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Case No. N20C-09-097 MMJ CCLD

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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

Plaintiff,

v.

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

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

INC., and AMERICAN PETROLEUM INSTITUTE,

Defendants.

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

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INTRODUCTION

This action seeks relief for harms allegedly arising from global emissions of greenhouse gases and is not, as Plaintiff claims, simply a product liability suit regarding "Defendants' deceptive promotion of products in Delaware." Opposition Brief ("Opp.") at 1. Courts have consistently rejected similar attempts to set environmental policy by imposing liability on select energy companies through the judiciary rather than through the political branches of government. *See, e.g.*, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"); *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012) ("*Kivalina I*"); *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018), *vacated on other grounds*, 960 F.3d 570 (9th Cir. 2020); *California v. Gen. Motors Corp.*, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). This Court should do the same, for several reasons.

***First*,** Plaintiff's claims cannot be governed by state law. It is well established that, as a matter of federal constitutional structure, state law cannot operate in areas of "uniquely federal interests." *Tex. Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 640 (1981). The Supreme Court has repeatedly held that interstate air pollution is such an area. In affirming dismissal of nearly identical claims, the

Second Circuit squarely held that a "suit seeking to recover damages for the harms caused by global greenhouse gas emissions may [not] proceed under [state] law," noting that "a mostly unbroken string of [Supreme Court] cases has applied federal law to disputes involving interstate air or water pollution." *City of New York*, 994 F.3d at 91 (citing cases). Plaintiff's counter-arguments do not address the constitutional constraints underpinning these decisions and, instead, improperly frame the question as whether federal common law provides a cause of action. But the critical question here is whether, under our constitutional structure, state law can govern claims seeking damages for interstate and international emissions. Because the answer is "no," the Complaint should be dismissed in its entirety.

***Second*,** even if Plaintiff could assert claims under state law, those claims would be preempted by the Clean Air Act ("CAA"). In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), the Supreme Court held that the Clean Water Act ("CWA") prohibits States from regulating out-of-state sources of water pollution, and numerous federal appellate courts have applied this rule to air pollution under the CAA. Plaintiff asserts that its claims fall outside the scope of the CAA because they turn on purported misrepresentation and deception, but it is the *effect* of an action that determines whether it is consistent with federal law. Regardless of the tort theory on which its claims are based, Plaintiff undeniably seeks to hold Defendants liable under Delaware law for emissions generated from the combustion

of their products outside Delaware. Under *Ouellette*, that type of interstate regulation is preempted by the CAA's comprehensive regime regulating those same emissions.

***Third*,** Delaware's political question doctrine bars this Court from deciding this case because there are no judicially discoverable and manageable standards for resolving Plaintiff's claims, and there is certainly no way to do so without encroaching upon the prerogatives of the political branches.

***Fourth*,** Plaintiff fails to adequately plead its putative state law claims. A nuisance claim will not lie based on a product, like fossil fuels, that is not inherently dangerous or unlawful. Plaintiff states no claim for trespass because it has not alleged that Defendants caused a cognizable entry onto land it exclusively possessed. Defendants had no duty to warn the world of the potential impact of fossil fuels on the global climate given the Complaint's allegations that those impacts were open and obvious. And Plaintiff's Delaware Consumer Fraud Act ("DCFA") claim targeting Defendants' alleged "campaign of deception" is time-barred, and the limitations period cannot be tolled given Plaintiff was on notice of Defendants' alleged deceptions for *decades* before it filed this action.

***Fifth*,** Plaintiff fails to satisfy the heightened pleading standard that governs claims sounding in "fraud, negligence, or mistake." Del. Super. Ct. Civ. R. 9(b). Contrary to Plaintiff's representations, the substance of Plaintiff's claims—not their

labels or elements—determines whether Rule 9(b) applies. And Plaintiff has repeatedly stated that the substance of its claims are fraud and misrepresentation. *See, e.g.*, Compl. ¶ 220. Yet the Complaint fails to allege "what the false advertising was, where it was located, the contents of the statements and the reliance that ensued from those statements which caused the damage." *Rinaldi v. Iomega Corp.*, 1999 WL 1442014, at *8 (Del. Super. Ct. Sept. 3, 1999).

The Complaint should be dismissed with prejudice.

ARGUMENT

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

Plaintiff's claims seek compensation for harms allegedly caused by *interstate and international* emissions of greenhouse gases that allegedly contribute to *global* climate change. But under our constitutional system, States cannot use their own laws to resolve claims seeking redress for injuries caused by out-of-state emissions. *See* Joint Brief at 12–13 ("Br."). This constitutional rule derives from the federal structure of our government. As the Supreme Court recently explained, "[t]he States would have had the raw power to apply their own law to such matters before they entered the Union, but the 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). Plaintiff does not contend otherwise.

Instead, Plaintiff analyzes at length whether federal common law supplies a cause of action that would preempt state law. *See, e.g.*, Opp. at 7–8. Plaintiff not only misconstrues Defendants' argument, but misses the constitutional point, which is that the Constitution's federal structure does not allow States to apply their own law to claims like Plaintiff's irrespective of whether federal law—common law or statutory law—supplies a cause of action.

The Supreme Court has made clear that state law cannot govern cases "in which a federal rule of decision is 'necessary to protect uniquely federal interests.'" *Tex. Indus.*, 451 U.S. at 640. Certain "matters [are] exclusively federal, because made so by constitutional or valid congressional command, or others so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings." *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 307 (1947). This is such a case. Whether a federal common law remedy exists or whether any such remedy has been displaced by statute is irrelevant. *See City of New York*, 993 F.3d at 98 ("[S]tate 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."); *Illinois v. City of Milwaukee*, 731 F.2d 403, 410–11 (7th Cir. 1984) ("*Milwaukee III*"). And even if it were not, federal common law has *not* been displaced with respect to foreign emissions—emissions for which

Plaintiff admits it seeks damages. *See City of New York*, 993 F.3d at 92, 95 n.7. Because Plaintiff attempts to bring its claims under state law, the Complaint must be dismissed. Plaintiff's arguments to the contrary do not change the analysis.

***First*,** Plaintiff argues that state law must apply because "none of [its] claims fit within any recognized federal common law." Opp. at 7. But it does not matter whether federal law currently supplies a cause of action. What matters is whether "a federal rule of decision" addressing claims premised on injuries arising from interstate (and international) emissions "is '*necessary* to protect uniquely federal interests.'" *Tex. Indus.*, 451 U.S. at 640 (emphasis added). Because the answer is "yes," Delaware is constitutionally prohibited from applying its own law.

In any event, Plaintiff is incorrect that its claims do not fit within recognized federal common law. As the Second Circuit explained, "[f]or over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution." *City of New York*, 994 F.3d at 91. In *Illinois v. City of Milwaukee*, the Supreme Court held that "basic interests of federalism" demand "applying federal law" to a dispute involving "the pollution of a body of water such as Lake Michigan bounded, as it is, by four States." *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) ("*Milwaukee I*"). The Supreme Court reaffirmed that holding more than a decade later when it explained that "the regulation of interstate water pollution is a matter of federal, not state, law."

Ouellette, 479 U.S. at 488. And more recently, the Supreme Court applied federal law to a dispute involving climate change-related injuries because, "'[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law.'" *AEP*, 564 U.S. at 421.

