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CITY OF HOBOKEN,

Plaintiff,

v.

EXXON MOBIL CORP., EXXONMOBIL OIL CORP., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, BP P.L.C., BP AMERICA INC., CHEVRON CORP., CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, and AMERICAN PETROLEUM INSTITUTE,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY

Docket No. HUD-L-3179-20

Civil Action
CBLP Action

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

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I. INTRODUCTION

Plaintiff the City of Hoboken seeks to hold twelve energy companies and an energy industry trade association liable under *state* law for the alleged effects of *global* climate change. While the state-law labels Plaintiff attaches to its claims may be familiar, the substance and reach of the claims are extraordinary. Plaintiff seeks to regulate the nationwide—and even worldwide—marketing and distribution of lawful products on which billions of people outside of Hoboken, and New Jersey, rely to heat their homes, power their hospitals and schools, produce and transport their food, and manufacture countless items essential to the safety, wellbeing, and advancement of modern society—in the process distorting the scope and content of state tort law beyond recognition. Allowing such claims to proceed would not only usurp the power of the legislative and executive branches (both federal and state) to set climate policy, but would do so retrospectively and far beyond the geographic boundaries of this State. It is therefore unsurprising that "[n]o plaintiff has ever succeeded in bringing" such claims "based on global warming." *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1023 (N.D. Cal. 2018), *vacated on other grounds*, 960 F.3d 570 (9th Cir. 2020). This Court should likewise dismiss the Amended Complaint.

First, the simplest and most straightforward defect in Plaintiff's suit is that its claims are duplicative of a nearly identical suit brought by the State of New Jersey. Under New Jersey law, courts generally defer to the suit brought by the representative of the State where, as here, a political subdivision of the State brings a suit that overlaps with the State's claims and seeks the same relief. This Court can and should dismiss Plaintiff's suit in favor of the State's.

Second, although Plaintiff purports to plead state-law claims, state law cannot constitutionally apply here. As the U.S. Supreme Court has long made clear, the federal Constitution's structure generally precludes States from using their own laws to resolve disputes involving out-of-state conduct. Thus, in cases involving "interstate and international disputes

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

Every federal court to consider this question in analogous cases has held that state law cannot be used to obtain relief for the alleged consequences of global climate change. Most recently, the U.S. Court of Appeals for the Second Circuit affirmed dismissal of a case raising similar claims. *See City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). Describing "the question before us" as "whether a nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions may proceed under [state] law," the court held: "Our answer is simple: no." *Id*. at 91. This is because "disputes involving interstate air . . . pollution," such as climate change litigation, "implicate two federal interests that are incompatible with the application of state law: (i) the 'overriding . . . need for a uniform rule of decision' on matters influencing national energy and environmental policy, and (ii) 'basic interests of federalism.'" *Id*. at 91–92. When, as here, a plaintiff seeks "to hold [energy companies] liable, under [state] law, for the effects of emissions made around the globe," "[s]uch a sprawling case is simply beyond the limits of state law." *Id*. at 92.

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

Third, even if state law could apply (which it cannot), Plaintiff's claims would be preempted by the Clean Air Act. The U.S. Supreme Court held more than thirty years ago that the Clean Water Act "precludes a court from applying the law of an affected State against an out-of-state source" because doing so would "upset[] the balance of public and private interests so carefully addressed by the Act." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). Every federal court of appeals to consider the question has held that the preemptive scope of the Clean Air Act is materially identical to that of the Clean Water Act. The Clean Air Act thus bars Plaintiff's attempt to use New Jersey law to obtain damages for injuries allegedly caused by innumerable out-of-state sources of emissions.

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

Fifth, Plaintiff's claims premised on Defendants' purported scheme of "deception" to allegedly conceal the risks of climate change are barred by New Jersey's statute of limitations. The Amended Complaint fails to identify a single alleged act of "deception" within the ten-year

limitations period. In fact, the most recent alleged statement was made in 2006—*more than 14 years* before Plaintiff filed its Complaint. Accordingly, any claims premised on such allegations should be dismissed.

Sixth, each of the putative state-law claims in Plaintiff's Amended Complaint fails on its own terms. As a threshold matter, Plaintiff's common-law nuisance, trespass, and negligence claims are subsumed by the New Jersey Product Liability Act ("PLA"), because each of those claims asserts harm allegedly caused by Defendants' fossil-fuel products, and the PLA provides the exclusive remedy under New Jersey law for all product-liability theories of harm. And even if they were not subsumed, each of Plaintiff's state-law claims is also independently meritless.

Plaintiff's nuisance claims fail because New Jersey law does not recognize nuisances allegedly attributable to products, as opposed to the use of land. The New Jersey Supreme Court has squarely rejected attempts, like Plaintiff's here, to expand nuisance law to cover the promotion and sale of lawful consumer products, explaining that "essential to the concept of a public nuisance tort . . . is the fact that it has historically been linked to the use of land by the one creating the nuisance." *In re Lead Paint Litig.,* 191 N.J. 405, 423 (2007). In that case, and dispositive here, the Supreme Court declined to allow a public nuisance claim based on the promotion and sale of lead pigment, notwithstanding the harmful effects of lead poisoning, because doing so would "stretch the concept of public nuisance far beyond recognition and would create a new and *entirely unbounded tort* antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance." *Id.* at 421 (emphasis added). Nor can Plaintiff allege facts showing that Defendants exercised control over the "instrumentality" allegedly causing the nuisance—*i.e.*, the concentration of greenhouse gases in the Earth's atmosphere. Moreover, Plaintiff improperly attempts to recover damages as a private plaintiff, despite allegedly suffering injuries characteristic of a public entity.

Plaintiff's trespass claim fails because New Jersey no longer favors common law trespass claims for environmental injury. Even if it did, Plaintiff's claim fails because it does not allege that Defendants or their products unlawfully entered its property, and Plaintiff never held exclusive possession of the subject property.

Plaintiff's negligence claim fares no better. Among other reasons, this claim fails because Defendants owe no duty to warn Plaintiff—let alone the entire world—about the potential dangers of using oil and gas products, as those risks have been well known to Plaintiff and the public for decades, and Plaintiff fails to allege that it justifiably relied on Defendants' purported misrepresentations.

Plaintiff's claim under the New Jersey Consumer Fraud Act ("CFA") fails because Plaintiff lacks a cause of action under the statute. Representative suits under the CFA are limited to the New Jersey Attorney General (who has brought one), and Plaintiff cannot avail itself of the statute's private cause of action because it has not brought suit in its capacity as a consumer.

Finally, Plaintiff's newly added Racketeer Influenced and Corrupt Organizations Act ("RICO") claim is baseless and must be dismissed for multiple independent reasons. Among other things, Plaintiff falls far short of the statute's demanding standard for alleging the direct harm necessary for standing to bring a claim, alleging, at most, an attenuated and indirect causal chain. In addition, Plaintiff does not allege that Defendants intentionally harmed Plaintiff or that Defendants committed the requisite predicates to sustain the RICO claim.

* * *

As Judge Alsup of the Northern District of California remarked in dismissing similar claims, "the development of our modern world has literally been fueled by oil and coal," and "[a]ll of us have benefitted" from their development—including Plaintiff. *City of Oakland*, 325 F. Supp. 3d at

1023; *see also City of New York*, 993 F.3d at 86 ("[E]very single person who uses gas and electricity—whether in travelling by bus, cab, Uber, or jitney, or in receiving home deliveries via FedEx, Amazon, or UPS—contributes to global warming."). Fossil fuels support the safety, security, and wellbeing of our Nation—and that of billions of consumers worldwide. Plaintiff asks this Court to ignore the central importance fossil fuels play in the world economy and, instead, to impose liability and damages on a select group of energy companies under *New Jersey* law because of their—and many others'—*global* production, promotion, and distribution of those lawful products and their end-use emissions.

The Court should dismiss the Amended Complaint with prejudice.

II. BACKGROUND

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

The first such lawsuit unsuccessfully asserted nuisance claims against automobile companies for alleged contributions to climate change. *See California v. Gen. Motors Corp.*, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (dismissing state and federal common-law nuisance claims against automakers based on emissions for failing to state a claim and because claims were nonjusticiable). After that failure, the next round of litigation asserted claims against direct emitters, such as power companies, but that, too, failed. *See AEP*, 564 U.S. at 429 (holding that claims seeking abatement of the alleged public nuisance of climate change fail because the federal common law that necessarily governs claims for injuries allegedly caused by interstate emissions was displaced by the Clean Air Act); *Kivalina*, 663 F. Supp. 2d at 863 (dismissing as nonjusticiable

and for lack of standing federal common-law nuisance claims against energy companies, including claims that defendants "misle[d] the public with respect to the science of global warming," *see* No. 4:08-cv-01138 (N.D. Cal.), Dkt. 1 ¶ 269).

Here, Plaintiff reaches even further back in the supply chain, suing companies that provide the raw material used by direct emitters[1]—the fuel that billions of people depend on every day. Over the past six years, States and municipalities across the country have brought more than two dozen cases against energy companies seeking damages for the alleged impacts of climate change. Only a few of these cases have proceeded to the merits, but in those that have, federal courts universally have dismissed them for failure to state a claim. *See City of New York*, 993 F.3d at 92, 95; *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466, 476 (S.D.N.Y. 2018), *aff'd*, 993 F.3d 81; *City of Oakland*, 325 F. Supp. 3d at 1017. As here, the plaintiffs in each of those cases alleged that the defendants "have known for decades that their fossil fuel products pose a severe risk to the planet's climate," and yet "downplayed the risks and continued to sell massive quantities of fossil fuels, which has caused and will continue to cause significant changes to the City's climate and landscape." *City of New York*, 993 F.3d at 86–87; *see also, e.g.*, Am. Compl. ¶¶ 1–15. And, like Plaintiff here, the plaintiffs in those cases suggested that this group of energy companies is therefore "primarily responsible for global warming and should bear the brunt of these costs," even though "every single person who uses gas and electricity . . . contributes to global warming." *City of New York*, 993 F.3d at 86; *see also, e.g.*, Am. Compl. ¶¶ 2, 3, 36, 42.

Plaintiff initially asserted five causes of action: (1 & 2) public and private nuisance; (3) trespass, (4) negligence, and (5) violations of the New Jersey Consumer Fraud Act, N.J. Stat.

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[1] Plaintiff has also sued API, a trade association that does not sell, transport, or refine fossil fuels anywhere, let alone in New Jersey. *See* Am. Compl. ¶ 24(a).

§§ 56:8-1, *et seq.* Compl. ¶¶ 289–365. Plaintiff later filed an Amended Complaint adding alleged violations of RICO, premised on the same allegations as its other claims. Am. Compl. ¶¶ 16, 385–415. Plaintiff seeks compensatory damages, punitive damages, abatement of the alleged nuisance, treble damages under the CFA, and attorneys' fees and costs. Am. Compl. at 160 (Prayer for Relief).

While Plaintiff purports to sue based on Defendants' "market[ing], and [sale]" of oil-and-gas products "on a massive scale," *id.* ¶ 2, Plaintiff's alleged injuries depend on "[t]he accumulation of greenhouse gasses" in "the Earth's atmosphere," *id.* ¶ 31. And greenhouse gas emissions result from countless sources, including the billions of daily choices made over the course of more than a century—by governments, private organizations, and individuals around the world—about what types of fuel to use, how efficiently to use those fuels, and whether to take steps to offset the resulting emissions. The Amended Complaint itself alleges that emissions are the mechanism of the alleged nuisance: "greenhouse gas emissions from fossil fuels are the main driver of global warming." *Id.* ¶ 33.

As one court explained in dismissing similar claims: "The harm alleged . . . remains a harm caused by fossil fuel *emissions*, not the mere extraction or even sale of fossil fuels." *City of Oakland*, 325 F. Supp. 3d at 1024 (emphasis in original); *see also City of New York*, 325 F. Supp. 3d at 471–72 ("[T]he amended complaint makes clear that the City is seeking damages for global-warming related injuries resulting from greenhouse gas emissions, and not only the production of Defendants' fossil fuels."). And, even though the Amended Complaint alleges that Defendants' oil-and-gas products account for "more than 12% of all global CO_2 emissions between 1965 and 2017," Am. Compl. ¶ 42—with, therefore, 88% coming from other sources—Plaintiff nonetheless

asserts that Defendants should be held liable for *all* harm caused to it by climate change, both in the past and in the future. *See id.* at 160 (Prayer for Relief).

Our constitutional structure forecloses such claims under state law. And even if state law could apply, Plaintiff's Amended Complaint fails to state a claim under the terms of those state laws.

III. ARGUMENT

Defendants may raise "by motion" defenses to plaintiff's claims, including "failure to state a claim upon which relief can be granted." *R.* 4:6-2(e). Courts deciding such motions are required to "search[] the complaint with liberality to ascertain whether the fundament of a cause of action may be gleaned." *Baskin v. P.C. Richard & Son, LLC*, 246 N.J. 157, 171 (2021) (internal quotation marks omitted). Despite this "generous standard," New Jersey courts grant motions to dismiss where elements are missing or under-pled. *See*, *e.g.*, *Nostrame v. Santiago*, 213 N.J. 109, 126 (2013). Likewise, at the pleadings stage, New Jersey courts dismiss claims that are preempted by federal law. *See Glukowsky v. Equity One, Inc.*, 180 N.J. 49, 71–72 (2004).

