EFiled: May 18 2023 02:49PM EDT
Transaction ID 70037733
Case No. N20C-09-097 MMJ CCLD

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, Attorney General of the State of Delaware,

Plaintiff,

v.

BP AMERICA INC., BP P.L.C., CHEVRON CORPORATION, CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, XTO ENERGY INC., HESS CORPORATION, MARATHON OIL CORPORATION, MARATHON OIL COMPANY, MARATHON PETROLEUM CORPORATION, MARATHON PETROLEUM COMPANY LP, SPEEDWAY LLC, MURPHY OIL CORPORATION, MURPHY USA INC., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, CITGO PETROLEUM CORPORATION, TOTAL S.A., TOTAL SPECIALTIES USA INC., OCCIDENTAL PETROLEUM CORPORATION, DEVON ENERGY CORPORATION, APACHE CORPORATION, CNX RESOURCES CORPORATION, CONSOL ENERGY INC., OVINTIV,

C.A. No. N20C-09-097-MMJ CCLD

INC., and AMERICAN PETROLEUM INSTITUTE,

Defendants.

DEFENDANTS' JOINT OPENING BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Pages

Cases

TABLE OF AUTHORITIES
(*Continued*)

TABLE OF AUTHORITIES
(*Continued*)

TABLE OF AUTHORITIES
(*Continued*)

TABLE OF AUTHORITIES
(*Continued*)

TABLE OF AUTHORITIES
(*Continued*)

TABLE OF AUTHORITIES
(*Continued*)

Statutes

TABLE OF AUTHORITIES
(*Continued*)

Other Authorities

Rules

Treatises

Regulations

TABLE OF AUTHORITIES
(*Continued*)

Defendants, by their undersigned attorneys and pursuant to Superior Court Civil Rule 12(b)(6), respectfully submit this Joint Opening Brief in Support of their Motion to Dismiss Plaintiff's Complaint. The State of Delaware has not stated a claim against Defendants, and its Complaint should therefore be dismissed with prejudice.

INTRODUCTION

Plaintiff the State of Delaware seeks to hold thirty energy companies liable under *state* law for the alleged effects of *global* climate change. While the state-law labels Plaintiff attaches to its claims may be familiar, the substance and reach of the claims are extraordinary. Plaintiff seeks to regulate the nationwide—and even worldwide—marketing and distribution of lawful products on which billions of people beyond the State's jurisdiction rely to heat their homes, power their hospitals and schools, produce and transport their food, and manufacture countless items essential to the safety, wellbeing, and advancement of modern society—in the process stretching state tort law well beyond its permissible scope. Allowing such claims to proceed would not only usurp the power of the legislative and executive branches (both federal and state) to set climate policy, but would do so retrospectively and far beyond the geographic boundaries of this State. It is therefore unsurprising that "[n]o plaintiff has ever succeeded in bringing" such claims "based

on global warming." *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1023 (N.D. Cal. 2018), *vacated on other grounds*, 960 F.3d 570 (9th Cir. 2020). This Court should likewise dismiss the Complaint.

***First*,** although Plaintiff purports to plead state-law claims, state law cannot constitutionally apply here. As the Supreme Court has long made clear, the federal Constitution's structure generally precludes States from using their own laws to resolve disputes involving out-of-state conduct. Thus, in cases involving "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations," "our federal system does not permit the controversy to be resolved under state law" "because the interstate or international nature of the controversy makes it inappropriate for state law to control." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Consistent with this principle, as the Supreme Court has recognized, one State cannot apply its own law to claims dealing with "air and water in their ambient or interstate aspects"; in that context, "borrowing the law of a particular State would be inappropriate." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421–22 (2011) ("*AEP*"); *see also Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) ("*Milwaukee I*") ("basic interests of federalism . . . demand[]" this result).

Every federal court to consider this question in analogous cases has held that state law cannot be used to obtain relief for the alleged consequences of global

climate change. Most recently, the U.S. Court of Appeals for the Second Circuit affirmed dismissal of a case raising substantially similar claims. *See City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). Describing "the question before us" as "whether a nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions may proceed under [state] law," the court held: "Our answer is simple: no." *Id*. at 91. This is because "disputes involving interstate air . . . pollution," such as climate-change litigation, "implicate two federal interests that are incompatible with the application of state law: (i) the 'overriding . . . need for a uniform rule of decision' on matters influencing national energy and environmental policy, and (ii) 'basic interests of federalism.'" *Id*. at 91–92. When, as here, a plaintiff seeks "to hold [energy companies] liable, under [state] law, for the effects of emissions made around the globe," "[s]uch a sprawling case is simply beyond the limits of state law." *Id*. at 92.

The same is true here: the federal system established by the Constitution does not permit any State to apply its own laws to claims seeking redress for injuries allegedly caused by out-of-state emissions. Because only a federally uniform standard can apply, the Constitution bars the application of state law here.

***Second*,** even if state law could apply (which it cannot), Plaintiff's claims would be preempted by the Clean Air Act. The U.S. Supreme Court held more than thirty years ago that the Clean Water Act "precludes a court from applying the law

of an affected State against an out-of-state source" because doing so would "upset[] the balance of public and private interests so carefully addressed by the Act." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). Every federal court of appeals to consider the question has held that the preemptive scope of the Clean Air Act is materially identical to that of the Clean Water Act. The Clean Air Act thus precludes Plaintiff's attempt to use Delaware law to obtain damages for injuries allegedly caused by innumerable out-of-state sources of greenhouse gas emissions.

***Third*,** Plaintiff's claims raise vital questions of public policy that are nonjusticiable under the political question doctrine. Indeed, the sweeping policy justifications that Plaintiff asserts in support of its claims underscore their unfitness for judicial resolution. Plaintiff's claims lack the judicially discoverable and manageable standards required to ensure that the Court does not overstep its constitutional bounds and touch upon issues—including how to balance environmental interests with interests of economic growth, energy independence, and national security—that have been committed to the political branches.

***Fourth*,** Plaintiff's Complaint fails to allege essential elements of each of its putative state-law claims.

Plaintiff's public nuisance claim fails because Delaware law does not recognize nuisances allegedly attributable to products, as opposed to the use of land. Delaware courts have consistently and repeatedly rejected nuisance claims based on

the sale and promotion of lawful products, including in three cases brought by the State of Delaware and its municipalities. *See State ex rel. Jennings v. Monsanto Co.*, 2022 WL 2663220 (Del. Super. Ct. July 11, 2022), *appeal filed*, No. 279 (Del.) (polychlorinated biphenyls); *State ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382 (Del. Super. Ct. Feb. 4, 2019) (opioid medications); *Sills v. Smith & Wesson Corp.*, 2000 WL 33113806 (Del. Super. Ct. Dec. 1, 2000) (handguns). If that were not enough, Plaintiff's public nuisance claim also fails because Plaintiff has not alleged (and cannot allege) facts showing that Defendants exercised control over the "instrumentality" of the alleged nuisance—the global greenhouse gas emissions that have allegedly contributed to climate change.

Plaintiff has failed to adequately plead a trespass claim because Plaintiff is not in exclusive possession of the land in question, Defendants have neither intruded nor caused an intrusion on that land, and the vast majority of damages Plaintiff seeks for the alleged intrusion are speculative. And, as with nuisance claims, Delaware courts routinely reject attempts to hold product manufacturers liable for trespass. *See Monsanto*, 2022 WL 2663220, at *5–6.

The Court should dismiss the failure to warn claim because Plaintiff's novel theory seeks to impose an unprecedented duty of care that would dramatically expand Delaware tort law—in direct conflict with controlling precedent that reserves such expansions of law for the legislature. And in any event, there is no duty to warn

where, as here, the alleged impact of fossil fuel use on the global climate has been "open and obvious" for decades.

Finally, Plaintiff fails to state a claim under the Delaware Consumer Fraud Act ("DCFA") because the alleged misrepresentations related to Defendants' so-called "campaign of deception" are outside the applicable five-year statute of limitations, and/or are not about "merchandise," as required by Delaware law.

Fifth**,** because Plaintiff's claims are purportedly premised on alleged fraudulent statements, they are subject to Rule 9(b)'s heightened requirements to plead with particularity. But Plaintiff's vague and generalized allegations do not come close to meeting this standard.

* * *

As Judge Alsup of the Northern District of California remarked in dismissing similar claims, "the development of our modern world has literally been fueled by oil and coal," and "[a]ll of us have benefitted" from their development—including Plaintiff. *City of Oakland*, 325 F. Supp. 3d at 1023; *see also City of New York*, 993 F.3d at 86 ("[E]very single person who uses gas and electricity—whether in travelling by bus, cab, Uber, or jitney, or in receiving home deliveries via FedEx, Amazon, or UPS—contributes to global warming."). Fossil fuel production has supported the safety, security, and wellbeing of our Nation—to say nothing of the billions of consumers worldwide. Plaintiff asks this Court to ignore the central

importance fossil fuels play in the world economy and, instead, to impose liability and damages on a select group of energy companies under *Delaware* law because of the *global* production, promotion, distribution, and end-use emissions of those lawful products. This, it cannot do. The Court should dismiss the Complaint with prejudice.

STATEMENT OF THE QUESTIONS INVOLVED

1. Whether the federal Constitution's structure precludes States from applying their own law to resolve claims for alleged injuries stemming from interstate and international air emissions.

2. Whether the Clean Air Act preempts state-law claims seeking redress for alleged injuries stemming from interstate and international air emissions.

3. Whether Plaintiff's claims are barred by Delaware's political question doctrine.

4. Whether Plaintiff's public nuisance claim fails because Delaware law does not recognize a nuisance claim based on the sale and promotion of lawful products, and because Plaintiff has not alleged that Defendants exercised control over the instrumentality of the alleged nuisance.

5. Whether Plaintiff's trespass claim fails because Plaintiff is not in exclusive possession of the land, Defendants have not caused an intrusion into that land, and Plaintiff cannot show damages caused by any intrusion.

6. Whether Plaintiff's failure to warn claim fails because Plaintiff has not alleged a cognizable duty of care, or a special relationship giving rise to a duty of care, and because the alleged climate-related risks of fossil fuel use have been open and obvious for decades.

7. Whether Plaintiff's Delaware Consumer Fraud Act claim fails because it accrued outside of the five-year statute of limitations and because Plaintiff failed to allege that Defendants' purported misstatements are about "merchandise."

8. Whether Plaintiff's claims, which are premised on allegations of fraudulent conduct, fail to meet Rule 9(b)'s heightened particularity pleading requirements.

STATEMENT OF THE CASE

This lawsuit is part of a long series of ill-conceived climate change-related actions that "seek[] to impose liability and damages on a scale unlike any prior environmental pollution case." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012). Federal courts have consistently, and properly, dismissed these actions as nonjusticiable or non-viable.

The first such lawsuit unsuccessfully asserted nuisance claims against automobile companies for alleged contributions to climate change. *See California v. Gen. Motors Corp.*, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (dismissing state and federal common-law nuisance claims against automakers based on

emissions for failing to state a claim and because claims were nonjusticiable). After that failure, the next round of litigation asserted claims against direct emitters, such as power companies, but that, too, failed. *See AEP*, 564 U.S. at 429 (holding that claims seeking abatement of the alleged public nuisance of climate change fail because the federal common law that necessarily governs claims for injuries caused by interstate emissions was displaced by the Clean Air Act); *Kivalina*, 663 F. Supp. 2d at 863 (dismissing as nonjusticiable and for lack of standing federal common-law nuisance claims against energy companies, including claims that defendants "misle[d] the public with respect to the science of global warming," *see* No. 4:08-cv-01138 (N.D. Cal.), Dkt. 1 ¶ 269).

Here, Plaintiff reaches even further back in the supply chain by suing companies that provide the raw material used by direct emitters—that is, the fuel that billions of people depend on every single day. Over the past six years, States and municipalities across the country, largely represented by the same counsel, have brought more than two dozen nearly identical cases against energy companies seeking damages for the alleged impacts of climate change. Only a few of these cases have proceeded to the merits, but, in those that have, federal courts universally have dismissed them for failure to state a claim. *See City of New York*, 993 F.3d at 92, 95; *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466, 476 (S.D.N.Y. 2018), *aff'd*, 993 F.3d 81; *City of Oakland*, 325 F. Supp. 3d at 1017. As here, the plaintiffs

in each of those cases alleged that the defendants "have known for decades that their fossil fuel products pose a severe risk to the planet's climate," and yet "downplayed the risks and continued to sell massive quantities of fossil fuels, which has caused and will continue to cause significant changes to the City's climate and landscape." *City of New York*, 993 F.3d at 86–87; *see also, e.g.*, Compl. ¶¶ 1, 2, 8, 58, 108. And like Plaintiff here, the plaintiffs in those cases suggested that this "group of large fossil fuel producers" is therefore "primarily responsible for global warming and should bear the brunt of these costs," even though "every single person who uses gas and electricity . . . contributes to global warming." *City of New York*, 993 F.3d at 86; *see also, e.g.*, Compl. ¶¶ 9, 47–61.

The Complaint here asserts four state-law causes of action: (1) negligent failure to warn, Compl. ¶¶ 234–46; (2) trespass, *id.* ¶¶ 247–52; (3) nuisance, *id.* ¶¶ 253–63; and (4) violations of the Delaware Consumer Fraud Act ("DCFA"), *id.* ¶¶ 264–80. Plaintiff seeks compensatory damages, penalties under the DCFA, punitive damages, attorneys' fees, and costs. *See id*., Prayer for Relief.