Plaintiff attempts to distinguish these cases on the ground that they involved *nuisance* claims, whereas this case purportedly involves consumer deception. *See* Opp. at 8–9. But Plaintiff *does* bring a nuisance claim seeking damages for the alleged impact of interstate (and international) emissions. Compl. ¶¶ 253–63. And with respect to Plaintiff's other claims, this argument fails because it is the *effect* of the relief sought, not a claim's label, that determines whether the claim implicates uniquely federal interests.

City of New York is directly on point. There, the City argued that state law governed because "this case concerns only 'the production, promotion, and sale of fossil fuels, not the regulation of emissions.'" 993 F.3d at 91. But the Second Circuit disagreed. In its view, the determinative consideration was that the City's claims targeted the *harms* from interstate pollution: "Stripped to its essence, then, the question before us is whether a nuisance suit seeking to recover damages *for the harms caused by global greenhouse gas emissions* may proceed under New York law. Our answer is simple: no." *Id.* (emphasis added); *see also* Ex. A (New York City Complaint). That the City dressed up its claims in the language of promotion,

and attacked an earlier link in the causal chain, was irrelevant: "Artful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions. It is precisely *because* fossil fuels emit greenhouse gases—which collectively 'exacerbate global warming'—that the City is seeking damages." *Id.* (emphasis in original).[1]

The same is true here. Plaintiff concedes that it seeks damages for harms allegedly caused by interstate emissions. *See, e.g.*, Compl. ¶ 18 (alleging Delaware has "been injured by . . . global warming"); Opp. at 26 (alleging "Defendants' deceptive and wrongful promotion of fossil fuel products . . . substantially increased greenhouse gas emissions"). If Plaintiff succeeds, that victory will have effects far beyond Delaware's borders. Even if Defendants could be sued only for alleged

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[1] Plaintiff's attempts to distinguish *City of New York* fail. ***First*****,** *City of New York* is not "materially different" from this case. Opp. at 16. Both cases involve allegations of deception. While the City may have emphasized different aspects of its claims, that was irrelevant to the outcome. As explained above, the Second Circuit described the question in that case simply as "whether municipalities may utilize state tort law to hold multinational oil companies liable *for the damages caused* by global greenhouse gas emissions." 993 F.3d at 85 (emphasis added). ***Second*****,** Plaintiff asserts that "the Second Circuit's legal analysis . . . applied the source-state preemption rule adopted in *Ouellette*, and found the claims preempted by the CAA." Opp. at 17. Not so. Rather, the Second Circuit applied constitutional principles to hold that state law could not apply regardless of the CAA's preemptive effect. *See* 993 F.3d at 91–92 ("[S]uch quarrels often 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.' The City's lawsuit is no different.").

misrepresentations made *in Delaware*, Plaintiff seeks damages for injuries allegedly caused by global climate change, which necessarily results from emissions across the planet, including the combustion of fossil fuels *worldwide*. Holding Defendants liable for those alleged injuries would clearly amount to using state law to "regulat[e]" an industry's interstate and even extraterritorial operations. *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012). It therefore creates a "significant conflict with an identifiable federal policy or interest." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1994).

For the same reason, Plaintiff's contention that "[t]he State's claims rest on a core State 'interest in ensuring the accuracy of commercial information in the marketplace'" and "target[] misconduct traditionally regulated by the States" (Opp. at 11) is a red herring. Such alleged interests were no less at play in *Milwaukee I*, *Ouellette*, and *City of New York*. Yet the plaintiffs in those cases were barred from using non-source state law to advance those claimed interests because doing so would have the impermissible effect of regulating out-of-state conduct and encroaching on uniquely federal interests. In such a case, "borrowing the law of a particular State would be inappropriate." *AEP*, 564 U.S. at 422; *see also Hindes v. FDIC*, 137 F.3d 148, 169 (3d Cir. 1998) ("[S]tate laws or requirements which are inconsistent with federal law or its objectives are subordinated by virtue of the Supremacy Clause."). And while Plaintiff cites *American Fuel & Petrochemical*

Manufacturers v. O'Keeffe, 903 F.3d 903 (9th Cir. 2018), for the proposition that this action is designed to "redress[] injuries that 'states have a legitimate interest in combatting,' namely 'the adverse effects of climate change'" (Opp. at 11), there was no dispute in that case that the law at issue "d[id] not legislate extraterritorially." 903 F.3d at 917. Here, Plaintiff *does* seek to apply Delaware law extraterritorially.

Plaintiff asserts that this Supreme Court authority can be brushed aside because "[s]ix federal circuit courts of appeal have . . . f[ound] materially similar claims do not arise under federal law for purposes of federal subject-matter jurisdiction." Opp. at 9. But those cases addressed federal removal law, not the *merits* question before this Court (and before the Second Circuit in *City of New York*): whether the structure of the federal constitution precludes States from applying their distinct laws to claims for damages caused by out-of-state emissions. While Defendants disagree with those decisions, those decisions do not foreclose Defendants' arguments here. And Plaintiff should be precluded from asserting otherwise given that it told the Supreme Court that those decisions are "not in conflict with the Second Circuit's decision in *City of New York*" because they "resolved different questions in different postures." Plaintiff's Opp. to Pet. for Writ of Cert. 3, No. 22-821 (U.S. Mar. 31, 2023), http://tinyurl.com/mre2aax7; *see also Minnesota by 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 . . . to state-law public nuisance.").

***Second*,** Plaintiff argues that, even if its claims were once governed by federal common law, "Congress displaced such federal common law by enacting the Clean Air Act, and when federal common law is displaced, it is entirely abrogated." Opp. at 13. Again, Plaintiff confuses the issue presented. As explained above, *constitutional* principles prohibit state law from governing disputes involving interstate pollution. This constitutional constraint on state authority to govern these disputes is separate and distinct from how this authority is allocated *within the federal government—i.e.*, whether Congress acts through statute to regulate interstate pollution or whether federal courts do so through the development of federal common law.

Plaintiff asserts that "[t]he U.S. Supreme Court has consistently held that once displaced by statute, federal common law cannot preempt state law." Opp. at 15. But the Constitution's federal structure prohibits state law from applying even if federal common law does not otherwise preempt Plaintiff's claims. In any event, the cited cases come nowhere close to supporting Plaintiff's proposition. In *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966), the Court merely noted that, "[i]n deciding whether rules of federal common law should be fashioned, . . . [i]t is by no means enough that . . . Congress could under the Constitution readily enact a

complete code of law" addressing an issue because "[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress." *Id.* at 68. Far from holding that state law governed following the displacement of federal common law, the Court declined to find that federal common law ever existed in the first place: "Because we find no significant threat to any identifiable federal policy or interest, we do not press on to consider other questions relevant to invoking federal common law." *Id.* at 68–69. That is not the case here.

