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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,	)	C.A. No. N20C-09-097 MMJ CCLD
Plaintiff,	)	
v.	)	**TRIAL BY JURY OF 12 DEMANDED**
BP AMERICA INC., *et al.*,	)	
Defendants.	)	

PLAINTIFF'S ANSWERING BRIEF IN OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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INTRODUCTION

This case is about Defendants' deceptive promotion of products in Delaware that they knew would cause harm in Delaware. Defendants—some of the world's largest oil-and-gas companies and their primary trade association—have waged a sophisticated, long-running disinformation campaign to discredit the science of global warming and mislead the public about their fossil fuel products' environmental impacts. Defendants' deception worsened and accelerated climate change and its local impacts to the State and its citizens. To remedy the harms from Defendants' deception, the State brought this action against them for negligent failure to warn, trespass, common law nuisance, and violations of the Delaware Consumer Fraud Act ("CFA").

Defendants' arguments for dismissal all attack an imagined caricature of the Complaint ("Compl."). Their arguments that the State's claims are preempted by federal common law, or alternatively by the federal Clean Air Act ("CAA"), hinge on the faulty assumption that through this case the State would "usurp the power of the legislative and executive branches (both federal and state) to set climate policy." *See* Joint Opening Brief in Support of Motion to Dismiss for Failure to State a Claim ("Mot.") at 1. It would not. When the State prevails, Defendants will *not* need to reduce fossil fuel production to avoid incurring further liability, and the case does

not and could not regulate interstate or international pollution. Defendants could avoid ongoing liability by simply ending their deception.

No federal common law preempts the State's claims, moreover, because there has never been a federal common law concerning consumer deception. The federal common law Defendants do invoke was displaced by the CAA and has no effect. And Defendants cannot satisfy the strict conditions necessary to recognize *new* federal common law, even assuming this Court could do so. The CAA likewise does not preempt the State's claims because the statute does not occupy the field of air pollution regulation, and Defendants cannot show the claims here would pose an obstacle to accomplishing the CAA's purposes. This case also does not present any nonjusticiable political questions because the rights and remedies the State seeks to vindicate are well known to Delaware common law. And the State's claims would not interfere with the regulatory authority of the elected branches because, again, the State does not seek to regulate emissions or set climate policy.

Defendants' arguments under state law likewise fail. The Delaware Supreme Court recently held that a plaintiff states an "environmental-based public nuisance claim" when it alleges a defendant "substantially contributed to a public nuisance by misleading the public and selling a product it knew would eventually cause a safety hazard and end up contaminating the environment for generations when used by industry and consumers." *State ex rel. Jennings v. Monsanto Co.*, 2023 WL

4139127, at *7–8 (Del. June 22, 2023) ("*Monsanto*"). That is exactly what the State alleges here, and its public nuisance claim is sufficiently pleaded. In the same decision, the Supreme Court held that where a plaintiff seeks relief for environmental injuries to "land it holds directly," allegations that a defendant "substantially contributed to the entry onto the [plaintiff's] land by supplying [products] to Delaware manufacturers and consumers, knowing that their use would eventually trespass onto other lands" will state a claim for trespass. *Id.* at *12. The State again makes precisely those allegations, and its trespass cause of action is to that extent adequately pleaded.[1] The State's CFA and negligent failure to warn claims are likewise adequately pleaded because they are timely and Defendants' extensive misleading statements are actionable. Finally, the State has satisfied all obligations under Rule 9(b), and Defendants cannot seriously contend they lack adequate notice.

STATEMENT OF FACTS

For more than half a century, Defendants have known that their oil and gas products create greenhouse gas pollution that changes the planet's climate. Compl. ¶¶ 1, 7, 47–103. As early as the 1950s, Defendants researched the link between fossil fuel consumption and global warming, amassing a comprehensive

[1] The State acknowledges that the Supreme Court held that the State "does not have exclusive possession of land it holds in trust" and thus cannot state a trespass claim with respect to injuries to those lands. *Id.*

understanding of their products' climate impacts. *Id.* ¶¶ 62–103. Their scientists predicted "dramatic environmental effects," warning that only a narrow window of time existed to curb emissions and stave off "catastrophic" climate change. *E.g.*, *id.* ¶¶ 67, 76, 80, 85.

When the public started to treat climate change as a real threat, Defendants began a decades-long campaign of denial and disinformation about the science and consequences of global warming. *See generally id.* ¶¶ 104–41. Defendants worked to create doubt in the minds of consumers and the public about the existence, causes, and adverse effects of climate change. *Id.* ¶¶ 102, 103, 108–10. They bankrolled fringe climate scientists, think tanks, and foundations, whose views conflicted with the overwhelming scientific consensus and with Defendants' own research. *Id.* ¶¶ 131–32, 135–36. They placed newspaper ads, radio commercials, and direct mail to discredit mainstream climate science and conceal Defendants' role in the climate crisis. *Id.* ¶¶ 112–30. They did all this while shoring up their own infrastructure to profit from a warming world. *Id.* ¶¶ 142–47.

When public awareness started catching up to Defendants' own knowledge, Defendants pivoted to a new strategy: "greenwashing." *Id.* ¶¶ 161–210. Today, Defendants promote their gasoline products as "green" or "clean," while failing to warn that those very same products drive climate change. *Id.* ¶¶ 161, 202, 204–05, 207, 209. Defendants also falsely portray themselves as leaders in the fight against

climate change, to appear more environmentally responsible. *Id.* ¶¶ 171, 177, 200. They trumpet investments in low-carbon energy sources but fail to disclose that those investments comprise a tiny fraction of their spending on fossil fuels, and fail to mention their plans to ramp up fossil fuel production. *Id.* ¶¶ 204–05, 213.

These climate deception campaigns had the purpose and effect of inflating and sustaining the market for Defendants' fossil fuel products, and Defendants have profited immensely as a result. *Id.* ¶¶ 152(i), 158, 162. By driving up and maintaining profligate consumption of fossil fuels, Defendants' disinformation campaigns significantly increased greenhouse gas pollution, and thereby substantially contributed to climate change and its adverse effects in Delaware. *Id.*

QUESTIONS INVOLVED

1. Do any federal statutes or common law rules preempt the State's claims where the State alleges that Defendants misled consumers and the public about their fossil fuel products' known, foreseeable risks in violation of Delaware tort and consumer protection laws?

2. Has the State sufficiently pleaded its nuisance claim where it alleges Defendants substantially contributed to unreasonable interferences with public rights by misleading the public and selling products they knew would cause severe environmental harm?

3. Has the State sufficiently pleaded its trespass claim where it alleges Defendants substantially contributed to unauthorized entries onto the State's land by foreign matter Defendants knew to a substantial certainty would result from the usual and intended use of Defendants' fossil fuel products, but misled the public about those impacts?

4. Has the State sufficiently pleaded its negligent failure to warn claim where it alleges Defendants breached their duty of care by failing to warn consumers of dangers Defendants knew would likely occur from the intended use of their products, causing foreseeable harm to the State?

5. Has the State sufficiently pleaded its Consumer Fraud Act claim where it alleges Defendants for decades concealed and misrepresented material facts concerning the climatic effects of fossil fuel products in connection with the advertisement and sale of those products in Delaware, and through those misrepresentations prevented the State from discovering their conduct?

6. Has the State satisfied Superior Court Civil Rule 9(b)?

7. Have Defendants justified a departure from the norm of granting leave to amend?

LEGAL STANDARD

"The standards governing a motion to dismiss for failure to state a claim are well settled: (i) all well-pleaded factual allegations are accepted as true; (ii) even

vague allegations are well-pleaded if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and (i[v]) dismissal is inappropriate unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof." *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002) (cleaned up). A complaint "attacked by a motion to dismiss for failure to state a claim will not be dismissed unless it is clearly without merit," meaning "it appears to a certainty that under no set of facts which could be proved to support the claim asserted would the plaintiff be entitled to relief." *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

ARGUMENT

I. No Federal Common Law Preempts Delaware's State-Law Causes of Action

Defendants' argument that the State's claims are preempted because "our federal constitutional system" prohibits applying state law in any case "seeking redress for injuries allegedly caused by out-of-state emissions," Mot. 13, fails for at least four reasons.

First, the federal common law on which Defendants rely does not preempt any of the State's claims for the simple reason that none of those claims fit within any recognized federal common law. And there is no basis to recognize new federal common law because Defendants cannot show a substantial conflict between

Delaware's state-law claims and any uniquely federal interest. *Second*, the common law Defendants cite has been "displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions," namely the CAA, and has no effect. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011) ("*AEP*"). *Third*, there has never been a federal common law of "foreign emissions," and to the extent Defendants rely on the foreign affairs doctrine, they have not made a serious showing that it applies. And *fourth*, Defendants' heavy reliance on *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), does not support dismissal, because the claims at issue there were materially different from the claims here, and the Second Circuit's preemption analysis has no application to claims like the State's.

A. No Federal Common Law Applies to This Case

There has never been a federal common law pertaining to consumer deception, and none of the cases Defendants cite are analogous. Defendants likewise have not shown any basis to craft *new* federal common law because this case targets traditional areas of state authority and does not conflict with any uniquely federal interest.

Defendants' contention that "the Constitution bars the application of state law here," Mot. 3, severely overstates the former scope of federal common law concerning interstate pollution. The U.S. Supreme Court has only ever recognized a "federal common law of interstate nuisance," *AEP*, 564 U.S. at 418, where a State

sought to restrict and regulate the amount of pollution discharged from specific point sources located in other states. *Id.* at 421.[2] The State's claims look nothing like that—the alleged basis for Defendants' liability is their deceptive promotion and failure to warn. The State does not seek a reduction or cessation of emissions, nor injunctive relief that would limit Defendants' ability to extract, refine, or sell fossil fuels. "Delaware . . . bring[s] traditional state-law claims" that fall outside the bounds of federal common law pollution nuisance. *See City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 710 (3d Cir. 2022), *cert. denied*, 2023 WL 3440749 (U.S. May 15, 2023).

Defendants contort the State's claims, saying this case "seeks to regulate the nationwide—and even worldwide—marketing and distribution" of fossil fuels and "set climate policy" across the globe, Mot. 1; "regulat[e] . . . alleged harms arising from interstate greenhouse gas emissions," *id.* at 27; and "regulate international activities or foreign policy and affairs," *id.* at 24. Six federal circuit courts of appeal have rejected the same mischaracterizations and none have accepted them, finding materially similar claims do not arise under federal law for purposes of federal subject-matter jurisdiction. The Fourth Circuit held in *Mayor & City Council of*

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[2] *E.g.*, *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 236 (1907); *New York v. New Jersey*, 256 U.S. 296, 298 (1921); *New Jersey v. City of New York*, 283 U.S. 473, 476–77 (1931); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972) ("*Milwaukee I*").

