UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF NEW YORK, Plaintiff, v. BP P.L.C.; CHEVRON CORPORATION; CONOCOPHILLIPS; EXXON MOBIL CORPORATION; and ROYAL DUTCH SHELL PLC, Defendants.	Case No. 18 Civ. 182 (JFK)

REPLY OF CHEVRON CORPORATION, CONOCOPHILLIPS, AND EXXON MOBIL CORPORATION ADDRESSING COMMON GROUNDS IN SUPPORT OF THEIR MOTIONS TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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I. PRELIMINARY STATEMENT

Plaintiff's boundless theory of liability has no precedent in either state or federal law. Indeed, Plaintiff has not identified a single global warming-based nuisance claim that has survived a motion to dismiss. And there is none. In an attempt to avoid a similar fate, Plaintiff tries to cloak its arguments in the language of products liability—asserting that "a corporation that makes a product causing severe harm when used exactly as intended should shoulder the costs of abating that harm." Opp. 1. But that is not even a correct statement of products liability law (or any law), *see* ConocoPhillips Reply at 1, and Plaintiff has not pleaded a products-liability cause of action (nor could it). Rather, Plaintiff's claims boil down to the contention that the level of worldwide greenhouse gas emissions is unreasonable. As such, their claims are (1) governed by federal common law and displaced by the Clean Air Act ("CAA"), (2) barred by numerous federal doctrines, (3) invalid under New York law, and (4) non-justiciable.

II. ARGUMENT

As Plaintiff does not dispute, previous global-warming-based nuisance cases have been dismissed on the ground that Congress displaced federal common law remedies through the CAA, which delegated to the EPA the authority to regulate greenhouse gas emissions. *See*, *e.g.*, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011) ("*AEP*"); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853, 857 (9th Cir. 2012). Plaintiff's principal contention in opposition is that, rather than being governed by *AEP*, this case should instead be governed by *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.* ("*MTBE*"), 725 F.3d 65 (2d Cir. 2013), a case Plaintiff cites on nearly every page. *See* Opp. 2, 9, 10 & nn.5 and 6, 17, 18, 19, 20, 21, 28.

But *MTBE* was a purely *localized* nuisance case. The plaintiff "adduced evidence showing that Exxon manufactured gasoline containing MTBE and *supplied that gasoline to*

service stations in Queens," and "introduced evidence that Exxon knew specifically that *tanks in the New York City area leaked*." 725 F.3d at 121 (emphasis added). Moreover, the plaintiff "sought to hold Exxon liable as both a direct spiller of MTBE gasoline and as a manufacturer, refiner, supplier, and seller of MTBE gasoline, and . . . the jury's verdict on public nuisance did not distinguish between these theories of causation," *id.* at 122, meaning the verdict may well have turned on Exxon's chemical releases. The court thus concluded that "Exxon's extensive involvement *in the Queens gasoline market* belie[d] any claim that its conduct was too geographically remote to sustain liability for public nuisance." *Id.* at 123 (emphasis added). And the court made clear even then that "mere use of MTBE would not have caused the company to incur liability" without a showing of "additional tortious conduct." *Id.* at 104.

In this case, by contrast, Plaintiff seeks to hold Defendants liable under New York nuisance law for their *worldwide* extraction and production of fossil fuels, the combustion of which by billions of intervening third parties—including Plaintiff itself—has allegedly changed the *Earth's* climate. Plaintiff's heavy reliance on such an inapposite case reveals how untethered its claims are from any recognizable body of tort law. They should be dismissed.