Nor did *Ouellette* find that state law sprang into life after the CWA displaced the federal common law of interstate water pollution. Quite the opposite: "In light of the [CWA's] pervasive regulation and the fact that the control of interstate pollution is primarily a matter of federal law, it is clear that the only suits that remain available are those *specifically preserved by the Act*." 479 U.S. at 492 (emphasis added).[2] The Court's preemption analysis was thus aimed at determining the extent to which the CWA specifically authorized state law to govern—not whether federal law's *silence* allowed state law to govern. This is consistent with the Seventh Circuit's holding on remand from *Milwaukee I*—which *Ouellette* endorsed, *see id.* at 490, 497—that the enactment of the CWA did not resurrect state common law

[2] As demonstrated below, *Ouellette* makes clear that the only form of state law regulation preserved by the CWA—and hence the CAA—is that which applies to in-state sources of pollution. *See infra*, Part II.

claims that were never valid in the first place: "The very reasons the Court gave for resorting to federal common law in *Milwaukee I* are the same reasons why the state claiming injury cannot apply its own state law to out-of-state discharges now. . . . The claimed pollution of interstate waters is a problem of uniquely federal dimensions requiring the application of uniform federal standards both to guard states against encroachment by out-of-state polluters and equitably to apportion the use of interstate waters among competing states." *Milwaukee III*, 731 F.2d at 410–11.

Once again, *City of New York* is on point. The court began by acknowledging the distinction between a preemption analysis and the constitutional analysis presented here. While "[t]he typical test for determining whether a federal statute preempts state law proceeds from the assumption that the historic police powers of the states were not to be superseded by federal statute unless that was the clear and manifest purpose of Congress . . . , where a federal statute displaces federal common law, it does so *not in a field in which the states have traditionally occupied*," but rather in a field where federal law *must* govern by virtue of our constitutional structure. 993 F.3d at 98 (cleaned up; emphasis added). As a result, "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." *Id.* Indeed, the Second Circuit found that

argument "too strange to seriously contemplate." *Id.* at 98–99. Citing *Ouellette*, the Court noted that "resorting to state law on a question previously governed by federal common law is permissible only to the extent *authorized* by federal statute." *Id.* at 99 (emphasis added). And because the CAA "does not authorize the City's state-law claims, . . . such claims concerning domestic emissions are barred." *Id.* at 100. At bottom, whether or not Congress has displaced federal common law remedies, "the interstate or international nature of the controversy makes it inappropriate for state law to control." *Tex. Indus.*, 451 U.S. at 641.

***Third*,** Plaintiff again invokes preemption to argue that its claims targeting foreign emissions survive because, "[u]nder the foreign affairs doctrine, state law is preempted where it takes a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," which Plaintiff asserts is not the case here. Opp. at 19. But again, this is not a matter of traditional preemption. State law cannot govern claims for harms caused by foreign emissions for the same federalism and separation-of-powers reasons discussed above—namely, that allowing state law to govern would "needlessly complicate the nation's foreign policy, while clearly infringing on the prerogatives of the political branches." *City of New York*, 993 F.3d at 103. While Plaintiff insists that Delaware law should reach conduct occurring not only outside the State, but outside the *country*, it does not cite a single case to support its position—because there is none.

By conceding it seeks damages based on international emissions, Plaintiff refutes its own contention that the federal common law applicable to its claims has been displaced. As the Second Circuit explained, federal common law is "still require[d]" to govern extraterritorial aspects of claims challenging global emissions because the CAA "does not regulate foreign emissions." *City of New York*, 993 F.3d at 95 n.7, 101; *accord City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*") ("[I]f federal common law exists, it is because state law cannot be used."). This flows from the constitutional principle that States lack the power to regulate international activities or foreign policy and affairs, and that such matters "must be treated exclusively as an aspect of federal law." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425–26 (1964). 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.

Thus, federalism and comity concerns embodied in the Constitution preclude the application of state law to claims like Plaintiff's. Climate change is global, caused by the cumulative effect of actions beyond the reach of any State's jurisdiction. While "Congress has ample authority to enact [climate] 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 of N. Am., Inc. v. Gore*, 517 U.S. 559,

571 (1996) (footnote omitted); *see Massachusetts v. EPA*, 549 U.S. 497, 519 (2007) ("Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions."); *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). The implications are apparent here: States and municipalities across the country have filed more than two dozen lawsuits challenging the same conduct targeted by Plaintiff, each arguing that this conduct is subject to *their own* laws.

Simply put, only federal law can govern Plaintiff's interstate and international emissions claims because "the basic scheme of the Constitution so demands." *AEP*, 564 U.S. at 421. Because Plaintiff pleads only state law claims, this action should be dismissed.

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

Even if state law could govern interstate pollution under the federal constitution, Plaintiff's claims would fail because the CAA preempts state law claims that would have the effect of regulating out-of-state emissions.

Contrary to Plaintiff's suggestion, Defendants do not contend that States are powerless under the CAA to address pollution generated *within* their borders. *See* Opp. at 20–21. Rather, under *Ouellette*, one State may not apply its laws to pollution sources in *other* States. Such claims are preempted *even if*, as Plaintiff alleges, the impacts of out-of-state emissions are experienced in-state. *See, e.g.*, Compl. ¶¶ 10–12. The CAA preempts such claims because they "'stand[] as an obstacle' to the full implementation" of the Act and "interfere[] with the methods by which the federal statute was designed" to regulate pollution. *Ouellette*, 479 U.S. at 494.

Plaintiff concedes that *Ouellette*, which held that common law claims against out-of-state pollution sources are preempted under the CWA, applies with equal force to the CAA. Plaintiff cites cases (Opp. at 21–22) finding "no meaningful difference between the [CWA] and the [CAA] for the purposes of [the court's] preemption analysis," meaning that "*Ouellette* controls." *Bell v. Cheswick Generating Station*, 734 F.3d 188, 196–97 (3d Cir. 2013).

Plaintiff notes that *Ouellette* construed the CWA's savings clauses as preserving certain state authority. Opp. at 21. But the savings clauses reserve state authority to regulate only *in-state* pollution sources; the Court made clear that the Act "*precludes* . . . applying the law of an affected State against an out-of-state source." 479 U.S. at 494. The savings clauses in the CAA are similarly limited. *See, e.g.*, *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 691, 693 (6th Cir.

2015). Indeed, in *Merrick*, the Sixth Circuit recognized that damages claims "based on the common law of a non-source state . . . are preempted by the Clean Air Act." *Id.* at 693. Similarly, in *N.C. ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2010), the Fourth Circuit concluded that, insofar as North Carolina "wanted out-of-state entities, including TVA, to follow its state laws" respecting emissions, "it violates *Ouellette*'s directive that source state law applies" to such disputes. *Id.* at 308–09.[3]

Plaintiff's response boils down to a single contention—that its lawsuit deals only with "deceptive promotion and failure to warn," not out-of-state sources of pollution. Opp. at 9. This is contradicted by the pleadings. Plaintiff seeks redress for harms allegedly caused by climate change (*e.g.*, Compl. ¶ 10), a global phenomenon caused by emissions from sources in literally every State and Nation in the world. Plaintiff seeks to hold Defendants liable under Delaware law for those out-of-state emissions.

