide a sufficient legislative solution to the nuisance alleged to warrant a conclusion that this legislation has occupied the field to the exclusion of federal common law.

Third, the well-pleaded complaint rule does not bar removal of these actions. Federal jurisdiction exists in this case if the claims necessarily arise under federal common law. *Wayne v. DHL Worldwide Express, 294 F.3d 1179, 1184 (9th Cir. 2002)*. Plaintiffs concede that our court of appeals recognized this rule, but contend that it should be ignored as dicta. To the contrary, in support *Wayne* cited *Milwaukee I*, where the Supreme Court explained that a claim "'arises under' federal law if the dispositive issues stated in the complaint require the application of federal common law." *406 U.S. at 100*.[3]

Plaintiffs' claims for public nuisance, though pled as state-law claims, depend on a global complex **[*15]** of geophysical cause and effect involving all nations of the planet (and the oceans and atmosphere). It necessarily involves the relationships between the United States and all other nations. It demands to be governed by as universal a rule of apportioning responsibility as is available. This order does not address whether (or not) plaintiffs have stated claims for relief. But plaintiffs' claims, if any, are governed by federal common law. Federal jurisdiction is therefore proper.

The foregoing is sufficient to deny plaintiffs' motions for remand. It is worth noting, however, that other issues implicated by plaintiffs' claims also demonstrate the proprietary of federal common law jurisdiction. Importantly, the very instrumentality of plaintiffs' alleged injury — the flooding of coastal lands — is, by definition, the navigable waters of the United States. Plaintiffs' claims therefore necessarily implicate an area quintessentially within the province of the federal courts. *See Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 772 (7th Cir. 2011)*. This issue was not waived, as defendants timely invoked federal common law as a grounds for removal.

CONCLUSION

For the foregoing reasons, plaintiffs' motions for remand are **DENIED**.

[3] Plaintiffs' remaining authorities on this point are inapposite. Contrary to plaintiffs, our court of appeals found that it lacked subject-matter jurisdiction over the state-law claims asserted in *Patrickson v. Dole Food Company* because it was merely possible that "the federal common law of foreign relations *might* arise as an issue." *251 F.3d 795, 803 (9th Cir. 2001)* (emphasis added). Similarly, the complaint in *Provincial Government of Marinduque v. Placer Dome, Inc., 582 F.3d 1083, 1090 (9th Cir. 2009)*, did not raise federal law on its face, but rather implicated it "only defensively."

CERTIFICATION UNDER *28 U.S.C. § 1292(b)*

The district **[*16]** court hereby certifies for interlocutory appeal the issue of whether plaintiffs' nuisance claims are removable on the ground that such claims are governed by federal common law. This order finds that this is a controlling question of law as to which there is substantial ground for difference of opinion and that its resolution by the court of appeals will materially advance the litigation. (This certification, however, is not itself a stay of proceedings.)

IT IS SO ORDERED.

Dated: February 27, 2018.

/s/ William Alsup

WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE

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State v. Moody's Corp.

United States District Court for the District of Connecticut

January 5, 2011, Decided; January 5, 2011, Filed

Civil No. 3:10cv546(JBA)

Reporter
2011 U.S. Dist. LEXIS 780 *; 2011 WL 63905

State of Connecticut, Plaintiff, v. Moody's Corporation, et al, Defendants.

Subsequent History: Related proceeding at State v. Moody's Corp., 2012 Conn. Super. LEXIS 1268 (Conn. Super. Ct., May 10, 2012)

Outcome
Motion granted in part, denied in part.

Core Terms

real party in interest, removal, restitution, diversity jurisdiction, Consumer, diversity, costs, practices, parties, injunctive relief, purposes, ratings, individual citizen, citizenship, damages, class action, quasi-sovereign, unfair

Case Summary

Overview

Plaintiff State of Connecticut (State) moved to remand its suits against defendants credit-rating agencies under Conn. Gen. Stat. § 42-110a et seq. to state court. Remand was proper because the State's stake in the cases was shown by Conn. Gen. Stat. § 42-110m, which let the Attorney General seek relief in its name, so it was a real party in interest with an articulated interest, due to its authority under Conn. Gen. Stat. § 42-110m to further the well-being of its populace, causing incomplete diversity of citizenship and a lack of subject-matter jurisdiction under 28 U.S.C.S. § 1332(a).

LexisNexis® Headnotes

Civil Procedure > Preliminary Considerations > Jurisdiction > General Overview

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Removal > Elements for Removal > Removability

HN1[] **Preliminary Considerations, Jurisdiction**

A party asserting jurisdiction bears the burden of proving that a case is properly in federal court. Thus, where jurisdiction is asserted by a defendant in a removal petition, it follows that the defendant has the burden of establishing that removal is proper.

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

Governments > State & Territorial Governments > Claims By & Against

Civil Procedure > Parties > Real Party in Interest > General Overview

HN2 **Diversity Jurisdiction, Citizenship**

There is no question that a state is not a "citizen" for purposes of diversity jurisdiction, and that a state may be a real party in interest insofar as it seeks relief on behalf of its citizenry as a whole.

Civil Procedure > Parties > Real Party in Interest > General Overview

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > Individuals

HN3 **Parties, Real Party in Interest**

The "citizens" upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy, not merely nominal parties.

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

Civil Procedure > Parties > Real Party in Interest > General Overview

HN4 **Diversity Jurisdiction, Citizenship**

Where a state seeks both relief on behalf of a subset of its citizens and injunctive relief, the state's quasi-sovereign interest renders it the real party in interest for determining jurisdiction.

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

Civil Procedure > Parties > Real Party in Interest > General Overview

HN5 **Diversity Jurisdiction, Citizenship**

Where a state is a real party in interest, there is no diversity of citizenship, even if individual citizens are also real parties in interest, because 28 U.S.C.S. § 1332 requires complete diversity between the parties, that is, diversity jurisdiction does not exist unless each defendant is a citizen of a different state from each plaintiff.

Civil Procedure > Special Proceedings > Class Actions > Class Action Fairness Act

Governments > State & Territorial Governments > Claims By & Against

HN6 **Class Actions, Class Action Fairness Act**

The Class Action Fairness Act (CAFA), 28 U.S.C.S. § 1332(d), permits removal of certain class actions under 28 U.S.C.S. § 1453(b). CAFA defines the term "class action" to encompass a "mass action," i.e., any civil action in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact. 28 U.S.C.S. § 1332(d)(11)(A), (B)(i). However, the term "mass action" shall not include any civil action in which all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a state statute specifically authorizing such action. 28 U.S.C.S. § 1332(d)(11)(B)(ii)(III).

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

Civil Procedure > ... > Removal > Procedural Matters > General Overview

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN7 **Basis of Recovery, Bad Faith Awards**

A court may exercise its discretion to award fees and costs where a removing party lacked an objectively reasonable basis for seeking removal. There is no presumption in favor of or against fee awards under 28 U.S.C.S. § 1447(c), but assessing such costs should recognize the purpose of disincentivizing use of removals as a method for delaying litigation or increasing costs on a plaintiff.

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For McGraw-Hill Co, Inc, Standard & Poor's Financial Services, LLC, Consol Defendants: Adam Zurofsky, Floyd Abrams, Tammy Roy, LEAD ATTORNEYS, PRO HAC VICE, Cahill, Gordon & Reindel, New York, NY; Steven David Ecker, LEAD ATTORNEY, Cowdery, Ecker & Murphy, L.L.C., Hartford, **[*2]** CT; William James Gullotta, LEAD ATTORNEY, Cowdery, Ecker & Murphy, Hartford, CT.

Judges: Janet Bond Arterton, U.S.D.J.

Opinion by: Janet Bond Arterton

Opinion

RULING ON MOTIONS FOR REMAND AND FEES

The State of Connecticut brought two suits in state court, against Moody's Corporation and Moody's Investors service, Inc. (collectively "Moody's") and against McGraw Hill Co., Inc. and Standard & Poor's Financial Services, LLC (collectively "S&P"), under the Connecticut Unfair Trade Practices Act ("CUTPA"), *Conn. Gen. Stat. § 42-110a, et seq*., seeking redress for Defendants' alleged business practices of misrepresenting the independence and objectivity of their ratings assigned to structured-finance securities, which the State claims constitute unfair or deceptive practices. Defendants removed to federal court on the basis of diversity jurisdiction, where both cases have been consolidated. Plaintiff now moves to remand the consolidated action and for costs and fees, claiming that because Connecticut has brought suit against Defendants in its sovereign and quasi-sovereign enforcement capacities pursuant to express statutory authority, it is the real party in interest, thus there is no diversity jurisdiction. For the following **[*3]** reasons, Plaintiff's motions to remand will be granted, but Defendants will not be ordered to pay attorneys costs and fees.