Baltimore v. BP P.L.C., for example, that the defendants' arguments "rest[ed] on a fundamental confusion of Baltimore's claims," which "d[id] not merely allege that Defendants contributed to climate change and its attendant harms by producing and selling fossil-fuel products," but rather alleged "concealment and misrepresentation of the products' known dangers" as "the source of tort liability." 31 F.4th 178, 217, 233 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 1795 (2023).[3] While those decisions did not consider preemption defenses on the merits, their reasoning applies: the State's claims do not arise under federal common law.

To the extent Defendants ask the Court to recognize new federal common law, they cannot carry the "heavy burden" to do so. *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 362 (9th Cir. 1997). "The cases in which federal courts may engage in common lawmaking are few and far between." *Rodriguez v. F.D.I.C.*, 140 S. Ct. 713, 716 (2020). Only a "few," "restricted" areas exist where judge-made federal law is appropriate absent express congressional authorization, because "a federal rule of decision is necessary to protect uniquely federal interests." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (cleaned up). And "before federal judges may claim a new area for common

[3] *See also Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 54 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 1796 (2023); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1274–75 (10th Cir. 2022), *cert. denied*, 143 S. Ct. 1795 (Apr. 24, 2023); *Minnesota v. Am. Petroleum Inst.*, 63 F.4th 703, 708 (8th Cir. 2023); *City of Hoboken*, 45 F.4th at 709, 713.

lawmaking, strict conditions must be satisfied." *Rodriguez*, 140 S. Ct. at 717. First, state law must be in "significant conflict with an identifiable federal policy or interest." *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 88 (1994). The conflict must implicate a "genuinely identifiable (as opposed to judicially constructed) federal policy," *id.* at 89, and must be "specifically shown" by the proponent of the federal rule, *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966).[4]

The State's claims rest on a core State "interest in ensuring the accuracy of commercial information in the marketplace." *Edenfield v. Fane*, 507 U.S. 761, 769 (1993). It targets misconduct traditionally regulated by the States. *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541–42 (2001) (advertising); *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (unfair business practices); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963) (consumer protection). It pursues tort remedies rooted in "the state's historic powers to protect the health, safety, and property rights of its citizens." *In re MTBE Prods. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013) ("*MTBE*"). And it redresses injuries that "states have a legitimate interest in combating," namely "the adverse effects of climate change." *Am. Fuel & Petrochem. Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018). As

[4] The State is aware of no authority suggesting that *this* Court (or any state court) could create new federal common law, which would necessarily constitute federal "lawmaking." *See Rodriguez*, 140 S. Ct. at 717. Defendants cite none. Even assuming the Court has that authority, however, Defendants' theory fails.

the Third Circuit recognized, "[t]he causes of action are about state torts." *Hoboken*, 45 F.4th at 713. Any interest the federal government has is shared with the states, not uniquely federal.

There is likewise no significant conflict between the State's claims and any federal interest. Federal law preserves and promotes the use of state law to protect consumers and the public from dangerous products and deceptive commercial activity.[5] Defendants say state law conflicts with an "overriding need for a uniform rule of decision on matters influencing national energy and environmental policy," and with vague "basic interests of federalism." Mot. 3, 15–16 (cleaned up). But the U.S. Supreme Court has held that federal common law cannot rest on "that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity," and requires instead a "specific, concrete federal policy or interest" with which state law conflicts. *O'Melveny*, 512 U.S. at 88. Defendants do not identify either any uniquely federal interest or significant conflict, and thus cannot satisfy "the most basic" preconditions for crafting federal common law. *Rodriguez*, 140 S. Ct. at 717.

B. Any Prior Federal Common Law of Interstate Air Pollution Nuisance Has Been Displaced

Defendants' contention that "'the basic scheme of the Constitution' gives courts the power to fashion *federal* common-law remedies for disputes involving

[5] *See, e.g.*, 15 U.S.C. § 57b(e) (savings clause in Federal Trade Commission Act); 15 U.S.C. § 2072(c) (savings clause in Consumer Product Safety Act).

'air and water in their ambient or interstate aspects,'" Mot. 14 (quoting *AEP*, 564 U.S. at 421), is wrong on its own terms. Congress displaced such federal common law by enacting the Clean Air Act, 42 U.S.C. § 7401 *et seq*., and when federal common law is displaced, it is entirely abrogated.

1. The Supreme Court Held in *AEP* That Any Federal Common Law of Air Pollution Nuisance Is Displaced by the Clean Air Act

Federal common law "plays a necessarily modest role" in a system that "vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." *Rodriguez*, 140 S. Ct. at 717. And because "federal lawmaking power is vested in the legislative, not the judicial, branch of government," the fate and scope of "federal common law is 'subject to the paramount authority of Congress.'" *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 95 (1981) (quoting *New Jersey*, 283 U.S. at 348).

"The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue." *AEP*, 564 U.S. at 424 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). The judiciary's "commitment to the separation of powers is too fundamental to continue to rely on federal common law by judicially decreeing what accords with common sense and the public weal when Congress has addressed the problem." *City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981) ("*Milwaukee*

II") (cleaned up). "Thus, once Congress addresses a subject, even a subject previously governed by federal common law . . . . the task of the federal courts is to interpret and apply statutory law, not to create common law." *Nw. Airlines, Inc.*, 451 U.S. at 95 n.34. Stated simply, "[w]hen a federal statute displaces federal common law, the federal common law ceases to exist." *Mayor & City Council of Baltimore*, 31 F.4th at 205.

The U.S. Supreme Court ruled in *AEP* that the body of federal common law on which Defendants rely has been displaced. The plaintiffs there brought federal common law nuisance claims against electric power companies, seeking injunctive relief requiring each defendant to reduce its emissions. 564 U.S. at 418–19. The Court "h[e]ld that the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions," because "the Act 'speaks directly' to emissions of carbon dioxide from the defendants' plants." *Id.* at 424. The "underlying legal basis" for the former federal common law "is now pre-empted by statute" and has no effect. *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 22 (1981).

Defendants suggest the CAA displaced only "federal-common law *remedies*," Mot. 14, 15, and federal common law may still preempt state law even if it provides no relief or any substantive rules. But every court that has considered the issue has held that "federal common law addressing domestic greenhouse gas emissions has

been displaced by Congressional action," which in turn "displaces federal common law public nuisance actions," not forms of relief. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012). *See also City of New York*, 993 F.3d at 95 ("[I]t is beyond cavil that the Clean Air Act displaced federal common law nuisance suits seeking to abate domestic transboundary emissions of greenhouse gases."). "In other words, the federal common law of nuisance that formerly governed transboundary pollution suits *no longer exists*." *Boulder*, 25 F.4th at 1260.

2. Displaced Federal Common Law Provides No Rule of Decision and Does Not Preempt State Law

Defendants agree that the CAA displaces any federal common law as to air pollution nuisance. *See, e.g.*, Mot. 9, 14–15. They nonetheless contend that "displacement does not allow state law to govern," *id.* at 14, because "the structure of the U.S. Constitution precludes the application of state law," *id.* at 24. That is incorrect and misstates both the history of cases examining federal common law and the holding in *AEP*, which confirms that preemption of state law could only be accomplished here by the CAA.

The U.S. Supreme Court has consistently held that once displaced by statute, federal common law cannot preempt state law. Only the displacing *statute* can, because "[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress," not the courts. *Wallis*, 384 U.S. at 68–69. This division of authority was central to *International Paper Co. v. Ouellette*, 479 U.S.

481 (1987). The plaintiffs there brought Vermont common-law nuisance claims, alleging certain New York defendants polluted Lake Champlain, which abuts both states. *Id.* at 483–84. The Court noted that "[u]ntil fairly recently, federal common law governed the use and misuse of interstate water," but had been displaced by the 1981 amendments to the Clean Water Act ("CWA"). *Id.* at 487; *see Milwaukee II*, 451 U.S. at 317. The Court thus performed an ordinary statutory preemption analysis and held that "[t]he [CWA] 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 Court followed suit in *AEP*, explaining that "[i]n light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia,* on the preemptive effect of the federal Act." 564 U.S. at 429. The rule could not be clearer: When federal common law is displaced, the displacing statute may preempt state law, but the former common law cannot.

Defendants rely on *City of New York* for the proposition that state law does not "snap back into action" when federal common law is displaced, because that result would be "difficult to square with the fact that federal common law governed this issue in the first place." 993 F.3d at 98; *see* Mot. 14–15. *City of New York* is not instructive here for two reasons. *First*, the cases are materially different. In *City of New York*, the plaintiff "acknowledge[d]" that the conduct on which it premised liability was "lawful commercial activity," and the Second Circuit held that the

City's claims would "effectively impose strict liability for the damages caused by fossil fuel emissions," requiring the defendants to "cease global production altogether" to avoid ongoing liability. 993 F.3d at 87, 93 (cleaned up). In contrast, the Complaint here "seeks to challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign," and the alleged tortious conduct is Defendants' "concealment and misrepresentation of the products' known dangers." *Baltimore*, 31 F.4th at 233.

Second, the Second Circuit's legal analysis, while difficult to parse, applied the source-state preemption rule adopted in *Ouellette*, and found the claims preempted by the CAA.[6] The court held that because the City's complaint challenged lawful production and sales activities, it "would regulate cross-border emissions" by "compel[ling] the [defendants] to develop new means of pollution control." *City of New York*, 993 F.3d at 93 (cleaned up). Because the Second Circuit viewed the case as seeking to regulate interstate emissions, it applied the *Ouellette* rule that the CWA and CAA "permit only state lawsuits brought under the law of

[6] The court suggested confusingly that it was not conducting a "traditional statutory preemption analysis," *City of New York*, 993 F.3d at 98, but stated that the City's claims would be "permissible only to the extent authorized by federal statute" and held that "[t]he [CAA] therefore does not authorize the City's state-law claims." *Id.* at 99, 100 (cleaned up). In doing so, the court discussed the scope of the CAA's savings clauses and Congress's intent with respect to state participation in regulating air pollution. *Id.* at 99–100. The court's conclusion, however couched, was that the CAA preempted state law.

the pollution's *source* state" and found the case preempted. *Id.* at 100 (cleaned up) (citing *Ouellette*, 479 U.S. at 497; *AEP*, 564 U.S. at 429). At the same time, it found—albeit incorrectly, *see* Part I.C., *infra*—that the City's claims *were* preempted by federal common law insofar as they related to international emissions, because it found the CAA did not displace common law in that respect. *Id.* at 101–103.