A. Plaintiff's Case Should Be Dismissed Because It Is Subsumed By The State's Nearly Identical Suit.

Hoboken is a political subdivision of the State of New Jersey. As the U.S. Supreme Court has recognized, "[p]olitical subdivisions of States—counties, cities or whatever—never were and never have been considered as sovereign entities." *Reynolds v. Sims*, 377 U.S. 533, 575 (1964). Rather, they are "regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental function." *Sailors v. Bd. of Educ. of Kent Cnty.*, 387 U.S. 105, 107–08 (1967). New Jersey law recognizes the derivative nature of its political subdivisions' authority. *See, e.g.*, *Town of Kearny v. Jersey City Incinerator Auth.*, 140 N.J. Super.

279, 287 (Ch. Div. 1976) ("A municipality is a creation of the state and derives all its authority and power not secured by our constitutions from the legislature.").

This case should be dismissed because, after Hoboken filed its complaint, the State of New Jersey filed a suit involving nearly identical defendants, arguments, claims, and requested relief. *See Platkin et al. v. Exxon Mobil Corp. et al.*, No. MER-L-001797-22 (N.J. Super. Ct., Mercer Cty.). Indeed, virtually everything Plaintiff seeks here is also sought in the State's suit, such that "the relief sought by the Attorney General will adequately deal with the grievance alleged" by the City. *Olive v. Graceland Sales Corp.*, 61 N.J. 182, 186 (1972). Dismissal of this case would avoid wasteful, counterproductive, and potentially inconsistent parallel litigation. The State's suit seeks to recover *all* damages from climate change suffered *anywhere* in the State, including by individual municipalities, and thus the relief requested by Plaintiff here is completely subsumed by and duplicative of the relief requested by the State. *See New Hampshire v. City of Dover*, 891 A.2d 524, 531 (N.H. 2006) (dismissing lawsuits brought by New Hampshire municipalities due to parallel lawsuit brought by New Hampshire Attorney General); *see also State of Ill. v. Associated Milk Producers, Inc.*, 351 F. Supp. 436, 440 (N.D. Ill. 1972) ("Justice and judicial economy is best served by having the largest governmental unit sue on behalf of all its parts rather than having multiple suits brought by various political subdivisions within the State.").

In the case of overlapping lawsuits seeking near-identical relief, New Jersey courts defer to the suit brought by the representative of the State. *Cosentino v. Philip Morris Inc.* is instructive. 1998 WL 34168879 (N.J. Super. Ct. Law. Div. Oct. 22, 1998). There, the Superior Court faced multiple suits against the tobacco industry, seeking "almost identical" relief. *Id*. at *3. One set of cases included five separate actions filed by individual plaintiffs seeking class certification against several tobacco companies and tobacco trade associations, while the other was a suit initiated by

the Attorney General "based on [the State's] *parens patriae* power." *Id*. The Attorney General's suit "contain[ed] the same allegations made by plaintiffs in the [private] case," including "deceptive trade practices" and "product liability-defective design." *Id*. Exercising its "discretionary power," the Superior Court "disallow[ed]" any relief requested in the "private suits and/or class actions" that overlapped with the relief requested by the Attorney General. *Id*. Notably, *Cosentino* relied on the New Jersey Supreme Court's decision in *Lemelledo v. Beneficial Mgmt. Corp. of America*, 150 N.J. 255 (1997), which held that a court entertaining a private cause of action under the CFA might, in its discretion, defer to an agency that "legitimately has exercised its jurisdiction" to pursue an identical proceeding. 150 N.J. at 275.

The circumstances here are similar to those in *Cosentino* and, if anything, militate more strongly in favor of dismissal in deference to the State's lawsuit. Here, the Attorney General, Department of Environmental Protection ("DEP"), and the Director of the Division of Consumer Affairs—officials and agencies representing the State of New Jersey—filed a lawsuit that subsumes Hoboken's lawsuit in every way. *See* Ex. A to Cert. of Herbert J. Stern, Esq. (Complaint in *Platkin et al. v. Exxon Mobil Corp. et al.*, No. MER-L-001797-22 (N.J. Super. Ct., Mercer Cty.)).[2] The theory of each case—that defendants deceived the public about their products' connection to global climate change, the effects of which have injured plaintiffs—is identical. *Compare* Am. Compl. ¶¶ 1–16, *with* Ex. A ¶¶ 1–18. The defendants in each case are identical. The relief Plaintiff seeks is encompassed by the relief the Attorney General seeks, and nearly every cause of action is

[2] The Court may take judicial notice of "records of the court in which the action is pending and of any other court of this state or federal court sitting for this state." N.J.R.E. 201(b)(4).

duplicative. *Compare* Am. Compl. ¶¶ 307–416, *with* Ex. A ¶¶ 235–333.[3] Just as this suit seeks damages and abatement on behalf of Hoboken, the Attorney General's suit seeks damages and abatement on behalf of the State of New Jersey, including Hoboken. *Compare* Am. Compl. at 160, *with* Ex. A at 193–94. And just like the Attorney General's suit in *Cosentino*, the New Jersey state case is premised, in part, on the State's "*parens patriae* authority to protect . . . the health and welfare of New Jersey's residents," Ex. A ¶ 22—many of whose interests Hoboken likewise seeks to advance, *see* Am. Compl. ¶ 17 (invoking Hoboken's power to protect the health, welfare, safety, and property of its residents).

This is all the more true in the environmental context. New Jersey courts have noted that "simultaneous actions involving identical claims" brought by agencies of the State and local government entities "rais[e] unnecessary questions concerning authority over the litigation, its conduct, and its possible settlement." *Loc. Bd. of Health of Twp. of Bordentown v. Interstate Waste Removal Co., Inc.*, 191 N.J. Super. 128, 139 (Law. Div. 1983) (holding that suits by local boards of health to enforce the Solid Waste Management Act are "oust[ed]" by an overlapping suit by DEP). "[T]he unrestricted allowance of multiple enforcement actions," the Appellate Division has remarked, "may well be counterproductive." *Howell Twp. v. Waste Disposal, Inc.*, 207 N.J. Super. 80, 96 (App. Div. 1986) (recognizing a trial court's "position to protect and harmonize all interests protected by the complex maze of environmental legislation and maintain an orderly progression of litigation arising therefrom").

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[3] Hoboken's only claim that is not duplicative of the Attorney General's suit is a single count alleging violations of New Jersey's RICO statute. *See* Am. Compl. ¶¶ 385–416. This is a distinction without a difference. The claim is premised on the same theory of the case and the same allegations as Plaintiff's other claims, which, again, are duplicative of the State's allegations, and the sole remedy sought by Hoboken for Defendants' purported RICO violation (*i.e.*, treble damages) is duplicative of a remedy sought by Hoboken for alleged violations of the Consumer Fraud Act—a claim that was also brought by the Attorney General.

In short, if these two cases are not duplicative, then no two cases are. Indeed, they are "almost identical." *Cosentino*, 1998 WL 34168879, at *3. The suits allege the same misconduct led to the same injuries. And virtually everything Plaintiff seeks here is also sought in the State's suit, such that "the relief sought by the Attorney General will adequately deal with the grievance alleged" by the City. *Olive*, 61 N.J. at 186. Because the two lawsuits overlap nearly completely, there is a substantial risk of both inconsistent rulings and inconsistent remedies. For example, one court may determine, as a matter of law, that a defendant cannot be liable under the CFA, while the other court incorrectly rules the same defendant is liable under the CFA for the same alleged misconduct.

Because these cases are a paradigmatic example of "counterproductive" simultaneous litigation, *Howell Twp.*, 207 N.J. Super. at 96, this Court should follow *Cosentino* and disallow the claims and relief requested in this suit because they overlap with that requested in the New Jersey State case. As the State's requested relief encompasses, in practice, everything Plaintiff seeks here, this action should be dismissed in its entirety.

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

Because Plaintiff seeks damages for harms allegedly caused by *interstate* emissions and *global* warming, its claims cannot be governed by state law: Under our federal constitutional system, state law cannot be used to resolve claims seeking redress for injuries allegedly caused by out-of-state emissions.

1. The Supreme Court has long held that—based on the structure of the U.S. Constitution—"a few areas, involving uniquely federal interests, are so committed by the Constitution . . . to federal control that state law is pre-empted." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504

(1988) (citation omitted). In fact, in such "inherently federal" cases, "no presumption against pre-emption obtains . . . ." *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001).

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

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

Accordingly, "the basic scheme of the Constitution" gives courts the power to fashion *federal* common-law remedies for disputes involving "air and water in their ambient or interstate aspects" because they are not "matters of substantive law appropriately cognizable by the states."

AEP, 564 U.S. at 421. Congress, of course, may displace federal common-law remedies—as it did here for claims based on domestic emissions through the Clean Air Act—but such displacement does not allow state law to govern matters that it could not have governed absent displacement. As the Seventh Circuit has explained, a State "cannot apply its own state law to out-of-state discharges" even after statutory displacement of federal common law. *Illinois v. City of Milwaukee*, 731 F.2d 403, 409–11 (7th Cir. 1984). The Second Circuit, too, has recognized that "state law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one"; indeed, such an argument is "too strange to seriously contemplate." *City of New York*, 993 F.3d at 98–99. Whether or not Congress has displaced federal common-law remedies, Supreme Court precedent establishes that "state law cannot be used" to resolve claims seeking redress for injuries allegedly caused by out-of-state pollution. *Milwaukee II*, 451 U.S. at 313 n.7.

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

In reaching this conclusion, the Second Circuit emphasized that the dispute "implicate[d] two federal interests that are incompatible with the application of state law"—namely, the "overriding need for a uniform rule of decision" on matters influencing national energy and environmental policy and the "basic interests of federalism." *Id.* at 91–92 (cleaned up). And the court explained that applying state law would "risk upsetting the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." *Id.* at 93. The other federal courts to consider the question have reached the same conclusion. *See City of New York*, 325 F. Supp. 3d at 471–72 (holding claims of this sort "are ultimately based on the 'transboundary' emission of greenhouse gases," so "our federal system does not permit the controversy to be resolved under state law"); *City of Oakland*, 325 F. Supp. 3d at 1022 (reaching same conclusion). *But see City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-380-JPC, Dkt. 618 (Haw. Cir. Ct. Mar. 29, 2022).[4]

Similarly, in *AEP*, eight States and various other plaintiffs sued five utility companies, alleging that "the defendants' carbon-dioxide emissions" had substantially contributed to global warming, thereby "creat[ing] a 'substantial and unreasonable interference with public rights,' in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law." 564 U.S. at 418. Justice Ginsburg, writing for the majority, held that such claims necessarily require "federal law governance" and that "borrowing the law of a particular State would be inappropriate." *Id.* at 421–22. The issues involve "questions of national or international policy," requiring "informed assessment of competing interests," and Congress and the "expert agency, here, EPA,"

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[4] The Hawaii Circuit Court granted defendants' motion for leave to file an interlocutory appeal from the denial of their motion to dismiss, Dkt. 688, and the appeal is calendared for oral argument before the Hawaii Supreme Court on August 17, 2023.

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

Thus, federalism and comity concerns embodied in the Constitution preclude the application of state law to claims like those asserted here. Climate change is by its very nature global, caused by the cumulative effect of actions far beyond the reach of any one State's borders. Applying state law to claims for injuries allegedly caused by global climate change resulting from emissions around the world would necessarily require applying that law beyond the State's jurisdictional bounds. While "Congress has ample authority to enact such a policy for the entire Nation, it is clear that no single State could do so, or even impose its own policy choice on neighboring States." *BMW*, 517 U.S. at 571 (footnote omitted); *see also Philip Morris USA v. Williams*, 549 U.S. 346, 352–53 (2007) ("[O]ne State[ ]" may not "impose" its "policy choice[s] . . . upon neighboring States with different public policies."). Allowing state law to govern such areas would permit one State to "impose its own legislation on . . . the others," violating the "cardinal" principle that "[e]ach state stands on the same level with all the rest." *Kansas v. Colorado*, 206 U.S. 46, 97 (1907).

Nor may state law dictate our "relationships with other members of the international community." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964). Yet, that is exactly what Plaintiff's state-law claims would do. If Plaintiff succeeds, Defendants will be subject to

ongoing future liability for producing and selling fossil fuel products around the globe unless they do so in the precise manner that New Jersey law is deemed to require. That is a paradigmatic example of state law improperly employing "damages" to "regulat[e]" an industry's extraterritorial operations, *Kurns v. R.R. Friction Prods. Corp*., 565 U.S. 625, 637 (2012), by forcing Defendants to "change [their] methods of doing business . . . to avoid the threat of ongoing liability," *Ouellette*, 479 U.S. at 495. And "[a]ny actions" Defendants "take to mitigate their liability" in New Jersey "must undoubtedly take effect across every state (and country)." *City of New York*, 993 F.3d at 92.

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

There is no disputing that Plaintiff's claims involve interstate—and international—air emissions. Plaintiff seeks damages for claimed injuries in Hoboken allegedly caused not by actions in New Jersey, but by the cumulative impact of actions taken in every State in the Nation and every country in the world. Plaintiff concedes this point repeatedly in its Complaint, alleging that Defendants' conduct "has caused the *Earth* to warm," Am. Compl. ¶ 68, that Defendants have known of the "enormous harms that fossil fuels have caused . . . *around the world*," *id*. ¶ 81, that

Defendants' conduct "is driving *global* warming," *id*. ¶ 189, and that the use of fossil fuels marketed and sold by Defendants "causes *global* warming and its attendant climate impacts . . . each of which has harmed Hoboken," *id*. ¶ 309(b) (emphases added).