The "obstacle" that Plaintiff's unprecedented theory would pose "to the full implementation" of the CAA is readily apparent. *Ouellette*, 479 U.S. at 494. For example, Plaintiff attempts to hold certain Defendants responsible for combustion

[3] Plaintiff's reliance on *Farina v. Nokia*, 625 F.3d 97 (3d Cir. 2010), is misplaced, particularly since the court held that the plaintiff's state-law claims were *preempted* by federal regulations. *See id.* at 133–34.

of their diesel and gasoline products in vehicles sold and driven around the Nation. Compl. ¶ 211. But greenhouse gas emissions from motor vehicles are regulated comprehensively under the CAA. Br. at 25–26. EPA sets national standards, and States may apply more stringent standards *only* for vehicles sold *in-state*, and only under carefully prescribed circumstances. 42 U.S.C. § 7507. What States may not do, under any circumstances, is regulate emissions from vehicles sold in *other* States. But that is precisely what Plaintiff seeks to do here—impose liability under Delaware law for vehicle emissions originating outside the State. Moreover, Plaintiff seeks to impose Delaware's liability regime regardless of whether the out-of-state emissions have "complied fully with . . . state and federal . . . obligations" under the CAA. *Ouellette*, 479 U.S. at 495.

It is no answer that other portions of Plaintiff's Complaint purport to focus on Defendants' alleged statements to consumers, or that its claims arise under laws concerning product liability, failure to warn, and/or consumer deception. The essence of Plaintiff's theory is that these statements induced greater consumption of Defendants' products, and that the resulting emissions *combined with similar emissions in all other States* (and around the world) to exacerbate climate change, allegedly causing injury to Delaware. Under Plaintiff's theory, liability for emissions in States from Maryland to New York to Texas would be assigned to

Defendants as a matter of Delaware law, even if such emissions were within permissible levels determined by EPA and each source State.

And this would hold true for every State that follows in Delaware's footsteps. Fuel suppliers would be subject to "an indeterminate number of potential regulations" through the application of "a variety of common-law rules established by the different States." *Ouellette*, 479 U.S. at 496, 499. This is exactly the extraterritorial application of state law that *Ouellette* held would impermissibly "interfere" with Congress's "comprehensive regulation." *Id.* at 500. Plaintiff is not permitted to "upset[] the balance of public and private interests so carefully addressed by" Congress and thereby "effectively override" policy choices made by EPA and neighboring States regulating sources within their own borders. *Id.* at 495; *see also Cooper*, 615 F.3d at 302 (observing that courts "are hardly at liberty to ignore the Supreme Court's concerns and the practical effects of having multiple conflicting standards to guide emissions").

Moreover, under Plaintiff's theory, even if the conduct that *triggers* liability is Defendants' purportedly deceptive marketing in Delaware, the *theory of harm* is tied to emissions allegedly resulting from the combustion of Defendants' products across the country and around the world. *See supra* at 7–10. Plaintiff's alleged injuries consist entirely—and exclusively—of harms purportedly attributable to cumulative global greenhouse gas emissions. These injuries allegedly reach into the

hundreds of millions, if not billions, of dollars. *See, e.g.*, Compl. ¶¶ 228(a), 228(b), 228(g). The imposition of such liability will invariably have drastic effects on emissions and energy policy far beyond Delaware's borders.

Because Plaintiff seeks to use Delaware law to remedy injuries allegedly caused by out-of-state sources, its claims violate *Ouellette*, as well as the extensive federal appellate caselaw following it. As the Supreme Court explained in *AEP*, Congress has designated EPA "as primary regulator of greenhouse gas emissions," rather than individual "judges issuing ad hoc, case-by-case" rulings. 564 U.S. at 428. If permitted, Plaintiff's claims would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as expressed in the CAA. *Arizona v. United States*, 567 U.S. 387, 399 (2012). This would violate the Supreme Court's teaching that States cannot "do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *Ouellette*, 479 U.S. at 495. As a result, Plaintiff's claims are preempted.[4]

[4] For this reason, Plaintiff's reliance on *Wyeth v. Levine*, 555 U.S. 555 (2009), is misplaced. In *Wyeth*, the Supreme Court wrote that one of the "cornerstones" guiding preemption analysis is the presumption that a federal statute does not preempt States' historic police powers unless that is the clear and manifest purpose of Congress. *Id.* at 565. But in our federal system, the States' historic police powers do not encompass *interstate* pollution, which is a field "the states have traditionally *not* occupied." *City of New York*, 993 F.3d at 98.

III. Plaintiff's Claims Raise Nonjusticiable Political Questions.

Plaintiff's claims also fail because they would require the Court to usurp the political branches' power to set energy and climate policy, in violation of the political question doctrine. Plaintiff does not dispute that "the political question doctrine is recognized generally in Delaware." Opp. at 24. Nor does it dispute that Delaware's political question doctrine precludes judicial resolution of cases that present "one of the 'formulations' that the U.S. Supreme Court first recognized in *Baker v. Carr*, 369 U.S. 186 (1962)" (*id.* at 23)—including "'a lack of judicially discoverable and manageable standards for resolving [the dispute]; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.'" *State ex rel. Oberly v. Troise*, 526 A.2d 898, 904 (Del. 1987). Yet Plaintiff insists that the political question doctrine is inapplicable here for two reasons.

***First*,** Plaintiff notes that the political question doctrine "has rarely if ever served as a basis to abstain from hearing a case" in Delaware. Opp. at 24. Even if Delaware courts have infrequently invoked the doctrine to dismiss a case, that says nothing about its application to *this case*. Nor does Plaintiff cite any case like this one. And Plaintiff ignores the multiple federal cases that have applied the same standard to dismiss similar climate change-related claims on this basis. For example, the court in *Kivalina I* dismissed under the political question doctrine claims that

sought to hold energy companies liable for climate change because adjudicating those claims would require the factfinder "to weigh the benefits derived from [energy production] choices against the risk that increasing greenhouse gases would in turn increase the risk of causing flooding," and the plaintiffs "fail[ed] 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." 663 F. Supp. 2d at 874–75.

Likewise, in *General Motors*, the court dismissed nuisance claims that sought to hold automobile manufacturers liable for climate change because "the adjudication of Plaintiff's [nuisance] claim would require the Court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development," and "[t]he balancing of those competing interests is the type of initial policy determination to be made by the political branches, and not this Court." 2007 WL 2726871, at *8. Plaintiff's failure to address these cases is fatal and dispositive.

***Second*,** Plaintiff asserts that "[n]one of the *Baker v. Carr* factors are present here" because "[e]ach cause of action . . . has well-defined elements in Delaware law that courts are familiar with applying." Opp. at 24. But Plaintiff does not explain what those elements are or how they are capable of judicial resolution under the circumstances here. And crucially, many cases have held that the exact same claims

are not susceptible of judicial resolution precisely because they do not provide judicially discoverable and manageable standards. *See, e.g.*, *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 864 (S.D. Miss. 2012) ("[P]laintiffs are asking the Court, or more specifically a jury, to determine without the benefit of legislative or administrative regulation, whether the defendants' emissions are 'unreasonable.' 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."); *General Motors*, 2007 WL 2726871, at *16; *Kivalina I*, 663 F. Supp. 2d at 876.[5]

Plaintiff contends that this case is nevertheless susceptible to judicial resolution because "liability here does not turn on the volume of emissions from any

[5] Plaintiff contends that two *other* cases—*Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), and *Sagoonick v. State*, 503 P.3d 777 (Alaska 2022)—are "inapposite" because only the *relief* requested in those cases lacked any judicially manageable standards. Opp. at 25. But as Defendants have explained, "[a]lthough Plaintiff has not provided the specifics of the requested abatement relief, it is presumably asking this Court to estimate potential future damages resulting from global climate change over the next century and to oversee and administer a fund to pay for and address those future injuries." Br. at 38. Plaintiff does not contend otherwise. The relief requested here is thus substantially similar to the unmanageable relief sought in *Juliana* and *Sagoonick*. *Id.* And as the United States recently explained, "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.

particular source." Opp. at 25. But no part of the *Baker* framework requires that liability turn on the volume of emissions from a given source. Rather, the question is whether the case presents "a lack of judicially discoverable and manageable standards for resolving" the dispute "or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. The answer here is "yes" for the reasons provided in Defendants' Motion. Br. at 32–39. Plaintiff does not even address, much less deny, those reasons. Plaintiff's claims are barred by the political question doctrine and should be dismissed.