To the extent the Second Circuit's reasoning suggests federal common law's preemptive effect somehow survives displacement, it cannot be reconciled with *AEP* and *Ouellette*. *See AEP*, 564 U.S. at 429; *Ouellette*, 479 U.S. at 500. When Congress speaks directly, "even [on] a subject previously governed by federal common law . . . the task of the federal courts is to interpret and apply statutory law, not to create common law." *Nw. Airlines, Inc.*, 451 U.S. at 95 n.34. Any prior federal common law of interstate pollution nuisance has been displaced by the CAA, no longer exists, and cannot preempt the State's claims.

C. Defendants' Invocation of Foreign Policy Does Not Satisfy Their Burden

To the extent Defendants rely on federal foreign policy as a basis for applying or crafting federal common law, they cannot satisfy their burden. There has never been a federal common law of "foreign emissions," and the separate foreign affairs doctrine has no application here.

Under the foreign affairs doctrine, state law is preempted where it "take[s] a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 n.11 (2003). But state law must "produce something more than [an] incidental effect in conflict with express foreign policy of the National Government" to violate the doctrine. *Id.* at 420. Defendants make no serious argument that the doctrine applies. This is a case about deceptive marketing, not global greenhouse gas regulation.

The Second Circuit in *City of New York* arguably recognized a new federal common law of "foreign emissions," but that case is distinguishable as noted above, and to the extent it did so it was wrongly decided. The court held that because the City's claims "implicat[e] the conflicting rights of states and our relations with foreign nations, this case poses the quintessential example of when federal common law is most needed," 993 F.3d at 92 (cleaned up), and that "the Clean Air Act cannot displace the City's federal common law claims to the extent that they seek recovery for harms caused by foreign emissions," *id.* at 101. But as the Fourth Circuit noted in *Baltimore*, the Second Circuit "essentially evade[d] the careful analysis that the Supreme Court requires during a significant-conflict analysis" because it did not identify any specific foreign policy interest or any specific conflict with` state law. 31 F.4th at 203. There is no federal common law concerning foreign relations that might apply here, and no basis to create one.

II. The Clean Air Act Does Not Preempt the State's Claims

The State's claims are not preempted by the CAA. Defendants' Motion is ambiguous whether Defendants raise an obstacle preemption or field preemption challenge to the Complaint, but both fail. There is no field preemption because the CAA's savings clauses make clear Congress did not intend to bar all state regulation of air pollution. To the contrary, "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). The State's case is also not preempted under an obstacle preemption analysis, because no aspect its claims stand in the way of the CAA's purposes and objectives.

Defendants' citation suggests they raise a so-called "field preemption" challenge. *See* Mot. 25. Under the field preemption doctrine, "[s]tates are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona v. United States*, 567 U.S. 387, 399 (2012). Congressional intent to "occupy exclusively" a field of law "may be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (cleaned up). "The presence of a savings provision," however, "'is fundamentally incompatible with complete field preemption; if Congress intended to preempt the entire field

there would be nothing to 'save.'" *Farina v. Nokia Inc.*, 625 F.3d 97, 121 (3d Cir. 2010) (cleaned up) (quoting *In re NOS Commc'ns*, 495 F.3d 1052, 1058 (9th Cir. 2007)).

Here, even assuming the State's case pertained to air pollution regulation, multiple CAA provisions demonstrate Congress did *not* intend to exclusively occupy that field. *First*, as noted above, Congress found in enacting the CAA that point source air pollution control "is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). *Second*, the CAA contains two savings provisions expressly allowing state regulation. *See* 42 U.S.C. § 7416 ("nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce" any standard, limit, or requirement concerning air pollution control or abatement unless the state requirement is "less stringent than the standard or limitation" that the CAA would impose); *id.* § 7604(e) (citizen suit provision does not "restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief"). The legislation's findings and savings clauses are "fundamentally incompatible with complete field preemption." *See Farina*, 625 F.3d at 121; *Ouellette*, 479 U.S. at 492 ("Although Congress intended to dominate the field of [water] pollution regulation," the CWA's "saving clause negates the inference that Congress 'left no room' for state causes of action."); *Bell*

v. Cheswick Generating Station, 734 F.3d 188, 195 (3d Cir. 2013) ("[A] textual comparison of the two savings clauses [in the CAA and CWA] demonstrates there is no meaningful difference between them.").

While Defendants do not expressly invoke obstacle preemption, that theory fails as well. State law can be preempted if it stands as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in a federal statute. *Wyeth v. Levine*, 555 U.S. 555, 563–64 (2009). But "a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011). Preemption cannot rest on "brooding federal interests," "judicial policy preferences," or "abstract and unenacted legislative desires." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901, 1907 (2019) (lead opinion). There must instead be "an irreconcilable conflict between the federal and state standards," or a state standard that "would frustrate the objectives of the federal law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). Courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth*, 555 U.S. at 565 (citation omitted).

The State's claims will not and could not stand in the way of Congress's regulation of point source air pollution control because the acts that trigger liability

under the Complaint involve the use of deception to promote fossil fuels. Contrary to Defendants' argument, Mot. 28, the marketing of fossil fuels is not even a "peripheral concern" of the statute. *DeCanas v. Bica*, 424 U.S. 351, 360–61 (1976) (finding no preemption "where the activity regulated was a merely peripheral concern of the federal regulation" (cleaned up)). Instead, the CAA's stated purpose is to protect the nation's air resources by preventing pollution. *See* 42 U.S.C. § 7401 (defining the CAA's purpose); *MTBE*, 725 F.3d at 95–100 (CAA did not preempt state tort claims based on water contamination by gasoline additive). The statute achieves that goal by "regulat[ing] pollution-generating emissions from both stationary sources, such as factories and powerplants, and moving sources, such as cars, trucks, and aircraft." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 308 (2014). The CAA simply has nothing to say about the marketing of fossil fuel products, or about Defendants' statements concerning climate change to consumers or the public.

III. The State's Claims Do Not Present Nonjusticiable Political Questions

The State's claims also do not present any nonjusticiable political question, and instead turn on traditional questions of tort law in areas of clear judicial competence. The Delaware Supreme Court has recognized that cases exist involving nonjusticiable political questions that "will clearly present" one of the "formulations" that the U.S. Supreme Court first recognized in *Baker v. Carr*, 369 U.S. 186 (1962). Those include "a lack of judicially discoverable and manageable

standards for resolving" the case, "the impossibility of deciding [the dispute] without an initial policy determination of a kind clearly for nonjudicial discretion," and "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." *State v. Troise*, 526 A.2d 898, 904 (Del. 1987) (quoting *Baker*, 369 U.S. at 217).

While the political question doctrine is recognized generally in Delaware, it has rarely if ever served as a basis to abstain from hearing a case, and never under circumstances like those presented here. *See Delawareans for Educ. Opportunity v. Carney*, 199 A.3d 109, 172 (Del. Ch. 2018) ("The Delaware Supreme Court has discussed the possibility of political-question abstention . . . but has never abstained on that basis."). And "when the question at issue requires the Court to interpret a statute or rule, that question is not a political question because the judicial branch's function is to interpret the law." *Guy v. City of Wilmington*, 2020 WL 2511122, at *3 (Del. Super. May 15, 2020). Lower courts have likewise been reluctant to apply the doctrine. *See, e.g.*, *O'Neill v. Town of Middletown*, 2006 WL 205071, at *13–14 (Del. Ch. Jan. 18, 2006).

None of the *Baker v. Carr* factors are present here. Each cause of action in the Complaint has well-defined elements in Delaware law that courts are familiar with applying. *See* Compl. ¶¶ 234–80. And as discussed above, the State's claims would in no way require the Court to "usurp the political branches' power to set

energy and climate policy," Mot. 31, because liability here does not turn on the volume of emissions from any particular source. The State does not ask the Court to monitor or restrain any emissions from any source.

The two cases Defendants cite, *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), and *Sagoonick v. State*, 503 P.3d 777 (Alaska 2022), are inapposite. In both, the plaintiffs brought claims against the federal or state government, demanding that the government reduce or even eliminate greenhouse gas emissions, which the courts held was beyond the judicial power to order. In *Juliana*, the Ninth Circuit held that "[t]he crux of the plaintiffs' requested remedy is an injunction requiring the [federal] government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions," all of which would necessarily interfere with decision-making by the elected branches. 947 F.3d at 1170. Likewise in *Sagoonick*, the Alaska Supreme Court held that "the remedy plaintiffs [sought] in this case would require courts to make decisions that article VIII [of the Alaska constitution, concerning individual rights to natural resources] has committed to the legislature," including measuring, accounting for, remedying, and reducing greenhouse gas emissions statewide, "and separation of powers considerations therefore are clearly implicated." 503 P.3d at 798. The State requests no analogous relief.

IV. The State Pleads Cognizable Claims Under Delaware Law

A. The Complaint States a Cognizable Public Nuisance Claim

Defendants say the State cannot assert a viable public nuisance claim because Defendants sold lawful products and did not control what they view as the instrumentality of the nuisance. Mot. 39–48. The Delaware Supreme Court recently explained, however, that "whether a product is involved, and whether there is control of the product once sold, are not elements of an environmental-based public nuisance or trespass claim under Delaware law." *Monsanto*, 2023 WL 4139127, at *2. The holdings in *Monsanto* are dispositive here. For "environmental-based public nuisance claim[s]" like the State's, a defendant "can be held liable when it substantially contributed to a public nuisance by misleading the public and selling a product it knew would eventually cause a safety hazard and end up contaminating the environment for generations when used by industry and consumers." *Id.* at *8. The State has made all those allegations.

1. *Monsanto* Holds That a Defendant Can Be Liable in Public Nuisance for Misleadingly Promoting a Product the Defendant Knows to Be Dangerous to the Environment

Monsanto precludes Defendants' argument that injuries relating to products cannot support a public nuisance claim. *See* Mot. 39–44. The State challenges Defendants' deceptive and wrongful promotion of fossil fuel products while concealing their knowledge of those products' risks, which substantially increased greenhouse gas emissions and created nuisance conditions in Delaware. *See, e.g.*,

Compl. ¶¶ 58, 253–63. The Delaware Supreme Court in *Monsanto* held that materially similar allegations stated a claim for public nuisance; all its reasoning applies here and the result is the same.

The State in *Monsanto* sued "to recover damages for harm suffered due to the manufacturing of PCBs," alleging "public nuisance, trespass, and unjust enrichment." 2023 WL 4139127, at *4. Monsanto argued that because it "manufactured PCBs and sold them to third parties before the PCBs entered the environment," the State's nuisance claims were not cognizable. *Id.* at *5. The Supreme Court rejected Monsanto's position. It observed that "Delaware courts have applied the common-sense notion that public nuisance liability extends . . . to those who substantially participate in creating the public nuisance." *Id.* at *6. As examples, it cited cases where a defendant no longer owned or controlled a property causing a nuisance, but could nonetheless be subject to liability for prior conduct that contributed to and culminated in nuisance conditions. *Id.* at *6–7. The Court further noted that "historical examples abound of products that were held to create a public nuisance," and concluded that a manufacturer can "be held liable after a product it manufactures is sold to third parties whose activities release the product into the environment and cause a public nuisance," *id.* at *7–8.