Plaintiff has described its Complaint as "target[ing] Defendants' alleged failure to warn and/or disseminate accurate information about the use of fossil fuels" and has asserted that the "source of tort liability in this litigation is Defendants' concealment and misrepresentation of [fossil fuel] products' known dangers." *Delaware v. BP Am. Inc.*, No. 1:20-cv-01429-LPS, Dkt. 101, at 2–3, 22 (D. Del.

Apr. 6, 2021). But Plaintiff alleges that its *injuries* are "caused by anthropogenic greenhouse gas *emissions*." Compl. ¶¶ 47–49 (emphasis added). Emissions are, to use Plaintiff's words, "[t]he mechanism" of its alleged injuries. *Id.* ¶ 48. According to Plaintiff, "greenhouse gas pollution, primarily in the form of CO_2, is far and away the dominant cause of global warming," *id.* ¶ 5, and its purported injuries are "*all due* to anthropogenic global warming," *id.* ¶ 10 (emphasis added). Hence, the theory underlying Plaintiff's Complaint is that Defendants' production and sale of fossil fuels and Defendants' allegedly deceptive public relations and lobbying activity render them liable for the alleged climate change-related harms resulting from global greenhouse gas emissions. *Id.* ¶¶ 1–15.

But these emissions are the result of billions of daily choices—over more than a century and across the whole world, by governments, companies, and individuals—about what types of fuels to use and how to use them. Plaintiff candidly admits that *worldwide* conduct, not conduct that occurred in Delaware alone, caused its injuries. Compl. ¶¶ 52–55, 148–49. Plaintiff's failure to identify conduct in Delaware that is traceable to any of its alleged injuries is not an accident but, rather, follows from the very nature of climate change. As Plaintiff acknowledges, "it is not possible to determine the source of any particular individual molecule of CO_2 in the atmosphere attributable to anthropogenic sources, because such greenhouse gas molecules do not bear markers that permit tracing them to their

source, and because greenhouse gasses quickly diffuse and comingle in the atmosphere." *Id.* ¶ 245. Plaintiff's claims, therefore, seek to impose liability and damages for alleged conduct occurring outside Delaware and, indeed, around the world.

LEGAL STANDARD

Dismissal for failure to state a claim under Superior Court Civil Rule 12(b)(6) is warranted where the plaintiff fails to allege facts supporting a "reasonably conceivable set of circumstances" under which it would be entitled to relief. *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 536 (Del. 2011). While the court must "accept[] as true all well-pleaded factual allegations in the complaint," it "need not 'accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party,'" nor must it "adopt 'every strained interpretation of the allegations' the plaintiff proposes." *Lima USA, Inc. v. Mahfouz*, 2021 WL 5774394, at *6 (Del. Super. Ct. Aug. 31, 2021).

ARGUMENT

I. Plaintiff's Claims Are Barred Because State Law Cannot Constitutionally Be Applied Here.

Because Plaintiff seeks damages for alleged harms caused by *interstate* emissions and *global* warming, its claims cannot be governed by state law: Under

our federal constitutional system, States cannot use their own laws to resolve claims seeking redress for injuries allegedly caused by out-of-state emissions.

A. The Supreme Court has long held that—under the U.S. Constitution's federal structure—"a few areas, involving uniquely federal interests, are so committed by the Constitution . . . to federal control that state law is pre-empted." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (citation omitted). In fact, in such "inherently federal" cases, "no presumption against pre-emption obtains." *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001).

These exclusively federal areas include "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations" and other areas "in which a federal rule of decision is necessary to protect uniquely federal interests"; in such cases, "our federal system *does not permit* the controversy to be resolved under state law." *Tex. Indus.*, 451 U.S. at 640–41 (emphasis added). "[T]he Constitution implicitly forbids that exercise of power because the interstate nature of the controversy makes it inappropriate for state law to control." *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1498 (2019) (cleaned up). This principle reflects the well-established premise that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996).

The Supreme Court has long explained that a State cannot apply its own law to claims dealing with "air and water in their ambient or interstate aspects"; in that context, "borrowing the law of a particular State would be inappropriate." *AEP*, 564 U.S. at 421–22. The "basic interests of federalism . . . demand[]" that "the varying common law of the individual States" cannot govern such disputes. *Milwaukee I*, 406 U.S. at 105 n.6, 107 n.9; *see also Ouellette*, 479 U.S. at 488 ("interstate . . . pollution is a matter of federal, not state, law"); *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*") ("state law cannot be used" to resolve such disputes).

Accordingly, "the basic scheme of the Constitution" gives courts the power to fashion *federal* common-law remedies for disputes involving "air and water in their ambient or interstate aspects" because they are not "matters of substantive law appropriately cognizable by the states." *AEP*, 564 U.S. at 421. Congress, of course, may displace federal common-law remedies—as it did here for claims based on domestic emissions through the Clean Air Act—but such displacement does not allow state law to govern matters that it could not have governed absent displacement. As the Seventh Circuit has explained, a State "cannot apply its own state law to out-of-state discharges" even after statutory displacement of federal common law. *Illinois v. City of Milwaukee*, 731 F.2d 403, 409–11 (7th Cir. 1984). The Second Circuit, too, has recognized that "state law does not suddenly become

presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one"; indeed, such an argument is "too strange to seriously contemplate." *City of New York*, 993 F.3d at 98–99. Whether or not Congress has displaced federal common-law remedies, Supreme Court precedent establishes that "state law cannot be used" to resolve claims seeking redress for injuries allegedly caused by out-of-state pollution. *Milwaukee II*, 451 U.S. at 313 n.7.

For this reason, every federal court to consider this question has held that state law cannot be used to obtain relief for the alleged consequences of global climate change. For example, the Second Circuit, in considering materially identical claims, squarely held that "a nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions may [not] proceed under [state] law." *City of New York*, 993 F.3d at 91. There, the plaintiff alleged that certain energy companies (including some Defendants here) were liable under state law for injuries caused by global climate change. *Id.* at 88. But the Second Circuit held that such "sprawling" claims, which sought "damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet," were "simply beyond the limits of state law." *Id.* at 92.

In reaching this conclusion, the Second Circuit emphasized that the dispute "implicate[d] two federal interests that are incompatible with the application of state

law"—namely, the "overriding need for a uniform rule of decision" on matters influencing national energy and environmental policy and the "basic interests of federalism." *Id.* at 91–92 (cleaned up). And the court explained that applying state law would "risk upsetting the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." *Id.* at 93. The other federal courts to consider the question have reached the same conclusion. *See City of New York*, 325 F. Supp. 3d at 471–72 (claims of this sort "are ultimately based on the 'transboundary' emission of greenhouse gases," so "our federal system does not permit the controversy to be resolved under state law"); *City of Oakland*, 325 F. Supp. 3d at 1022 (reaching same conclusion). *But see City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-380-JPC, Dkt. 618 (Haw. Cir. Ct. Mar. 29, 2022).

Similarly, in *AEP*, eight States and various other plaintiffs sued five utility companies, alleging that "the defendants' carbon-dioxide emissions" had substantially contributed to global warming, thereby "creat[ing] a 'substantial and unreasonable interference with public rights,' in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law." 564 U.S. at 418. Justice Ginsburg, writing for the majority, held that such claims necessarily require "federal law governance" and that "borrowing the law of a particular State would be

inappropriate." *Id.* at 421–22. The issues involve "questions of national or international policy," requiring "informed assessment of competing interests," and Congress and the "expert agency, here, EPA," are "better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions." *Id.* at 427–28; *see also id.* at 428 (noting that "judges lack the scientific, economic, and technological resources" that EPA possesses). Indeed, a federal court's inability to adjudicate such policy questions makes state courts applying different state laws all the more inappropriate—as the United States has explained in a similar case, the claims are "inherently federal in nature," and greenhouse gas "emissions just can't be subjected to potentially conflicting regulations by every state and city affected by global warming." Oral Arg. Tr., *BP p.l.c. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 2021 WL 197342 (2021).

Thus, federalism and comity concerns embodied in the Constitution preclude the application of state law to claims like those asserted here. Climate change is by its very nature global, caused by the cumulative effect of actions far beyond the reach of any one State's borders. Applying state law to claims seeking redress for injuries allegedly caused by global climate change resulting from emissions around the world would necessarily require applying that law beyond the State's jurisdictional bounds. While "Congress has ample authority to enact such a policy for the entire Nation, it is clear that no single State could do so, or even impose its own policy

choice on neighboring States." *BMW*, 517 U.S. at 571 (footnote omitted); *see also Philip Morris USA v. Williams*, 549 U.S. 346, 352–53 (2007) ("[O]ne State[]" may not "impose" its "policy choice[s] . . . upon neighboring States with different public policies."). Allowing state law to govern such areas would permit one State to "impose its own legislation on . . . the others," violating the "cardinal" principle that "[e]ach state stands on the same level with all the rest." *Kansas v. Colorado*, 206 U.S. 46, 97 (1907).

Nor may a State dictate our "relationships with other members of the international community." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964). Yet, that is exactly what Plaintiff's state-law claims would do. If Plaintiff succeeds, Defendants will be subject to ongoing future liability for producing and selling fossil fuel products around the globe unless they do so in the precise manner that Delaware law is deemed to require. That is a paradigmatic example of a State improperly using "damages" to "regulat[e]" an industry's extraterritorial operations, *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012), by forcing Defendants to "change [their] methods of doing business . . . to avoid the threat of ongoing liability," *Ouellette*, 479 U.S. at 495. And "[a]ny actions" Defendants "take to mitigate their liability" in Delaware "must undoubtedly take effect across every state (and country)." *City of New York*, 993 F.3d at 92.

Using state law in this way would not only impinge on other States' sovereignty, it would also create the unfair and untenable condition in which energy companies find the same conduct simultaneously subject to the different—and often conflicting—energy, economic, and environmental policies of fifty different States. At the same time, the undifferentiated nature of transboundary pollution means that Defendants cannot alter their conduct to comply with the respective laws of each State in which they operate; to the extent their conduct causes transboundary pollution, they would simultaneously be subject to liability under fifty different, and often "conflicting[,] standards." *North Carolina, ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 302 (4th Cir. 2010) (noting the "difficulties" of "allow[ing] multiple courts in different states to determine whether a single source constitutes a nuisance").

There is no disputing that Plaintiff's claims involve interstate—and international—pollution. Plaintiff seeks damages for claimed injuries in Delaware allegedly caused not by actions in Delaware, but by the cumulative impact of actions taken in every State in the Nation and every country in the world. It concedes this point repeatedly in its Complaint, alleging that Defendants caused an increase in "*global* greenhouse gas pollution," Compl. ¶ 2, that "greenhouse gas pollution . . . is far and away the dominant cause of *global* warming," *id.* ¶ 5, and that it has "been injured by . . . *global* warming," *id.* ¶ 18 (emphases added).

Plaintiff tries to evade the preclusion of state law by arguing that its claims are based solely on misrepresentations. But the Third Circuit correctly rejected that characterization, explaining that "Delaware . . . take[s] issue with [Defendants'] entire business, from production through sale"; while "Delaware and Hoboken try to cast their suits as just about misrepresentations[,] . . . their own complaints belie that suggestion. They charge the oil companies with not just misrepresentations, but also trespasses and nuisances. Those are caused by burning fossil fuels and emitting carbon dioxide." *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 712 (3d Cir. 2022).

Moreover, Plaintiff's claims are nearly identical to those dismissed in *City of New York*. That case concerned not just the "production and sale of fossil fuels," but also their "promotion." 993 F.3d at 88, 91, 97 n.8. The City alleged there, as Plaintiff does here, that "Defendants have known for decades that their fossil-fuel products pose risks of severe impacts on the global climate through the warnings of their own scientists" yet still "extensively promoted fossil fuels for pervasive use, while *denying* or *downplaying* these threats." *City of New York*, 325 F. Supp. 3d at 468–69 (emphases added). The City argued that the defendants were liable for "nuisance and trespass" damages because, "for decades, Defendants promoted their fossil fuel products by *concealing* and *downplaying* the harms of climate change [and] profited from the misconceptions they promoted." Br. for Appellant at 27,

City of New York v. BP P.L.C., No. 18-2188, 2018 WL 5905772 (2d Cir. Nov. 8, 2018) (emphases added). Plaintiff here purports to pursue the exact same theory of liability.

The Second Circuit saw through the City of New York's similar attempt to re-cast its claims and concluded that the City's attempt to "focus on" one particular "moment in the global warming lifecycle is merely artful pleading and does not change the substance of its claims." *City of New York*, 993 F.3d at 97. The court recognized that emissions were the "singular source of the City's harm." *Id*. at 91. Accordingly, the Second Circuit refused to allow the City to deny the obvious: its "case hinges on the link between the release of greenhouse gases and the effect those emissions have on the environment generally," as confirmed by the fact that "the City does not seek any damages for the [defendants'] production or sale of fossil fuels that do not in turn depend on harms stemming from emissions." *Id.* at 97. The same is true here: Plaintiff's claims unquestionably constitute attempts to collect damages for injuries allegedly stemming from worldwide emissions.