I. Background

At the request of the Commissioner of the Connecticut Department of Consumer Protection, the State of Connecticut brought these CUTPA actions against Defendants in Connecticut Superior Court, alleging that Defendants, credit-rating agencies [1] that regularly provide credit ratings on residential mortgage backed securities ("RMBSs") and collateralized debt obligations ("CDOs"), regularly and falsely made public representations—routinely relied on by investors and other participants in the financial markets within the State of Connecticut—that their ratings on structured-securities are independent, objective, and not influenced by either Defendants' or their clients' financial interest. Plaintiff contends that Defendants had a financial stake in assigning high ratings to securities in that high ratings would generate higher-volume trading in structured finance securities, which would positively affect Defendants' business. Plaintiff seeks a declaration that Defendants violated the Connecticut Unfair Trade Practices Act, an injunction prohibiting Defendants **[*4]** from continuing to engage in deceptive and unfair business practices, an accounting, restitution and disgorgement under *Conn. Gen. Stat. § 42-110m*, and civil penalties.

II. Standard

[1] "Credit rating agencies distinguish among grades of debt creditworthiness. In other words, a credit rating is a statement as to the likelihood that the borrower or issuer will meet its contractual, financial obligations as they become due." (Moody's Compl. [Doc. # 1] ¶ 50.)

HN1[] "[T]he party asserting jurisdiction bears the burden of proving that the case is properly in federal court." United Food & Commercial Workers Union, Local 919, AFL-CIO v. CenterMark Props. Meriden Square, Inc., 30 F.3d 298, 301 (2d Cir. 1994). Thus, "'[w]here, as here, jurisdiction is asserted by a defendant in a removal petition, it follows that the defendant has the burden of establishing that removal is proper.'" Calif. Pub. Emp.'s Ret. Sys. v. WorldCom, Inc., 368 F.3d 86, 100 (2d Cir. 2004) (quoting CenterMark Props., 30 F.3d at 301). The Court concludes that Defendants have failed to bear their burden, and the cases must be remanded to state court.

III. Discussion

The State argues that diversity jurisdiction is lacking, both because **[*5]** it is a citizen of no state for diversity-jurisdiction purposes and because the Class Action Fairness Act does not confer federal court jurisdiction because it is inapplicable to state enforcement actions. Defendants argue that the State, by seeking restitution for individual citizens, takes on the citizenship of those individuals in the diversity-jurisdiction equation.

A. Diversity Jurisdiction[2]

The parties agree that HN2[] "there is no question that a State is not a 'citizen' for purposes of . . . diversity jurisdiction," Moor v. Cnty. of Alameda, 411 U.S. 693, 717, 93 S. Ct. 1785, 36 L. Ed. 2d 596 (1973), and that a state may be a real party in interest insofar as it seeks relief on behalf of its citizenry as a whole. They disagree as to whether the State of Connecticut is a real party in interest to the extent it seeks restitution and as to whether the citizenship of Connecticut individuals who may be entitled to restitution should govern. HN3[] "[T]he 'citizens' upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy," not merely nominal parties. **[*6]** Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 461, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980).

Defendants contend that the State's prayer for relief, which includes restitution under Conn. Gen. Stat. § 42-110m, is necessarily brought on behalf of the subset of Connecticut residents who purchased securities rated by Defendants, rendering the State a nominal party and the individual Connecticut residents the real parties in interest, such that their citizenship controls and satisfies diversity requirements. Defendants rely on cases holding that so long as any relief is sought on behalf of individual citizens who have individual-enforcement rights, the jurisdiction of those citizens is determinative of whether there is diversity jurisdiction over the entire action. *See, e.g.*, Louisiana ex rel. Caldwell v. Allstate Ins. Co., 536 F.3d 418, 429-30 (5th Cir. 2008) (Louisiana sued insurance company defendants for antitrust violations and in addition to injunctive relief, sought treble damages under § 138 of the Monopolies Act on behalf of "any person who is injured in his business or property," which the Fifth Circuit determined made these "individuals [who] have the right to enforce this provision" the real parties in interest for **[*7]** diversity jurisdiction purposes); West Virginia ex rel. McGraw v. Comcast Corporation, 705 F. Supp. 2d 441 (E.D. Pa. 2010) (individual Comcast cable subscribers were real parties in interest in suit brought by the state for injunctive relief and treble damages, where there were already "many private lawsuits . . . filed on behalf of Comcast's allegedly aggrieved premium cable subscribers . . . [that] suggests that the State's inherent *parens patriae* prerogative to prevent . . . injury to those who cannot protect themselves . . . is not implicated by the pursuit of treble and compensatory damages" (internal quotations omitted)); Connecticut v. Levi Strauss & Co., 471 F. Supp. 363 (D. Conn. 1979) ("[A] state's role in suing on behalf of particular citizens sufficiently dispenses with its sovereign capacity not only to bar access to the Supreme Court's original jurisdiction but also to gain access to the district court's diversity jurisdiction.").

The State responds that not only does it have an sovereign interest in enforcing its own laws, but it also has a "quasi-sovereign" interest in protecting all Connecticut citizens from Defendants' allegedly illegal conduct and deterring future **[*8]** violations of CUTPA, and therefore, it is the real party in interest, and there is no diversity of citizenship. Several courts departing from the approach urged by Defendants have examined the state's interest as a whole and have concluded that HN4[] where a state seeks both relief on behalf of a subset of its citizens and injunctive relief, the state's quasi-sovereign interest renders it the real party in interest for determining jurisdiction. In *New York v. General Motors, Corporation*, a suit against General Motors for injunctive relief and restitution for fraudulent business practices under Section 63(12) of the New York Executive Law, the court determined the state to be the real party in interest

[2] The parties do not dispute that the amount in controversy exceeds the $75,000 jurisdictional requirement. 28 U.S.C. § 1332(a).

because

> [r]ecovery of damages for aggrieved consumers is but one aspect of the case. The focus is on obtaining wide-ranging injunctive relief designed to vindicate the State's quasi-sovereign interest in securing an honest marketplace for all consumers. That recovery on behalf of an identifiable group is also sought should not require this Court to ignore the primary purpose of the action and to characterize it as one brought solely for the benefit for a few private parties.

547 F. Supp. 703, 705-06 (S.D.N.Y. 1982). **[*9]** *See also, e.g.*, New York v. Charles Schwab & Co., Inc., No. 09cv7709(LMM), 2010 U.S. Dist. LEXIS 5830, 2010 WL 286629, * 6 (S.D.N.Y. Jan. 19, 2010) (where New York sought injunctive and restitutionary relief for alleged violations of its General Business Law, the state was the real party in interest, because it was "completely understandable that a state should, at the same time, seek to prevent the recurrence of harmful conduct in the future and to remedy the damage it has caused in the past"); Hood ex rel. Mississippi v. Microsoft Corp., 428 F. Supp. 2d 537, 546 (S.D. Miss. 2006) ("the fact that private parties may benefit monetarily from a favorable resolution of this case does not minimize nor negate [the state] plaintiff's substantial interest," such that the state was the real party in interest); Wisconsin v. Abbott Labs, 341 F. Supp.2d 1057, 1062 (W.D. Wis. 2004) ("Defendants are correct that plaintiff appears to be wearing two hats by requesting relief for itself and for private parties, but that fact does not require this court to break the complaint apart along those lines for purposes of determining the real party in interest. On the contrary, most courts analyze real party in interest questions by **[*10]** examining the state's interest in a lawsuit as a whole.").