Carefully reviewing the complaint, the Court held that "the State has pled sufficiently that Monsanto, as the sole PCB producer, substantially participated in

the creation of the public nuisance." *Id.* at *10. The Court found certain allegations critical that are highly instructive here:

> As alleged in the complaint, continuing to supply PCBs, which were known to be toxic to humans and wildlife, to industry and to consumers, knowing PCBs would escape and permanently contaminate Delaware's lands and waters, and taking affirmative steps to mislead the public and government officials about the safety of PCBs, qualifies as participating to a substantial extent in carrying on a public nuisance.

Id. at *8. The State "alleged that Monsanto knew early on about the dangers of PCBs," "took affirmative steps to conceal the toxic nature of PCBs and spread misinformation about PCBs negative health effects," and "used a misleading advertisement to conceal the toxic nature of PCBs." *Id.* at *10. Based on those allegations, the Court held "it is reasonably conceivable that Monsanto substantially participated in the creation of a public nuisance by manufacturing and selling PCBs" that Monsanto knew "would eventually end up causing long lasting contamination to state lands and waters." *Id.* at 11.

The allegations central to the Complaint here are on all fours with *Monsanto*. Defendants "have known for nearly half a century that unrestricted production and use of fossil fuel products create greenhouse gas pollution that warms the planet and changes our climate." Compl. ¶ 1; *see also e.g. id*. ¶¶ 7, 12, 58, 62–103. Defendants "nevertheless engaged in a coordinated, multi-front effort to conceal and deny their own knowledge of those threats, to discredit the growing body of publicly available scientific evidence, and to persistently create doubt" in the public's understanding

of "the reality and consequences of the impacts of their fossil fuel products." *Id.* ¶ 1; *see also, e.g.*, *id.* ¶¶ 3, 4, 8, 12, 58, 104–41. Defendants continue to use "false and misleading advertising campaigns" that make their companies and products appear more environmentally friendly and responsive to climate change than they are. *Id.* ¶ 164; *see also, e.g.*, *id.* ¶¶ 161–210. As a result, the State has and will continue to suffer nuisance conditions. *See, e.g.*, *id.* ¶¶ 226–33. Under *Monsanto*, these allegations state a claim for public nuisance.

The *Monsanto* decision did not "reach the question whether Delaware law categorically forecloses nuisance claims against manufacturers of products like handguns, opioids, and tobacco for harms caused by those products to a public right," holding only that claims concerning those products "are not the same as products like PCBs that cause environmental harm to property and economic loss to the plaintiff." *Monsanto*, 2023 WL 4139127, at *8–9; *see also* Mot. 40–42 (citing *State ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382 (Del. Super. Feb. 4, 2019) ("*Purdue*") (opioid medications); *Sills v. Smith & Wesson Corp.*, 2000 WL 33113806 (Del. Super. Dec. 1, 2000) (handguns)). This Court need not consider the question either, because the State alleges Defendants "knew for some time that [fossil fuels] would cause long-lasting environmental harm . . . and hid those dangers from the public," which sufficiently alleges Defendants "substantially contributed to a public nuisance." *Monsanto*, 2023 WL 4139127, at *9.

2. *Monsanto* Holds that "Control of the Product Once Sold" Is Not an Element of an Environmental-Based Public Nuisance Claim

Defendants next argue that the State's nuisance claim fails because Defendants "did not control the instrumentality that caused the alleged nuisance of global climate change—namely, greenhouse gas emissions." Mot. 44–48. That argument too is foreclosed by *Monsanto*: "[W]hether the defendant exercised control of the product at the time of the alleged nuisance" is not an element of a nuisance claim alleging environmental harms causing damage to property. *Monsanto*, 2023 WL 4139127, at *8.

Monsanto argued, as Defendants do here, that it could not be liable for public nuisance "unless it exercise[d] control over the instrumentality that caused the nuisance at the time of the nuisance." *Id.* at *6 (quotation omitted). The Supreme Court disagreed, noting that courts of this State have recognized nuisance claims where "defendants no longer owned or controlled the property creating the nuisance." *Id.* Reiterating the "common-sense approach" that substantial contribution to a nuisance will support liability "even when the defendant is not a property owner causing the nuisance," *id.* at *9, the Supreme Court held the State "pled sufficiently that Monsanto . . . substantially participated in the creation of the public nuisance," *id.* at *10. The allegations here are materially the same, and state

a nuisance claim. The Supreme Court's decision in *Monsanto* confirms that Delaware nuisance law will accommodate the State's allegations here.

B. The Complaint States a Cognizable Trespass Claim

The State's trespass claim seeks to hold Defendants liable for causing saltwater and harmful materials to enter State lands and property, and *Monsanto* again largely forecloses Defendants' arguments for dismissal. To state a claim for intentional trespass, a plaintiff "must show: (1) that the plaintiff has lawful possession of the land; (2) that the defendant entered onto the plaintiff's land without consent or privilege; and (3) damages." *Newark Square, LLC v. Ladutko*, 2017 WL 544606, at *2 (Del. Super. Feb. 10, 2017). The Complaint pleads each element.

First, the State alleges Defendants caused foreign matter to invade State-owned land, and property over which the State has actual and exclusive possession. Second, the State sufficiently pleads unlawful entry by alleging Defendants engaged in deception and disinformation campaigns while knowing to a substantial certainty their conduct would cause foreign matter to enter State lands. Third, the State can recover for all past and reasonably probable future damages resulting from invasions caused by Defendants, including invasions and damages it has already suffered.

1. The State Alleges Unlawful Invasions to a Range of State-Owned Lands and Need Not Specify Individual Properties

Defendants argue the State's trespass claim fails to the extent it "is premised on its beaches, wetlands, and coastal land" because the State allegedly lacks

exclusive possession over such lands. Mot. 48–49. Defendants do *not* challenge the State's actual, exclusive possession of State-owned lands and property, however.

In *Monsanto*, the Supreme Court confirmed the State can maintain a trespass claim for invasions of "land it holds directly," but cannot recover for invasions of lands held in the public trust. 2023 WL 4139127, at *11–12. Defendants assert that the State cannot maintain a trespass claim for invasions to *any* "beaches, wetlands, and coastal land" because the State supposedly lacks exclusive possession over such lands. Mot. 48. But Defendants provide no authority for their assumption that all beaches, wetlands, and coastal land are public trust resources. *See id.* at 49. The State does hold some coastal land in public trust for its citizens, including beach areas from the mean low tide line to the sea. *See Groves v. Sec'y of DNREC*, 1994 WL 89804, at *5 (Del. Super. Feb. 8, 1994). Oher beaches are owned outright by the State, however, including beach and shoreland in State parks. To the extent the Court determines *Monsanto* bars part of the State's trespass claims, it should tailor its ruling to public trust lands, not beaches, wetlands, and coasts categorically.

Defendants also comment that the State fails to allege where the trespass occurred. Mot. 48–49. Courts have rightly rejected attempts to dismiss trespass claims for failure to identify specific invaded properties. *See, e.g.*, *Maryland v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 471 (D. Md. 2019) ("Federal Rule of Civil Procedure 8(a)(2) does not require the State to identify the precise locations of all

the State properties that were contaminated by MTBE."); *In re MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d 348, 438 (S.D.N.Y. 2005) (plaintiffs "need not make such a showing at the pleading stage"). Even if that were required at the pleading stage, the Complaint identifies specific, exemplary State-owned properties jeopardized by sea level rise, flooding, and other climate-related invasions, such as the Port of Wilmington, Route 9, and Route 1. *See, e.g.*, Compl. ¶ 228(a)–(b). These allegations suffice to plead exclusive possession.

2. "Control of the Product Once Sold" Is Not an Element of an Environmental-Based Trespass Claim Under Delaware Law

Defendants next argue the trespass claim fails because the State does not allege Defendants or their products unlawfully entered State lands. Mot. 49–51. *Monsanto* forecloses this argument, too.

The Delaware Supreme Court held in *Monsanto* that "whether a product is involved, and whether there is control of the product once sold, are not elements of an environmental-based . . . trespass claim under Delaware law." 2023 WL 4139127, at *2. "[I]t is enough that an act is done with knowledge that it will to a *substantial certainty* result in the entry of the foreign matter" onto another's lands. *Id.* at *12 (quoting Restatement (Second) of Torts § 158 cmt. i (Am. Law Inst. 1965) ("Rest.")). There, the State satisfied this requirement by alleging that Monsanto "substantially contributed to the entry [of PCBs] onto the State's land by supplying PCBs to Delaware manufacturers and consumers, knowing that their use would

eventually trespass onto other lands." *Id.* As explained repeatedly above, the State makes materially indistinguishable allegations here that Defendants knew fossil fuel products would lead to climate change injuries and misled consumers and the public about those facts.

Defendants' counterarguments are unpersuasive. *First*, Defendants inaccurately contend that an overt physical act bearing directly on the plaintiff's land is required. *See* Mot. 50. The Supreme Court rejected that argument in *Monsanto*; the defendants could be liable for trespass there although they did not "dump[] the PCBs directly onto the State's land" and did not own or take action on "adjoining land." *Monsanto*, 2023 WL 4139127, at *12. The pre-*Monsanto* cases Defendants are not to the contrary. The first, *Newark Square, LLC v. Ladutko*, involved a fire on the defendant's property that migrated onto the plaintiff's property. 2017 WL 544606, at *1. This Court's analysis centered on the lack of a "volitional act that constituted trespass," explaining that "a defendant must take some action that proximately causes damage to another's property, even if that action is not purposeful." *Id.* at *3. Because there was insufficient evidence that the defendant's negligence caused the fire, the plaintiff was not entitled to summary judgment. *See id.* The second case involved an action by the cross-defendant on the cross-plaintiff's property that led to water pooling on the cross-plaintiff's property, but neither that case nor this Court in *Newark Square* held that an overt physical act

bearing directly on the plaintiff's land is *required* to state a claim for trespass. *See Beckrich Holdings, LLC v. Bishop*, 2005 WL 1413305 (Del. Ch. June 9, 2005). Defendants' intentional, decades-long campaigns to deceptively market their products caused invasions of the State's property.