More fundamentally, Plaintiff's suggestion that its claims are based on misrepresentations misses the point. Whether Plaintiff's claims focus on production or deceptive marketing (or a combination of the two) is irrelevant here, because Plaintiff admits that its alleged *injuries* all stem from interstate and international emissions. Plaintiff alleges that "[a]nthropogenic greenhouse gas pollution,

primarily in the form of CO_2, is far and away the dominant cause of global warming," Compl. ¶ 5, and that its injuries are "*all* due to anthropogenic global warming," *id.* ¶ 10 (emphasis added). In other words, just as in *City of New York*, "[i]t is precisely because fossil fuels emit greenhouse gases—which collectively 'exacerbate global warming'—that [Delaware] is seeking damages." 993 F.3d at 91 (emphasis omitted). Accordingly, Plaintiff's claims are precluded by federal law.

Some recent federal appellate decisions have addressed the question whether claims alleging climate change-related harms arise under federal common law for purposes of conferring federal jurisdiction. But, as Plaintiff told the U.S. Supreme Court, those federal decisions "resolved different questions in different postures"—namely, "affirm[ing] orders granting remand for lack of federal subject-matter jurisdiction." Plaintiff's Opp. to Pet. for Writ of Cert. 3, No. 22-821 (U.S. Mar. 31, 2023), *available at* https://tinyurl.com/mre2aax7. Defendants' merits arguments here are consistent with the Third Circuit's and other courts' decisions regarding the removal issue because this case presents the separate question those cases left open: whether federal law precludes Plaintiff's claims *on the merits*. *See City of New York*, 993 F.3d at 93–94 (explaining that in Rule 12(b)(6) context the court is "free to consider the [energy companies'] preemption defense on its own terms, not under

the heightened standard unique to the removability inquiry").[1] And the answer to that question is "yes"—federal law bars Plaintiff's claims. *See id.*

B. Moreover, that Plaintiff's claims are premised on international emissions confirms that state law is inapplicable. Only federal law can govern claims based on foreign emissions, and "foreign policy concerns foreclose" any remedy. *City of New York*, 993 F.3d at 101.

Plaintiff does not seek to hold Defendants liable only for the "effects of emissions released" in Delaware, or even the United States. *City of New York*, 993 F.3d at 92. Rather, Plaintiff "intends to hold [Defendants] liable . . . for the effects of emissions made *around the globe* over the past *several hundred years*." *Id.* (emphases added); *see, e.g.*, Compl. ¶ 2 ("Defendants have promoted and profited from" an "enormous, foreseeable, and avoidable increase in *global* greenhouse gas pollution" (emphasis added)). "In other words, [Plaintiff] requests damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet." *City of New York*, 993 F.3d at 92. The Complaint makes clear that Plaintiff's claims are based chiefly on conduct occurring far outside of

[1] *See also Minnesota ex rel. Ellison v. Am. Petroleum Inst.*, 63 F.4th 703, 710 (8th Cir. 2023) (noting that "the Second Circuit recently held that federal common law still provides a defense—ordinary preemption—to state-law public nuisance"); *Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018) ("There may be important questions of ordinary preemption, but those are for the state courts to decide upon remand.").

Delaware, and even beyond the United States. *See, e.g.*, Compl. ¶¶ 22(g), 24(h), 28(f), 29(f), 31(d), 46(b).

The Second Circuit explained that federal common law is "still require[d]" to apply to extraterritorial aspects of claims challenging undifferentiated global emissions, because the Clean Air Act "does not regulate foreign emissions." *City of New York*, 993 F.3d at 95 n.7; *see also id*. at 101. Federal common law thus continues to apply in this area, even after the enactment of the Clean Air Act, thereby preempting Plaintiff's state-law claims. *See Milwaukee II*, 451 U.S. at 313 n.7 ("[I]f federal common law exists, it is because state law cannot be used.").

This conclusion flows from the constitutional principle that States lack the power to regulate international activities or foreign policy and affairs, and such matters "must be treated exclusively as an aspect of federal law." *Sabbatino*, 376 U.S. at 425–26. State "regulations must give way if they impair the effective exercise of the Nation's foreign policy," *Zschernig v. Miller*, 389 U.S. 429, 440 (1968), which calls for a unified federal law rather than a set of "divergent and perhaps parochial state interpretations," *Sabbatino*, 376 U.S. at 425.

* * *

In sum, the structure of the U.S. Constitution precludes the application of state law to Plaintiff's claims for damages based on interstate and international emissions

because those claims "implicat[e] the conflicting rights of [S]tates [and] our relations with foreign nations." *City of New York*, 993 F.3d at 92.

II. Plaintiff's State-Law Claims Are Preempted By The Clean Air Act.

Even if the Constitution did not preclude the application of state law to Plaintiff's claims, those claims would still fail because the Clean Air Act preempts state-law causes of action that would have the effect of regulating out-of-state greenhouse gas emissions.

"[I]n the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990). Preemption is "presumed when the federal legislation is 'sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation.'" *Ouellette*, 479 U.S. at 491 (citation omitted).

Through the Clean Air Act, Congress evaluated and balanced the societal harms and benefits associated with extraction, production, processing, transportation, sale, and use of fossil fuels, and has already comprehensively regulated fossil fuels and greenhouse gas emissions.

For example, Title II of the Act governs greenhouse gas emissions standards for vehicles, aircraft, locomotives, motorcycles, and nonroad engines and equipment. 42 U.S.C. §§ 7521(a)(1)–(2), (3)(E), 7571(a)(2)(A), 7547(a)(1), (5).

Based on this authority, EPA has set vehicle-specific greenhouse gas emission standards, choosing the level of emissions reduction (and hence the level of permissible emissions) that appropriately balances environmental and other national needs. 40 C.F.R. §§ 86.1818-12, 86.1819-14.

The statute also governs "whether and how to regulate carbon-dioxide emissions from powerplants" and other stationary sources. *AEP*, 564 U.S. at 426; *see also* 42 U.S.C. § 7411(b)(1)(A)–(B), (d). EPA has issued comprehensive regulations to control greenhouse gas emissions up and down the fossil fuel supply chain, which include: limiting emissions of methane (the second-most prevalent greenhouse gas) and emissions from crude oil and natural gas production, including the facilities operated by some of the Defendants, *see* 40 C.F.R. § 60, subpart OOOOa; regulating carbon dioxide emissions from fossil fuel-fired power plants; and requiring many major industrial sources—including Defendants' oil refineries and gas-processing facilities, as well as manufacturers that use Defendants' products—to employ the control technologies constituting the best system of emission reduction to limit greenhouse gas emissions. *See Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 331 (2014) ("*UARG*").

The Act's Renewable Fuel Standard Program regulates the consumption and use of the same fossil fuel products at issue in the Complaint; specifically, the Program requires Defendants and other fuel companies to reduce the quantity of

petroleum-based transportation fuel, heating oil, or jet fuel sold by blending in renewable fuels, resulting in lower greenhouse gas emissions on a lifecycle basis. *See* 42 U.S.C. § 7545(*o*). Thus, through the Clean Air Act and its implementing regulations, the federal government has balanced the benefits and harms relating to activities associated with greenhouse gas emissions through an "informed assessment of competing interests," including the "environmental benefit potentially achievable," and "our Nation's energy needs and the possibility of economic disruption." *AEP*, 564 U.S. at 427.

This comprehensive statutory system leaves "no room" for supplemental state regulation of alleged harms arising from interstate greenhouse gas emissions. *Ouellette*, 479 U.S. at 491.

More than thirty years ago, the U.S. Supreme Court concluded that "[t]he [Clean Water] Act pre-empts state law to the extent that the state law is applied to an out-of-state point source." *Ouellette*, 479 U.S. at 500. The Clean Air Act shares all of the features of the Clean Water Act that led the Supreme Court to find preemption of state regulation of interstate pollution. Both laws authorize "pervasive regulation" that entails a "complex" balancing of economic costs and environmental benefits, *id.* at 492, 494–95; both laws provide States with a circumscribed role that is "subordinate" to EPA's, *id.* at 491; and both confirm that "control of interstate . . . pollution is primarily a matter of federal law," *id.* at 492.

Given these statutory features, the Supreme Court held in *Ouellette* that "the [Clean Water Act] precludes a court from applying the law of an affected State against an out-of-state source" because doing so would "upset[] the balance of public and private interests so carefully addressed by the Act." *Id.* at 494.

Because the structure of the Clean Air Act parallels that of the Clean Water Act—even containing an analogous savings clause—courts have consistently construed *Ouellette* to mean that the Clean Air Act preempts state laws to the extent they purport to regulate air pollution originating out of state. *See, e.g.*, *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015) ("[C]laims based on the common law of a non-source state . . . are preempted by the Clean Air Act."); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 194–96 & n.6 (3d Cir. 2013) (same); *Cooper*, 615 F.3d at 301, 306 (same). As Plaintiff's claims arise from global climate change, which is the result of cumulative worldwide greenhouse gas emissions over more than a century, the remedies they seek would regulate the extraction, production, marketing, and sale of fossil fuel products outside of Delaware's borders. As the Supreme Court explained in *AEP*, regulation via tort law "cannot be reconciled with the decisionmaking scheme Congress enacted." 564 U.S. at 429. "Congress designated an expert agency . . . , EPA, as best suited to serve as primary regulator of greenhouse gas emissions," and "[t]he expert agency

is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions." *Id.* at 428. As a result, Plaintiff's claims are preempted.

While *AEP* reserved the narrow question whether to allow state-law claims brought under "the law of each State *where the defendants operate powerplants*," 564 U.S. at 429 (emphasis added), that potential exception merely proves the rule—one State cannot apply its law to claims based on emissions from *another* State. Here, Plaintiff intentionally and explicitly targets interstate emissions: the emissions allegedly causing Plaintiff's claimed injuries come from every State in this Nation and every country in the world. *See, e.g.*, Compl. ¶¶ 199, 243, 245, 257. But Plaintiff is suing under its *own* state law—which federal law prohibits. *See Ouellette*, 479 U.S. at 495; *City of New York*, 993 F.3d at 92 ("Any actions [defendants would] take to mitigate their liability . . . must undoubtedly take effect across every state (and country).").

It is no response that Plaintiff's claims also seek to recover *damages* for emissions-related harms in addition to abating emissions. As the U.S. Supreme Court has explained, state damages suits equally constitute state regulation: "[A] liability award can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008); *see also BMW*, 517 U.S. at 572 n.17 ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute."). And

because Plaintiff here seeks damages based on harms caused by emissions, any liability award would result in the State regulating interstate emissions.

Plaintiff also cannot evade the dispositive force of *Ouellette* by casting its claims as based solely on Defendants' alleged campaign of deception, rather than on greenhouse gas emissions. Plaintiff expressly predicates these claims on conduct occurring both "in and outside of Delaware," *e.g.*, Compl. ¶¶ 239, 241, 270–75, asserts that the alleged harm to Delaware and its consumers stems from misrepresentations to and failures to warn the country and entire world, and from reliance by "Delaware consumers *and other consumers*" inside and outside of Delaware, *e.g.*, *id*. ¶¶ 235–40, 270–75 (emphasis added), and contends that Defendants were required to warn about climate-change risks before "introducing fossil fuel products into the stream of commerce" inside and outside of Delaware, *id*. ¶ 242. Plaintiff predicates its claims on statements to the "public at large," *id*. ¶ 277, because—as it candidly admits—there is no way to trace any injury suffered by Delaware to alleged failures to warn or misrepresentations that occurred in Delaware or to determine whether statements to consumers in Delaware caused any global warming-related harm to anyone in Delaware, *id.* ¶ 245. It is beyond dispute that "the *singular source* of [Plaintiff's] harm" is the nationwide greenhouse gas emissions regulated by the Clean Air Act—and the worldwide emissions that state law cannot regulate. *City of New York*, 993 F.3d at 91 (emphasis added). Indeed,

"[t]he central goal of the Clean Air Act is to reduce air pollution," *Oxygenated Fuels Ass'n Inc. v. Davis*, 331 F.3d 665, 673 (9th Cir. 2003), and the statute achieves that goal by "regulat[ing] pollution-generating emissions," *UARG*, 573 U.S. at 308.

Sustaining these claims would accordingly force Defendants to conform their conduct across the country to Delaware's assessment—rather than to Congress's and EPA's—of the relative benefits and risks of fossil fuels. These federal bodies have concluded that selling and using fossil fuel products should be lawful and regulated, balancing the risks to the climate with the benefits to the public and the United States. But Plaintiff's lawsuit would regulate Defendants' marketing of those same products—even their marketing in other States—because the resulting out-of-state emissions might cause harm in Delaware. "The inevitable result of [sustaining these claims] would be that [Delaware] and other States could do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *Ouellette*, 479 U.S. at 495.

III. Plaintiff's Claims Raise Nonjusticiable Political Questions.

Plaintiff's claims also fail because they would require the Court to usurp the political branches' power to set energy and climate policy, in violation of the political question doctrine. The Delaware Supreme Court has adopted the political question doctrine as articulated by the U.S. Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962). *See State ex rel. Oberly v. Troise*, 526 A.2d 898, 904 (Del. 1987).

Under that articulation, a political question will "present at least one of the following formulations . . . 'a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.'" *Id.* (quoting *Baker*, 369 U.S. at 217).