Here the State's stake in the litigation as a whole—including the restitution claim—is evidenced by Conn. Gen. Stat. § 42-110m, which explicitly authorizes the Attorney General to sue for injunctive relief and restitution "in the name of the state of Connecticut" when requested by the Commissioner of the Department for Consumer Protection. As in *General Motors Corp.*, in which New York had a statutory interest to "secur[e] an honest marketplace in which to transact business," 547 F. Supp. at 706, Connecticut has a statutory interest under CUTPA "to protect the public from unfair practices in the conduct of any trade or commerce," Eder Bros., Inc. v. Wine Merchants of Connecticut, Inc., 275 Conn. 363, 380, 880 A.2d 138 (2005). It is noteworthy that the cases Defendants rely on, Caldwell, Comcast, and Levi Strauss, all involve state actions to secure damages or restitution explicitly on behalf of specific individuals, insurance policy holders, cable subscribers, and blue jeans purchasers respectively. Here, although the State alleges harm to individual citizens, its prayer for relief seeks only "[a]n order pursuant to Conn. Gen. Stat. § 42-110, **[*11]** directing [Defendants] to pay restitution," without specifying beneficiaries of that restitution, which the State argues may be ordered paid to the Connecticut Department of Consumer Protection's Consumer Protection Enforcement Account "to fund positions and other related expenses for the enforcement of Department of Consumer Protection licensing and registration laws," Conn. Gen. Stat. § 21a-8a(a). Thus, far from Defendants' suggestion that the State is merely a nominal party in seeking restitution, the State is a real party in interest with an articulated "interest apart from the interests of particular private parties," New York ex rel. Vacco v. Operation Rescue Nat'l, 80 F.3d 64, 71 (2d Cir. 1996), by virtue of its statutory authority under § 42-110m to further the "well-being of its populace," Snapp & Son, Inc. v. P.R., 458 U.S. 592, 602, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982).

HN5[↑] Where a state is a real party in interest, there is no diversity of citizenship, even if individual citizens are also real parties in interest, because 28 U.S.C. § 1332 requires complete diversity between the parties, "[t]hat is, diversity jurisdiction does not exist unless *each* defendant is a citizen of a different State from *each* **[*12]** plaintiff." Owen Equip. & Erection Co. V. Kroger, 437 U.S. 365, 374, 98 S. Ct. 2396, 57 L. Ed. 2d 274 (1978) (emphasis in original); *see also, e.g.,* Hood v. Hoffman-La Roche, Ltd., 639 F. Supp. 2d 25, 33 (D. D.C. 2009) (complete diversity lacking in state enforcement action seeking forfeiture, civil penalties, and compensatory damages for individual citizens, because the state was a real party in interest in addition to individual citizens); Hood v. AstraZeneca Pharms. LP, 744 F. Supp. 2d 590, No. 1:10CR104-SA-JAD, 2010 U.S. Dist. LEXIS 107411, 2010 WL 3951906, * 3 (N.D. Miss. Oct. 7, 2010) (same). Thus, because the State of Connecticut is a real party in interest for purposes of determining jurisdiction because of its interests under Conn. Gen. Stat. § 42-110m, there is incomplete diversity of citizenship, and the Court lacks subject-matter jurisdiction under 28 U.S.C. § 1332(a).

B. Class Action Fairness Act

Defendants also maintain that even if the Court lacks diversity jurisdiction, this matter is properly before it pursuant to HN6[↑] the Class Action Fairness Act

("CAFA"), 28 U.S.C. § 1332(d), which permits removal of certain class actions under 28 U.S.C. § 1453(b). CAFA defines the term "class action" to encompass a "mass action," *i.e.*, "any civil action **[*13]** . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(A), (B)(i). However, the term "mass action" "shall not include any civil action in which . . . all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action." *Id.* at § 1332(d)(11)(B)(ii)(III). Because the State is a real party in interest and sues to protect and vindicate the rights of its public in general under Conn. Gen. Stat. § 42-110m, this action is not a "mass action." [3] *See, e.g.,* Harvey v. Blockbuster, Inc., 384 F. Supp. 2d 749, 752-54 (D. N.J. 2005) (remanding state attorney general's suit against Blockbuster under the New Jersey Consumer Fraud Act for failing to clearly and conspicuously disclose the terms of Blockbuster's "No More Late Fees" policy, because the attorney general sued for civil penalties and injunctive relief on behalf of the general public). Given the nature of this action and the authority under which **[*14]** the State Attorney General brings it, CAFA does not confer subject-matter jurisdiction over this suit.

C. Attorneys Fees

Having prevailed on its motion for remand, the State also seeks an award of "just costs including attorney fees incurred as a result of the removal" 28 U.S.C. § 1447(c), claiming that Defendants had no objectively reasonable basis for removal. Plaintiff relies on the rejection by two other judges in this District of claims that the state was not a real party in interest for diversity purposes. *See* Connecticut v. Moody's, 664 F. Supp. 2d 196 (D. Conn. 2009); *Connecticut v. Guy Carpenter et al*, No. 3:07cv1627(CFD) (D. Conn. Feb. 9, 2009).

HN7[↑] A court may exercise its discretion to award fees and costs "[w]here the removing party lacked an objectively reasonable basis for seeking removal." Martin v. Franklin Capital Corp., 546 U.S. 132, 141, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005). The Supreme Court has made clear that there is no presumption in favor of or against fee awards under 28 U.S.C. § 1447(c) but **[*16]** that assessing such costs should recognize the purpose of disincentivizing use of removals as a method for delaying litigation or increasing costs on a plaintiff. *Id*.

The basis for removal set out in Defendants' removal petition, was "[t]o the extent the State of Connecticut seeks relief on behalf of identifiable and circumscribed group of Connecticut citizens, *i.e.*, the Connecticut consumers that have allegedly relied on [Defendants'] credit ratings of structured finance products." (Notice of Removal at 2.) Although the action is being remanded to state court, "lack of jurisdiction [is] not obvious from the face of the removal petition." Albstein v. Six Flags Entertaining Corp., No. 10 Civ. 5840(RJH), 2010 U.S. Dist. LEXIS 118116, 2010 WL 4371433, *4 (S.D.N.Y. Nov. 4, 2010) (citing Sherman v. A.J. Pegno Constr. Corp., 528 F. Supp. 2d 320, 331 (S.D.N.Y. 2007 ("Because this Court's lack of jurisdiction was not obvious from the face of the removal petition filed in the action, the Court cannot conclude that defendants lacked an objectively reasonable basis for seeking removal.")). As the foregoing caselaw discussion reflects, there are differing judicial approaches to characterizing the nature of a state's sovereign **[*17]** or quasi-sovereign interest for diversity purposes where a state seeks a monetary recovery including restitution, reflective of consumer harm, in its action to enjoin allegedly unlawful business practices impacting consumers. The existence of two other decisions in this District unfavorable to Defendants'

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[3] During debate on CAFA, Senator Grassley stated that

> State attorneys general have authority under the laws of every State to bring enforcement actions to protect their citizens. Sometimes these laws are parens patriae cases, similar to class actions in the sense that the State attorney general represents the people of that State. In other instances, their actions are brought directly on behalf of that particular State. But they are not class actions; rather, they are very unique attorney general lawsuits authorized under State constitutions or under statutes. . . .
>
> The key phrase there is "class action." Hence, because almost all civil suits brought by State attorneys general are parens patriae suits, similar representative suits or direct enforcement actions, it is clear they do not fall within this definition. That means that cases brought by State attorneys general will not be affected by this bill.

151 Cong.Rec. S1157-02, at S1163 (statement of Sen. Grassley). Senator Cornyn added that as to "statutes that are typical of every State-deceptive trade practice acts and consumer protection **[*15]** statutes—which . . . specifically authorize the attorney general to seek remedies on behalf of aggrieved consumers," it was Congress's intent that "[t]his bill certainly . . . not encroach on that authority." *Id.* at S1162 (statement of Sen. Cornyn). *See id*. at S1160 (statement of Sen. Specter stating same).

position does not render the basis for Defendants' removal objectively unreasonable, in the absence of similar outcome in the Second Circuit. That Defendants continued to press their view of diversity jurisdiction in this case in reliance on other arguably supportive decisions, despite having previously failed to persuade another judge in this District in another CUTPA case brought against them by the Connecticut Attorney General, does not render their articulated removal basis objectively unreasonable such that a fee award would be "just." Accordingly, Plaintiff's motion for attorney fees and costs will be denied.