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

Even if the Court concludes that Plaintiff's claims can be decided under state law, Plaintiff's claims still fail because Plaintiff has not adequately pleaded essential elements of those claims. The Delaware Supreme Court's recent decision in *State ex rel. Jennings v. Monsanto Co.*, 2023 WL 4139127 (Del. June 22, 2023), does not counsel otherwise.

A. Plaintiff's Nuisance Claim Fails Because It Alleges Harm Caused By Lawful Products, And Plaintiff Does Not Allege Defendants Were A Substantial Cause Of The Purported Nuisance.

Plaintiff does not dispute that in nearly every case in which Delaware governmental entities have attempted to use public nuisance law to hold companies liable for the sale of lawful products, Delaware courts have rejected those efforts.

Instead, Plaintiff focuses solely on *Monsanto*, asserting that this single decision upends decades of well-established tort law. It does not, for at least two reasons.

***First*,** the Delaware Supreme Court expressly limited its holding in *Monsanto* to nuisance claims involving "products like [polychlorinated biphenyls ('PCBs')]." 2023 WL 4139127, at *8. Indeed, the Court emphasized that "[t]his decision does not reach the question whether Delaware law categorically forecloses nuisance claims against manufacturers of products like handguns, opioids, and tobacco for harms caused by those products to a public right," which are excluded from the Restatement's definition of "public nuisance resulting in economic loss." *Id.*; *see also* Restatement (Third) of Torts: Liability for Economic Harm § 8, cmt. g. Many of the cases Defendants cited in their Motion dealt with precisely those types of products. *See* Br. at 40–43.

Plaintiff insists that this case is like *Monsanto* because it involves environmental harm. Opp. at 29. But *Monsanto* involved a very different type of environmental harm than this case—namely, the *direct release of the defendant's product* into the environment. Indeed, the *Monsanto* court made clear that the State's nuisance claim was based on the "release of PCBs onto Delaware's lands and into its waters." 2023 WL 4139127, at *5. Moreover, there was "'no practical course of action that c[ould] so effectively police the uses of these products as to prevent environmental contamination'" because PCBs *at any level* were toxic. *Id.* at *4.

Here, by contrast, Plaintiff's claims are *not* based on the direct release of Defendants' fossil fuel products into the environment. Rather, they are based on a theory that third-party use and combustion of those products released emissions into the atmosphere, which, when combined with all greenhouse gases worldwide, allegedly caused harm decades later through an attenuated causal chain. Plaintiff's claims are thus fundamentally different from those asserted in *Monsanto*. *See Kivalina I*, 663 F. Supp. 2d at 875–76 (distinguishing water pollution cases from those based on global warming because, "[i]n a water pollution case, the discharge in excess of the amount permitted is presumed harmful," whereas "the harm from global warming involves a series of events disconnected from the discharge itself"). Moreover, unlike PCBs, fossil fuels are neither inherently dangerous nor incapable of safe use. Even the emissions they produce are benign at certain levels. *See* Compl. ¶ 76 (noting that "[l]imiting the carbon dioxide concentration in the atmosphere to 440 ppm, or a 50% increase over preindustrial levels," is "'assumed to be a relatively safe level for the environment'"). And of course, the weather phenomena that Plaintiff identifies as the immediate cause of its alleged injuries—such as temperature changes, storms, and flooding—are different in kind from the "environmental contamination" caused by PCBs. *Monsanto*, 2023 WL 4139127, at *1.

Fossil fuels fall squarely within the ambit of comment "g" to Section 8 of the Restatement (Third) of Torts, which addresses nuisance claims against the "makers of products." Restatement (Third) of Torts: Liab. for Econ. Harm § 8 cmt. g. The Restatement provides that "[l]iability on such theories has been rejected by most courts, and is excluded by this Section, because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue." *Id.* This is because harms caused by allegedly "dangerous products are better addressed through the law of products liability, which has been developed and refined with sensitivity to the various policies at stake." *Id.* The *Monsanto* court recognized that certain products excluded by the Restatement "are not the same as products like PCBs." 2023 WL 4139127, at *9. Defendants' lawful fossil fuel products are "not the same" as PCBs for multiple reasons including, most importantly, that they are not directly released onto Plaintiff's land and waterways and can be used at safe levels.

***Second*,** even if *Monsanto* allows public nuisance claims targeting the sale of lawful fossil fuel products, it does not permit a public nuisance claim here. To survive a motion to dismiss after *Monsanto*, a plaintiff still must allege facts sufficient to show that "the defendant participated *to a substantial extent* in carrying out the activity that created the public nuisance." 2023 WL 4139127, at *2 (emphasis added). In *Monsanto*, the State satisfied this standard by "pl[eading]

sufficiently that Monsanto, *as the sole PCB producer*, substantially participated in the creation of the public nuisance." *Id.* at *10 (emphasis added).

Plaintiff does not (and cannot) make such an allegation here. Plaintiff not only concedes that much of the emissions cumulatively contributing to global climate change are attributable to non-parties to this case—often occurring decades or even centuries ago, Compl. ¶¶ 4–5, 9–10, 59–60, 148, 226–28, 245—but also that "it is not possible to determine the source of any particular individual molecule of CO_2 in the atmosphere," *id.* ¶ 245. To that end, no Delaware court—including *Monsanto*—has ever recognized a global warming-based public nuisance claim like Plaintiff's. And for good reason: As *Kivalina I* put it, there are "significant distinctions between a nuisance claim based on water or air pollution and one . . . based on global warming," namely that the latter "seeks to impose liability and damages on a scale unlike any prior environmental pollution case." 663 F. Supp. 2d at 876. That observation remains true post-*Monsanto*. In other words, a global warming-based public nuisance claim like Plaintiff's was not viable before *Monsanto*, and *Monsanto* did nothing to change that.

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

"In order to present a *prima facie* case for trespass to land, a plaintiff must establish the following: (1) the plaintiff must have lawful possession of the property; (2) the defendant must have entered onto the plaintiff's land without consent or

privilege; and (3) the plaintiff must show damages." *O'Bier v. JBS Constr., LLC*, 2012 WL 1495330, at *2 (Del. Super. Ct. Apr. 20, 2012). The Complaint does not adequately allege any of these elements.

