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CITY OF HOBOKEN,

Plaintiff,

-against-

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, AMERICAN PETROLEUM INSTITUTE,

Defendants.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION: HUDSON COUNTY

DOCKET NO. HUD-L-003179-20
CBLP Action

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS ON "SUBSUMPTION" GROUNDS

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PRELIMINARY STATEMENT

Defendants invent a new legal doctrine. They propose that a lawsuit filed by the New Jersey Attorney General on behalf of the State of New Jersey should extinguish any prior lawsuits filed by a municipality, county, or other subdivision of the State just because the State seeks damages for itself arising out of the same general set of facts. Although not lacking in hubris, Defendants' theory is bereft of legal support. None of Defendants' cited cases remotely support the creation of such a radical "subsumption" doctrine. In fact, the New Jersey Supreme Court has made it clear—in a case *Defendants rely upon*—that the New Jersey Consumer Fraud Act, the basis for one of Hoboken's claims, "specifically contemplates cumulative remedies and private attorneys general" and intentionally allocates enforcement power "among various governmental and nongovernmental entities" because "underenforcement may result" when "remedial power is concentrated in one agency." *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 150 N.J. 255, 269-70 (1997). Yet Defendants urge this Court to reach the exact outcome the New Jersey Supreme Court has *already* rejected, on the ground that the Attorney General "subsumes" all other enforcement power under the Consumer Fraud Act every time it files a case. Nor do Defendants' cases say anything to suggest that Hoboken's common law claims cannot coexist with the Attorney General's, much less that Hoboken's RICO claim must be dismissed when the Attorney General *did not even bring that claim*.

Similarly-positioned tort defendants have tried Defendants' gambit before—and lost time and again. Most recently, courts around the country repeatedly rejected opioid manufacturers' analogous efforts to dismiss municipalities' deceptive marketing claims because their states had filed similar lawsuits. Gun manufacturers have also tried and failed with the same argument. The reality is that municipalities and states litigate in parallel all the time. New Jersey's recent opioid litigation is emblematic. It involved separate claims brought by the New Jersey Attorney General

and at least a dozen New Jersey municipalities. This parallel litigation was no impediment to the orderly disposition of all parties' claims, which ultimately concluded with a settlement in which the municipalities and the State both had a say in the outcome and a share in the proceeds. Parallel, cumulative litigation is even more appropriate in this case because it is exactly what the legislature designed the Consumer Fraud Act to allow.

Defendants' motion boils down to the argument that the filing of a later-in-time lawsuit by the Attorney General automatically nullifies all similar, existing suits brought by any county or municipality, even suits like Hoboken's, where Hoboken has litigated for more than two years before the State filed its action. Alarmingly, Defendants not only purport to vest the Attorney General with this enormous power, they seek to wield that power *themselves*, even though they do not represent the interests of the State (they are actually *adverse* to it), and they cite no case where the Attorney General has ever asserted such extraordinary authority. Defendants' motion to dismiss under their manufactured "subsumption" doctrine should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff City of Hoboken brings this action for public and private nuisance, trespass, negligence, and violations of both the New Jersey Consumer Fraud Act ("CFA") and the New Jersey RICO statute, seeking relief for harms caused by Defendants' half-century campaign of deceiving the public about fossil fuels' impact on the climate. As detailed in Hoboken's Amended Complaint, this coastal city of over 50,000 people is uniquely vulnerable to climate change's worst impacts because of its position along the Hudson River, low elevation, dense population, and rapidly accelerating sea level rise on its coastline. *See* Amended Complaint ("Am. Compl.") ¶¶ 8, 243-56. The damage climate change has already wrought and will continue to inflict on Hoboken is so devastating that the City has independently developed its

own, $500 million "Resist, Delay, Store, Discharge" plan to comprehensively defend itself from the rising seas encroaching into its communities. *See* Am. Compl. ¶¶ 241-42, 288-90.