A. Plaintiff's Claims Arise Under Federal Common Law and Should Be Dismissed

Plaintiff asserts that the range of questions that must be governed by federal common law is "'severely limited.'" Opp. 26 (citations omitted). But the Supreme Court has squarely held that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*"); *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) ("T]he control of interstate pollution is primarily a matter of federal law[.]"). As Plaintiff concedes, "federal common law has long

applied" to interstate pollution cases. Opp. 28–29 & n. 27.[1]

Plaintiff contends that this is not an interstate pollution case because "the City bases liability on defendants' production and sale of fossil fuels—not defendants' direct emissions of GHGs." Opp. 27. But the Amended Complaint alleges that "*GHG pollution* from the burning of fossil fuels is the dominant cause" of global warming. FAC ¶ 52 (emphasis added); *see also id.* ¶¶ 54, 64, 68. Greenhouse gas emissions are thus central to Plaintiff's claims, which seek to hold Defendants liable for the "GHG pollution" of others. Those emissions do not originate exclusively (or even predominantly) in New York—rather, greenhouse gases are emitted from sources in all 50 states and every nation on Earth. This is exactly the sort of "transboundary pollution suit[]" to which federal common law, rather than state law, has historically applied. *Kivalina*, 696 F.3d at 855–58; *see also AEP*, 564 U.S. at 422 (applying "the law of a particular state" to global warming claim "would be inappropriate"); *California v. BP p.l.c.*, 2018 WL 1064293, at *3 (N.D. Cal. Feb. 27, 2018) ("[T]he transboundary problem of global warming raises exactly the sort of federal interests that necessitate a uniform solution.").[2]

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[1] Plaintiff cites a handful of cases declining to apply federal common law in *other contexts*, Opp. 26–27, but none of the cited cases involved nuisance law or interstate pollution. *See*, *e.g.*, *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987, 989 (2d Cir. 1980) (products liability claim against a manufacturer based on illnesses allegedly caused by exposure to the manufacturer's product); *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1316 (5th Cir. 1985) (strict liability claims against asbestos manufacturers for injuries caused by exposure to the product); *Marsh v. Rosenbloom*, 499 F.3d 165, 184 (2d Cir. 2007) (declining to create a federal common law version of the trust fund doctrine); *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 84–85 (1994) (holding that federal common law should not govern a legal malpractice claim); *Woodward Governor Co. v. Curtiss Wright Flight Sys., Inc.*, 164 F.3d 123, 126 (2d Cir. 1999) (federal common law does not govern action for breach of government procurement sub-subcontract.); *Capmark Fin. Grp. Inc. v. Goldman Sachs Credit Partners L.P.*, 491 B.R. 335, 348–49 (S.D.N.Y. 2013) (declining to create federal veil piercing standard in actions under the Bankruptcy Code); *Empire HealthChoice Assur., Inc. v. McVeigh*, 396 F.3d 136, 138–39 (2d Cir. 2005), *aff'd*, 547 U.S. 677 (2006) (holding that federal common law should not govern a breach of contract action involving an administrator of a health plan for federal employees).

[2] The court in *County of San Mateo v. Chevron Corp.*, 2018 WL 1414774 (N.D. Cal. Mar. 16, 2018), recently rejected Plaintiff's proposed distinction, holding that claims against fossil fuel manufacturers are not "materially different from *Kivalina*." *Id.* at *1.

Because federal common law governs Plaintiff's claims, "state common law [i]s preempted." *Ouellette*, 479 U.S. at 488; *see City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) ("[I]f federal common law exists, it is because state law cannot be used."). Plaintiff argues that *AEP* and *Kivalina* "*preserved*" the plaintiffs' state common law claims, Opp. 29, but that is incorrect. In *Kivalina* the plaintiff did not appeal the district court's dismissal of its state law claims, 696 F.3d at 858 (Pro, J., concurring), so there were no claims for the Ninth Circuit to "preserve." And in *AEP*, the Court left open for reconsideration on remand only the narrow issue of whether claims brought under "the law of each State where the defendants operate power plants" were preempted. 564 U.S. at 429. But Plaintiff has not sued under the law of the states in which fossil fuels were manufactured or emissions generated. On the contrary, Plaintiff seeks to use New York law to remedy injuries allegedly caused by pollution emanating from all 50 states. In that context, a "patchwork of fifty different answers to the same fundamental global issue would be unworkable," and "the extent of any judicial relief should be uniform across our nation." *BP*, 2018 WL 1064293, at *3. Hence the application of federal common law.