***First*,** Plaintiff does not allege any trespass over land in which it has *exclusive* possession. The Delaware Supreme Court held in *Monsanto* that exclusive possession is an essential element of trespass and that land held in public trust is not within the State's exclusive possession: "We conclude that the State does not have exclusive possession of land it holds in trust. Thus, the Superior Court properly dismissed the State's trespass claims for lands it holds in public trust." 2023 WL 4139127, at *12. Plaintiff does not disagree. *See* Opp. at 32.

This is fatal to Plaintiff's trespass claim. The Complaint asserts that Defendants' conduct is causing an intrusion on Delaware's "beaches," "wetlands," and "coastal communities." *See, e.g.*, Compl. ¶¶ 11, 46. But as Plaintiff concedes, it "hold[s] some coastal land in public trust for its citizens, including beach areas from the mean low tide line to the sea." Opp. at 32 (citing *Groves v. Sec'y of DNREC*, 1994 WL 89804, at *5 (Del. Super. Ct. Feb. 8, 1994)); *see also New Jersey Dep't of Env't Prot. v. Hess Corp.*, 2020 WL 1683180, at *6 n.4 (N.J. Super. Ct. App. Div. Apr. 7, 2020) ("The [public trust] doctrine has been applied to ensure public access to beach areas."). While Plaintiff insists that "[o]ther beaches are owned outright by the State . . . , including beach and shoreland in State parks" (Opp.

at 32), it does not identify a single beach over which Plaintiff purportedly holds exclusive possession. Plaintiff attempts to sidestep this omission by noting that "Defendants provide no authority for their assumption that all beaches, wetlands, and coastal land are public trust resources." Opp. at 32. But because exclusive possession is an *element* of a trespass claim, it is Plaintiff's burden to plead it. That Plaintiff's Opposition does not (and cannot) cite any allegation in the Complaint of trespass to land over which it has *exclusive* possession is fatal and dispositive.

The State insists the Complaint *does* "identif[y] specific, exemplary *State-owned* properties jeopardized by sea level rise, flooding, and other climate-related invasions, such as the Port of Wilmington, Route 9, and Route 1." Opp. at 33 (emphasis added). But the question under *Monsanto* is not whether there has been a trespass to "State-owned" property, but whether there has been a trespass to property over which the State has "exclusive possession." 2023 WL 4139127, at *12 (acknowledging that Delaware "can exclude certain people from the property" at issue, but holding that this is insufficient for a trespass claim because "the public trust doctrine significantly limits the State's right to exclude others"). Plaintiff does not allege that it somehow has exclusive possession of Delaware's roads and ports. Indeed, the State's control is "non-exclusive and may at times be subordinate to the public's right to travel." *Monsanto*, 2023 WL 4139127, at *12; *see also White House Vigil for the ERA Comm. v. Clark*, 746 F.2d 1518, 1527 (D.C. Cir. 1984)

("Sidewalks, like streets and parks, are places whose title has immemorially been held in trust for the use of the public.").

Second, Plaintiff "does not allege that Defendants, *or even their products*, unlawfully entered its land." Br. at 49 (emphasis in original). Instead, Plaintiff alleges only that Defendants "caused flood waters, extreme precipitation, saltwater, and other materials, to enter the State's real property." Compl. ¶ 249. While Plaintiff contends that "*Monsanto* forecloses this argument" (Opp. at 33), that case held only that the manufacturer of a product need not directly *cause* its products to enter another's land—not that those products need not enter another's land at all.

In *Monsanto*, Delaware alleged that PCBs manufactured and sold by Monsanto contaminated the State's land and waterways. 2023 WL 4139127, at *1. The Superior Court found "Monsanto could not be liable for environmental contamination under public nuisance and trespass because it did not exercise control over the PCBs once sold to third parties." *Id.* at *5. The Delaware Supreme Court disagreed, explaining that "[w]hile Monsanto might not have owned adjoining land or dumped the PCBs directly onto the State's land, as the only manufacturer of PCBs in the United States, it substantially contributed to the entry onto the State's land by supplying PCBs to Delaware manufacturers and consumers, knowing that their use would eventually trespass onto other lands." *Id.* at *12.

Crucially, the instrument of the intrusion was still the PCBs that Monsanto manufactured and sold. Here, by contrast, Plaintiff alleges that the instrument of the intrusion is seawater, not Defendants' products or even the emissions that result from their combustion. While Plaintiff cites a string of cases that have "recognized that a defendant can trespass by causing water to enter a plaintiff's land . . . even where the trespass would not have occurred absent weather events like rainfall, storms, or snowfall" (Opp. at 35), none of those cases hold that a defendant can trespass by *influencing the weather*. Rather, those cases dealt with conditions or improvements on the defendant's land that diverted water or other materials onto the plaintiff's property. *See, e.g.*, *Robinson v. Oakwood Vill., LLC*, 2017 WL 1548549, at *1 (Del. Ch. Apr. 28, 2017) (housing development on adjacent land "increased surface stormwater discharge"); *Mapco Express v. Faulk*, 24 P.3d 531, 534 (Alaska 2001) (stockpiling snow on adjoining uphill property); *Kurpiel v. Hicks*, 284 Va. 347, 350 (2012) (stripping adjacent property of all vegetation and altering storm water drain system).

***Third*,** Plaintiff has failed to plead damages because, as explained, it has not pleaded any cognizable intrusion onto land that it exclusively possessed. Even if Plaintiff did plead such an intrusion, "virtually all of Plaintiff's alleged injuries are entirely speculative and will be felt (if at all) only decades hence." Br. at 52.

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

This Court should dismiss Plaintiff's failure-to-warn claim because the Complaint does not allege facts suggesting Defendants had a duty to warn of the alleged harms of their products.

***First*,** Plaintiff's allegations establish that the risks of fossil-fuel use were open and obvious during the time period at issue, and "there is no duty to warn of or protect invitees from an open and obvious danger." *Jones v. Clyde Spinelli, LLC*, 2016 WL 3752409, at *2 (Del. Super. Ct. July 8, 2016), *aff'd*, 159 A.3d 242 (Del. 2017).

Plaintiff does not take issue with this legal point, but contends that its applicability involves "disputed issues of fact" such that dismissing Plaintiff's failure-to-warn claim "would intrude on the jury's province to determine the existence and adequacy of Defendants' warnings." Opp. at 49. But regardless of whether openness and obviousness is *generally* a fact question, it most certainly is not where a complaint *affirmatively concedes* that any danger was open and obvious.

The Complaint here does precisely that. Plaintiff alleges that "***[b]y 1965*** . . . President Lyndon B. Johnson's Science Advisory Committee's Environmental Pollution Panel reported that a 25% increase in carbon dioxide emissions could occur by the year 2000, [and] that such an increase could ***cause significant global***

warming" (Compl. ¶ 66 (emphases added)); that "***[i]n 1988***, [NASA] scientists confirmed that ***human activities were actually contributing to global warming***" (*id.* ¶ 106(a) (emphases added)); and that "***[i]n 1990***, the IPCC . . . concluded that . . . 'there is a natural greenhouse effect which ***already keeps the Earth warmer than it otherwise would be***'" (*id.* ¶ 106(d) (emphases added)). For purposes of this motion, Plaintiff's "'well-pleaded factual allegations are accepted as true'" (Opp. at 6)—even if Plaintiff now regrets them.