Hoboken filed this case on September 2, 2020, nearly three years ago. After the filing, Defendants removed the action to the U.S. District Court for the District of New Jersey in a seven-count, 163-page Notice of Removal. Hoboken moved to remand the case back to this Court. For the next two-and-a half years, the parties litigated Hoboken's remand motion in the District Court, United States Court of Appeals for the Third Circuit, and United States Supreme Court. Hoboken prevailed at every stage. The District Court granted Hoboken's motion to remand; the Third Circuit affirmed; and on May 15, 2023, the Supreme Court denied Defendants' certiorari petition, confirming that state court is the proper forum for this case.

The New Jersey Attorney General filed its separate climate deception case against fossil fuel companies in the Mercer County Superior Court on October 18, 2022, more than two years after Hoboken filed this case. *Platkin et al. v. Exxon Mobil Corp. et al.*, No. MER-L-1797-22 (Mercer Cnty. Super. Ct. Oct. 18, 2022). Unlike Hoboken's case, the Attorney General's case does not include a RICO claim. *See generally id.* Nor did the Attorney General play any role in beating back Defendants' misguided, multi-year campaign to remove this case to federal court, which Hoboken litigated and defeated all the way up to the U.S. Supreme Court, without the Attorney General as a party.

On July 7, 2023, Defendants, individually and collectively, filed six separate motions to dismiss, including a 67-page joint motion to dismiss for failure to state a claim raising numerous defenses. One of those defenses is that the Court should dismiss this case because the Attorney General's later-filed climate deception case "subsumes" it. *See* Defs. Br. at 9-13. On July 14, 2023, the Court held a status conference on the motions to dismiss and requested the parties

complete briefing on this issue before briefing the remainder of Defendants' motions. On July 18, 2023, the Court issued an Order setting a briefing schedule for the parties to brief Defendants' "subsumption" defense. Plaintiff submits this brief in accordance with the Court's July 18 Order.

ARGUMENT

I. DEFENDANTS' IMAGINARY DOCTRINE

There is no such thing as a "subsumption" doctrine that permits defendants to seek dismissal of a municipality's lawsuit by simply pointing to the fact that the Attorney General has filed its own, separate case against them. To the contrary, the CFA expressly provides that one party's claims may not "deny, abrogate or impair" another's. N.J.S.A. § 56:8-2:13. Given the plain language of the CFA, it is not surprising that the two New Jersey Supreme Court cases Defendants cite in their brief *undermine* rather than support Defendants' novel theory. Those cases hold that the State does *not* possess sole enforcement authority when it comes to consumer fraud. Defendants' remaining cases are even further afield. They either concern class certification—not dismissal—or arise under non-CFA statutes that expressly provide for exclusive enforcement by the State, which are entirely unrelated to any of Hoboken's statutory or common law claims. *No* case Defendants cite supports the outright dismissal of any of Hoboken's claims, which would be unprecedented.

A. Defendants' Proposed "Subsumption" Doctrine Would Upend the Consumer Fraud Act and Violate Settled New Jersey Supreme Court Law

Far from allowing a suit filed by the Attorney General to "subsume" other lawsuits filed by separate parties, *Olive v. Graceland Sales Corp.* held that "[n]either the Consumer Fraud Act, nor the statute creating the Office of Consumer Protection . . . purports to vest in the Attorney General the exclusive power to act in the area of consumer fraud." 61 N.J. 182, 185 (1972). And,

after a careful analysis of the CFA's structure and intent, *Lemelledo v. Beneficial Management Corporation of America* similarly held that the CFA "reflect[s] an apparent legislative intent to enlarge fraud-fighting authority and to delegate that authority among various governmental and nongovernmental entities, *each exercising different forms of remedial power*." 150 N.J. at 269 (emphasis added). That is, the CFA gives New Jersey, municipalities in the State, and private parties alike (and together at once) the right to enforce the statute—it does not favor the State over any other party.