Plaintiff concedes, as it must, that the CAA displaces federal common law nuisance claims seeking abatement of interstate greenhouse gas emissions. Opp. 31. Plaintiff nonetheless contends that *its claims* are not displaced because the CAA does not "regulate the production and sale of fossil fuels." *Id.* But Plaintiff's alleged injuries arise (if at all) only because third-party *users* of fossil fuels—located in all 50 states and around the world—emit greenhouse gases. Plaintiff's derivative theory of liability does not distinguish this case from *AEP* or *Kivalina*. *See San Mateo*, 2018 WL 1414774, at *1. Before this Court could hold Defendants liable for contributing to injuries allegedly caused by other parties' greenhouse gas emissions, it would need to conclude that such *emissions* caused a public nuisance. This would require "mak[ing] an

initial decision as to what is unreasonable in the context of carbon dioxide emissions." *California v. Gen. Motors Corp.*, 2007 WL 2726871, at *8 (N.D. Cal. Sept. 17, 2007). In short, the Court would have "to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development." *Id.* Because Congress has empowered the EPA, not federal courts, to determine the appropriate level of greenhouse gas emissions, Plaintiff's claims "cannot be reconciled with the decisionmaking scheme Congress enacted." *AEP*, 564 U.S. at 428–29.

The Supreme Court's decision in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), cited at Opp. 32, has no bearing on the displacement analysis here, because in that case the defendant "admitt[ed] that the [Clean Water Act] does not displace compensatory remedies for consequences of water pollution." *Id.* at 489. Although the defendant argued that the CWA "somehow preempt[ed] punitive damages, but not compensatory damages," the Court held that "nothing in the statutory text points to fragmenting the recovery scheme this way." *Id*. Here, by contrast, "Congress has acted to occupy the entire field" of greenhouse gas regulation and thus "displace[d] any previously available federal common law action," which "means displacement of remedies." *Kivalina*, 696 F.3d at 857.

Plaintiff argues, in the alternative, that there is no conflict between the CAA and Plaintiff's claims because Defendants' "intentional invasion" of Plaintiff's interest is unreasonable as a matter of law. Opp. 33. That argument runs headlong into the Court's holding in *AEP*. There, as here, the plaintiffs "alleged that public lands, infrastructure, and health were at risk from climate change," and "that climate change would destroy habitats for animals and rare species of trees and plants on land the [plaintiff] trusts owned and conserved." 564 U.S. at 418–19. The Court held that to adjudicate the plaintiffs' nuisance claim a judge would have "to

determine, in the first instance, what amount of carbon-dioxide emissions is 'unreasonable,'" *id.* at 428—the very determination Plaintiff contends is unnecessary in this case.

Finally, to the extent Plaintiff's claims can be construed as alleging that oil and gas production itself somehow constitutes a nuisance aside from greenhouse gas emissions, they are displaced by a host of federal statutes that speak directly to the reasonableness of that conduct and affirm that oil and gas extraction is essential for national security and the U.S. economy.[3]

Plaintiff argues this case should survive dismissal because it was "entirely foreseeable" that consumers would combust the fossil fuels produced by Defendants. Opp. 35. Yet Plaintiff has not identified a single case where the manufacturer of a lawful product was held liable for creating a nuisance under federal common law because downstream users of that product created pollution that crossed state lines and caused injury.[4] As the Supreme Court held just last week, where (as here) there are "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, courts should refrain from creating the remedy in order to respect the role of Congress." *Jesner v. Arab Bank, PLC*, 2018 WL 1914663, at *15 (U.S. 2018).