Such is the case with respect to energy and climate policy. As the U.S. Supreme Court has recognized, "[t]he appropriate amount of regulation in any particular greenhouse gas-producing sector" raises "questions of national or international policy" that require an "informed assessment of competing interests." *AEP*, 564 U.S. at 427.

A. *Kivalina* is directly on point and should be followed here. There, as here, the plaintiffs alleged that the defendant energy companies were "substantial contributors to global warming" and had, among other things, "conspir[ed] to mislead the public about the science of global warming." 696 F.3d at 854. Also as here, "Plaintiffs' global warming claim [was] based on the emissions of greenhouse gases from innumerable sources located throughout the world and affecting the entire planet and its atmosphere." 663 F. Supp. 2d at 875 (emphasis omitted). And finally, as here, "Plaintiffs acknowledge[d] that the global warming process involves 'common pollutants that are mixed together in the atmosphere that cannot be similarly geographically circumscribed.'" *Id.* (alteration omitted).

The court found that the claims presented nonjusticiable political questions because they would require the trier of fact to "balance the utility and benefit of the alleged nuisance against the harm caused." *Kivalina*, 663 F. Supp. 2d at 874. "Stated another way," the court explained, "resolution of [the] nuisance claim is not based on whether the plaintiff finds the invasion unreasonable, but rather 'whether reasonable persons generally, *looking at the whole situation* impartially and objectively, would consider it unreasonable.'" *Id.* The plaintiffs had "fail[ed] to articulate any particular judicially discoverable and manageable standards that would guide the factfinder in rendering a decision that is principled, rational, and based upon reasoned distinctions." *Id.* at 875. So, too, here.

The Northern District of California reached a similar result in *California v. General Motors Corp.*, 2007 WL 2726871 (N.D. Cal. Sep. 17, 2007). There, California sued General Motors and other automakers for creating or contributing to climate change. *Id.* at *1–2. The court found that the State's claims "left [it] without guidance in determining what is an unreasonable contribution to the sum of carbon dioxide in the Earth's atmosphere, or in determining who should bear the costs associated with the global climate change that admittedly result from multiple sources around the globe." *Id.* at *15. The court also rejected the notion that global climate-change cases are just like any other trans-boundary pollution case,

explaining that the State sought to impose damages on an "unprecedented scale" that left the court no way to distinguish one emitter from another. *Id.*

Similarly, the plaintiffs in *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012), brought nuisance and trespass claims against a group of energy companies alleging that their products "led to the development and increase of global warming, which produced the conditions that formed Hurricane Katrina, which damaged their property." *Id.* at 852. The court rejected these claims as requiring "the Court, or more specifically a jury, to determine without the benefit of legislative or administrative regulation, whether the defendants' emissions are 'unreasonable.'" *Id.* at 864. "Simply looking to the standards established by the Mississippi courts for analyzing nuisance, trespass, and negligence claims would not provide sufficient guidance to the Court or a jury." *Id.*

More recently, the Alaska Supreme Court rejected similar climate-change claims under the political question doctrine. *Sagoonick v. State*, 503 P.3d 777 (Alaska 2022). The court explained that "[t]he political question doctrine maintains the separation of powers by 'exclud[ing] from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to' the political branches of government." *Id.* at 795. Notably, the court found that plaintiffs' nuisance claims require balancing the social utility of defendants' conduct with the harm it inflicts, *id.*, and "[t]hat process, by

definition, entails a determination of what would have been an acceptable limit on the level of greenhouse gases emitted by Defendants," *Kivalina*, 663 F. Supp. 2d at 876.[2]

Plaintiff's claims present even greater hurdles to judicial resolution than those in *Kivalina*, *General Motors*, *Comer*, *Sagoonick*, or *Kanuk*. Plaintiff does not seek to hold Defendants liable for their *own* emissions but, rather, for production of fossil fuel products that countless *third parties* combusted and for alleged misrepresentations that supposedly caused those third parties to consume more than they otherwise would have. *See* Compl. ¶¶ 47–49. Under nuisance and negligence law, Plaintiff would need to prove that Defendants' actions were "unreasonable." But the concept of reasonableness provides no guidance for resolving the far-reaching economic, environmental, foreign-policy, and national-security issues raised by Plaintiff's claims—indeed, "with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance." *AEP*, 564 U.S. at 427; *see also Vieth v. Jubelirer*, 541 U.S. 267, 291 (2004) ("'Fairness' does not seem to us a judicially manageable

[2] *See also Kanuk ex rel. Kanuk v. State, Dep't of Res.*, 335 P.3d 1088, 1099 (Alaska 2014) ("The limited institutional role of the judiciary supports a conclusion that the science- and policy-based inquiry here is better reserved for executive-branch agencies or the legislature, just as in *AEP* the inquiry was better reserved for the EPA.").

standard."); *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 731 (Okla. 2021) (reversing judgment holding opioid manufacturers liable under public nuisance theory and "defer[ring] the policy-making to the legislative and executive branches"). In short, "Plaintiff's global warming nuisance tort claim seek[ing] to impose damages on a much larger and unprecedented scale by grounding the claim in pollution originating both within, and well beyond, the borders of the State" presents nonjusticiable political questions and should be dismissed. *Gen. Motors*, 2007 WL 2726871, at *15.

B. These political questions are not theoretical—the Delaware executive and legislative branches have known about climate change for decades (including the alleged climate risks that Plaintiff accuses Defendants of concealing) and have weighed the benefits and costs of fossil fuel use in enacting policies they believe best serve the State. For example, in 2000, the Delaware State Energy Office sponsored a Delaware Climate Change Action Plan to develop policy options to reduce Delaware's greenhouse gas emissions. *See* Del. Energy Office, *Delaware Climate Change Action Plan* (2000), https://tinyurl.com/33n87nhy. In 2013, Governor Markell issued Executive Order 41, through which the State took steps to prepare Delaware for emerging climate impacts. Compl. ¶ 231. In 2017, Delaware developed the DelDOT Strategic Implementation Plan for Climate Change, which, among other initiatives, implemented a statewide study of transportation

infrastructure and chronic flooding and erosion problems caused by sea level rise. Compl. ¶ 231. And the State continues to regulate the issue, recently introducing the Delaware Climate Change Solutions Act of 2023 with the goal of establishing targeted emissions reductions and developing resilience strategies. *See* H.B. 99, 152d Gen. Assemb. (Del. 2023), https://tinyurl.com/mrwaztyy.

At the same time, Delaware has promoted, and continues to promote, petroleum products. In 2011, Delaware approved tax incentives to support reopening the Delaware City Refinery, with Senator Coons noting that the refinery is "essential to Delaware's economy and important to America's energy security." Newark Post, *PBF Celebrates Restart of Delaware City Refinery* (Oct. 7 2011), https://tinyurl.com/5n7rr8pk. Similarly, Senator Carper touted the reopening of the refinery, stating that he "never gave up" and was "successful in finding a buyer . . . , which brought back life to this refinery." Statement of Sen. Carper on Delaware City Refinery Announcement (Dec. 21, 2011), https://tinyurl.com/y3zrdhej. More recently, the Sussex County Council voted in March 2022 to expand a natural gas pipeline in Bridgeville, Delaware. *See* Kelli Steele, *Eastern Shore Natural Gas Pipeline Expansion Approved by Sussex County Council*, Del. Pub. Media (Mar. 23, 2022), https://tinyurl.com/4d5rx5du.

These issues are political questions that have been considered by the executive and legislative branches for decades, resolution of which belongs in their hands, not in the judiciary's.

C. Finally, Plaintiff seeks an "order that provides for abatement of the public nuisance" that Defendants allegedly created. Compl. ¶ 263. Although Plaintiff has not provided the specifics of the requested abatement relief, it is presumably asking this Court to estimate potential future damages resulting from global climate change over the next century and to oversee and administer a fund to pay for and address those future injuries. The Ninth Circuit rejected a request for a similar remedy in *Juliana v. United States*, 947 F.3d 1159, 1169–75 (9th Cir. 2020), finding it beyond the power of the court "to order, design, supervise, or implement the plaintiffs' requested remedial plan . . . [which] would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches." *Id.* at 1171.

The same is true here. Administering "abatement" of this kind would "entail a broad range of policymaking," such as determining what infrastructure projects—from sea walls, to transit, to levees—are supposedly necessary to prevent climate change-related harms and how such projects should be prioritized. *Juliana*, 947 F.3d at 1172. And "given the complexity and long-lasting nature of global climate

change, the court would be required to supervise the [fund] for many decades," if not forever. *Id.*

IV. Plaintiff Fails To State A Claim Under State Law.

Even if the Court concludes that Plaintiff's claims can be decided under state law and are not preempted by the Clean Air Act or barred by the political question doctrine, Plaintiff's claims still fail because Plaintiff has not—and cannot—adequately plead the essential elements of those claims.

A. Plaintiff's Nuisance Claim Fails Because It Alleges Harm Caused By Lawful Products, And Defendants Did Not Control The Instrumentality Of The Nuisance.

For more than twenty years, Delaware governmental entities have attempted to deploy public nuisance law to hold companies liable for the sale of lawful products, from industrial chemicals to pharmaceuticals, that allegedly have caused harm when subsequently used by third parties. In *each and every case*, Delaware courts have rejected those efforts—as have many courts across the country when presented with similar claims. This Court should follow this well-settled precedent and dismiss Plaintiff's public nuisance claim for at least two reasons.

***First*,** no court has ever recognized a nuisance claim under Delaware law based on the production, promotion, sale, or use of a lawful consumer product. Quite the opposite: Delaware courts routinely hold that claims targeting the production

and sale of products are *not* encompassed by the doctrine of public nuisance, which is generally limited to claims involving the use of *land*.

In *Sills*, the City of Wilmington sued gun manufacturers and trade associations to recover damages allegedly resulting from the manufacturing, marketing, and promotion of handguns. 2000 WL 33113806, at *1. The City alleged that the defendants' conduct constituted a public nuisance because it "'create[d] an unreasonable interference with the exercise of the common rights of the health, safety and welfare of the citizens of Wilmington.'" *Id.* at *7. But as the court explained, "Delaware has yet to recognize a cause of action for public nuisance based upon products." *Id.* "Delaware public nuisance claims have been limited to situations *involving land use*," and, "[w]hile no express authority exists requiring [that] public nuisance claims be restricted to those based on land use, Delaware courts remain hesitant to expand public nuisance." *Id.* (emphasis added). The court therefore dismissed the public nuisance claim. *Id.*

In *Purdue*, Delaware sued various manufacturers and distributors of opioids, alleging that they "ha[d] duties to disclose accurately the risks associated with opioid medications, specifically, the high risk of addiction and subsequent misuse," yet they "misrepresented those risks through multi-million-dollar advertising campaigns, and inaccurately claimed that those who were showing signs of addiction were not actually addicted." 2019 WL 446382, at *1. Citing *Sills*, this Court dismissed

Delaware's public nuisance claim because, "[i]n Delaware, public nuisance claims have not been recognized for products." *Id.* at *12. The Court noted that dismissal was consistent with the practice in other jurisdictions, which "also have refused to allow products-based public nuisance claims." *Id.* In fact, the Court observed that "[t]here is a clear national trend to limit public nuisance to land use." *Id.* (collecting cases).

Most recently, Delaware brought a public nuisance claim against Monsanto on the theory that the company "designed, marketed, and sold polychlorinated biphenyls ('PCBs')" from 1935 until at least 1971, despite being "aware of the toxic effect of PCBs on animals and humans as early as 1937." *Monsanto*, 2022 WL 2663220, at *1. Again, this Court dismissed the claim, reasoning that "*Purdue*, *Sills*, and the great weight of authority in other jurisdictions support the conclusion that product claims are not encompassed within the public nuisance doctrine." *Id.* at *4 (footnote omitted); *accord Summers v. Cabela's Wholesale, Inc*., 2019 WL 1423095, at *8–9 (Del. Super. Ct. Mar. 29, 2019) ("Delaware has yet to recognize a cause of action for public nuisance based upon products"), *aff'd*, 223 A.3d 96 (Del. 2019).

Many federal and state courts outside of Delaware agree that nuisance law addresses the use or condition of property, not the production and sale of products. The Oklahoma Supreme Court recently reversed a public nuisance judgment arising

from the allegedly deceptive sale and promotion of opioids on precisely this ground, reasoning that public nuisance "has historically been linked to the use of land by the one creating the nuisance" and that Oklahoma "has never applied public nuisance law to the manufacturing, marketing, and selling of lawful products." *Hunter*, 499 P.3d at 724.

Similarly, the New Jersey Supreme Court rejected an attempt to expand nuisance law to cover the promotion and sale of lead paint because "essential to the concept of a public nuisance tort . . . is the fact that it has historically been linked to the use of land by the one creating the nuisance." *In re Lead Paint Litig.*, 924 A.2d 484, 495 (N.J. 2007). The Rhode Island Supreme Court concurred, explaining that "[t]he law of public nuisance never before has been applied to products, however harmful." *State v. Lead Indus. Ass'n*, 951 A.2d 428, 456 (R.I. 2008); *see also Monsanto*, 2022 WL 2663220, at *3. The Eighth Circuit, too, in affirming dismissal of public nuisance claims relating to the production and sale of asbestos products, noted that "cases applying [North Dakota's] nuisance statute all appear to arise in the classic context of a landowner or other person in control of property conducting an activity on his land in such a manner as to interfere with the property rights of a neighbor." *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993).