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

2. Moreover, Plaintiff's claims are nearly identical to those dismissed in *City of New York*. That case concerned not just the "production and sale of fossil fuels," but also their "promotion." 993 F.3d at 88, 91, 97 n.8. New York City alleged there, as Plaintiff does here, that "Defendants have known for decades that their fossil-fuel products pose risks of severe impacts on the global climate through the warnings of their own scientists" yet still "extensively promoted fossil fuels for pervasive use, while *denying* or *downplaying* these threats." *City of New York*, 325 F. Supp. 3d at 468–69 (emphases added). New York City argued that the defendants were liable for "nuisance and trespass" damages because, "for decades, Defendants promoted their fossil fuel products by *concealing* and *downplaying* the harms of climate change [and] profited from the misconceptions they promoted." Br. for Appellant at 27, *City of New York v. BP P.L.C.*, 2018 WL 5905772 (2d Cir. Nov. 8, 2018) (emphases added). Plaintiff here pursues the exact same theory of liability.

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

More fundamentally, Plaintiff's suggestion that its claims are based on misrepresentations misses the point. Whether Plaintiff's claims focus on production or deceptive marketing (or a combination of the two) is irrelevant here, because Plaintiff admits that its alleged *injuries* all stem from interstate and international emissions. Plaintiff alleges that "fossil fuels are the primary driver of climate change," Am. Compl. ¶ 172, and that its injuries are "caused by anthropogenic climate change," *id.* ¶ 240. In other words, just as in *City of New York*, "[i]t is precisely because fossil fuels emit greenhouse gases—which collectively 'exacerbate global warming'—that [Hoboken] is seeking damages." 993 F.3d at 91 (emphasis omitted). The relief Plaintiff seeks—and the global causal mechanism upon which it depends—trigger the exclusive application of federal law. Accordingly, Plaintiff's claims are precluded by federal law.

Some recent federal appellate decisions have addressed the question whether claims alleging climate change-related harms arise under federal common law for purposes of conferring

federal jurisdiction. But, as Plaintiff recently told the U.S. Supreme Court, those cases "decided a different question entirely," namely the propriety of removal. Plaintiff's Opp. to Pet. for Writ of Cert. at 20, No. 22-821 (U.S. Mar. 31, 2023), *available at* https://tinyurl.com/3h9mhn9j. Defendants' merits arguments here are consistent with the Third Circuit's and other courts' decisions regarding the removal issue because this case presents the separate question those cases left open: whether federal law precludes Plaintiff's claims *on the merits*. *See City of New York*, 993 F.3d at 93–94 (explaining that in Rule 12(b)(6) motion to dismiss context, the court is "free to consider the [energy companies'] preemption defense on its own terms, not under the heightened standard unique to the removability inquiry").[5] And the answer to that question is "yes"—federal law bars Plaintiff's claims. *See id.*

In addition, that Plaintiff's claims are premised on international emissions confirms that state law is inapplicable. Only federal law can govern claims based on foreign emissions, and "foreign policy concerns foreclose" any remedy. *City of New York*, 993 F.3d at 101. Plaintiff does not seek to hold Defendants liable only for the "effects of emissions released" in Hoboken, or even the United States. *City of New York*, 993 F.3d at 92. Rather, Plaintiff "intends to hold [Defendants] liable . . . for the effects of emissions made *around the globe* over the past *several hundred years*." *Id.* (emphases added); *see, e.g.*, Am. Compl. ¶ 3 (discussing Defendants' alleged contributions to "*global* emissions" (emphasis added)). "In other words, [Plaintiff] requests damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet." *City of New York*, 993 F.3d at 92. The Complaint makes clear that Plaintiff's claims are

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

based chiefly on conduct occurring far outside of Hoboken and New Jersey, and even beyond the United States. *See, e.g.*, Am. Compl. ¶¶ 18(a), 19(a), 20(a), 20(e), 21(b), 22(a), 180–83.

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

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

* * *

In sum, the structure of the U.S. Constitution precludes the application of state law to Plaintiff's claims for damages based on interstate and international emissions, because those claims "implicat[e] the conflicting rights of [S]tates [and] our relations with foreign nations." *City of New York*, 993 F.3d at 92.

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

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

"[I]n the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). "[T]he longstanding rule [is] that the enactment of a uniform federal scheme displaces state law." *United States v. Locke*, 529 U.S. 89, 103 (2000). Preemption is "presumed when the federal legislation is 'sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation.'" *Ouellette*, 479 U.S. at 491 (citation omitted).

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

For example, Title II of the Act governs greenhouse gas emissions standards for vehicles, aircraft, locomotives, motorcycles, and nonroad engines and equipment. 42 U.S.C. §§ 7521(a)(1)–(2), (3)(E), 7571(a)(2)(A), 7547(a)(1), (5). Based on this authority, EPA has set vehicle-specific greenhouse gas emission standards, choosing the level of emissions reduction (and hence the level of permissible emissions) that appropriately balances environmental and other national needs. 40 C.F.R. §§ 86.1818-12, 86.1819-14.

The statute also governs "whether and how to regulate carbon-dioxide emissions from powerplants" and other stationary sources. *AEP*, 564 U.S. at 426; *see also* 42 U.S.C. §§ 7411(b)(1)(A)–(B), (d). EPA has issued comprehensive regulations to control greenhouse gas

emissions up and down the oil-and-gas supply chain, which include: limiting emissions of methane (the second-most prevalent greenhouse gas) and emissions from crude oil and natural gas production, including the facilities operated by some of the Defendants, *see* 40 C.F.R. § 60, subpart OOOOa; regulating carbon dioxide emissions from fossil fuel-fired power plants; and requiring many major industrial sources—including Defendants' oil refineries and gas-processing facilities, as well as manufacturers that use Defendants' products—to employ control technologies constituting the best available system of emissions reduction to limit greenhouse gas emissions. *See Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 331 (2014) ("*UARG*").

The Act's Renewable Fuel Standard Program regulates the consumption and use of the same fossil fuel products at issue in the Complaint; specifically, the Program requires Defendants and other fuel companies to reduce the quantity of petroleum-based transportation fuel, heating oil, or jet fuel sold by blending in renewable fuels, resulting in lower greenhouse gas emissions on a lifecycle basis. *See* 42 U.S.C. § 7545(o). Thus, through the Clean Air Act and its implementing regulations, the federal government has balanced the benefits and harms relating to activities associated with greenhouse gas emissions through an "informed assessment of competing interests," including the "environmental benefit potentially achievable," and "our Nation's energy needs and the possibility of economic disruption." *AEP*, 564 U.S. at 427.

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

More than thirty years ago, the U.S. Supreme Court concluded that "[t]he [Clean Water] Act pre-empts state law to the extent that the state law is applied to an out-of-state point source." *Ouellette*, 479 U.S. at 500. The Clean Air Act shares all of the features of the Clean Water Act that led the Supreme Court to find preemption of state regulation of interstate pollution. Both laws

authorize "pervasive regulation" that entail a "complex" balancing of economic costs and environmental benefits, *id.* at 492, 494–95; both laws provide States with a circumscribed role that is "subordinate" to EPA's role as the federal environmental regulatory agency, *id.* at 491; and both ensure that "control of interstate . . . pollution is primarily a matter of federal law," *id.* at 492. Given these statutory features, the Supreme Court held in *Ouellette* that "the [Clean Water Act] precludes a court from applying the law of an affected State against an out-of-state source" because doing so would "upset[] the balance of public and private interests so carefully addressed by the Act." *Id.* at 494.

Because the structure of the Clean Air Act parallels that of the Clean Water Act—even containing an analogous savings clause—courts have consistently construed *Ouellette* to mean that the Clean Air Act preempts state laws to the extent they purport to regulate air emissions originating out of state. *See, e.g.*, *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015) ("[C]laims based on the common law of a non-source state . . . are preempted by the Clean Air Act."); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 194–96 & n.6 (3d Cir. 2013) (same); *Cooper*, 615 F.3d at 301, 306 (same). As Plaintiff's claims arise from global climate change, which is the result of cumulative worldwide greenhouse gas emissions over more than a century, the remedies it seeks would regulate the extraction, production, marketing, and sale of fossil fuel products outside of New Jersey's borders. As the Supreme Court explained in *AEP*, regulation via tort law "cannot be reconciled with the decisionmaking scheme Congress enacted." 564 U.S. at 429. "Congress designated an expert agency . . . , EPA, as best suited to serve as primary regulator of greenhouse gas emissions," and "[t]he expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions." *Id.* at 428. As a result, Plaintiff's claims are preempted.

While *AEP* reserved the narrow question whether to allow state-law claims brought under "the law of each State *where the defendants operate powerplants*," 564 U.S. at 429 (emphasis added), that potential exception merely proves the rule—one State's law cannot apply to claims based on emissions from *another* State. Here, Plaintiff intentionally and explicitly targets interstate emissions: the emissions allegedly causing Plaintiff's claimed injuries come from every State in this Nation and every country in the world. *See, e.g.*, Am. Compl. ¶¶ 3, 19(b), 32, 36, 42, 68. But Plaintiff is suing under its state law—which federal law prohibits. *See Ouellette*, 479 U.S. at 495; *City of New York*, 993 F.3d at 92 ("Any actions [defendants would] take to mitigate their liability . . . must undoubtedly take effect across every state (and country).").

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

Plaintiff also cannot evade the dispositive force of *Ouellette* by casting its claims as based solely on Defendants' alleged campaign of deception, rather than on greenhouse gas emissions. Plaintiff attempts to cabin the scope of its claims by emphasizing only its allegations related to certain steps of the causal chain allegedly connecting Defendants' supposed misstatements to Plaintiff's purported injuries (*i.e.*, alleged deception and resulting climate-related harms). But that attempt ignores the other essential steps of the proposed causal chain (*i.e.*, global production,

consumption, and emissions). As its own pleadings show, Plaintiff's theory of injury—alleged harm from cumulative global emissions—requires grappling with these links in the chain. *See, e.g.*, Am. Compl. ¶ 32 ("[g]lobal production and combustion on fossil fuels is the central reason" for the increased concentration of greenhouse gases), ¶ 33 ("greenhouse gas emissions from fossil fuels are the main driver of global warming"), ¶ 44 ("currently accelerating global warming has caused major climate disruptions"). It is beyond dispute that "the *singular source* of [Plaintiff's] harm" is the nationwide greenhouse gas emissions regulated by the Clean Air Act—and the worldwide emissions that state law cannot regulate. *City of New York*, 993 F.3d at 91 (emphasis added). Indeed, "[t]he central goal of the Clean Air Act is to reduce air pollution," *Oxygenated Fuels Ass'n Inc. v. Davis*, 331 F.3d 665, 673 (9th Cir. 2003), and the statute achieves that goal by "regulat[ing] pollution-generating emissions," *UARG*, 573 U.S. at 308.

At least one New Jersey court, citing U.S. Supreme Court precedent, has recognized that conflict preemption analysis turns not just on the pleaded causes of action, but on the impact that the harm alleged and the relief sought would have on the overall federal scheme. In that case, the court determined that the plaintiffs' state law tort claims for interference with collective bargaining agreements were preempted by the National Labor Relations Act. *Loc. Union No. 502 of Hod Carriers' Bldg. & Common Laborers' Union v. Park Arlington Corp.*, 73 N.J. Super. 427 (Ch. Div. 1962). Quoting extensively and favorably from *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the court adopted wholesale the Supreme Court's rule for determining whether the subject matter of a particular litigation is preempted. *See Loc. Union No. 502*, 73 N.J. Super. at 433–34. Relevant here, the court noted that "[r]egardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of

national purposes." *Id.* at 434 (quoting *Garmon*, 359 U.S. at 244) (internal quotation marks omitted).

Moreover, the court recognized that such state regulation can be exerted through the relief requested—such as a demand for damages—because "the obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Id.* (quoting *Garmon*, 359 U.S. at 244) (internal quotation marks omitted)); *see also Riegel*, 552 U.S. at 324; *BMW*, 517 U.S. at 572 n.17. And since "remedies form an ingredient of any integrated scheme of regulation," a remedy that has the effect of "regulat[ing] activities that are potentially subject to the exclusive federal regulatory scheme" "only accentuates the danger of conflict." *Loc. Union No. 502*, 73 N.J. Super. at 434 (quoting *Garmon*, 359 U.S. at 244) (internal quotation marks omitted).

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

D. Plaintiff's Claims Are Non-Justiciable Political Questions.

Plaintiff's claims also fail because they would require the Court to usurp the powers of the state and federal political branches to set state and national energy and climate policy in violation of the political question doctrine. Under New Jersey law, the purpose of the political question doctrine, otherwise known as the separation of powers doctrine, "is to safeguard the 'essential

integrity' of each branch of government," *Gilbert v. Gladden*, 87 N.J. 275, 281 (1981) (quoting *Massett Bldg. Co. v. Bennett*, 4 N.J. 53, 57 (1950)), and it is "designed to prevent a single branch from claiming or receiving inordinate power," *Brown v. Heymann*, 62 N.J. 1, 11 (1972).

The Supreme Court of New Jersey has adopted the political question doctrine as articulated by the U.S. Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962). *See Gilbert*, 87 N.J. at 281. Under that articulation, a political question will "present at least one of the following formulations . . . 'a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.'" *Id.* (quoting *Baker*, 369 U.S. at 217).

Both are true here. As the U.S. Supreme Court has recognized, "[t]he appropriate amount of regulation in any particular greenhouse gas-producing sector" raises "questions of national or international policy" that require an "informed assessment of competing interests." *AEP*, 564 U.S. at 427. And the judiciary lacks the "the scientific, economic, and technological resources" to deal with these issues. As the Supreme Court explained: "Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located." *Id.*at 428.