Lemelledo offers an especially emphatic refutation of Defendants' claim that an Attorney General's lawsuit should somehow allow *defendants* to seek dismissal of other lawsuits concerning similar conduct. Affirming the reinstatement of a CFA claim dismissed by the trial court, the State's highest court expressly warned that "the risk of underenforcement" arises "[w]hen remedial power is concentrated in one agency," especially when "the regulated party is a relatively powerful business entity." *Id.* at 269-70. Defendants are some of the largest and most powerful business entities in the world; by this motion, they seek to cabin CFA enforcement—indeed the enforcement of all New Jersey laws—against them exclusively to the State, and no other public or private entity. The New Jersey Supreme Court emphatically rejected Defendants' proposed regime because it concluded that the CFA, "in allowing for private suits in addition to actions instituted by the Attorney General," is guided by a "sweeping legislative remedial purpose" which "specifically contemplates cumulative remedies" sought by any party empowered to bring a claim under the statute in order to promote the "salutary benefits to be achieved by expanding enforcement authority and enhancing remedial redress." *Id.* at 268-70.[1]

[1] In *Lemelledo*, the New Jersey Supreme Court permitted the private plaintiff's CFA claim concerning fraudulent loan practices to proceed even though the defendant's loan practices were subject to intense regulation by four other state statutes and multiple state agencies. 150 N.J. at 271-73. The Court reasoned that other state regulation could only crowd out a private plaintiff's CFA claim if his claims created "a nearly irreconcilable conflict" with the

Indeed, the CFA provides that:

> The rights, remedies and prohibitions accorded by the provisions of this act are hereby declared to be in addition to and cumulative of any other right, remedy or prohibition accorded by the common law or statutes of this State, and nothing contained herein shall be construed to deny, abrogate or impair any such common law or statutory right, remedy or prohibition.

N.J.S.A. § 56:8-2:13. Thus, by law, the Attorney General's claims cannot "deny, abrogate, or impair" Hoboken's, which are "in addition to and cumulative" to the State's (and any other party's). As the Supreme Court held in *Lemelledo*, recognizing the doctrine Defendants propose here would "undermine the CFA's enforcement structure," the design of which "is for the Legislature, not for this Court" to decide. *Lemelledo*, 150 N.J. at 270.

Defendants' scaremongering regarding possible "wasteful, counterproductive, and potentially inconsistent parallel litigation" and "overlapping lawsuits seeking near-identical relief," Defs. Br. at 10, ignores that multi-pronged, overlapping enforcement is an intentional feature and not a bug of the CFA, and one that New Jersey courts are well equipped to handle. *Olive*, 61 N.J at 189 ("We see no problem of manageability arising from the fact that both plaintiffs and the Attorney General seek relief."); *Lemelledo*, 150 N.J. at 275 ("We are confident that the courts and agencies charged with enforcement of the various laws designed to protect consumers from unscrupulous practices will be able and willing to coordinate their enforcement responsibilities in a constructive and flexible manner to further the clear policy of consumer protection that the Legislature has announced through a variety of statutory mechanisms.").

Even outside of the context of the Consumer Fraud Act, courts have recognized New Jersey's political subdivisions' standing to bring similar claims as Hoboken brings here, under

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regulation. *Id.* at 271. Although it acknowledged that the other State regulation had "the same general goal" as the CFA, it permitted the plaintiff's CFA claim to proceed because it "complements" the rest of the regulatory regime. *Id.* at 272-73. Here, Defendants do not and cannot identify any "irreconcilable conflict" between the State's and Hoboken's cases, which are likewise complementary.

New Jersey's specific statutory and regulatory framework. *See, e.g.*, *Camden Cnty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 265 (D.N.J. 2000), *aff'd*, 273 F.3d 536 (3d Cir. 2001) (holding that Camden County's appearance as a plaintiff bringing nuisance claims "is entirely consistent with New Jersey's public nuisance jurisprudence" and held that "municipalities such as Camden County have general statutory and constitutional standing to sue in order to abate public nuisances").

B. Dismissal Is an Unprecedented, Unavailable Remedy Under Defendants' Own Cases

1. Defendants Rely on an Irrelevant, Unpublished Opinion About Class Certification

Defendants' leading case, *Cosentino v. Phillip Morris Inc.*, is irrelevant. *See* No. Civ.A MDL-L-5135-97, 1998 WL 34168879 (N.J. Super. Ct. Oct. 22, 1998). *Cosentino* concerned only a motion for class certification under the CFA. There was no motion to dismiss, nor did the court dismiss any claims, much less an entire lawsuit. *See generally id.* Rather, *Cosentino* denied class certification to a group of individual tobacco users who sought to certify a class action against the tobacco manufacturer Phillip Morris on behalf of "all residents of New Jersey" who smoked cigarettes or suffered related ailments. *See id.* at *1, *11.[2] *Cosentino* reiterated the New Jersey Supreme Court's holding in *Olive* that "the Attorney General does not have exclusive power to act in the area of consumer fraud," but (in Defendants' reading) also "disallow[ed]" certain "reliefs enumerated in the Attorney General's case," without specifying exactly which "reliefs" it