Second, Defendants protest that it would be "novel" to hold them liable because use of their products "may result in weather changes that affect another's property." Mot. 49–50. Quite the opposite. In this state and elsewhere, courts have long recognized that a defendant can trespass by causing water to enter a plaintiff's land. *See, e.g.*, *Robinson v. Oakwood Vill., LLC*, 2017 WL 1548549, at *15 (Del. Ch. Apr. 28, 2017) (collecting cases); *Newark Square, LLC*, 2017 WL 544606, at *3. That is so even where the trespass would not have occurred absent weather events like rainfall, storms, or snowfall. *See, e.g.*, *Mapco Express v. Faulk*, 24 P.3d 531, 538, 540, 547 (Alaska 2001) (snowfall); *Shaheen v. G & G Corp.*, 198 S.E.2d 853, 855 (Ga. 1973) (rainfall); *Kurpiel v. Hicks*, 731 S.E.2d 921, 923 (Va. 2012) (significant storms); *see* Rest. § 158 cmt. i (defendant "builds an embankment that during ordinary rainfalls the dirt from it is washed upon" plaintiff's land). Defendants can be liable for "actively misleading the public and continuing to supply [their fossil fuel products] to industry and consumers knowing that [those products] were hazardous" and that their use "would lead to widespread and lasting

contamination of Delaware's lands and waters." *See Monsanto*, 2023 WL 4139127, at *2.

3. The State Has Sufficiently Alleged Damages and Its Trespass Claim is Ripe

Defendants contend the State's trespass claim is unripe to the extent based on future invasions of property, and that "virtually all of Plaintiff's alleged injuries are entirely speculative." Mot. 52. But as the Second Circuit held in *MTBE*, Defendants "mistakenly conflate[] the nature of the [State's] claimed damages with its injury." 725 F.3d at 110. In rejecting a similar ripeness argument, the court held that the complaint sufficiently "alleged a *present* injury," that the plaintiff's wells "had *already* been contaminated with MTBE," and that future steps required to address this contamination involved "the scope of *damages* flowing from the injury, not whether there is an injury at all." *Id.*; *see also id.* at 111 ("[an] injured party has the right to bring suit for all of the damages, past, present and future, caused by the defendant's acts" (quotation omitted)).

Contrary to Defendants' uncited assertions, Delaware law does not bar recovery of future damages. Instead, Delaware courts routinely permit recovery of "reasonably probable" future pain and suffering, medical expenses, and loss of income, in addition to compensation for damages already incurred. *See, e.g.*, *Schueller v. Cordrey*, 2017 WL 3635570, at *6–7 (Del. Super. Aug. 23, 2017); *Sheeran v. Colpo*, 460 A.2d 522, 524–25 (Del. 1983); *see also Henne v. Balick*, 146

A.2d 394, 396 (Del. 1958) (plaintiffs may recover "damages relating to the future consequences of a tortious injury" where "the proofs establish with reasonable probability the nature and extent of those consequences"). And the mere "fact that there is some uncertainty as to plaintiff's damage or the fact that the damage is very difficult to measure will not preclude a jury from determining its value." *Henne*, 146 A.2d at 373.

Accordingly, the State is entitled to recover not only the damages it has already incurred due to the invasions caused by Defendants' tortious conduct, but also reasonably probable future damages resulting from this conduct. As alleged, "[e]ven if all carbon emissions were to cease immediately, Delaware would continue to experience sea level rise due to the 'locked in' greenhouse gases already emitted and the lag time between emissions and sea level rise," among other climate-related invasions. Compl. ¶ 228(a). At trial, the State will prove the nature and extent of the injuries that are already locked in from these emissions, and the resulting reasonably probable damages. The State is entitled to recover damages for such injuries—not only for invasions that have occurred before filing.

Even if Defendants were correct that only damages for invasions that have already occurred were recoverable—despite providing no authority for such a proposition—the Complaint alleges that the State has already been injured by the invasions caused by Defendants' conduct. *See, e.g.*, Compl. ¶¶ 247–52. It also

specifies numerous climate-related harms that have occurred to date, including over one foot of sea level rise that is "already submerging lowlands, exacerbating coastal flooding, and inundating natural resources and the State's property and infrastructure, causing damage and preventing its normal use," and costs the State has already incurred on projects to address sea level rise, such as raising roads and highways. *See id.* ¶¶ 228(a)–(b).

Moreover, Defendants' contention that the State's injuries are speculative is inaccurate and improper for the pleading stage. Although the State is not required to support its allegations with evidence, the Complaint cites numerous scientific studies, planning reports, and other sources to buttress its allegations of the invasions that will occur to State property in the form of sea level rise, flooding, and other climate-related harms. *See, e.g.*, Compl. ¶¶ 11 & n.9, 226–31 & nn.208–38. The State's detailed allegations of injury go far beyond what is required to plausibly allege that the State has suffered damages for purposes of a trespass claim,[7] and Defendants' accusations that these injuries are speculative is plainly without merit. Defendants' own scientific research has long predicted the climate-related invasions

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[7] *Cf. Cohen v. Mayor & Council*, 99 A.2d 393, 395 (Del. Ch. 1953) (denying motion to dismiss trespass claim because although "complaint d[id] not set forth specifically in what manner defendants will trespass upon plaintiff's land in the future or the irreparable damage which will be sustained by plaintiff, the damage already sustained by plaintiff" was sufficiently alleged and plaintiff alleged "that such damage will continue in the future").

the Complaint alleges have harmed and will continue to harm the State. *See* Compl. ¶¶ 62–103.

C. Defendants Breached Their Duties to Warn

Defendants try to dismiss the State's failure to warn claim by ignoring established precedent and raising disputed issues of fact, while again misconstruing the Complaint. They insist the State cannot assert this claim because it was not injured by its own use of Defendants' products, and they invite this Court to hold—as a matter of law—that the climate impacts of fossil fuel products were open and obvious to ordinary consumers. Defendants' arguments fail because they had a duty to warn both consumers and bystanders that would foreseeably be harmed by the intended use of their products, and because they made sure the dangers of their products were neither open nor obvious through their pervasive climate-disinformation campaigns. To hold otherwise would intrude on the jury's province to determine the existence and adequacy of Defendants' warnings.

1. Defendants Had a Duty to Provide Appropriate Warnings to Protect Consumers and Bystanders Like the State

Defendants first argue they did not have a duty to warn the State of the dangers of fossil fuel products because they did not owe the State a duty of care. Mot. 53–58. Defendants insist that a duty of care arises only when "a plaintiff claims injury from *its own use* of a product." *Id.* at 53.

To the extent the State is an injured bystander, its claims are cognizable. Although products liability law "was at first limited to 'users' or 'consumers'" because it was "grounded on a theory of warranty," courts quickly shelved this theory starting in the 1960s and expanded products liability to protect bystanders injured by products consumed or used by others. *Prosser & Keeton on Torts* § 100, pp. 703–04 (5th ed. 1984). The rationale for this expansion is aptly summarized in *Elmore v. Am. Motors Corp.*, 451 P.2d 84 (Cal. 1969), the first case to have a "real discussion" of bystander liability. *Prosser & Keeton on Torts* § 100, p. 704. There, the California Supreme Court reasoned that "the costs of injuries [should be] borne by the manufacturers that put [] products on the market rather than by the injured persons who are powerless to protect themselves." 451 P.2d at 88 (cleaned up). "If anything," the court continued, "bystanders should be entitled to greater protection than the consumer or user where injury to bystanders . . . is reasonably foreseeable." *Id.* at 89. That is because "the bystander ordinarily has no . . . opportunity" to avoid dangerous products. *Id.*

Since *Elmore*, courts have "almost unanimously" allowed foreseeably injured bystanders to sue in products liability. 1 *Owen & Davis on Products Liability* § 5:5 (4th ed., May 2022 update); *accord* 6 *American Law of Torts* § 18:137 (Mar. 2022 update) (this is the "[m]odern prevailing view"). Delaware is no exception. Indeed, one of the cases Defendants cite indicates as much. In *Ramsey v. Georgia Southern*

University Advanced Development Center, the Supreme Court explained that Delaware courts "adhere to § 388 of the Restatement, which has long governed whether manufacturers can be held liable for negligent failure to warn under [Delaware] law." 189 A.3d 1255, 1261 (Del. 2018). Under Section 388, a manufacturer's duty to warn about the hazards of its products "extends 'not only to those for whose use the chattel is supplied but also to third persons whom the supplier should expect to be endangered by its use,'" *id.* at 1279 (quoting Rest. § 388 cmt. d), "which may include 'persons who have no connection with the ownership or use of the chattel itself,'" *id.* (quoting Rest. § 395 cmt. i). Courts nationwide have broadly accepted this understanding.

In *Ramsey*, the Supreme Court determined that "the spouses of employees who launder asbestos-covered clothes"—i.e., not direct users of the asbestos-containing products—were reasonably foreseeable plaintiffs "affected by the Manufacturers' actions [that] should be entitled to recover." *Id.* at 1261, 1278; *see also id.* at 1279–80. Thus, these spouses could assert claims against manufacturers that "fail[ed] to warn and provide safe laundering instructions to an employer that exposes its employees to the manufacturer's asbestos products." *Id.* at 1280. Although the Court concluded the manufacturer did not owe a duty to warn the employees directly unless the manufacturer "knew that the employer could not be reasonably trusted to pass on the [warning] to its employees," *id.* at 1283, this

conclusion was grounded in application of "Delaware's 'sophisticated purchaser' defense" and "the requirements of reasonableness and good faith" in the context of a manufacturer supplying asbestos products *to an employer* that then exposes its employees, whose spouses may in turn be exposed by laundering their clothing, *see id.* at 1280–81. The sophisticated purchaser defense absolves manufacturers of a "concurrent duty to warn . . . employees" when an employer "has 'equal knowledge' of the product's dangers" and can be relied on "to protect its own employees from harm." *Id.* at 1281 (quotations omitted). In that context, "a fair and efficient accountability system" required manufacturers to warn employers of the product hazards and employers to warn the employees, partly "[b]ecause employers are in a comparatively better position to warn employees." *Id.* at 1277–78, 1283. And neither the manufacturer nor the employer was required to warn the spouses directly because this would require them to "inquir[e] into employees' household dynamics, determin[e] who is responsible for doing the family laundry, and deliver[] to that person a personalized warning." *Id.* at 1278. That context—and the sophisticated purchaser defense—is inapplicable here, where the State does not allege Defendants sold their products to employers who then had their employees use fossil fuels, but that Defendants primarily marketed fossil fuel products directly at consumers.

Here, Defendants have neither adequately warned the State nor other consumers of the harms of fossil fuel products, and the State is within the zone of

foreseeable persons Defendants should have expected to be endangered by use of their products. *See id.* at 1279 & 1271 n.74. In fact, the State alleges that Defendants *did* foresee as much—they have known for decades that the intended use of their products would cause grave dangers to localities like Delaware. *See, e.g.*, Compl. ¶¶ 1, 7, 62–103, 234–46. As in *Ramsey*, the "precise risk[s] of harm" the State alleges were "recognized by . . . industry resources." 189 A.3d at 1280.