Allowing plaintiffs to pursue public nuisance claims based on the production, promotion, and sale of lawful products would vitiate the carefully crafted rules governing products-liability law. Courts have long recognized that the boundaries between nuisance and products liability must be respected; otherwise, public nuisance law would turn into "a monster that would devour in one gulp the entire law of tort." *Tioga Pub. Sch. Dist.*, 984 F.2d at 921; *see also Monsanto*, 2022 WL 2663220, at *3. In particular, "[p]ublic nuisance focuses on the abatement of annoying or bothersome *activities*," whereas products liability is "designed specifically to hold manufacturers liable for harmful *products*." *Lead Indus. Ass'n*, 951 A.2d at 456 (emphases added). For this reason, courts "refus[e] to apply" nuisance law "in the context of injuries caused by defective product design and distribution." *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 909 (E.D. Pa. 2000); *see also Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001) (per curiam) ("[C]ourts have enforced the boundary between the well-developed body of product liability law and public nuisance law."); *Atl. Richfield Co. v. Cnty. of Lehigh*, 2023 WL 3266792, at *8 (Pa. Commw. Ct. May 5, 2023) ("The manufacture and distribution of products rarely, if ever, causes a violation of a public right as that term has been understood in the law of public nuisance." (cleaned up)). Otherwise, plaintiffs would be able to

circumvent important "requirements that surround a products liability action." *Lead Indus. Ass'n*, 951 A.2d at 456.

The New Jersey Supreme Court's reasoning in *In re Lead Paint* is instructive. There, the court declined to allow a public nuisance claim based on the promotion and sale of lead pigment, notwithstanding the harmful effects of lead poisoning, because doing so would "stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance." 924 A.2d at 494. Similarly, the Oklahoma Supreme Court's decision in *Hunter* warned that "[e]xtending public nuisance law to the manufacturing, marketing, and selling of products . . . would allow consumers to convert almost every products liability action into a [public] nuisance claim," 499 P.3d at 729–30, and "would create unlimited and unprincipled liability for product manufacturers," *id.* at 725. Delaware courts have cited both of these decisions favorably. *See, e.g.*, *Monsanto*, 2022 WL 2663220, at *3; *Purdue*, 2019 WL 446382, at *12 n.70. Plaintiff's product-based public nuisance claim should therefore be dismissed as a matter of Delaware law.

***Second*,** Plaintiff's nuisance claim fails because Defendants did not control the instrumentality that caused the alleged nuisance of global climate change—namely, greenhouse gas emissions. Such control is an essential element of a public

nuisance claim under Delaware law. In *Purdue*, for example, the court explained that even if the defendants could be held liable for a public nuisance resulting from their promotion and sale of opioids, the claim still must be dismissed because "[a] defendant is not liable for public nuisance unless it exercises control over the instrumentality that caused the nuisance *at the time of the nuisance*." 2019 WL 446382, at *13 (emphasis added). The Court reiterated this point in *Monsanto*. *See* 2022 WL 2663220, at *2 (citing *Purdue*, 2019 WL 446382, at *13).

Defendants here exercise even less control over the instrumentality of the alleged nuisance—global greenhouse gas emissions—at the time of the nuisance than Purdue exercised over prescription opioids or Monsanto did over PCBs. In both of those cases, defendants sold the instrumentality of the nuisance directly to third parties, whose use of the instrumentality then directly caused the alleged interference with public rights. Here, by contrast, Defendants did not sell or distribute greenhouse gas emissions; rather, they sold fossil fuel products that, when combusted by third-party individuals, corporations, and governments using their own devices (automobiles, airplanes, electric power generating facilities, homes and hospitals, etc.), produced the emissions that—in combination with other anthropogenic and natural sources of emissions over the course of decades or longer—have allegedly interfered with public rights. *See* Compl. ¶¶ 148, 245. Because Defendants exercised no control over the emissions that allegedly created

the nuisance, it is irrelevant whether they "control[ed] every step of the fossil fuel product supply chain." *Id*. ¶ 261. In fact, Plaintiff does not—and cannot—allege that Defendants exercised control over those emissions at *any* time, much less when they reached cumulative levels sufficient to create an alleged public nuisance.

As courts have long recognized, it "would run contrary to notions of fair play" to hold sellers like Defendants liable for a public nuisance when "they lack direct control over how end-purchasers use" their products. *City of Philadelphia*, 126 F. Supp. 2d at 911. Thus, the vast majority of courts have joined Delaware in "refrain[ing] from applying public nuisance doctrine in cases where the instrument of the nuisance is a lawfully sold product which has left the manufacturer's control." *Id.*; *see also, e.g.*, *Hunter*, 499 P.3d at 727–28 ("Another factor in rejecting the imposition of liability for public nuisance . . . is that J&J, as a manufacturer, did not control the instrumentality alleged to constitute the nuisance at the time it occurred."); *Lead Indus. Ass'n*, 951 A.2d at 449 ("[A] defendant must have *control* over the instrumentality causing the alleged nuisance *at the time the damage occurs*."); *Detroit Bd. of Educ. v. Celotex Corp.*, 196 Mich. App. 694, 712–13 (1992) ("If the defendants exercised no control over the instrumentality, then a remedy directed against them is of little use."); *Tioga Pub. Sch. Dist.*, 984 F.2d at 920 ("[L]iability for damage caused by a nuisance turns on whether the defendant is in control of the instrumentality alleged to constitute a nuisance, since without control

a defendant cannot abate the nuisance."). Imposing nuisance liability on the Defendants here for the far-reaching atmospheric processes allegedly precipitated by end consumers' combustion of fossil fuels would eviscerate the control requirement.

Plaintiff's allegation that Defendants controlled the instrumentality of the nuisance "by flooding the marketplace with disinformation concerning their products" does not save its public nuisance claim. In *Purdue*, the court found that defendants lacked sufficient control over the instrumentality of the nuisance even though they were accused of "misrepresent[ing] . . . risks [associated with their opioid products] through multi-million dollar advertising campaigns." 2019 WL 46382, at *1; *see also, e.g.*, *Lead Indus. Ass'n*, 951 A.2d at 440 (dismissing public nuisance claim despite allegations that "defendants failed to warn Rhode Islanders of the hazardous nature of lead [paint]" and "concealed these hazards from the public or misrepresented that [lead paint] w[as] safe"). In any event, Plaintiff itself alleges that its purported harms flow from the overall concentration of greenhouse gases in the atmosphere. *See* Compl. ¶¶ 4, 9, 59–60, 148–49, 226–28.

A long line of Delaware cases—including *Sills*, *Purdue*, and *Monsanto*—has rejected public nuisance claims that, like the one Plaintiff alleges here, attempt to hold a party liable for the sale of lawful products that purportedly created a nuisance after leaving the seller's control. These holdings under Delaware law are in accord

with the weight of authority from outside the State. This Court likewise should reject Plaintiff's "clever, but transparent attempt" to recast its products-liability claim in the guise of nuisance law. *City of Philadelphia*, 126 F. Supp. 2d at 911.

B. Plaintiff's Trespass Claim Fails Because Plaintiff Has Not Adequately Pleaded Any Of Its Elements.

Plaintiff's trespass claim fares no better. Trespass under Delaware law comprises three elements: "(1) the plaintiff must have lawful possession of the property; (2) the defendant must have entered onto the plaintiff's land without consent or privilege; and (3) the plaintiff must show damages." *O'Bier v. JBS Constr., LLC*, 2012 WL 1495330, at *2 (Del. Super. Ct. Apr. 20, 2012). Plaintiff fails to adequately allege any of these elements, as Delaware case law makes clear.

***First*,** Plaintiff fails to allege where the trespass(es) occurred. *See* Compl. ¶ 248 (generically referring to "real property throughout the State of Delaware"). Moreover, insofar as Plaintiff's trespass claim is premised on its beaches, wetlands, and coastal land, *see* Compl. ¶¶ 11, 46, its trespass claim fails as a matter of law because Delaware law requires that Plaintiff have *exclusive* possession to have standing to assert a trespass claim. In *Monsanto*, for example, Delaware brought a trespass claim on the ground that Monsanto "designed, marketed, and sold polychlorinated biphenyls ('PCBs') in bulk for use by third-party manufacturers in an array of industrial and commercial applications," and those PCBs ultimately polluted the Delaware River. 2022 WL 2663220, at *1–2. Although "[i]t [wa]s

undisputed that the State has regulatory control over State land and resources," the court concluded that this was not enough to state a claim for trespass under Delaware law because "there is no support for the proposition that the State has exclusive possession of water," and "[l]ack of exclusive possession negates the State's standing to seek damages on a trespass theory." *Id.* at *6 (emphases omitted). As this Court observed, "the word 'intrusion' is used in relation to trespass 'to denote the fact that the possessor's interest in the *exclusive possession* of his land has been invaded by the presence of a person or thing upon it without the possessor's consent.'" *Id.* at *4 (emphasis added).

The same is true here. Plaintiff asserts that Defendants' conduct is causing an intrusion on Delaware's "beaches," "wetlands," and "coastal communities." *See, e.g.*, Compl. ¶¶ 11, 46. But Plaintiff lacks exclusive possession over such property as a matter of law. As the Court held in *Monsanto*, "[l]and in the public trust is held by the State on behalf of a second party, the people. Such land cannot be in 'exclusive possession' of the State as the interest created by the doctrine is intended to ensure that others have use of the same land." 2022 WL 2663220, at *5.

***Second*,** Plaintiff does not allege that Defendants, *or even their products*, unlawfully entered its land. Instead, Plaintiff alleges only that Defendants "caused flood waters, extreme precipitation, saltwater, and other materials, to enter the State's real property." Compl. ¶ 249. But no precedent supports the novel assertion

that a party can be held liable in trespass because use of its product by third parties around the world over nearly a century may result in weather changes that affect another's property. In fact, the Restatement suggests the opposite, providing that an actor causes an object to trespass upon another's property when, "without himself entering the land, [he] may invade another's interest in its exclusive possession *by throwing, propelling, or placing a thing* either on or beneath the surface of the land or in the air space above it." Restatement (Second) of Torts § 158 cmt. i (emphasis added).

Consistent with the Restatement, Delaware trespass cases require an overt physical act by the defendant that bears directly on the plaintiff's property to sustain a trespass claim. *Compare Newark Square, LLC v. Ladutko*, 2017 WL 544606, at *2–3 (Del. Super. Ct. Feb. 10, 2017) (rejecting the argument that the defendant "should be liable for trespass because [a] fire that originated on [its] Property crossed onto the [plaintiff's] Property and caused damage" because "there was no volitional act that constituted trespass"), *with Beckrich Holdings, LLC v. Bishop*, 2005 WL 1413305, at *9 (Del. Ch. June 9, 2005) (holding that the defendant trespassed onto plaintiff's property when he altered the terrain in a way that resulted in water pooling on the plaintiff's property and causing damage). Plaintiff alleges no such act here.

Even if Plaintiff could reframe its trespass claim to involve Defendants' products or emissions by third parties' use of Defendants' products, the claim would

still fail because Defendants did not have control over those things at the time of the trespass. *Monsanto* is again dispositive. In addition to concluding that Delaware failed to allege exclusive possession over the property on which the alleged trespass occurred, the court held that "there can be no trespass action for contamination" by PCBs because "there must be some exercise of ownership or control over the intruding instrumentality" of the trespass, but "[t]here [wa]s no allegation of control by Defendants of [the PCBs] at the time at which the pollution occurred." 2022 WL 2663220, at *6. On the contrary, "[t]he State allege[d] that PCBs enter[ed] the environment by escaping their intended uses . . . *by third parties*" who had purchased them from Monsanto. *Id.* at *2 (emphasis added).

Similarly, Plaintiff here alleges that greenhouse gas emissions entered the atmosphere only after Defendants' products were combusted by billions of third parties around the world. *See, e.g.*, Compl. ¶ 5 ("The primary cause of the climate crisis is the combustion of coal, oil, and natural gas."); *id.* ¶ 49 ("Greenhouse gases are largely byproducts of humans combusting fossil fuels to produce energy and using fossil fuels to create petrochemical products."). But it is undisputed that, at the time Defendants' fossil fuel products were combusted and released greenhouse gases into the atmosphere, Defendants had no control over those products (or the resulting emissions).

***Third*,** Plaintiff's trespass claim is not ripe to the extent it is based on anticipated *future* invasions of property, and virtually all of Plaintiff's alleged injuries are entirely speculative and will be felt (if at all) only decades hence. For example, the Complaint alleges that "Delaware *will* experience significant additional and accelerating sea level rise," such that residents will face "flooding risk *in the coming decades*," and "*[i]n the coming decades*, sea level rise will threaten over 400 miles of roadway." Compl. ¶ 228(a) (emphases added). For this reason, too, Plaintiff cannot state a claim for trespass.

As one court observed, "modern courts do not favor trespass claims for environmental pollution." *In re Paulsboro Derailment Cases*, 2013 WL 5530046, at *8 (D.N.J. Oct. 4, 2013). Indeed, "use of trespass liability for [environmental pollution] has 'been held to be an inappropriate theory of liability' and an 'endeavor to torture old remedies to fit factual patterns not contemplated when those remedies were fashioned.'" *Woodcliff, Inc. v. Jersey Constr., Inc.*, 900 F. Supp. 2d 398, 402 (D.N.J. 2012). That is especially so where, as here, Plaintiff cannot even plead the elements of a traditional trespass claim. The Court should therefore dismiss Plaintiff's claim for trespass.