[2] Defendants' reliance on *Cosentino* is not only flawed on the merits, but also procedurally futile. *Cosentino* is an unpublished, non-precedential opinion. The New Jersey Rules of Court are clear that "[n]o unpublished opinion shall constitute precedent or be binding upon any court" and "no unpublished opinion shall be cited by any court." R. 1:36-3. Defendants also fail to acknowledge, as required under R. 1:36-3, that the *Cosentino* court issued an opinion on reconsideration months later. *See Cosentino v. Philip Morris Inc.*, No. MID–L–5135–97 (N.J. Super. Ct. Feb. 11, 1999) ("Opinion on Plaintiffs' Motion for Reconsideration of Class Certification").

was "disallow[ing]" (if any) or how they impacted the private plaintiffs' claims.[3] *Id.* at *3. Although the opinion is not a picture of clarity, it *is* clear that denying the plaintiffs' motion for class certification seeking to litigate on behalf of all other citizens of New Jersey under R. 4:32—*not dismissal of the plaintiffs' own individual claims*—was the only remedy considered and ordered by the *Cosentino* court.[4] Moreover, *Cosentino* denied class certification only on the grounds that the class lacked commonality, and not because of any identical relief sought in the plaintiffs' and the Attorney General's cases. *Cosentino*, 1998 WL 34168879, at *11 ("Because plaintiffs have not established commonality in accordance with Rule 4:32–1(a), the discussion as to typicality and adequacy is not warranted. Hence, their motion for class certification must be DENIED."). Indeed, the entire discussion of disallowing certain claims is at best *dicta.*[5]

Defendants note that *Cosentino* quoted an observation from *Lemelledo* 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." *Lemelledo*, 150 N.J. at 275. Defendants' reliance on this quote is misplaced. This portion of *Lemelledo* does not concern parallel Attorney General and municipality suits in court. Rather, it concerns the unrelated question of how a court may react when the *same* private plaintiff brings a claim in court and also separately in an

[3] The identical "reliefs" identified in *Cosentino* were all forms of equitable and injunctive relief. *Id.* at *3 n.3 (identifying the nearly identical relief as consisting of funding for "a corrective public educational campaign," funding for "smoking cessation programs," disgorgement of all profits, and a constructive trust over all future profits). In contrast, the separate money damages sought by Hoboken and the Attorney General are expressly contemplated by the CFA's enforcement regime; they are *cumulative*, and not functionally identical. *See Lemelledo*, 150 N.J at 268-69 (describing the legislature's choice to "diffuse enforcement power to combat fraud" between various governmental and non-governmental entities, through the CFA's "recognition of cumulative remedies," including the "carrot of treble damages" in private suits) (internal citations omitted).

[4] *See also Olive*, 61 N.J. at 189 ("Ordinarily, the merits of a complaint are not involved in the determination as to whether a class action may be maintained, unless of course the allegations are patently frivolous.").

[5] *Cosentino* is inapposite even accepting, *arguendo*, Defendants' reading of its unclear language. Under Defendants' reading, the *Cosentino* court: (1) first acknowledged the New Jersey Supreme Court's holding in *Olive* that "Attorney General does not have exclusive power to act in the area of consumer fraud"; then (2) "disallow[ed]" the plaintiffs' claims in defiance of *Olive*; and then (3) proceeded to analyze the merits of class certification on those already "disallow[ed]" claims anyway, ultimately denying class certification on commonality grounds instead.

administrative agency proceeding, where the agency is empowered to adjudicate "factual determinations" and "award[] relief." *Id.*; *see also, e.g.*, N.J.S.A. 56:8-15 (empowering Attorney General or his designee to conduct hearings and award restitution). Even in the same-plaintiff agency proceeding scenario—which is obviously not applicable here—*Lemelledo* does not suggest that the court case should be dismissed; rather it clarifies that in such circumstances, a court may elect to stay proceedings while an agency proceeding is ongoing, but that "the court may resume its proceedings" if the relief awarded in the agency proceeding "is less than what the court is empowered to award." *Lemelledo*, 150 N.J. at 275. Defendants' argument misrepresents *Lemelledo* and flies in the face of New Jersey's basic regulatory structure.