III. Conclusion

Accordingly, Plaintiff's Motions to Remand and for Costs and Fees [Doc. ## 17, 23] are GRANTED in part and DENIED in part; Plaintiff's actions against Moody's and S&P are hereby ordered remanded to Connecticut Superior Court for the Judicial District of Hartford, **[*18]** but Defendants are not required to pay Plaintiff's attorneys fees and costs.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 5th day of January, 2011.

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New York v. Charles Schwab & Co.

United States District Court for the Southern District of New York

January 19, 2010, Decided; January 19, 2010, Filed

09 Civ. 7709 (LMM)

Reporter
2010 U.S. Dist. LEXIS 5830 *; 2010 WL 286629

THE PEOPLE OF THE STATE OF NEW YORK by ANDREW M. CUOMO, Attorney General of the State of New York, Plaintiff v. CHARLES SCHWAB & CO., INC., Defendant.

Subsequent History: On remand at, Dismissed by, Judgment entered by *People v. Charles Schwab & Co., Inc., 33 Misc. 3d 1221(A), 939 N.Y.S.2d 742, 2011 N.Y. Misc. LEXIS 5387 (2011)*

Core Terms

real party in interest, removal, diversity, district court, restitution, parties, injunction, Notice, sovereign immunity, federal court

Case Summary

Procedural Posture

Plaintiff, the attorney general for the State of New York, filed an action against defendant broker alleging four claims under state law for allegedly fraudulent an deceptive conduct in the sale to the investing public of auction rate securities (ARS). The broker removed the matter to the court, and the attorney general filed a motion to remand, pursuant to *28 U.S.C.S. § 1447*.

Overview
The broker asserted that it was a California corporation with a principal office in California and that plaintiffs were citizens of the State of New York. The broker asserted that the State of New York was not the real party in interest in the case. The complaint sought injunctive relief and disgorgement, plus payment of restitution and damages, and other equitable relief. The court held that attorney general was authorized by New York statute to pursue on behalf of the state the claims alleged in the complaint. The court rejected the broker's assertion that the state was not the real party in interest because the state had a real interest, pecuniary or otherwise in the outcome of the litigation. Thus removal was not available. The broker had not shown that a clear rule demanded removal. Under the governing law, the state was the party entitled to enforce the right and the state was not just a nominal party.

Outcome
The court granted the motion to remand the matter to state court.

LexisNexis® Headnotes

Civil Procedure > ... > Removal > Postremoval

Remands > Jurisdictional Defects

HN1[] Postremoval Remands, Jurisdictional Defects

28 U.S.C.S. § 1447 provides, in part, that if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. 28 U.S.C.S. § 1447(c).

Civil Procedure > ... > Removal > Specific Cases Removed > Diversity of Citizenship

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

HN2[] Specific Cases Removed, Diversity of Citizenship

The district courts have diversity jurisdiction where, assuming the requisite amount in controversy, the suit is between citizens of different states. It is well established that for a case to fit within 28 U.S.C.S. § 1332(a)(1), there must be "complete" diversity. Diversity is not complete if any plaintiff is a citizen of the same state as any defendant.

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

Civil Procedure > Parties > Real Party in Interest > General Overview

HN3[] Diversity Jurisdiction, Citizenship

It has long been established that the citizens upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy. Thus, a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > General Overview

HN4[] Diversity Jurisdiction, Amount in Controversy

The diversity jurisdiction statute requires the requisite amount in controversy, now $ 75,000; 28 U.S.C.S. § 1332(a).

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > General Overview

HN5[] Diversity Jurisdiction, Amount in Controversy

The United States Supreme Court has stated that, under established law, two or more plaintiffs could aggregate their claims for purposes of satisfying the amount in controversy requirement only in cases in which they unite to enforce a single title or right in which they have a common or undivided interest.

Civil Procedure > Parties > Real Party in Interest > General Overview

HN6[] Parties, Real Party in Interest

Where the primary purpose of a suit initiated by the state is to secure redress for an identifiable group of state citizens, those citizens -- and not the state -- are the real parties in interest.

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

HN7[] Diversity Jurisdiction, Citizenship

There is no question that a State is not a "citizen" for purposes of diversity jurisdiction.

Civil Procedure > Parties > Real Party in Interest > General Overview

HN8[] Parties, Real Party in Interest

Fed. R. Civ. P. 17(a) requires that every action shall be prosecuted in the name of the real party in interest. This means that an action must be brought by the person who, according to the governing substantive law, is entitled to enforce the right.

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

HN9 **Diversity Jurisdiction, Citizenship**

A state is not a citizen for purposes of diversity jurisdiction.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN10 **Preliminary Considerations, Federal & State Interrelationships**

A district court, out of considerations of comity, should be as "reluctant" as the United States Supreme Court to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it.

Counsel: **[*1]** For The People of The State of New York by Andrew M. Cuomo, Attorney General of the State of New York, Plaintiff: Armen Morian, LEAD ATTORNEY, New York State Office of the Attorney General (NYC), New York, NY.

For Charles Schwab & Co., Inc., Defendant: Faith E. Gay, LEAD ATTORNEY, White & Case LLP, Miami, FL; Marc Laurence Greenwald, LEAD ATTORNEY, Quinn Emanuel Urquhart Oliver & Hedges LLP, New York, NY; Richard A. Schirtzer, LEAD ATTORNEY, Quinn, Emanuel, Urquhart, Oliver & Hedges, New York, NY.

Judges: Lawrence M. McKenna, United States District Judge.

Opinion by: Lawrence M. McKenna

Opinion

MEMORANDUM AND ORDER

McKENNA, D.J.,

1.

This action -- asserting four claims under, respectively, (i) New York Executive Law § 63(12), (ii) New York General Business Law § 352-c(1) (a), (iii) *id*. § 352-c(1)(c), and (iv) *id*. § 349, all relating to the allegedly fraudulent and deceptive conduct of defendant in the sale to the investing public of auction rate securities (ARS) -- was filed in the Supreme Court of the State of New York, County of New York, on or about August 17, 2009, and removed to this Court, on or about September 4, 2009, on the ground of diversity of citizenship.

Plaintiff moves for remand pursuant to **HN1** 28 U.S.C. § 1447, **[*2]** which provides, in part, that: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." *Id*. § 1447(c).

> **HN2** [T]he district courts have diversity jurisdiction where, assuming the requisite amount in controversy, the suit is between "citizens of different States." It is well established that for a case to fit within this section, there must be "complete" diversity. Diversity is not complete if any plaintiff is a citizen of the same state as any defendant.

St. Paul Fire & Marine Ins. Co. v. Universal Builders Supply, 409 F.3d 73, 80 (2d Cir. 2005) (quoting 28 U.S.C. § 1332(a)(1) & Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373, 98 S. Ct. 2396, 57 L. Ed. 2d 274 (1978)) (other citation omitted). **HN3** "[I]t has long been 'established that the "citizens" upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy.' Thus, 'a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.'" *Id*. (quoting Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 460-61, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980)) (other citations omitted).

As noted in *St. Paul*, **HN4** the diversity jurisdiction **[*3]** statute also requires the requisite amount in controversy, now $ 75,000; 409 F.3d at 80; 28 U.S.C. § 1332(a).

"In Snyder v. Harris, 394 U.S. 332, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969), **HN5** the Court stated that, under established law, two or more plaintiffs could aggregate their claims for purposes of satisfying the amount in

controversy requirement *only* 'in cases in which [they] unite to enforce a single title or right in which they have a common or undivided interest.'" Richard H. Fallon, Jr. *et al.*, Hart and Wechsler's The Federal Courts and the Federal System 1481-82 (5th ed. 2003) (quoting *Snyder, 394 U.S. at 335*).

Defendant asserts that it is a California corporation with its principal "executive office" in California (Notice of Removal P 5), and that "[p]laintiffs are citizens of the State of New York" (*id*. P 6). Defendant argues that "[t]he State of New York is not the real party in interest in this case. ***HN6***[⬆] Where the primary purpose of a suit initiated by the state is to secure redress for an identifiable group of state citizens, those citizens -- and not the state -- are the real parties in interest." (Def. Mem. at 5.) The claimed real parties in interest are, according to defendant, "New York-based Schwab customers **[*4]** who purchased and still hold ARS." (*Id*.)