Kivalina is directly on point and should be followed here. There, as here, the plaintiffs alleged the defendant energy companies were "substantial contributors to global warming" and had "act[ed] in concert to create, contribute to, and maintain global warming and . . . conspire[ed] to mislead the public about the science of global warming." 696 F.3d at 854. Also, like here, "Plaintiffs' global warming claim [was] based on the emissions of greenhouse gases from innumerable sources located throughout the world and affecting the entire planet and its

atmosphere." 663 F. Supp. 2d at 875. And finally, just like here, "Plaintiffs acknowledge[d] that the global warming process involves 'common pollutants that are mixed together in the atmosphere [that] cannot be similarly geographically circumscribed.'" *Id.*

The court found that the plaintiffs' allegations and claims for relief (which mirror Plaintiff's here) presented nonjusticiable political questions because the trier of fact would need to "balance the utility and benefit of the alleged nuisance against the harm caused" to resolve the claims. 663 F. Supp. 2d at 874. "Stated another way," the court explained, "resolution of a nuisance claim is not based on whether the plaintiff finds the invasion unreasonable, but rather 'whether reasonable persons generally, *looking at the whole situation* impartially and objectively, would consider it unreasonable." *Id.* To do this, "the factfinder w[ould] have to weigh, inter alia, the energy-producing alternatives that were available in the past and consider their respective impact on far ranging issues such as their reliability as an energy source, safety considerations[,] and the impact of the different alternatives on consumers and business at every level." *Id.* The factfinder would "then have to weigh the benefits derived from those choices against the risk that increasing greenhouse gases would in turn increase the risk of causing flooding along the coast . . . ." *Id.* at 874–75. The court concluded that with respect to "this aspect of their claim," plaintiffs there "fail[ed]"—as Plaintiff does here—"to articulate any particular judicially discoverable and manageable standards that would guide a factfinder in rendering a decision that is principled, rational, and based upon reasoned distinctions." *Id.* at 875. The court further held the plaintiffs' "nuisance claim requires the judiciary to make a policy decision about *who* should bear the cost of global warming," a decision properly committed to the executive and legislative branches. *Id.* at 876–77. So, too, here.

The Northern District of California reached a similar result in *California v. General Motors*. In that case, California sued General Motors and other automakers for creating or contributing to climate change. 2007 WL 2726871 at *1–2. The court found that the State's claims "left [it] without guidance in determining what is an unreasonable contribution to the sum of carbon dioxide in the Earth's atmosphere, or in determining who should bear the costs associated with the global climate change that admittedly results from multiple sources around the globe." *Id.* at *15. The court also rejected the notion that global climate change cases are just like any other trans-boundary pollution case, explaining that the State sought to impose damages on an "unprecedented scale" that left the court no way to distinguish one emitter from another. *Id*.

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

More recently, the Alaska Supreme Court rejected similar climate change claims under the political question doctrine. *Sagoonick v. State*, 503 P.3d 777 (Alaska 2022). The court explained that "[t]he political question doctrine maintains the separation of powers by 'exclud[ing] from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to' the political branches of government." *Id.* at 795.

Notably, the court found that plaintiffs' nuisance claims require balancing the social utility of defendants' conduct with the harm it inflicts, *id.*, and "[t]hat process, by definition, entails a determination of what would have been an acceptable limit on the level of greenhouse gases emitted by Defendants," *Kivalina*, 663 F. Supp. 2d at 876. *See also Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1099 (Alaska 2014) ("The limited institutional role of the judiciary supports a conclusion that the science- and policy-based inquiry here is better reserved for executive-branch agencies or the legislature, just as in *AEP* the inquiry was better reserved for the EPA.").

Plaintiff's claims here present hurdles to judicial resolution at least as great as those in *Kivalina*, *General Motors*, *Comer*, *Sagoonick*, or *Kanuk*. Plaintiff does not seek to hold Defendants liable for their own direct emissions, but rather for alleged misrepresentations that supposedly led unidentified *third parties* across the globe to increase their use of oil and gas products, thereby resulting in greenhouse gas emissions which, in combination with all other worldwide activities that independently produce or exacerbate greenhouse gas emissions, contributed to a global climate phenomena that allegedly will cause Plaintiff injuries. *See* Am. Compl. ¶¶ 36, 381. Under nuisance and negligence law, Plaintiff would have to prove that Defendants' actions were "unreasonable." But the concept of reasonableness provides no guidance for resolving the far-reaching economic, environmental, foreign-policy, and national-security issues raised by Plaintiff's claims—indeed, "with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance." *AEP*, 564 U.S. at 427; *see also*

Vieth v. Jubelirer, 541 U.S. 267, 291 (2004) ("'Fairness' does not seem to us a judicially manageable standard.").[6]

Plaintiff's claims fail because Plaintiff does not, and cannot, articulate standards that the Court could apply to differentiate between an acceptable and an unreasonable quantity of emissions or emissions-generating activities. Indeed, under Plaintiff's theory, this Court would first need to determine what an "acceptable" level of greenhouse gas emissions is (and whether this level applies to the world, the United States, New Jersey, or Hoboken) and then determine whether Defendants' alleged misrepresentations (as opposed to other factors and activities) caused emissions to exceed that level. Those are quintessential political questions. Simply put, "Plaintiff's global warming nuisance tort claim seek[ing] to impose damages on a much larger and unprecedented scale by grounding the claim in pollution originating both within, and well beyond, the borders of the State" presents nonjusticiable political questions and should be dismissed. *General Motors*, 2007 WL 2726871, at *15.

Confirming the political questions raised by this case, Plaintiff requests "an Order compelling Defendants to abate the nuisance alleged [in the Complaint] and to pay the costs of abatement." Am. Compl. at 160, Prayer for Relief. Although Plaintiff has not provided the specifics of the requested abatement relief, it is presumably asking this Court to estimate potential future damages resulting from global climate change and to oversee and administer a fund to pay for and address those future injuries. The Ninth Circuit rejected a request for a similar remedy in

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[6] *See also, e.g.*, *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 384 (Ill. 2004) ("[A]n analysis of the harm caused by firearms versus their utility is better suited to legislative fact-finding and policymaking than to judicial assessment."); *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 731 (Okla. 2021) ("The district court's expansion of public nuisance law allows courts to manage public policy matters that should be dealt with by the legislative and executive branches; the branches that are more capable than courts to balance the competing interests at play in societal problems. . . . This Court defers the policy-making to the legislative and executive branches and rejects the unprecedented expansion of public nuisance law.").

Juliana v. United States, 947 F.3d 1159, 1169–75 (9th Cir. 2020), finding it beyond the power of the court "to order, design, supervise, or implement the plaintiffs' requested remedial plan . . . [which] would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches." *Id.* at 1171.

The same is true here. Administering "abatement" of this kind would "entail a broad range of policymaking," such as determining what infrastructure projects—from sea walls, to transit, to levees—are supposedly necessary to prevent climate change-related harms and how such projects should be prioritized. *Id*. at 1172. And "given the complexity and long-lasting nature of global climate change, the court would be required to supervise the [fund] for many decades," if not forever. *Id.*

The political questions that Plaintiff's case raise are not theoretical. Indeed, "the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change." *Id.* at 1164. "The government affirmatively promotes fossil fuel use in a host of ways, including beneficial tax provisions, permits for imports and exports, subsidies for domestic and overseas projects, and leases for fuel extractions on federal land." *Id.* at 1167. And the government continues to do so: in 2021, one year after Plaintiff filed its complaint here, the Biden Administration announced that it was "engaging with relevant OPEC+ members" to encourage "*production increases*" of crude oil in hopes of lowering "high[] gasoline costs," because "reliable and stable energy supplies" were (and still are) essential to the "ongoing global recovery" from the pandemic.[7]

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[7] The White House, *Statement by National Security Advisor Jake Sullivan on the Need for Reliable and Stable Global Energy Markets*, Aug. 11, 2021, https://bit.ly/3yXWVFO.

The New Jersey executive and legislative branches have had ample information about climate change for decades—including voluminous information about the climate risks that Plaintiff claims Defendants should have disclosed—and have weighed the benefits and costs of fossil fuel use in enacting policies they believe best serve New Jersey. Indeed, New Jersey policymakers have acknowledged and acted upon the link between fossil fuels and climate change since at least 1989. *See*, *infra*, Section III.E.

As the United States recently explained in defending a climate lawsuit, "the courts have no business deciding" a "dispute over American energy and environmental policy," which instead lies "within the province of the political branches." Defendants' Motion To Dismiss Second Am. Compl. and Motion To Certify at 13, 18, *Juliana v. United States*, No. 6:15-cv-01517 (D. Or. June 22, 2023), Dkt. 547. The United States, under the Biden Administration, also emphasized that there is "no fundamental right to a 'stable climate system'" and recognized such a right is "without basis in the Nation's history or tradition." *Id.* at 1, 20.

Plaintiff's lawsuit raises political questions that have been considered by the executive and legislative branches for decades, resolution of which lies with them, not the courts.

E. Plaintiff's Claims Based On A Purported "Campaign of Climate Obfuscation" Are Barred By The Statute of Limitations.

New Jersey law establishes a ten-year limitations period for "any civil action commenced by the State," including "its political subdivisions." N.J. Stat. § 2A:14-1.2; *see also Headen v. Jersey City Bd. of Educ.*, 420 N.J. Super. 105, 115 (App. Div. 2011) ("We generally associate the term 'political subdivision' with a county, city, town, or municipality."), *aff'd as modified*, 22 N.J.

437 (2012).[8] As such, Plaintiff must, at a minimum, allege a misstatement within the ten years preceding the filing of its Complaint on September 9, 2020—*i.e.*, an act that occurred after September 9, 2010.

The Amended Complaint asserts two distinct courses of conduct or "schemes": (1) a "campaign of disinformation" that started in the *late 1980s*, *see* Am. Compl. ¶¶ 115–79; and (2) a "greenwashing" campaign consisting of Defendants' purported efforts to "feign concern about climate change and promote nonexistent commitments to sustainable energy," Am. Compl. ¶¶ 7, 190–210. And the Amended Complaint makes clear that these are *distinct* theories of liability based on *distinct* acts of alleged deception. The Amended Complaint alleges: "Instead of publicly denying climate science, Defendants *have now embarked* on 'greenwashing' efforts to dupe consumers into believing they are committed to addressing climate change."[9] *Id.* ¶ 189 (emphasis added). Indeed, the Amended Complaint characterizes Defendants' alleged "greenwashing" as a "tactical shift." *Id.*

The latest purportedly deceptive statement that Plaintiff alleges Defendants made as part of their purported "campaign of climate obfuscation" occurred in 2006. *See* Am. Compl. ¶ 174. Thus, because Plaintiff itself alleges that the purported "campaign" ended before 2010, Plaintiff's claims

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[8] The RICO statute does not explicitly provide a statute of limitations period, but courts have adopted a four-year statute of limitations for such claims. *In re Liquidation of Integrity Ins. Co.,* 245 N.J. Super. 133, 135 (Law Div.1990) (analogizing civil RICO claims to civil claims brought under New Jersey's Antitrust Act, N.J. Stat. 56:9–14). At least one court has applied the four-year limitations period to a civil RICO claim brought by a local government, rather than the ten-year period. *See Cnty. of Hudson v. Janiszewski*, 520 F. Supp. 2d 631, 640 (D.N.J. 2007). But even if the ten-year limitations period applies to Plaintiff's RICO claim, the claim is still untimely, for the reasons discussed in this section.

[9] To "embark on" denotes a new and different set of action—the phrase means "to begin (a journey)," Merriam-Webster, https://www.merriam-webster.com/dictionary/embark%20on (last visited July 5, 2023), and "to start something new and important," Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/embark-on-upon (last visited July 1, 2023).

based thereon are barred by the statute of limitations and must be dismissed. *See Pereira v. Azevedo*, 2015 WL 1257926, at *3 (N.J. Super. Ct. App. Div. 2015) (dismissing claims because "Plaintiff took no legal action until" after the statute of limitations expired).[10]

Any attempt by Plaintiff to invoke the so-called "discovery rule" to save its claims fails because Plaintiff has not pleaded, and cannot plead, facts showing that it lacked knowledge of the basis of its claims before September 2010. Under the discovery rule, "the statute of limitations begins to run when the plaintiff is aware, or reasonably should be aware, of facts indicating that she has been injured through the fault of another." *Baird v. Am. Med. Optics*, 155 N.J. 1019, 1026 (1998). Plaintiff's own allegations make clear that it had knowledge of these claims, or at a minimum, was on notice of facts upon which it now belatedly bases its claims.

As an initial matter, the Amended Complaint alleges that the supposed misrepresentations were part of "Defendants' deceptive *public* communications and campaigns," so these statements were not secret or hidden. Am. Compl. ¶ 173 (emphasis added); *see also id.* ¶ 113 (Defendants "embark[ed] on a massive marketing campaign to . . . manipulate public opinion"); ¶ 126 (Defendants "waged campaigns to turn public opinion"); ¶ 376(e) ("campaign . . . targeted" "New Jersey customers directly"). And Plaintiff's own allegations make clear that—well before 2010—the general public was aware of the effects fossil fuel use might have on the climate. *See, e.g.*, *id.* ¶ 82 (describing a "Columbia University symposium" in 1959, attended by "[o]ver 300 government officials, economists, historians, scientists, and [fossil fuel] industry executives" where the potential dangers of climate change, and its link with fossil fuels, was discussed); *id.* ¶ 145 (noting that

[10] New Jersey courts regularly grant partial dismissals of claims on statute of limitations grounds. *See, e.g.*, *Halpern v. Twp. of Irvington*, 2016 WL 6543638, at *3 (N.J. Super. Ct. App. Div. Nov. 4, 2016); *Munoz v. Perla*, 2011 WL 6341182, at *4 (N.J. Super. Ct. App. Div. Dec. 20, 2011).

polling in 1991 found that "80% of respondents thought the [global warming] problem was 'somewhat serious' and 45% thought it was 'very serious'").