Defendants' *Cosentino*-based argument cannot serve as a basis for providing them with any relief, much less serve as precedent for the creation of a draconian new subsumption doctrine that would extinguish plaintiffs' statutory rights under the CFA.

2. Defendants' Remaining Cases Concern Inapplicable and Inapposite Statutes

Defendants' remaining cases from New Jersey both arise under statutes that expressly provide for sole or preferred enforcement by the State, unlike all of Hoboken's common law and statutory claims. In *Howell Township v. Waste Disposal, Inc.*, a municipality brought a claim under a statute pursuant to which "the legislature has entrusted to the DEP [Department of Environmental Protection] *primary and supervisory* enforcement powers," and which does not permit other parties to bring a case "absent [DEP's] bad faith, negligence or inaction, indicating abdication of its responsibilities." 207 N.J. Super. 80, 94-96 (App. Div. 1986) (emphasis added). In *Local Board of Health of Township of Bordentown v. Interstate Waste Removal Co., Inc.*, a local board of health and the DEP brought simultaneous claims under a statute that "permits a local board of health *'or'* the Commissioner to bring a suit," meaning "either may sue, but not

both." 191 N.J. Super. 128, 139 (N.J. Super. Ct. Burlington Cnty. 1983). By contrast, none of Hoboken's statutory or common law claims have an enforcement scheme that gives any preference or preclusive power to claims brought by the State—and the CFA makes clear that one party's claims may not "deny, abrogate or impair" another's. N.J.S.A. § 56:8-2:13; *see also Lemelledo*, 150 N.J. at 269.

As a result, Defendants present no argument supporting the dismissal of Hoboken's non-CFA claims. That is particularly glaring considering that Hoboken's RICO claim does not overlap with any claim made by the Attorney General. Even in the cases Defendants rely on considering class certification, the existence of non-overlapping claims is sufficient to avoid denial of class certification. *See Olive*, 61 N.J. at 186 ("[Where] the Attorney General does not purport to deal with the whole subject, and this being so, a private class action should not be denied because of the Attorney General's activity.")

Defendants' out-of-state cases are just as far afield. In *State v. City of Dover*, the New Hampshire Attorney General itself—not the defendants—sought to dismiss a case brought by certain municipalities. 153 N.H. 181, 184 (2006). The municipalities brought suits for identical relief *after* the state had already sued. *Id.* Prior to the municipalities' suits, the state informed the cities of its suit and its position that separate suits would be considered duplicative. *Id.* The court first observed that the municipalities strategically chose to file separate suits rather than intervening in the state's suit. *Id.* at 188. The court applied the same standing requirements to the later-in-time municipal plaintiffs as those required of intervenors. *Id.* It dismissed their suits after it concluded that (1) the municipalities failed to meet the "compelling interest" standard required of later-in-time intervenors to maintain their suits, *see id.* at 188-90; and (2) the municipalities did not have a cause of action under the relevant New Hampshire statues, *see id.* at 190-92.

Rather, New Hampshire's specific statutory framework "envisions a preemptive role for the State in protecting public water supplies" and "squarely authorizes the attorney general to assume *full responsibility* for a case filed by a municipality seeking injunctive relief against a polluter." *Id.* at 191-92 (emphasis added). Since Hoboken filed two years before the State and the CFA provides for parallel litigation, *City of Dover* could not be more distinguishable from this case.