2.

The complaint (Notice of Removal, Ex. A) seeks injunctive relief against conduct similar to, or having a purpose and effect similar to, the conduct complained of in the complaint, "to the extent such conduct has any nexus with the New York marketplace" (Compl., *ad damnum*, P A); an order "that Defendant, pursuant to Articles 22-A and 23-A of the General Business Law and *Section 63(12)* of the Executive Law and the common law of the State of New York, disgorge all gains and pay all restitution and damages caused, directly or indirectly, by the fraudulent and deceptive acts complained of herein" (*id*. P B), penalties, costs and attorneys' fees as provided by law (*id*. P C); an order requiring defendant to buy back [ARS] from defrauded customers at par (*id*. P D); and such other equitable relief as may be necessary to redress defendant's violations of New York law (*id*. P E).

The complaint does not specifically identify the persons on whose behalf restitution and damages are sought. The complaint does refer in its allegations to unnamed persons who are said to reside in New York. (Compl. PP 55-56, 58-59, 64-66.) The complaint also refers to persons not **[*5]** said to reside in New York. (*Id*. PP 57, 60-62, 67-68.)

Defendant does not identify the amounts in controversy of the persons on whose behalf plaintiff seeks restitution other than to say that "[p]laintiffs demand, *inter alia*, disgorgement and restitution for 'hundreds of millions' of dollars worth of ARS sales." (Notice of Removal P 9 (quoting Compl. P 74 & citing Compl., Prayer for Relief).) [1]

The record at present presents a number of open questions relating to whether or not complete diversity is present. Defendant states in the notice of removal that its principal "executive office" is in California (Notice of Removal P 5); it does not, however, as far as the Court can find, state that California is its principal place of business. *See* **[*6]** *28 U.S.C. § 1332(c)(1)*. The record is not clear that all of the persons for whom the action seeks monetary relief are "citizens" of New York. *See id*. *§ 1332(a)(1)*. It is not clear whether the persons for whom the action seeks monetary relief could aggregate their damages, or, if they cannot, whether any -- or if any -- which have claims of $ 75,000 or more. *See id*.

It is entirely possible that these gaps could be remedied by further submissions (and perhaps limited discovery), but there are other reasons indicating that there is no diversity, and the issues mentioned need not be reached.

3.

Defendant does not appear to disagree with the proposition that ***HN7***[⬆] "[t]here is no question that a State is not a 'citizen' for purposes of the diversity jurisdiction." *Moor v. County of Alameda, 411 U.S. 693, 717, 93 S. Ct. 1785, 36 L. Ed. 2d 596 (1973)*. Defendant argues, however, that:

> The New York Attorney General, Andrew M. Cuomo, as the nominal party, is not the real party in interest in this dispute. The Attorney General seeks by his suit to obtain restitution on behalf of certain New York customers of Schwab who purchased Auction Rate Securities . . . through their Schwab accounts, the real parties in interest.

(Notice of Removal **[*7]** P 7.)

HN8[⬆] "*Rule 17(a) of the Federal Rules of Civil Procedure* requires that '[e]very action shall be prosecuted in the name of the real party in interest.' This means that an 'action must be brought by the person who, according to the governing substantive law, is entitled to enforce the right.'" *Oscar Gruss & Son, Inc. v.*

[1] In paragraph 68 of the complaint, it is alleged that one of defendant's customers borrowed $ 400,000 for a home restoration project and invested that amount in a Schwab money market fund, to learn later that the money was invested in ARS. That does not identify an amount in controversy, however. Defendant says that it sold "millions of dollars of [ARS] to the investing public." (Compl. P 74.) Again, that does not identify an amount in controversy.

Hollander, 337 F.3d 186, 193 (2d Cir. 2003) (quoting Fed. R. Civ. P. 17(a); 6A Charles Alan Wright *et al., Federal Practice and Procedure* § 1543 (2d ed. 1990)). The Attorney General of the State of New York is authorized by New York statute to pursue on behalf of the State the claims alleged in the complaint. (*See* Pl. Mem. at 9-17.) Defendant does not refute this proposition, but argues that there is an exception: "Where, as here, the primary purpose of the state's suit is to seek restitution for an identifiable group of investors the state is not the real party in interest, and the case may be removed to federal court." (Def. Mem. at 2.)

Just such an argument as defendant makes here was rejected in *New York v. General Motors Corp*., where the district court denied remand and concluded that:

> [r]ecovery of damages for aggrieved consumers is but one aspect of the case. The **[*8]** focus is on obtaining wide-ranging injunctive relief designed to vindicate the State's quasi-sovereign interest in securing an honest marketplace for all consumers. That recovery on behalf of an identifiable group is also sought should not require this Court to ignore the primary purpose of the action and to characterize it as one brought solely for the benefit of a few private parties.

547 F. Supp. 703, 706-07 (S.D.N.Y. 1982) (citation and footnote omitted), *see also* West Virginia v. Morgan Stanley & Co., 747 F. Supp. 332, 338 (S.D. W. Va. 1990) ("So long as the state is more than a nominal or formal party and has a real interest, pecuniary or otherwise, in the outcome of the litigation, it has been held that the State is a real party to the controversy and removal on diversity grounds is improper." (citations omitted)).

Defendant, in response, extracts the proposition that "[w]here the state's role is to collect proceeds that would then be distributed to state citizens, it is not the real party in interest" (Def. Mem. at 6) from In re Baldwin-United Corp., 770 F.2d 328 (2d Cir. 1985). In *Baldwin-United*, the district court, in a multi-district litigation including more than 100 federal **[*9]** securities actions, entered, for the purpose of facilitating settlement, a preliminary injunction against the commencement of actions against any of the defendants in the multi-district matter which might affect the right of any plaintiff or class member in that matter. A number of states objected to the injunction, and appealed, raising, among other arguments, the issue whether the injunction offended the Eleventh Amendment sovereign immunity of the states. 770 F.2d at 340. The Court of Appeals, in rejecting the Eleventh Amendment argument, noted that "certain types of actions involving state interests may nonetheless be heard in federal court." *Id*. One such exception, the court said, was "actions instituted by state officials in a representative capacity." Id. at 341.

> [W]hen the state merely asserts the personal claims of its citizens, it is not the real party in interest and cannot claim parens patriae standing. Thus, when relief against such representative actions by the state is sought, the state's sovereign immunity is not a bar.

Id. (citations omitted).

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cavicchia, 311 F. Supp. 149 (S.D.N.Y. 1970), also relied on by defendant, again **[*10]** involves an Eleventh Amendment sovereign immunity issue. Actions had been commenced both in New York (by the Attorney General of the State of New York) and in New Jersey (by private parties) in which orders had been entered placing the property of one Cavicchia in the custody of a court-appointed receiver (New York) or the court itself (New Jersey). Two stakeholder brokerage firms that held money and securities in accounts for Cavicchia, in which both New York and New Jersey claimed an interest, commenced statutory interpleader actions, "seeking judgment restraining all the defendants" -- including New York -- "from commencing or prosecuting any suit against plaintiffs to recover the securities here involved and requiring defendants to interplead and settle among themselves the right to this property." 311 F. Supp. at 151-52 (footnote omitted). The State of New York (and the receiver) moved for dismissal of the stakeholders' actions on Eleventh Amendment grounds. The district court concluded that

> the maximum extent of the interest of the state in the deposited property is that it be held safely in the custody of a court-appointed receiver until such time as intervening residents establish **[*11]** their valid claims therein and the remainder thereof, if any, is returned to the defendant. Those residents who have been defrauded are the parties with real interests in the sequestered property, and it is these people whom the Attorney General represents.

Id. at 157-58. The State, the court found, could not demonstrate that it was the real party in interest. "The state's general governmental interest in the prevention of fraudulent securities activity notwithstanding, such a demonstration cannot be made in the case at hand. This litigation does not in any way affect state revenues, state

property, state contracts, or any activity by the state as a political entity." *Id. at 158-59*. [2] Dismissal was denied.