A cursory review of the allegations in the Amended Complaint confirms that Plaintiff has long had notice of the bases of its claims. The Amended Complaint alleges that "[b]y the late *1980s and early 1990s*, the public awareness of fossil fuels' potentially devastating climate consequences was on the rise. During this time, reputable scientific sources confirmed to the public that fossil fuel combustion was warming the planet." Am. Compl. ¶ 115 (emphasis added). At a bare minimum, Plaintiff's allegations confirm that it was on notice of its potential claims in the "2000s, [when] the scientific consensus that fossil fuels are the primary driver of climate change coalesced *even more firmly*." *Id.* ¶ 172 (emphasis added). In particular, the Intergovernmental Panel on Climate Change's ("IPCC") Fourth Assessment, published in 2007, concluded that "there is very high confidence [at least a 90% chance] that the net effect of human activities since 1750 has been one of warming." *Id.*[11] These allegations are more than sufficient to trigger the statute of limitations. *See Cohen v. Telsey*, 2009 WL 3747059, at *12 (D.N.J. Nov. 2, 2009) ("When the gist of the action is fraud concealed from the plaintiff, the statute [of limitations] begins to run on discovery of the wrong or facts that reasonably should lead the plaintiff to inquire into the fraud." (citation omitted)).

And, indeed, there has been abundant information in the public record for many decades—let alone by 2010—that confirms that Plaintiff was on notice that fossil fuels may contribute to

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[11] The IPCC is an intergovernmental body, under the auspices of the United Nations, created to provide the international community with scientific information as to climate change. The IPCC publishes regular "assessment reports," which summarize the current state of scientific knowledge regarding climate change. The IPCC's Fourth Assessment Report represented the global community's level of scientific knowledge as to climate change as of 2007, when it was published. *See* Am. Compl. ¶¶ 27, 118, 172; *see also* The Intergovernmental Panel on Climate Change, *About the IPCC* (2023), https://www.ipcc.ch/about/.

climate change.[12] In 1989, for example, New Jersey Governor Thomas Kean issued an Executive Order describing "emissions of carbon dioxide" as "a necessary byproduct of the combustion of fossil fuels and a major contributor to global climate change." State of New Jersey, "Executive Order #219," Oct. 23, 1989, https://nj.gov/infobank/circular/eok219.htm. The Executive Order concluded that a "scientific consensus exists that emissions of certain gases . . . are causing significant changes in the composition of the Earth's atmosphere" and "that these emissions are likely to cause significant changes in the Earth's climate, including overall warming, increased drought, an increase in the intensity of hurricanes and other major storms, as well as increased incidence of harmful ultraviolet radiation." *Id.*

In 1998—*more than two decades before this lawsuit was filed*—the New Jersey Department of Environmental Protection published a report stating: "Global warming of the atmosphere and ocean resulting from increasing concentrations of carbon dioxide and greenhouse gases (greenhouse gas warming) will control the rise of global sea level." Peter Sugarman, "Sea Level Rise in New Jersey," New Jersey Department of Environmental Protection, October 1998, available at: https://www.nj.gov/dep/njgs/enviroed/infocirc/sealevel.pdf (last visited June 27, 2023). The report also found that "the prevailing scientific view is that continued and increased emissions of greenhouse gases will disrupt the Earth's climate in the foreseeable future." *Id.* In fact, the report

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[12] "In evaluating motions to dismiss, courts consider allegations in the complaint, exhibits attached to the complaint, *matters of public record*, and documents that form the basis of a claim." *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 182–84 (2005) (emphasis added). The Court may take judicial notice, for example, of "determinations of all governmental subdivisions and agencies thereof," *see Matter of Adoption of N.J.A.C. 7:9B*, 2022 WL 2822746, at *31 (N.J. Super. Ct. App. Div. July 20, 2022) (quoting N.J.R.E. 201(a)); executive orders, *see, e.g.*, *Green v. State Health Benefits Comm'n*, 373 N.J. Super. 408, 418 n.4 (App. Div. 2004); and federal court records, *see* N.J.R.E. 201(b)(3); *see also Easley v. N.J. Dep't of Corrs.*, 2019 WL 3213954, at *19 (N.J. Super. Ct. App. Div. July 17, 2019); *State v. Silva*, 394 N.J. Super. 270, 272–78 (App. Div. 2007).

maintained that "[a]s sea level rises, coastal storms" would "penetrate farther inland" and lead to "increased flooding." *Id*. And critically, in 2004, the State of New Jersey filed a complaint seeking to enjoin emissions from power companies, alleging that "[t]here is a clear scientific consensus that global warming has begun and that most of the current global warming is caused by emissions of greenhouse gases, primarily carbon dioxide from fossil fuel combustion." *Connecticut v. Am. Elec. Power Co.*, No. 1:04-cv-05669-LAP (S.D.N.Y. July 21, 2004), Dkt. 1, Compl. ¶ 79. New Jersey's lawsuit and the allegations therein are dispositive on this issue.

Plaintiff has also been aware of its alleged injuries for decades. *See* Am. Compl. ¶¶ 48, 62–64, 71; *see Dunn v. Borough of Mountainside*, 301 N.J. Super. 262, 274 (App. Div. 1997) ("[I]t is the discovery of the injury that is important, not the discovery of the injurer."). By its own admission, Plaintiff was aware of its claimed injuries—those allegedly caused by sea level rise, Am. Compl. ¶ 251; rising temperatures, *id.* ¶¶ 260–63; and increased precipitation, *id.* ¶¶ 266–67, 269–71—long before 2010.

Nor can Plaintiff claim it was not aware of Defendants' alleged deception until recently—the same accusations that Plaintiff makes here regarding a purported "campaign of deception" by energy companies have been widely publicized by other parties for decades. *Cf.* Am. Compl. ¶¶ 234–39. As early as 1997, *The Washington Post* ran a story on the front page of its opinion section charging that, "[e]ven as global warming intensifies, the evidence is being denied with a ferocious disinformation campaign. Largely funded by oil and coal interests, it is being carried out on many fronts." Ross Gelbspan, *Hot Air, Cold Truth*, Wash. Post (May 25, 1997), https://tinyurl.com/mwwxdbuv. A year later, the Sunday edition of *The New York Times* reported on its front page that oil-and-gas "[i]ndustry opponents of a treaty to fight global warming have drafted an ambitious proposal to spend millions of dollars to convince the public that the

environmental accord is based on shaky science." John H. Cushman, Jr., *Industrial Group Plans to Battle Climate Treaty*, N.Y. Times (Apr. 26, 1998), https://tinyurl.com/fakcbkph.[13]

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

Plaintiff alleges no actionable conduct related to the purported campaign of climate obfuscation within the ten years before it filed suit, and as demonstrated by the sources cited in the Amended Complaint, Plaintiff had actual or constructive knowledge of its potential claims and injuries well before that time. Thus, its claims based on purported climate deception are barred by the statute of limitations and must be dismissed. *See Grewal v. Purdue Pharma L.P.*, 2018 WL 4829660, at *18 (N.J. Super. Ct. Ch. Oct. 2, 2018) (finding "that all alleged acts or omissions that occurred prior to [the limitations period] are time-barred").

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[13] Defendants deny the accuracy of these materials and do not offer them for the truth of their contents, but only to show that Plaintiff knew or should have known of its claims. Accordingly, the Court may take judicial notice of these articles. *See supra* n.12.

F. Plaintiff's Amended Complaint Fails To State A Claim Under New Jersey Law.

As just shown, Plaintiff's claims are preempted, nonjusticiable, and untimely. But even if they were not, the Amended Complaint would nevertheless be subject to dismissal for failure to state a claim under New Jersey law.

1. The Product Liability Act Subsumes Plaintiff's Putative Common-Law Claims.

Plaintiff's three putative common-law claims—nuisance, trespass, and negligence—face a dispositive preliminary hurdle: none of those causes of action, as pled, exist under New Jersey state law. Plaintiff seeks to recover for harms allegedly caused by fossil fuel products. The New Jersey Product Liability Act subsumes all claims based on product liability theories, even when disguised behind the labels of nuisance, trespass, or negligence. Because the PLA provides the exclusive remedy for claims alleging harms caused by a product, Plaintiff's "complaint[] cannot be understood to state" such putative common-law claims, and those claims should be dismissed. *Lead Paint*, 191 N.J. at 435–37.

New Jersey's PLA is "both expansive and inclusive, encompassing virtually all possible causes of action relating to harms caused by consumer and other products." *Id.* at 436–37. It broadly defines a "product liability action" as "any claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim, except actions for harm caused by breach of an express warranty." N.J. Stat. § 2A:58C-1(b)(3). "Harm" is defined as "(a) physical damage to property, other than to the product itself; (b) personal physical illness, injury or death; (c) pain and suffering, mental anguish or emotional harm; and (d) any loss of consortium or services or other loss deriving from any type of harm described in subparagraphs (a) through (c) of this paragraph." N.J. Stat. § 2A:58C-1(b)(2).

Plaintiff's putative common-law claims fall within these definitions. Though couched in the language of nuisance, trespass, and negligence, the "essential nature" of Plaintiff's claims "sound in products liability causes of action." *Lead Paint*, 191 N.J. at 437. The New Jersey Supreme Court already reached this result in an analogous inquiry: in *Lead Paint*, that Court held that municipalities' and counties' public-nuisance claims were subsumed under the PLA, as the "central focus" of those claims was that "defendants were aware of dangers associated with lead—and by extension, with the dangers of including it in paint intended to be used in homes and businesses—and failed to warn of those dangers." *Id*. Similarly here, Plaintiff alleges that Defendants "have known . . . that the fossil fuels they market and sell . . . are causing accelerating climate change," Am. Compl. ¶ 2, but "concealed the harms of fossil fuels from the public," *id*. ¶ 5. This failure-to-warn theory "is squarely within the theories included in the PLA." *Lead Paint*, 191 N.J. at 437. And Plaintiff's alleged harms—*see*, *e.g.*, Am. Compl. ¶ 240 (describing property damage, personal physical illness, and derivative losses)—fall within the categories enumerated by statute. *See Lead Paint*, 191 N.J. at 437. Thus, the PLA bars Plaintiff's common-law claims, and they should be dismissed.

Even if the PLA did not preclude Plaintiff's nuisance, trespass, and negligence claims, those claims also fail, as explained below. *See*, *infra*, Sections III.F.2, 3, 4.

2. Plaintiff's Nuisance Claims Fail Because Plaintiff Alleges Harm Caused By Lawful Products, Defendants Did Not Control The Instrumentality Of The Nuisance, And Plaintiff Improperly Seeks Damages.

For years, plaintiffs have attempted to deploy nuisance law to hold companies liable for the sale of lawful products, from industrial chemicals to pharmaceuticals, that allegedly have caused harm when subsequently used by third parties. New Jersey courts have *consistently and repeatedly* rejected those efforts—as have many courts across the country when presented with similar claims. This Court should follow this well-settled precedent and dismiss Plaintiff's nuisance claims because

New Jersey law rejects nuisance claims based on promotion, distribution, and sale of a lawful consumer product rather than the use of land. Moreover, this Court should dismiss Plaintiff's public nuisance claim for the additional reasons that (1) Defendants lacked the requisite control over the instrumentality causing the alleged nuisance; and (2) Plaintiff, a public entity, improperly attempts to recover damages as a private plaintiff.

First, at virtually every turn, Plaintiff's nuisance claims clash with basic principles of nuisance doctrine articulated in 2007 by the New Jersey Supreme Court in *Lead Paint*, where the Court declined to allow a public nuisance claim based on the sale and promotion of lead pigment, notwithstanding the harmful effects of lead poisoning. As the Supreme Court warned, recognizing such an expansive claim would depart from "the well-recognized parameters" of public nuisance, "stretch[ing] the concept of public nuisance far beyond recognition and . . . creat[ing] a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance." *Lead Paint*, 191 N.J. at 409, 421. The same is true here. Plaintiff alleges that Defendants created a nuisance by "marketing, distributing, and profiting from the sale of fossil fuels" and thereby "caus[ing] adverse effects on a common right." Am. Compl. ¶ 309. But the highest courts in numerous States—including the New Jersey Supreme Court in *Lead Paint* —have rejected similar attempts by government entities to expand common-law public nuisance claims to cover the sale, distribution, or promotion of lawful consumer products, including lead paint, asbestos, prescription opioids, firearms, and tobacco.

In *Lead Paint*, the New Jersey Supreme Court emphasized that the sale of consumer products in the ordinary course of commerce is not an appropriate basis for a public nuisance suit because it would convert "the conduct of merely offering an everyday household product for sale" into a strict liability theory "far exceed[ing] any cognizable cause of action" under public nuisance.

Lead Paint, 191 N.J. at 432–36. Indeed, "[w]hatever the precise scope of public nuisance law in New Jersey may be, no New Jersey court has ever allowed a public nuisance claim to proceed against manufacturers for lawful products that are lawfully placed in the stream of commerce." *Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001) (per curiam). Accordingly, the Supreme Court rejected the plaintiffs' attempts to bring a nuisance claim based on the sale and promotion of lead paint.