Finally, Plaintiff's federal common law claims are invalid because they seek to hold Defendants liable for extraterritorial conduct—*i.e.*, overseas fossil fuel extraction and foreign emissions by third parties. "[T]he potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa v.*

[3] *See*, *e.g.*, Energy Policy Act of 1992, 42 U.S.C. §§ 13401, 13411(a), 13412, 13415(b)–(c); Energy Policy Act of 2005, 42 U.S.C. §§ 15903, 15904, 15909(a), 15910(a)(2)(B), 15927; Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a; Coastal Zone Management Act of 1972, 16 U.S.C. § 1451(j); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701(a)(12)

[4] The one case Plaintiff cites for its "foreseeability" argument, *Higazy v. Templeton*, 505 F.3d 161 (2d Cir. 2007), involved a *Bivens* action against an FBI agent for violating the plaintiff's right against self-incrimination.

Alvarez-Machain, 542 U.S. 692, 726–28 (2004). Indeed, the Supreme Court's "recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law, where th[e] Court has 'recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.'" *Jesner*, 2018 WL 1914663, at *15.

B. Plaintiff's Claims Are Independently Barred by Numerous Federal Doctrines

Foreign Affairs. Plaintiff's claims "'must give way' to the foreign policy of the United States" because they conflict with the federal government's stated policy relating to climate change. *In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 117–20 (2d Cir. 2010) (quoting *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420–21 (2003)). The government has declared its support of a "balanced approach to climate policy that lowers emissions while promoting economic growth and ensuring energy security," and announced its strategy to "work with other countries" and "participate in international climate change negotiations and meetings," including ongoing negotiations regarding the Paris Agreement. U.S. Dep't of State, Communication Regarding Intent to Withdraw from Paris Agreement (Aug. 4, 2017).

Plaintiff's tort claims are in clear conflict with this policy and undermine the negotiating power of the United States. Rather than ensuring that "all future policy options remain open" to the federal government to address climate change—as announced in its statement on climate policy—Plaintiff is seeking a coercive, multi-billion dollar damages award that would undercut "the President's diplomatic discretion and the choice he has made exercising it." *Garamendi*, 539 U.S. at 423–24. Even if there were no "actual conflict" with federal law, Opp. 14, Plaintiff's claims would still be barred because they "undermine[] the Government's objective" of negotiating acceptable international agreements before taking drastic action to reduce domestic greenhouse gas emissions. *Assicurazioni*, 592 F.3d at 118 (holding state law was preempted

even though it was "not directly in conflict with government's policy").

Plaintiff points (at Opp. 12–13) to the Second Circuit's decision in *AEP*, which concluded that federal common law was not displaced because, *inter alia*, there was "no unified [U.S. foreign] policy on greenhouse gas emissions." *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 330–31 (2d Cir. 2009). But the Supreme Court reversed the Second Circuit's displacement ruling, and the foreign policy analysis in that case does not reflect developments since the Paris Accords. Finally, Plaintiff's assertion that there is no "statute giving the president exclusive authority over all activities causing climate change," Opp. 14, is irrelevant. Neither *Garamendi* nor *Crosby* suggested that the executive had "exclusive authority" over the industries involved, yet the Court concluded that state law was preempted in both cases.

Commerce Clause. Plaintiff asserts that "this case is first and foremost about compensatory relief." Opp. 15. But the Supreme Court has recognized that "the obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012). "[R]egulation can be . . . effectively exerted through an award of damages," *id.*, and "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute," *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 n.17 (1996). Common-law environmental tort claims, in particular, can force a defendant to "change its methods of doing business and controlling pollution to avoid the threat of ongoing liability[.]" *Ouellette*, 479 U.S. at 495; *see also Boomer v. Atl. Cement Co.*, 26 N.Y.2d 219, 226 (1970) ("the risk of being required to pay permanent damages . . . would itself be a reasonable effective spur" to change the defendant's conduct). There can be no question that a multi-billion dollar damages award would have a substantial effect on Defendants' out-of-state conduct, and if similar awards are issued in

other cases, the entire industry could be driven into the ground. *See Healy v. Beer Inst. Inc.*, 491 U.S. 324, 336 (1989) (requiring courts to consider "what effect would arise if not one, but many or every State" pursued similar policies).[5]