C. Plaintiff's Failure To Warn Claim Fails Because Defendants Did Not Have A Duty To Warn Of Widely Publicized Risks Relating To Climate Change.

"[A] plaintiff must prove in a negligence-based products liability case . . . that the defendant had a duty to warn of dangers associated with its product." *Walls v. Ford Motor Co.*, 160 A.3d 1135 (Del. 2017). For at least two reasons, Plaintiff has not alleged facts sufficient to show that Defendants had a duty to warn.

***First*,** Plaintiff's novel failure to warn theory exceeds the bounds of any cognizable duty of care—and the Delaware Supreme Court has long cautioned against "extend[ing]" common-law tort duties in areas, like climate change, "laden with policy concerns" that could affect "the national economy." *State of Sao Paulo of Federative Republic of Brazil v. Am. Tobacco Co.*, 919 A.2d 1116, 1126 (Del. 2007); *see also id.* ("So complex and intricate are [some] concerns that they are better addressed by the legislature(s), not by courts applying common law principles.").

Here, Plaintiff seeks to impose an unprecedented duty of care on Defendants—far beyond anything recognized by Delaware law. Section 388 of the Restatement "has long governed whether manufacturers can be held liable for negligent failure to warn under [Delaware] law." *Ramsey v. Ga. S. Univ. Advanced Dev. Ctr.*, 189 A.3d 1255, 1261 (Del. 2018). That Restatement section applies where a plaintiff claims injury from *its own use* of a product—*i.e.*, that Defendants' alleged

failure to warn *Plaintiff* about fossil fuel combustion caused *Plaintiff* to consume fossil fuels, and that *Plaintiff's* use in turn injured *Plaintiff*. *See* Restatement (Second) of Torts § 388 cmts. *a* ("[T]he rule stated in this Section has been applied only in favor of those who are injured while the chattel is being used by the person to whom it is supplied, or with his consent.") & *e* ("The liability stated in this Section exists only if physical harm is caused by the use of the chattel by those for whose use the chattel is supplied"). But that is not what Plaintiff alleges here.

Instead, Plaintiff's theory is that Defendants "should have warned *the public*"—writ large—about these risks and that Defendants' alleged failure to warn "the public" caused a marginal increase in cumulative greenhouse gas emissions by unidentified third parties throughout the world, which ultimately injured Plaintiff and others. Compl. ¶ 105 (emphasis added). Accepting that theory, no single actor's use of fossil fuels created risk to the user—because the harm flows not from any individual's use of the product but, rather, from the overall concentration of greenhouse gases in the atmosphere, as determined by cumulative *global* emissions over many decades. No Delaware court has recognized such a boundless duty to warn—where the user cannot protect itself from harm by declining to use the product—and this Court should decline to do so. *See In re Asbestos Litig.*, 2007 WL 4571196, at *12 (Del. Super. Ct. Dec. 21, 2007) (rejecting failure to warn claim

where court could not "discern a relationship between the plaintiff and the defendant that would support a legal duty").

Nor does Plaintiff allege a "special relationship" between itself and Defendants that could impose a duty of care. *See Rahaman v. J.C. Penney Corp.*, 2016 WL 2616375, at *8 (Del. Super. Ct. May 4, 2016) ("In negligence cases alleging nonfeasance, or an omission to act, there is no general duty to others without a 'special relationship' between the parties."). A special relationship can arise in four situations: (1) a common carrier has a special relationship with its passengers, (2) an innkeeper has a special relationship with its guests, (3) a possessor of land who holds it open to the public has a special relationship with members of the public who enter in response to his invitation, and (4) one who takes custody of another under circumstances such as to deprive him of his normal opportunities for protection has a special relationship with that person. *See Furek v. Univ. of Del.*, 594 A.2d 506, 517 (Del. 1991). Plaintiff does not even *attempt* to allege any of these circumstances, nor could it.

On the contrary, Plaintiff alleges an undifferentiated duty *to the world* to warn of potential risks of fossil fuel combustion decades in the future. That limitless conception of duty would "expand traditional tort concepts beyond manageable bounds" and impermissibly create "an indeterminate class of" potential plaintiffs.

Gourdine v. Crews, 405 Md. 722, 750 (Ct. App. 2008) (declining to impose an effective "duty to the world").

Second, it is hornbook law that "there is no duty to warn of or protect invitees from an open and obvious danger." *Jones v. Clyde Spinelli, LLC*, 2016 WL 3752409, at *2 (Del. Super. Ct. July 8, 2016), *aff'd*, 159 A.3d 242 (Del. 2017); *see also Macey v. AAA-1 Pool Builders & Serv. Co.*, 1993 WL 189481, at *3 (Del. Super. Ct. Apr. 30, 1993) (holding that a "manufacturer has no duty to warn if it reasonably perceives that the potentially dangerous condition of the product is readily apparent"). The Complaint repeatedly asserts that the potential link between fossil fuel use and global climate change has been well understood and widely known for at least half a century. To take just a few examples, Plaintiff alleges that:

- "Decades of scientific research has shown that pollution from Defendants' fossil fuel products plays a direct and substantial role in the unprecedented rise in emissions of greenhouse gas pollution and increased atmospheric CO_2 concentrations that have occurred since the mid-20th century. This dramatic increase in atmospheric CO_2 and other greenhouse gases is the main driver of the gravely dangerous changes occurring to the global climate." Compl. ¶ 4.

- "By 1965, concern over the potential for fossil fuel products to cause disastrous global warming reached the highest levels of the United States' scientific community. In that year, President Lyndon B. Johnson's Science Advisory Committee's Environmental Pollution Panel reported that a 25% increase in carbon dioxide concentrations could occur by the year 2000, that such an increase could cause significant global warming, that melting of the Antarctic ice cap and rapid sea level rise could result, and that fossil fuels were the clearest source of the pollution." *Id.* ¶ 66.

- "In 1988, National Aeronautics and Space Administration (NASA) scientists confirmed that human activities were actually contributing to global warming" with "significant news coverage." *Id.* ¶ 106(a).

- "In December 1988, the United Nations formed the Intergovernmental Panel on Climate Change (IPCC), a scientific panel dedicated to providing the world's governments with an objective, scientific analysis of climate change and its environmental, political, and economic impacts." *Id.* ¶ 106(c).

- "In 1990, the IPCC published its First Assessment Report on anthropogenic climate change, in which it concluded that . . . 'there is a natural greenhouse effect which already keeps the Earth warmer than it would otherwise be.'" *Id.* ¶ 106(d) (footnote omitted).

- "The United Nations began preparing for the 1992 Earth Summit . . . [which] resulted in the United Nations Framework Convention on Climate Change (UNFCCC), an international environmental treaty providing protocols for future negotiations aimed at 'stabiliz[ing] greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.'" *Id.* ¶ 106(e).

See also, e.g., *id.* ¶ 98 (describing 1991 Shell film discussing "serious warning" about climate change "endorsed by a uniquely broad consensus of scientists in their report to the UN at the end of 1990"), ¶ 99 (describing 1991 BP film calling the threat of climate change an "urgent concern[]"), ¶ 151 (discussing 1997 public speech of BP's chief executive acknowledging the "effective consensus" that "there is a discernible human influence on the climate").

Because Plaintiff's own allegations make clear that the potential dangers of fossil fuel use on the climate have been "open and obvious" for decades, Defendants had no duty to warn about these dangers, and Plaintiff's negligent failure to warn

claim fails as a matter of law. *See Trabaudo v. Kenton Ruritan Club, Inc.*, 517 A.2d 706, 708 (Del. Super. Ct. 1986) (holding that sellers should not be "required to warn consumers of the necessity for proper cooking when the need for such is common knowledge"); *Macey*, 1993 WL 189481, at *3 (same).

D. Plaintiff's Delaware Consumer Fraud Act Claim Is Time-Barred And Fails On The Merits.

To state a claim under the DCFA, Plaintiff must allege that (1) Defendants engaged in conduct that violates the statute, (2) Plaintiff was a "victim" of the unlawful conduct, and (3) a causal relationship exists between Defendants' unlawful conduct and Plaintiff's loss. *Teamsters Loc. 237 Welfare Fund v. AstraZeneca Pharm. LP*, 136 A.3d 688, 693 (Del. 2016). The "DCFA is only applicable if the fraudulent conduct occurs within Delaware." *Marshall v. Priceline.com Inc*., 2006 WL 3175318, at *2 (Del. Super. Ct. Oct. 31, 2006).[3]

Plaintiff alleges two forms of deception under the DCFA: (1) "a campaign of deception to hide [Defendants'] knowledge of the harmful effects of the intended use of their fossil fuel products on climate change," Compl. ¶ 276, and (2) a "greenwashing" campaign purportedly consisting of "false and misleading

[3] Plaintiff does not assert a DCFA claim against ConocoPhillips, ConocoPhillips Company, Phillips 66, Phillips 66 Company, Murphy Oil Corporation, Murphy USA Inc., TotalEnergies SE, TotalEnergies Marketing USA, Inc., Occidental Petroleum Corporation, Devon Energy Corporation, Apache Corporation, CONSOL Energy Inc., and Ovintiv, Inc. *See* Compl. ¶ 265.

advertising campaigns promoting [Defendants] as sustainable energy companies committed to finding solutions to climate change, including by investing in alternative energy," *id.* ¶ 164. The Complaint makes clear that these are *distinct* theories of liability based on *distinct* acts of alleged deception. Indeed, the Complaint alleges: "*After* having engaged in a long campaign to deceive consumers and the public about the science behind climate change, Defendants are *now* engaging in 'greenwashing.'" *Id.* (emphases added). Plaintiff has one entire section of the Complaint entitled "Defendants Did Not Disclose Known Harms Associated with the Extraction, Promotion, and Consumption of Their Fossil Fuel Products, and Instead Affirmatively Acted to Obscure Those Harms and Engaged in a Campaign to Deceptively Protect and Expand the Use of their Fossil Fuel Products." *Id.* ¶¶ 104–41. And it has a separate section entitled "Defendants Continue to Mislead About the Impact of Their Fossil Fuel Products on Climate Change Through Greenwashing Campaigns and Other Misleading Advertisements in Delaware and Elsewhere." *Id.* ¶¶ 161–201.

Plaintiff's DCFA claim based on an alleged "campaign of deception" fails as a matter of law for two reasons: (1) it violates the applicable statute of limitations, and (2) it fails to allege any deception about Defendants' products.

***First*,** claims regarding the alleged past "campaign of deception" over climate science are barred by the statute of limitations. DCFA claims must be initiated

within "5 years from the time the cause of action accrued." Del. Code Ann. tit. 6, § 2506; *see also State ex rel. Brady v. Pettinaro Enters.,* 870 A.2d 513, 528 (Del. Ch. 2005) ("§ 2506 explicitly limits actions brought by the Attorney General, stating that: 'no action at law by the Attorney General brought under this chapter shall be initiated after the expiration of 5 years from the time the cause of action accrued.'"). The Delaware Supreme Court "has repeatedly held that a cause of action 'accrues' . . . at the time of the wrongful act." *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004). And that is so "even if the plaintiff is ignorant of the cause of action." *Brady*, 870 A.2d at 531 (applying this rule of accrual to claims under the DCFA). As such, Plaintiff must, at a minimum, allege an act of deception within the five years preceding the filing of its Complaint on September 10, 2020—*i.e.*, an act that occurred *after* September 10, 2015.

But Plaintiff does not identify any allegedly misleading statements under the "campaign of deception" during the limitations period. Rather, Plaintiff alleges that this campaign started in approximately *1988*, Compl. ¶ 106, and that the last alleged statement made as a part of this purported campaign of deception occurred in 1998 through a public "national media relations program"—*more than 15 years before the limitations period began in 2015*. *See id.* ¶¶ 122–23.

Apparently recognizing this hurdle to its DCFA claim, Plaintiff asserts that "[n]either the State nor its consumers were on inquiry or actual notice to investigate

the CFA Defendants' campaign of deception until recently, nor should a reasonable person have been, because CFA Defendants' campaign of deception was so effective at concealing their lies from the public." Compl. ¶ 276. But this is plainly inconceivable and is controverted by Plaintiff's own allegations.

As an initial matter, Plaintiff's Complaint alleges that the link between the combustion of fossil fuels and global climate change has been well understood, and widely known, for at least half a century. *See, e.g.*, Compl. ¶¶ 66, 89. Plaintiff alleges that Defendants had been attempting to downplay this evidence through their supposed "campaign of deception" for nearly *35 years* by the time it filed this action. But this alleged "campaign of deception" was purportedly carried out in full view of the public—influencing the public was allegedly the *entire point* of the "campaign"—precluding Defendants from concealing it. *See Brady*, 870 A.2d at 531–32 (rejecting fraudulent concealment when conduct giving rising to claims was "obvious").