The New Jersey Supreme Court also rejected efforts to expand nuisance law to cover the sale and promotion of lawful consumer products because "essential to the concept of a public nuisance tort . . . is the fact that it has historically been linked to the use of land by the one creating the nuisance." *Lead Paint*, 191 N.J. at 423; *see also Rowe v. E.I. DuPont De Nemours & Co.*, 262 F.R.D. 451, 459 (D.N.J. 2009) ("To succeed on a private nuisance claim, Plaintiffs must show that 'there has been . . . use by a person of his real property which is resulting in a material annoyance, inconvenience, or hurt.'") (quoting *State, Dep't of Env't Prot. v. Exxon Corp.*, 151 N.J. Super. 464, 482–83 (Ch. Div. 1977))). That holding accords with multiple courts in other jurisdictions, which have found that "the idea of a wrongful use of property is central to the legal concept of a private nuisance." *Cofield v. Lead Indus. Ass'n, Inc.*, 2000 WL 34292681, at *6 (D. Md. Aug. 17, 2000) (citing *Detroit Bd. of Educ. v. Celotex Corp.*, 196 Mich. App. 694, 710 (1992)); *see also State v. Beardsley,* 108 Iowa 396, (Iowa 1899) ("[A] nuisance is the unlawful use of one's own property, working an injury to a right of another or of the public, and producing such inconvenience, discomfort, or hurt that the law will presume a consequent damage."); *Prosser and Keeton on Torts*, § 86 (5th ed. 1984) at 618 ("If 'nuisance' is to have any meaning at all, it is necessary to dismiss a considerable number of cases which have applied the term to matters not connected either with land or with any public right, as mere aberration.").

Many federal and state courts outside of New Jersey agree that nuisance law addresses the use or condition of property, not the production and sale of products. As the Oklahoma Supreme Court explained in overturning a public nuisance judgment arising from a manufacturer's deceptive sale and promotion of opioids, public nuisance "has historically been linked to the use of land by the one creating the nuisance." *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d at 724. In reaching its conclusion, the court recognized the "clear national trend to limit public nuisance to land or property use." *Id*. at 730.

The Rhode Island Supreme Court agrees, explaining that "[t]he law of public nuisance never before has been applied to products, however harmful." *State v. Lead Indus. Ass'n*, 951 A.2d 428, 456 (R.I. 2008). And, in affirming dismissal of public nuisance claims related to the production and sale of asbestos products, the Eighth Circuit Court of Appeals explained that "cases applying the state's nuisance statute all appear to arise in the classic context of a landowner or other person in control of the property conducting an activity on his land in such a manner as to interfere with the property rights of a neighbor." *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum*, 984 F.2d 915, 920 (8th Cir. 1993).

Moreover, allowing plaintiffs to pursue nuisance claims based on the production, promotion, and sale of lawful products would vitiate the carefully crafted rules governing products-liability law. Courts have long recognized that the boundaries between nuisance and products liability must be respected; otherwise, nuisance law would turn into "a monster that would devour in one gulp the entire law of tort." *Lead Paint*, 191 N.J. at 440 (quoting *Camden Cnty.*, 273 F.3d at 540, in turn quoting *Tioga Pub. Sch. Dist.*, 984 F.2d at 921). In particular, "[p]ublic nuisance focuses on the abatement of annoying or bothersome activities," whereas products liability is "designed specifically to hold manufacturers liable for harmful products." *Lead Indus. Ass'n*, 951

A.2d at 456. For this reason, courts "refus[e] to apply" nuisance law "in the context of injuries caused by defective product design and distribution." *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 909 (E.D. Pa. 2000); *see also Camden Cnty.*, 273 F.3d at 540 ("[C]ourts have enforced the boundary between the well-developed body of product liability law and public nuisance law."); *Atl. Richfield Co. v. Cnty. of Lehigh*, 2023 WL 3266792, at *8 (Pa. Commw. Ct. May 5, 2023) ("The manufacture and distribution of products rarely, if ever, causes a violation of a public right as that term has been understood in the law of public nuisance." (cleaned up)). Otherwise, plaintiffs would be able to circumvent important "requirements that surround a products liability action." *Lead Indus. Ass'n*, 951 A.2d at 456.

As the Oklahoma Supreme Court has recognized, "public nuisance is fundamentally ill-suited to resolve claims against product manufacturers," *Hunter*, 499 P.3d at 726, and "extending public nuisance law to the manufacturing, marketing, and selling of products . . . would allow consumers to convert almost every products liability action into a [public] nuisance claim" *id*. at 729–30. Indeed, applying nuisance law "to lawful products as the State requests would create unlimited and unprincipled liability for product manufacturers," which is why the "court has never applied public nuisance law to the manufacturing, marketing, and selling of lawful products." *Id.* at 725.

Accordingly, Plaintiff's public and private nuisance claims should be dismissed because the Amended Complaint does not contend that the alleged nuisance arose from the use of Defendants' land.

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

New Jersey law. In *Lead Paint*, the New Jersey Supreme Court held that "a public nuisance, by definition, is related to conduct, performed in a location within the actor's control, which has an adverse effect on a common right." 191 N.J. at 429.

Defendants here exercise even less control over the instrumentality of the alleged nuisance—global greenhouse gas emissions—at the time of the nuisance than paint manufacturers exercised over the instrumentality in that case—lead paint. Whereas the *Lead Paint* defendants sold lead paint directly to third parties, whose use of it then directly caused the alleged harms, Defendants here did not sell or distribute greenhouse gas emissions, let alone extreme weather events. Rather, they sold fossil fuel products that, when independently combusted by third-party individuals, corporations, and governments through, for example, automobiles, airplanes, electric power generating facilities, homes, and hospitals, produced the emissions that—in combination with other anthropogenic and natural sources of emissions around the world over the course of many decades—allegedly interfered with public rights. *See* Am. Compl. ¶¶ 30–41 (explaining that CO_2 *emissions* are the primary driver of climate change). In fact, Plaintiff does not—and cannot—allege that Defendants exercised control over those emissions at any time, much less when they accumulated at levels sufficient to create an alleged public nuisance.

As courts across the country have long recognized, it "would run contrary to notions of fair play" to hold sellers like Defendants[14] liable for a public nuisance when "they lack direct control over how end-purchasers use" their products. *City of Philadelphia*, 126 F. Supp. 2d at 911. Thus, the vast majority of courts have joined New Jersey in "refrain[ing] from applying public nuisance doctrine in cases where the instrument of the nuisance is a lawfully sold product which has left the

[14] Again, API does not sell, transport, or refine fossil fuels at all, making Plaintiff's nuisance claim against it even more attenuated.

manufacturer's control." *Id.*; *see also, e.g.*, *Hunter*, 499 P.3d at 727–28 ("Another factor in rejecting the imposition of liability for public nuisance . . . is that J&J, as a manufacturer, did not control the instrumentality alleged to constitute the nuisance at the time it occurred."); *Lead Indus. Ass'n*, 951 A.2d at 449 ("[A] defendant must have *control* over the instrumentality causing the alleged nuisance *at the time the damage occurs*."); *Detroit Bd. of Educ.*, 196 Mich. App. at 712–13 ("If the defendants exercised no control over the instrumentality, then a remedy directed against them is of little use."); *Tioga Pub. Sch. Dist.*, 984 F.2d at 920 ("[L]iability for damage caused by a nuisance turns on whether the defendant is in control of the instrumentality alleged to constitute a nuisance, since without control a defendant cannot abate the nuisance."). Imposing nuisance liability on the Defendants here for the far-reaching atmospheric processes allegedly precipitated by end consumers' combustion of fossil fuels would eviscerate the control requirement.

Third, Plaintiff improperly attempts to recover damages as a private plaintiff, despite allegedly suffering injuries characteristic of a public entity. As the New Jersey Supreme Court has explained, in public nuisance, "the remedies available traditionally vary between public and private plaintiffs." *Lead Paint*, 191 N.J. at 434. While a public entity seeks to vindicate a "common right" and thus pursues "civil actions to abate the nuisance at the property owner's expense," a private plaintiff "seeks recompense for damages to the extent of the special injury sustained." *Id.* Accordingly, the Supreme Court has made clear that "there is no right either historically, or through the Restatement (Second)'s formulation, for [a] public entity to seek to collect money damages in general," which are "not a remedy available to a public entity plaintiff to the extent that it acts in the place of the 'sovereign.'" *Id.* at 434–35. And subsequent cases have also rejected attempts by public entities to seek damages in public nuisance cases. *See, e.g.*, *N.J. Dep't of Env't Prot. v. E.I. du Pont de Nemours and Co.*, 2021 WL 6049522, at *7 (D.N.J. Dec. 21, 2021) (limiting public

entity plaintiffs' "public nuisance claims . . . to abatement and the costs of such abatement" in motion to dismiss context); *N.J. Dep't of Env't Prot. v. Hess Corp*., 2020 WL 1683180, at *6–7 (N.J. Super. Ct. App. Div. Apr. 7, 2020) (affirming dismissal of public entity's public nuisance claim for damages).

Although Plaintiff purports to act on behalf of its residents in seeking to abate sources of greenhouse gas emissions to address "sea level rise, extreme heat, and increasingly destructive storms," Am. Compl. ¶ 2, it also purports to sue "in its capacity as a private plaintiff" and, accordingly, "seeks an award of damages for the special injury [it has] already suffered." *Id*. ¶ 324. But to allow Plaintiff, indisputably a public entity, to seek such damages by asserting that it is "suing in its capacity as a private plaintiff" would—through mere sleight of hand—nullify the general prohibition that public entities may not seek damages in public nuisance claims. As explained, Plaintiff's lawsuit duplicates the State's lawsuit in its sovereign capacity and, thus, is displaced. *See supra* Section III.A. But, even if Plaintiff could maintain its nuisance claims, damages "is not a remedy available to a public entity plaintiff." *Lead Paint*, 191 N.J. at 434.[15]

At bottom, the New Jersey Supreme Court, and many other courts, have rejected public nuisance claims that attempt to hold a party liable for the sale of lawful products that purportedly created a nuisance after leaving the seller's control. This Court likewise should reject Plaintiff's "clever, but transparent attempt" to bring an improper claim in the guise of nuisance law. *City of Philadelphia*, 126 F. Supp. 2d at 911.

[15] Moreover, Plaintiff's request for damages "caused by Superstorm Sandy and similar events" merely articulates a category of harms "general to the public at large," *Lead Paint*, 191 N.J. at 436. None of the asserted categories of "damages" are tied to the requisite "special injury" for that form of relief in the private-plaintiff context. *Id.*

3. Plaintiff's Trespass Claim Fails Because New Jersey Does Not Recognize Such A Claim For Environmental Injury And Plaintiff Has Not Adequately Pleaded the Elements Of A Common Law Claim.

Hoboken's trespass claim also must be dismissed. New Jersey law no longer favors common law trespass claims for environmental injury and, in any event, Plaintiff cannot satisfy the elements of a common law trespass claim.

Most fundamentally, New Jersey has moved away from common law claims, like trespass and nuisance, in cases involving claims for environmental injury. *See Player v. Motiva Enters. LLC*, 2006 WL 166452, at *12 (D.N.J. Jan. 20, 2006), *aff'd*, 240 F. App'x 513 (3d Cir. 2007) (citing *Mayor & Council of Borough of Rockaway v. Klockner & Klockner*, 811 F. Supp. 1039, 1053 (D.N.J. 1993)). Instead, New Jersey courts have recognized a shift towards a legislatively imposed statutory liability regime. *See State, Dep't of Env't Prot. v. Ventron Corp.*, 94 N.J. 473, 492–95 (1983). For example, in *Kenney v. Scientific, Inc*, the court granted summary judgment to the defendant waste generators on plaintiffs' trespass claim because New Jersey's statutory framework for environmental torts was a more appropriate basis to resolve defendants' liability than "endeavor[ing] to torture old remedies to fit factual patterns not contemplated when those remedies were fashioned." 204 N.J. Super. 228, 256 (Law Div. 1985). As another court put it, "modern courts do not favor trespass claims for environmental pollution." *In re Paulsboro Derailment Cases*, 2013 WL 5530046, at *8 (D.N.J. Oct. 4, 2013) (internal citation and quotation marks omitted). And, as yet another court held, "use of trespass liability for [environmental pollution] has 'been held to be an inappropriate theory of liability' and an 'endeavor to torture old remedies to fit factual patterns not contemplated when those remedies were fashioned.'" *Woodcliff, Inc. v. Jersey Constr., Inc.*, 900 F. Supp. 2d 398, 402 (D.N.J. 2012).

Even if the common-law trespass framework were applicable here, however, Plaintiff's claim would fail. New Jersey courts generally apply the Second Restatement's standard of liability

for trespass claims. *Ross v. Lowitz*, 222 N.J. 494, 510 (2015). Under this standard, trespass is (1) the intentional entry onto another's land, regardless of harm, or (2) the entry onto another's land through recklessness, through negligence, or as a result of abnormally dangerous activity if the entry causes harm. *Id.* (citing Restatement (Second) of Torts §§ 158, 165). Plaintiff fails to adequately allege these elements, as New Jersey case law makes clear.

First, Plaintiff does not have an actionable trespass claim because Plaintiff never held exclusive possession of the subject property. Under New Jersey law, a trespass requires that the invasion be to land in the *exclusive possession* of the plaintiff. *Ventron*, 94 N.J. at 488–89; *see Hess*, 2020 WL 1683180, at *6. Plaintiff does not allege exclusive possession of the land on which Defendants allegedly trespassed. And it cannot: "[l]and in the public trust is held by the State on behalf of a second party, the people. Such land cannot be in 'exclusive possession' of the State as the interest created by the doctrine is intended to ensure that others have use of the same land. It does not grant to the State the exclusive possession of property." *Hess*, 2020 WL 1683180, at *6. Because Plaintiff does not have exclusive possession of the property on which Defendants allegedly trespassed, the trespass claim must be dismissed. *Id.*; *see N.J. Dep't of Env't Prot.*, 2021 WL 6049522, at *3 ("New Jersey law clearly requires exclusive possession as an element of trespass." (citation omitted)).

Second, Plaintiff does not allege that Defendants, *or even their products*, intruded on City-owned property. Instead, Plaintiff alleges "the encroachment of water onto City-owned property precipitated by or exacerbated by sea level rise or extreme precipitation events due to anthropogenic climate change." Am. Compl. ¶ 345.