Plaintiff's reliance (at Opp. 15) on *VIZIO, Inc. v. Klee*, 886 F.3d 249 (2d Cir. 2018), is misplaced. In that case, the "thrust of VIZIO's argument [was] that Connecticut is prohibited from referencing national market share when it assesses recycling fees because doing so regulates—and thereby places a burden on—interstate commerce." *Id.* at 255. The court held that "such a principle has not before been acknowledged in our dormant Commerce Clause jurisprudence[.]" *Id*. Here, by contrast, Defendants have not argued that "referencing" Defendants' out-of-state conduct violates the Commerce Clause; rather, the point is that imposing a multi-billion dollar damages award on the basis of their lawful out-of-state conduct would effectively require them to curtail their worldwide fossil fuel extraction to avoid additional crippling awards in the future. The Commerce Clause forbids any state from using its tort law to exercise such extraterritorial control over an entire industry.

Due Process and Takings. The Due Process Clause prohibits state tort law from being used as a hammer to "chang[e] the tortfeasors' lawful conduct in other States." *BMW*, 517 U.S. at 572–73 & n.19; *see also State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003) (collecting cases). Although it is true that *BMW* and *State Farm* both dealt with punitive damages awards (Opp. 17), the principle announced in those cases applies with equal force here, where the requested multi-billion dollar damages award is designed to coerce Defendants into

[5] Plaintiff cites *N. Y. State Rifle & Pistol Ass'n, Inc. v. City of N.Y.*, 883 F.3d 45, 64 (2d Cir. 2018), for the proposition that where state action addresses a "legitimate local concern[]" any extraterritorial impact is "of no judicial significance." Opp. 16. But the holding of *N.Y. State Rifle* is not so broad. There, the plaintiff challenged a gun *licensing* regime that "directly govern[ed] only activity within New York City, in order to protect the safety of the City's residents." 883 F.3d at 64. The court held any "incidental" extraterritorial effect was irrelevant because the statute did not target out-of-state conduct. *Id.* at 66. The lawsuit here, by contrast, effectively seeks to impose an impermissible tax on Defendants' out-of-state conduct.

changing their out-of-state behavior and would "infring[e] on the policy choices of other States." *BMW*, 517 U.S. at 572.[6]

The Takings and Due Process Clauses also prevent the government from "divest[ing] [a party] of property long after the company believed its liabilities . . . to have been settled," where the company's "retroactive liability is substantial and particularly far reaching." *E. Enters. v. Apfel*, 524 U.S. 498, 534 (1998) (plurality). Plaintiff argues that *Apfel* does not apply to judicially imposed liability, Opp. 17, but "[t]here is no textual justification" for that argument, and "[i]t would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 714 (2010) (plurality); *see also Smith v. United States*, 709 F.3d 1114, 1117 (Fed. Cir. 2013) (recognizing the existence of "judicial takings" claims); *Vandevere v. Lloyd*, 644 F.3d 957, 964 n.4 (9th Cir. 2011) (same).

Federal Preemption. The Clean Air Act was carefully designed by Congress to accomplish national goals, and for this reason "the appropriate amount of regulation" relating to greenhouse gas emissions has been "entrust[ed]" to the EPA. *AEP*, 564 U.S. at 427. Because the state-by-state application of nuisance law to punish fossil fuel manufacturers based on their consumers' greenhouse gas emissions would be an obstacle to the comprehensive national policy embodied in the CAA, Plaintiff's claims are preempted. *See Am. Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196, 201 (2d Cir. 1998) (reasoning that air pollution is uniformly regulated by the EPA "in recognition of the burden on commerce that would result from allowing other states to set their own individual emission standards."); *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*,

[6] *See, e.g.*, *Transcript: Mayor de Blasio Appears Live On The Bernie Show With Senator Bernie Sanders* (Jan. 25, 2018), http://on.nyc.gov/2F14B1k (stating that Plaintiff intends to "help bring the death knell to this industry"); *id.* (asserting that Defendants' and other fossil fuel companies' "assets should stay in the ground").