In *Illinois v. Associated Milk Producers, Inc.*, a federal case from Illinois, the defendants challenged the Attorney General's standing to bring an antitrust suit. *See* 351 F. Supp. 436, 440 (N.D. Ill. 1972). *Associated Milk Producers* stands only for the irrelevant proposition that the Illinois Attorney General has standing to bring certain antitrust claims; it does not concern parallel litigation by the Attorney General and municipalities or other parties at all. *See id.*

II. COURTS HAVE UNIFORMLY REJECTED SUBSUMPTION ARGUMENTS IN SIMILAR TORT CASES

Courts have rejected similar "subsumption" arguments brought by defendants and even Attorneys General, in large tort cases. The recent national ligation involving opioids, for example, involved over a thousand government-entity plaintiffs (unlike here, where there are only two, Hoboken and the Attorney General). *See In re Nat'l Prescription Opiate Litig.*, 927 F.3d 919, 923 (6th Cir. 2019) (describing the plaintiffs as "about 1,300 public entities including cities, counties, and Native American tribes").

First, the defendants challenged municipalities' standing to bring certain claims, including by asserting that "*all* of Plaintiffs' costs responding to Defendants' alleged misconduct are sovereign or quasi-sovereign public services derivative of their residents' opioid problems, for which they cannot recover," among other arguments. *In re Nat'l Prescription Opiate Litig.*,

No. 1:17-MD-2804, 2018 WL 6628898, at *10 (N.D. Ohio Dec. 19, 2018). The trial court disagreed and refused to dismiss the municipalities' cases. *Id.*

Later, the state of Ohio brought a writ of mandamus in the Sixth Circuit to dismiss or postpone a consolidated bellwether trial brought by two municipal plaintiffs, Cuyahoga County and Summit County, Ohio. *See In re Nat'l Prescription Opiate Litig.*, No. 19-3827, 2019 U.S. App. LEXIS 30500, at *3 (6th Cir. Oct. 10, 2019). The state moved to stay the trial on the grounds that it, and not the municipalities, "has sole authority to assert *parens patriae* claims for harms to its citizens' health and welfare, and that the Counties' claims, and their requested relief, go far beyond direct injuries to the Counties and duplicate the much more expansive relief that Ohio seeks in its own lawsuits pending in state court." *Id.* Noting the earlier trial court decision rejecting the defendants' similar argument, the Sixth Circuit dismissed the Attorney General's attempt to delay the municipalities' trial. *Id.* In reaching that conclusion, the Sixth Circuit took particular note of the fact that the parties, including the municipalities, had already engaged in extensive litigation, much like Hoboken has here. *Id.* at *4.

In the course of its opioid litigation, the state of Arkansas too, like Ohio, attempted to have a separate suit filed by dozens of counties and cities dismissed by presenting a similar "subsumption" argument. The Supreme Court of Arkansas dismissed the state's effort in a one-sentence opinion.[6]

In *City of New York v. Beretta U.S.A. Corp.*, in the U.S. District Court for the Eastern District of New York, defendant gun manufacturers argued that a prior case brought by New

[6] *See State of Arkansas ex rel. Leslie Rutledge, Attorney General v. Scott Ellington*, No. CV-18-296 (per curiam) (Apr. 6, 2018) ("Petitioner's emergency petition for writ of mandamus is denied."), https://images.arcourts.gov/IMAGESimg/CK_Image.Present2?DMS_ID=0D581A90624AF3E084BA50B96D98231AC6920B6FA397720193CFCD80327DFA5D49625E79EF725A7A9219A52624C34431807AD845E6F3F4565DD27FB16C69F743&i_url=https://images.arcourts.gov/IMAGESimg.

York state in its *parens patriae* capacity barred the City of New York or other sub-state entities from subsequently bringing suit on the same cause of action. *See* 315 F. Supp. 2d 256, 266 (E.D.N.Y. 2004). Because the question was an issue of first impression in New York, the Court conducted a painstaking analysis dissecting the relationship between cities, states, and their citizens. *See id.* at 265-74. The court rejected the defendants' arguments for multiple reasons, including: (a) that the City "has a municipal interest that is separate and distinct from, and not duplicative of, the interests of individual New Yorkers" and was therefore not bound by *res judicata* from the state's earlier suit, even if individual New Yorkers might be; (b) that "precluding the City from bringing a suit aimed at redressing the problem of gun-related violence would interfere with its authority to promote the safety and well-being of its inhabitants"; and (c) that "the interests of the City and the State are often different." *Id. City of New York* relied, to some extent, on specific characteristics of New York law delineating the difference between the state and municipal authorities. While the New Jersey framework in Hoboken's case—the CFA—may be different from the New York state law underlying *City of New York*, the CFA similarly provides a statutory basis for Hoboken to bring a case parallel to the State's, vindicating its own interests.