Still, Defendants protest that the State does not allege a "special relationship" between itself and Defendants that would impose a duty of care. Mot. 55. But as another case Defendants cite explains, this requirement arises "[i]n negligence cases alleging *nonfeasance*." *Rahaman v. J.C. Penney Corp.*, 2016 WL 2616375, at *8 (Del. Super. May 4, 2016) (emphasis added). As the Supreme Court explained in *Ramsey*, nonfeasance classically "involves a situation when a bystander comes across someone suffering harm *from causes not of the bystander's making*." 189 A.3d at 1284 (emphasis added). By contrast, misfeasance occurs when "the defendant has created a new risk of harm to the plaintiff." *Id.* at 1285 (quotation omitted). "Once [a defendant] has engaged in misfeasance, recognized principles of tort law impose upon it a duty to 'act reasonably, as a reasonably prudent man (or entity) would,' which 'encompasses protecting against reasonably foreseeable events.'" *Id.* at 1286 (quotations omitted). Here, the Complaint primarily alleges *misfeasance* rather than *nonfeasance*: Defendants' decades-long, affirmative

campaigns of deception and disinformation to misrepresent and conceal the hazards of their products created new risks of harm to the State and others foreseeably injured by the intended use of Defendants' fossil fuel products. As such, the State need not allege a special relationship with Defendants to impose a duty of care.

Nor does the State "seek[] to impose an unprecedented duty of care" on Defendants or to broadly expand the bounds of tort law. *See* Mot. 53. Instead, consistent with Delaware law, the State merely alleges that Defendants had a duty to "issue adequate warnings" about product dangers. *See* Compl. ¶ 235. In other words, the State seeks to apply "settled Delaware law to a new set of facts." *Banks v. E.I. du Pont de Nemours & Co.*, 2022 WL 3139087, at *6 (D. Del. Aug. 4, 2022). This merely continues the "orderly" evolution of the common law. *United Food & Com. Workers Union v. Zuckerberg*, 262 A.3d 1034, 1058 (Del. 2021); *see also Beattie v. Beattie*, 630 A.2d 1096, 1098 & n.3 (Del. 1993).

Finally, Defendants' argument ignores that the Complaint alleges that Defendants "breached their duty of care by failing to adequately warn any *consumers, including, but not limited to, the State, its residents*, and any other party," of the hazards of using their products as intended. Compl. ¶ 236 (emphasis added). In other words, the State was both a consumer of Defendants' fossil fuel products and a bystander injured by the products Defendants sold to others.

Ultimately, the jury will decide the factual question of what would have constituted an adequate warning under the circumstances. *See Smith v. Daimlerchrysler Corp.*, 2002 WL 31814534, at *4 (Del. Super. Nov. 20, 2002); 10A Federal Practice and Procedure (Wright & Miller) § 2729.1 (courts are "relunctan[t]" to resolve factual issues, including "whether defendant . . . delivered an adequate warning"); *see MTBE*, 725 F.3d at 123 & n.44 (affirming jury verdict where plaintiff argued the defendant manufacturer had a duty to warn the public, not just users and consumers, and the court gave a general instruction about the defendants' duty to warn). This Court should not do so on a motion to dismiss.

2. The Dangers of Defendants' Products Were Not Open and Obvious

Next, Defendants contend the dangers of their products were open and obvious. Mot. 56–58. But the open-and-obvious danger doctrine is interpreted narrowly to avoid intruding on the jury's province, and Defendants concealed and misrepresented fossil fuel products' dangers, stymieing consumer understanding.

It is generally a jury question "whether a dangerous condition exists and whether the danger was apparent to the plaintiff," except in "very clear cases." *Jones v. Clyde Spinelli, LLC*, 2016 WL 3752409, at *2 (Del. Super. July 8, 2016) (quotation omitted); *Williamson v. Wilmington Hous. Auth.*, 208 A.2d 304, 306 (Del. 1965) (obviousness "depend[s] upon the facts and circumstances of each case and is generally a question of fact for the jury").

A danger is open and obvious if it "creates a risk of harm that is visible, is a well-known danger, or what is discernible by causal inspection to those of ordinary intelligence. It is a danger that is so apparent that [another] can reasonably be expected to notice it and protect against it, because the condition itself constitutes adequate warning." *Jones*, 2016 WL 3752409, at *2 (cleaned up). That is not the case here. A person cannot discern the climate-related dangers of liquid and gaseous fossil fuels by casually inspecting them; the greenhouse effect caused by fossil fuels is imperceptible and falls outside the common experience of ordinary people. That sets this case apart from those Defendants cite, which were anyway all resolved *at summary judgment* rather than on the pleadings. *See, e.g.*, *Jones*, 2016 WL 3752409, at *3 (it was "undisputed that the office space heater was open and obvious" and facts indicated plaintiffs "appreciated its 'danger'"); *Macey v. AAA-1 Pool Builders & Serv. Co.*, 1993 WL 189481, at *1–4 (Del. Super. Apr. 30, 1993) (dangers were obvious where plaintiff was injured by diving into a shallow pool and steps of pool ladder stated "DO NOT DIVE"); *Trabaudo v. Kenton Ruritan Club, Inc.*, 517 A.2d 706, 708 (Del. Super. 1986) (no duty to warn of dangers of eating raw pork products because "the necessity for proper cooking" of pork "is common knowledge").

The dangers alleged here are not visible, nor so apparent that ordinary consumers can be expected to know them—at minimum, this is a question for the jury to resolve. *See Evans v. Lorillard Tobacco Co.*, 990 N.E.2d 997, 1023 (Mass.

2013) (obviousness was a jury question because "cigarette manufacturers[] engaged in a calculated effort through advertising and public statements to raise doubts [about] the causative link between cigarettes and cancer"). Delaware courts have determined that intuitively potentially obvious dangers presented jury questions. *See, e.g.*, *Foreman v. Two Farms, Inc.*, 2018 WL 3949294, at *3–4 (Del. Super. Aug. 16, 2018) (danger of slipping on a snowy, icy sidewalk); *Caine v. Sovereign Prop. Mgmt., LLC*, 2017 WL 6550433, at *2 (Del. Super. Dec. 21, 2017) (similar).

Moreover, Delaware courts recognize an exception where distractions overcome a danger's open, obvious nature. *See, e.g.*, *Sweiger v. Del. Park*, 2013 WL 6504641, at *3–4 (Del. Super. Dec. 3, 2013); *Duran v. E. Ath. Clubs*, 2018 WL 3096612, at *3–4 (Del. Super. June 7, 2018). Defendants' deceptive conduct in affirmatively misrepresenting and concealing the hazards of their products and for decades obscuring the realities of climate change could support a jury finding that those dangers were not open and obvious *because of* Defendants' conduct, which distracted consumers from the true nature of the harms. *See, e.g.*, Compl. ¶¶ 104–41, 161–210, 234–46. The Court should not allow Defendants to escape liability on obviousness grounds after they spent decades, and billions of dollars, to convince consumers and the public that climate change was not an imminent threat.

D. The State Pleads Actionable CFA Violations

Defendants contend that the State's CFA claim fails to the extent it is based on their historical campaigns of deception, but *do not challenge* the claim to the extent it is based on more recent allegations of greenwashing. Mot. 58–64. Although the Complaint makes clear that Defendants' greenwashing conduct is merely the latest iteration of their ongoing campaigns of deception, the State's CFA claim is viable to the extent it is based on their historical acts of deception, too. The CFA claim is timely because Defendants' fraudulent concealment of their unlawful conduct tolled the statute of limitations until the State could reasonably have discovered their conduct—a question for the jury to resolve. And Defendants' deceptive statements about climate change are actionable because a jury could reasonably conclude that Defendants sought to indirectly induce consumers to purchase their fossil fuel products.

1. The State's CFA Claim Is Timely

Defendants argue the State's CFA claim is barred by the statute of limitations to the extent it challenges misrepresentations made more than five years before the suit was filed on September 10, 2020. Mot. 59–63. However, Defendants' fraudulent concealment of their conduct tolled the limitations statute as to their deceptive statements before that date.

The fraudulent concealment doctrine applies when "a defendant knowingly acted to prevent a plaintiff from learning facts or otherwise made misrepresentations intended to 'put the plaintiff off the trail of inquiry.'" *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 531 (Del. Ch. 2005) (quotation omitted). This doctrine tolls the statute of limitations "until a plaintiff discovers his rights or could have discovered them by the exercise of reasonable diligence." *Id.* (citing *Shockley v. Dyer*, 456 A.2d 798, 799 (Del. 1983)).

The Complaint alleges that neither the State nor other consumers were on notice of CFA Defendants' misrepresentations or omissions "until recently," given CFA Defendants' misleading statements from 1977 to the present and that CFA Defendants fraudulently concealed their violations from the State and other consumers through their campaigns of deception. *See* Compl. ¶¶ 219–25, 275–77. Defendants "deliberately obscured" the existence and operation of their deception campaigns using think tanks, fringe scientists, and trade associations. *Id.* ¶¶ 37(b), 39–42, 110–35. Defendants thus also ensured outside observers like the State would view the disinformation as coming from unconnected neutral sources, rather than Defendants. Defendants' acts to promote disinformation, conceal their knowledge about their products' harms, and cast doubt on the scientific consensus—while covering their tracks through use of third parties—"put the [State and other consumers] off the trail of inquiry." *See Pettinaro Enters.*, 870 A.2d at 531.

Not until September 2015 did investigative journalists make public "that Exxon Mobil had superior knowledge of the causes and potential consequences of climate change and the role its products played in causing climate change as far back as the 1970s." Compl. ¶ 137. Between October and December 2015, other news publications published a series of articles about Exxon and certain other CFA Defendants' superior knowledge and deceptive conduct dating back to the 1970s. *Id.* ¶ 138 & n.125. More publications followed in 2017 regarding API's role, other CFA Defendants' historical knowledge of the scientific consensus on climate change. *See id.* ¶ 139; *see also id.* ¶ 275 & n.240. As a result, the State did not discover essential facts underpinning its CFA claim based on Defendants' historical campaigns of deception until September 2015, and could not have discovered them sooner. At minimum, a jury should resolve the factual question of whether the State could have traced the threads of climate disinformation to Defendants before September 2015. *See Crest Condo. Ass'n v. Royal Plus, Inc.*, 2017 WL 6205779, at *6 (Del. Super. Dec. 7, 2017) (denying summary judgment motion because whether fraudulent concealment doctrine applied was a "question[] of fact that must be left to the jury" (citation omitted)); *Snyder v. Butcher & Co.*, 1992 WL 240344, at *4 (Del. Super. Sept. 15, 1992) ("[A]s Plaintiffs have successfully pled fraudulent concealment, the affirmative statute of limitations defense turns on a question of fact, and relief on a motion to dismiss is not appropriate." (citations omitted)).