The district court in *Merrill Lynch, see* *311 F. Supp. 149, 154-55*, and defendant also (Def. Mem. *passim*), cite *Missouri, Kansas, & Texas Rv. v. Missouri R.R. & Warehouse Comm'rs, 183 U.S. 53, 22 S. Ct. 18, 46 L. Ed. 78 (1901)*. The question there was whether a Kansas railroad, sued in **[*12]** a Missouri court to compel compliance with an order of Missouri railroad commissioners with respect to rates and charges, could remove the case to a federal court against the argument that the real party in interest was the State of Missouri. The Supreme Court found that the real parties in interest were commissioners, not the State:

> [T]he party named in the record as plaintiff is the real party plaintiff, and . . . the voluntary assumption by the state of the costs in some contingencies of the litigation, or the indirect and remote pecuniary results which may follow from a disobedience of the orders of the court, do not make it the party to whom alone the relief sought inures, and in whose favor a decree for the plaintiff will effectively operate.

183 U.S. at 61. Removal was approved.

4.

While the issue is not free of some difficulties, the Court concludes that New York State is the real party in interest, and that removal was thus not available. ***HN9***[] "[A] State is not a "citizen" for purposes of the diversity jurisdiction." *Moor, 411 U.S. at 717*.

The exception which defendant advocates should not be applied here.

To begin with,***HN10***[] a district court, out of "considerations of comity," should be **[*13]** as "reluctant" as the Supreme Court "to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it." *See* *Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 21 n.22, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)*.

Defendant has not shown that a "clear rule demands" removal. *Id.* *Baldwin-United* and *Cavicchia* are not removal, but sovereign immunity cases, and, while *Missouri, Kansas, & Texas Rv.* is a removal case, it was decided on the ground that the actual plaintiffs were the commissioners named as such in the complaint. This Court remains aware that in *Cavicchia*, Judge Lasker suggested that the precise meaning of "real party in interest" in the different contexts of removal and sovereign immunity "should be founded on consistent principles of construction," *311 F. Supp. at 156*, but most respectfully disagrees. The particular objectives of the removal statutes, on the one hand, and the *Eleventh Amendment*, on the other, as well as the factual contexts of the case law, need to be kept in mind.

Here -- focusing on Title 28 issues, and leaving the *Eleventh Amendment*, which is not implicated, to the side -- it is clear that New York is the real party in interest, **[*14]** *i.e.*, "'the person who, according to the governing substantive law, is entitled to enforce the right.'" *Oscar Gruss & Son, 337 F.3d at 193*. It is not disputed that, under New York law, New York may pursue the claims asserted under New York law alleged in the complaint.

All of the claims in the complaint are focused on the same alleged conduct, illegal under New York law, on the part of defendant. As in *General Motors*, "[t]he purpose of seeking this wide-ranging relief is not merely to vindicate the interests of a few private parties. Rather, it is to take a step toward eliminating fraudulent and deceptive business practices in the marketplace." *547 F. Supp. at 705*. "The State's goal of securing an honest marketplace in which to transact business is a quasi-sovereign interest. As such, it is sufficient to preclude characterizing the state as a nominal party without a real interest in the outcome of this lawsuit." *Id. at 705-06* (citations omitted).

Nor does it make sense in cases, such as the present one, in which a state seeks both injunctive relief against illegal business practices *and* restitution for victims, to engage in an attempt to characterize one or the other as primary, as if **[*15]** the purposes can be separated from each other. It is completely understandable that a state should, at the same time, seek to prevent the recurrence of harmful conduct in the future and to remedy the damage it has caused in the past.

* * *

Motion for remand granted. The Clerk is directed to remand this action to the New York State Supreme Court, New York County.

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[2] The court also noted that allowing New York to pursue its Martin Act claim would not expose the stakeholders to double liability because the district court could determine the claims of all parties under *28 U.S.C. § 2361*. *Id. at 160*.

Dated: January 19,, 2010

SO ORDERED.

/s/ Lawrence M. McKenna

Lawrence M. McKenna

U.S.D.J.

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Questioned
As of: November 16, 2020 4:02 PM Z

Robinson v. Pfizer Inc.

United States District Court for the Eastern District of Missouri, Eastern Division

April 29, 2016, Decided; April 29, 2016, Filed

Case No. 4:16-CV-439 (CEJ)

Reporter
2016 U.S. Dist. LEXIS 57174 *

ELAINE ROBINSON, et al., Plaintiffs, vs. PFIZER INC., Defendant.

Subsequent History: Costs and fees proceeding at *Robinson v. Pfizer Inc., 2016 U.S. Dist. LEXIS 65920 (E.D. Mo., May 19, 2016)*

Core Terms

plaintiffs', fraudulent, diversity, joinder, misjoinder, joined, out-of-state, non-diverse, removal, parties, subject matter jurisdiction, fraudulent joinder, egregious

Counsel: **[*1]** For Elaine Robinson, Helen Psaras, Rebecca Couture, Vanesa Ford, Georgia Lee Harlan, Claire A. Holmes, Tina Loomis, Juana Miles, Deloris Mitchell, Himilce Negron, Carol L. Qualls, Rhonda Robinson, Harriet L. Scott, Charlottte L. Shaw, Susan M. Simcox, Linda C. Tanguay, Violet E. Wyers, Kim Diling, Rebekah McDonald, Socorro Perez, Cynthia Weddle, Mary Higdon, Yolanda Baker, Priscilla Billingslea, Yiona Bryant, Diane Ezell, Janet Gallo, Ladessa Lewis, Quynh Nguyen, Isabel Power, Denise Proulx, Sharon Wheelehan, Patricia Herrera, Carol Henriques, Linda Christner, Rita Probst, Patricia Johnson, Lois Morton, Sharon Bowers, Henrietta Eatman, Sharon Murdock, Mildred Watley, Delayne Wharton, Patricia Trotman, Gladys Bates, Helen Courtney, Myrtle White-Royes, Carol Peterson, Elena Barnovics, Victoria Elleman, Eleftheria Karamihalis, Linda L. Jackson, Gladys F. Brent, Mary Robinson, Martha Farr, Eliza Taylor, Rose Rush-Gaswirth, Ardell R. Martinez, Carol A. Moran, Lou Anne Box, Barbara L. Kuikahi, Elizabeth A. Parks-McDonald, Willie Williams, Clara Yarborough, Plaintiffs: Trent B. Miracle, LEAD ATTORNEY, Eric S. Johnson, SIMMONS AND HANLY, LLC, Alton, IL.

For Pfizer, Inc., Defendant: Mark C. Hegarty, **[*2]** LEAD ATTORNEY, SHOOK AND HARDY, LLP, Kansas City, MO.

Judges: CAROL E. JACKSON, UNITED STATES DISTRICT JUDGE.

Opinion by: CAROL E. JACKSON

Opinion

MEMORANDUM AND ORDER

This matter is before the Court on plaintiffs' motion to remand the complaint to the Missouri state court from which the case was removed pursuant to *28 U.S.C. § 1447(c)*. Defendant has responded in opposition. Also before the Court is defendant's motion to stay the proceedings in this action pending a decision by the Judicial Panel on Multidistrict Litigation regarding the transfer of this action to a Multidistrict Litigation (MDL) action pending in the District of South Carolina, to which plaintiff has responded in opposition.

I. Background

On February 29, 2016, sixty-four plaintiffs from twenty-nine states filed this action in the Circuit Court for the City of St. Louis, Missouri, alleging seven state law causes of action against defendant arising out of its manufacture and sale of the prescription medication Lipitor (atorvastatin calcium). Plaintiffs allege that they developed Type II diabetes as a result of ingesting Lipitor. Plaintiffs assert claims of product liability for failure to warn, negligence, breach of implied warranty, fraud, constructive fraud, unjust **[*3]** enrichment, and punitive damages.

On March 31, 2016, defendant removed the action to this Court on the basis of diversity jurisdiction, *28 U.S.C. § 1332*. Defendant is a citizen of Delaware and New York. Six plaintiffs are also citizens of New York. Despite the lack of complete diversity on the face of the complaint, defendant argues that diversity jurisdiction exists because the out-of-state plaintiffs' claims were either fraudulently joined or procedurally misjoined, and thus, the out-of-state plaintiffs should be ignored for purposes of determining jurisdiction. Plaintiffs move to remand, arguing that the out-of-state plaintiffs' claims have been properly joined, and the Court lacks subject matter jurisdiction over this action in the absence of complete diversity of the parties.