III. MUNICIPALITIES AND STATES SUCCESSFULLY LITIGATE IN PARALLEL ALL THE TIME

Finally, Defendants' argument ignores the fact that municipalities and states frequently litigate complex cases in parallel without posing administrative difficulties. *See, e.g.*, *Olive*, 61 N.J at 189 ("We see no problem of manageability arising from the fact that both plaintiffs and the Attorney General seek relief."). Most recently, the Attorney General's Office and multiple New Jersey municipalities worked cooperatively to settle separately brought opioid cases, entering into an agreement for the distribution of funds for mutual benefit. Acknowledging that

the State and certain local governments were separately pursing opioid lawsuits, the agreement provided that all parties would enter into national opioid litigation settlements, and established binding terms for the distribution and spending of funds among the State's various political subdivisions.[7]

As the State noted in a March 2022 press release, after New Jersey announced its participation in the opioid settlements, "state, county, and local officials worked together to ensure that New Jersey would receive the maximum possible benefit from the settlements, with assistance from the New Jersey State League of Municipalities and New Jersey Association of Counties," an effort based on the aforementioned agreement between the State, its counties and municipalities.[8] New Jersey and its municipalities' cooperation was a resounding success, achieving "100 percent participation among its 21 counties and 241 relevant municipalities, entitling the State to the maximum recovery available under the nationwide settlement agreements."[9] New Jersey's successful and well-managed experience with parallel state and municipality opioid litigation and settlements, puts to bed any concerns Defendants present here about the manageability of "overlapping" litigation.[10]

Similar examples of parallel litigation abound in other states and in varying types of

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[7] *See* Memorandum of Agreement Between the State of New Jersey and Local Governments on Opioid Litigation Recoveries, (Jan. 28, 2022), https://nationalopioidsettlement.com/wp-content/uploads/2022/04/NJ-State-Subdivision-Agreement.pdf.

[8] *See* Press Release, State of New Jersey, "Governor Murphy and Acting Attorney General Platkin Announce New Jersey Set To Receive $641 Million from Settlements with Opioid Distributors and Manufacturers," (Mar. 11, 2022), https://www.nj.gov/governor/news/news/562022/20220311a.shtml.

[9] *Id.*

[10] Even in Arkansas, where the state once sought to have the municipalities' separate litigation dismissed, the state and separate litigating municipalities eventually reached a cooperative agreement for a coordinated settlement and distribution of funds. *See* Arkansas Opioids Memorandum of Understanding (acknowledging that "the State of Arkansas, though its Attorney General, the Counties, through their elected representatives, and nearly all of the Cities, through their elected representatives, are separately engaged in litigation" and establishing procedure for settlement and distribution of funds), https://nationalopioidsettlement.com/wp-content/uploads/2021/11/Signed-AR-MOU.pdf.

litigation. *See, e.g.*, *City of New York v. Heckler*, 578 F. Supp. 1109, 1119-23 (E.D.N.Y. 1984), *aff'd*, 742 F.2d 729 (2d Cir. 1984) (state and city both have standing—and state has *parens patriae* standing—to maintain action against Social Security Administration for denial of Social Security benefits to people with severe mental impairments); *New Mexico v. McAleenan*, 450 F. Supp. 3d 1130, 1188 & n.15 (D.N.M. 2020) (state of New Mexico and city of Albuquerque both have standing to challenge the federal government's decision to stop aiding asylum seekers trying to reach their final destinations).

CONCLUSION

This Court should decline Defendants' invitation to manufacture a new doctrine just so they can avoid the unremarkable fate of litigating tort cases brought separately by a municipality and a state Attorney General. Defendants' radical request—based entirely upon a single, irrelevant case about class certification—would upend the basic structure of the CFA and defy settled New Jersey Supreme Court law. Defendants' "subsumption" motion should be dismissed.

Dated: August 11, 2023

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