The same accusations that Plaintiff makes here regarding a purported "campaign of deception" by energy companies have been widely publicized by other parties for decades before Plaintiff filed the Complaint in this action. As early as 1997, *The Washington Post* ran a story on the front page of its opinions section charging that, "[e]ven as global warming intensifies, the evidence is being denied with a ferocious disinformation campaign. Largely funded by oil and coal interests,

it is being carried out on many fronts." Ross Gelbspan, *Hot Air, Cold Truth*, Wash. Post (May 25, 1997), https://tinyurl.com/mwwxdbuv. A year later, the Sunday edition of *The New York Times* reported on its front page that oil-and-gas "[i]ndustry opponents of a treaty to fight global warming have drafted an ambitious proposal to spend millions of dollars to convince the public that the environmental accord is based on shaky science." John H. Cushman Jr., *Industrial Group Plans to Battle Climate Treaty*, N.Y. Times (Apr. 26, 1998), https://tinyurl.com/fakcbkph.[4]

Moreover, this alleged campaign formed the centerpiece of the highly publicized *Kivalina* lawsuit, which was filed in 2008 and includes many of the same allegations that Plaintiff makes here. As the *New York Times* reported, that suit alleged "'a long campaign by power, coal and oil companies to mislead the public about the science of global warming,'" which "contributed 'to the public nuisance of global warming by convincing the public at large and the victims of global warming that the process is not man-made when in fact it is.'" Felicity Barringer, *Flooded Village Files Suit, Citing Corporate Link to Climate Change*, N.Y. Times (Feb. 27, 2008), https://tinyurl.com/4f6fr4j9; *see also Kivalina*, No. 4:08-cv-01138 (N.D. Cal.), Dkt. 1 ¶¶ 189–248, 269–77.

[4] Defendants deny the accuracy of these materials and do not offer them for the truth of their contents, but only to show that Plaintiff knew or should have known of its claims. Accordingly, the Court may take judicial notice of these articles. *See Bredberg v. Bos. Sci. Corp.*, 2021 WL 2816897, at *3 (Del. Super. Ct. July 2, 2021).

Accordingly, Plaintiff's DCFA claims based on allegations that Defendants engaged in a "campaign of deception" are barred by the statute of limitations and should be dismissed as a matter of law.

Second, the DCFA claim regarding the so-called "campaign of deception" should also be dismissed because the alleged misrepresentations relate to *climate change*, a climatological phenomenon, rather than Defendants' *products*. The DCFA requires that the misrepresentation be "in connection with the sale, lease, receipt, or advertisement *of any merchandise*." Del. Code Ann. tit. 6, § 2513(a) (emphasis added). The "Court cannot ignore the clear language of the statute which restricts its application to deceptive practices 'in connection with the sale or advertisement' of the merchandise." *Norman Gershman's Things To Wear, Inc. v. Mercedes-Benz of N. Am., Inc*., 558 A.2d 1066, 1074 (Del. Super. Ct. 1989).

Here, the focus of Plaintiff's Complaint is not deceptive acts related to Defendants' products, during the limitations period or otherwise. Plaintiff's allegations with respect to a "campaign of denial" relate only to the *effects of climate change* writ large—not to Defendants' specific merchandise or products. Indeed, Defendants' alleged "advertisements challenging the validity of climate science . . . intended to obscure the scientific consensus on anthropogenic climate change and induce political inertia to address it," and their supposed "campaign to convince the public that the scientific basis for climate change was in doubt," Compl. ¶¶ 116, 123,

have nothing to do with any particular fossil fuel products. This is fatal to the DCFA claim and requires dismissal of that claim.

V. Plaintiff's Complaint Does Not Satisfy Rule 9(b)'s Heightened Pleading Standard For Claims Alleging Fraud.

Complaints averring fraud must allege the circumstances constituting the fraud with "particularity." Del. Civ. R. 9(b). This heightened pleading requirement applies whenever a plaintiff alleges fraud, even if the cause of action itself does not contain fraud as an element. *See York Linings v. Roach*, 1999 WL 608850, at *2 (Del. Ch. July 28, 1999) (applying heightened pleading requirement to claim for breach of fiduciary duty premised on allegations of fraud); *Toner v. Allstate Ins. Co.*, 821 F. Supp. 276, 283 (D. Del. 1993) ("[T]he requirements of the [similar Federal Rule 9(b)] apply to all cases where the gravamen of the claim is fraud even though the theory supporting the claim is not technically termed fraud.").

That is the situation here, where, despite bringing only one claim that is facially premised on fraud (the DCFA claim), Plaintiff has framed each of its claims as arising out of a "decades-long campaign [of deception]" through which Defendants allegedly "concealed their fraud by issuing misleading advertorials and other statements diminishing the harmful effects of their products' use on climate change without disclosing their own knowledge to the contrary." Compl. ¶¶ 108, 276. Under Plaintiff's own theory of liability, all of its claims concern alleged "fraudulent concealment[s]," *id.* ¶ 277, and Rule 9(b) thus necessarily applies.

Because Plaintiff's claims purport to be based on alleged misrepresentations and deceptions, Rule 9(b) requires that the Complaint allege with particularity "what the false advertising was, where it was located, the contents of the statements and the reliance that ensued from those statements which caused the damage." *Rinaldi v. Iomega Corp.*, 1999 WL 1442014, at *8 (Del. Super. Ct. Sept. 3, 1999). For a case purportedly based on a "campaign of deception," Plaintiff's Complaint does not satisfy this standard, instead offering mostly generalized allegations that fail to identify specific misstatements, how their alleged advertising was conducted (*e.g.*, by print, television, radio, internet, or something else), whether the advertising was run in or aimed at Delaware, or who heard or saw the advertisements. Plaintiff plainly fails to allege the requisite "details regarding time, place, and content" to support its misrepresentation-based claims. *Universal Cap. Mgmt. v. Micco World, Inc.*, 2012 WL 1413598, at *4 (Del. Super. Ct. Feb. 1, 2012).

Any attempt to rely on generalized group pleading fails as a matter of law because, as federal courts have explained with regard to the identical Federal Rule 9(b), that rule "does not allow a complaint to merely lump multiple defendants together but require[s] plaintiffs to differentiate their allegations when suing more than one defendant."[5] *Swartz v. KPMG LLP*, 476 F.3d 756, 764–65 (9th Cir. 2007)

[5] Despite alleging claims based on *public* statements, which Plaintiff necessarily has access to, Plaintiff has identified no statements by Hess Corporation, Murphy Oil Corporation, Murphy USA Inc., Marathon Oil Corporation, Citgo Petroleum

(per curiam). Courts routinely dismiss deception-based claims where, as here, no misrepresentation is identified or pleaded with particularity. *See, e.g.*, *Lum v. Bank of Am.*, 2007 WL 1316320, at *2 (3d Cir. May 7, 2007); *U.S. Bank Nat'l Ass'n ex rel. SG Mortg. Sec. Asset Backed Certificates, Series 2006-FRE2 v. Murray*, 2016 WL 1551427, at *6 (N.J. Super. Ct. App. Div. Apr. 18, 2016). In *Lum*, for example, the Third Circuit affirmed dismissal where the Complaint did "not allege a specific date, place, or time for the fraud," or otherwise "inject precision into [its] allegations." 2007 WL 1316320, at *2. In *U.S. Bank*, the New Jersey Appellate Division called similar failures "fatal" to asserted CFA claims. 2016 WL 1551427, at *6.

Equally absent from the Complaint is any particularized allegation of actual "reliance that ensued from those statements which caused the damage." *Rinaldi*, 1999 WL 1442014, at *8. "[T]o plead reliance with particularity, plaintiff must explain what he did, or refrained from doing, in justifiable reliance upon the statement." *Otto Candies, LLC v. KPMG LLP*, 2019 WL 994050, at *22 n.199 (Del. Ch. Feb. 28, 2019). But the Complaint does not so much as hint at which, if any, of Plaintiff's decisions were influenced by any Defendant's supposedly misleading

---

Corporation, TotalEnergies SE, TotalEnergies Marketing USA, Inc., Occidental Petroleum Corporation, Devon Energy Corporation, Apache Corporation, CNX Resources Corporation, CONSOL Energy Inc., Ovintiv, Inc., Marathon Petroleum Company LP, and Speedway LLC.

statements. Indeed, Plaintiff does not allege—not even once—that it decided to use fossil fuels as a result of any allegedly fraudulent or misleading statement made by Defendants.

Because Plaintiff has failed to allege when, where, and how any alleged misstatements were made, and the effect those alleged statements had, the Complaint should be dismissed. Moreover, although "[u]sually, a dismissal for failure to comply with Rule [9(b)] is without prejudice to a litigant's right to amend the pleading," the Court should "part from the usual course in this case." *Lynx Asset Servs., L.L.C. v. Minunno*, 2017 WL 563310, at *3 (N.J. Super. Ct. App. Div. Feb. 13, 2017). Because the alleged "campaign of deception" was purportedly aimed at the public, Plaintiff cannot contend that it lacked access or means to set forth the specifics of this alleged fraudulent conduct. Plaintiff's failure to do so is inexcusable and the Court should therefore dismiss the Complaint with prejudice.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court dismiss Plaintiff's Complaint with prejudice.

DATED: MAY 18, 2023

Respectfully submitted,

By: */s/ David E. Wilks*
David E. Wilks (Del. Bar I.D. 2793)

WILKS LAW, LLC
David E. Wilks
dwilks@wilks.law
4250 Lancaster Pike, Suite 200
Wilmington, DE 19805
Telephone: 302.225.0858

GIBSON, DUNN & CRUTCHER LLP
Theodore J. Boutrous, Jr., *pro hac vice*
William E. Thomson, *pro hac vice*
tboutrous@gibsondunn.com
wthomson@gibsondunn.com
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: 213.229.7000
Facsimile: 213.229.7520

Andrea E. Neuman, *pro hac vice*
aneuman@gibsondunn.com
200 Park Avenue
New York, NY 10166
Telephone: 212.351.4000
Facsimile: 212.351.4035

Thomas G. Hungar, *pro hac vice*
thungar@gibsondunn.com
1050 Connecticut Avenue, N.W.,
Washington, DC 20036
Telephone: 202.955.8500
Facsimile: 202.467.0539

Joshua D. Dick, *pro hac vice*
jdick@gibsondunn.com
555 Mission Street
San Francisco, CA 94105-0921
Telephone: 415.393.8200
Facsimile: 415.393.8306

Attorneys for Defendants Chevron Corporation and Chevron U.S.A. Inc.

MORRIS NICHOLS ARSHT & TUNNELL
/s/ Kenneth J. Nachbar
Kenneth J. Nachbar (#2067)
Alexandra M. Cumings (#6146)
1201 North Market Street, 16th Floor
P.O. Box 1347
Wilmington, DE 19899-1347
Tel.: (302) 658-9200
Fax: (302) 422-3013
knachbar@mnat.com
acumings@mnat.com

EIMER STAHL LLP
Nathan P. Eimer, *pro hac vice*
Pamela R. Hanebutt, *pro hac vice*
Lisa S. Meyer, *pro hac vice*
224 South Michigan Avenue, Suite 1100
Chicago, IL 60604
Tel: (312) 660-7600
neimer@eimerstahl.com
phanebutt@eimerstahl.com
lmeyer@eimerstahl.com

Robert E. Dunn, *pro hac vice*
99 S. Almaden Blvd. Suite 662
San Jose, CA 95113
Tel: (669) 231-8755
rdunn@eimerstahl.com

Attorneys for Defendant CITGO Petroleum Corporation.

ECKERT SEAMANS CHERIN & MELLOTT, LLC
*/s/ Colleen D. Shields*_____
Colleen D. Shields, Esq. (I.D. No. 3138)
Patrick M. Brannigan, Esq. (I.D. No. 4778)
222 Delaware Avenue, 7th Floor
Wilmington, DE 19801
Telephone: (302) 574-7400
Fax: (302) 574-7401
Email: cshields@eckertseamans.com
Email: arogin@eckertseamans.com

SHOOK, HARDY & BACON L.L.P.
Tristan L. Duncan, *pro hac vice*
Daniel B. Rogers, *pro hac vice*
William F. Northrip, *pro hac vice*
2555 Grand Blvd.
Kansas City, MO 64108
Phone: (816) 474-6550
Email: tlduncan@shb.com
Email: drogers@shb.com
Email: wnorthrip@shb.com

Attorneys for Defendant Murphy USA Inc.

WOMBLE BOND DICKINSON (US) LLP
/s/ Kevin J. Mangan
Kevin J. Mangan (DE No. 3810)
1313 North Market Street, Suite 1200
Wilmington, Delaware 19801
Telephone: (302) 252-4320
Facsimile: (302) 252-4330
Email: kevin.mangan@wbd-us.com

MCGUIREWOODS LLP
Jeremiah J. Anderson, *pro hac vice*
Texas Tower, 24th Floor
845 Texas Ave.
Houston, TX 77002
Telephone: (832) 255-6339
Facsimile: (832) 255-6386
Email:
jjanderson@mcguirewoods.com

Kathryn M. Barber, *pro hac vice*
Gateway Plaza
800 East Canal Street
Richmond, VA 23219
Telephone: (804) 775-1227
Facsimile: (804) 698-2227
Email: kbarber@mcguirewoods.com

Attorneys for American Petroleum Institute

DUANE MORRIS LLP
/s/ Coleen W. Hill
Mackenzie M. Wrobel (#6088)
Coleen W. Hill (#6287)
1201 N. Market Street, Suite 501
Wilmington, DE 19801-1160
Telephone: (302) 657-4900
Email: CWHill@duanemorris.com

SHOOK HARDY & BACON LLP
Michael F. Healy, *pro hac vice*
555 Mission Street, Suite 2300
San Francisco, CA 94105
Telephone: (415) 544-1942
Email: mfhealy@shb.com

DUANE MORRIS LLP
Michael L. Fox, *pro hac vice*
Spear Tower
One Market Plaza, Suite 2200
San Francisco, CA 94105-1127
Telephone: (415) 957-3092
Email: MLFox@duanemorris.com

Attorneys for Defendant
OVINTIV INC.