Defendants next point out Complaint allegations that scientists have acknowledged a link between fossil fuels and climate change for decades. *See* Mot. 61. But Defendants conflate knowledge of climate change and its impacts with knowledge of Defendants' alleged deception. Defendants did not violate the CFA by producing fossil fuels; they did so by concealing and misrepresenting the dangers of their products. The State's evolving understanding of climate change did not cause its claims to accrue or the limitations period to begin running. Grasping at straws, Defendants cite two news articles from the late 1990s, as well as the filing of the *Native Village of Kivalina* lawsuit in 2008 and a news article about the case, to argue "that Plaintiff knew or should have known" about their campaign of deception. Mot. 61–62 & n.4. Defendants boldly assert that their deception campaigns were "widely publicized" in these discrete publications and unrelated legal filing. But "[t]he fact that news about some event was available at a particular time does not, by itself, resolve whether a reasonable person would have read or heard that news." *Johnson v. Multnomah Cnty. Dep't of Cmty. Just.*, 178 P.3d 210, 216 (Or. 2008). Defendants') (*en banc*). Defendants' argument only highlights the fact questions at issue in resolving whether the State knew or should have known about Defendants' CFA violations. The Court should leave these factual disputes for the jury.

2. Defendants' Misrepresentations About Climate Change Are Actionable

Defendants next argue the State's CFA claim should be dismissed to the extent it challenges their historical campaigns of deception "because the alleged misrepresentations relate to climate change . . . rather than Defendants' products." Mot. 63 (emphasis omitted). But there is no requirement in Delaware law that a CFA claim challenge misrepresentations about a specific product. Section 2513(a) of the CFA prohibits deception, fraud, and misrepresentation, along with concealment, suppression, or omission of any material fact, "in connection with the sale, lease, receipt, or advertisement of any merchandise." Advertisement is defined as "the attempt by publication, dissemination, solicitation or circulation to induce, *directly or indirectly*, any person to enter into any obligation or acquire any title or interest in, any merchandise." 6 *Del. C.* § 2511(1) (emphasis added). The CFA "is to be liberally construed" in light of its purpose to "protect consumers and legitimate business enterprises from unfair or deceptive merchandising practices." *Norman Gershman's Things To Wear, Inc. v. Mercedes-Benz of N. Am., Inc.*, 558 A.2d 1066, 1074 (Del. Super. 1989) (quoting 6 *Del. C.* § 2512). Delaware courts have broadly construed the phrase "in connection with" to advance the statute's purposes. *See, e.g.*, *Pack & Process, Inc. v. Celotex Corp.*, 503 A.2d 646, 648 (Del. Super. 1985) ("'In connection with' is a phrase suggesting a broad interpretation . . . .").

Although this question is premature at the pleading stage, Defendants have not shown (and cannot show) as a matter of law that all their statements about climate change were not "attempt[s]" to "indirectly" "induce" consumers to buy their fossil fuel products—i.e., advertisements under the CFA. *See* 6 *Del. C.* § 2511(6)(1). Reinforcing the statute's plain language, this Court has confirmed that "*the inducement may be direct or indirect as a matter of law*." *Barba v. Bos. Sci. Corp.*, 2015 WL 6336151, at *4 (Del. Super. Oct. 9, 2015) (emphasis added). Here, a jury could reasonably conclude that CFA Defendants' misrepresentations about climate change were attempts to indirectly induce Delaware consumers to buy their fossil fuel products. A Massachusetts court presiding over a similar climate deception case rejected Exxon's analogous argument "that it did not make the challenged 'greenwashing' statements in connection with the sale or offer to sell any 'services' or 'property'" as defined by Massachusetts' consumer fraud statute. *Massachusetts v. Exxon Mobil Corp.*, 2021 WL 3493456, at *13 (Mass. Super. Ct. June 22, 2021) (quoting Mass. Gen. Laws ch. 93A, § 1). The court found the complaint "sufficiently alleged that Exxon engaged in deceptive practices with respect to the 'greenwashing' claim" by alleging that "Exxon's 'greenwashing' campaign is designed to 'induce consumers to purchase its products.'" *Id.* (citation omitted); *see also* Compl. ¶ 277. This Court should allow the jury to make that determination as to Defendants' statements in furtherance of their historical deception campaigns.

The sole case Defendants cite is inapposite. It explains "that *post-sale representations* which are not connected to the sale or advertisement of the [product] do not constitute consumer fraud under the Act." *Norman Gershman's Things To Wear, Inc.*, 558 A.2d at 1074 (emphasis added). Defendants do not assert their alleged misrepresentations are non-actionable post-sale statements, and the holding in that case is no longer good law in any event—in 2021 the legislature broadened the scope of unlawful practices under the CFA to include misrepresentations made in connection with the "receipt" of merchandise. *See* 83 *Del. Laws*, c.85 (2021) (amending 6 *Del. C.* § 2513(a)).

Even if the Court concludes that statements must reference specific products to be actionable, Defendants are wrong that the allegations regarding their historical deception "relate only to the effects of climate change writ large" rather than their products. *See* Mot. 63. The Complaint challenges numerous misrepresentations Defendants made about their own products and those products' contributions to climate change. *See, e.g.*, Compl. ¶ 126 ("Defendants made misleading statements about . . . the relationship between climate change and their fossil fuel products.").

V. Defendants' Rule 9(b) Challenges Fail

Finally, Defendants contend that the Complaint does not satisfy Delaware Superior Court Rule 9(b). *See* Mot. 64–67. Rule 9(b) does not apply to most of the

State's claims, and regardless, the State pleads all its claims with sufficient particularity to meet satisfy Rule 9(b).

A. Rule 9(b) Does Not Apply to the State's CFA Claim

The State's CFA claim is not subject to Rule 9(b). In *State v. Publisher's Clearing House*, the Court of Chancery held that Chancery Rule 9(b)'s heightened pleading standard does not apply to CFA claims brought by the Attorney General. 787 A.2d 111, 116–17 (Del. Ch. 2001). The court's reasoning applies equally to Superior Court Rule 9(b).

The court's conclusion was based on five observations. *First*, applying the "essential elements" test used in *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1207–08 (1993), the court explained CFA claims are "quite distinct" from common-law fraud claims, which require scienter, intent to induce action, reliance, and damages. *Publisher's Clearing House*, 787 A.2d at 116. *Second*, "the legislature's intent that [the CFA] be liberally construed," indicates that applying Rule 9(b) "to enforcement actions brought by the Attorney General to protect the consuming public" would be "inconsistent" with the statute's "remedial goals." *Id.* at 117. *Third*, Rule 9(b)'s purpose is to "discourage the initiation of suits brought solely for their nuisance value, and safeguard[ing] potential defendants from frivolous accusations of moral turpitude." *Id.* at 115 (quoting *Desert Equities*, 624 A.2d at 1208). But "none of th[os]e purposes . . . is

implicated by [CFA] claims" because such claims "do not involve charges of moral turpitude and are unlikely to be brought by the State for purposes of harassment." *Id.* at 117. *Fourth*, requiring the State to satisfy Rule 9(b) would "defeat the legislative mandate to the Attorney General in bringing actions such as these on behalf of the citizens of this State." *Id.* Finally, Delaware's "liberal discovery rules and pretrial practice" sufficiently protect CFA defendants by enabling parties to "properly discover[] and defin[e] the scope of issues to be litigated." *Id.*

Each of these reasons applies with full force to CFA claims brought by the Attorney General in the Superior Court. True, Superior Court Rule 9(b) applies more broadly than Chancery Rule 9(b) because it extends to "averments of . . . negligence" in addition to those of fraud or mistake. *Compare* Super. Ct. Civ. R. 9(b), *with* Ch. R. 9(b). That distinction is immaterial here because the State alleges *intentional* rather than negligent violations of the statute, *see* Compl. ¶¶ 265–79, and Defendants contend Rule 9(b) applies because the State's claims are grounded in fraud, not negligence, Mot. 64. The reasoning in *Publisher's Clearing House* is on point, and this Court should similarly find that Superior Court Civil Rule 9(b) does not apply to the State's CFA claim.

B. Rule 9(b) Applies to the State's Negligent Failure to Warn Claim but Not to Its Public Nuisance or Trespass Claims

Defendants gloss over the distinctions between the State's claims with a blanket assertion that Rule 9(b) applies to all the claims because they are based on Defendants' campaign of deception. *See* Mot. 64–65.

Rule 9(b) requires "all averments of fraud, negligence or mistake" to "state[] with particularity" "the circumstances constituting fraud, negligence or mistake," although "knowledge and other" mental conditions "may be averred generally." The Delaware Supreme Court has determined whether Rule 9(b) applies to a claim by considering whether the essential elements of the cause of action resemble those of a fraud claim. *See Desert Equities, Inc.*, 624 A.2d at 1208 (Rule 9(b) does not apply to claim for bad faith because "[t]he essential elements of a claim of fraud are materially different from those required to establish a tortious state of mind"); *see also Publisher's Clearing House*, 787 A.2d at 115–16. Here, Rule 9(b) applies to the State's negligent failure to warn claim because it sounds in negligence—not because it sounds in fraud. *See Rinaldi v. Iomega Corp.*, 1999 WL 1442014, at *8–9 (Del. Super. Sept. 3, 1999) (finding Rule 9(b) satisfied for negligent failure to warn claim, despite finding Rule 9(b)'s pleading standard for fraud applicable to—and not satisfied for—CFA claim by private plaintiffs).

The State's public nuisance and trespass claims, however, are not subject to Rule 9(b). Defendants cite not a single example of a court in Delaware (or

elsewhere) applying Rule 9(b) to such claims. To the contrary, multiple courts have applied Rule 9(b) to fraud or negligence claims but *not* to trespass claims. *See, e.g.*, *St. Philip's Evangelical Lutheran Church of Wilmington v. Delmarva Power & Light Co.*, 2018 WL 3650214, at *4 (Del. Super. July 31, 2018); *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 251 (D. Md. 2000).

That result is sensible because the elements of public nuisance or trespass claims do not resemble those of common-law fraud. Common law fraud requires proof of:

> (1) a false representation, usually one of fact, made by the defendant; (2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; (3) an intent to induce the plaintiff to act or to refrain from acting; (4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of such reliance.