Defendants recited these allegations—and many others—at length in their Motion, *see* Br. at 56–57, and Plaintiff has no response. Instead, Plaintiff attempts to redefine the open-and-obvious test as turning on whether the danger "'creates a risk of harm that is visible, is a well-known danger, or . . . is discernible by casual inspection to those of ordinary intelligence.'" Opp. at 46 (quoting *Jones*, 2016 WL 3752409, at *2). In Plaintiff's telling, because "[t]he dangers alleged here are not visible," and because "[a] person cannot discern the climate-related dangers of liquid and gaseous fossil fuels by casually inspecting them," they cannot be open and obvious. *Id.*

While visibility and discernibility are sufficient conditions to establish that a danger is open and obvious, they are not necessary conditions. Rather, "[t]he determination of whether a product's potential danger is of an open and obvious character is an objective test" that simply "focus[es] on the typical user's or

consumer's knowledge and whether the risk is fully apparent, widely known or commonly recognized by such persons." *Macey v. AAA-1 Pool Builders & Serv. Co*., 1993 WL 189481, at *3 (Del. Super. Ct. Apr. 30, 1993). This is why the court in *Trabaudo v. Kenton Ruritan Club, Inc.*, 517 A.2d 706 (1986), held that pork sellers did not have a duty to warn consumers of the risk of consuming undercooked pork, even though the trichinae infestation at issue was neither visible nor discernible by casual inspection. *Id.* at 708. For the reasons laid out in Plaintiff's own Complaint, a typical consumer would have been aware of the risks of fossil fuel use during the time period in question, as Plaintiff's own allegations make clear that such risks were "universal common knowledge." *Id.*[6]

***Second*,** Defendants did not have a duty to warn Plaintiff of harms attributable to fossil fuel use because, "'[i]n negligence cases alleging nonfeasance, or an omission to act, there is no general duty to others without a 'special relationship' between the parties.'" Br. at 55 (quoting *Rahaman v. J.C. Penney Corp.*, 2016 WL 2616375, at *8 (Del. Super. Ct. May 4, 2016)).

[6] Plaintiff contends that "Defendants' deceptive conduct" brings this case within "an exception where distractions overcome a danger's open, obvious nature." Opp. at 47. The cases it cites, however, merely recognize that the presence of distractions are relevant to determining whether a danger was open and obvious in the first place under an objective standard. Here, Plaintiff's allegations foreclose any question as to the openness and obviousness of the alleged dangers of fossil fuels.

Plaintiff does not dispute that the Complaint fails to allege any of the four "special relationships" that give rise to a duty to warn. Instead, it claims that "the Complaint primarily alleges *misfeasance* rather than *nonfeasance*." Opp. at 43. But a *failure* to warn is, by its very nature, a nonfeasance, as Delaware courts have expressly recognized. *See, e.g.*, *Washington House Condo. Ass'n of Unit Owners v. Daystar Sills, Inc.*, 2017 WL 3412079, at *16 (Del. Super. Ct. Aug. 8, 2017) ("[A] corporate agent's knowledge of defects and failure to warn or correct those defects will generally be considered acts of *nonfeasance*" (emphasis in original)); *Brandt v. Rokeby Realty Co.*, 2004 WL 2050519, at *10 (Del. Super. Ct. Sept. 8, 2004) ("Claims based on the failure to warn, inspect or repair, or implement and supervise indoor air quality programs for common areas affected by mold are acts of nonfeasance."); *Heronemus v. Ulrick*, 1997 WL 524127, at *3 (Del. Super. Ct. July 9, 1997) (finding that liability for "failure to warn, failure to provide safety spotters and failure to test the game . . . are claims of nonfeasance or the omission of an act which a person ought to do.").

Plaintiff also attempts to rest its failure-to-warn claim on "bystander liability," under which "foreseeably injured bystanders [may] sue in products liability." Opp. at 40. But this theory has never been applied in the way Plaintiff advocates—namely, to create a duty to warn *the entire world* of harms caused by the *cumulative effect* of innumerable emissions sources, including billions of individuals' use of

products over *the course of more than a century and across the globe*. Rather, bystander liability has been limited to products that are inherently dangerous in their normal use. *See* Restatement (Second) of Torts § 388 (imposing liability on third parties "if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied"). And even then, the Delaware Supreme Court has cautioned that the duty to warn under bystander liability must be interpreted in light of the fact that "the purpose of making the finding of a legal duty . . . in products liability is to avoid the extension of liability for every conceivably foreseeable accident, without regard to common sense or good policy." *Ramsey v. Georgia S. Univ. Advanced Dev. Ctr.*, 189 A.3d 1255, 1279 n.123 (Del. 2018).

Thus, Plaintiff's "bystander liability" theory fails on two separate grounds. *First*, Plaintiff alleges its harm was not caused by products that were dangerous in their ordinary use, but rather by the cumulative use of those products by countless individuals, entities, and governments around the world for decades. *See* Compl. ¶ 76 (noting that "[l]imiting the carbon dioxide concentration in the atmosphere to 440 ppm, or a 50% increase over preindustrial levels," is "'assumed to be a relatively safe level for the environment'"). *Second*, Plaintiff's theory would create a limitless duty to warn the entire world—a duty never before recognized.

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

Plaintiff's DCFA claim regarding certain Defendants' alleged "campaign of deception" over climate science fails for at least two reasons.

First*,** this claim is barred by the statute of limitations. DCFA claims must be initiated within "5 years from the time the cause of action accrued." 6 Del. C. § 2506; *see also State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 528 (Del. Ch. 2005) ("§ 2506 explicitly limits actions brought by the Attorney General"). But the Complaint alleges that this purported campaign of deception began in 1988, and that the last alleged statement in this campaign occurred in 1998—more than fifteen years before the limitations period began in 2015***. Compl. ¶¶ 106, 122–23.

Plaintiff does not dispute this timeline, but claims that certain Defendants' alleged "concealment of their conduct tolled the limitations statute" because "neither the State nor its consumers were on notice of CFA Defendants' misrepresentations or omissions 'until recently.'" Opp. at 48–49. But whether Plaintiff had *actual* notice of the alleged concealment is irrelevant because a limitations period is tolled only "until the Attorney General's office [i]s place[d] on *inquiry* notice of" its claims. *Brady*, 870 A.2d at 531 (emphasis added). This means that for tolling to occur "'there must have been no observable or objective factors to put a party on notice of injury.'" *Id.*

Plaintiff's own Complaint shows that Plaintiff had inquiry notice long before 2015. It alleges that members of the scientific community had publicized mounting evidence of fossil fuels' contribution to global climate change since at least the 1960s. *See supra* at 34–35. And although Plaintiff contends that this "conflate[s] knowledge of climate change and its impacts with knowledge of Defendants' alleged deception" (Opp. at 51), the two cannot be separated for these purposes. If, as Plaintiff alleges, fossil fuels' impact on climate change was publicly known, then Plaintiff would have been on inquiry notice of its DCFA claims as soon as it encountered advertisements that purportedly denied any such impact. The vast discrepancy between public knowledge and the alleged deception would put a reasonable person on notice to inquire further.