MCCARTER & ENGLISH LLP
/s/ Daniel J. Brown
Daniel J. Brown (#4688)
Alexandra M. Joyce (#6423)
Renaissance Centre
405 N. King St., 8th Floor
Wilmington, DE 19801
(302) 984-6331
djbrown@mccarter.com
ajoyce@mccarter.com

LATHAM & WATKINS LLP
Steven M. Bauer, *pro hac vice*
Margaret A. Tough, *pro hac vice*
Nicole C. Valco, *pro hac vice*
Katherine A. Rouse, *pro hac vice*
505 Montgomery Street, Suite 2000
San Francisco, California 94111-6538
(415) 391-0600
steven.bauer@lw.com
margaret.tough@lw.com
nicole.valco@lw.com
katherine.rouse@lw.com

BARTLIT BECK LLP
Jameson R. Jones, *pro hac vice*
Daniel R. Brody, *pro hac vice*
1801 Wewatta Street, Suite 1200
Denver, CO 80202
(303) 592-3123
jameson.jones@bartlit-beck.com
dan.brody@bartlit-beck.com

Attorneys for Defendants ConocoPhillips and ConocoPhillips Company

MCCARTER & ENGLISH LLP
/s/ Daniel J. Brown
Daniel J. Brown (#4688)
Alexandra M. Joyce (#6423)
Renaissance Centre
405 N. King St., 8th Floor
Wilmington, DE 19801
(302) 984-6331
djbrown@mccarter.com
ajoyce@mccarter.com

LATHAM & WATKINS LLP
Steven M. Bauer, *pro hac vice*
Margaret A. Tough, *pro hac vice*
505 Montgomery Street, Suite 2000
San Francisco, California 94111-6538
(415) 391-0600
steven.bauer@lw.com
margaret.tough@lw.com

Attorneys for Defendants Phillips 66 and Phillips 66 Company

ABRAMS & BAYLISS LLP
/s/ Michael A. Barlow
Michael A. Barlow (#3928)
20 Montchanin Road, Suite 200
Wilmington, Delaware 19807
(302) 778-1000
barlow@abramsbayliss.com

ORRICK, HERRINGTON & SUTCLIFFE LLP
Robert P. Reznick, *pro hac vice*
1152 15th Street NW
Washington, DC 20005
(202) 339-8600
rreznick@orrick.com

James Stengel, *pro hac vice*
Marc R. Shapiro, *pro hac vice*
51 West 52nd Street
New York, New York 10019-6142
(212) 506-5000
jstengel@orrick.com

Catherine Y. Lui, *pro hac vice*
405 Howard Street
San Francisco, California 94105-2669
(415) 773-5571
clui@orrick.com

Attorneys for Marathon Oil Corporation

RICHARDS, LAYTON & FINGER, P.A.
*/s/ Robert W. Whetzel*_____
Robert W. Whetzel (#2288)
Blake Rohrbacher (#4750)
One Rodney Square
920 N. King Street
Wilmington, DE 19801
302-651-7700
whetzel@rlf.com

KIRKLAND & ELLIS LLP
Anna Rotman, P.C., *pro hac vice*
609 Main Street
Suite 4500
Houston, TX 77002
713-836-3750
anna.rotman@kirkland.com

Attorneys for Defendants TotalEnergies SE and TotalEnergies Marketing USA, Inc.

K&L GATES LLP
/s/ Steven L. Caponi
Steven L. Caponi (No. 3484)
Matthew B. Goeller (No. 6283)
Megan E. O'Connor (No. 6569)
600 N. King Street, Suite 901
Wilmington, DE 19801
Phone: (302) 416-7000
steven.caponi@klgates.com
matthew.goeller@klgates.com
megan.oconnor@klgates.com

KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
David C. Frederick, *pro hac vice*
James M. Webster, III, *pro hac vice*
Daniel S. Severson, *pro hac vice*
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Phone: (202) 326-7900
dfrederick@kellogghansen.com
jwebster@kellogghansen.com
dseverson@kellogghansen.com

Counsel for Shell plc (f/k/a Royal Dutch Shell plc) and Shell USA, Inc. (f/k/a Shell Oil Company)

ASHBY & GEDDES P.A.
/s/ Catherine A. Gaul
Catherine A. Gaul (#4310)
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, DE 19801
(302) 654-1888
cgaul@ashbygeddes.com

ARNOLD & PORTER KAYE SCHOLER LLP
Nancy G. Milburn, *pro hac vice*
Diana E. Reiter, *pro hac vice*
250 West 55th Street
New York, NY 10019-9710
Tel: (212) 836-8000
Fax: (212) 836-8689
nancy.milburn@arnoldporter.com
diana.reiter@arnoldporter.com

Jonathan W. Hughes, *pro hac vice*
3 Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024
Tel: (415) 471-3100
Fax: (415) 471-3400
jonathan.hughes@arnoldporter.com

John D. Lombardo, *pro hac vice*
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017-5844
Tel: (213) 243-4000
Fax: (213) 243-4199
john.lombardo@arnoldporter.com

Attorneys for Defendants BP America Inc. and BP p.l.c.

RICHARDS, LAYTON & FINGER, P.A.
/s/ Jeffrey L. Moyer
Jeffrey L. Moyer (#3309)
Christine D. Haynes (#4697)
One Rodney Square
920 North King Street
Wilmington, DE 19801
(302) 651-7700
moyer@rlf.com
haynes@rlf.com

CRAVATH, SWAINE & MOORE LLP
Kevin Orsini, *pro hac vice*
Vanessa A. Lavely, *pro hac vice*
825 Eighth Avenue
New York, NY 10019
Tel: (212) 474-1000
Fax: (212) 474-3700
Email: korsini@cravath.com
Email: vlavely@cravath.com

Attorneys for Defendant Occidental Petroleum Corporation

MARON MARVEL BRADLEY ANDERSON & TARDY LLC
/s/ Antoinette D. Hubbard
Antoinette D. Hubbard (No. 2308)
Stephanie A. Fox (No. 3165)
1201 N. Market Street, Suite 900
P.O. Box 288
Wilmington, DE 19801
Tel: (302) 425-5177
Adh@maronmarvel.com
Saf@maronmarvel.com

HUNTON ANDREWS KURTH LLP
Shannon S. Broome, *pro hac vice*
Ann Marie Mortimer, *pro hac vice*
50 California Street
San Francisco, CA 94111
Tel: (415) 975-3718
SBroome@HuntonAK.com
AMortimer@HuntonAK.com

Shawn Patrick Regan, *pro hac vice*
200 Park Avenue
New York, NY 10166
Tel: (212) 309-1046
SRegan@HuntonAK.com

Attorneys for Defendants Marathon Petroleum Corporation, Marathon Petroleum Company LP, and Speedway LLC

WHITE AND WILLIAMS LLP
/s/ Christian J. Singewald
CHRISTIAN J. SINGEWALD (#3542)
600 N. King Street
Suite 800
Wilmington, DE 19801
(302) 654-0424

MCGUIREWOODS LLP
Joy C. Fuhr
Brian D. Schmalzbach
W. Cole Geddy
800 East Canal Street
Richmond, VA 23219
Telephone: (804) 775-1000
Email: jfuhr@mcguirewoods.com
Email:
bschmalzbach@mcguirewoods.com
Email: cgeddy@mcguirewoods.com

Attorneys for Defendant Devon Energy Corporation

CHIPMAN BROWN CICERO & COLE, LLP
/s/ Paul D. Brown
Paul D. Brown (#3903)
Hercules Plaza
1313 N. Market Street, Suite 5400
Wilmington, DE 19801
Telephone: (302) 295-0194
EMAIL: brown@chipmanbrown.com

CROWELL & MORING LLP
Tracy A. Roman, *pro hac vice*
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel.: (202) 624-2500
troman@crowell.com

Honor R. Costello, *pro hac vice*
590 Madison Avenue, 20th Fl.
New York, NY 10022
Tel.: (212) 223-4000
hcostello@crowell.com

Attorneys for Defendant CONSOL Energy Inc.

BALLARD SPAHR LLP
/s/ Beth Moskow-Schnoll
Beth Moskow Schnoll (#2900)
919 N. Market Street, 11th Fl.
Wilmington, DE 19801
Tel.: (302) 252-4465
moskowb@ballardspahr.com

JONES DAY
Noel J. Francisco, *pro hac vice*
David M. Morrell, *pro hac vice*
51 Louisiana Avenue, N.W.
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
Email: njfrancisco@jonesday.com
Email: dmorrell@jonesday.com

David C. Kiernan, *pro hac vice*
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939
Facsimile: (415) 875-5700
Email: dkiernan@jonesday.com

Attorneys for Defendant CNX Resources Corp.

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
/s/ Matthew D. Stachel
Daniel A. Mason (#5206)
Matthew D. Stachel (#5419)
500 Delaware Avenue, Suite 200
Post Office Box 32
Wilmington, DE 19899-0032
Tel.: (302) 655-4410
Fax: (302) 655-4420
dmason@paulweiss.com
mstachel@paulweiss.com

Theodore V. Wells, Jr., *pro hac vice*
Daniel J. Toal, *pro hac vice*
Yahonnes Cleary, *pro hac vice*
Caitlin E. Grusauskas, *pro hac vice*
1285 Avenue of the Americas
New York, NY 10019-6064
Tel.: (212) 373-3000
Fax: (212) 757-3990
twells@paulweiss.com
dtoal@paulweiss.com
ycleary@paulweiss.com
cgrusauskas@paulweiss.com

Attorneys for Defendants Exxon Mobil Corporation, ExxonMobil Oil Corporation, and XTO Energy Inc.

RICHARDS LAYTON & FINGER, P.A.
/s/ Robert W. Whetzel
Robert W. Whetzel (#2288)
Tel: (302) 651-7634
Fax: (302) 651-7701
One Rodney Square
902 North King Street
Wilmington, DE 19801
whetzel@rlf.com

VINSON & ELKINS L.L.P.
Patrick W. Mizell, *pro hac vice*
Stephanie L. Noble, *pro hac vice*
845 Texas Avenue
Suite 4700
Houston, TX 77002
T: (713) 758-2932
F: (713) 615-9935
pmizell@velaw.com
snoble@velaw.com

Matthew R. Stammel
VINSON & ELKINS LLP
2001 Ross Avenue
Suite 3900
Dallas, Texas
T: (214) 220-7776
F: (214) 999-7776
mstammel@velaw.com

Mortimer H. Hartwell, *pro hac vice*
555 Mission Street, Suite 2000
San Francisco, CA 94105
Tel: (415) 979-6930
Fax: (415) 807-3358
mhartwell@velaw.com

Brooke A. Noble
VINSON & ELKINS LLP
200 West 6th Street
Suite 2500
Austin, Texas
T: (512) 542-8409
F: (512) 236-3234
bnoble@velaw.com

Attorneys for Apache Corporation

GORDON REES SCULLY MANSUKHANI
/s/ Joseph J. Bellew
Joseph J. Bellew (#4816)
824 N. Market Street, Suite 220
Wilmington, DE 19801
Telephone: (302) 992-8952
Email: jbellew@grsm.com

BAKER BOTTS L.L.P.
J. Scott Janoe, *pro hac vice*
910 Louisiana Street, Suite 3200
Houston, Texas 77002-4995
Telephone: (713) 229-1553
Facsimile: (713) 229-7953
Email: scott.janoe@bakerbotts.com

Megan Berge, *pro hac vice*
Sterling Marchand, *pro hac vice*
700 K Street, N.W.
Washington, D.C. 20001-5692
Telephone: (202) 639-1308
Facsimile: (202) 639-1171
Email: megan.berge@bakerbotts.com
Email: sterling.marchand@bakerbotts.com

Attorneys for Defendant HESS CORPORATION

GORDON REES SCULLY MANSUKHANI
/s/ Joseph J. Bellew _____
Joseph J. Bellew (#4816)
824 N. Market Street, Suite 220
Wilmington, DE 19801
Telephone: (302) 992-8952
Email: jbellew@grsm.com

BAKER BOTTS L.L.P.
J. Scott Janoe, *pro hac vice*
910 Louisiana Street, Suite 3200
Houston, Texas 77002-4995
Telephone: (713) 229-1553
Facsimile: (713) 229-7953
Email: scott.janoe@bakerbotts.com

Megan Berge, *pro hac vice*
Sterling Marchand, *pro hac vice*
700 K Street, N.W.
Washington, D.C. 20001-5692
Telephone: (202) 639-1308
Facsimile: (202) 639-1171
Email: megan.berge@bakerbotts.com
Email: sterling.marchand@baker-botts.com

Attorneys for Defendant MURPHY OIL CORPORATION