Stephenson v. Capano Dev., Inc., 462 A.2d 1069, 1074 (Del. 1983). A public nuisance claim, by contrast, requires proof of (1) "an unlawful act or omission to discharge a legal duty" (2) that "endangers the lives, safety, health or comfort of the public or by which the public are obstructed in the exercise or enjoyment of a right common to all." *Town of Georgetown v. Vanaman*, 1988 WL 7388, at *4 (Del. Ch. Jan. 28, 1988) (quoting *Mayor of Wilmington v. Vandegrift*, 29 A. 1047, 1048 (Del. 1893)). Trespass, meanwhile, requires (1) the plaintiff's lawful possession of property, (2) that the defendant entered without consent or privilege, and (3) resulting damages. *O'Bier v. JBS Const., LLC*, 2012 WL 1495330, at *2 (Del.

Super. Apr. 20, 2012). The only overlapping element is injury, which is common to nearly all tort claims.

Finally, even if Rule 9(b) might apply to public nuisance and trespass claims if brought by a *private* party, the Rule should not apply to the State's claims given the reasoning in *Publisher's Clearing House*. One of the main rationales supporting the Court of Chancery's reasoning—that the State is unlikely to bring frivolous claims alleging fraud for the purpose of harassing defendants—applies equally to the State's nuisance and trespass claims. *See* 787 A.2d at 117. As with a CFA claim by the Attorney General, "none of [Rule 9(b)'s animating] purposes . . . is implicated by" public nuisance or trespass claims by the Attorney General because such claims "do not involve charges of moral turpitude and are unlikely to be brought by the State for purposes of harassment." *See id.*

C. The Complaint Satisfies Rule 9(b) as to All Claims

Even if Rule 9(b) applies to all the State's claims, the Complaint is more than sufficient. "The purpose of [] Rule [9(b)] is to '(1) provide defendants with enough notice to prepare a defense; (2) prevent plaintiffs from using complaints as fishing expeditions to unearth wrongs to which they had no prior knowledge; and (3) preserve a defendant's reputation and goodwill against baseless claims.'" *Purdue*, 2019 WL 446382, at *8. Where Rule 9(b) applies, "date, place and time allegations are not required to satisfy the particularity requirement." *Sammons v.*

Hartford Underwriters Ins. Co., 2010 WL 1267222, at *5 (Del. Super. Apr. 1, 2010) (quotation omitted). The complaint must simply plead the circumstances of fraud "sufficiently 'to place defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior.'" *Id.* at *6 (quotation omitted).

A negligent failure to warn claim satisfies Rule 9(b) where the defendant is "apprised of: (1) what duty, if any, was breached; (2) who breached it, (3) what act or failure to act breached the duty, and (4) the party upon whom the act was performed." *Purdue*, 2019 WL 446382, at *8 (quotation omitted). The Complaint satisfies those requirements. It alleges Defendants had a duty to warn consumers about climate-related injuries they knew would flow from using their fossil fuel products; Defendants failed to give adequate warnings, and instead waged disinformation campaigns that prevented the State and other consumers from gaining access to comparable knowledge; and the intended use of Defendants' products caused the precise harms Defendants had reasonably foreseen. *See* Compl. ¶¶ 235–44; *cf. Purdue*, 2019 WL 446382, at *8 (allegations that "repeatedly refer[red] to specific statutory and common law duties, identifie[d] defendant groups, point[ed] out the actions or inactions Defendants allegedly committed or omitted, and claim[ed] that Defendants' conduct caused injury to the State of Delaware" satisfied Rule 9(b) as to negligence claims).

As for the State's CFA, trespass, and public nuisance claims, the Complaint provides more than sufficient detail to notify Defendants of the challenged conduct and enable them to mount a defense. The Complaint:

- Specifies the subject matter of the deception, alleging that Defendants failed to warn about the climate impacts of fossil fuels and made false and misleading statements about the existence, causes, and consequences of climate change, *see, e.g.*, Compl. ¶¶ 100–01;

- Explains why Defendants' statements and omissions were false or misleading, providing specific examples of how Defendants' public facing communications contradicted their internal ones, *see, e.g.*, *id.* ¶¶ 107–11;

- Identifies the timing of the deception, documenting how Defendants started studying climate change in the 1950s and how they launched their disinformation campaigns at the end of the 1980s, *see id.* ¶¶ 62, 104–112;

- Describes how the deception campaigns operated, explaining that Defendants used front groups, industry associations, think tanks, and dark money foundations to discredit climate science, cast doubt on the existence and effects of global warming, and downplay their products' role in driving the climate crisis, *see, e.g.*, *id.* ¶¶ 134–35, 152;

- Links each Defendant to the climate deception campaigns, either through their own advertisements or through their participation in the American Petroleum Institute ("API") and other industry groups that coordinated and implemented those campaigns, *see, e.g.*, *id.* ¶¶ 21–42;

- Details each Defendant's role in the deception campaigns, alleging that each failed to warn consumers and the public about the dangers of fossil fuels, and that each participated in the strategy, governance, and operation of trade associations and front groups that disseminated climate disinformation, *see, e.g.*, *id.* ¶¶ 21–42, 134–35, 110; and

- Supplies numerous, specific examples of false and misleading statements made by Defendants or groups working on behalf of Defendants, *id.* ¶¶ 111–30, 161–210.

Those allegations meet Rule 9(b)'s pleading standard.

Still, Defendants say the Complaint is flawed because it impermissibly relies on "group pleading." Mot. 65–66. But Delaware courts permit group pleading "so long as individual defendants are on notice of the claim against them." *River Valley Ingredients, LLC v. Am. Proteins, Inc.*, 2021 WL 598539, at *3 (Del. Super. Feb. 4, 2021). Because the cornerstone of Rule 9(b) is notice, a complaint which puts defendants on notice of the "precise misconduct with which they are charged" suffices even if it engages in so-called group pleading. *See Grant v. Turner*, 505 Fed. App'x 107, 111–12 (3d Cir. 2012) (quoting *Seville Indus. Mach. Corp. v. Southmost Mach. Corp*., 742 F.2d 786, 791 (3d Cir. 1984)). Group pleading is particularly appropriate where, as here, defendants are alleged to have concealed facts regarding their misconduct, leaving the plaintiff unable to further specify a defendant's conduct "absent discovery." *Grant*, 505 Fed. App'x at 112. Collective allegations are likewise appropriate where "information that would permit greater particularity is exclusively within the possession of a defendant, and defendants are alleged to have acted together to facilitate a general scheme." *Hawk Mountain LLC v. Mirra*, 2016 WL 4541032, at *2 (D. Del. Aug. 31, 2016). As described above, both factors are alleged here.

Next, Defendants fault the Complaint for not including specific misrepresentations from each individual defendant. Mot. 65–66 n.5. But as a case Defendants cite explains, "there is no absolute requirement that where several

defendants are sued in connection with an alleged fraudulent scheme, the complaint must identify false statements made by each and every defendant." *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007); *see also Grant v. Turner*, 505 F. App'x 107, 112 (3d Cir. 2012) (vacating dismissal of fraud-based claims because "[a]lthough Plaintiffs d[id] not allege who, specifically, made misrepresentations to whom in all cases," the complaint sufficiently notified defendants of their charged misconduct). Indeed, this Court rejected a materially similar argument in *Purdue*, explaining that although "[a]t the pleading stage, a defendant in a group of similar defendants may attempt to distinguish its behavior from other defendants," "that there were no allegations of specific misrepresentations" by certain defendants is not a basis to dismiss claims against them. 2019 WL 446382, at *8. Here, far from the picture Defendants paint, *see* Mot. 66, the Complaint alleges a great number of specific misrepresentations made by specific defendants over the course of decades—including the content, time period, and medium of these representations. *See, e.g.*, Compl. ¶¶ 116–23, 172–73, 178–80, 182–86, 189–201. Moreover, the State alleges that each Defendant engaged in the same wrongful conduct and fraudulent scheme.

Finally, Defendants argue that the Complaint lacks particularized allegations of actual reliance. Mot. 66–67. But reliance is not an element of any of the State's causes of action, including its CFA claim. *See Stephenson*, 462 A.2d at 1074 (for a CFA claim based on omission or concealment, plaintiffs must plead that defendants

intended others to rely on the omission or concealment but proof of reliance is not required). Even assuming *arguendo* that it was necessary, the Complaint pleads reliance with sufficient particularity by alleging Defendants' campaigns caused consumers to purchase more fossil fuels than they otherwise would have, and by identifying the types of misrepresentations that influenced consumers and how they were transmitted to consumers. *See* Compl. ¶¶ 9, 58, 104–41, 200, 211–18, 273.

VI. Any Dismissal Should Be Without Prejudice

In Delaware, as elsewhere, dismissal under Rule 12(b)(6) without granting leave to amend is disfavored. Instead, courts freely grant leave to amend when the plaintiff can allege additional facts to state a claim and amendment is in the interest of justice. *See, e.g.*, *Cornell Glasgow, LLC v. La Grange Props., LLC*, 2012 WL 2106945, at *12 (Del. Super. June 6, 2012); *Ward v. CareFusion Sols., LLC*, 2018 WL 1320225, at *3 (Del. Super. Mar. 13, 2018). Particularly so where, as here, the defendant has filed a motion to dismiss "but not an answer or other responsive pleading," because in that scenario the plaintiff is "entitled to amend [its] [c]omplaint as a matter of course" under Superior Court Rule 15(a). *See Ward*, 2018 WL 1320225, at *3.

Despite recognizing that dismissal *without prejudice* for failure to comply with Rule 9(b) is "the usual course," Defendants urge the Court to dismiss with prejudice "[b]ecause the alleged 'campaign of deception' was purportedly aimed at

the public, [so] Plaintiff cannot contend that it lacked access or means to set forth the specifics of this alleged fraudulent conduct." Mot. 67 (quotation omitted). But they provide no support for their puzzling justification for departing from the general rule here—if Rule 9(b) applies *and* the Complaint lacks sufficient particularity—simply because their misrepresentations were aimed at consumers and the public.

The sole case Defendants cite in support of their brazen request is handily distinguishable. There, "*no* specifics were stated in the [cross-]complaint" to support conclusory allegations of fraud, and the defendant's certification in opposition to the plaintiff's summary judgment motion "failed to supply *any* factual predicates for [the counter-]claims." *Lynx Asset Servs., LLC v. Minunno*, 2017 WL 563310, at *4 (N.J. Super. App. Div. Feb. 13, 2017) (emphases added). As detailed above, the Complaint contains ample specific allegations to support each of the State's claims, and the State need not prove its allegations at the pleading stage.

If the Court finds that any of the State's causes of action fails to state a claim, the State respectfully requests dismissal without prejudice so that it may amend to provide more detailed allegations. *See Purdue*, 2019 WL 446382, at *11 (dismissing certain claims without prejudice where the issue requiring dismissal could be cured).

CONCLUSION

Defendants' Joint Motion to Dismiss for Failure to State a Claim should be denied. If the Court grants any part of the Motion, it should do so without prejudice to the State's filing an amended complaint.

Respectfully submitted,

DELAWARE DEPARTMENT OF JUSTICE

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