II. Discussion

A. Motion to Stay

Defendant moves to stay the proceedings until the Judicial Panel on Multidistrict Litigation (JPML) rules on its motion to transfer this case to the MDL proceeding In re: Lipitor (Atorvastatin Calcium) Marketing, Sales Practices and Products Liability Litigation (No. II), MDL No. 2502. However, "[a] putative transferor court need not automatically postpone rulings on pending motions, or in any **[*4]** way generally suspend proceedings, merely on grounds that an MDL transfer motion has been filed." *Spears v. Fresenius Med. Care N. Am., Inc., No. 4:13-CV-855 (CEJ), 2013 U.S. Dist. LEXIS 82423, 2013 WL 2643302, at *1 (E.D. Mo. June 12, 2013)* (quoting *T.F. v. Pfizer, Inc., No. 4:12-CV-1221 (CDP), 2012 U.S. Dist. LEXIS 101859, 2012 WL 3000229, at *1 (E.D. Mo. July 23, 2012))*. "This is especially true where, as here, [a] pending motion is one for remand and goes to the Court's subject matter jurisdiction." *Id.* "This Court is in the best position to determine subject matter jurisdiction, and waiting for a decision by the JPML before ruling on the motion to remand 'would not promote the efficient administration of justice.'" *Id.* Accordingly, defendant's motion to stay will be denied.

B. Motion to Remand

An action is removable to federal court if the claims originally could have been filed in federal court. *28 U.S.C. § 1441*; *In re Prempro Prods. Liab. Litig., 591 F.3d 613, 619 (8th Cir. 2010)*. The defendant bears the burden of establishing federal jurisdiction by a preponderance of the evidence. *Altimore v. Mount Mercy Coll., 420 F.3d 763, 768 (8th Cir. 2005)*. A case must be remanded if, at any time, it appears that the district court lacks subject-matter jurisdiction. *28 U.S.C. § 1447(c)*; *Fed. R. Civ. P. 12(h)(3)*. Any doubts about the propriety of removal are resolved in favor of remand. *Wilkinson v. Shackelford, 478 F.3d 957, 963 (8th Cir. 2007)*.

Removal in this case was premised on diversity jurisdiction, which requires an amount in controversy greater than $75,000 and complete diversity of citizenship among **[*5]** the litigants. *28 U.S.C. § 1332(a)*. "Complete diversity of citizenship exists where no defendant holds citizenship in the same state where any plaintiff holds citizenship." *OnePoint Solutions, LLC v. Borchert, 486 F.3d 342, 346 (8th Cir. 2007)*. There is no dispute that the amount in controversy is over $75,000. Likewise, the parties agree that six plaintiffs are citizens of the same state as defendant and, thus, complete diversity is lacking on the face of the complaint. Defendant argues that this Court nonetheless has diversity jurisdiction because the out-of-state plaintiffs' claims were either fraudulently joined or procedurally misjoined.

"Courts have long recognized fraudulent joinder as an exception to the complete diversity rule." *Prempro, 591 F.3d at 620*. "Fraudulent joinder occurs when a plaintiff files a frivolous or illegitimate claim against a non-diverse defendant solely to prevent removal." *Id.* To prove fraudulent joinder, the removing party must show that "the plaintiff's claim against the diversity-destroying defendant has 'no reasonable basis in fact and law.'" *Knudson v. Sys. Painters, Inc., 634 F.3d 968, 980 (8th Cir. 2011)* (quoting *Filla v. Norfolk S. Ry. Co., 336 F.3d 806, 810 (8th Cir. 2003))*. "[I]f it is *clear* under governing state law that the complaint does not state a cause of action against the non-diverse defendant, the joinder is

fraudulent." *Id.* Conversely, "joinder is not fraudulent where 'there **[*6]** is arguably a reasonable basis for predicting that the state law might impose liability based upon the facts involved.'" *Id.* (quoting *Filla, 336 F.3d at 811*).

Fraudulent misjoinder, a doctrine the Eighth Circuit has neither accepted nor rejected, occurs when a plaintiff joins a viable claim, either by another non-diverse plaintiff or against another non-diverse defendant, with "no reasonable procedural basis to join them in one action" because the claim that destroys diversity has "no real connection with the controversy." *Prempro, 591 F.3d at 620* (footnotes and citations omitted); see *id. at 622* ("[W]e conclude that even if we adopted the doctrine, the plaintiffs' alleged misjoinder in this case is not so egregious as to constitute fraudulent misjoinder."). Whether a party has been fraudulently misjoined depends on whether there has been an "egregious and grossly improper" joinder "under the broadly-interpreted joinder standards." *Id. at 624*.

Thus, fraudulent misjoinder challenges the propriety of joining viable claims into a single action while fraudulent joinder challenges the viability of the claims themselves. In other words, alleging fraudulent joinder "requires the court to look, at least somewhat, at the substantive merits of the claim," while **[*7]** fraudulent misjoinder is a question of procedure. See *Bowling v. Kerry, Inc., 406 F. Supp. 2d 1057, 1060 (E.D. Mo. 2005)* (referring to fraudulent misjoinder as "procedural misjoinder").

Here, defendant is not asking the Court to assess the out-of-state plaintiffs' claims to determine if the plaintiffs have a cause of action under substantive state law; rather, defendants are challenging the propriety of joining the out-of-state plaintiffs' claims into a single action.[1] Correctly characterized, defendants' argument is based on the theory of fraudulent misjoinder. Thus, the real issue is whether the out-of-state plaintiffs' claims have been properly joined under *Rule 20 of the Federal Rules of Civil Procedure*. As in *Prempro* and several recent cases before this Court, even if the fraudulent misjoinder doctrine is applied, it does not support this Court's exercise of jurisdiction. See, e.g., *Morgan v. Janssen Pharms., Inc., No. 4:14-CV-1346 (CAS), 2014 U.S. Dist. LEXIS 164811, 2014 WL 6678959 (E.D. Mo. Nov. 25, 2014)*; *Butler v. Ortho-McNeil-Janssen Pharms., Inc., No. 4:14-CV-1485 (RWS), 2014 U.S. Dist. LEXIS 142985, 2014 WL 5025833 (E.D. Mo. Oct. 8, 2014)*; *Orrick v. Smithkline Beecham Corp., No. 4:13-CV-2149 (SNLJ), 2014 U.S. Dist. LEXIS 112003, 2014 WL 3956547 (E.D. Mo. Aug. 13, 2014)*.

Rule 20 "allows multiple plaintiffs to join in a single action if (i) they assert claims 'with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences;' and (ii) 'any question of law or fact common to all plaintiffs will arise in the action.'" *Prempro, 591 F.3d at 622* (quoting *Fed. R. Civ. P. 20(a)(1)*). Missouri's permissive joinder rule is substantively **[*9]** identical. *Mo. Sup. Ct. R. 52.05(a)*; *State ex rel. Allen v. Barker, 581 S.W.2d 818, 826 (Mo. banc 979)*. "In construing *Rule 20*, the Eighth Circuit has provided a very broad definition for the term 'transaction.'" *Prempro, 591 F.3d at 622*. "It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." *Mosley v. Gen. Motors Corp., 497 F.2d 1330, 1333 (8th Cir. 1974)*. Accordingly, *Rule 20* "permit[s] all reasonably related claims for relief by or against different parties to be tried in a single proceeding," without requiring "[a]bsolute identity of all events." *Prempro, 591 F.3d at 622*.

"Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers v. Gibbs, 383 U.S. 715, 724, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*. Plaintiffs' subjective intent in adding non-diverse parties is irrelevant to the Court's *Rule 20* analysis. As the Eighth

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[1] According to defendant, no federal or state court in Missouri can exercise personal jurisdiction over defendant and comport with due process with respect to the out-of-state plaintiffs' claims. The parties do not dispute, however, that Missouri **[*8]** courts have personal jurisdiction over defendant with respect to the in-state plaintiffs' claims. Missouri courts, thus, may properly exercise personal jurisdiction over defendant with respect to this cause of action as a whole arising out of or related to its contacts and conduct in Missouri. See *Shaffer v. Heitner, 433 U.S. 186, 204, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)* (stating that the proper focus of the due process inquiry for the exercise of personal jurisdiction is "the relationship among the defendant, the forum, and the litigation"); see also *Walden v. Fiore, 134 S. Ct. 1115, 1126, 188 L. Ed. 2d 12 (U.S. 2014)* ("[I]t is the defendant, not the plaintiff or third parties, who must create contacts with the forum State."); *Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984)* (permitting a forum State to assert personal jurisdiction over a nonresident defendant on a claim related to the defendant's activities within the forum State when the plaintiff's contacts with the forum were "extremely limited" or even "entirely lacking").