615 F.3d 291, 301 (4th Cir. 2010) (noting nuisance law is ill-suited to national climate policy).

Plaintiff argues that its nuisance claims do "not depend upon the unreasonableness of defendants' conduct," Opp. 19, but even the Restatement, on which Plaintiff relies, notes that a court must "determin[e] whether the gravity of the interference with the public right *outweighs the utility of the actor's conduct*." Restatement § 829A (emphasis added); *see also id.* § 826, cmts. a, c; § 830. That is precisely the sort of balancing that Congress has entrusted to the EPA. Plaintiff does not contest there are "a few areas, involving uniquely federal interests, [that] are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988). Global warming and national climate policy plainly fall in that category.

C. Plaintiff Cannot Plead Nuisance or Trespass Claims Under New York Law

Plaintiff contends that nuisance and trespass are appropriate legal tools for addressing environmental harm resulting from lawful commercial activity, and that this case is a garden-variety application of tort law. *See* Opp. 9–11; Conoco Opp. 7–11. But New York courts have rejected similar efforts to use tort law to "address a myriad of societal problems" and impose liability "regardless of the distance between the 'causes' of the 'problems' and their alleged consequences, and without any deference to proximate cause." *See People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d 192, 203 (1st Dep't 2003).

Plaintiff argues that *Sturm, Ruger* "was dismissed because it sought to recycle the same factual theory rejected at trial in *Hamilton* (*i.e.*, that manufacturers could trace illegal gun purchases through a federal database) and because 'unlawful and frequently violent acts of criminals' broke the causal chain." Opp. 11. That is a gross distortion. In fact, the court rejected the plaintiff's attempt to hold handgun manufacturers liable for endangering public health because the theory there, as here, would have expanded New York nuisance law beyond

recognition. *Sturm, Ruger*, 761 N.Y.S.2d at 201; *see also id.* at 194–95 ("[T]he Legislative and Executive branches are better suited to address the societal problems concerning the already heavily regulated commercial activity at issue."); ConocoPhillips Reply 3–5. Courts have thus read *Sturm, Ruger* as a decision about the limits of tort law. *E.g.*,*Sahu v. Union Carbide Corp.*, 2014 WL 3765556, at *11 (S.D.N.Y. July 30, 2014) ("[T]he process of manufacturing chemicals produces waste. But it does not necessarily follow that the production of chemicals itself constitutes legal causation of a tort.") (citing *Sturm, Ruger*, 761 N.Y.S.2d at 202).

Here, the FAC alleges that Defendants' lawful conduct is separated from the alleged harm by countless third parties all over the world (including Plaintiff itself) that combusted fossil fuels and emitted greenhouse gases over several decades. FAC ¶¶ 55, 62, 65–66, 69–70, 72, 74, 76. Even taken as true, Defendants' conduct is so remote and attenuated from the alleged harm that Plaintiff's claims fail as a matter of law. *See Sturm, Ruger*, 761 N.Y.S.2d at 197 (public nuisance requires "*direct and immediate*" connection between defendant's conduct and alleged harm (*citing New York Trap Rock Corp. v. Town of Clarkstown*, 299 N.Y. 77, 80–81 (1949)). None of the cases on which Plaintiff relies involved such remote and attenuated conduct. *See ConocoPhillips* Reply 3–5. For example, in *Boomer* (cited in Conoco Opp. 9), the defendant's cement factory polluted "*nearby* properties." 26 N.Y.2d at 219 (emphasis added). Likewise, plaintiff admits that in *City of Rochester v. Premises Located at 10-20 S. Washington St.,* 687 N.Y.S.2d 523, 526–27 (Sup. Ct. 1998), the defendant nightclub was found "liable for a nuisance precipitated by its drunk patrons *outside the club*." Conoco Opp. 10. Plaintiff also relies on distinguishable trespass cases where, unlike here, the alleged intentional conduct was linked *directly* to the harm. *See, e.g.*, *TIA of N.Y., Inc. v. I.J. Litwak Realty 1, LLC*, 36 N.Y.S.3d 680 (2d Dep't 2016) (dispute of fact over whether third-party defendant intentionally and

unjustifiably sealed a common storm sewer drainage line, resulting in flooding of defendant/third-party-plaintiff's adjacent property).[7]