But no precedent supports the novel assertion that a party can be held liable in trespass because use of its product by third parties around the world over nearly a century may result in

weather changes that affect another's property. In fact, the Restatement suggests the opposite, providing that an actor causes an object to trespass upon another's property when, "without himself entering the land, [he] may invade another's interest in its exclusive possession *by throwing, propelling, or placing a thing* either on or beneath the surface of the land or in the air space above it." Restatement (Second) of Torts § 158 cmt. i (emphasis added). Here, however, the alleged trespass was the *indirect* result of the purchase and use of oil and gas by billions of actors around the world over decades—not the "throwing, propelling, or placing" of anything by Defendants. *Id.* Nothing in the Restatement or in New Jersey law provides a basis for Plaintiff's expansive conception of trespass.

Even if Plaintiff could reframe its trespass claim to involve Defendants' products or emissions by third parties' use of Defendants' products, the claim would still fail because Defendants did not have control over the products or emissions at the time of the alleged trespass. As the Alaska Supreme Court has noted, "[t]he general consensus thus suggests that ownership or control of the intruding instrumentality is dispositive of an actor's trespass liability." *Parks Hiway Enters., LLC v. CEM Leasing, Inc.*, 995 P.2d 657, 664 (Alaska 2000). Indeed, the Court emphasized that "[s]everal cases have held that courts do not impose trespass liability on sellers for injuries caused by their product after it has left the ownership and possession of the sellers." *Id.* (collecting cases); *see also, e.g.*, *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 615 (7th Cir. 1989) (same). Here, Plaintiff alleges that greenhouse gas emissions entered the atmosphere only after Defendants' products were combusted by billions of third parties around the world. *See, e.g.*, Am. Compl. ¶ 32 ("Global production and combustion of fossil fuels is the central reason why the atmospheric concentration of greenhouse gases . . . has dramatically increased."). But it is undisputed that, at the time Defendants' fossil fuel products were combusted and, thus, released

greenhouse gases into the atmosphere, Defendants had no control over those products (or the resulting emissions).

In short, New Jersey does not recognize a trespass claim where, as here, Plaintiff seeks damages for environmental pollution. That is especially so where, as here, Plaintiff cannot even plead the elements of a traditional trespass claim. The Court should therefore dismiss Plaintiff's claim for trespass.

4. Plaintiff's Negligence Claim Fails Because Defendants Did Not Have A Duty To Warn Of Widely Publicized Risks Relating To Climate Change And Plaintiff Did Not Rely On Any Alleged Misstatements.

Plaintiff's negligent misrepresentation and/or failure-to-warn claim fails because (1) the alleged dangers of using oil and gas were well known to Plaintiff and the public; and (2) Plaintiff does not allege that it justifiably relied on Defendants' purported misrepresentations.[16]

First, it is hornbook law—and simple logic—that Defendants had no duty to warn customers, let alone the public, of purported dangers of their products already well known to the public. The "obviousness" of a product's danger "is an absolute defense to [a] failure to warn action," such that there is no "need to warn users of . . . obvious and generally known risks inherent to products . . . as a matter of law." *Mathews v. Univ. Loft Co.*, 387 N.J. Super. 349, 361–63 (App. Div. 2006), *certif. denied*, 188 N.J. 577 (2006); *see also Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 94–98 (1990).

In *Mathews*, the court looked to the Restatement (Third) of Torts, which provides:

> In general, a product seller is not subject to liability for failing to warn or instruct regarding risks and risk-avoidance measures that should be obvious to, or generally

[16] Although Count Four is nominally pled as a claim for "Negligence," Plaintiff has repeatedly characterized its claims as premised on alleged "deception." Accordingly, Defendants have construed Count Four as alleging a negligent misrepresentation or negligent failure to warn claim. To the extent Plaintiff intended to plead a different negligence theory, it is far too vague to be actionable.

> known by, foreseeable product users. When a risk is obvious or generally known, the prospective addressee of a warning will or should already know of its existence.

Restatement (Third) of Torts: Products Liability, § 2, cmt. j.

Here, Plaintiff claims that the environmental effects of burning oil and gas are obvious and well understood—and have been for decades—notwithstanding any alleged "deception campaign" by Defendants. For example, Plaintiff alleges:

- "The scientific consensus that human activities are warming the planet is now beyond debate. . . . 'Warming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and ocean have warmed, the amounts of snow and ice have diminished, and sea level has risen.'" Am. Compl. ¶ 27;

- "In 1988, NASA scientist James Hansen testified to the U.S. Congress that climate change was caused by human activities. His testimony received front-page coverage in The New York Times." *Id.* ¶ 116;

- "That same year, members of the U.S. Congress introduced The National Energy Policy Act of 1988, intended to 'establish a national energy policy that will quickly reduce the generation of carbon dioxide and [other] trace gases as quickly as is feasible in order to slow the pace and degree of atmospheric warming . . . to protect the global environment.' George H.W. Bush, running for President of the United States that year, also pledged to combat the 'greenhouse effect with the White House effect.'" *Id.* ¶ 117;

- "Also in 1988, the world's nations joined together to create the IPCC to provide a scientific basis for policy action on climate change. The IPCC released its First Assessment Report in 1990, concluding that 'there is a natural greenhouse effect which already keeps the Earth warmer than it otherwise would be,' and 'emissions resulting from human activities are substantially increasing the atmospheric concentrations of greenhouse gases.'" *Id.* ¶ 118;

- "In the 2000s, the scientific consensus that fossil fuels are the primary driver of climate change coalesced even more firmly. In 2007, the IPCC published its Fourth Assessment Report, concluding that 'there is very high confidence that the net effect of human activities since 1750 has been one of warming.' The IPCC defined 'very high confidence' as at least a 9 out of 10 chance." *Id.* ¶ 172; and

- "In the last decade, the scientific certainty that Defendants' mass marketing, and sale of fossil fuels is driving global warming has led Defendants to publicly acknowledge the scientific reality of climate change." *Id.* ¶ 189.

Likewise, as noted above, the public record makes clear that government officials have been aware *for decades* of the potential effects on the climate of using oil and gas products. *See, supra*, at Section III.E.

Because Plaintiff's own allegations make clear that the potential impact of fossil fuel use on the climate has been "obvious or generally known" for decades, Defendants had no duty to warn about these dangers, and Plaintiff's negligent failure to warn claim fails as a matter of law. *See Mathews*, 387 N.J. Super. at 355 (remanding for entry of a judgment dismissing the complaint because Defendant had no duty to warn against a danger that was "open and obvious").

Second, Plaintiff also fails to plead facts establishing that Defendants' alleged misrepresentations were "justifiably relied on." *Kaufman v. i-Stat Corp.*, 165 N.J. 94, 109 (2000). Plaintiff makes only conclusory allegations that it relied on Defendants' "practices" and that its reliance on such "practices" "led to the sale and consumption of fossil fuels that would otherwise not be consumed." Am. Compl. ¶ 375. Plaintiff does not allege that it relied on the alleged statements, nor could it given the fact that the alleged risks were known for decades. *See*, *supra*, at Section III.E. Plaintiff makes no specific allegations that Hoboken or its residents justifiably relied on any of Defendants' statements. Plaintiff makes no allegations about specific purchases that otherwise would not have occurred. *See* Am. Compl. ¶¶ 375–76. Absent more specific allegations about purchases that otherwise would not have occurred, Plaintiff cannot establish the requisite reliance. *See McMullin v. Casaburi*, 2018 WL 3673256, at *4 (N.J. App. Div. Aug. 3, 2018) ("[B]are assertions, without more, that the defendant's conduct constitutes negligent misrepresentation and nondisclosure, are insufficient.").

5. Plaintiff Is Not Authorized To Bring Its Consumer Fraud Act Claim.

Plaintiff lacks a cause of action under the CFA. "The [CFA] was enacted to 'protect the consumer against imposition and loss as a result of fraud and fraudulent practices by persons

engaged in the sale of goods and services.'" *Scibek v. Longette*, 339 N.J. Super. 72, 77 (App. Div. 2001). The CFA provides a private cause of action for any "person" who suffers an ascertainable loss of moneys or property as a result of practices made unlawful by the CFA. N.J. Stat. § 56:8-19. The CFA also provides the New Jersey Attorney General with a cause of action to enjoin consumer fraud and seek additional penalties on behalf of New Jersey consumers, *see* N.J. Stat. § 56:8-8, which, as noted above, the New Jersey Attorney General has done in the New Jersey State case. *See* Ex. A ¶¶ 312–33.

Neither of those provisions authorizes Plaintiff's suit. The private cause of action in N.J. Stat. § 56:8-19 is limited to *consumers*, defined as "those who both use and consume economic goods and services." *Papergraphics Int'l, Inc. v. Correa*, 389 N.J. Super. 8, 12 (App. Div. 2006) (denying relief because plaintiff was not a "consumer" under the CFA). Where non-consumers purport to bring suit under that provision, New Jersey courts dismiss the claims. *See, e.g.*, *Owoh v. Sena*, 2023 WL 473302, at *3 (N.J. Super. Ct. App. Div. Jan. 27, 2023) (granting summary judgment where CFA plaintiff was not a consumer); *N.J. State League of Master Plumbers, Inc. v. N.J. Nat. Gas Co.*, 2010 WL 3720301, at *6 (N.J. Super. Ct. App. Div. Sept. 24, 2010) (dismissing CFA claims where there was no transaction between plaintiff and defendants); *Zorba Contractors, Inc. v. Housing Auth. of City of Newark*, 282 N.J. Super. 430, 435 (App. Div. 1995) (public authority may only bring suit under the CFA when "acting as a consumer").

Plaintiff includes only the most cursory allegation that it has ever purchased or consumed any of Defendants' products, and it manifestly has not brought suit on the basis of any such transactions. To the contrary, the entire thrust of Plaintiff's suit—CFA claim included—is that Plaintiff has brought suit on behalf of New Jersey consumers, or the public, more broadly. *See, e.g.*, Am. Compl. ¶¶ 3, 375, 376, 378.

In fact, the Amended Complaint alleges that Plaintiff "brings this action as an exercise of its police power as a public entity," including its powers to "ensure compliance with the laws of New Jersey, and to prevent and abate hazards to public health, safety, welfare, and the environment." Compl. ¶ 17. But the New Jersey Attorney General has already exercised his authority under N.J. Stat. § 56:8-8 to bring suit on behalf of New Jersey consumers. *See Platkin et al. v. Exxon Mobil Corp. et al.*, No. MER-L-001797-22 (N.J. Super. Ct., Mercer Cty.). Just as Plaintiff cannot interfere with the State's exercise of its *parens patriae* authority, *see supra* Section III.A, it likewise cannot avail itself of the Attorney General's statutory authority under the CFA to prosecute consumer fraud claims on behalf of the New Jersey public. Because Plaintiff does not assert its CFA claim in the capacity of a consumer and lacks statutory authority to assert claims on behalf of other New Jersey consumers, it lacks a cause of action under the CFA and its claim must be dismissed.

6. Plaintiff Does Not Plead A Viable New Jersey RICO Claim.

Plaintiff's RICO claim must also be dismissed. Plaintiff fails (1) to allege facts sufficient to show that it has standing to bring an RICO claim; (2) to properly allege the RICO predicates; and (3) to properly allege a conspiracy to violate the RICO statute.

First, Plaintiff lacks standing as to the RICO claim, because it fails to plead facts alleging that it has been harmed in anything more than an indirect way. To plead a civil cause of action under RICO, Plaintiff must allege that it "was injured as a result of the conspiracy." *Sharp v. Kean Univ.*, 153 F. Supp. 3d 669, 674 (D.N.J. 2015). "In a private civil RICO action, the predicate act must be the proximate cause of the plaintiff's injury." *Fairfax Fin. Holdings Ltd. v. S.A.C. Cap. Mgmt., L.L.C.*, 450 N.J. Super. 1, 38 (App. Div. 2017). That is, Plaintiff must show that "there was a *direct* relationship between plaintiff's injury and defendant's conduct." *Franklin Med. Assocs. v. Newark Pub. Sch.*, 362 N.J. Super. 494, 514 (App. Div. 2003) (citation omitted) (emphasis added).

"If a plaintiff is harmed only in an indirect way by the acts constituting the predicate . . . violation, the plaintiff does not have standing to pursue a civil . . . claim." *Id.* Indeed, "[t]he general tendency of the law[] . . . is not to go beyond the first step[,]" and that "tendency applies with full force to proximate cause inquiries under RICO." *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 2 (2010) (internal quotation marks omitted) (alteration in original); *see also Interchange State Bank v. Veglia*, 286 N.J. Super. 164, 180 (App. Div. 1995) ("If a plaintiff is harmed only in an indirect way by the predicate acts, the plaintiff does not have standing to pursue a RICO claim.").[17]

Plaintiff's RICO allegations go far beyond the "first step"—the chain between Defendants' alleged deception and Plaintiff's supposed injuries relies on many intervening factors, including independent actions of billions of third parties around the globe over decades. Plaintiff's theory consists of *at least* the following five steps between Defendants' alleged statements and omissions and Plaintiff's alleged injuries.

1. Defendants, starting in the 1960s, Am. Compl. ¶ 401(a), allegedly engaged in a pattern of behavior "for the purpose of promoting the purchase or sale of their fossil fuels," *id.* ¶ 403.

2. Because of those allegedly deceptive statements, third-party consumers (only a tiny percentage of whom even possibly heard Defendants' supposed false statements in New Jersey) purchased and combusted Defendants' products at increased levels, beyond what would have been consumed absent the alleged deception, producing an increased amount of greenhouse gases. *See id.* ¶¶ 48, 75.

3. The greenhouse gases emitted by billions of third-party consumers accumulated in the atmosphere to levels that allegedly exacerbated climate change beyond what would have been expected absent the alleged deception. *Id.* ¶ 59.