Moreover, as Defendants recounted in their Motion (at 61–62), since *at least 1997*, Plaintiff was on notice of accusations of the purported deception alleged in the Complaint. In May 1997, *The Washington Post* ran a story charging that, "[e]ven as global warming intensifies, the evidence is being denied with a ferocious disinformation campaign" that was "[l]argely funded by oil and coal interests." Ross Gelbspan, *Hot Air, Cold Truth*, Wash. Post (May 25, 1997), http://tinyurl.com/mwwxdbuv. These allegations served as the centerpiece of *Kivalina*, which was filed in 2008 and includes many of the same allegations Plaintiff makes here. High-profile films and books publicizing this alleged

"disinformation" campaign were released around the same time, including *An Inconvenient Truth* in 2006 and the book *Merchants of Doubt* in 2010. Contrary to Plaintiff's representations, Academy Award-winning films and articles in the country's leading periodicals are not "discrete publications" that leave open "'whether a reasonable person would have read or heard that news.'" Opp. at 51.[7]

***Second*,** Plaintiff's claim fails because the DCFA requires that the alleged misrepresentations be made "in connection with the sale, lease, receipt, or advertisement *of any merchandise*." 6 Del. C. § 2513(a) (emphasis added). Because the alleged "campaign of deception" relates to climate change—not Defendants' *products*—Plaintiff's claims based on this "campaign" should be dismissed.

Plaintiff claims dismissal would be improper because "a jury could reasonably conclude that CFA Defendants' misrepresentations about climate change were attempts to *indirectly* induce Delaware consumers to buy their fossil fuel products." Opp. at 53 (emphasis added). But the misrepresentations alleged by Plaintiff do not identify any products at all.[8]

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[7] Plaintiff's characterization of *The Washington Post* and *The New York Times* as "discrete publications" to which it was oblivious is belied by the allegations in its Complaint that Defendants' supposedly misleading advertisements appeared "in print publications **circulated widely to Delaware consumers**, including but not limited to *The Atlantic*, *Fortune Magazine*, ***The New York Times***, *Newsweek*, *Time Magazine*, ***The Washington Post***, and *The Wall Street Journal*." Compl. ¶ 21(h) (emphases added).

[8] Certain Defendants have filed individual motions to dismiss challenging the

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

Plaintiff insists that its novel state tort claims are not governed by federal law regarding interstate pollution (*see supra*, Part I) and are not preempted by the CAA (*see supra*, Part II) because they deal only with pedestrian allegations of misrepresentation and fraud, while at the same time insisting those very same claims are not subject to Rule 9(b)'s heightened pleading standard for "averments of fraud, negligence or mistake." (Del. Super. Ct. Civ. R. 9(b)). Plaintiff cannot have it both ways.

First, the Complaint must satisfy Rule 9(b)'s heightened pleading standard because its claims sound in fraud. Plaintiff has attempted to frame its claims as arising out of a "decades-long campaign [of deception]" through which Defendants allegedly "concealed their fraud by issuing misleading advertorials and other statements diminishing the harmful effects of their products' use on climate change without disclosing their own knowledge to the contrary." Compl. ¶¶ 108, 276.

Plaintiff insists that Rule 9(b) does not apply because "the elements of public nuisance or trespass claims do not resemble those of common-law fraud." Opp. at 58. But it is *Plaintiff* that has attempted to make alleged misrepresentations the linchpin of its claims—including its nuisance and trespass claims. And multiple

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validity of Plaintiff's greenwashing theory, as well.

cases have held that Rule 9(b) applies where, as here, the plaintiff's claim sounds in fraud. *See York Linings v. Roach*, 1999 WL 608850, at *2 (Del. Ch. July 28, 1999) (breach of fiduciary duty based on allegations of fraud); *Toner v. Allstate Ins. Co.*, 821 F. Supp. 276, 283 (D. Del. 1993) ("[T]he requirements of [Federal Rule 9(b)] apply to all cases where the gravamen of the claim is fraud even though the theory supporting the claim is not technically termed fraud.").

The lone case Plaintiff cites for its contention says nothing of the sort. In *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199 (Del. 1993), the defendants argued that "plaintiff's allegations of bad faith should be treated as a claim of fraud" and subject to Rule 9(b)'s particularity requirement. *Id.* at 1207. The Delaware Supreme Court rejected that argument *not* because the elements of a fraud claim and a bad faith claim are different or even because Rule 9(b) is inapplicable to bad faith claims. Rather, the Court held that bad faith need not be pled with particularity because "a claim of bad faith hinges on a party's state of mind," and *even* "*[u]nder Rule 9(b)*, state of mind may be pled generally." *Id.* at 1208 (emphasis added); *see* Del. Super. Ct. Civ. R. 9(b) ("Malice, intent, knowledge and other condition of mind of a person may be averred generally."). Here, Defendants do not contend that Plaintiff's claims should be dismissed for failure to plead state of mind with particularity.[9] As explained below,

[9] Plaintiff's suggestion that this Court should interpret *State v. Publisher's Clearing*

Defendants contend that Plaintiff has not pleaded the circumstances and specifics of the alleged deception and misstatements with sufficient particularity.

Second, the Complaint does not satisfy Rule 9(b)'s requirement that "the circumstances constituting fraud, negligence or mistake shall be stated with particularity." Del. Super. Ct. Civ. R. 9(b). Rule 9(b) requires that a plaintiff identify "what the false advertising was, where it was located, the contents of the statements and the reliance that ensued from those statements which caused the damage." *Rinaldi*, 1999 WL 1442014, at *8. Plaintiff argues that certain statements in the Complaint "provide[] more than sufficient detail to notify Defendants of the challenged conduct and enable them to mount a defense" (Opp. at 61), but a closer look at those paragraphs reveals no such detail. For example, Paragraphs 100–101 discuss internal reports and an Environmental Impact Statement filed with a regulatory body, not any deceptive or misleading representations. Paragraphs 107–111 also do not identify a single example of a misleading public statement or advertisement. And the allegedly Defendant-specific allegations at Paragraphs 21–42 are entirely vague, repeating in conclusory fashion that each Defendant

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House, 787 A.2d 111 (Del. Ch. 2001), to hold that Rule 9(b) "should not apply to the State's claims" (Opp. at 59) ignores that the decision in that case turned on the DCFA's statutory language. There is no similar statutory text with respect to Plaintiff's common-law claims for failure to warn, nuisance, and trespass. All of Plaintiff's claims are founded on the same alleged fraudulent scheme and deceptive conduct, the facts of which must be stated with particularity.

"advertised in print publications circulated widely to Delaware consumers," that "these advertisements also contained false or misleading statements, misrepresentations, and/or material omissions obfuscating the connection between [Defendant's] fossil fuel products and climate change," and "contained no warning commensurate with the risks of [Defendant's] products." Compl. ¶ 21(h). Such allegations fail to allege the requisite "details regarding time, place, and content" of Defendants' purportedly fraudulent or misleading representations. *Universal Capital Mgmt. v. Micco World, Inc.*, 2012 WL 1413598, at *4 (Del. Super. Ct. Feb. 1, 2012).

CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiff's Complaint with prejudice.

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Respectfully submitted,

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