Plaintiff incorrectly asserts (at Conoco Opp. 10) that *Sturm, Ruger* cited *City of Rochester* "with approval." To the contrary, *Sturm, Ruger* explained that:

> Plaintiff's reliance on *City of Rochester* . . . is similarly misplaced because even though the court there held defendants liable for conduct of their patrons both in and outside of defendant's nightclub*, the patrons' off-premises conduct occurred in spatial proximity to defendant's premises and in temporal proximity to its commercial activity*, and the conduct was very much related to the commercial entity's business activity.

Sturm, Ruger, 761 N.Y.S.2d at 197 (emphasis added). The court thus found *City of Rochester* distinguishable for the very same reasons it does not apply here—Plaintiff's alleged injuries are not spatially or temporally proximate to Defendants' lawful fossil-fuel extraction.

Although Plaintiff contends (at Opp. 11) that it has properly alleged lack of "consent" to Defendants' conduct, paragraphs 148 and 149 in the FAC plead only legal conclusions, which the Court need not accept as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Documents "incorporated in the complaint" show that Plaintiff has consented to Defendants' extraction and sale of fossil fuels.[8] *See Newman & Schwartz v. Asplundh Tree Expert Co., Inc.*, 102 F.3d 660, 662 (2d Cir. 1996). Plaintiff's trespass claims must therefore be dismissed. S*ee Hirsch v. Arthur*

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[7] Plaintiff cites various cases for the proposition that intervening acts of third parties do not break the chain of causation in nuisance and trespass cases involving commercial activity. Conoco Opp. 8–11. But each of these cases involved the release of a defendant's *product* onto or in close proximity to a plaintiff's property. *E.g., MTBE*, 725 F.3d at 119–23 ("Exxon manufactured gasoline containing MTBE" "near the relative geographic areas," and *that gasoline* leaked into groundwater); *State v. Fermenta ASC Corp.*, 656 N.Y.S.2d 342, 346 (2d Dep't 1997) (defendants "direct[ed] consumers to apply [*its product*] to the soil"); *State v. Schenectady Chem. Inc.*, 479 N.Y.S.2d 1010, 1014 (3d Dep't 1984) (contractor disposed of *defendant's waste*, contaminating the surrounding environment). Plaintiff does not allege that any of Defendant's product has invaded its land.

[8] *E.g.*, *City of New York, One New York: The Plan For a Strong and Just City*, 163 (Apr. 2015) (cited at FAC ¶¶ 10, 118) ("[New York City is] consuming more goods and resources, and consequently risk[s] generating more waste and pollution. Our businesses and lifestyles, the engines of our economy and the products of our creativity, also require increasing amounts of energy, most of which is still derived from carbon-intensive fossil fuels; *City of New York, 1.5° C: Aligning New York City With The Paris Climate Agreement*, 42, 46 (Sept. 2017) (cited at FAC ¶ 56) ("Citywide GHG emissions in 2016 were 52.1 million metric tons of carbon dioxide equivalent ($MtCO_{2e}$). . . . City Government GHG emissions in 2016 were 2.74 $MtCO_{2e}$.").

Andersen & Co., 72 F.3d 1085, 1095 (2d Cir. 1995) (affirming dismissal where the "Complaint's attenuated allegations of control [were] contradicted both by more specific allegations in the Complaint and by facts of which we may take judicial notice.").