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[17] *See State v. Cagno*, 211 N.J. 488, 508 (2012) ("[B]ecause [the] New Jersey RICO statute is modeled upon its federal counterpart, it is appropriate to accept guidance from the federal RICO cases." (cleaned up)).

4. This exacerbation, in turn, led to extreme weather events that were worse than they would have been without Defendants' allegedly false statements. *Id.* ¶¶ 273–87.

5. Extreme weather events allegedly caused Hoboken to sustain damage to its property and to incur planning costs in preparation for future weather events, beyond what would otherwise have been expected absent the alleged deception. *Id.* ¶¶ 240–42.

Far less attenuated theories of standing have failed as a matter of law.

In *Veglia*, for example, the Appellate Division dismissed a plaintiff's claims for lack of standing to assert a RICO claim stemming from a mortgage fraud scheme. 286 N.J. Super. at 181–83. There, the plaintiff bank sued the defendant mortgage company under RICO, alleging it engaged in a conspiracy to commit forgery and fraudulent practices with a third party who originated mortgage loans. *Id.* at 175–77. The plaintiff claimed it was damaged because it was held liable for conversion in an action by a separate mortgage company, due to plaintiff's acceptance of falsely endorsed checks. *Id.* The court dismissed the RICO claims because the plaintiff lacked standing. *Id.* at 181–83. The court explained that the defendant's wrongful acts were not the proximate cause of plaintiff's damages, because plaintiff was not compelled or influenced by them to accept checks that led to liability for conversion. *Id.* Rather, it was plaintiffs' employees' failure to observe their statutory duties that led to plaintiff's damages. *Id.* The court also dismissed the claim because plaintiff failed to "establish[] that it was the intended victim of the RICO conspiracy[] or that the conspiracy was a direct cause of its injuries." *Id.* The same outcome must result here.

In *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d. Cir. 1999), the Third Circuit considered federal RICO claims brought by a collection of health funds against Philip Morris "to recover [their] costs of treating their participants' smoking-related illnesses." *Id*. at 918. The health funds accused Philip Morris and the other tobacco companies of

suppressing "research on safer tobacco products," defrauding "health care providers and payers by informing them that the companies' tobacco products were safe," and causing "smokers to become ill by preventing the dissemination of smoking-reduction and smoking cessation information." *Id*. In affirming the dismissal of federal RICO claims against Philip Morris, the Third Circuit held that "the causation chain is much too speculative and attenuated to support a RICO claim." *Id*. at 933. Describing this "speculative and attenuated" chain of causation, the court noted that "if the Funds are allowed to sue, the court would need to determine the extent to which their increased costs for smoking-related illnesses resulted from the tobacco companies' conspiracy to suppress health and safety information, as opposed to smokers' other health problems, smokers' independent (i.e., separate from the fraud and conspiracy) decisions to smoke, smokers' ignoring of health and safety warnings, etc." *Id*.

The New Jersey Supreme Court has also rejected an indirect "fraud on the market" theory for any claims—which would include Plaintiff's RICO claim here—outside the securities fraud context, holding that a plaintiff must show actual losses rather than that an allegedly fraudulent marketing campaign led to higher market prices. *See Int'l Union of Operating Eng'rs Loc. No. 68 Welfare Fund v. Merck & Co.*, 192 N.J. 372, 392 (2007) ("We have rejected the fraud on the market theory as being inappropriate in any context other than federal securities fraud litigation.").

Here, Plaintiff's alleged damages are even more attenuated, as Plaintiff does not allege that Defendants' supposed deception was the "direct cause of its injuries." *Veglia*, 286 N.J. Super. at 182. The Amended Complaint alleges a "decades-long campaign of deception," which supposedly enabled Defendants "to grow their core business in fossil fuels," which, in turn, led (in some unspecified manner or degree) to worsening climate change and somehow exacerbated Plaintiff's purported injuries. Am. Compl. ¶¶ 189, 211. Nor does Plaintiff allege that Defendants acted

intentionally in "driving global warming and its attendant consequences," including (purportedly) the storms that hit Hoboken in 2011 and 2012. Plaintiff's alleged damages are at least "several steps removed from the predicate acts," *Veglia*, 286 N.J. Super. at 182, and thus fail as a matter of law.

Parallel cases applying federal RICO statutes and the same underlying federal predicate crimes at issue in this case have rejected such remote theories of standing. In *Hemi Group, LLC v. City of New York*, New York City brought a RICO claim against an online cigarette retailer alleging that it failed to file required customer information with New York State. 559 U.S. at 4. That failure, New York City argued, constituted mail and wire fraud, which caused it to lose tens of millions of dollars in unrecovered cigarette taxes. *Id.* at 9. The Supreme Court held that the chain of causation was too attenuated because "the conduct directly responsible for Plaintiff's harm was the customers' failure to pay their taxes. And the conduct constituting the alleged fraud was [the cigarette retailer]'s failure to file" the customer information. *Id.* at 11.

Similarly here, Plaintiff's alleged harm was caused not by Defendants but by the actions of billions of third parties emitting greenhouse gases into the atmosphere (in addition to third-party decisions about agricultural practices, land-use decisions, and many other factors). Plaintiff's injuries are too far removed from Defendants' alleged misconduct to sustain a RICO claim. *See, e.g.*, *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457–59 (2006) (dismissing RICO claim by a steel company against a competitor for failing to charge and remit sales taxes because it allowed the competitor to undercut plaintiff in price); *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 270–74 (1992) (rejecting RICO claim brought under a theory of subrogation); *Steamfitters*, 171 F.3d at 933 ("[T]his causation chain is much too speculative and attenuated to support a RICO claim").

Second, Plaintiff does not properly plead any of its RICO predicates—deceptive business practices, mail fraud, or wire fraud—much less a "pattern of racketeering activity." Plaintiff must plead allegations of fraud with particularity. *R*. 4:5-8(a) ("In all allegations of misrepresentation, fraud, mistake, breach of trust, willful default or undue influence, particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable. Malice, intent, knowledge, and other condition of mind of a person may be alleged generally."); *cf. Hlista v. Safeguard Props., LLC*, 649 Fed. Appx. 217, 221 (3d Cir. 2016) (affirming dismissal of federal RICO claims for failure to plead mail and wire fraud with particularity). Plaintiff's deceptive business practices predicate, Am. Compl. ¶ 398, rests on the unadorned claim that Defendants made false or misleading statements to promote the sale of fossil fuels as part of their "schemes to defraud." *Id*. ¶¶ 400–04. That is insufficient. Plaintiff's dominant allegation is simply a restatement that Defendants engaged in a fraudulent scheme. The Amended Complaint offers nothing more conclusory allegations of purportedly fraudulent conduct without reference to particulars or dates. *See, e.g.*, *id.* ¶ 402(a) ("Causing op-eds to be published in major national publications like the New York Times fraudulently claiming that climate change was the result of natural variation, not burning fossil fuels"). The Amended Complaint's conclusory allegations do not plausibly allege a deceptive business practices predicate anchored in fraud.

Plaintiff also relies on "impermissible group pleadings" to support its RICO claim against Defendants. *Salit Auto Sales, Inc. v. CCC Info. Servs. Inc.*, 2020 WL 5758008, at *7 (D.N.J. Sept. 28, 2020). "Mere conclusory allegations against defendants as a group which fail to allege the personal involvement of any defendant are insufficient to survive a motion to dismiss." *Id.* (citations omitted). Rather, Plaintiff "must allege facts that establish each individual defendant's liability for the misconduct alleged," and "[w]hen different defendants are named in a complaint,

[P]laintiff cannot refer to all defendants who occupied different positions and presumably had distinct roles in the alleged misconduct without specifying which defendants engaged in what wrongful conduct." *Id.* (citations omitted). Here, Plaintiff simply lumps "Defendants" together as collectively engaged in alleged predicate activities, without making any effort to allege specific conduct on the part of each individual Defendant, as is required. *See* Am. Compl. ¶¶ 397–413.

In addition, Plaintiff fails to allege *prima facie* violations of the federal mail or wire fraud statutes. "The elements of mail and wire fraud are (1) a scheme or artifice to defraud for the purpose of obtaining money or property, (2) participation by the defendant with specific intent to defraud, and (3) use of the mails or wire transmissions in furtherance of the scheme." *Nat'l Sec. Sys., Inc. v. Iola*, 700 F.3d 65, 105 (3d Cir. 2012). Courts "have drawn a fine line between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid—which do not violate the mail or wire fraud statutes—and schemes that depend for their completion on a misrepresentation of an essential element of the bargain—which do violate the mail and wire fraud statutes." *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015) (internal quotation marks omitted).

Accordingly, courts "repeatedly [have] rejected application of the mail and wire fraud statutes where the purported victim received the full economic benefit of its bargain." *Id.* Here, Plaintiff does not allege that anyone was wrongfully deprived of the money spent to purchase Defendants' products. Rather, Plaintiff alleges that Hoboken was harmed because, unbeknownst to consumers, by using Defendants' products, they were contributing to climate change. But Plaintiff's mail and wire fraud allegations do not assert any specific or economic harm to consumers, and Defendants are not alleged to have gained anything from climate change beyond advertised commercial exchanges, and certainly not anything from Plaintiff.

Nor does Plaintiff allege a "pattern of racketeering activity." As discussed above, the Amended Complaint asserts two distinct "schemes": (1) a "campaign of climate obfuscation" that started in the late 1980s, *see* Am. Compl. ¶¶ 115–78; and (2) a "greenwashing" campaign consisting of Defendants' purported efforts to "feign concern about climate change and promote nonexistent commitments to sustainable energy," *id*. ¶¶ 7, 190–210. New Jersey law, however, "expressly enjoins use of the RICO statute to cover isolated criminal incidents." *State v. Ball*, 141 N.J. 142, 168 (1995) (citing N.J. Stat. § 2C:41–1d(2)). Indeed, the primary criterion of New Jersey's "pattern of racketeering activity" is "relatedness." *Id*. Predicate acts are related if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id*. at 164 (quotation omitted). As the Amended Complaint makes clear, Plaintiff alleges distinct theories of liability based on distinct acts of alleged deception: "Instead of publicly denying climate science, Defendants have now embarked on 'greenwashing' efforts to dupe consumers into believing they are committed to addressing climate change." Am. Compl. ¶ 189 (emphasis added); *see also*, *supra*, Section III.E. Plaintiff does not—and cannot—allege a pattern of racketeering activity when the Amended Complaint characterizes Defendants' alleged "greenwashing" as a "tactical shift" separate and apart from its previous alleged deception. Am. Compl. ¶ 189.

Likewise, Plaintiff cannot rely solely on Defendants' participation in GCC and API as the basis for its RICO claim. Mere participation in an enterprise—absent any distinct "racketeering activity"—cannot support a claim under N.J. Stat. § 2C:41-2(c). *See Ball*, 141 N.J. at 181 (to establish a violation under N.J. Stat. § 2C:41-2(c), the defendant must have both "participated in the conduct of the affairs of the enterprise" *and* "participated through a pattern of racketeering activity" (emphasis added)). As explained above, Plaintiff fails to make out any underlying

predicate acts, let alone a "pattern" of racketeering, and Defendants' mere participation in GCC and API alone cannot suffice for a claim under N.J. Stat. § 2C:41-2(c).

Third, Plaintiff has failed to state a *conspiracy* to violate the RICO statute. To state a RICO conspiracy claim under N.J. Stat. § 2C:41-2(d), a plaintiff must plead that the "defendant agreed to participate directly or indirectly in the conduct of the affairs of the enterprise by agreeing to commit, or to aid other members of the conspiracy to commit, at least two racketeering acts." *Ball*, 141 N.J. at 180. A plaintiff must also allege that the defendant "acted ***knowingly*** and ***purposely with knowledge*** of the unlawful objective of the conspiracy and with the intent to further its unlawful objective." *Id*. (emphases added). Additionally, Plaintiff must allege facts sufficient to show "an agreement by defendants" to violate the RICO statute. *Grippi v. Spalliero*, 2008 WL 4963978, at *7 (N.J. Sup. Ct. App. Div. Nov. 24, 2008).

Plaintiff here has failed to allege sufficient facts demonstrating that Defendants knowingly agreed to violate the RICO statute. As noted above, Plaintiff has failed to plead with sufficient particularity any facts demonstrating that Defendants "acted knowingly and purposely with knowledge of" and with "the intent to further" an unlawful objective through either trade association. *Ball*, 141 N.J. at 180. Instead, Plaintiff roots its conspiracy claim in conclusory group pleadings—impermissible in their own right—that all "Defendants" conspired to violate N.J. Stat. § 2C:41-2(c),[18] which is insufficient to withstand a motion to dismiss, *see Grippi*, 2008 WL 4963978, at *7.

Accordingly, the RICO claim must be dismissed.

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[18] *See, e.g.*, Am. Compl. ¶ 397 ("Defendants have conducted or participated, *or conspired to conduct or participate*, in [API and GCC] through a pattern of racketeering activity in violation of N.J. Stat. § 2C:41-2(c) and (d)" (emphasis added)).

IV. CONCLUSION

Plaintiff is trying to hold a small number of corporations liable—based on their marketing and sale of a lawful consumer product—for the cumulative actions of billions of actors over the course of many decades. Plaintiff's claims have many shortcomings, as detailed above, including that those claims are duplicative of those brought by the State; that they are foreclosed by the structure of the federal Constitution and the Clean Air Act; that those claims improperly seek to supplant the policy-making authority of the political branches of both state and federal governments; that the bulk of Plaintiff's claims are brought long past the statute of limitations; and that they fail under New Jersey law, even if that law could be applied.

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

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