Circuit has held, "if the nondiverse plaintiff is a real party in interest, the fact that his joinder was motivated by a desire to defeat federal jurisdiction is not material." *Iowa Pub. Serv. Co. v. Med. Bow Coal Co., 556 F.2d 400, 404 (8th Cir. 1977)*; *id. at 406* ("[I]f [a plaintiff] can avoid the federal forum by the device of properly joining a nondiverse defendant or a nondiverse co-plaintiff, he is free to do so.").

On numerous occasions, this Court has determined that the joinder of plaintiffs alleging injury from a single **[*10]** drug is not "egregious," because common issues of law and fact connect the plaintiffs' claims. See, e.g., *Parker v. Pfizer, Inc., No. 4:15-CV-441 (CAS), 2015 U.S. Dist. LEXIS 84554, 2015 WL 3971169 (E.D. Mo. June 30, 2015)* (Viagra); *Gracey v. Janssen Pharms., Inc., No. 4:15-CV-407 (CEJ), 2015 U.S. Dist. LEXIS 57990, 2015 WL 2066242 (E.D. Mo. May 4, 2015)* (Risperidone); *Hebron v. Abbvie Inc., No. 4:14-CV-1910 (ERW), 2014 U.S. Dist. LEXIS 183715 (E.D. Mo. Dec. 18, 2014)* (AndroGel); *Polk v. Pfizer, Inc., No. 4:15-CV-542 (ERW), 2015 U.S. Dist. LEXIS 57335, 2015 WL 1976370 (E.D. Mo. May 1, 2015)* (Lipitor); *T.F. ex rel. Foster v. Pfizer, Inc., No. 4:12-CV-1221 (CDP), 2012 U.S. Dist. LEXIS 101859, 2012 WL 3000229 (E.D. Mo. July 23, 2012)* (Zoloft); *Douglas v. GlaxoSmithKline, LLC, No. 4:10-CV-971 (CDP), 2010 U.S. Dist. LEXIS 66234, 2010 WL 2680308 (E.D. Mo. July 1, 2010)* (Avandia). The Court finds that here, as in those cases, plaintiffs' claims satisfy *Rule 20(a)*'s standard. First, plaintiffs' complaint raises common questions of law or fact regarding injuries alleged from use of the same product and arising from the same design, testing, development, labeling, packaging, distribution, marketing, and sales practices for that product. Also, because plaintiffs' allegations relate to defendant's design, manufacture, testing, and promotion of Lipitor—occurrences common as to all plaintiffs—their claims also arise out of the same transaction or occurrence, or series thereof. That is so even if the end-of-the-line exposures occurred in different states and under the supervision of different medical **[*11]** professionals. Thus, defendant has failed to demonstrate that the joinder of the out-of-state plaintiffs' claims with the in-state plaintiffs' claims is so egregious as to constitute fraudulent misjoinder. See *Prempro, 591 F.3d at 624*.

Accordingly, the Court finds that joinder of all sixty-four plaintiffs' claims under *Rule 20(a)* is proper. Because the joinder of claims in this case does not constitute egregious misjoinder, complete diversity does not exist. Thus, Defendant has not met its burden of demonstrating that this Court has jurisdiction over this case as required by *28 U.S.C. § 1332*. Because the Court lacks subject matter jurisdiction over this case, the case will be remanded to state court.

Finally, plaintiffs requests attorneys' fees and costs pursuant to *28 U.S.C. § 1447(c)*, which grants courts the authority "to require payment of just costs and actual expenses, including attorney fees, incurred as a result of the removal." The cases in which this defendant has been informed by this Court under substantially similar circumstances that joinder of the plaintiffs' claims is proper under *Rule 20* and controlling Eighth Circuit case law include: *Clark v. Pfizer, Inc., No. 4:15-CV-546 (HEA), 2015 U.S. Dist. LEXIS 102173, 2015 WL 4648019 (E.D. Mo. Aug. 5, 2015)*; *Parker, 2015 U.S. Dist. LEXIS 84554, 2015 WL 3971169*; *Polk, 2015 U.S. Dist. LEXIS 57335,, 2015 WL 1976370*; *Davood v. Pfizer Inc., No. 4:14-CV-970 (CEJ), 2014 U.S. Dist. LEXIS 78678, 2014 WL 2589198 (E.D. Mo. June 10, 2014)*; *Jennings v. Pfizer Inc., No. 4:14-CV-276 (HEA), 2014 U.S. Dist. LEXIS 81044 (E.D. Mo. May 8, 2014)* **[*12]** ; *Lovett v. Pfizer Inc., No. 4:14-CV-458 (CEJ), 2014 U.S. Dist. LEXIS 39983, 2014 WL 1255956 (E.D. Mo. Mar. 26, 2014)*; *Jackson v. Pfizer Inc., No. 4:13-CV-1915 (RWS), 2013 U.S. Dist. LEXIS 186545 (E.D. Mo. Oct. 15, 2013)*; S.L. v. Pfizer, Inc., No. 4:12-CV-420 (CEJ) (E.D. Mo. Apr. 29, 2013); *T.F. ex rel. Foster, 2012 U.S. Dist. LEXIS 101859, 2012 WL 3000229*. In at least twenty-five other cases, this Court has remanded for lack of subject matter jurisdiction when other defendants have attempted to remove matters to federal court asserting substantially similar arguments. See e.g., *Littlejohn v. Janssen Research & Dev., LLC, No. 4:15-CV-194 (CDP), 2015 U.S. Dist. LEXIS 48048, 2015 WL 1647901 (E.D. Mo. Apr. 13, 2015)*; *Swann v. Johnson & Johnson, No. 4:14-CV-1546 (CAS), 2014 U.S. Dist. LEXIS 167254, 2014 WL 6850766 (E.D. Mo. Dec. 3, 2014)*; *Morgan, 2014 U.S. Dist. LEXIS 164811, 2014 WL 6678959*; *Butler, 2014 U.S. Dist. LEXIS 142985, 2014 WL 5025833*; *McGee v. Fresenius Med. Care N. Am., Inc., No. 4:14-CV-967 (SNLJ), 2014 U.S. Dist. LEXIS 90735, 2014 WL 2993755 (E.D. Mo. July 3, 2014)*; *Coleman v. Bayer Corp., No. 4:10-CV-1639 (SNLJ), 2010 U.S. Dist. LEXIS 143673, 2010 WL 10806572 (E.D. Mo. Dec. 9, 2010)*. In light of these repeated admonishments and remands to state court for six years, defendant can no longer argue that its asserted basis for seeking removal to federal court in these circumstances is objectively reasonable. Accordingly, the Court finds that plaintiffs are entitled to just costs and actual expenses because defendant lacked an objectively reasonable basis for seeking removal. Plaintiffs will be required to submit a bill of costs and expenses in support of their request for the Court's

approval.

* * * **[*13]** *

For the reasons set forth above,

IT IS HEREBY ORDERED that defendant's motion to stay the proceedings in this action pending MDL transfer [Doc. #8] is **denied**.

IT IS FURTHER ORDERED that plaintiffs' motion for remand [Doc. #11] is **granted**.

IT IS FURTHER ORDERED that the Clerk of the Court shall remand this action to the Twenty-Second Judicial Circuit Court of Missouri (City of St. Louis), from which it was removed.

IT IS FURTHER ORDERED that plaintiffs shall have five days from the date of this order to submit documentation of the costs and expenses they reasonably incurred as a result of defendant's removal in support of their request for attorney fees and costs under *28 U.S.C. § 1447(c)*.

/s/ Carol E. Jackson

CAROL E. JACKSON

UNITED STATES DISTRICT JUDGE

Dated this 29th day of April, 2016.

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