Finally, Plaintiff argues that the *in pari delicto* doctrine does not bar its claims because Plaintiff has not "contributed equally" to its injuries. Opp. 12. But the *in pari delicto* doctrine is applied "without regard to the quantity of fault." *Iroquois Gas Corp. v. Int'l Ry. Co.*, 270 N.Y.S. 197, 198 (4th Dep't 1934). Although the doctrine may not bar a claim by a negligent plaintiff where the defendant acted willfully, *see MF Glob. Holdings Ltd. v. PricewaterhouseCoopers LLP*, 199 F. Supp. 3d 818, 832 (S.D.N.Y. 2016), such disparity does not exist here. Plaintiff concedes that the consequences of greenhouse gas emissions have been well known for decades. FAC ¶ 72. The City that never sleeps—a longtime avid user of fossil fuels and an investor in fossil fuel companies—was thus an "active, voluntary participant" in the activities it now claims created the nuisance and trespass. Mot. 30–31. Its claims are therefore barred by *in pari delicto*.

D. Plaintiff's Claims Are Not Justiciable

This action is a naked attempt to regulate global greenhouse gas emissions through the imposition of a crippling damages award. Courts have not hesitated to dismiss even otherwise ordinary torts claims (let alone far-flung ones such as those here) as non-justiciable where they have implicated equally weighty national (and international) policy issues. *See, e.g.*, *Al-Tamimi v. Adelson*, 264 F. Supp. 3d 69, 77–81 (D.D.C. 2017) (terrorism); *He Nam You v. Japan*, 150 F. Supp. 3d 1140, 1145–47 (N.D. Cal. 2015) (war crimes). The cases Plaintiff cites (at Opp. 21–23), are not to the contrary, as they each dealt with harm confined to a single state.[9] Plaintiff

[9] *See*, *e.g.*, *Maine People's Alliance & Nat. Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 281 (1st Cir. 2006) (plaintiffs alleged harm "downriver" from defendant's plant); *Cox v. City of Dallas, Tex.*, 256 F.3d 281, 287 (5th Cir. 2001) (plaintiffs were "homeowners in residential areas adjoining [defendant's garbage] dumps");

reads the Second Circuit's *AEP* decision as holding that "a global warming public nuisance claim" is justiciable, Opp. 21, but that case was "brought by domestic plaintiffs against domestic companies for domestic conduct." *AEP*, 582 F.3d at 325. Here, by contrast, Plaintiff has sued both domestic and foreign companies for their worldwide conduct. The requested relief in *AEP*—an injunction capping emissions at six domestic power plants—was also far narrower than the relief requested here, and the court held that it "applie[d] in only the most tangential and attenuated way to the expansive domestic and foreign policy issues raised by Defendants." *Id*.[10] The massive damages award Plaintiff seeks here, however, would disturb both national and international climate policies.

Finally, while Plaintiff has not sufficiently pleaded *any* of the indispensable elements of Article III standing, *see* Mot. 34–35, the defect is particularly acute as to traceability because, as the FAC concedes, global greenhouse gas emissions have contributed to global warming "since the dawn of the Industrial Revolution," FAC ¶¶ 3, 52, and emissions "cannot be traced to their source," FAC ¶ 75. Plaintiff relies on *Massachusetts v. EPA*, 549 U.S. 497 (2007), which upheld a state's standing to sue for global warming-related injuries. Opp. 23. But in *Massachusetts* the Court applied *relaxed* standing standards because the plaintiff was a sovereign "protecting its quasi-sovereign interests." 549 U.S. at 520. The "special solicitude" afforded the state, *id.*, was "an implicit concession that petitioners [could] []not establish standing on traditional terms," *id.* at 540 (Roberts, C.J., dissenting). Plaintiff is not entitled to any such "relaxed" standards.

III. CONCLUSION

For the foregoing reasons, Plaintiff's claims should be dismissed with prejudice.

Copart Indus., Inc. v. Consol. Edison Co. of N.Y, Inc., 41 N.Y.2d 564, 565 (1977) (defendant's property was "adjacent" to plaintiff's business); *Boomer*, 26 N.Y.2d at 222 (plaintiffs were "neighboring land owners").

[10] Although Plaintiff asserts that the Supreme Court "affirmed" the Second Circuit's justiciability ruling, the affirmance was by an equally divided court and thus has no precedential value. *AEP*, 564 U.S. at 420.

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Respectfully submitted,

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